

Bulk disposal of goods by administrator not prevented by retention of title clause

Sandhu (trading as Isher Fashions UK) v Jet Star Retail Limited (in administration) and others [2011] EWCA Civ 459

The Court of Appeal has determined that an administrator's disposal of a retailer's business as a going concern (including the bulk disposal of goods) did not go beyond the implied authority given to the retailer to sell and dispose of goods subject to a retention of title clause. The retention of title clause in question merely provided the supplier with the right to withdraw that authority upon the insolvency of the retailer; a right which the supplier had not exercised.

Background

The supplier ("**Isher**") supplied the retailer ("**Jet Star**") with women's fashion garments under supply contracts which included retention of title clauses. The retention of title clauses provided that Isher would retain property, title and ownership of the garments until it received payment of all sums owing for all garments supplied (classic "all monies" clauses). The supply contracts further provided that if Jet Star had (amongst other things) a winding up petition presented against it or an administrator appointed, then Isher may require Jet Star not to re-sell or part with the possession of any products owned by Isher until Jet Star had paid in full all sums due to Isher.

Jet Star went into administration in late 2008. For the week following their appointment, the administrators continued to trade Jet Star and stock held in various shops (including some of the garments supplied by Isher) was sold to the public. A week after their appointment, the administrators sold the entire business of Jet Star as a going concern and delivered the remaining stock in bulk to the purchaser.

Isher was aware of Jet Star's financial situation, since the proprietor of Isher was also the sole shareholder in Jet Star and was effectively responsible for the management of Jet Star. Despite this, Isher took no steps to withdraw Jet Star's authority to dispose of the garments at any time before the sale of the business by the administrators was completed.

The decision

Isher subsequently brought proceedings against Jet Star and its administrators, alleging that the sales of the garments after the appointment of the administrators (including the bulk disposal of the garments in connection with the administrators' sale of the business) amounted to a wrongful interference with Isher's ownership of the garments (conversion).

Isher argued that the purpose of the retention of title clauses was to provide security similar to that of a floating charge for the payment of the purchase price of the supplied garments and that any implied authority to dispose of the garments before they had been paid for was limited to selling the garments in the "ordinary course of business". Isher also argued that any such authority ceased once Jet Star became insolvent and entered administration.

At a trial of certain preliminary issues, Isher's claim was rejected in the first instance. On appeal, the Court of Appeal held that Isher's attempt to categorise the retention of title clauses as similar to a floating charge was flawed. Lord Justice Moore-Bick (with whom the rest of the Court agreed) considered that there is a clear distinction to be drawn between a floating charge over the retailer's goods on the one hand and a contract that provides protection to the supplier in respect of goods to which it retains title, contingent on the decision of the supplier to withdraw authority, on the other hand.

The case therefore turned on the scope of Jet Star's authority to sell the garments. Based on a construction of the particular retention of title clauses in question, and taking into account the commercial object of the supply contracts as a whole, the Court of Appeal concluded that the parties clearly had in mind that, unless Isher exercised its rights under the retention of title clauses, Jet Star might be permitted to continue to deal with the garments even after it had gone into administration.

In relation to the bulk disposal of goods to the purchaser of the business, the parties agreed that the purpose of the contracts was to supply the garments for sale in the retail market, in large quantities and at a high turnover on terms which contemplated that garments would be sold on before they had been paid for. Moreover, Lord Justice Moore-Bick considered that it was not unknown in the clothing trade for stock clearances to be made from time to time in order to create space for new lines. These were all, in the opinion of the Court, aspects of the trade which tended to suggest that the parties must have had in mind that Jet Star might wish to dispose of substantial quantities of stock to wholesalers rather than disposing of them through its own retail outlets. Accordingly, the Court concluded that Jet Star's implied authority to sell and dispose of the garments encompassed both the sales by the administrators to the public and the bulk sale to the purchaser of the business.

The Court of Appeal concluded that Isher's chosen method of securing protection when Jet Star encountered financial difficulties was to reserve the right to decide whether, and if so when, to intervene in order to preserve its interest in any of the garments for which payment had not been made. Isher's failure to exercise that right in a timely fashion meant that the administrators were entitled to continue to trade or dispose of the garments for the benefit of the general creditors (even by way of a bulk sale) without further reference to Isher. Accordingly, Isher's claim for damages failed, although Isher remained an unsecured creditor in respect of the price of the garments.

Implications of the decision

Ultimately, the decision turned on the wording of the retention of title clauses. If the clauses had provided for an automatic withdrawal of authority upon insolvency or if Isher had acted quickly to exercise its right to withdraw Jet Star's authority and put the administrators on notice of its retention of title claims, the outcome may well have been different.

The decision provides a timely reminder for suppliers that the wording of retention of title clauses in contracts can be determinative of suppliers' rights in the event of a customer experiencing financial difficulties. Suppliers should also remain vigilant about their customers' financial circumstances and be ready to act quickly if a customer enters into insolvency proceedings.

If you would like further information on retention of title clauses or how to act in the event of customer insolvency, please contact:

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