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Welcome to Norton White's Commodity Briefcase for May 2007.

We welcome Alison Cook & Simone Bailey as the newest members of the Trade and Transport Group.

Welcome to Lou Le Compte, Robert Picone, Daniel Kelly to the firm practising in our Commercial Section.

This edition focuses on one of our favourite topics, Retention of Title. Retention of Title clauses are always topical and often controversial.

The Australian Transport Safety Bureau (ATSB) has recently released a report on the grounding of the *Massive Tide* in Western Australia, a discussion of which can be found on the Norton White website.

Happy Reading.  
Geoff Farnsworth - Editor

» article

Samantha Mackay | Solicitor

**Retention of Title and Insolvency:  
Are the goods really yours?**

A bankruptcy or an insolvency event often raises questions regarding the transfer of title of goods. In the February 2007 Briefcase we reviewed the recent amendments to the New South Wales *Sale of Goods Act* (1923) and the *Warehouseman's Liens Act* (1935) which offer some protection over title to warehoused or commingled goods. One of the main issues affecting retention clauses is the status of goods in the possession of a third party. In this edition we review two recent judgments regarding retention of title clauses in sale of goods agreements, where the goods are in the hands of a third party.

[Hardy Wine Company Limited v Tasman Liquor Traders Pty Ltd \[2006\] SASC 168](#)

The South Australian Supreme Court recently considered retention of title clauses contained in a credit agreement and tax invoices, where the possession of the goods had passed to a third party. The Court held that the parties had agreed that title would not pass until full payment was received.

Hardy was a supplier of wines and Tasman was a Victorian wholesaler of Hardy's goods. The parties had entered into a credit agreement which contained a retention of title clause. Tasman shipped Hardy's products to Eaglehawk in Tasmania. Hardy would invoice Tasman and Tasman would invoice Eaglehawk, both invoices containing retention of title clauses. For convenience, the parties agreed that Hardy would deliver the goods direct to Eaglehawk and again each delivery docket contained a retention of title clause. The invoicing procedure remained unchanged.

Tasman went into liquidation. Eaglehawk had possession of \$282,269.75 of Hardy's product for which Hardy had not been paid. Hardy asserted that they retained title to the goods, whilst Tasman disagreed.

The *Sale of Goods Acts* in each state are reasonably uniform and contain provisions which permit parties to transfer title in property at a time of their choosing. A clause specifically recognises that a seller could retain title until certain conditions are fulfilled.

The retention of title clause in the credit agreement and invoices stated:

*"The buyer agrees that the property in the goods does not pass to the buyer until the price of such goods...is paid in full to the seller. The buyer acknowledges that he holds*

## » Retention of Title and Insolvency continued

*the goods as bailee of the seller until payment is made...the buyer is obliged to store the goods so that they are clearly identifiable as the property of [Hardy].”*

The Court considered that the credit agreement was a commercial contract and that the intent of the parties when entering the agreement was that Hardy could wholesale goods to Tasman, who was not prepared to pay for the goods immediately, to establish a system of credit. As such the goods would remain the property of Hardy following delivery. The Court posed the question: why would the parties not intend that the retention of title clause covered the goods subject to the new delivery arrangement?

The Court at first instance considered that the retention of title clauses in the Hardy delivery docket and the Tasman invoices to Eaglehawk were of no effect. The Full Court (on appeal) considered that there was no reason as to why the change in the place of delivery affected the express terms of the credit agreement and the invoices between Hardy and Tasman. Not only did the agreement, invoices and delivery docket contain the retention of title clauses but the conduct of the parties, by delivery and acceptance of the goods was a confirmation that the parties considered that Hardy retained title of the goods even though they were in the possession of a third party.

Moreover the retention of title was not subject to Tasman holding the goods as bailee. To interpret the agreement in that fashion would produce an agreement lacking in commercial efficacy and Hardy’s security would be affected in an arbitrary manner. The Full Court concluded that the retention of title clauses should be given full effect.



**[Fairfax Gerrard Holdings Ltd v Capital Bank PLC \[2006\] EWHC 3439; \[2007\] 1 LLR 171](#)**

Dimond wished to purchase a machine and entered into a Finance Agreement with Fairfax to do so. Under the Finance Agreement, Fairfax reserved title to the machine and stated that Fairfax’s subsidiary, Assetline, would manage the transaction and that it would “retain title to the machine until we have been repaid in full.”

Dimond arranged to sell the machine to Capital. One year after delivery Dimond went into voluntary liquidation and Fairfax wrote to Capital asserting title to the machine. Capital replied that by entering into an arrangement with Dimond, Assetline had released title.

The parties disagreed as to the interpretation of the Finance Agreement. Fairfax submitted that it had entered into the agreement on behalf of itself and its subsidiaries. Fairfax would purchase the machine and transfer title to Assetline, who would sell the machine to Dimond subject to a reservation of title clause. Fairfax submitted that the Finance Agreement gave no authority for Dimond to pass title in the machine to a third party and that the Agreement should be construed by reference to its commercial purpose. Fairfax agreed that frequent use of the word “we” in the agreement indicated that the agreement referred to all claimants as well as being an acknowledgement that “we”, as in Fairfax, would have title in the machine until Assetline had been paid in full no matter which entity had title at the particular time.

Capital rejected this interpretation and submitted that the Finance Agreement was only between Fairfax and Dimond, not including its subsidiaries, with a simple retention of title clause which has no effect in respect of a sub-sale. The Finance Agreement envisaged that Dimond would sell the machine, and had authority to do so from the agreement, and the trust receipt expressly authorised Dimond to sell it in the ordinary course of business. Without authority to sub-sell Dimond would not be able to fulfil the sale to its customer which was the commercial purpose of the transaction.

Justice Mackie held that the Claimant’s interpretation was correct considering the presumed intention of the two contracting parties. Neither party could proceed with the transaction without the security of the Finance Agreement. Whilst the Finance Agreement was poorly drafted, the agreement and trust receipt should be read as a whole, the drafting of which does not require implied terms to operate. When entering into the agreement neither party would have expected or permitted the structure or consequences that Capital submitted. The reservation of title clauses were express and at the time of entering into the agreement both parties understood that Fairfax would be operating through its agents and subsidiaries. As such the Court upheld the operation of the retention of title clause. ◀◀

## » article

Samantha Mackay | Solicitor

**Perfection Dairies: When is a party bound by amended contractual terms?**[Perfection Dairies v Australian Co-Operative Foods \(Dairy Farmers\) \[2007\] NSWSC 176](#)

Dairy Farmers entered into a trade mark licence agreement with Perfection Dairies ('Perfection') providing Perfection with an exclusive licence to process, package, distribute and sell whole milk within the north western Sydney region.

The agreement expired in 2001 but the parties continued to abide by the agreement until it was renegotiated in 2004 primarily to increase the amount of milk Perfection purchased. The negotiation was summarised in a document titled 'Perfection Offer' and was signed by both parties a few days later. Dairy Farmers stated that it "would start operating under the bullet points immediately and we can move to a more formal agreement later." The parties expected that a formal agreement would be negotiated and executed.

The relationship between the parties became strained and in 2006 Perfection threatened to terminate the agreement. In response, Dairy Farmers decided to become self-sufficient so as not to require Perfection's services.

Upon achieving this goal, Dairy Farmers decided to terminate the agreement and considered that Perfection's use of its own containers, rather than those approved by Dairy Farmers, was a fundamental breach of the contract (even though neither the Offer nor original agreement provided for the source of the containers). Perfection disagreed, alleging that it could package the milk as it pleased and that Dairy Farmers' action amounted to wrongful termination.

Perfection commenced an action for damages. The main issue for the Court was whether the terms of the summary were immediately binding upon the parties or if the agreement only became binding upon execution of the formal agreement. Dairy Farmers also contended that the use of approved containers was an implied term of the agreement which had been breached.

To be bound by the 'Offer', requires consideration of the party's intentions to contract and whether the summary contains all the essentials of a binding contract. The Court stated:

*"The decisive issue is always the intention of the parties which must be objectively ascertained from the terms of the document when read in light of the surrounding circumstances...if the terms indicate that the parties intend to be bound immediately, effect must be given irrespective of the subject matter, magnitude or complexity of the transaction."*

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**news inBrief**

- » The United States proposes to modify international trade rules to prohibit government subsidies to commercial fishing, in an effort to halt the depletion of marine life globally. Australia, as part of the 'Friends of Fish' group, with Argentina, Chile, Ecuador, New Zealand and the United States, has long supported a blanket ban on subsidies which annually amount to USD\$34 billion and include payments for ships, fuels and loan guarantees. (Courtesy of Bridges).
- » The driver of a truck which collided with the Ghan last December has been charged with doing a dangerous act, failing to stop at a level crossing and driving an unregistered, uninsured and unsafe vehicle. The collision caused the derailment of two locomotives and nine carriages, causing extensive damage to the train and disrupting services for days. (Courtesy of ABC).
- » The Australian Competition and Consumer Commission (ACCC) is seeking submissions regarding a draft decision proposing to remove Agsafe's ability to impose trading sanctions on businesses who are not accredited through its industry program. Agsafe is an industry association established by manufacturers of agricultural and veterinary chemicals. The ACCC can be contacted on 1300-302-502.



## » cases inBrief



## Sale of Grain not Maritime Transportation

The United States District Court of New York in *Aston Agro-Industrial AG v Star Grain Ltd*, 20 December 2006, held that sale of goods contracts between two parties did not fall within its maritime jurisdiction even though the grain was shipped pursuant to a charterparty. Aston entered into two separate contracts with Star Grain to purchase Russian wheat. The wheat was shipped to Egypt but was not discharged due to damage. Star Grain would not re-export the goods until it received full payment for the damage, which it received two months later. Aston claimed demurrage, which Star Grain denied, and the dispute proceeded to a GAFTA arbitration. The GAFTA panel found for Aston, not on the basis of the demurrage clause (which failed to assign liability to either party) but on the basis that the contracts were on C.I.F Free Out terms, under which the risk of loss passes to the buyer upon shipment. Consequently Star Grain assumed the risk of shipping damages and consequential delay once the wheat was delivered into the carrier's custody.

Aston applied to the United States District Court to enforce the award through a maritime attachment and garnishment order. Such an order can only be made pursuant to the Court's maritime jurisdiction, which Star Grain claimed the Court lacked. The Court's maritime jurisdiction extends to contracts "which relate to the navigation, business or commencement of the sea." In this case the contracts were for the sale of goods; the wheat was transported by charterparty with a third party carrier. Whilst the dispute relates to the maritime portion within the sale of goods contracts, the Court held "there is nothing uniquely maritime about these obligations." As such the Court lacked maritime jurisdiction and the attachment order was vacated.

## SPAM doesn't pay

[\*Clarity1\*](#) was fined \$5.5 million by the Federal Court of Australia following a determination that sending 231 million unsolicited emails from harvested-address lists contravened the *SPAM Act 2003* (Cth). To comply with the Act, businesses marketing through the use of commercial email must have the recipients' consent to receive such email, the identity of the sender is prominently displayed and there is a functional unsubscribe facility.

## Agistment of Livestock : An Indistinguishable Mixture

In [\*Bishop Hereford Pty Ltd v Thomas \[2006\] NSWSC 1159\*](#), the New South Wales Supreme Court considered the possession of cattle on agistment when herds commixed and became indistinguishable. The commixture of the cattle occurred following the bankruptcy of the defendant. The facts are too complex to reproduce, however the Court made valuable comments regarding the legal nature of an agistment.

The Court stated that an agistment may take different legal forms. The first is bailment, which occurs where the owner of the stock has no right to enter the land upon which the stock graze and is not responsible for their care. In that case the owner of the land is the bailee and has possession of the cattle and must take reasonable and proper care of the stock.

A second form is a licence by which the owner of the cattle has permission to graze the cattle on the licensor's land and to enter the land to care for them. There the owner of the stock retains possession of the cattle while they are on the licensor's land. The third form is that of a lease, if exclusive possession of the land is granted.

The Court stated that an important distinction between bailment and a licence is whether the agistor (or landowner) undertakes responsibility for care of the stock. The Court added that a person who obtains possession of land upon which the stock of others is agisted under a licence does not thereby obtain lawful possession of the stock. Where a herd, or goods, are commixed so to become indistinguishable, the mixture belongs to the former proprietors in common in proportion to their respective contributions and that natural offspring of dams belong to the owner of the dam.

In this instance the agistment was held to be a licence and possession of the property by the trustee did not confer a right of possession of the cattle. Following detailed examination of stock movements the Court awarded 60% of the cattle to the plaintiff and 40% to the defendant. ◀

## » Perfection Dairies continued



In this instance a formal agreement was not drafted until months later. Perfection submitted that the delay indicated that the parties were bound by the Offer. The Court agreed given that Perfection was handling greater quantities of milk, as per the Offer, and that action demonstrated the parties intention to be bound by the Offer.

The Court stated that: *“each party needed the commercial security that the terms of the accepted offer were intended to provide; but neither would obtain that security unless and until those terms acquired contractual effect.”*

Dairy Farmers argued that it was an implied term that Perfection “would not change the bottles which such milk was packaged in without first obtaining [Dairy Farmer’s] approval to a change.”

To imply a term into an agreement the term must be reasonable, necessary to give business efficacy to the contract, must be obvious, capable of clear expression and must not contradict an express term of the contract.

The Court considered that the term Dairy Farmers wished to imply did not meet this legal hurdle as it was not reasonable to imply a term containing an absolute veto. Whilst the Court recognised the importance of packaging to a milk supplier, some restriction upon Dairy Farmers right to approve or disapprove should exist. Therefore the Court held that the term was not implied into the contract and as such there could be no breach of that term. Dairy Farmers purported termination of the contract was held to be void and of no effect. ◀◀

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*This newsletter is a summary of cases and selected issues of interest or concern to clients. It does not cover all aspects of the law on the relevant subject matter. Detailed professional advice should be sought before any action is taken based upon the matters referred to herein.*