

Why am I paying you for something that I legally own?

The imposition of levies by insolvency practitioners for the recovery of PMSI stock

By Nicholas Boyce*

The recent decision of the Supreme Court of New South Wales in *Re Plantation Outdoor Kitchens Pty Ltd (In Liq)* [2019] NSWSC 925 has provided guidance to insolvency practitioners and creditors on how an insolvency practitioner should deal with stock subject to multiple claims and how it should be compensated for dealing with those issues.

The court was required to consider:

1. how a liquidator should treat various categories of stock subject to various interests of customers and suppliers; and
2. whether a liquidator would be justified in imposing a levy on the parties claiming an interest in and



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seeking the recovery of stock in respect of the expenses incurred in identifying, preserving and distributing the stock.

The significance of the levy sought was that it would result in both customers and suppliers paying a levy to obtain possession of stock that they legally owned.

Summary of facts

Plantation Outdoor Kitchens Pty Ltd (In Liquidation) (Company) operated a retail business supplying barbecue equipment and outdoor appliances both in store, by telephone and via an online website.

The Company traded from a showroom and held stock in a section of a warehouse which it rented from Jackman Logistics Pty Ltd (**Warehouse Owner**).

In the course of the business of the Company, orders were placed by customers that were entered into the MYOB system at the point of sale, paid for upfront and would be delivered or collected by customers as follows.

1. If stock was immediately available at the warehouse, a label was placed on the stock with the customer's name, address and contact number.
2. If the stock was not available, an order was placed with the Company's supplier and upon

receipt at the warehouse, a label in accordance with the above was placed on the stock.

If an order contained multiple items, the stock immediately available would be allocated in accordance with paragraph 1 above with the balance to be allocated in accordance with paragraph 2 above once delivered to the warehouse.

On 26 April 2019, the Company went into voluntary administration and Mr Christopher Darin was appointed as administrator. On 31 May 2019, the creditors resolved that the Company be wound up and Mr Darin was appointed as liquidator (**Liquidator**).

During the voluntary administration period, the Liquidator undertook work to identify the assets of the Company. This work included a stocktake and valuation of goods held at the showroom and warehouse.

Categories of stock

The Liquidator identified the following categories of stock held by the Company.

- A. Category A – stock paid in full by a customer that has been allocated to the customer by label and the entirety of their order could be fulfilled.
- B. Category B – stock paid in full by a customer where part of the order has been allocated to the

- customer by label but there was insufficient stock held to fulfil the balance of the order.
- C. Category C – stock paid in full but there were more open customer orders for that stock on MYOB than there is stock available at the warehouse to fulfil the order.
 - D. Category D – stock subject to a purchase money security interest (PMSI) where a security interest over the Company's all present and after-acquired property also existed (limited to one creditor's claim that was later abandoned).
 - E. Category E – stock that is subject to a PMSI registered on the Personal Property Securities Register arising from retentions of title held by suppliers.
 - F. Category F – remaining stock held by the Company.

The Liquidator brought an application in the Supreme Court of New South Wales for directions to ascertain how the categories of stock should be dealt with and how it should be compensated for the work performed in relation to the stock.

A further difficulty that arose was that the Warehouse Owner claimed a lien over the stock for unpaid storage and handling fees under the *Storage Liens Act 1935* (NSW). This essentially meant that the Warehouse Owner could retain possession of the stock until it had been paid in priority to all other claims over the stock.

Decision of the court

The court held the following in respect of the categories of stock and the levy claimed by the Liquidator.

1. The lien of the Warehouse Owner took priority over all other interests claimed.
2. A customer was the legal owner of any stock that had been allocated to them by label and they took the stock free of any security interest (such as a retention of title by a supplier) in accordance with section 46 of the *Personal Property Securities Act 2009* (Cth).

3. The Liquidator was justified in charging a levy to customers and suppliers for expenses incurred in identifying, preserving and distributing the stock.

Calculation of the levy

It is generally accepted as a matter of law that an insolvency practitioner is entitled to be compensated for work conducted for the care, preservation and realisation of property of a company¹. If a fund is created by the insolvency practitioner from dealing with an asset, they will generally be entitled to payment in priority from the fund in respect of its costs incurred.

The total value of the stock held was estimated to be \$391,498.89 based on the value of the customer stock of \$134,133.88 (at the recommended retail price), the supplier PMSI stock of \$88,770.34 (at cost value) and the remaining Company stock of \$168,594.67 (at forced liquidation value).

The Liquidator estimated the stock preservation costs to be \$219,219.79 (including remuneration, rent, wages to employees of the Company, legal costs and warehouseman's lien).

The Liquidator proposed for the stock preservation costs to be levied as follows.

1. \$49,411.33 to be levied against Category A, B and C customers.
2. \$58,570.64 to be levied against Category E suppliers (being 65.98% of the total value).
3. \$111,238.76 to be recouped out of the Category F stock.

The Liquidator successfully argued that it would be inequitable to impose an equal levy on all categories, in particular between customers and suppliers, as suppliers may have the benefit of a tax deduction for the payment of any levy that would not be afforded to customers.

The amounts payable for the levy were to be apportioned in accordance with the actual value of the stock. For example, if a supplier sought to recover goods with a cost value of

\$10,000, a levy of \$6,598 would have been payable.

It is of interest to note that only the Liquidator and a single customer appeared on the application. There was no appearance by any of the suppliers.

Lessons from the decision

The decision provides guidance to insolvency practitioners on how to deal with stock in an administration that may be subject to multiple claims such as storage liens, security interests and claims by bona fide purchasers.

Trade creditors should be aware that if you are seeking to recover goods from a customer in an external administration based on a retention of title registered as a PMSI on the PPSR, the insolvency practitioner may be entitled to impose a levy for the return of the goods.

The decision is not an authority for the proposition that a levy will always be payable and the specific circumstances of each case need to be considered. However, it does provide a further potential obstacle and expense for trade creditors in seeking to reduce exposure in the event of an insolvency of a customer.

Consideration must be given to the value of the goods sought to be recovered, the prospect of resale and resaleable value and the costs of recovery (including legal costs).

Legal advice should be sought when faced with such a request to consider whether the insolvency practitioner is entitled to charge a levy as a matter of law and if so, in what amount. ♦

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FOOTNOTES:

- 1 Re Universal Distributing Co Limited (in liquidation) (1933) 48 CLR 171; *Stewart v Atco Controls Pty Ltd* (in liq) (2014) 252 CLR 307.