



Précis Paper

Security Interests

A discussion about the recent decision of *Jayfield Pty Ltd v Cussen & Ors (2020) VSC 280*.

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Security Interests

In this edition of BenchTV, Mark McKillop (Barrister, Castan Chambers, Melbourne) and Natalie McCabe (Senior Associate, Gadens, Melbourne) discuss the recent decision of *Jayfield Pty Ltd v Cussen & Ors (2020) VSC 280*.

Facts of case

1. The proceeding was commenced by Jayfield Pty Ltd against the liquidators of Melded Fabrics Australia Pty Ltd (Melded). Melded subleased a large commercial premise in 2016 from Australian Comfort Group Pty Ltd (ACG), who was the second defendant in the proceeding. The premises that Melded leased were part of a larger property that was leased by ACG who had a head lease with the lessor and sub-leased a portion of that property to Melded.
2. In March 2016, around the time the sublease was entered into, Melded transported and stored a large volume of goods at the premises. The goods comprised heavy equipment used in textile manufacturing and printing and included 11 shipping containers and discarded fabric.
3. A third party, Jayfield claimed that it was the owner of the stored goods and that it was entitled to damages against Melded and ACG for failure to release the stored goods to Jayfield following the appointment of the first defendants as administrators.
4. The Court ultimately found that Jayfield failed to establish that Melded was not the true owner of the stored goods and the vast majority of the judgement that was handed down by Justice Garde of the Supreme Court dealt with ACG's counterclaim against Jayfield and the liquidators of Melded.

Clause 6.8 of the lease

5. The sublease contained a number of clauses that were also contained in the headlease and the principle clause that was considered in the judgement was clause 6.8.
6. Clause 6.8(a) provided that prior to the expiration of the term of the lease, the lessee was required to remove the lessee's property and make good any damage to the premises, the building or the land that was caused by the removal.
7. Clause 6.8(b) provided that, in addition, if the lessee did not comply with clause 6.8(a), the lessor may remove and store, at the cost and risk of the lessee, such of the lessee's property that the lessee failed to remove. The lessee was required to then pay the lessor on demand the costs and expenses incurred.

8. In 2019, Melded fell into financial difficulty and ACG terminated the sublease. Melded vacated the premises in April 2019 and left a large volume of textile manufacturing equipment, discarded fabric and shipping containers on the premises. As the sublease was terminated by ACG, the assets remaining could be said to be the subject of those clauses 6.8(a) and (b) relating to the storage of the items left on site. After the termination of the lease, Jayfield asserted that it had an interest in the stored goods as owner.

The Notice of Intention to dispose of goods

9. In June 2019, administrators were appointed to Melded and subsequently as liquidators. It was following the appointment of the administrators that ACG served a notice of intention to dispose of the goods left on site pursuant to the requirements of the *Australian Consumer Law and Fair Trading Act 2012* (Vic).
10. It was found that the disposal notice served pursuant to this act by ACG met the requirements under the act as it stated that the goods could be collected from the premises, it set out the amount of the relevant charge that was payable to ACG for the stored goods and the daily rate at which the relevant charge was increasing. It also set out that unless the relevant charge was paid within 28 day, the stored goods would be disposed of and that ACG would retain the proceeds of sale up to an amount not exceeding the amount due for the relevant charge and disposal costs.
11. Notwithstanding, Jayfield continued to assert that it had an interest in the stored goods as owner and the administrators of Melded asserted that ACG could not sell the goods without either the administrator's consent or without an order from the court. In August 2019, the liquidators engaged auctioneers to sell the goods and Jayfield sought to disrupt that process by commencing the proceeding and obtaining an interlocutory injunction against the liquidators to prevent them from selling the goods. Jayfield obtained an injunction against the liquidators and ACG filed a counterclaim seeking a disposal order under the *Australian Consumer Law and Fair Trading Act 2012* (VIC).

Finding of the Court

12. His Honour ultimately found in favour of ACG and made a disposal order under section 70 of the *Australian Consumer Law and Fair Trading Act 2012* (VIC). The Court held that the stored goods were deemed to be uncollected goods within the meaning of section 54(1)(a) of the *Australian Consumer Law and Fair Trading Act 2012* (VIC).

Contractual Lien

13. An issue which arose was whether or not clause 6.8(b) of the sublease conferred a contractual lien on the landlord, ACG for a purpose that gave them an interest in the goods under section 12(1) of the *Personal Property Securities Act 2009* (Cth) (PPSA).
14. Clause 6.8(a) of the lease contained an obligation applying to the tenant at the expiration of the lease to remove their property and make good any damage to the premises caused by the removal. Melded did not comply with this obligation and as a consequence, under clause 6.8(b) of the lease, the landlord had the right to remove those goods at its cost and store them. It then had the power to recuperate those costs from the tenant, the effect being a security interest being a form of contractual lien.
15. A security interest under the PPSA is defined in section 12, being any interest in property that is provided for by a transaction. It has to, in substance, secure performance of an obligation or secure a payment obligation.
16. In this case, the lease gave an interest in the property left over by the tenant, it was provided for by the sublease itself (therefore it was provided for by a transaction) and it did secure a payment obligation and a performance obligation (the obligation to remove the goods in the first place). It was argued that as a consequence, the contractual lien gave rise to a security interest and that the obligations under the PPSA that apply to a security interest holder also applied here.
17. ACG argued in contrast that as a matter of construction, although the sublease was capable of operating as a lien, it did not operate as such in this case as the landlord never removed or stored the goods. What the landlord did was at the end of the tenancy, leave the goods in situ in the premises that had been sublet and did not in substance touch them. So therefore, no power to remove the goods ever kicked in and the right to levy a charge for the storage and removal of the goods never kicked in.
18. The liquidator argued that the failure of ACG to exercise its rights did not matter. It was sufficient that ACG had the right to remove and store the goods in order to secure the costs of doing so and also to secure performance of the obligation to remove them. The existence of the right alone was sufficient to create a prospective power that could be used to secure the payment and performance obligations and that fit the definition of a security interest.
19. ACG did not perfect its security interest by registering its sublease on the PPSA. If there is an unperfected security interest at the time of the appointment of an administrator or liquidator, that security interest vests by operation of section 267 of the PPSA in the grantor, which in this case is Melded Fabrics.
20. The effect of that would be, absent any other lien, that ACG would have no contractual lien upon the appointment of the liquidator as a consequence of vesting and it would rank as an unsecured creditor in respect of monies owed to it in respect of the goods and it would have no security over the goods left at its premises.
21. His Honour found that it would not have made any difference to his decision, even if a contractual lien under the *Personal Property Securities Act 2009* (Cth) (PPSA) was created

by the terms of the sublease, because ACG in its counterclaim relied on Part 4.2 of the *Australian Consumer Law and Fair Trading Act 2012* (VIC) and also on there being an equitable lien in respect of the stored goods, neither of which are subject to the *PPSA*.

Liquidator's argument

22. In order to be able to get an order under the *Australian Consumer Law and Fair Trading Act 2012* (VIC) to dispose of the uncollected goods, ACG as landlord had to fit within the provisions of the Act. A landlord must demonstrate that they have some sort of contractual or other equitable or common law right to payment before the goods are taken away.
23. In this case, initially ACG relied on clause 6.8 as a means of demonstrating a right to payment before the goods were taken away. It then argued that it had an equitable lien arising in equity independent of the contract and not being the subject of a transaction to succeed.
24. This argument avoided the need to set up a consensual lien as the basis for ACG's claim under the *Australian Consumer Law and Fair Trading Act 2012* (VIC) so they had no vesting problem. The consequences were that if the vesting had occurred, they cannot rely on a contractual lien. So, they instead looked at the concept of getting an equitable lien.

Equitable Lien

25. An equitable lien is a right against property that arises by the law of equity and is implied to secure the discharge of an actual or potential indebtedness. It is effectively a form of equitable charge over subject property in that it does not depend upon possession of the property. There is also no requirement that there be a contractual entitlement.
26. An equitable lien will generally be enforced via the sale of the subject property, though usually pursuant to a court order and it effectively confers on the lienee, in this case ACG, via the court the power to obtain an order for sale in the event of the debtor's default.
27. ACG's claim is limited to the extent of the debt owed to it, that is, the storage costs that ACG incurred by keeping and safeguarding the items that were left at the property. The interest in the encumbered asset is limited to the value necessary to discharge the debt.
28. Where an equitable lien is found to exist, it will effectively confer a priority in favour of the lienee in the insolvency of the debtor

The application of equitable principles

29. Ultimately the court found that an equitable lien existed in favour of ACG and there were a number of factors that the court deemed relevant. They were primarily the fact that the goods were stored and secured, initially at Jayfield's request. Also, that Jayfield and Melded knew that ACG was incurring considerable expense and was not rendering those services gratuitously. The Court also considered that upon the notification of disposal, neither Jayfield nor Melded rejected the performance of the storage services by ACG and after Melded vacated the premises, no new sublease or licence ever materialized.
30. His Honour also found that it would be unconscionable and unfair for ACG to be left with the considerable expense of storing the goods without affording the opportunity to recover some of those expenses through the commission of an equitable lien over those stored goods.

The interplay between clause 6.8(b) the contractual lien and the existence of the equitable lien

31. The Court found that clause 6.8(b) gave ACG the power to remove and store the goods at Melded's cost and risk. The Court ultimately found that upon construction of clause 6.8(b), because ACG did not in fact remove and store the goods, it found that an equitable lien could exist and was still consistent with the provisions of clause 6.8(b) as it had not removed and stored the goods.
32. The Court also found that the clause could provide a contractual lien where the goods were in fact removed on the termination of the lease and affords a power of sale if the costs and expenses of removal of the storage are left unpaid by the departing lessee
33. An equitable lien would achieve a similar purpose where the goods are left behind by a departing lessee and those goods are of such size and magnitude as to render the premises unusable, as is the case in this matter.
34. One of the arguments was that the security interest that would have been created had there been a contractual lien found to have existed, that security interest vested in Melded upon the appointment of the administrators.
35. The Court found that as a matter of construction clause 6.8 was not a security interest because it had not been activated as a matter of fact. The Court also found that even if such an interest had existed and had vested, the equitable lien did exist and it provided security in equity for the same interests that the contractual lien did and so it provided a basis upon which the uncollected goods provisions could apply by giving the landlord, as receiver, a right to insist on payment or discharge of that lien before they had to release the goods. Therefore, that activated the provisions of the *Australian Consumer Law and Fair Trading Act 2012* (VIC) which require that element before one can get an order for sale of uncollected goods.

Takeaways

36. Landlords should take comfort from this decision particularly in instances where there is a tenant and the tenant becomes insolvent. Where goods are left on the premises after the expiration of a lease without the lessor's consent, the lessee fails to collect the goods, after having been told that they are available for collection and being told that storage fees apply, then it is likely that the items left at the premises would be deemed uncollected goods within the meaning of section 54(1)(a) of the *Australian Consumer Law and Fair Trading Act 2012* (VIC) and may then be subject to a disposal order. However, it will come down to the individual facts applicable.
37. The other takeout of comfort for landlords and discomfort for liquidators is that although the vesting argument is available, there is the ability to access the *Australian Consumer Law and Fair Trading Act 2012* (VIC) via an equitable lien argument. Landlords also need to be cautious about not registering on the Personal Property Securities Register to protect a security interest.

BIOGRAPHY

Mark McKillop

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Mark has over 25 years' experience in commercial law as Counsel and in his prior career as a solicitor in private practice and inhouse. As a barrister Mark has appeared mainly in commercial matters in his area of practice including PPSA disputes, oppression matters, freezing orders in a range of contexts, priority disputes and caveat applications, s146 disputes, all aspects of voluntary administrations and liquidations, examinations, setting aside or termination of deeds of company arrangement, corporate winding up, setting aside of demands, bankruptcy matters including sequestration, s120 and s121 recoveries, annulments, personal liability of insolvency practitioners, remuneration approval, preference and uncommercial transactions, cross border insolvency orders, mortgage enforcement and recovery, guarantee enforcement, managed investment schemes and financial aspects of Family Law matters.

Natalie McCabe

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Natalie has a broad range of litigation experience in general commercial disputes, insolvency and banking and finance.

Natalie practises primarily in commercial dispute resolution including shareholder disputes, director's duties claims, breach of trust claims, misleading and deceptive conduct claims, Corporations Act disputes, insolvency and banking and finance litigation. She regularly acts for private clients, SMEs and insolvency practitioners and has acted for major financial institutions in relation to mortgage enforcement and recovery, including advising in relation to the implications, interpretation and applicability of specific legislation relating to the enforcement of securities.

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