



# Briefing

## Corporate Turnaround and Insolvency

September 2014

### Guidance on IPs' duties to identify ROT stock

The recent unreported decision of the Bristol District Registry of the High Court in *Blue Monkey Gaming Limited v Hudson & Others [2014] All ER (D) 222* provides useful guidance for insolvency practitioners on the extent of their duties in respect of identification and preservation of ROT stock.

#### What was the case about?

This case concerned an action for conversion brought by MDM Machines Limited against the administrators of a company called Frankice Limited in respect of gaming machines supplied under alleged retention of title terms, the relevant clause reading "The legal ownership of goods herein is retained by the Seller until full and final settlement is made."

Frankice's group was placed into administration in 2009, the proposals being to trade the business until a buyer was found. MDM wrote to the administrators in June 2010 (five months before the eventual sale took place) regarding the return of machines supplied, and sought a declaration of ownership whilst - all the while - continuing to supply Frankice with new machines. The expectation was that a purchaser would ultimately pay for the machines supplied. In June 2011 (after the sale) MDM brought an action for conversion against the administrators personally, alleging that the administrators had caused Frankice to use the machines to the benefit of the administration, and that the machines had not been delivered up when requested. Prior to the hearing MDM itself went into liquidation, and its claims were assigned to Blue Monkey Gaming.

#### What issues did the court have to decide?

The court was asked to decide the issue of conversion, Blue Monkey alleging that circa £4 million was owing.

#### What did the court decide?

The court found against Blue Monkey. The key findings of fact included that:

- (i) the administrators were never personally in possession of the machines;
- (ii) Notwithstanding (i), Frankice had been in lawful possession

of the machines until December 2010 when the business was sold;

- (iii) It was not the administrators' job to identify the claimant's assets, and they were able to reject ROT claims on the basis of incomplete evidence. Although the administrators should offer supervised access to identify the goods, it is up to the claimant to be clear and specific about the goods to which it is claiming title.
- (iv) MDM had not clearly identified its assets, and had not unequivocally demanded the return of the machines. The letter evidencing that request had not identified the specific goods, and that letter (combined with MDM's subsequent conduct in continuing to supply goods) made clear that the request was merely posturing on MDM's part rather than a genuine attempt to reclaim its goods. The court observed that MDM had in fact allowed the goods to remain on site precisely because they expected a better return by allowing the goods to be sold to a third party than through their return.
- (v) MDM could have made an application under para 43 of Sch B1, to the effect that future use of machines would be subject to their being treated as an administration expense, but had not done so. On the contrary, the machines had been permitted to be used through the administration at no cost.

#### What does this mean for practitioners?

This case does not create anything in the way of new law, but is a useful reiteration of some core principles. It is easy to lose sight of the wider issues when considering ROT, by focussing simply on the question of incorporation of the relevant terms into the contract for supply of goods. Four major hurdles still remain, namely: (i) identification of goods (especially with "simple" rather than "all monies" ROT clauses, where goods have to be identified by reference to particular purchase orders or invoices); (ii) separation of the goods in question (a facet of identification, but more of an issue where generic goods - capable of being confused with other goods of the same type - have been supplied); (iii) the goods have not been onward-

*continued overleaf*

supplied/sold or incorporated into other goods (i.e. cannot be removed, or at least not without damaging the goods into which they have been incorporated) and (iv) a clear revocation of the express or implied permission to on-sell combined with an unequivocal demand for the return of the goods. Many suppliers are wise to incorporation of contract terms and identification/separation of goods, however on the last point, there is often a margin for doubt, especially where supply continues in the hope that a purchaser of the business will "see the supplier right".

In any event, the decision will provide comfort to IPs that there are boundaries as to their responsibilities, and that there is more to ROT than a simple allegation that an ROT clause applies.

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