

[CONTRACTS]

Secure your interests

In a landmark decision, the courts have ruled that 'equitable liens' can apply in the contract of a sale of commercial goods. Alan Ma explains what this means for buyers



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The courts have ruled for the first time that a buyer can have a particular type of security right in a contract of sale of commercial goods despite the fact that right is not expressed in the contract.

The right, called an "equitable lien", provides for a secured interest in another's property until certain specific claims have been satisfied.

When would this type of right be relevant to buyers? Consider the following scenario: In a supply of goods contract, a buyer makes payment for goods, but under the contract, does not have legal title in them until delivery. The goods are made but not yet delivered. At the same time, the seller is in default of a loan with a third party lender, who enforces judgement against the seller and claims seizure of the goods. Could the buyer defeat the third party lender's claim and order the goods to be delivered? The courts considered this issue in a recent case involving International Finance Corporation (IFC) and DSNL Offshore Limited (DSNL).

In this case, Chevron Nigeria Limited (Chevron) had a contract with DSNL for the purchase of modules and equipment to be installed on a platform off the Nigerian coast. Chevron paid the various sub-suppliers directly, and the materials were delivered to DSNL's site in Middlesbrough and assembled into the modules.

In the meantime, IFC obtained a judgment for US\$20 million against DSNL for an unpaid loan. As a result, a High Court enforcement officer took possession of DSNL's assets

including the modules and equipment. Chevron challenged the possession.

In the High Court, the judge ruled that although Chevron did not have legal title it did have an equitable lien over all the equipment it had paid for. As such, the judgment debt due to IFC could not be executed until the lien in favour of Chevron was discharged.

The concept of equitable liens usually applies in the sale of land. As soon as a binding contract for the sale of land has been made, the seller has a lien on the property for the purchase money and a right to retain the property until payment is made. Equitable liens apply even if the seller no longer has

possession of the property and legal title has passed to the buyer.

Since the right is an "equitable" one, it is based on general considerations of justice and will not be available where the person claiming the right has acted in a questionable or improper way.

The concept of equitable liens has been extended to other situations, but was generally considered not to apply in a contract of a sale of commercial goods until this landmark decision.

The extent of its applicability is far from certain. Having considered the terms of the underlying contract and the conduct of the parties in relation to it, the judge concluded a contract for the bespoke design and purpose built construction of the superstructure of an oil platform is a case that has a strong argument for the equitable lien to arise.

Buyers and sellers should be aware that equitable liens can occur in contracts of sale of goods and may be used by the courts to achieve fairness and prevent serious injustice.

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