



INSIDE STORY – DECEMBER 2016

The insolvency of Dutch retail chain Etam Groep and the position of suppliers

In the last two years quite a lot Dutch retail chains went bankrupt. To name a few: Free Record Shop, Van Leest (music stores), DA (drugstore), Scapino, Dolcis, Manfield, Schoenenreus (shoe stores), Aktiesport, Perry Sport (sportswear), Mexx (fashion store) and, of course, V&D (the renowned warehouse). In this Inside Story I want to highlight the insolvency of another Dutch retail chain where I was involved in, the insolvency of Etam Groep.

By order of April 9, 2015, the Court of The Hague granted the requested provisional suspension of payments to Etam Groep and ordered a cooling-off period of two months. Mr. F.Th.P. van Voorst (Hoens & Souren) and Mr. M.J.H. Vermeeren (Buren N.V.) have been appointed as administrators in this temporary suspension of payment. On April 21, 2015, the Court of The Hague has revoked the provisionally granted suspension of payments and simultaneously declared Etam Groep bankrupt with appointment of the administrators as trustees. The Court of The Hague also declared that the two-month cooling-off period is still running and is deemed to have commenced on April 9, 2015.

Etam Groep operated a retail chain in women's and girls' fashion. There were two fashion labels, Miss Etam and Promiss. Etam Groep exploited around 200 stores at various locations throughout the Netherlands. Of these stores, 140 were operated under the label Miss Etam and 60 under the label Promiss. In addition, the collections of Miss Etam and Promiss were sold through the online shops at missetam.nl and promiss.nl. Also, the collections were sold through 20 shop-in-shop formulas and through (webshops of) third parties. Approximately 2,000 employees were employed by Etam Groep, of which 300 were employed at the head office of Etam Groep in Zoetermeer. The other 1,700 employees carried out retail work in the stores.

Many vendors that had sold clothing and other fashion items to Etam Groep delivered these goods at the distribution centre of Etam Groep in Zoetermeer. This distribution centre has a total floor area of 36,000m², divided over three floors. By using approximately 100 logistics employees (internal and external) per day and fully mechanized and automated distribution systems per day between 10,000 and 100,000 pieces of clothing were extradited towards its own stores, shop-in-shop locations, consumers (the e-commerce channel) and towards the distribution of partners like wehkamp.nl.

On April 9, 2015, when Etam Groep was granted suspension of payments, the business of Etam Groep was still running. In the interest of each stakeholder of Etam Groep, the administrators - together with the

directors of Etam Groep – decided to temporarily continue the business of Etam Groep. This continuation took place until the restart of Etam Groep was realized. With an effective date of May 1, 2015, this restart was realized with FIPH B.V. This restart offered the highest proceeds for the bankrupt estate (and the joint creditors) of Etam Groep. Moreover, continuity and employment were served through this restart.

By continuing the business of Etam Groep during its insolvency the interest of each stakeholder of Etam was served. In this way goodwill/value of the business was preserved as much as possible, meaning the restart would offer the highest possible proceeds for the estate and the creditors. Most of the employees could continue with their work instead of being immediately unemployed. In addition, no immediate vacancy of Etam stores arose as a result of the continuation. Carrying on the business was also in the best interest of the suppliers of Etam Groep with a valid claim under property law (such as a retention of title (*eigendomsvoorbehoud*) and a right of recovery (*recht van reclame*). In an alternative, immediate liquidation scenario these suppliers would have incurred costs to claim their goods. Costs include, *inter alia*, transportation costs, costs to locate every separate piece of clothing delivered in the distribution centre and the approximate 200 stores of Etam Groep, costs to strip clothing from Miss Etam or Promiss labels and an estate fee for the cooperation of the trustees to claim these goods.

As such, the continuation of the business of Etam Groep was in particular in the interest of suppliers with a valid retention of title claim or right of recovery. Trustees were able to offer these suppliers a compensation of 70% of the cost price of the clothes (stock) delivered and sold by these suppliers. A presumably much higher amount than suppliers would have received when claiming and reselling their properties.

Apart from two suppliers, all involved suppliers with a valid retention of title claim or right of recovery, have accepted the compensation of 70% of the cost price of the delivered goods. Trustees could offer this compensation since it was in the interest of the bankruptcy estate and the suppliers. The bankruptcy estate would not suffer any claim costs such as distribution costs. Suppliers got 70% of the cost price while reselling would bring considerable costs for transport and getting out the trade marks. These expenses are reflected in the proposed compensation of 70%.

The two suppliers that did not accept the proposed compensation claimed the invoice value - meaning 100% of the cost price – of the stock delivered by them. These suppliers had a valid retention of title claim, i.e. the ownership of the delivered stock was retained by these suppliers until the purchase price of the delivered items had been paid in full. Since the trustees did not want to offer a higher compensation, litigation before the Court of The Hague followed.

In brief, two suppliers principally stated in court that the trustees acted unlawfully by not paying their invoices in full when selling their goods during the continuation of the business of Etam Groep.

In its assessment, the Court first and foremost stated that it is correct that the two suppliers did not accuse the trustees for deciding to continue the sale of clothing in the stores of Etam Groep during the cooling-off period. In this case substantial interests – such as the continuity of the business and employment – prevailed over the interests of individual creditors/suppliers. Therefore, the trustees have not acted unlawfully by the mere continuation of the sale in the stores.

However, the Court was of the interest that the trustees were obliged to look after the rights of the two suppliers, because the sale has infringed their ownership of the clothing sold. According to the Court, the basis of a compensation must be found in the unjust enrichment of the bankrupt estate of Etam Groep. However, the Court stated that the damages for the two suppliers are not equal to the invoice value of the goods sold. A comparison needs to be made between the actual situation that the clothing has been sold and the hypothetical situation that the clothing was claimed by the two suppliers. This means that also the expenses to retrieve the goods for these suppliers need to be taken into account when determining a just compensation.

The Court used its power to estimate these expenses and found these expenses amounted to about 20.5% of the cost price of the goods concerned meaning 79,5% of the cost price of the goods sold had to be paid by the trustees.

Although these expenses should not be estimated in the view of the trustees and in case that they need to be estimated, the estimate of the expenses should be a higher figure, for pragmatic reasons the trustees did not appeal to the judgment of the Court.

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