IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M81 of 2013

BETWEEN

JAMES HENRY STEWART IN HIS CAPACITY AS LIQUIDATOR OF NEWTRONICS PTY LTD (IN LIQUIDATION) ACN 061 493 516

First Appellant

NEWTRONICS PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 061 493 516

Second Appellant

and

ATCO CONTROLS PTY LTD (IN LIQUIDATION) ACN 005 182 481

Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Statement of issues

2. A liquidator causes a company in liquidation to sue its secured creditor and receivers appointed under the security. The claim seeks damages and to set aside the security as invalid. Although the company ultimately loses both claims, the receivers pay a settlement sum to avoid the risks of an appeal. Where the settlement sum is captured by the security, should the liquidator be entitled to retain it pursuant to an equitable lien in priority to the secured creditor's claim?

3. The liquidator contends he is entitled to such a lien because his work (i.e. the litigation) has provided a "benefit" to the secured creditor. What is the test for "benefit"? Specifically, does it direct attention to the factual outcome of the work, the possibility that it would produce a benefit, or the nature and purpose of the work? Further, must the work have been undertaken for the benefit of the secured creditor, or does it suffice that it was for the benefit of unsecured creditors?

4. The litigation and the liquidator's remuneration were funded by the company's largest unsecured creditor, which also funded other proceedings commenced by the liquidator. In approaching the company's creditors for funding, the liquidator informed them that, if there were any recovery, he would apply under section 564 of the *Corporations Act 2001* for funding creditors to receive a priority. He entered a funding agreement with

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the funding creditor. The agreement required the liquidator to take into account the funding creditor's views and act in accordance with its wishes. It did not require the liquidator to repay any money advanced, but provided instead that the liquidator would make application to the Court under section 564 for orders if any assets or damages were recovered as a result of work undertaken pursuant to the agreement. In having the agreement approved, the liquidator explained to the Court in an affidavit that he would seek orders under section 564 to afford the funding creditor priority.

5. An equitable lien is a right which arises "to secure the discharge of an actual or potential indebtedness".[1] Is it relevant to the recognition of the lien that the litigation constituting the "work" was funded, that the fees, costs and expenses relating to the litigation were paid by the funding creditor, and that the liquidator had no obligation to repay the money advanced? Further, is it relevant that the litigation was undertaken to advance the interests of the funding creditor, whose views the liquidator was obliged to take into account and in accordance with whose wishes he was obliged to act, and whose own officers and lawyers were extensively involved in the litigation?

6. The liquidator did not make an application under section 564, but simply paid the money to the funding creditor. Do the matters described in paragraph 4 above, including the terms of the funding agreement, preclude the liquidator's entitlement to the lien (if it exists otherwise)?

7. If the liquidator is entitled to the lien in priority to the secured creditor, by what operative principle is the secured creditor's interest displaced?

Part III: Certification regarding section 78B

8. The respondent (**Atco**) considers that notice is not required under section 78B of the *Judiciary Act 1903.*

Part IV: Statement of material facts

9. Save as follows, Atco agrees with the appellants' narrative of facts and chronology.

   (a) As to **paragraph 14**, by a report dated 17 February 2002 to Newtronics' creditors, the liquidator sought funding.[2] The report stated (emphasis in original):

> Section 564 of the Act enables the court to make an order as it deems just with respect to the distribution of property recovered by a Liquidator with a view to giving those creditors who have indemnified the Liquidator an advantage over the other creditors in consideration of the risk assumed by them...
>
> **I confirm that if any assets or damages are ultimately recovered, I will make an application to the Court for Orders that Seeley and any other**

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1 *Hewett v Court* (1983) 149 CLR 639, 663.

2 The report is at "ATF-6" to the affidavit of Avitus Fernandez sworn on 26 August 2010 (**Fernandez affidavit**).

creditor who provides me with funding be given priority in recovery of the costs incurred by then under the indemnity over all other creditors of Newtronics who did not provide funding.

(b) The "specific tasks"[3] funded by the funding creditor (**Seeley**) included investigations into the validity of Atco's charge over Newtronics, dealings between Atco and Newtronics and whether they constituted voidable transactions or insolvent trading under the *Corporations Act*.[4] They also included investigating "the circumstances surrounding the conduct of Newtronics' defence and the conduct of Newtronics' directors and officers and Atco's directors and officers in the conduct of" Seeley's Federal Court proceeding against Newtronics, and whether actions lay against Newtronics' solicitors and Atco in relation to that proceeding.

(c) Pursuant to Seeley's indemnity, the liquidator conducted compulsory examinations of some 25 people in 2003 and 2004.[5] After the examinations, he instructed Newtronics' solicitors to "commence preparation of a statement of claim dealing with all claims that Newtronics had arising out of circumstances that lead to the supply of defective components to Seeley, the failure to warn Seeley in a timely fashion regarding the defective components, the manner in which the Seeley proceeding was defended and Atco's desertion of Newtronics upon handing down of the Federal Court reasons..."[6] Ultimately, Newtronics commenced four such proceedings:

(i) the "promise of support proceeding" against Atco;

(ii) a proceeding against Newtronics' directors for supply of defective parts to Seeley and failure to warn Seeley about them;

(iii) another proceeding against Newtronics' directors and former solicitors for the manner in which Newtronics had defended the litigation brought by Seeley; and

(iv) an insolvent trading claim against Newtronics' directors and ultimate holding companies.[7]

(d) As to **paragraph 16**: In applying to have his agreements with Seeley approved by the Federal Court, the liquidator explained the funding arrangements, which the Judge (Gordon J) recited in her reasons,[8] as follows:

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3 Appellants' submissions, paragraph 14.
4 The specific tasks are set out in clause 5 of the indemnity agreement dated 22 March 2002.
5 Affidavit of James Henry Stewart sworn 20 October 2010, paragraphs 15-18 (**Stewart affidavit**).
6 Stewart affidavit, 19.
7 Stewart affidavit, 20.

> In funding the liquidation, Seeley is not seeking to obtain a proportion of any monies recovered. Rather, it has simply been agreed that I will approach the Court pursuant to section 564... of the Act to seek orders that the Court afford Seeley priority.

(e) As to **paragraph 21**: After the trial of the "promise of support" proceeding, and while the appeals were on foot (but before they were heard), Newtronics applied to have the liquidator (Mr Stewart) appointed as a special purpose liquidator of Atco. Atco opposed the application. The Supreme Court (Efthim AsJ) appointed a special purpose liquidator, but refused to appoint Mr Stewart.[9]

10 **Part V: Applicable provisions**

10. In addition to the provisions cited by the appellants, section 545 of the *Corporations Act 2001* is relevant. It provides:

> Subject to this section, a liquidator is not liable to incur any expense in relation to the winding up of a company unless there is sufficient available property.

Part VI: Argument in answer to appellants' argument

Summary of Atco's argument

11. This case is concerned with the availability of an equitable lien of the kind described in *Re Universal Distributing Co Ltd (in liq)*.[10] The appellants describe the *Universal Distributing* lien as "a self-contained or *sui generis* species of equitable lien".[11] That
20 description is not supported by authority and casts no light on the principles to be applied in determining the availability of the lien.

12. The appellants identify a series of "elements" which they submit are met, and establish the existence of a lien having priority over Atco's claims. The relevance of several of those elements is not supported by principle, while the facts show that several others were not established. For instance (and as these submissions will explain), the fact that the liquidator acted pursuant to a "statutory duty" is not relevant to the lien's asserted availability, the litigation was not brought for the purpose of bringing in assets "for the benefit of all creditors", Atco's position has not been "augmented" by the litigation (in fact, Atco is worse off), Atco has not "come in" to the liquidation, and the expenses
30 claimed by the liquidator were not incurred "exclusively" in the realisation of the settlement sum.

13. Contrary to the appellants' contention,[12] this was far from "a typical case". As Cavanough AJA said "this was not the typical case of a realisation by a liquidator, but

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8 [2007] FCA 1375, [27].
9 Affidavit of Avitus Fernandez sworn on 29 October 2010 (**second Fernandez affidavit**), 11-15.
10 (1933) 48 CLR 171.
11 Appellants' submissions, 30.
12 Appellants' submissions, 31.

rather commercial litigation by a chargor against its chargee, being litigation which sought to impugn the charge as well as to recover damages against the chargee, all or virtually all for the intended benefit of a particular unsecured creditor" (CA, [288]).

14. The appellants do not point to any case in which the relevant "work" involved litigation against the secured creditor, still less litigation that had the purpose of emasculating the secured creditor's security.

15. The principles expressed in *Hewett v Court*[13] are of general application.[14] Further, there is nothing unconscientious in Atco claiming the settlement sum: the work involved an attack on it and its security, and was not for its benefit.

10 16. The appellants take an incorrect view of the requirement of "benefit".[15] They focus only on the existence of the settlement sum and ignore both the nature and purpose of the litigation and that Atco is in a worse position for it having been brought.

17. The Court of Appeal considered the notion of "incontrovertible benefit" as part of its assessment of the "benefit" which the appellants asserted. The Court's application of the principles concerning equitable liens was orthodox. There is no question about the introduction of "tests and concepts derived from restitution".[16]

18. An equitable lien can be precluded or qualified by agreement. By the funding agreement, Seeley and the liquidator provided for the means by which Seeley would receive any recoveries, thereby ousting the lien.[17] Further, to have distributed the
20 settlement sum under the cloak of an equitable lien is inconsistent with (1) the terms of the funding agreement, (2) the liquidator's explanation to creditors of how recoveries would be treated and (3) the liquidator's explanation to the Federal Court when having the funding agreement approved.

Equitable liens – general principles

19. In *Hewett v Court*,[18] this Court, and Gibbs CJ and Deane J in particular, considered the general doctrinal basis of equitable liens. Although the case concerned a purchaser's lien, the principles expressed are of general application.

20. Chief Justice Gibbs explained that an equitable lien:[19]

> ...arises by operation of law, under a doctrine of equity "as part of a scheme of
30 equitable adjustment of mutual rights and obligations"; those words of Isaacs J.

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[13] (1983) 149 CLR 639.
[14] Cf. appellants' submissions, 32.
[15] Appellants' submissions, 34.
[16] Cf. appellants' submissions, 35.
[17] Cf. appellants' submissions, 35.
[18] (1983) 149 CLR 639.
[19] (1983) 149 CLR 639, 645.

were used in *Davies v. Littlejohn* (1923) 34 CLR 174, at p 185 , in relation to the doctrine of vendor's lien, but they have a general application.

21. After briefly describing purchaser's and lender's liens, his Honour said:

> In other circumstances an equitable lien may arise because of the relationship that exists between the parties (e.g., that of partnership, or trustee and beneficiary or solicitor and client) or by reason of subrogation or estoppel. Cases of this kind, which will be found discussed in the textbooks [citations omitted] do not closely resemble the present, but their existence shows that the rules governing the circumstances in which equity has considered that justice requires the recognition of the existence of a lien are not confined to one narrow category.

22. Justice Deane described an equitable lien as "a right against property which arises automatically by implication of equity, to secure the discharge of an actual or potential indebtedness".[20] He recognised that, although called a "lien", "it is, in truth, a form of equitable charge over the subject property"[21] and explained:

> It has been said that the doctrine of equitable lien "was introduced for the sole purpose of furnishing a ground for the specific remedies which equity confers, operating upon particular identified property, instead of the general pecuniary recoveries granted by courts of law" (*Pomeroy's Equity Jurisprudence*, 5th ed. (Symons) (1941), pars. 166 and 1234).[22]

23. *Pomeroy's Equity Jurisprudence* in turn explains that, in addition to equitable liens arising from executory contracts for the transfer of property:[23]

> there are some further instances where equity raises similar liens, without agreement therefor between the parties, based either upon general considerations of justice (*ex aequo et bono*), or upon the particular equitable principle that he who seeks the aid of equity in enforcing some claim must himself do equity, that is, must recognize and admit the equitable rights of others the opposite party directly connected with or arising out of the same subject matter.

24. Both Gibbs CJ and Deane J recognised that it would be "difficult, if not impossible" to state a general principle to cover the diversity of cases in which an equitable lien has been recognised,[24] a view shared by *Halsbury's Laws of England*:[25]

> It is not possible to state a general principle which accounts for the diversity of situations in which an equitable lien arises [citing *Hewett v Court* (1983) 149 CLR 639 at 645, per Gibbs CJ and eg *Giumelli v Giumelli* (1999) 196 CLR 101]. Apart from equitable liens arising from contractual dealings in property, equitable liens have been based upon general considerations of justice or upon the principle that

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[20] *Hewett v Court* (1983) 149 CLR 639, 663.
[21] *Ibid.*
[22] (1983) 149 CLR 639, 667.
[23] *Pomeroy's Equity Jurisprudence* (5 ed, 1941), s 1239. This passage was cited with approval by the Full Federal Court in *Shirlaw v Taylor* (1991) 31 FCR 222, 228. See also Heydon and Leeming, *Jacobs' Law of Trusts in Australia* (7th ed, 2006), [229] and Mason, Carter and Tolhurst, *Mason and Carter's Restitution Law in Australia* (2nd ed, 2008), [1734]. In *Bridgewater v Leahy* (1998) 194 CLR 457, 488 [110], Gaudron, Gummow and Kirby JJ described the vendor's lien as having a similar basis.
[24] (1983) 1459 CLR 639, 645 (Gibbs CJ) and 668 (Deane J).
[25] *Halsbury's Laws of England* (online edition) [804]; see also [855].

> he who seeks the aid of equity in enforcing some claim must admit the equitable rights of others associated with the subject matter [citing *Shirlaw v Taylor* (1991) 102 ALR 551 at 557-558].

25. As the appellants note,[26] an insolvency appointee may be entitled to an equitable lien. The relevant authorities were analysed in *Coad v Wellness Pursuit Pty Ltd (in liq)*[27] by Buss JA, who concluded that the test was whether the holder of the charge "would be acting unconscientiously if it were to assert priority over the assets realised... without the relevant remuneration, costs and expenses having been discharged".[28]

26. That statement of principle is consistent with the judgment of Deane J in *Hewett v Court*, who said that is was a major precondition of an equitable lien that the relationship between the actual or potential indebtedness and the property be such that "the owner would be acting unconscientiously or unfairly if he were to dispose of the property without the consent of the other party or without the relevant liability having been discharged".[29]

"Coming in" to the winding up

The meaning of "coming in"

27. As Dixon J's statement in *Universal Distributing* makes clear, the costs of realisation can be cast on the relevant asset if the secured creditor "come in and have his rights decided in the winding up".

28. The meaning that the appellants attribute to "come in and have his rights decided"[30] is incorrect.

29. The phrases "come in" and "come under" are longstanding in Chancery practice. Explaining equity's jurisdiction over the administration of deceased estates, Maitland states that Chancery "had a machinery for taking accounts; it could call upon all the creditors of the deceased to come in and prove their debts and then by its injunctions it could prevent the creditors from suing in any other Court".[31] Chancery's "special modes of administering assets" were applied in relation to bankruptcies and insolvencies, as well as to trusts for creditors and administration decrees in respect of

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[26] Appellants' submissions, footnote 17.
[27] (2009) 40 WAR 53. Wheller and Pullin JJA agreed with Buss JA.
[28] *Ibid*, [96]. Buss JA explained his statement of principle was "based primarily (and either directly or by analogy, as appropriate) on the reasons of Gibbs CJ and Deane J in *Hewett*, Dixon J in *Re Universal Distributing Co*, the Full Court of the Federal Court in *Shirlaw*, Austin J in *Weston*, Winneke P in *Lockwood* and Finkelstein J in *GDK Financial Solutions*".
[29] (1983) 149 CLR 639, 668; see also *Dean Willcocks v Nothintoohard Pty Ltd (in liq)* [2007] 25 ACLC 109, [6]-[7] per Spigelman CJ.
[30] *Maitland's Equity*, 2nd edition (1949), p. 249.
[31] Appellants' submissions, 44-46.

deceased estates. These entailed the withdrawal of ordinary rights of recovery and their substitution by a right to come in to receive payments under the administration.[32]

30. The term "come in" was used in Chancery decrees respecting personal and real assets, often in conjunction with a requirement that there be an advertisement for creditors to "come in and prove".[33] The term was adopted in legislation and rules of court, including in relation to companies.[34] For instance, section 25(1) the *Judicature Act 1875*, provided that, in relation to insolvent estates or a winding-up under the *Companies Act 1864* or *1867*, persons entitled to prove for and receive dividends from the estate, or the assets of the company, "*may come in under the decree or order for the administration of such estate, or under the winding up of such company...*"[35]

31. However, a "secured creditor [was] not bound to come in and prove. He may prefer to rest on his security."[36] A secured creditor had a *prima facie* right to apply for and obtain leave to bring, or proceed with, an action for enforcing his securities.[37] Where the mortgage debenture conferred remedies (e.g. to appoint a receiver, or to carry on or sell the mortgaged property), the aid of the Court was not required. However, some remedies were available only with the aid of the Court.

32. The relief sought in such a "debenture-holder's action" would usually include a declaration and enforcement of the charge, execution of the trusts of the trust deed (where there was one), and appointment of a receiver.[38] Where a liquidator had already been appointed, he was generally appointed the receiver; and, where the liquidator's appointment was subsequent to the receiver's, the receiver was discharged and the liquidator appointed in his stead.[39]

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[32] See *Motor Terms Company Pty Limited v Liberty Insurance Limited (in liq)* (1967) 116 CLR 177, 181 per Kitto J.

[33] See for example, Seaton, *Forms of Decrees in Equity* (1830), pp 51, 62, 85, 89, 173. In an administration action, the usual course was "for one or more creditors to file a bill (commonly called a creditors' bill) by and on behalf of him, or themselves, and all other creditors who should come under the decree, for an account of the assets and a due settlement of the estate": Story, *Commentaries on Equity Jurisprudence*, 3rd English edition (1920), p.232, § 547. Story also explains that, before the *Judicature Act 1873*, the executor or administrator was entitled to an injunction preventing suits at law or proceeding in suits already commenced because the object of the court "was to compel all the creditors to come in and prove their debts before the master; and to have the proper payments and discharges made under the authority of the court..." *Ibid*, p.234, § 549.

[34] See, for example, rules made under the *Companies Act* 1862, such as Rule 20, which concerned advertising "for the purpose of ascertaining the debts and claims due from the company, and of requiring the creditors to come in and prove their debts or claims" and Rule 21, which required creditors to "come in and prove their debts or claims upon receipt of a notice from the official liquidator". See also Rules 12 and 13 of the rules under the *Companies Act 1867*, concerned with proofs of debt or claims by creditors in the context of reductions of capital.

[35] Section 25(1) of the *Judicature Act 1873* also used the language of "come in under the decree" but did not extend to windings-up.

[36] *Palmer's Company Precedents: Part II Winding Up* (10th ed, 1910), p.478. *Palmer's Company Precedents: Part 3 Debentures* (16th ed, 1952), 440. Palmer, *Company Precedents* (2nd ed, 1881), p 414 states : "In the case of a mortgagee or mortgage debenture holder of a company, it is very common to apply to the court for liberty to bring and proceed with connection to foreclose or realise the security, and a mortgagee has a *primâ facie* right to such an order."

[37] *Palmer's Company Precedents: Part II Winding Up* (10th ed, 1910), p. 479

[38] *Daniell's Chancery Practice* (7th ed, 1901), p. 1173. See also *Palmer's Company Precedents: Part 3 Debentures* (16th ed, 1952), p. 416.

[39] See *Daniell's Chancery Practice* (7th ed, 1901), pp. 1177-1178.

33. However, it is important to appreciate that the secured creditor's application was usually brought in the winding-up.[40] It is in that context that the costs of realisation would be borne by the proceeds of the secured property. Palmer states:[41]

> And very commonly a secured creditor applies in the winding-up for a declaration of his rights and a direction to the liquidators to realise the security, and pay him. See Forms 451 et seq.
>
> In such cases the secured creditor is entitled to be paid out of the proceeds his principal, interest, and costs, subject only to the costs of the realisation. *In re Marine Mansions Co.*, 4 Eq. 601. See also *Oriental Hotels Co.*, 12 Eq. 126; *In re Regent's Canal* Co., 3 C. Div. 411.

34. Ashburner makes a similar statement:[42]

> Where debenture-holders come in under the winding-up, or where they take proceedings to enforce their security, and the liquidator under the winding-up is appointed receiver, and the property is realized by the liquidator, the debenture-holders are entitled to their principal, interest, and costs out of the fund realized, subject to the expenses of realization, but in priority to the general costs of the winding-up. *In re Marine Mansions Co.* 4 Eq. 601; *In re Oriental Hotels Co.* 12 Eq. 126; *In re Regent's Canal Ironworks Co.* 3 Ch. D. 411, 426.

Atco did not "come in"

35. Atco did not apply for its rights to be determined. Nor did it apply for the liquidator to be appointed as its receiver or to realise its security.

36. None of the other matters to which the appellants point[43] can constitute "coming in". The appellants appear to contend[44] that the fact that the validity of Atco's security was called into question is sufficient to constitute "coming in" and that, because Atco brought the proceeding as an appeal from the liquidator's decision, it has "come in".[45] The Court of Appeal correctly rejected these circular arguments.

37. As to the first, Warren CJ (CA, [38]-[44]) held that "the principle as articulated in *Universal Distributing* requires some willingness on the part of the secured creditor to participate in the winding up."[46] Atco did not seek to "have its rights decided". Its rights were impugned by Newtronics.[47]

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[40] In a compulsory winding up, the debenture-holders' summons would be assigned to the Judge having jurisdiction in the winding up: *Daniell's Chancery Practice* (7th ed, 1901), p. 1173.

[41] Palmer, *Company Precedents* (2nd ed, 1881), p. 414. The same passage is found in *Palmer's Company Precedents: Part II Winding Up* (10th ed, 1910), p. 479. Examples of such applications can be found in *In re General South American Co* (1876) 2 Ch D 337 and *Perry v Oriental Hotels Co* (1870) LR 5 Ch App 420.

[42] *Ashburner's Concise Treatise on Mortgages, Pledges, and Liens* (2nd ed, 1911), p. 389.

[43] Appellants' submissions, 49-51.

[44] Appellants' submissions, 49.

[45] Appellants' submissions, 51.

[46] Warren CJ cited *Moodemere Pty Ltd (in liq) v Waters* where Tadgell J, after quoting from *Universal Distributing*, set out the principle that, "where property providing the security is realised in the winding up **with the consent of the chargee**, the liquidator's costs, charges and expenses of the realisation are the first charge, the encumbrances rank next and the general costs of the winding up are payable only out of the surplus, if any" (1988) VR 215, 229 (the emphasis is Warren CJ's) and the cases cited in *Ford's Corporations Law*.

[47] Even Cavanough AJA, who accepted that, by claiming the settlement sum, Atco had come in "in a way", held that the

38. As to the fact that Atco appealed the liquidator's decision, the appellants put form over substance. Atco was a "person aggrieved" by an act or decision of the liquidator and therefore entitled to utilise section 1321 to appeal it. Further, on the appellants' logic, a person seeking to appeal a liquidator's decision that it has "come in" would never be able to.[48] The appellants' contention that Atco "did not sue in debt or by a common money count", although strictly correct, overlooks that Atco sought declarations that the settlement sum was secured by its mortgage debenture and should have been paid to it (Atco), as well as orders that the liquidator pay it an amount equal to the settlement sum.[49]

10 *The weight that the appellants place on "coming in"*

39. The appellants appear to contend that "coming in" is sufficient to establish the liquidator's entitlement to the lien.[50]

40. That contention finds no support in authority or principle. Further, it would impose a formulaic test that would have the effect of depriving a court considering the issue of the opportunity to consider the conduct of the parties. Thus, it would be inconsistent with equity's focus on conscience and its recognition of the equitable lien "as part of a scheme of equitable adjustments of mutual rights and obligations". Adopting it would also produce the type of "absurd and unjust outcomes" to which Millett J (as he then was) referred in *Re M.C. Bacon Ltd.*[51]

20 *The relevance of In re M.C. Bacon Ltd*

41. The appellants downplay the fact that the "work" upon which the liquidator bases his claim involved an unsuccessful challenge to a secured creditor's security.[52] They also contend that there is nothing objectionable in the liquidator seeking allowance of his fees, costs and expenses of producing the settlement sum that "third parties in the litigation (the receivers) agreed to pay to settle the claim brought against them".[53]

42. The latter (new) contention is curious in that it seeks to distance the claim against the receivers from the claim against Atco. The appellants contend (as they did below) that the claim against Atco was the "necessary foundation" for the claim against the receivers appointed by Atco.[54]

Universal Distributing principles do not apply directly and without qualification in this case (CA, [284]).

48 A point made by Redlich JA during argument (T 97 ll 1-3).

49 See Atco's originating process and amended originating process.

50 Appellants' submissions, 63 and 64.

51 [1991] Ch 127.

52 See appellants' submissions, 49.

53 *Ibid.*

54 Appellants' submissions,50; see also CA, [149], [155], [204] and [304].

43. More importantly, the appellants do not point to any authority in support of these contentions, nor any case where a liquidator has been allowed to assert, as against a secured creditor, a lien for the costs of suing that creditor. Further, their submissions do not grapple, whether as a matter of fact or principle, with the perverse outcome of recognising the equitable lien in circumstances such as the present: that is, casting against the settlement sum the costs of the very person claiming an entitlement to it; worse still, the costs of a suit which sought – unsuccessfully – to impugn the security on which the entitlement is founded.

44. The decision in *In re M.C. Bacon Ltd*[55] is one of the few cases to have considered the costs implications, insofar as the priorities between a liquidator and a secured creditor are concerned, of a liquidator's unsuccessful challenge to a security. There, a liquidator, who had unsuccessfully sued to set aside a bank's floating charge as a voidable preference, applied for an order that he be reimbursed from funds subject to the floating charge for the costs he had been ordered to pay, as well as his own costs. Justice Millett refused the application, and said of the order sought, "It is difficult to imagine anything more unjust."[56]

45. The members of the Court of Appeal were conscious of the "different factual and legal circumstances"[57] of *M.C. Bacon* (Warren CJ [55]; Redlich JA [215]; Cavanough AJA [291]-[292]). They referred to it as an illustration of the outcome that would arise where – as here – a liquidator seeks to cast against a secured creditor the costs of suing to set aside a security.

Seeley's indemnity and involvement: "substance over form"

46. All the members of the Court of Appeal accepted Atco's "substance over form" argument, namely, that the litigation was in substance brought by on behalf of, or for the benefit of Seeley (Warren CJ, [71]; Redlich JA, [216], Cavanough AJA, [286]). The appellants contend that this is a "distraction" and irrelevant.[58]

47. Whether circumstances sufficient for the implication of an equitable lien "exist or are satisfied in a particular case should, like most questions involved in the application of equitable doctrines, be determined by reference to the substance of the transaction rather than its form."[59] Given that the liquidator bases his entitlement to the lien in priority to Atco's secured claim on having brought legal proceedings, and that the settlement sum was paid in the course of those proceedings, the character of the proceedings, the relief

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55 [1991] Ch 127.
56 Later, in *Bulcher v Talbot*, he said (as Lord Millett) of the orders sought in *M.C. Bacon*, "A more absurd and unjust outcome could hardly be imagined" [2004] 2 AC 298, 321.
57 Appellants' submissions, [31].
58 Appellants' submissions, 49 and 67(c).
59 *Hewett v Court* (1983) 149 CLR 639, 668.

sought in them and the identity of the defendants cannot be ignored. As Redlich JA said (CA, [208]):

> The court must look to the substance of the circumstances said to give rise to the equitable lien, not merely its form. It is an objective assessment in which one must consider the nature and purpose of the transaction.

48. The Court of Appeal had regard to the "compelling evidence"[60] that the litigation was undertaken to further Seeley's interests, including that:

(a) the agreement between Seeley and the liquidator provided that the liquidator could not appoint solicitors or counsel to act in the litigation without Seeley's prior consent (Redlich JA, [214]; also Warren CJ, [79], Cavanough AJA, [286] and [288]);

(b) the agreement also provided that, before making any material decisions in relation to the litigation, and subject to his duties under the Act and as an officer of the Court, the liquidator was obliged to "take into account the views expressed by Seeley and shall act in accordance with Seeley's wishes" (Redlich JA, [214]);

(c) Seeley's own officers and lawyers were extensively involved in the litigation, participating in all stages including the preparation of the pleadings and discovery, strategic discussions and the appeals (Redlich JA, [214]; also Warren CJ, [69] and Cavanough AJA, [286]);

(d) upon receipt of the settlement sum the liquidator, having received advice, passed the full sum to Seeley within two days (Redlich JA, [214]);

(e) Newtronics' statement of claim in the proceeding specifically claimed that Atco was obliged to pay Seeley's taxed costs of the Federal Court proceeding (Redlich JA, [212]; Cavanough AJA, [286]).[61]

49. As Redich JA concluded (CA, [216]):

> The conclusion is inescapable that the investigation was undertaken at every stage of the litigation, from trial to application for special leave to the High Court, with the object of benefitting Seeley to the detriment of Atco.

(see also Warren CJ, [71]; Cavanough AJA, [286]).

Benefit

50. Central to the liquidator's contention that he is entitled to an equitable lien is the notion that, by claiming the settlement sum, Atco is seeking the benefit of his work.[62]

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[60] The description is Redlich JA's, (CA, [214])

[61] Newtronics made specific claims concerning Newtronics' debt to Seeley, including claims for declarations that Atco (a) was obliged to pay Seeley's taxed costs of the Federal Court proceeding against Newtronics, and (b) was not entitled to demand repayment under, or to enforce, its charge until Newtronics' debts to Seeley were paid: Cavanough AJA, [286]

[62] Appellants' submissions, 20, 55 and 56.

However, the view that the appellants take of the necessary benefit is not only narrow and artificial, but inconsistent with authority.

51. The appellants' contentions that "benefit" means "the possibility of augmenting the assets available for distribution to the secured creditor or creditors generally" and is established "by reference to the *potential* for the action taken to have benefitted creditors"[63] should not be accepted, at least in the circumstances of this case. No authority is cited in support of them. They ignore the fact that the purpose and nature of the litigation was such that there was never a prospect that Atco would obtain any benefit from it. They also ignore the factual finding that Atco received no benefit from the liquidator's "work".

52. For a lien to take priority over the secured creditor, the relevant work must have been done for the benefit the secured creditor. Costs incurred for the benefit of the general body of unsecured creditors cannot have priority over the claims of the secured creditor,[64] particularly when those costs have entailed a challenge to the security.[65]

53. There was no possibility for the litigation to have benefitted Atco. It involved an attack on Atco's charge and a claim that it pay damages. The best Atco could hope was that, by defeating the litigation, it could preserve the status quo. As Warren CJ said, "the actions of the liquidator were not undertaken to advance Atco's interests" (CA, [94]; see also Cavanough AJA, [288]).

54. Further, as a matter of fact, Atco was worse off as a result of the litigation. Associate Justice Efthim found (Warren CJ, [77]):[66]

> Had the work not been done, Atco Controls would have been better off. There is no substantial benefit to the trust property. Atco Controls was required to defend the litigation, incur legal costs which it will not recover and would not have done the work to obtain such a fund.

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[63] Appellants' submissions, 55 (emphasis in original).

[64] *In re Wrexham Mold & Connah's Quay Railway Co* [1900] 1 Ch 261, 271-2 and *Batten, Proffitt & Scott v Dartmouth Harbour Commissioners* (1890) 45 Ch D 612, 618-9, considered in detail by Redlich JA (CA, [217] and Cavanough AJA (CA, [278]-[283]. See also *Commonwealth Bank of Australia v Butterell* (1994) 35 NSWLR 64, 71C (considered below, in the context of "Exclusivity"). In *Moodemere Pty Ltd v Waters*, Tadgell J said that the right of the person claiming the lien (in that case, receivers appointed out of court) "is limited by reference to the interest in the fund that is enjoyed by the beneficiary or beneficiaries **for whom** the realisation is made or attempted": [1988] VR 215, 229 (emphasis added). In *ASIC v GDK Financial Solutions Pty Ltd (in liq) (No 3)* (2008) 246 ALR 580, [10], Finkelstein J said (in a passage which the appellants cite 59(f)) "a receiver is entitled to be paid out of the proceeds of sale of mortgaged property the cost of any work that **directly benefits** the mortgagee" (emphasis added). In *Re Berkeley Applegate (Investment Consultants) Ltd (in liq); Harris v Conway* [1989] Ch 32 at 51, identified (in another passage which the appellants cite) that the factors which the court will consider in exercising the jurisdiction to make allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property includes "the fact that the work has been of **substantial benefit** to the trust property and to the persons interested in it in equity" (emphasis added).

[65] In *Batten, Proffitt & Scott v Dartmouth Harbour Commissioners* (1890) 45 Ch D 612, the plaintiffs had disputed the title of other incumbrancers. Justice Kekewich said "it is probable that some of the costs have been incurred on their own behalf only and with a view solely to their own interest," and refused to allow those costs.

[66] See also Redlich JA, [223] and Cavanough AJA, [295].

55. The analogies that the appellants seek to draw with the trustee's lien and the solicitor's "fruits of the action"[67] lien are inapt. As to the solicitor's lien, the solicitor will have undertaken the relevant "work" on the client's behalf, with its consent and pursuant to its instructions. Secondly, the work producing the "fruits" will have been in the client's interests; it will not have entailed litigation against the client itself and receivers appointed (and likely indemnified) by it.[68] Finally, recognition of the lien presupposes that the solicitor's fees and costs have not been paid. Here, the liquidator's costs and remuneration have been paid, by Seeley. The analogy with the trustee's lien is inapt for similar reasons.

10 56. That aside, and staying with the analogies for the sake of argument, their practical application is illustrative, and supports Atco's case. It is difficult to see, for instance, how a court of conscience would ever allow a solicitor to raise a lien, as against a client, for the costs of suing that client, nor how a trustee who, funded by a beneficiary, unsuccessfully sues another beneficiary seeking to impugn the latter's interest under the trust, could be entitled to a lien.

Incontrovertible benefit

57. The appellants criticise the Court of Appeal for having considered whether Atco obtained an "incontrovertible benefit" from the work undertaken by the liquidator.[69]

58. That phrase was deployed in Atco's pleading to deny the conferral of any benefit on it.[70]
20 In any event, the Court of Appeal's use of the concept of "incontrovertible benefit" was concerned, as it was in the other cases to which the appellants refer, with the identification of a relevant "benefit".[71] There is no suggestion in any of the judgments in the Court of Appeal that incontrovertible benefit "replaces the test for an equitable lien".[72] The Court of Appeal's consideration and application of the principles pertaining to an equitable lien was entirely orthodox (see eg. Warren CJ, [93]; Redlich JA, [198] and [218]; Cavanough AJA, [273]-[281]). No error was occasioned by the Court's use of the concept.

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67 Appellants' submissions, 60 and fn. 18.

68 See e.g. *James v Commonwealth Bank* (1992) 37 FCR 445, 447 per Gummow J.

69 Appellants' submissions, 57.

70 See paragraph 4 of Atco's points of defence; see also the authorities summarised under the heading "Where the external administrator's services and expenditure have conferred a benefit by way of salvage or necessitous intervention: the so-called 'incontrovertible benefit' exception" in [26.230] of *Ford's Principles of Corporations Law* (online edition),

71 For instance, *Monks v Poynice Pty Ltd* (1987) 8 NSWLR 662, 664; *Young v ACN 081 162 512 Pty Ltd (in liq)* (2005) 218 ALR 449, 451, [10]-[11]. The authorities are summarised in the section of *Ford's Principles of Corporations Law* described in the preceding footnote.

72 Cf appellants' submissions, 57.

59. There is a certain irony in the appellants' complaint about "concepts and tests derived from restitution"[73] and the decisions in *Monks* and *Young*,[74] given that their arguments previously embraced the concepts and those cases.

60. Before Efthim AsJ, the appellants contended that the equitable lien was, amongst other things, based on "restitutionary" principles[75] and their written submissions relied on the doctrine of unjust enrichment.[76] Further, they relied expressly on *Monks* and *Young* as part of their case that Seeley (the funding creditor) was entitled to assert an equitable lien.[77] Before Davies J, they relied again on restitutionary language and the decision in *Monks*.[78]

American authorities

61. The need for the expenses claimed by the liquidator to have provided a benefit to the secured creditor is illustrated by United States cases to have considered the cognate doctrine to that in *Universal Distributing*.

62. In the United States, the general rule is that, absent agreement, the expenses associated with administering a bankruptcy estate are not chargeable to a secured creditor's collateral or claim, but must be borne by the unencumbered assets.[79] An exception to this rule is stated in 11 U. S. C. § 506(c), which provides

> The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

63. The section codifies the earlier equitable principle that a lienholder may be charged with the reasonable costs and expenses incurred by the estate that are necessary to preserve

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[73] Appellants' submissions, 33.

[74] Appellants' submissions, 57.

[75] "... the lien arises where it would be unconscientious of the secured creditor to deny it, then what is driving the unconscionability there is this notional precept of unjust enrichment" (T 73, ll 5-10); "To do that, to insist on that, where it has the choice to move on or not involves unconscientious conduct, if we are going to take that formulation, because it would involve the secured creditor manifestly electing to enrich itself at the expense of those who have done the work and incurred the expense. That's the principle. That's what underlies it." (T 74, ll 3-9); "by analogy and clearly accepted analogy with the trustee's indemnity, the equity is based on a restitutionary principle, the plainest principle of justice, that underlies the unconscientious denial by the secured creditor of the liquidator's right to be reimbursed... ...(T 77 l 29 to T 78 l 4); "Your Honour will have our submission on the lien as to the relationship between the precept of restitution and the content of conscientious or unconscientious conduct on the part of the secured creditor, and it arises at the point of choice as to whether to take or leave the benefit of the realised asset." (T 88, ll 26-31); see also T 113, ll 13-17 and T 114, ll 28-31.

[76] The appellants' written submissions before Efthim AsJ stated (paragraph 11.1), "In short... the secured creditor cannot claim the Settlement Sum without allowing for the costs of obtaining it. Taking the benefit without the burden is unconscientious, and would result in Atco being unjustly enriched at the expense of those who brought in the fund."

[77] The appellants' written submissions before Efthim AsJ stated (paragraphs 28-29), "It would be unconscientious of the secured creditor to claim the benefit of the Settlement Sum without making allowance for the burden of expense which the indemnifying creditor bore. The equitable lien is not confined to a liquidator. It extends to other controllers and, relevantly, to creditors: *Monks v Poynice Ltd* (1987) 8 NSWLR 662 at 663, *Young v ACN* (2005) 532 ACSR 629 per Gzell J..."

[78] The appellants' written submissions before Davies J stated (paragraph 16): "Where the secured creditor claims the benefit of the realised asset in the exercise of a free choice to accept or reject, this is the modern equivalent of the older language of an 'implied request': *Lumbers v W Cook Builders Pty Ltd* (2008) 232 CLR 635 at [53], [89]; *Monks v Poynice Pty Ltd* (1987) 8 NSWLR 662 at 664 B-C."

[79] 4 *Collier on Bankruptcy* ¶ 506.05 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2013).

or dispose of the lienholder's collateral to the extent that the lienholder derives a benefit as a result.[80] In addition to the requirements that the costs and expenses be both "necessary" and "reasonable", it requires that expenses recoverable from the collateral of the secured creditor must have bestowed a "benefit" to the secured creditor.

64. "In general, a secured creditor receives a "benefit" within the meaning of section 506(c) if the relevant expense preserved or increased the value of its collateral. The general concept underlying this requirement is the prevention of a windfall to the secured creditor; a secured creditor should not reap the benefit of actions taken to preserve the secured creditor's collateral without shouldering the cost."[81] However, in assessing "benefit", United States courts look not only to the outcome of the expenses, but also the reason they were incurred. The expenses must have been incurred primarily for the benefit of the secured creditor.[82] Further, indirect or incidental benefits are insufficient.[83]

65. Accordingly, Collier notes, "care should be taken to distinguish expenses that truly contribute to the preservation or enhancement of the secured creditor's position, and those that have no such effect. **Examples of the latter include professional fees incurred in challenging the secured creditor's security interest.**"[84]

The rule in Falcke's Case

66. The principle in *Falcke's Case* is also concerned with benefit. The principle is well known, namely, that a person who expends money or effort in respect of the property of another is not entitled to a lien on such property unless the work is done at the request (express or implied) of the owner.[85] "*Liabilities are not to be forced upon people*

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[80] *Ibid.* ¶ 506.05[1]; "Section 506(c)'s provision for the charge of certain administrative expenses against lienholders continues a practice that existed under the Bankruptcy Act of 1898, see, e. g., *In re Tyne*, 257 F. 2d 310, 312 (CA7 1958); 4 *Collier on Bankruptcy*, supra, ¶ 506.05[1]. It was not to be found in the text of the Act, but traced its origin to early cases establishing an equitable principle that where a court has custody of property, costs of administering and preserving the property are a dominant charge, see, e. g., *Bronson v. La Crosse & Milwaukee R. Co.*, 1 Wall. 405, 410 (1864); *Atlantic Trust Co. v. Chapman*, 208 U. S. 360, 376 (1908)." *Hartford Underwriters Insurance Co v Union Planters Bank, N.A.* 530 U.S. 1 (2000), Scalia J delivering the opinion of the Court.

[81] 4 *Collier on Bankruptcy* ¶ 506.05.

[82] *In re Flagstaff Service Corp*, 739 F.2d 73, 76 (1984); *In re Trim-X, Inc.* 695 F.2d 296, 301; *In re Codesco, Inc* 18 B.R. 225, 228-30; *In re Senior –G & A Operating Co, Inc*, 957 F.2d 1290, 1299 (1992); *In re Delta Towers, Ltd*, 924 F.2d 74, 77.

[83] *Ibid.* Collier notes that courts disagree over whether the requisite "benefit" must arise directly from some specific act taken with respect to the specific collateral (e.g., a repair of the collateral enhancing its value), or whether it may also arise from actions undertaken to enhance the collateral's value, but that do not necessarily succeed (e.g., a genuine but unsuccessful attempt to reorganize at the behest of the secured creditor, and for the sake of preserving the value of the secured creditor's collateral): 4-506 *Collier on Bankruptcy* ¶ 506.05[6]. This case falls under neither limb since the action was not a "genuine but unsuccessful attempt" at realisation in Atco's interest but an attack on Atco, which Atco resisted.

[84] 4-506 *Collier on Bankruptcy* ¶ 506.05[6][c] (emphasis added). For instance, in *In re Roggio*, 49 B.R. 450 (1985), the trustee's legal fees were not allowed, including because part of the services rendered by the trustee's attorneys were directed toward a possible challenge to the validity of the secured creditor's mortgage.

[85] As this Court explained in *Lumbers v W Cook Builders Pty Ltd (in liq)*, "the bare fact of conferral of the benefit or provision of the service does not suffice to establish an entitlement to recovery": (2008) 232 CLR 635, 663 [80].

behind their backs any more than you can confer a benefit upon a man against his will."[86]

67. The appellants' case involves the contention the litigation was brought, or produced a benefit, for Atco. But Atco did not request that Newtronics sue it and, for the reasons discussed above, the litigation was not for Atco's benefit.

68. The appellants contend that the liquidator and secured creditor are "bound together",[87] as if in some *Danse Macabre*. Their reference to "stranger"[88] presumably reflects the statement from *Ford's Principles of Corporations Law* to which Warren CJ (CA, [79]) and Redlich JA (CA, [184]) referred. The statement is worth quoting in full (emphasis added):

> But the position is not so straightforward where the stranger has a legal or equitable interest in the company's assets. **The mere fact that an external administrator has expended effort or incurred expense in protection, collection or realisation of assets of a company does not justify postponing a person who has an interest in those assets where that person is a stranger to the administration, in the sense of not being an object of the administration, either originally or by coming under it.** That case attracts the principle applied in *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234 that a person who, without being requested expressly or impliedly, expends money or effort in respect of property belonging to another is not entitled to any lien on that property for such expenditure. In the present context the "property belonging to another" is the interest of the stranger in assets of the company, such as the interest of a secured creditor. Not being an object of the administration, the stranger is not subject to the benefit/burden principle. There is no benefit/burden principle which is attracted merely because a person receives a benefit from a transaction to which he or she is not a party: *Government Insurance Office (NSW) v KA Reed Services Pty Ltd* [1988] VR 829 at 834-41 per Brooking J, O'Bryan J agreeing.

69. The statement is directly applicable to the present case.

70. The appellants' related contention, that the liquidator is bound to "pursue assets of the company in liquidation for the benefit of creditors, including the secured creditor if it has not itself acted under its security",[89] exposes the flaw in their case. As they would appear to have it, Atco should have sued itself for damages and to set aside its charge.

Other "errors" to which the appellants point

71. The appellants point to several other "errors" which they contend the Court of Appeal made.

72. In paragraph 67, the appellants identify, without elaboration, several matters that they contend the Court of Appeal erroneously took into account in considering

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[86] (1886) 34 Ch D 234, 248 per Bowen LJ.
[87] Appellants' submissions, 39.
[88] *Ibid.*
[89] Appellants' submission, 39.

unconscientiousness. Each of the matters related to the conduct giving rise to the liquidators' claim. As the appellants would have it, therefore, the Court of Appeal, in considering whether to grant an equitable remedy, cannot examine the conduct said to give rise to the claim. That contention is untenable. The Court did not err in considering the matters. Taking them in turn:

(a) As to **paragraph 67(a)**, the appellants repeatedly emphasise that the liquidator was acting pursuant to his "statutory duties" or "statutory functions".[90] However, as the cases show, the entitlement to an equitable lien does not depend on the lien claimant having acted pursuant to a duty.[91] Further, as Warren CJ said, "the liquidator's duty only stretches so far and it cannot be said that the action in this case was necessary to the liquidator fulfilling his duty. A liquidator is not required to pursue causes of action in the absence of available funding to do so" (CA, [87]). That statement was correct. Section 545 of the *Corporations Act* (to which her Honour referred) provides that a liquidator is not liable to incur any expense in relation to the winding up of a company unless there is sufficient available property.

(b) The contentions in **paragraphs 67(b) and (c)** were dealt with in paragraphs 46-49 and 50-56 above.

(c) As to **paragraph 67(d)**, the fact that Atco incurred costs that it will not recover goes to the issue of "benefit", dealt with above.

(d) The contentions in **paragraphs 67(e) and (f)** are dealt with below.

Relevance of the terms, and Court approval, of the indemnity agreement

73. The implication of an equitable lien can be precluded or qualified by express or implied agreement.[92] The funding agreement between Seeley and the liquidator expressly provided that the liquidator "will make application to the Court" under section 564 for orders that Seeley be given priority over Newtronics' other creditors.[93]

74. The liquidator made no such application. Further, he gave Atco no notice of his intention to pay the settlement sum to Seeley and did not seek a direction, notwithstanding that the issue of the validity of Atco's charge was still reserved before the Court of Appeal (Warren CJ, [102]; Redlich JA, [260]).

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[90] See e.g. appellants' submissions,30(a), 31, 34, 39 and 49.

[91] For instance, the *puisné incumbrancer* referred to in *Wright v Kirby* (1857) 23 Beav 463, 467; 53 ER 182, 184had no duty to institute proceedings, the injured motorist and his solicitor in *Deputy Commissioner of Taxation v Government Insurance Office of New South Wales* (1992) 109 ALR 159 (Wilcox J) (1993) 117 ALR 61, did not have a duty to commence proceedings against the insurer, the creditor in *Young v ACN 081 162 512* (2005) 218 ALR 449 had no duty to advance funds. See also *Arms v WSA Online Limited (subject to deed of company arrangement)* [2007] FCA 1712, [12].

[92] *Hewett v Court* (1983) 149 CLR 639, 663.

[93] The relevant clauses of the funding agreement are set out in footnote 4 to the appellants' submissions.

75. As a matter of construction, an "application under s 564 was intended by the parties to exhaustively provide for the means by which Seeley would recover the funds provided under the indemnity agreement" (Warren CJ, [119]; see also Redlich JA, [230], [248] "provided the mechanism" and [255] "expressly modified"). That construction is consistent with the explanation that the liquidator gave to the Federal Court as to how the funding creditor would be afforded any priority (Warren CJ, [119]; Redlich JA, [257]). As Redlich JA said, "It was on that basis that Gordon J saw fit to grant retrospective approval of the agreements" (CA, [257]).

76. The appellants seek to downplay the significance of these matters.[94] As they would have it, a court-appointed liquidator is entitled to conduct an important aspect of the liquidation in a manner wholly inconsistent with an agreement he made, the explanation of which he gave to creditors, and the explanation he gave to the Court whose approval of the agreement was required. Justice Redlich held that the liquidator "was in breach of his obligations under the court-approved indemnity agreement" (CA, [262]).

77. Further, notwithstanding the position they now take as to the irrelevance of section 564, before Efthim AsJ, they contended that it remained open to the liquidator to apply under the section, if the proceeding was determined against them, and reserved the right to do so.[95]

78. The appellants also submit that Seeley "has met real and necessary expenses of protecting and realising the asset".[96] On the basis of the "benefit" argument the appellants advance, Seeley itself would be entitled to assert an equitable lien.[97] The appellants pleaded such an entitlement[98] and they advanced it before Efthim AsJ.[99] However, the claim was not advanced before Davies J. Instead, the (unpleaded) subrogation argument was raised for the first time (see Redlich JA (CA, [232] and [261]).

Part VII – Atco's notice of contention

The need for exclusivity

79. In order to give rise to an equitable lien, the particular cost or expense must relate *exclusively* to the property in question.[100] If the sole purpose of the relevant work was

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94 Appellants' submissions, 35 and 68.
95 T 5 ll 4-8; T 8 ll 17-25.
96 Appellants' submissions, 68.
97 See the authorities cited in footnote 91 above.
98 Appellants' points of defence, paragraph 7(b).
99 Appellants' written submissions before Efthim AsJ, 28-32.
100 *Universal Distributing* (1933) 48 CLR 171 at 174-175; *Coad v Wellness Pursuit Pty Ltd (in liq)* (2009) 71 ACSR 250 at [49].

not to preserve or realise the property, the secured creditor takes in priority to the person whose efforts brought about the fund.[101]

80. The settlement sum was produced by the claim against the receivers. However, the costs and expenses claimed by the liquidator were not incurred for the exclusive purpose of preserving or realising that claim.

81. First, throughout the entire proceedings, Newtronics sought damages from Atco. That alone is sufficient to show that the litigation was not exclusively for the purpose of preserving or realising the claim against the receivers. The claim against the receivers did not necessitate, let alone depend on, a damages claim against Atco. Secondly, as the history of the litigation shows, the principal claim was against Atco. The claim against the receivers was ancillary to it and was brought later.[102] Thirdly, the liquidator sought to cast against the settlement sum the entire cost of having conducted the compulsory examinations. Yet, those examinations were not conducted exclusively for the purposes identifying claims against Atco and the receivers. The "promise of support proceeding" was only one of four proceedings having their genesis in the examinations.

82. For these reasons, Warren CJ and Redlich JA should have concluded, as (Cavanough AJA did (CA, [310]-[313]), that the costs and expenses claimed by the liquidator were not incurred for the exclusive purpose of preserving or realising the claim against the receivers, and that he was consequently not entitled to an equitable lien.

Part VIII:

83. Atco estimates 2½ hours will be required for the presentation of its oral argument.

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[101] *Commonwealth Bank of Australia v Butterell* (1994) 35 NSWLR 64 at 71C, per Young J, citing Dixon J in *Universal Distributing* (1933) 48 CLR 171 at 175.

[102] The proceeding was commenced in April 2006. The receivers were not joined until December 2006.