

**STEWART & ANOR v ATCO CONTROLS PTY LTD (IN LIQUIDATION)**  
**(M141/2013)**

Court appealed from: Court of Appeal, Supreme Court of Victoria  
[2013] VSCA 132

Date of judgment: 25 June 2013

Date special leave granted: 8 November 2013

In January 2002, the respondent ('Atco') appointed receivers to the second appellant ('Newtronics') after Newtronics lost a Federal Court case brought against it by Seeley International Pty Ltd ('Seeley'). Newtronics was a wholly owned subsidiary of Atco. On 26 February 2002, on application by Seeley, Newtronics was wound up and the first appellant ('Stewart') was appointed liquidator. Seeley is the major unsecured creditor of Newtronics. In addition, Newtronics owed money to Atco which was secured by a registered mortgage debenture. Immediately after the Federal Court judgment, Atco had made formal demand of Newtronics for payment of the money secured by the charge.

In April 2006, Newtronics commenced proceedings against Atco, claiming that letters of support provided by Atco gave rise to a contractual obligation on Atco's part to provide ongoing financial support to Newtronics and not to call upon its secured debt. Those proceedings were stayed when Atco went into voluntary administration and later liquidation. In December 2006, Newtronics was granted leave to proceed and to join Atco's receivers to the litigation. The proceedings against Atco and its receivers were funded by Seeley under an agreement to indemnify the liquidator, inter alia, for his costs and expenses in pursuing the proceeding. While its claim against Atco ultimately failed, Newtronics settled with the receivers on terms that required that they pay the settlement sum to Newtronics. Without informing Atco, the liquidator paid the settlement sum to Seeley, pursuant to the indemnity agreement.

Atco commenced an appeal, in the Supreme Court of Victoria, pursuant to s 1321 of the *Corporations Act 2001*(Cth) against Stewart's decision to pay Seeley the settlement sum, claiming that the settlement should have been paid to it under its registered charge. The proceeding was initially heard before Eftim AsJ who ordered that Stewart pay the settlement sum to Atco. An appeal was heard *de novo* by Davies J, who found in favour of Stewart on the basis that the right of indemnity by way of an equitable lien over the settlement sum arose because the costs and expenses were necessarily incurred by the liquidator in the Newtronics action in the course of the discharge of his duties as liquidator to collect in and realise the assets of the company.

Atco successfully appealed to the Court of Appeal (Warren CJ, Redlich JA & Cavanough AJA). The Court found that no equitable lien arose in favour of the liquidator over the settlement sum for a number of reasons. First, the litigation challenging the right of the secured creditor to enforce its charge and which led to the realisation of the settlement sum was pursued for the benefit of the unsecured creditor (Seeley), who was the fund provider, and it would not be unconscionable for the secured creditor (Atco) to obtain the sum free of the liquidator's litigation costs. Second, the realisation of the settlement sum bestowed no incontrovertible benefit on the secured creditor. Third, the liquidator had no existing indebtedness to which an equitable lien could or should attach. The litigation being for the benefit of the

fund provider, equity will not provide the remedy of subrogation to enable the fund provider to recover his costs from the settlement sum in priority to the secured creditor. Further, the fund provider's right of subrogation was expressly modified by the indemnity agreement, thus removing any obligation by the liquidator to account to him. The agreement between the fund provider and the liquidator set out the process by which it was intended that the fund provider, through the liquidator, could recover costs incurred under the indemnity agreement from the settlement sum. That process was approved by the Federal Court. The liquidator improperly bypassed the process set out under the indemnity agreement.

The grounds of appeal include:

- The Court below erred in holding that the liquidator of Newtronics was not entitled to an equitable lien for his reasonable fees, costs and expenses exclusively referable to his realising for the benefit of the creditors of Newtronics a sum of \$1.25 million claimed by Atco as secured creditor;
- The Court below erred in holding that the liquidator and indemnifying creditor had excluded or modified their rights, respectively, to have recourse to an equitable lien to recoup expenditure exclusively incurred in realising the sum and to be subrogated to the fruits of that lien.

Atco has filed a Notice of Contention on the grounds that:

- the Court of Appeal ought to have concluded that the lien did not arise because the costs and expenses claimed by Stewart did not relate exclusively to the realisation of the settlement sum, but included costs and expenses incurred in respect of Newtronics' claim against Atco.