IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY No. M 141 of 2013

BETWEEN

JAMES HENRY STEWART in his capacity as liquidator of NEWTRONICS PTY LTD (in liquidation)
First Appellant

10 **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

APPELLANTS' SUBMISSIONS

PART I: PUBLICATION

1. The Appellants certify that this submission is in a form suitable for publication on the internet.

20 ### PART II: ISSUES ON THE APPEAL

2. What is the test for the recognition and enforcement of a liquidator's equitable lien for costs, expenses and reasonable remuneration exclusively incurred in the care, preservation and realisation of assets in priority to the claims of a secured creditor to those assets?

3. In this case is it permissible for a secured creditor to claim the benefit of work undertaken by a liquidator in bringing in and realizing charged property in the course of the liquidation, without allowing for the reasonable costs, expenses and remuneration of the liquidator incurred in that bringing in and realization?

4. Is it relevant to the recognition and enforcement of the liquidator's equitable lien that:

   a. the sum realised by his efforts and claimed by the secured creditor resulted from legal
30 proceedings by the liquidator against the secured creditor, among others? or

   b. the legal proceedings brought by the liquidator called into question the validity of the secured creditor's security or enforcement steps? or

   c. in bringing those proceedings, the liquidator was funded under an indemnity from the largest unsecured creditor?

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5. Do the circumstances in paragraph 4 or in section 564 of the Corporations Act or the terms of the funding creditor's indemnity with the liquidator or otherwise preclude the liquidator from exercising the lien or (if otherwise relevant) preclude the indemnifying creditor from being subrogated to the liquidator's equitable lien for the purpose of recouping funding provided under the indemnity out of the sum realized by the liquidator?

PART III: *JUDICIARY ACT 1903*, SECTION 78B

6. Having considered whether any notice should be given under s 78B of the *Judiciary Act 1903*, the Appellants are of the view that no notice is required,

PART IV: REPORTS

7. The decisions below have not been reported. The medium neutral citations are:

   a. *Atco Controls Pty Ltd v Stewart and Anor*: Efthim As J (unreported, 20 April 2011)

   b. *Re Newtronics Pty Ltd:* Davies J [2011] VSC 349 (28 July 2011)

   c. *Atco Controls Pty Ltd v Stewart and Newtronics Pty Ltd*: Court of Appeal [2013] VSCA 132 (25 June 2013),

PART V: FACTS

8. In 1993, Atco Controls Pty Ltd, a lighting manufacturer, established Newtronics Pty Ltd as a subsidiary, designing, manufacturing and supplying electronic components: CA [3]. In April 1995, Newtronics granted Atco a fixed and floating charge over all its assets to secure all indebtedness from time to time advanced by Atco to it: CA [2]. From 1993 to 2001, except for two years, Newtronics was not profitable and relied on intercompany debt from Atco. As at December 2001, Newtronics owed Atco $19.09 million.

9. In respect of the financial support supplied to Newtronics, from time to time Atco provided "letters of support": CA [2]. The letters of support were in standard terms:

> "Atco Controls Pty Ltd, being the ultimate holding company of Newtronics Pty Ltd, hereby confirm the following: That the amount owing by Newtronics Pty Ltd to Atco Controls Pty Ltd of $[amount owed] as at [date of end of relevant financial year] shall not be called upon within the current period to the detriment of all other unsecured creditors. That if necessary, funds or additional bank security will be provided to Newtronics Pty Ltd or its debt financier to ensure that it can meet its current trading obligations that have, or will be incurred."

10. In February 1998, a customer, Seeley International Pty Ltd, sued Newtronics in the Federal Court of Australia, alleging breach of contract, negligence and misleading or deceptive conduct in respect of the supply of components used by Seeley in the construction of domestic air conditioning units, three of which caught fire after installation in early 1995. Seeley claimed substantial damages. Newtronics defended the proceedings.

11. On 21 December 2001, the Federal Court found against Newtronics[1] and determined that Newtronics was liable to pay damages of $8.9 million, plus interest and costs.[2]

12. Immediately after the Federal Court judgment, on 21 December 2001, Atco made formal demand of Newtronics pursuant to its charge for "the immediate payment of all the moneys secured by the charge". Newtronics did not pay. On 8 January 2002, Atco appointed receivers and managers of Newtronics pursuant to the charge: CA [4]. In March 2002, the receivers sold the business of Newtronics by tender to another subsidiary of Atco for $13 million, credited by book entries against Newtronics' debt.

13. On Seeley's application, the Federal Court ordered that Newtronics be wound up in insolvency on 26 February 2002 and appointed James Stewart as liquidator: CA [4].

14. Newtronics had no available assets for the liquidator's work and he sought funding from creditors for his investigations[3]; Seeley, the largest unsecured creditor, agreed to provide funding for specific tasks and entered into a series of indemnity agreements with the liquidator, commencing in March 2002. Seeley's funding did not extend to general expenses of the liquidation.

Indemnity agreement to fund liquidator in "Promise of Support" litigation

15. By a deed of indemnity dated 27 March 2006 between Seeley and the liquidator ("2006 indemnity agreement"), Seeley agreed to indemnify the liquidator in respect of all costs and expenses incurred in relation to pursuing "an action to enforce an agreement between Newtronics and [Atco] evidenced by, inter alia, a letter of support dated 20 July 2001 from Atco to Pitcher Partners, in proceedings to be instituted in the Supreme Court of Victoria" (""promise of support" proceeding").

16. Both the 2002 and 2006 indemnity agreements provided to the effect that, if any assets or damages were recovered as a result of work encompassed by the agreement, the liquidator would apply to the Court for the funder to be given priority ahead of all other creditors of Newtronics for the recovery of costs incurred by Seeley under the indemnity agreement and for payment of Seeley's debt.[4]

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[1] *Seeley International Pty Ltd v Newtronics Pty Ltd* [2001] FCA 1862 (O'Loughlin J).

[2] Interest was fixed at $5 million and judgment for this sim was entered on 31 January 2002. Costs were subsequently assessed at $1.89 million.

[3] The liquidator's circular to creditors and agenda for meeting of creditors is at Affidavit of Avitus Thomas Fernandez sworn 26 August 2010, annexure ATF-6.

[4] The 2002 agreement to indemnify provided (cl 7.1, "Section 564 Orders"): "The Liquidator agrees that if any assets or damages are recovered which occur as a result of work performed encompassed by the Scope of Works then the Liquidator will, as appropriate, make application to the Court for orders that Seeley be given priority in recovery of the costs incurred by it under this indemnity over other creditors of

17. On 28 August 2007, the Federal Court (Gordon J) gave retrospective approval under section 477(2B) of the *Corporations Act 2001* for the liquidator to enter into the 2002 and 2006 indemnities: *Stewart, in the matter of Newtronics Pty Ltd* [2007] FCA 1375.

Trial and settlement sum

18. In April 2006 Newtronics sued Atco in the Supreme Court of Victoria 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 until all other creditors were paid. Newtronics claimed that by reason of the alleged promise of support, Atco was 'not entitled to repayment to it of money secured by the mortgage debenture or to enforce the mortgage debenture': CA [5].

19. The proceedings were stayed when Atco went into voluntary administration and later liquidation. In December 2006, Newtronics was granted leave to proceed against Atco and to join and claim against the receivers. Against them, Newtronics claimed that, by reason of the contract said to be evidenced by the letters of support, Atco was prevented from appointing the receivers and their appointment was void. Newtronics claimed damages against the receivers for trespass and conversion arising from their having sold its assets: CA [6], [7].

20. The case put by Newtronics was also amended in December 2006 to introduce an allegation that Atco's mortgage debenture was wholly invalid and not binding on Newtronics, due to technical defects in its authorisation and execution. This claim was abandoned at the commencement of the trial: CA [5].

21. At trial in December 2008, Newtronics was successful against Atco but unsuccessful against the receivers.[5] Both Atco and Newtronics appealed to the Victorian Court of Appeal: CA [9].

22. On the day the appeals were due to be heard (3 September 2009), Newtronics settled with the receivers on terms that required that the receivers pay to Newtronics $1.25 million (the **settlement sum**): CA [10].

Newtronics." The 2006 indemnity provided (cl 12, "Section 564") (a) "The Liquidator will make application to the Court for orders that if any assets or damages are recovered ... then Seeley be given priority ahead of all other creditors of Newtronics: (i) for the recovery of costs incurred by Seeley under the Indemnity Agreement and this indemnity ...; and (ii) for the payment of Seeley's debt ... (b) The Liquidator may make the application ... at any stage of the Action and shall make such application forthwith at the request of Seeley."

[5] *Newtronics Pty Ltd v Atco Controls Pty Ltd* (2008) 69 ACSR 317; [2008] VSC 566 (Pagone J).

23. On 21 October 2009, Atco's appeal against Newtronics was allowed with costs.[6] Newtronics applied for special leave to appeal to the High Court. On 23 April 2010 the application was refused with costs: CA [11], [12].

24. Newtronics paid Atco's costs of the trial in an agreed sum and paid Atco's costs in the Court of Appeal and of the application to the High Court in the amounts for which they were assessed and allowed after formal taxations.

Claim for the settlement sum

25. Newtronics received the settlement sum from the receivers on or about 22 September 2009. The liquidator had by then estimated that his costs and expenses of the litigation which produced the settlement sum exceeded that sum[7] and had received legal advice that that he was entitled to claim an equitable lien for the amount.[8] On 24 September 2009, without informing Atco, the liquidator paid the settlement sum to Seeley, in reimbursement of costs and expenses of the promise of support proceeding funded by it under the indemnity agreement: CA [10].

26. On 29 October 2009, Atco's solicitors demanded payment of the settlement sum pursuant to Atco's charge, which was resisted by Newtronics on the basis that Stewart as liquidator was entitled to assert an equitable lien over the sum: CA[12].

27. Atco brought proceedings by way of an appeal to the Supreme Court of Victoria pursuant to s 1321 of the Corporations Act 2001 (Cth) against Stewart's refusal to pay it the settlement sum and his decision to pay it instead to Seeley. Atco sought relief in the form of declarations and the taking of accounts: CA [13]. Efthim As J upheld Atco's claim and ordered the settlement sum be paid to Atco.[9] The liquidator and Newtronics appealed to the Supreme Court, by way of a hearing *de novo*. Davies J upheld their appeal.[10] Atco in turn appealed to the Court of Appeal, which upheld the appeal.[11]

PART VI ARGUMENT

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[6] *Atco Controls Pty Ltd v Newtronics Pty Ltd* (2009) 25 VR 411 (Warren CJ, Nettle and Mandie JJA).
[7] Affidavit of James Henry Stewart sworn 20 October 2010, paras 38 -42 and annexure JHS-12; Second Affidavit of Stewart sworn 29 November 2010, paras [34] – [36]. The liquidator's costs – and thus the extent of the lien – remain to be proved: the case has been conducted on the basis that that step will follow the determination of the principle.
[8] Second Affidavit of Stewart, annexure JHS-20 (advice of Gadens [Liquidator's solicitor], dated 21 September 2009, forwarded on 22 September 2009); Exhibit 1 (letter of Johnson Winter & Slattery [solicitors for indemnifier] to Liquidator, 18 September 2009).

[9] *Atco Controls Pty Ltd v Stewart,* unreported, 20 April 2011.
[10] *Re Newtronics Pty Ltd* [2011] VSC 349.
[11] *Atco Controls Pty Ltd v Stewart* [2013] VSCA 132

Summary of appellant's argument

28. The liquidator is entitled to a first ranking equitable lien over the settlement sum for his reasonable fees, costs and expenses of producing the settlement sum, under an equitable lien, in accordance with the principles set out in *Re Universal Distributing Co Ltd* (1933) 48 CLR 171.

29. The equitable lien of a company liquidator for the costs and expenses incurred in the care, preservation and realization of the property is longstanding, traceable to *In re Marine Mansions Co* (1867) LR 4 Eq 601 at 611 and *In re Oriental Hotels; Perry v Oriental Hotels Company* (1871) 12 LR Eq 126 at 134 - 135 and widely and regularly applied since.

30. This is a self-contained or sui generis species of equitable lien; the principles set out in *Re Universal Distributing Co Ltd* are derived from the history of Equity and do not need to be further glossed or qualified. The elements are:

    a. The liquidator acted pursuant to his statutory duty to get in assets of the company for the benefit of all creditors entitled to claim. [12]

    b. The liquidator acted properly (as the Court of Appeal acknowledged but erroneously discounted[13]).

    c. The liquidator's efforts resulted in the sum of $1.25 million being raised and brought into the company.

    d. That sum augments the assets available for the secured creditor and (after payment of its debt) other creditors.

    e. The sum was obtained directly from the efforts of the liquidator and not by virtue of any action taken outside of the liquidation by the secured creditor under its security. In order to obtain the settlement sum, it was necessary to bring the proceeding in any case: that is, without the proceeding the settlement sum would not have existed.

    f. In stepping forward to claim the sum raised by the liquidator, the secured creditor comes in to the liquidation to that extent.[14]

    g. In these circumstances, the secured creditor is entitled to the settlement sum after allowing for the liquidator's costs, expenses and reasonable remuneration exclusively incurred in the realisation of the sum.

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[12] The CA erred in holding that the liquidator was in substance acting only in the interest of the indemnifying creditor and that this limited or excluded the entitlement to a lien : Warren CJ at [47] – [59]; Redlich JA at [163], [216], Cavanough A-JA at [294].

[13] Warren CJ at CA [67], [87]; Redlich JA at CA [179, [208].

[14] As correctly held by Redlich JA at [205]; *semble* Cavanough A-JA agreeing [248]; Warren CJ erred in holding to the contrary at [45].

31. This is a typical case where an asset was realised by the efforts of the liquidator in the admitted discharge of his statutory functions, in circumstances where the secured creditor could not, and professedly would not, have performed the necessary work. It is that, in combination with the secured creditor stepping forward to claim the asset realised in the course of the liquidation, which is the necessary and sufficient foundation for the conventional application of the equitable lien.

32. Further and in the alternative, if *Hewett v Court* (1983) 149 CLR 639 is to be taken as expressing a single or over-arching principle of unconscientiousness that informs all equitable liens (which the liquidator contends would be a misreading of that case), there was nothing in the liquidator's conduct which made it unconscientious for him to claim the lien, while in accordance with the authorities Atco's claim to the Settlement Sum, refusing to allow the liquidator his expenses and fees of bringing that fund into being, is unconscientious because it seeks to claim the benefit of the liquidator's work without accepting the co-relative burden attached to it.

33. Whether determining the scope and application of the controller's equitable lien or of the lien as discussed in *Hewett v Court,* it is unnecessary and an error to introduce concepts and tests derived from restitution. The Court of Appeal erred in requiring an *"incontrovertible benefit"* to be afforded to the secured creditor as the test of the lien.

34. It is irrelevant to the equitable lien that the litigation which gave rise to the settlement sum included a claim brought by the liquidator against the secured creditor and that the proceedings sought to set aside its security. That is part of the duty of the liquidator. The incidental costs of the secured creditor incurred in the course of that litigation do not deny the lien. What is important for Equity is that the assets available to creditors have been preserved and augmented and that the secured creditor has the opportunity to claim the settlement sum only because of the liquidator's action. That augmentation and consequent opportunity is the necessary "benefit" for the secured creditor which attracts the lien. The fact that the settlement sum is likely to be inadequate to meet the chargeholder's claims, after the liquidator's costs and disbursements are deducted, is no ground for denying the liquidator's claim.[15]

35. Nothing in the terms of the funding indemnity or in the liquidator's conduct with respect to seeking and obtaining approval for the funding indemnity displaces the equitable lien. The secured creditor cannot claim to have been misled or affected; nor was the Federal

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[15] *Re Universal Distributing Co Ltd* (1933) 48 CLR 171 at 173; *Moodemere Pty Ltd v Waters* [1988] VR 215 per Murphy J (Kaye J agreeing) at 221 and 223; *Re Lawrenson Light Metal Die Casting Pty Ltd* (1999)

Court misled by the liquidator when he sought approval of the indemnity pursuant to section 477(2B) of the Corporations Act.[16].

Nature of liquidator's equitable lien

36. There are many species of equitable lien: *Shirlaw v Taylor* (1991) 31 FCR 222 per Sheppard, Burchett and Gummow JJ at 228. *Hewett v Court* (1983) 149 CLR 639 acknowledged that no single explanation is available for the variety of liens (per Gibbs CJ at 149 CLR 645-646; per Deane J at 667-668). The lien in that case, arising between parties in a contractual relationship of purchaser and vendor of land, is quite different from that claimed by the liquidator or other insolvency controller. It is an error, or at least unnecessary, to attempt to standardise or synthesise all the types of equitable lien under a single test.

37. Equity has long recognised a first ranking lien or charge to secure the right of a controller of an insolvent's property, such as a liquidator,[17] to recoup out of the proceeds of an asset won or protected by the controller and passing through the controller's hands, the controller's costs and expenses incurred and reasonable remuneration earned exclusively in getting in, preserving and realising an asset of an insolvent for the benefit of those interested in the asset.[18] The Court of Appeal erred in its determination of the basis for and attributes of the liquidator's equitable lien and in failing to extend it in this case.

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33 ACSR 288 per Gillard J at 299 [114] – [115]; *Westpac Banking Corporation v ITS Taxation Services Pty Ltd* (2004) 22 ACLC 229 per Austin J at 235 [26] – [27].

[16] *Stewart, in the matter of Newtronics Pty Ltd* [2007] FCA 1375.

[17] For convenience this will be called the "liquidator's equitable lien" But the lien extends to all controllers of insolvent property: trustee of an insolvent estate, provisional liquidator (*Shirlaw v Taylor* (1991) 31 FCR 222 at 228-231; *Nationwide News Pty Ltd v Samalot Enterprises Pty Ltd (No 2)* (1986) 5 NSWLR 227, at 230), receiver (both Court appointed: *Bertrand v Davies* (1862) 31 Beav 429 at 436; 54 ER 1204 at 1207; *Re Oriental Hotels Co; Perry v Oriental Hotels Co* (1871) LR 12 Eq 126, at 132; *Batten v Wedgewood Coal & Iron Co* (1884) 28 Ch D 317; *Re Central Commodities Services Pty Ltd* [1984] 1 NSWLR 25 and a receiver out of court: *Hill v Venning* (1974) 4 ACLR 555; *Moodemere Pty Ltd v Waters* [1988] VR 215 (FC) at 229-230; *Dean-Willcocks v Nothintoohard Pty Ltd* (2005) 53 ACSR 587 at [39]; on appeal: (2007) 25 ACLC 109), and voluntary administrator (*Commonwealth Bank of Australia v Butterell* (1994) 35 NSWLR 64; *Cresvale Far East Ltd v Cresvale Securities Ltd (No 2)* (2001) 39 ACSR 622; *Coad v Wellness Pursuit Pty Ltd* (2009) 40 WAR 53).

[18] The equitable lien is an incident of a controller's appointment: *ASIC v John McKenney Consulting* (2002) 43 ACSR 458 per Warren J at 465 [27]. The lien is similar to, although separate from, the equitable rights of solicitors often referred to as a "fruits of the action lien": as to which see *Ex Parte Patience; Makinson v Minister* (1940) 40 SR (NSW) 96 per Jordan CJ at 100–101, *Carew Counsel Pty Ltd v French* (2002) 4 VR 172 at 186-187 [33] – [34] and *Firth v Centrelink* (2002) 55 NSWLR 451 per Campbell J at 463-465. The resemblance was expressly noted by Farwell J in *Re Born; Curnock v Born* [1900] 2 Ch 433 at 435, and *Worrell v Power & Power* (1993) 46 FCR 214 per Wilcox, Ryan and Gummow JJ at 222, and lies in the exertions of the lienor being instrumental in recovering the sum. Further, as noted in *Shirlaw v Taylor* (1991) 31 FCR 222 per Shephard, Burchett and Gummow JJ at 238, there are certain parallels with the trustee's right of indemnity out of the trust assets and right of recoupment from beneficiaries: see *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367; *Hardoon v Bellilios* [1901] AC 118; *J W Broomhead (Vic) Pty Ltd v J W Broomhead Pty Ltd* [1985] VR 891 at 936; *Balkin v Peck* (1988) 45 NSWLR 706. (Of course, the trustee's right is, speaking generally, against all assets of the trust, in respect

38. The features of the liquidator's equitable lien were comprehensively described by Dixon J in *Re Universal Distributing Co* (1933) 48 CLR 171 at 174 – 175. Dixon J drew on and summarised four early Chancery cases on corporate insolvency of 1867 – 1884.[19] All four cases illustrate that it was conventional and entirely consistent with Equity that certain costs and expenses of realisation take priority over an otherwise first ranking secured creditor. In some of those cases, the controller's equitable lien or allowance for costs and expenses of bringing in an asset was not controversial, but was axiomatic. Further examples show the widespread recognition of the principle: *Batten, Profitt & Scott v Dartmouth Harbour Commissioners* (1890) 45 Ch D 612; *In re the J G Ward Farmers' Association Ltd; Ex parte Cook* (1898) 16 NZLR 322, 323 -324.

Falcke fallacy

39. The dates of these cases is significant - they represent a stream of authority and principle quite separate from *Falcke v Scottish Imperial Insurance Company* (1886) 34 Ch D 234, at 248. The Court of Appeal erred in holding that *Falcke* precluded the liquidator's lien.[20] In the context of the common counts of work and labour done, or money paid at the request of another, *Falcke* rests on the uncontroversial proposition that a stranger who confers a benefit on another without an actual or implied request is not entitled to payment or recompense.[21] *Falcke* is thus concerned with the recognition of simple indebtedness; it is fallacious to invoke it in a case where an equitable interest is claimed[22] and wrong to apply it in a liquidation. The liquidator and secured creditor are not 'strangers': they are bound together in a relationship by the statute and the general law governing insolvency, under which the liquidator has a duty, within the limits of the resources available, to identify and 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. In that circumstance, Equity imputes an obligation to bear costs and grants a lien to secure it.

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of all liabilities properly incurred, and extends beyond the trust assets to be enforceable against *sui juris* beneficiaries. However, "the basis of the principle is that the beneficiary who gets the benefit of the trust should bear its burdens unless he can show some good reason why his trustee should bear the burdens himself": *Broomhead* at 936; *Balkin v Peck* at 712.)

[19] *In re Marine Mansions Co.* (1867) LR 4 Eq 601, at 611; *In re Oriental Hotels Co.; Perry v. Oriental Hotels Co.* (1871) LR 12 Eq 126; *In re Regent's Canal Ironworks Co.; Ex parte Grissell* (1875) 3 Ch D 411 at 427; *Batten v. Wedgwood Coal and Iron Co.* (1884) 28 Ch D 317 at 325.

[20] Warren CJ at CA [94]; Redlich JA at [186], [198], [199]; Cavanough A- JA at [296], [297].

[21] *Lumbers v W Cook Builders Pty Ltd* (2008) 232 CLR 635 at 663 – 664, where, in any case, it was noted that the principle in *Falcke* is not unqualified, extending certainly to salvage and that it was not necessary in that case to consider how extensive those qualifications were or what was their content.

[22] A year after *Falcke* was decided, Bowen LJ had no hesitation in recognising an equitable lien over the fruits of the exertion of solicitors, agreeing with Cotton LJ that the lien "*is grounded on the principle that it is not just that the client should get the benefit of the solicitor's labour without paying for it*": *Guy v Churchill* (1887) 35 Ch D 489, 491, 492.

Coming in to the winding up

40. This directs attention to the meaning in *Re Universal Distributing* of a secured creditor "coming and having rights decided in the winding-up". This phrase is derived from *In re Marine Mansions* (1867) LR 4 Eq 126 and formed the ground of decision in that case for a plaintiff mortgagee to have its costs of the proceeding paid in priority to those of other creditors. Relevantly, *Marine Mansions* drew a distinction of procedure between an interlocutory application in the winding-up and a separate action constituted by filing an originating process (a bill for administration by equity of the insolvent estate, in which all persons interested in the estate were required to brought before the Court). That distinction was drawn from the practices and principles of pre Judicature Act Chancery decisions of the Vice-Chancellors and Master of the Rolls with respect to the administration of (generally insolvent) deceased estates.[23]

41. These administration cases concerned the priority of mortgagee's costs of proceedings. In a suit for the general administration of a deceased's estate, the usual rule was that all the proper and necessary parties were paid their costs before the fund was administered. In a suit by a mortgagee or for the benefit of mortgagees to ascertain priorities upon a fund, the rule as to costs of the proceedings had two aspects: (a) the costs of all the various mortgagees were added to their mortgage securities and were recoverable according to the ranking of their mortgagees; (b) but this rule applies "after the payment of such costs as may be proper to the plaintiff, in the first instance, where all persons obtain the benefit of the suit". (*Ford v Earl of Chesterfield* (1856) 21 Beav 426 at 428; 52 ER 924 at 925).

42. "Obtaining the benefit of the suit" was explained in *Wright v Kirby* (1857) 23 Beav 463 at 467-468; 53 ER 182 at 184, by Romilly MR:

> *"it may be ... that a subsequent mortgagee institutes proceedings to realise and distribute a fund, which, but for such exertions, would have been unavailable for the purpose of paying the incumbrances, and which proceedings would have to be taken at all events. If this is done by a puisné incumbrancer, and the other incumbrancers, both prior and subsequent take the benefit of it, and make use of the Plaintiff's proceeding for their advantage, then the Plaintiff's costs ought to be paid first. To hold otherwise would be to say that in the case of deficient security, unless the first incumbrancer will take such proceedings, they shall not be taken at all."*[24]

43. When corporate insolvency developed, the liquidator was analogized with an encumbrancer whose exertions had brought the fund into existence or who had brought the necessary

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[23] *Tipping v Power* (1842) 1 Hare 405; 66 ER 1090 (Wigram V-C), *Armstrong v Storer* (1852) 14 Beav 535; 51 ER 391 (Romilly MR), *Ford v Earl of Chesterfield* (1856) 21 Beav 426; 52 ER 924 (Romilly MR) and *Wright v Kirby* (1857) 23 Beav 463; 53 ER 182 (Romilly MR).

[24] See, similarly, *Batten, Profitt & Scott v Dartmouth Harbour Commissioners* (1890) 45 Ch D 612, 618.

proceedings to resolve competing claims. Thus in the present case, the liquidator has brought proceedings "*to realise and distribute a fund, which, but for such exertions, would have been unavailable for the purpose of paying the incumbrance*".

44. Relevantly, in this case, "come in and have rights decided" means claiming the result of work generated by the liquidator. This arises from the fundamental procedural distinction between two paths by which an asset subject to a secured interest may be realised.

45. First, just as in the nineteenth century, a secured creditor may stand outside a liquidation and pursue its own remedies against the secured property, including initiating its own proceedings to recover property the subject of its security: cf s 471C, *Corporations Act*.[25] When it brings legal proceedings to enforce its security directly, obviously enough, the secured creditor carries the costs of its proceedings. That was not the present case.

46. Alternatively, the secured creditor may rely on someone else to undertake recovery action. It may do that by express agreement, or with tacit approval. Further, on occasion, another person may take action to realise an asset, despite the secured creditor's opposition and contrary to its claimed interest or priority. Where the other party which brought the claimed fund into existence is the liquidator, the secured creditor "comes in under the liquidation and has its rights decided in the winding up" in the phrase used in *Re Universal Distributing Co* when the secured creditor claims the fund in the liquidator's hands.

47. In *Re Universal Distributing Co* itself, there were, as noted in *Ford*,[26] at least two ways in which the secured creditor in came into the administration of the winding-up. First, the validity of the secured creditor's security had been in question and it needed a ruling of the court (see 48 CLR at 175); secondly, the secured creditor relied on the liquidator to exercise the company's power to call uncalled capital which was a charged asset. Under the law of the time, only the liquidator could perform this function. Thus the fund realized was brought into being when the liquidator performed an act which the secured creditor was legally incapable of doing.

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[25] This is reflected in the statutory provisions which control the right of a secured creditor to lodge a proof of debt and through it participate in the distribution of proceeds of property available for division among unsecured creditors: *Corporations Act*, Subdivision 6C of Part 5.6: s 554E(1) and ff. Unless it surrenders its security, a secured creditor must rely on its security. If there is an actual or estimated deficiency in the value of security, the secured creditor may prove for the balance, and is to that extent taken to be unsecured: s 554E(4) and (5).

[26] *Ford's Principles of Corporations Law* [26.230], p 26,386; 26,390 - 26,391.

48. Further, the secured creditor came in to the winding up when it appeared on the summons for taxation of the liquidator's remuneration and expenses, to challenge the liquidator's accounts: 48 CLR at 173, 175.

49. In the present case, the validity of the secured creditor's security was similarly called into question, by the liquidator. There is nothing unusual in a liquidator challenging the validity or scope of a secured creditor's security: "*Liquidators must, naturally, satisfy themselves at the outset as to the validity of any securities which creditors assert that they hold*"[27] and in the appropriate case may bring proceedings to challenge the security. The fact of such a challenge, including an unsuccessful one, does not immunise the secured creditor from allowing the liquidator's costs attendant on the realisation of a fund which the proceedings may have created nonetheless. There is nothing objectionable in law or in equity in the liquidator seeking allowance of his reasonable fees, costs and expenses of producing the settlement sum which third parties in the litigation (the receivers) agreed to pay to settle the claim brought against them by the liquidator. The Court of Appeal fell into error in generalising and applying emphatic remarks of Millett J in *M C Bacon Ltd* [1991] Ch D 127 directed towards quite different factual and legal circumstances (at CA [53]- [57]; [215]; [289] – [292]). This had no bearing on the present case. Similarly to say the liquidator was in substance acting only for the indemnifier is a distraction: it is accepted that in bringing the proceeding, the liquidator was acting properly and performing his statutory duty; that while he had no obligation to bring the proceeding in the absence of available funds, he had obtained funding; that the funding was from the principal unsecured creditor, which was no doubt motivated by a hope that funds would be obtained for unsecured creditors, of which it would have the lion's share on a pari passu basis, even before any special share that a Court might award under s 564, is a daily occurrence and unremarkable. But this is irrelevant: the indemnifier stands behind the secured creditor in priority. As the asset realised is claimable by the secured creditor, so the lien arises.

50. Secondly, the secured creditor has relied on the liquidator to realise the charged asset: it is common ground that the litigation which produced the settlement proceeds was impossible for the secured creditor to bring (as it involved suing itself as the foundation for suing the receivers appointed by it as mortgagee) and would not have been brought by it.

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[27] A R Keay *McPherson The Law of Company Liquidation* 4th ed (1999), p 554; and p 469: *"In examining the affairs of a company in liquidation the liquidator will carefully scrutinise charges existing over company property. ... charges may, in certain circumstances, be attacked and avoided."*

51. Thirdly, the procedure adopted by Atco in this case involves it coming into the winding-up to have its rights to the settlement sum decided. Atco brought this proceeding as an appeal under CA s 1321(1)(d) against the liquidator's decision not to pay it the settlement proceeds. It did not sue in debt or by a money count. This is a formal invocation of the Court's supervision of the winding-up and, as such, a coming in under the liquidation.[28]

Benefit

52. The Court of Appeal erred in holding that any entitlement to an equitable lien was defeated or limited by the failure of the liquidator to confer an "incontrovertible benefit" on the secured creditor (Warren CJ at CA [85], [93]; Redlich JA at [174], [217]- [223], Cavanough A-JA at [296]). This was put on the basis that the secured creditor "would have been better off if the liquidator had never brought the proceedings" out of which the Settlement Sum was obtained. It is said that the secured creditor incurred legal costs in defending the proceedings and that these costs had not been fully recompensed by the payment of its costs in the amounts agreed or assessed (CA [74] – [78], [93]; [221] – [222]).

53. This reasoning is wrong for three reasons: (1) as a matter of Equity, it brings irrelevant matters into account[29]; (2) it misconceives the nature of the "benefit" which is engaged; (3) it introduces doctrines and concepts from the separate discourse of restitution.

54. As far as Equity is concerned, what is relevant to the equities, is - who brought the fund into existence? Is that fund available to creditors (subject to proper costs of realisation)? In bringing the fund into existence, did the liquidator incur expense?

55. For the purposes of the equitable lien, "benefit" means the possibility of augmenting the assets available for distribution to the secured creditor or creditors generally, after deduction of the costs of realisation. "Benefit" is not determined by whether a positive monetary outcome is established, but by reference to the *potential* for the action taken to have benefited creditors.

56. The creation of an asset such as the settlement sum is a 'benefit' sufficient to engage the equitable lien, whether or not the asset that has been produced is sufficient to reach the hands of the secured creditor or other creditors entitled to it: *Batten v Wedgewood Coal & Iron Co* (1884) 28 Ch D 317 at 324-325; *Re Universal Distributing Co Ltd; Moodemere Pty*

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[28] The "appeal" is an inter partes hearing of the claim, in which the liquidator is defendant: *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 340-341.

[29] It is not any and every fact or circumstance which is relevant, but (just as in the doctrine of clean hands) only those which "have an immediate and necessary relation to the equity sued for" (*Dering v Earl of Winchelsea* (1787) 1 Cox Eq Cas 318 at 319, 29 ER 1184, [1775 – 1802] All ER Rep 140 at 142; *Moody v Cox and Hatt* [1917] 2 Ch 71 at 87-88).

Ltd v Waters [1988] VR at 225; and 221; *Westpac Banking Corporation v ITS Taxation Services Pty Ltd* (2004) 22 ACLC 229 at 235.

57. The notion of "incontrovertible benefit" adopted by the Court of Appeal is not a correct test. It is drawn from the writings of Peter Birks, as applied in *Monks v Poynice Pty Ltd* (1987) 8 NSWLR 662, a judgment of Young J which allowed an invalidly appointed receiver to lodge a proof of debt for fees for his services and expenses. This case was not a claim for a lien or for priority: rather the receiver sought to be recognised as an unsecured creditor entitled to prove in the subsequent winding up of the company. The case was argued and analysed entirely within the framework of quantum meruit and restitution (covering acceptance, salvage and incontrovertible benefit), in which Birks's 1985 work was the guide.[30] The case was followed in *Young v A C N 081 162 512* (2005) 218 ALR 449 by Gzell J, which is explicable on salvage principles.[31] These cases do not, in terms, purport to replace the test for an equitable lien in *Re Universal Distributing* – they grant liens in additional cases and may be distinguished. (If they are regarded as laying down the exclusive test for the equitable lien, they are decided on wrong principles and should be disapproved.)

Modern search for rationale for liquidator's equitable lien

58. It may be accepted that there is little discussion in the foundational cases of its doctrinal basis for the liquidator's lien in terms of grand theory beyond that it served a practical need of encouraging the realisation of assets and was obvious and just.

59. In more recent years, the rationale has been sought without final resolution.[32] The authorities express at least 7 separate bases on which the usual priority of a secured creditor may be displaced by the equitable lien of a relevant insolvency controller. These are not cumulative, but are alternatives or matters of emphasis:

    a. First, **exertions to create fund**: "where a party has, by his efforts, brought into court a fund in the administration of which various parties are interested, that party's costs and expenses should be a first claim upon that fund": *Batten v Wedgewood Coal & Iron Co* (1884) 28 Ch D 317 at 325; *Shirlaw v Taylor* (1991) 31 FCR 222 at 228.

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[30] See also *Cadorange Pty Ltd v Tanga Holdings Pty Ltd* (1990) 20 NSWLR 26, in which Young J imposed an equitable lien in a "borderline case", based on a mélange of restitution principles and dicta in *Hewett v Court* all designed to outflank *Falcke*: at 33, 38 and cp *Monk v Poynice* at 663.

[31] A shareholder made a voluntary payment to a supplier of the company which enabled the company in administration to obtain raw materials and to make a profit many times the benefit of the invoice discharged. Held: equitable lien granted to secure the payment.

[32] *Shirlaw v Taylor* (1991) 31 FCR 222; *ASIC v GDK Financial Solutions Pty Ltd (No 3)* (2008) 246 ALR 580; *Coad v Wellness Pursuit Pty Ltd* (2009) 40 WAR 53 at 80-81 [91].

"That was the essence of the decision of Dixon J ... in *Re Universal Distributing Co*": *Lockwood v White* (2005) 11 VR 402 (CA) per Winneke P (Buchanan JA and Gillard AJA agreeing) at 418[34]; *Dean-Willcocks v Nothintoohard Pty Ltd* (2007) 25 ACLC 109 per Beazley JA at 118-119 [62].[33]

b. Secondly, **remuneration of Court's officer**: the lien is extended by the Court from a concern to see that its officer (such as a liquidator or Court-appointed receiver) is remunerated and encouraged to undertake the duties of his or her role, with the consequent benefit to creditors and the community: *Skip v Harwood* (1747) 3 Atk 564, 26 ER 1125; *Wright v Kirby* (1857) 23 Beav 463 at 467-468; 53 ER 182 at 184; *Bertrand v Davies* (1862) 31 Beav 429, 436; 54 ER 1204, 1207; *Re Central Commodities Services Pty Ltd* [1984] 1 NSWLR 25 (Needham J); *Nationwide News Pty Ltd v Samalot Enterprises Pty Ltd (No 2)* (1986) 5 NSWLR 227 at 230G; *Shirlaw v Taylor* (1991) 31 FCR 222 at 228-229; *Westpac Banking Corporation v ITS Taxation Services Pty Ltd* (2004) 22 ACLC 229 at 235 [26]; and the cases on solicitor's fruit of the action liens, above.

c. Thirdly, **salvage**: as partaking in the nature of salvage, where "the principle is that those taking the benefit of the administration should not escape bearing the burden of the proper cost of it": *Shirlaw v Taylor* (1991) 31 FCR 222 at 230; *Westpac Banking Corporation v ITS Taxation Services Pty Ltd* (2004) 22 ACLC 229 at 235 [26], [28]. The description of "salvage" was treated as "more of a metaphor than a legal principle" in *Dean-Willcocks v Nothintoohard Pty Ltd* (2007) 25 ACLC 109 at [2] but the existence of the lien identified in *Re Universal Distributing* was not doubted.[34]

d. Fourthly, **necessary expense in any event**: expense which it would be necessary to incur in order to obtain the fund that is claimed ought to be borne by the person now claiming it: *Wright v Kirby* (1857) 23 Beav 463 at 467-468; 53 ER 182 at 184; *In re Regent's Canal Ironworks Company; Ex parte Grissell* (1875) 3 Ch D 411 per James

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[33] Further, as noted in *GDK* at [13] citing *Ford v Earl of Chesterfield (No. 3)* (1856) 52 ER 924, where costs are incurred for the benefit of all persons interested in a fund, those costs are borne by the fund. While this was treated by Finkelstein J as separate from this first principle, because it has a wider application than receivers and liquidators, a similar rationale underlies it. The solicitor's fruit of action lien cases also recognise the exertion of the party claiming the lien: *Sympson v Prothero* (1857) 26 LJ Ch 671 at 672; *Re Born, Curnock v Born* [1900] 2 Ch 433, 435, *Worrell v Power & Power* (1993) 46 FCR 214 at 221 - 222.

[34] Salvage proper is a maritime law doctrine, by which a volunteer is rewarded for assistance successfully rendered to a ship or cargo in danger, and is "governed largely by considerations of public policy and by the desirability of encouraging seafaring folk to take risks for the purpose of saving property": *Fisher v The "Oceanic Grandeur"* (1972) 127 CLR 312 at 318.

LJ at 427; *Re Universal Distributing*.[35] Here, the only means of bringing the fund into being was to undertake the litigation that resulted in the settlement sum.

e. Fifthly, **trustee or custodian's improvements**: that where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require ... that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property": *Re Berkeley Applegate (Investment Consultants) Ltd; Harris v Conway* [1989] Ch 32 at 51; *Shirlaw v Taylor* (1991) 31 FCR 222 at 230-231.

f. This has also been expressed in terms that a controller "is entitled to be paid out of the proceeds of sale of mortgaged property the costs of any work that directly benefits the mortgagee": *ASIC v GDK Financial Solutions Pty Ltd (No 3)* (2008) 246 ALR 580, at [10], citing *Re Universal Distributing* and *Moodemere Pty Ltd v Waters* [1988] VR 215 at 229. The concept of "benefit" is discussed above.

g. Sixthly, **consent, express or implied:** "*another instance* is where the prior encumbrancer is a party to the action in which the [controller] is appointed and consents to the appointment and the [controller's] administration of the charged property", *GDK* at [11], citing *Dean-Willcocks v Nothintoohard Pty Ltd* (2007) 25 ACLC 109; *Hill v Venning* (1974) 4 ACLR 55.

The secured creditor argued below that no lien arose because Atco did not consent to the liquidator creating the asset – it actively opposed it. There is no rule that an equitable lien depends on the consent of the party for whom the fund is created to the work being done. As the cases underlying *Marine Mansions* show, a relevant test is whether the asset was realised by the secured creditor in its own proceedings under its security or by the liquidator in the exercise of his powers. The lien claimed in this case is not based on Atco's consent to the initial proceedings but whether, after the Settlement Sum was realised, Atco as secured creditor wishes to claim the benefit of the liquidator's work in realising the sum and bringing the proceeds under the control of the court. For the purpose of establishing the lien, it is irrelevant who was sued in order to produce the Settlement Sum; what matters is who did the work to produce the Settlement Sum and how much did that work cost.

Finally, **"unconscientious" conduct**: "yet another instance where the rights of the prior encumbrancer may be postponed ... is where the prior encumbrancer is guilty of

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[35] This is not a warrant for arguing that the fund could have been produced at some hypothetical, alternative cost: *IMF (Australia) Ltd v Meadow Springs Fairway Resort Ltd* (2009) 253 ALR 240; (2009) 69 ACSR 507 (FCAFC) at [79].

"unconscientious" conduct": *GDK* at [12]. This might arise where there has been a representation by the chargee which induces the insolvency controller to incur costs or where there is a free acceptance of the benefit without due allowance for the costs of realising it: *Dean-Willcocks v Nothintoohard Pty Ltd* (2007) 25 ACLC 109 at 111[6]. There is no claim of inducement or misrepresentation in this case. On the other hand, in *ASIC v John McKenney Consulting* (2002) 43 ACSR 458, 21 ACLC 314, Warren J held (at 468 [41]):

> "The equitable lien of the liquidator attaching to the realisation of assets in the winding up, takes priority over the administrators' statutory lien in accordance with the equity, *in that it would be unconscionable for the administrators to benefit from the fruits of the liquidator's labour.*"

60. While these rationales may vary in emphasis, yet certain key features are deeply embedded with history of Equity. To adapt language from the directly comparable equitable lien of a solicitor over the fruits of litigation,[36] a prime rationale for the existence of the liquidator's lien over the fund recovered through his or her efforts is that, if the liquidator had not done the work, and spent the money, there would not be any fund in existence. The liquidator, like a solicitor, is an officer of the Court. The lienor's role in bringing the fund into existence is of such importance that equity recognises proprietary rights which enable the lienor to be paid out of the fund before those otherwise entitled to it. As said of the solicitor's lien by Lord Kenyon in *Read v Dupper* (1795) 6 TR 361 at 362; 101 ER 595 at 596, in terms equally applicable to the liquidator's lien:

> "the principle by which this application is to be decided was settled long ago, namely that the party should not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry, and in many instances at whose expense, those fruits are obtained."

61. That remains a principled and justified basis for the liquidator's equitable lien today in the modern contexts of corporate insolvencies and other forms of administration.

Other errors of Court of Appeal

62. The Court of Appeal erred in holding (for various and differing reasons) that the lien as recognised in *Universal Distributing* did not apply. In short, the Court took into account matters which were not relevant to the liquidator's equity or mischaracterised the liquidator's conduct.

63. All three members of the Court reached a conclusion that the *Universal Distributing* principle did not apply in this case. Warren CJ erred in holding that this was because, in her

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[36] *Firth v Centrelink* (2002) 55 NSWLR 451 at 468 [48].

Honour's view, the secured creditor had not 'come in to the liquidation' to claim the settlement sum (at CA [41] – [46]). Redlich JA and Cavanough A-JA disagreed with this conclusion (at CA [205], [284] respectively) but then erred in not upholding the liquidator's lien.

64. Redlich JA and Cavanough A-JA erred when each regarded the secured creditor's coming in to the liquidation as a necessary but not sufficient step in establishing the liquidator's lien. Their Honours both held that the liquidator needed to establish additional grounds to sustain the lien (CA [172]; [282]). They erred in entering on this enquiry; alternatively, they erred in the conclusions that they reached in the course of it.

10 65. A majority of the Court took *Hewett v Court* (1983) 149 CLR 639 as setting out the test applicable to the liquidator's equitable lien (Warren CJ at [64] – [65, [107], Redlich JA at [158] [159], [173], [206]; contra, correctly, Cavanough A- JA [299] [301]). If the liquidator's equitable lien is to rest on general equitable principles, the Court of Appeal erred in failing to find that it was unconscientious of the secured creditor to claim the fruits of the liquidator's actions (viz., the settlement sum) without allowing for the liquidator's reasonable costs, expenses and remuneration of producing that sum.

66. All members of the Court of Appeal erred in concluding that it was not unconscientious of Atco to deny that the settlement sum (over which it is accepted that Atco held a valid charge) should bear the cost of the action that brought it into existence.

20 67. In particular, all three members of the Court of Appeal fell into error by regarding as relevant to, and decisive against, the availability of an equitable lien:

a. that the liquidator, although acting properly in the discharge of his duties (Warren CJ at CA [67], [99]; Redlich JA at [208]), was under no compulsion by law to incur the expense of the proceeding (Warren CJ at CA [87], Redlich JA at [179]),

b. that the liquidator bringing proceedings against the secured creditor (Redlich JA at CA [209]; Cavanough A-JA at [282]) or to impugn the security of the secured creditor (Warren CJ at [33]; Redlich JA at [215]; Cavanough A-JA at [288]) resulted in the liquidator being ineligible to claim an equitable lien. This confused ;

c. that the litigation was said in substance to be acting (solely or primarily) for the benefit
30 of the indemnifying creditor, not for creditors as a whole or the interests of the secured creditor and that this limited the interest which the liquidator was entitled to assert in equity (Warren CJ at [71], [94]; Redlich JA at [199], [208] – [216]; Cavanough A-JA at [284], [286]);

d. that the secured creditor incurred costs in the litigation brought against it by the liquidator which were not fully indemnified by the costs orders in its favour (Warren CJ at CA [70]; [77]; Redlich JA at [223]; Cavanough A-JA at [295]);

e. that the terms of the indemnity agreement between the liquidator and his indemnifying creditor excluded or modified the lien (Warren CJ at [118] – [120]; Redlich JA at [230]; contra, correctly, Cavanough A-J at [308]);

f. that the liquidator did not apply to the Court under s 564 of the Corporations Act for an order or directions before exercising the lien and then paying the funds to the indemnifying creditor (Warren CJ at CA [99], [102]; Redlich JA at [239], [255]; [259], [260], [263] – [264]; contra, Cavanough A-JA at [308], [309]).

68. Nothing in the indemnity agreement between the liquidator and the indemnifying creditor or in s 564 of the Corporations Act provides a basis for the secure creditor to resist the lien or equitable allowance. The lien enables recovery of costs without recourse to s 564 (as held by Cavanough A-JA [304 – [305]) .The indemnifier has met real and necessary expenses of protecting and realising the asset, the liquidator has an obligation to account to the funder. The obligation to account to an indemnifier out of recoveries arises as a necessary and quintessential incident of every contract of indemnification: *Burnand v Rodocanachi* (1882) 7 App Cas 333 at 335, 339; *Castellain v Preston* (1883) 11 QBD 380 at 386, 393, 403-404 (CA); *Morris v Ford Motor Co* [1973] QB 792; [1973] 2 All ER 1084 (CA). No express term is necessary and the right to be reimbursed is protected by a right of subrogation to all receipts, rights and remedies of the indemnified party.

69. Further, as Cavanough A-JA held, the secured creditor was a stranger to the arrangement, did not rely on it, and should not be permitted to invoke it (CA at [305] – [308]).

PART VII LEGISLATION

70. *Corporations Act 2001* (Cth), sections 564 and 1321(1) (See Annexure).

PART VIII ORDERS SOUGHT

71. The appellants submit that the orders of the Court should be:

(a) Appeal allowed with costs.

(b) Set aside the orders made in the Court of Appeal on 25 June 2013 and, in lieu, order that the appeal to the Court of Appeal be dismissed with costs.

PART IX ORAL ARGUMENT

72. The appellants estimate that they will require 2 hours for their oral argument in this appeal.

Dated: 13 December 2013.

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY No. M 141 of 2013

BETWEEN

JAMES HENRY STEWART in his capacity as liquidator of NEWTRONICS PTY LTD (in liquidation)
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

ANNEXURE

Corporations Act 2001 (Cth) s564:
Power of Court to make orders in favour of certain creditors

Where in any winding up:
(a) property has been recovered under an indemnity for costs of litigation given by certain creditors, or has been protected or preserved by the payment of money or the giving of indemnity by creditors; or

(b) expenses in relation to which a creditor has indemnified a liquidator have been recovered;

the Court may make such orders, as it deems just with respect to the distribution of that property and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk assumed by them.

Corporations Act 2001 (Cth) s 1321(1):
Appeals from decisions of receivers, liquidators etc.

(1) A person aggrieved by any act, omission or decision of:

(a) a person administering a compromise, arrangement or scheme referred to in Part 5.1; or

(b) a receiver, or a receiver and manager, of property of a corporation; or

(c) an administrator of a company; or

(ca) an administrator of a deed of company arrangement executed by a company; or

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(d) a liquidator or provisional liquidator of a company;

may appeal to the Court in respect of the act, omission or decision and the Court may confirm, reverse or modify the act or decision, or remedy the omission, as the case may be, and make such orders and give such directions as it thinks fit.

These provisions are still in force, in that form, at the date of making the submissions.