HIGH COURT OF AUSTRALIA

CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

JAMES HENRY STEWART (IN HIS CAPACITY AS LIQUIDATOR OF NEWTRONICS PTY LTD (IN LIQUIDATION)) & ANOR APPELLANTS

AND

ATCO CONTROLS PTY LTD (IN LIQUIDATION) RESPONDENT

Stewart v Atco Controls Pty Ltd (in Liquidation)
[2014] HCA 15
7 May 2014
M141/2013

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of Victoria made on 25 June 2013 and, in its place, order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of Victoria

Representation

A J Myers QC with P G Willis for the appellants (instructed by Gadens Lawyers)

P D Crutchfield SC with C T Moller for the respondent (instructed by K & L Gates)

CATCHWORDS

Stewart v Atco Controls Pty Ltd (in Liquidation)

Equity – Equitable charges and liens – Liquidator's equitable lien for costs, expenses and remuneration – Where asset realised by liquidator's efforts in pursuing litigation – Where litigation involved unsuccessful attack on interest of secured creditor – Where liquidator acting with propriety and in course of his duties – Whether liquidator entitled to equitable lien over asset in priority to secured creditor.

Words and phrases – "come in to the winding up", "costs and expenses of realisation", "equitable lien", "*Universal Distributing* principle".

Corporations Act 2001 (Cth), s 564.

1 CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ. The second appellant, Newtronics Pty Ltd (receivers and managers appointed) (in liquidation) ("Newtronics"), is a wholly owned subsidiary of the respondent, Atco Controls Pty Ltd (in liquidation) ("Atco"). Atco was a lighting manufacturer and Newtronics designed, manufactured and supplied electronic components. From Newtronics' inception in 1993, Atco provided it with financial support and, later, took a fixed and floating charge over Newtronics' assets. As at December 2001, just before Newtronics was wound up, it owed Atco in the order of $19 million.

2 In addition to the financial support it provided from time to time, Atco provided Newtronics' auditors with letters of support in which Atco promised to provide Newtronics or its debt financier with funds in order that it could meet its trading obligations, and promised that it would not call up the debt owed to it within the relevant period to the detriment of unsecured creditors.

3 In January 2002, Atco appointed receivers to Newtronics after Newtronics was ordered to pay damages of $8.9 million, together with interest and costs, to Seeley International Pty Ltd ("Seeley"), a former customer of Newtronics[1]. The receivers sold the business of Newtronics to another subsidiary of Atco for $13 million, credited by book entries against Newtronics' debt to Atco. Newtronics was wound up in February 2002 on Seeley's application. The first appellant, Mr James Stewart, was appointed liquidator.

4 As Newtronics had no funds and no assets which could be realised in order to pay for the liquidator's work, the liquidator sought funding from its creditors for his investigations. Seeley was the largest unsecured creditor of Newtronics and agreed to provide funding for particular work. Seeley and the liquidator entered into a series of agreements by which Seeley undertook to indemnify the liquidator for his costs and expenses incurred with respect to the work. One such agreement was entered into on 27 March 2006. It provided that Seeley would indemnify the liquidator in respect of all costs and expenses reasonably incurred by the liquidator and his staff in pursuing an action to enforce what was described as "an agreement between Newtronics and [Atco] evidenced by, inter alia, a letter of support dated 21 July 2001" in proceedings to be instituted in the Supreme Court of Victoria and indemnify the liquidator against any adverse costs orders. The recitals to that indemnity agreement

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1 *Seeley International Pty Ltd v Newtronics Pty Ltd* (2002) Aust Torts Reports ¶81-648.

recorded that the liquidator had received advice from counsel. The indemnity agreement, in the form of a deed, was approved, retrospectively, by the Federal Court (Gordon J) in August 2007[2].

5 The foreshadowed action was brought by Newtronics in April 2006. It was alleged that Atco, by reason of its promises, was entitled neither to repayment of the monies advanced to Newtronics nor to enforcement of its security. Newtronics also claimed damages against Atco for in excess of $13 million. In December 2006, Newtronics joined the receivers, who had been appointed by Atco, to the proceedings, alleging that their appointment was void and claiming damages for trespass and conversion arising from the sale by them of its assets. The critical issue in both actions was the validity of Atco's security. It was subsequently agreed by Seeley that the indemnity it had provided to the liquidator concerning the action against Atco would extend to the action against the receivers.

6 Newtronics was successful at trial against Atco, but not against the receivers[3]. On the day appeals from that decision were to be heard, 3 September 2009, the receivers settled with Newtronics on terms that they pay it $1.25 million ("the settlement sum"). Atco proceeded with its appeal and was successful[4] and Newtronics was ordered to pay Atco's costs of the appeal. Atco's security was held to be valid. It was that security upon which the receivers' appointment was based. Newtronics' action against them had, necessarily, been premised upon the invalidity of the security. It is an unusual feature of this matter that, had it proceeded, Newtronics' appeal respecting the receivers was unlikely to have met with success. Nevertheless, it remains the fact that the settlement sum was paid as a result of the proceedings brought against the receivers and that a fund, constituted by the settlement sum, was thereby created.

7 On or about 22 September 2009, the liquidator of Newtronics received the settlement sum from the receivers and shortly thereafter paid it to Seeley by way of reimbursement of the costs and expenses Seeley had paid under the indemnity agreement respecting the actions against Atco and the receivers. The decision on

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

3 *Newtronics Pty Ltd (receivers and managers appointed) (In Liq) v Atco Controls Pty Ltd (In Liq)* (2008) 69 ACSR 317.

4 *Atco Controls Pty Ltd (In Liq) v Newtronics Pty Ltd (receivers and managers appointed) (In Liq)* (2009) 25 VR 411.

Atco's appeal was handed down on 21 October 2009. Atco's solicitors subsequently demanded payment of the settlement sum pursuant to Atco's charge.

8 Newtronics declined to pay the settlement sum to Atco, on the basis that the liquidator was entitled to an equitable lien over the sum. By this time, the liquidator had estimated that the costs and expenses of the litigation exceeded the settlement sum. If that is the case, a matter yet to be finalised, there will be no monies to meet Atco's charge.

9 Atco then brought proceedings in the Supreme Court of Victoria, by way of appeal under s 1321 of the *Corporations Act* 2001 (Cth) from the liquidator's decision to refuse to pay it the settlement sum and to pay that sum to Seeley instead. It sought relief in the nature of declarations and the taking of accounts. No issue was taken in the proceedings about whether Atco's charge was capable of attaching to the settlement sum.

10 Efthim AsJ upheld Atco's claim and ordered that the settlement sum be paid to Atco[5]. On an appeal by way of hearing de novo, Davies J found for Newtronics and the liquidator[6]. Atco in turn appealed to the Court of Appeal (Warren CJ, Redlich JA and Cavanough AJA), which allowed its appeal[7].

The principle in *Universal Distributing* and the question on the appeal

11 The issue in this matter is whether the liquidator was entitled to an equitable lien over the fund constituted by the settlement sum with respect to the costs and expenses incurred in the litigation against both Atco and the receivers. The liquidator submits that what was said by Dixon J in *In re Universal Distributing Co Ltd (In Liq)*[8] resolves that issue. Arguments advanced by Atco on the appeal necessitate that the relevant passage be set out in full:

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5 *Atco Controls Pty Ltd v Stewart (in his capacity as liquidator of Newtronics Pty Ltd (In Liq))* unreported, Supreme Court of Victoria (Commercial and Equity Division), 20 April 2011.

6 *Re Newtronics Pty Ltd (In Liq)* (2011) 29 ACLC ¶11-054.

7 *Atco Controls Pty Ltd (In Liq) v Stewart* (2013) 31 ACLC ¶13-065.

8 (1933) 48 CLR 171 at 174 (footnotes omitted); [1933] HCA 2.

> "If a creditor whose debt is secured over the assets of the company come in and have his rights decided in the winding up, he is entitled to be paid principal and interest out of the fund produced by the assets encumbered by his debt after the deduction of the costs, charges and expenses incidental to the realization of such assets (*In re Marine Mansions Co*). The security is paramount to the general costs and expenses of the liquidation, but the expenses attendant upon the realization of the fund affected by the security must be borne by it (*In re Oriental Hotels Co; Perry v Oriental Hotels Co*). The debenture-holders are creditors who have a specific right to the property for the purpose of paying their debts. But if it is realized in the winding up, a proceeding to which they are thus parties, the proceeds must bear the cost of the realization just as if they had begun a suit for its realization or had themselves realized it without suit (cf *In re Regent's Canal Ironworks Co; Ex parte Grissell*; and see *Batten v Wedgwood Coal and Iron Co*)."

12 Dixon J was stating a general principle to be applied in the circumstances there identified. His Honour went on to say[9] that, in applying this principle, expenses reasonably incurred in the care, preservation and realisation of the property of the company in liquidation would be "thrown against" the fund created by the liquidator's efforts. His Honour concluded[10] that the liquidator's remuneration for work done for the purpose of raising the fund should be charged against it.

13 In *Hewett v Court*[11], Deane J explained that an equitable lien is a right against property which, although called a lien, is, in truth, a form of equitable charge over the subject property. It will be observed from the passage in *Universal Distributing* that the charge securing a liquidator's realisation costs will take priority over a secured creditor's charge.

14 In *Davies v Littlejohn*[12], Isaacs J explained that an equitable lien arises by operation of law, under a doctrine of equity, "as part of a scheme of equitable adjustment of mutual rights and obligations". It may arise in a number of

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9 *In re Universal Distributing Co Ltd (In Liq)* (1933) 48 CLR 171 at 174.

10 *In re Universal Distributing Co Ltd (In Liq)* (1933) 48 CLR 171 at 175.

11 (1983) 149 CLR 639 at 663; [1983] HCA 7.

12 (1923) 34 CLR 174 at 185; [1923] HCA 64.

contexts. His Honour was there discussing the vendor's lien, but, as Gibbs CJ noted in *Hewett v Court*[13], the words are of "general application".

15 Gibbs CJ observed in *Hewett v Court*[14] that it is not possible to state "a general principle which would cover the diversity of cases in which an equitable lien has been held to be created." However, equity has been able to develop and state a principle to be applied in or with respect to particular circumstances or relationships.

16 With respect to a vendor's lien for unpaid purchase money, Gibbs CJ[15] said that such a lien is founded on the principle that "a person, having got the estate of another, shall not, as between them, keep it, and not pay the consideration". The lien of a purchaser is based on a converse principle. In both cases, the lien is for money "justly due". More closely analogous to the present case is the solicitor's particular lien (which may be distinguished from the general or retaining lien that entitles retention of documents until fees are paid), which arises over any property recovered or judgment obtained by a solicitor's work[16]. In *Guy v Churchill*[17], Lindley LJ said that "[i]t is right that they who get the benefit of the recovery of money should bear the expense of recovering it." A similar notion underlies the principle expressed in *Universal Distributing*. A secured creditor cannot lay claim to the benefit of realised assets without the costs of their realisation being met.

17 Generally speaking, in a system based on case law, the type of general principle to which Gibbs CJ referred in *Hewett v Court* is derived from judicial decisions on particular instances. The principle stated by Dixon J in *Universal Distributing* was derived from the earlier decisions of the equity courts to which his Honour referred.

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13 (1983) 149 CLR 639 at 645.

14 (1983) 149 CLR 639 at 645; see also at 667-668 per Deane J.

15 *Hewett v Court* (1983) 149 CLR 639 at 645, citing *Mackreth v Symmons* (1808) 15 Ves Jun 329 at 340 [33 ER 778 at 782].

16 *In re Meter Cabs Ltd* [1911] 2 Ch 557 at 559 per Swinfen Eady J.

17 (1887) 35 Ch D 489 at 492.

18 In the firstmentioned case, *In re Marine Mansions Co*[18], it was accepted that the costs of the realisation of a company's assets should be paid in priority to other claims. Sir W Page Wood VC noted[19] that there was no objection taken to the liquidator having "all just allowances in respect of his realizing the property". The issue in that case was whether the mortgagee was entitled to be paid, but there was no dispute that, if that were the case, the mortgagee was to be paid only after deduction of the costs of realising the property.

19 In the later case of *In re Oriental Hotels Co; Perry v Oriental Hotels Co*[20], Sir John Wickens VC appears to have considered that *Marine Mansions* stated a point of general principle: that the expenses of the realisation of assets are payable out of the fund in priority to any claim of the mortgagee.

20 In the third case mentioned by Dixon J, *In re Regent's Canal Ironworks Co; Ex parte Grissell*[21], James LJ acknowledged that the debenture holders had a specific right to the property for the purpose of paying their debts, but held that "[i]f the property is realized in the proceedings to which they are parties they must pay the costs of the realization, just as they would have had to pay them if they had their own suit for the purpose of realizing it". This statement is reflected in the passage from *Universal Distributing*.

21 *Batten v Wedgwood Coal and Iron Co*[22], the fourth case to which Dixon J referred, was a case where the business of the company in liquidation was sold by the debenture holders, after a receiver had run the company at a loss, with the result that there was insufficient money to pay both the costs of realisation and the receiver's remuneration. It was held that the costs of realisation had priority. It was there said[23]:

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18 (1867) LR 4 Eq 601 at 611.

19 *In re Marine Mansions Co* (1867) LR 4 Eq 601 at 612.

20 (1871) LR 12 Eq 126 at 132.

21 (1875) 3 Ch D 411 at 427.

22 (1884) 28 Ch D 317.

23 *Batten v Wedgwood Coal and Iron Co* (1884) 28 Ch D 317 at 325.

> "With regard to the costs of the realization of the assets, I think Mr Cozens-Hardy [counsel for the plaintiff debenture holder] is right in contending that these costs stand in a different position from any of the other claims. The property must be realized by someone in order that it may be distributed, and whoever has realized it and brought the proceeds under the control of the Court, has really constituted the fund which has to be distributed for the benefit of the receiver and everyone else who is entitled. These costs must therefore be paid in priority to the receiver."

22 The principle in *Universal Distributing* is stated at some length, no doubt because Dixon J was concerned to identify its sources. It may be more shortly stated as: a secured creditor may not have the benefit of a fund created by a liquidator's efforts in the winding up without the liquidator's costs and expenses, including remuneration, of creating that fund being first met. To that end, equity will create a charge over the fund in priority to that of the secured creditor.

23 The circumstances in which the principle will apply are where: there is an insolvent company in liquidation; the liquidator has incurred expenses and rendered services in the realisation of an asset; the resulting fund is insufficient to meet both the liquidator's costs and expenses of realisation and the debt due to a secured creditor; and the creditor claims the fund. In these circumstances, it is just that the liquidator be recompensed. To use the language of Deane J in *Hewett v Court*[24], it might be said that a secured creditor would be acting unconscientiously in taking the benefit of the liquidator's work without the liquidator's expenses being met. However, such a conclusion is avoided by the application of the principle stated in *Universal Distributing*.

24 In this case, there are certain facts that are not disputed. The fund constituted by the settlement sum was created by the efforts of the liquidator in pursuing the litigation and realising Newtronics' chose in action against the receivers. It is uncontroversial that the liquidator acted with propriety in bringing and pursuing that litigation and there is a finding, unchallenged, that he was acting in the course of his duties in doing so. Atco claims that fund.

25 These facts would appear to be sufficient for the principle stated in *Universal Distributing* to apply, yet it was not applied by the Court of Appeal. The question, therefore, is whether there is some fact or circumstance which renders the principle inapplicable.

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24 (1983) 149 CLR 639 at 668-669.

The decisions in the courts below

26 Davies J considered that the circumstances identified by Dixon J in *Universal Distributing* applied to this case and that the fund created out of the litigation should bear the cost of its realisation "in the ordinary way"[25]. Her Honour found that the liquidator was discharging his statutory obligations in pursuing the litigation[26] and the settlement sum was recovered only as the result of the liquidator's actions, which is to say it was realised in the course of the winding up[27].

27 Davies J held that the liquidator was entitled to all the costs and expenses incurred in the litigation, subject to the liquidator verifying them and the remuneration he claimed[28]. Her Honour rejected Atco's argument that the liquidator should recover only with respect to the claim brought against the receivers and found that the claim against Atco was necessary, as it provided the foundation for the claim respecting the receivers' appointment[29]. This finding was not disturbed by the Court of Appeal.

28 Each of the members of the Court of Appeal considered that there were features of this case which meant that the test in *Universal Distributing* either did not apply[30] or did not apply directly and without qualification[31]. The fact that the

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25 *Re Newtronics Pty Ltd (In Liq)* (2011) 29 ACLC ¶11-054 at 1,001 [13].

26 *Re Newtronics Pty Ltd (In Liq)* (2011) 29 ACLC ¶11-054 at 1,001 [14].

27 *Re Newtronics Pty Ltd (In Liq)* (2011) 29 ACLC ¶11-054 at 1,001 [13].

28 *Re Newtronics Pty Ltd (In Liq)* (2011) 29 ACLC ¶11-054 at 1,003 [20].

29 *Re Newtronics Pty Ltd (In Liq)* (2011) 29 ACLC ¶11-054 at 1,003 [19].

30 *Atco Controls Pty Ltd (In Liq) v Stewart* (2013) 31 ACLC ¶13-065 at 864 [32] per Warren CJ, 883 [172] per Redlich JA.

31 *Atco Controls Pty Ltd (In Liq) v Stewart* (2013) 31 ACLC ¶13-065 at 905 [284] per Cavanough AJA.

expenses were properly incurred by the liquidator was not considered sufficient for the application of the principle[32].

29 It will be necessary to consider the various factors identified by each of the members of the Court of Appeal as distinguishing this case from one to which the principle in *Universal Distributing* applies. For present purposes, it suffices to identify the principal considerations which influenced the Court of Appeal. These considerations concerned the nature and purpose of the action against Atco, namely that: it involved a challenge to Atco's security[33]; it was not pursued in the interests of Atco as secured creditor[34] or to its benefit[35]; and the liquidator's actions were taken in the interests of Seeley[36]. Indeed, Cavanough AJA went so far as to say that the action was, in substance, an action between Seeley and Atco[37] and that it was not, therefore, a typical case to which *Universal Distributing* could apply[38].

30 These views also informed their Honours' adoption of a different test as to whether an equitable lien should arise. That test was whether Atco would be acting unconscientiously if it were to assert priority over the assets without the relevant costs, expenses and remuneration having been discharged[39]. That test

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32 *Atco Controls Pty Ltd (In Liq) v Stewart* (2013) 31 ACLC ¶13-065 at 868 [60] per Warren CJ, 907 [294] per Cavanough AJA; see also at 885 [186] per Redlich JA.

33 *Atco Controls Pty Ltd (In Liq) v Stewart* (2013) 31 ACLC ¶13-065 at 903 [277] per Cavanough AJA.

34 *Atco Controls Pty Ltd (In Liq) v Stewart* (2013) 31 ACLC ¶13-065 at 888 [199] per Redlich JA.

35 *Atco Controls Pty Ltd (In Liq) v Stewart* (2013) 31 ACLC ¶13-065 at 870 [77] per Warren CJ.

36 *Atco Controls Pty Ltd (In Liq) v Stewart* (2013) 31 ACLC ¶13-065 at 869 [71] per Warren CJ, 888 [199] per Redlich JA, 905 [284] per Cavanough AJA.

37 *Atco Controls Pty Ltd (In Liq) v Stewart* (2013) 31 ACLC ¶13-065 at 905 [286].

38 *Atco Controls Pty Ltd (In Liq) v Stewart* (2013) 31 ACLC ¶13-065 at 905 [288].

39 *Atco Controls Pty Ltd (In Liq) v Stewart* (2013) 31 ACLC ¶13-065 at 864 [29], 868-869 [63]-[64] per Warren CJ, 876 [134], 883 [173] per Redlich JA, 901 [268], 907 [294] per Cavanough AJA.

was said to be consistent with the judgment of Deane J in *Hewett v Court*[40]. In that case, his Honour listed three circumstances which would be sufficient for the implication of an equitable lien in favour of a purchaser respecting monies paid towards the purchase of property. The third circumstance was where the relationship between the indebtedness that might arise from the monies paid by the purchaser and the property is such that the owner would be acting unconscientiously or unfairly if it were to dispose of the property without that liability being discharged.

31 Warren CJ stated[41] that a consideration as to whether Atco would be acting unconscientiously in asserting its security necessarily involved an assessment of the conduct of the parties, the nature of the litigation and the context in which it occurred. This suggests that a broad-ranging enquiry is necessary. However, in *Hewett v Court*[42], Gibbs CJ had cautioned that, while the rules of equity are not rigid or inflexible when faced with novel situations, this does not mean that courts should proceed on general notions of justice without regard to settled principles. A principle should be applied when the circumstances of a case fall within it.

The factors relied on by Atco to distinguish *Universal Distributing*

The language of Universal Distributing

32 Some distinguishing features were said by Atco to arise from the language employed by Dixon J in *Universal Distributing*. It is, of course, necessary to bear in mind, in connection with these submissions, that the words of a principle stated in a judge's reasons for decision require consideration of what those reasons convey about the principle and are not to be applied literally[43].

33 In the passage from *Universal Distributing* set out above, Dixon J referred to a creditor whose security is to be postponed to the liquidator's equitable lien as

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40 (1983) 149 CLR 639 at 667-668.

41 *Atco Controls Pty Ltd (In Liq) v Stewart* (2013) 31 ACLC ¶13-065 at 869 [65].

42 (1983) 149 CLR 639 at 649.

43 *Comcare v PVYW* (2013) 88 ALJR 1 at 6 [15]-[16]; 303 ALR 1 at 7; [2013] HCA 41, referring to *Brennan v Comcare* (1994) 50 FCR 555 at 572 per Gummow J; *Benning v Wong* (1969) 122 CLR 249 at 299-300; [1969] HCA 58.

one who has "come in" and had his rights decided in the winding up. His Honour also referred to the secured creditor as being a party to the winding up. Atco submits that it did not "come in" to the liquidation in the sense referred to by Dixon J. Warren CJ considered that Dixon J was referring to a secured creditor which had willingly participated in the realisation of assets, which Atco had not[44].

34 The reference by Dixon J to a creditor coming in to the winding up was drawn from the decision in *Marine Mansions*. In that case, the mortgagee did not bring a separate action to enforce its security, but instead took "the simple and proper course of coming in under the winding-up to have his rights decided by summons in Chambers."[45] The Chancery practice concerning the claims of creditors to an estate in administration permitted the bringing of proceedings, by way of a "creditor's bill", by one or more creditors to facilitate the taking of accounts. When this was undertaken, all other creditors might "come in under it, and obtain satisfaction of their demands equally with the plaintiffs in the suit"[46]. The practice was a matter of convenience intended to save the expense and delay which would result from a large number of creditors being made plaintiffs to the suit[47]. The Chancery Court would compel creditors to prove their debts and prevent them bringing proceedings in other courts[48].

35 In cases involving the general administration of an estate, the usual rule was that all proper and necessary parties were paid their costs before the estate's fund was distributed. In cases involving the ranking, in priority, of mortgages, the mortgagees' costs were recoverable according to their ranking, but only "after the payment of such costs as may be proper to the [p]laintiff, in the first instance,

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44 *Atco Controls Pty Ltd (In Liq) v Stewart* (2013) 31 ACLC ¶13-065 at 866 [43], [45].

45 *In re Marine Mansions Co* (1867) LR 4 Eq 601 at 611.

46 *Mitford's Chancery Pleadings*, 4th ed (1827) at 166; see also *Ashburner on Mortgages*, 2nd ed (1911) at 389; *Story's Commentaries on Equity Jurisprudence*, 3rd English ed (1920), §547; Maitland, *Equity*, 2nd ed (1936) at 249.

47 *Mitford's Chancery Pleadings*, 4th ed (1827) at 166-167.

48 *Mitford's Chancery Pleadings*, 4th ed (1827) at 168; *Story's Commentaries on Equity Jurisprudence*, 3rd English ed (1920), §549.

where all persons obtain the benefit of the suit"[49]. In *Wright v Kirby*[50], Sir John Romilly MR explained that, where a fund realised in a mortgagee's proceedings would have been unavailable if proceedings had not been brought, the person who brought the proceedings ought to be paid their costs first.

36 *Universal Distributing*, of course, did not involve the old Chancery practice. It did involve a liquidator taking action to get in uncalled capital, which was the subject of the debenture holder's charge, an action which the debenture holder could not himself take. The debenture holder objected to the liquidator's remuneration and expenses having priority to his security and claimed the fund constituted by the capital called in.

37 In this context, Dixon J may be understood to say that a secured creditor "comes in" to a winding up when it lays claim to, and seeks the benefit of, a fund created by the liquidator in the winding up in order to satisfy its charge. This may be contrasted with the situation where a security holder acts independently of the winding up and realises and enforces the security by its own action.

38 Atco does not seem to be in a position relevantly different from the debenture holder in *Universal Distributing*. It did not, and could not, bring proceedings with respect to Newtronics' chose in action against the receivers which gave rise to the fund. Atco made claim to the fund and sought orders against the liquidator to disburse it. It has, in the sense referred to, come in to the winding up. Atco's argument that it did so unwillingly and was effectively forced to claim the settlement sum does not alter that conclusion.

39 The other matter, to which the Notice of Contention directs attention, has regard to Dixon J's statement[51] that "I see no reason why remuneration for work done for the *exclusive* purpose of raising the fund should not be charged upon it" (emphasis added). Atco seeks to rely upon a view expressed[52] by Cavanough AJA that the liquidator's work in bringing the proceedings was not

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49 *Ford v Earl of Chesterfield (No 3)* (1856) 21 Beav 426 at 428 [52 ER 924 at 925].

50 (1857) 23 Beav 463 at 467-468 [53 ER 182 at 184].

51 *In re Universal Distributing Co Ltd (In Liq)* (1933) 48 CLR 171 at 175.

52 *Atco Controls Pty Ltd (In Liq) v Stewart* (2013) 31 ACLC ¶13-065 at 909-910 [310]-[311].

done for the "exclusive purpose of raising the fund". In his Honour's view, the principal purpose was to remove Atco's status as a creditor.

40 In *Universal Distributing*[53], Dixon J went on to fix the liquidator's remuneration and, in that process, excepted certain items from the liquidator's first-ranking charge. His Honour's reference to exclusivity of purpose is likely to have been intended to convey that only work done in connection with creating the fund was to be reimbursed. It most certainly does not imply that the subjective purpose of the liquidator is a relevant consideration.

41 The proper question that follows from what Dixon J said is whether, in a general sense, the costs and expenses claimed by the liquidator could be said to have been incurred in the realisation of the asset which created the fund. Whether the costs and expenses claimed were in fact so incurred is a matter to be determined when the liquidator verifies his accounts.

42 As to the more general question, the finding made by Davies J about the interconnectedness of the action against the receivers and that brought against Atco stands in the way of Atco's attempt to separate out the costs of the action against it. An essential element of the cause of action against the receivers was the invalidity of Atco's security and the liquidator sought to establish that in the proceedings brought against Atco. That being the case, her Honour held, the liquidator was entitled to the costs and expenses of the litigation as a whole. Her Honour's finding was not challenged. Atco has always accepted that the case against the receivers required that its charge be held invalid.

The relevance of MC Bacon

43 Reliance was placed by Atco upon the decision of Millett J in *In re MC Bacon Ltd*[54] because it was one of the few cases to have considered the question of costs, as between a liquidator and secured creditor, incurred by the liquidator in an unsuccessful challenge to a security. However, the case did not involve the question whether an equitable lien arose in connection with the realisation of assets by the liquidator. It concerned a claim by the liquidator for reimbursement, out of a fund in the hands of a secured creditor, of costs, which included costs the liquidator had been ordered to pay the secured creditor following the dismissal of the action in which he sought to invalidate the

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53 (1933) 48 CLR 171 at 176-177.

54 [1991] Ch 127.

creditor's security as a voidable preference. The action was dismissed when the liquidator called no evidence.

44 Millett J observed[55] that it would be "difficult to imagine anything more unjust" than making the order sought. This observation is perhaps best understood as addressed to the odd situation where the liquidator was effectively seeking reimbursement from the secured creditor with respect to the very costs the liquidator had been ordered to pay the creditor. The observation was relied upon in this case by the Court of Appeal in connection with the test of unconscientiousness[56], and to show that something more was required than that a liquidator incurred expenses[57], although their Honours acknowledged that *MC Bacon* concerned different factual and legal circumstances.

45 The essential question in *MC Bacon* was whether the costs and expenses of the litigation, including those which the liquidator was ordered to pay the secured creditor, were "properly incurred in the winding up" within the meaning of a provision of the *Insolvency Act* 1986 (UK). No similar question arises in the present case respecting the liquidator's costs and expenses. Insofar as they included costs and expenses of the action against Atco, those costs and expenses are the subject of the finding of Davies J referred to above.

Falcke's case

46 In connection with the potential benefit accruing to Atco by reason of the fund created by the liquidator, the Court of Appeal[58] upheld Atco's submission that the decision in *Falcke v Scottish Imperial Insurance Co*[59] applies to the facts of this case, with the result that the liquidator is unable to claim the costs and

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55 *In re MC Bacon Ltd* [1991] Ch 127 at 141.

56 *Atco Controls Pty Ltd (In Liq) v Stewart* (2013) 31 ACLC ¶13-065 at 891 [215] per Redlich JA, 905-907 [289]-[292] per Cavanough AJA.

57 *Atco Controls Pty Ltd (In Liq) v Stewart* (2013) 31 ACLC ¶13-065 at 867-868 [53]-[57] per Warren CJ.

58 *Atco Controls Pty Ltd (In Liq) v Stewart* (2013) 31 ACLC ¶13-065 at 870-872 [79]-[94] per Warren CJ, 883-888 [174]-[198] per Redlich JA, 908 [297] per Cavanough AJA.

59 (1886) 34 Ch D 234.

expenses of realisation. A possible exception to the rule established in *Falcke*, drawn from theories of unjust enrichment and involving the question whether Atco may have nevertheless received an "incontrovertible benefit", was considered not to arise[60].

47 The decision in *Falcke* has no bearing on a case involving work undertaken by a liquidator in a winding up. The decision stands for the proposition that a stranger who carries out work or services, or otherwise confers a benefit on another, without a request, actual or implied, to do so, is not entitled to payment or compensation. In similar terms, in *Lumbers v W Cook Builders Pty Ltd (In Liq)*[61], by reference to *Falcke*, it was said that "the bare fact of conferral of [a] benefit or provision of [a] service does not suffice to establish an entitlement to recovery."

48 The propositions in *Falcke* and *Lumbers* are uncontroversial. In the context of claims for work or labour, they are concerned with whether indebtedness on the part of a person receiving the benefit of the work can arise, absent a request on their part for the work. They have no application to work undertaken in the realisation of assets as part of a liquidator's statutory duties[62]. Atco's mistaken reliance on these decisions stems from its wrong assumption that Atco, as a secured creditor, must have requested that the litigation be brought.

No indebtedness

49 On this appeal, Atco continued to pursue a submission, which found favour with Warren CJ[63], that, at the time the settlement sum was received, there was no indebtedness that could give rise to an equitable lien, for the reason that Seeley had paid the liquidator's costs and expenses respecting the litigation under the indemnity agreement. The argument ignores Seeley's right to reimbursement and the liquidator's obligation to provide such reimbursement out of the settlement sum.

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60 *Atco Controls Pty Ltd (In Liq) v Stewart* (2013) 31 ACLC ¶13-065 at 872 [94] per Warren CJ, 885 [185], 892-893 [223] per Redlich JA.

61 (2008) 232 CLR 635 at 663 [80]; [2008] HCA 27.

62 *Corporations Act* 2001 (Cth), s 474(1)(a), s 478(1)(a).

63 *Atco Controls Pty Ltd (In Liq) v Stewart* (2013) 31 ACLC ¶13-065 at 873 [108]; see also at 876 [133], 894 [230], 901 [262] per Redlich JA.

50 It has never been disputed in these proceedings that the agreement between Seeley and the liquidator took effect as an indemnity. It is an incident of such an agreement that an indemnifier has a right to reimbursement of all monies paid under the indemnity. The indemnifier has a right of subrogation to all the rights and remedies of the party indemnified and any monies recovered by that party[64]. It follows that the liquidator was obliged to reimburse Seeley and that the equitable lien attached to the settlement sum as a charge to permit that indebtedness to be met.

Section 564

51 Atco also placed reliance upon cl 12 of the indemnity agreement of 27 March 2006, which was headed "Section 564" and provided that the liquidator "will make application to the Court for orders that if any assets or damages are recovered which occurs as a result of work performed … then Seeley be given priority ahead of all other creditors of Newtronics" for the recovery of the costs incurred by Seeley under the indemnity and for payment of its debt, including costs and interest on the judgment sum. Section 564 of the *Corporations Act* provides a court with power to make orders regarding the distribution of property which has been recovered under an indemnity for costs of litigation that give the creditors providing the indemnity an advantage over others, in consideration of the risk assumed by them.

52 Clause 12 was said by Atco to provide for the sole method of recovery by Seeley of the costs paid under the indemnity, and therefore precluded a lien arising. In the Court of Appeal, Warren CJ[65] considered that the requirement to seek an order displaced any implied obligation on the part of the liquidator to account to Seeley, and Redlich JA[66] considered that the clause modified Seeley's right of subrogation.

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64 *Burnand v Rodocanachi Sons & Co* (1882) 7 App Cas 333 at 335; *Castellain v Preston* (1883) 11 QBD 380 at 386, 393, 403-404; *Morris v Ford Motor Co* [1973] QB 792.

65 *Atco Controls Pty Ltd (In Liq) v Stewart* (2013) 31 ACLC ¶13-065 at 874 [120].

66 *Atco Controls Pty Ltd (In Liq) v Stewart* (2013) 31 ACLC ¶13-065 at 876 [133], 897-898 [248], 900 [255], [258], 901 [263].

53 In its terms, cl 12 does not restrict the liquidator's right to claim an equitable lien. Moreover, as Cavanough AJA correctly observed[67], Atco was not a party to the indemnity agreement and could not rely upon it as precluding a lien. The agreement was solely between Seeley and the liquidator and could not affect the liquidator's right to seek recourse against realised assets. Further, the indemnity agreement did not involve other creditors and did not bind the liquidator to a course of action.

54 Atco then sought to rely upon cl 12 as reflecting the course of action which the liquidator had advised the Federal Court he intended to take at the time the indemnity agreement was approved. Atco did not explain how this advice could prevent an equitable lien arising. It was not suggested that it amounted to an undertaking to the Court.

55 In any event, Atco's submission fails to take account of the purpose cl 12 was intended to serve, a purpose which was overtaken by the turn of events. At the time the indemnity agreement was approved, the claims against Atco and the receivers were in the order of $13 million. If Atco's security had been held invalid, a question would have arisen as to the extent to which Seeley should be preferred in the distribution by the exercise of the Court's powers under s 564. In approving the agreement, Gordon J said that it was important to ensure that the entity providing the funding for the litigation is not given a benefit disproportionate to the risk taken[68]. The extent of any benefit to be received by Seeley, in the event that monies became available to meet its costs and its debt, would have been a matter for the Court on the hearing of an application under s 564.

56 When Atco's security was held to be valid and the fund resulting from the litigation was likely to be insufficient to satisfy its debt and the liquidator's costs and expenses, an application under s 564 was not necessary with respect to Seeley's debt. So far as concerned the costs and expenses paid to the liquidator, the issue became one as to whether the liquidator should have priority over Atco to the fund. Section 564 does not affect the rights of secured creditors and the issue which arose could not be determined on an application under s 564.

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67 *Atco Controls Pty Ltd (In Liq) v Stewart* (2013) 31 ACLC ¶13-065 at 909 [306]-[308].

68 *Stewart, in the matter of Newtronics Pty Ltd* [2007] FCA 1375 at [26].

The nature and purpose of the action

57 Atco's principal argument concerned the nature and purpose of the action brought against it and the fact that it did not stand to benefit from that action. These considerations were necessitated by the test of unconscientiousness which the Court of Appeal applied and which it concluded in Atco's favour.

58 It is no part of a liquidator's duty to ensure that litigation conducted in the course of the realisation of assets is for the benefit of a secured creditor, or any particular creditor. A liquidator's duty is owed to the body of creditors as a whole and to the court[69]. The relevant benefit is that which is sought by the realisation of assets, namely the augmentation of assets available for distribution. A liquidator is to do what he or she can to augment the disposable assets of the company[70].

59 It is the duty of a liquidator to realise assets and, to that end, a liquidator has the power to bring proceedings[71]. While a liquidator must exercise care in determining whether to commence litigation, in this case the liquidator had received advice from counsel and there is no suggestion that the liquidator was reckless in bringing the actions or that the actions had no prospects of success. The liquidator acted with propriety in bringing them.

60 It is also part of a liquidator's duties to "carefully scrutinise" charges existing over company property and, in certain circumstances, to attack them and have them declared void[72]. Challenges by liquidators to the securities held by creditors are not uncommon. It would appear that in *Universal Distributing*[73], for example, there had been a question about the validity of the debenture holder's security.

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69 *In re Contract Corporation (Gooch's Case)* (1872) LR 7 Ch App 207 at 211.

70 *Re Tavistock Ironworks Co* (1871) 24 LT 605 at 605 per Lord Romilly.

71 *Corporations Act* 2001, s 477(2)(a).

72 *McPherson's Law of Company Liquidation*, 5th ed (looseleaf) at 11-11051 [11.2600].

73 (1933) 48 CLR 171 at 175.

61 The nub of Atco's argument, which is reflected in the judgments in the Court of Appeal, is that the action was in Seeley's interests. So much may be accepted, but it does not affect the question whether an equitable lien arose.

62 No doubt Seeley considered that its interests would be best served by facilitating the litigation. But this does not imply that the action brought by the liquidator was in some way wrongful. It is accepted that the liquidator was acting with propriety and in the course of his statutory duties in bringing the proceedings. The true purpose of the proceedings which resulted in the fund was the realisation of Newtronics' assets. The challenge to Atco's security was a fundamental plank of those proceedings.

63 Much is made of Seeley's indemnification of the liquidator, in an attempt to have the action brought against Atco viewed as one brought by Seeley. But there is nothing unusual about an unsecured creditor providing an indemnity to a liquidator to enable an action to be brought against, inter alia, a secured creditor. In *MC Bacon*[74], for example, the liquidator had an indemnifier for his costs. The fact that the liquidator of a company without funds for litigation may need to seek financial support from among the ranks of creditors is not only acknowledged by s 564, it is encouraged by the preferential distribution which may be accorded under that provision to a creditor who provides an indemnity.

64 The purpose of the proceedings in respect of which the liquidator incurred the costs and expenses for which an equitable lien was sought was the realisation of assets, just as it was in *Universal Distributing*.

Conclusion and order

65 There is no basis for excepting this case from the application of the principle in *Universal Distributing*.

66 The appeal should be allowed with costs and the orders of the Court of Appeal set aside. In lieu of those orders, there should be orders dismissing Atco's appeal with costs. It remains for the liquidator's costs to be verified, pursuant to the directions made by Davies J.

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74 [1991] Ch 127 at 134.