

LIQUIDATOR'S FEES AND EXPENSES - UNIVERSAL DISTRIBUTING CONSIDERED BY THE HIGH COURT

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In *Stewart v Atco Controls Pty Limited (in liquidation)* [2014] HCA 15, the High Court confirmed the *Universal Distributing* principle that a liquidator is entitled to be paid his or her remuneration and expenses in realising assets in priority to a secured creditor.

BACKGROUND

Atco Controls Pty Limited (in liquidation) (**Atco**) was a lighting manufacturer. Newtronics Pty Limited (receivers and managers appointed) (in liquidation) (**Newtronics**) was a subsidiary of Atco. Newtronics received financial support from Atco secured by a fixed and floating charge. As at December 2001, Newtronics owed \$19 million to Atco.

In January 2002, Atco appointed receivers and managers to Newtronics. The receivers sold the business of Newtronics for \$13 million and in February 2002, Newtronics was placed into liquidation.

The liquidator of Newtronics (**Liquidator**) sought and obtained funding from Newtronics' largest unsecured creditor, Seeley International Pty Limited (**Seeley**) to pursue a claim against Atco and its receivers. The Liquidator ultimately settled the claim against the receivers for \$1.25 million and was unsuccessful on appeal against Atco.

The whole of the \$1.25 million settlement sum that the Liquidator had received from the receivers was paid to Seeley under the terms of the funding agreement. However, Atco also claimed that it was entitled to receive these funds under the terms of its security. The Liquidator did not pay the settlement sum to Atco because he asserted an equitable lien over those funds in accordance with the principle in *Universal Distributing*.

WHAT IS THE UNIVERSAL DISTRIBUTING PRINCIPLE?

The principle set out by Dixon J *In re Universal Distributing Co Ltd (in liquidation)* (1933) 48 CLR 171 is that 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 first being met. A liquidator is entitled to an equitable lien over such a fund that takes priority to the interest of the secured creditor.

The ordinary application of the *Universal Distributing* principle is straightforward: If a secured creditor stands by and lets a liquidator realise secured assets, the secured creditor cannot then take the whole of the funds realised without first allowing the liquidator to be reimbursed for his or her remuneration and expenses incurred in realising the assets.

In the present case, Atco argued that the principle ought not apply for reasons including that:

- The court proceeding was not in Atco's interests. It did not stand to benefit from the primary proceeding. In essence, the primary proceeding was designed to challenge Atco's security.
- The Liquidator had the benefit of an indemnity for his remuneration and expenses. As the major unsecured creditor, it was Seeley that stood to benefit from the action and it was appropriate that Seeley bear the costs of doing so.

THE DECISION OF THE COURT OF APPEAL

The Supreme Court of Victoria Court of Appeal was satisfied that the above factors distinguished the present case from *Universal Distributing*.

The Court of Appeal held that the relevant question was whether Atco would be acting unconscionably if it were to assert priority over the assets without the relevant costs, expenses and remuneration of the Liquidator having been discharged. As the proceeding commenced by the Liquidator was contrary to Atco's interests and it was Seeley that stood to benefit, the Court of Appeal held that *Universal Distributing* should not apply and the funds should not be remitted to Atco.

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THE DECISION OF THE HIGH COURT

The High Court reversed the decision of the Court of Appeal and found that it was unnecessary to qualify the rule in *Universal Distributing* in the manner set out by the Court of Appeal. The High Court reached its decision by considering the role of a liquidator, noting that:

- A liquidator's duty is to the body of creditors as a whole and to the Court. In performing this duty, a liquidator should do what he or she can to augment the disposable assets of the company.
- A liquidator is not under a duty to ensure litigation is conducted or assets are realised for the benefit of a secured creditor or any other particular creditor.
- In exercising his or her duties, it is appropriate for a liquidator to carefully scrutinise charges over company property and where appropriate, to challenge those securities.

The fact that the proceeding may have been for the benefit of Seeley did not mean that it was improper for the Liquidator to have brought that proceeding. Accordingly, the Liquidator should be paid his remuneration and expenses in priority to the secured creditor and was entitled to the benefit of an equitable lien as security for those amounts.

The High Court also found that the fact that the Liquidator had the benefit of an indemnity for his remuneration and expenses was not unusual, nor did it impact on whether the rule in *Universal Distributing* applied.

COMMENT

The key point to emerge from this decision is that provided a liquidator is acting properly in conducting proceedings or realising assets, he or she is entitled to be paid his or her fees in priority to a secured creditor.

In determining whether an equitable lien arises, it is not necessary for the Court to conduct a wide ranging inquiry into actions or motives of the liquidator. Provided that he or she acts properly and in accordance with his or her duties, the liquidator will be entitled to priority for costs incurred in preserving and realising assets in the liquidation.

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