



## HIGH COURT OF AUSTRALIA

7 May 2014

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

[2014] HCA 15

Today the High Court unanimously held that the first appellant, a liquidator, was entitled to an equitable lien over a fund constituted by a settlement sum with respect to costs and expenses incurred in litigation against the respondent, a secured creditor, and receivers appointed by the respondent.

The second appellant, Newtronics Pty Ltd ("Newtronics"), is a wholly owned subsidiary of the respondent, Atco Controls Pty Ltd ("Atco"). For many years, Atco provided Newtronics with financial support and ultimately took a fixed and floating charge over Newtronics' assets. In January 2002, Atco appointed receivers to Newtronics. The receivers sold the business of Newtronics to another subsidiary of Atco and credited book entries against the debt owed to Atco by Newtronics. In February 2002, Newtronics was wound up and the first appellant was appointed liquidator. The liquidator brought an action on behalf of Newtronics against Atco and the receivers. The liquidator's costs and expenses reasonably incurred in pursuing the action were paid by Seeley International Pty Ltd, Newtronics' largest unsecured creditor, under an indemnity agreement. Newtronics was successful at trial against Atco, but not against the receivers. Prior to an appeal being heard, the receivers paid Newtronics a settlement sum. Atco proceeded with its appeal and was successful. It subsequently demanded payment of the settlement sum pursuant to its charge. The liquidator refused, on the basis that he was entitled to an equitable lien over the sum.

Atco brought proceedings in the Supreme Court of Victoria, by way of an appeal under s 1321 of the *Corporations Act* 2001 (Cth) from the liquidator's decision not to pay it the settlement sum. The Court ordered that the sum be paid to Atco. On an appeal by way of a new hearing, the Court found for the liquidator and Newtronics. The Court of Appeal in turn allowed Atco's appeal. By grant of special leave, the liquidator and Newtronics appealed to the High Court.

The High Court unanimously allowed the appeal. The Court held that there was no basis for excepting the case from the application of the principle that a secured creditor may not have the benefit of a fund created by a liquidator without the liquidator's costs and expenses of creating that fund first being met. The fund constituted by the settlement sum was created by the efforts of the liquidator, who was acting with propriety and in the course of his duties. In those circumstances, the liquidator was entitled to an equitable lien over the settlement sum in priority to Atco's charge.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*