

# Equitable Lien: Think before you leap when dealing with third party property

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## Summary

In the recent decision of *White, in the matter of Mossgreen Pty Ltd (Administrators Appointed) v Robertson* [2018] FCAFC 63, the Federal Court considered the circumstances in which an equitable lien can arise when a person, such as an administrator, uses his or her time and energy to care, preserve and realise property that is not property of the company.

## The Facts

- On 21 December 2017, administrators were appointed to Mossgreen Pty Ltd (Administrators Appointed) ('Mossgreen').
- Mossgreen operated an auction house and gallery.
- The inventory for its auction business was provided on a consignment basis. Consignors delivered items to Mossgreen and authorised it to sell those items at auction and deliver those items to the successful bidder upon payment.
- Mossgreen had both contractual and legal duties to consignors as a bailee for work and labour.
- Upon the appointment of administrators, Mossgreen was obliged to return the consigned items to their owners.
- The administrators identified that Mossgreen's stock records were not up to date and could not be relied upon to provide an accurate listing of the consigned items on hand.

- To facilitate the orderly return of goods to consignors, the administrators determined that it was necessary to complete a stocktake of the consigned items.
- The administrators did not approach the Court to endorse the stocktake process before it was conducted.
- The cost of the stocktake was in excess of AUD\$1 million.
- Upon completion of the stocktake, the administrators applied to the Court for directions to the effect that they held an equitable lien over the consigned items and would be justified in requiring each consignor to pay a levy to meet the costs of the stocktake calculated in direct proportion to the value of each consignor's items. Such levy was said to represent the reasonable costs incurred by the administrators in the identification, preservation and distribution of the consigned items.
- The administrators at all times were aware that Mossgreen had no claim to the consigned items and acknowledged that Mossgreen's obligation was to return the consigned goods to their owners.

## What is an Equitable Lien?

- An equitable lien arises by operation of law in a diverse range of circumstances where the general principles of justice support a lien<sup>1</sup>. It does not depend upon contract or upon possession.
- Whether the court will be satisfied that a lien arises is largely dependent upon the specific circumstances of the matter. Generally, however, an equitable lien

will be recognised where a person uses their time and energy in taking reasonable steps to:

- care for and preserve property;
- assist in the realisation of an asset;
- identify claims to property in situations where it is commingled;
- assist in the resolution of disputes as to ownership.

## The Mossgreen Decision at First Instance

- The primary judge held that an equitable lien did not arise.
- His Honour found that the work undertaken by the administrators did not relate to the property of Mossgreen and therefore did not fall within the administration of its affairs.
- In circumstances where there was no evidence that consigned items were commingled with property of the company and the administrators were obliged to deal with the commingled property, there was no basis to recognise the existence of an equitable lien.

## The Mossgreen Decision on Appeal

- Chief Justice Allsop, and Justices Banks-Smith and Colvin firstly rejected the view of the primary judge that the work undertaken by the administrators was outside the scope of the administration of the company's affairs and held as follows:  
*'It was within the statutory functions of the administrators to continue to perform the function of holding the consigned items and, as part of doing so, to take steps in respect of the systems for the management and return of the consigned items.'*
- As to whether an equitable lien could and did exist in favour of Mossgreen, the Court acknowledged that there can be a lien in favour of administrators in respect of costs incurred in dealing with claims for the return of items even where there is no claim to

ownership by the company under administration, including costs in holding them and keeping them secure in the meantime. However, it was said that this was not enough to establish a sufficient basis for the existence of an equitable lien contended for by the administrators.

- Whilst there are recent authorities that support the existence of a lien in favour of a liquidator or administrator over goods owned by third parties<sup>2</sup>, these cases do not stand for the broader proposition that an administrator dealing with property owned by third parties will always have a right to a lien over such property for expenses so incurred.
- The Court noted that the threshold questions as to whether equity ought to recognise a lien and the costs to be protected by such lien must be answered in the particular circumstances of each case. Whether equity would grant such a lien and its extent may depend upon the value of the statutory lien and the particular circumstances of the administrators' conduct.
- The Court acknowledged that in this instance there was potentially an entitlement to an equitable lien with respect to work properly done and expenses properly incurred that benefited a consignor by securing and protecting their property until it is returned under an efficient and cost effective process proportional to the value and nature of the goods in question.
- However, in the circumstances of this case, the Court was not satisfied that the administrators had sufficiently demonstrated that they were entitled to a lien covering the type of costs incurred and in the amount sought. Three main reasons were provided to support this conclusion:
  1. A significant portion of the stocktake costs related to the stocktake of consigned items that the administrators knew were abandoned and of little value and whose owners would have been readily identifiable by Mossgreen staff using its existing systems. The Court noted that the administrators had not led any evidence to the effect that the employees of Mossgreen had had any difficulties

fulfilling the responsibilities of delivering items to buyers and returning unsold items to owners prior to their appointment such that an inventory and the consequent cost and delay was necessary to deal with claims of ownership.

2. If, contrary to the above, there was a need for the stocktake in order to identify the owners of consigned items, then that need arose from a breach by Mossgreen of its obligations as bailee. To the extent that costs were incurred in order to redress liability caused by failure to maintain an adequate inventory system, those costs should not be borne by the consignors ahead of general creditors.
3. A large proportion of the costs incurred in connection with the stocktake were for the benefit of the general body of creditors, and not solely the consignors as they related to the preservation of the engagement of employees, exploring the possibility of a deed of company arrangement and undertaking a stocktake for the purpose of preparing an inventory of consigned goods for a prospective purchaser.

## Conclusion

The decision highlights that when an equitable lien is sought to be recognised, particularly in circumstances where that lien is sought to be asserted against property owned by a third party, the Court will consider the following matters:

1. The nature of the work undertaken;
2. Whether the work undertaken was necessary to secure, protect and either realise or return the property;
3. Whether the work undertaken has arisen as a consequence of breach of obligations between the parties;
4. The value of the property against which the lien is asserted;
5. Whether the work undertaken was the most cost effective way of caring, preserving or realising the property;

6. Whether proper consideration was given to any viable alternatives to undertake the work in question;
7. Whether the cost of the work is proportionate to the value and nature of the property in question;
8. Whether the work was of benefit to the third party in terms of securing and protecting their property until it was realised or returned.

The decision also highlights the importance of administrators approaching the Court to either endorse any process proposed to be adopted to deal with property to which a company has no claim, or to seek the appointment of receivers to that property so that the process may be supervised by the Court. This is particularly critical to obtain comfort and certainty that the costs of dealing with the property may be recovered, particularly when it is expected that costs of implementing the process will be significant.

<sup>1</sup> *Hewett v Court* (1983) 149 CLR 639 as confirmed by *Stewart v Atco Controls* [2014] HCA 15

<sup>2</sup> *International Art Holdings Pty Ltd (admin apptd) v Adams* [2011] NSWSC 164; *Crouch v Adams* [2006] NSWSC 1029; *In the matter of Renovation Boys Pty Ltd (admins apptd)* [2014] NSWSC 340.

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