

Supreme Court

New South Wales

Case Name: Volkswagen Financial Services Australia Pty Ltd v Atlas CTL Pty Ltd (Receivers and Managers Appointed) (In Liquidation)

Medium Neutral Citation: [2022] NSWSC 573

Hearing Date(s): 12, 13, 14, 19, 20, 21 April 2022

Decision Date: 12 May 2022

Jurisdiction: Equity - Corporations List

Before: Hammerschlag CJ in Eq

Decision:

1. Administrators/liquidators' claim to be secured by an equitable lien (or charge) dismissed.
2. Judgment for BMW against the administrators/liquidators for \$281,266.39 updated to the date of judgment
3. Administrators/liquidators' remuneration approved.

Catchwords: CORPORATIONS LAW – EQUITY – Corporations Act 2001 (Cth) ss 436A(1), 443A(1), and 443D – equitable lien – the principle in *Re Universal Distributing Co Ltd (in liq)* (1933) 48 CLR 171 (the Universal principle) that a creditor who holds security which forms part of a winding up or insolvent administration and which is cared for, preserved, or realised at the expense of the liquidator or administrator cannot conscientiously take advantage of the efforts of the liquidator or administrator without meeting her or his expenses in so doing. Equity creates a charge over a fund created by the realisation of the security as a result of those efforts. – where voluntary administrators trade the company's business at a loss, and earn remuneration on the asserted footing that they are doing so to protect the company's asset in the form of goodwill to facilitate a sale of its business as a going concern – where the

liquidators (previously voluntary administrators) assert an equitable lien over the proceeds of chattels belonging to secured creditors or securing their claims and in the possession of the company as security for their remuneration – where the company has a fund generated by the sale of secured assets not being the company’s business – whether the Universal principle applies – necessity for the costs and expenses to be incurred exclusively with respect to the property cared for, protected, or realised – limitation of the lien or equitable charge to creating security over that asset or the fund created by its realisation – necessity for the costs and expenses to be reasonably incurred – necessity for the costs and expenses to be adequately proved – HELD – the Universal principle does not apply and the claimants have in any event have not proved the quantum of the expenses alleged by them to have been incurred and remuneration earned for the exclusive benefit of the secured creditors.

CORPORATIONS LAW – voluntary administration/liquidation – application for approval or remuneration – HELD – remuneration should be approved.

Legislation Cited:

Corporations Act 2001 (Cth)
Personal Property Securities Act 2009 (Cth)

Cases Cited:

Dean-Willcocks v Nothintoohard Pty Ltd (in liq) (2007) 25 ACLC 109
Federal Commissioner of Taxation v Murry (1998) 193 CLR 605
Pattison v Lockwood [1998] FCA 472.
Primary Securities Limited v Willmott Forests Limited (Receivers and managers Appointed) (In Liq) (2016) 50 VR 752
Re Universal Distributing Co Ltd (in liq) (1933) 48 CLR 171
Stewart v Atco Controls Pty Ltd (in liq) (2014) 252 CLR 307
Troulis v Vamvoukakis [1998] NSWCA 237

Category:

Principal judgment

Parties:

Volkswagen Financial Services Australia Pty Ltd - First Plaintiff / First Respondent to the Fourth Cross-Claim
Ken Whittingham in his capacity as Receiver and Manager of Atlas CTL Pty Ltd (Receivers and Managers Appointed)(In Liquidation) and PJM Fleet Management Pty Ltd (Receivers and Managers Appointed (In Liquidation) - Second Plaintiff / Second Respondent to the Fourth Cross-Claim
Atlas CTL Pty Ltd (Receivers and Managers Appointed)(In Liquidation) - First Defendant / Third Respondent to the Fourth Cross-Claim
PJM Fleet Management Pty Ltd (Receivers and Managers Appointed)(In Liquidation) - Second Defendant / Fourth Respondent to the Fourth Cross-Claim
Nissan Financial Services Australia Pty Ltd - Third Defendant / Fifth Respondent to the Fourth Cross-Claim
Andrew Stewart Reed Hewitt and Matthew James Byrnes in their capacities as Receivers and Managers of Atlas CTL Pty Ltd (in Liquidation)(Receivers and Managers Appointed) - Fourth Defendants / Sixth Respondents to the Fourth Cross-Claim
BMW Australia Finance Limited - Fifth Defendant / Seventh Respondent to the Fourth Cross-Claim
Bruno Secatore and Sam Kaso in their capacity as Receivers and Managers of PJM Fleet Management Pty Ltd (Receivers and Managers Appointed)(In Liquidation) - Sixth Defendants / Eighth Respondents to the Fourth Cross-Claim
Richard Albarran, Richard John Lawrence and John Vouris (in their capacities as Administrators and Liquidators of Atlas CTL Pty Ltd (In Liquidation) and PJM Fleet Management Pty Ltd (In Liquidation) - Seventh Defendant / Applicants of the Fourth Cross-Claim

Representation:

Counsel:
S Keizer with D Farinha - First Plaintiff / First Respondent and Second Plaintiff / Second Respondent (Volkswagen and Volkswagen receiver)
HNG Austin QC with AC Roe - Third Defendant / Fifth Respondent and Fourth Defendants / Sixth Respondent (Nissan and Nissan receivers)

N Mirzai - Fifth Defendant / Seventh Respondent and Sixth Defendants / Eighth Respondents (BMW and BMW receivers)

J Evans QC with S Sykes - Seventh Defendants / Applicants to the Fourth Cross-Claim (former administrators/present liquidators)

Solicitors:

Hunt & Hunt Lawyers - Volkswagen and Volkswagen receiver

Mills Oakley - Nissan and Nissan receivers

HWL Ebsworth Lawyers - BMW and BMW receivers

SLF Lawyers - former administrators / present liquidators

File Number(s): 2020/155515

JUDGMENT

INTRODUCTION

- 1 HIS HONOUR: This is a claim by voluntary administrators, subsequently appointed liquidators of a company, Atlas CTL Pty Ltd (in liq) (receivers and managers appointed) ACN 158 167 492 (**Atlas** or **the company**), that a net loss representing unrecovered costs and expenses incurred by them in trading the business of the company, together with their remuneration earned in both capacities, are secured by an equitable lien over a fund in the hands of the company and over “the traceable proceeds” or other property to which such a lien is capable of attaching.
- 2 The existence of the lien is in issue, as well as the quantum of the claims which the lien is said to cover. Irrespective of whether the lien affords the administrators/liquidators any security, they seek the Court’s approval of the quantum of their remuneration, which approval the creditors have declined to give.
- 3 Initially, these proceedings included a series of contests between secured creditors in the company as to the priorities of their various security interests. These contests were progressively settled so that by the time of the scheduled commencement of the trial, all of them had been resolved.

- 4 Accordingly, all that remains to be determined are the claims by the administrators/liquidators.

THE FACTS

PJM and Atlas

- 5 PJM Fleet Management Pty Limited (Receivers and Managers Appointed) (In Liquidation) (**PJM**) and Atlas are related companies which were part of a group which, through PJM, operated a vehicle fleet leasing business (**the PJM business**) and, through Atlas, operated a business of retail short-term car and truck rentals and which also leased vehicles to ride-share operators (such as Uber) (**the Atlas business**).
- 6 PJM and Atlas are co-subsidiaries of P&J Murphy Corporation Pty Ltd which was owned and controlled by Pamela Judith Murphy, who was the sole director of both PJM and Atlas.
- 7 PJM operated from premises near Tullamarine Airport in Melbourne, Victoria. Atlas operated from a total of nine locations spread across Melbourne, Sydney, Brisbane, the Gold Coast, Cairns, Adelaide and Perth.
- 8 PJM's purchase or lease of vehicles was financed by a number of companies each associated with a motor vehicle manufacturer, including relevantly for present purposes, BMW, Nissan, Volkswagen and Toyota. With finance, it purchased or leased vehicles and in turn made them available to Atlas, principally under a Master Lease Agreement entered into on 1 July 2012.
- 9 There were some 2000 vehicles in the Atlas fleet.

The Financiers

Toyota

- 10 Toyota Finance Australia Limited (**Toyota**) (which is not a party to these proceedings, but which had provided finance) had a registered security interest registered over the whole of PJM's assets and undertaking. Possession of its vehicles was taken by a receiver appointed by it to PJM (which is referred to below) and they were sold.

BMW

- 11 PJM gave BMW Australia Finance Limited (**BMW**) a chattel mortgage over each vehicle acquired by PJM with BMW finance. Additionally, PJM executed a General Security Deed dated 27 May 2014 in favour of BMW securing PJM's obligations to BMW over all PJM's personal property (as defined in the *Personal Property Securities Act 2009* (Cth)).

Nissan

- 12 On 21 October 2013, PJM entered into a General Security Agreement with Nissan Financial Services Australia Pty Limited (**Nissan**), granting Nissan a charge and security interest over the whole of its undertaking, property and assets, both present and after-acquired.
- 13 By a guarantee signed on 21 May 2014, Atlas guaranteed PJM's obligations to Nissan.
- 14 On 26 August 2016, Atlas entered into a General Security Agreement with Nissan, granting it a charge and a security interest over the whole of Atlas' undertaking, property, and assets both present and after- acquired.

Volkswagen

- 15 Volkswagen Financial Services Pty Limited (**Volkswagen**) had a General Security Agreement, dated 29 September 2016, under which PJM gave it a charge over all of PJM's personal property, securing its obligations to Volkswagen. Volkswagen and PJM were also parties to a Master Asset Finance Agreement-Lease agreement and a Master Asset Finance Agreement-Loan agreement with PJM.

Effect of Securities

- 16 It suffices to say that the cumulative effect of the securities described above was (at a minimum) to give the finance providers security over vehicles the acquisition or leasing of which they had financed. It is to be observed, however, that Nissan and Volkswagen, but not BMW, had a security interest over the whole of Atlas' undertaking.
- 17 Unless the context otherwise indicates, references below to "the secured creditors" is a reference, collectively, to BMW, Nissan and Volkswagen.

- 18 It is common cause that the secured creditors rank ahead of the administrators/liquidators except insofar as the claims made by them in these proceedings are secured by an equitable lien. Correspondingly, it is common cause that insofar as those claims are secured by such a lien, they rank ahead of the secured creditors with respect to any property to which the lien attaches.

The Initial Spanoan Proposal

- 19 Prior to 22 October 2019, a group known as the Spanoan Group (**Spanoan**) expressed interest in acquiring the PJM business and the Atlas business. Negotiations took place. In anticipation of an agreement, representatives from Spanoan were installed in senior management positions in PJM and Atlas.

The administration period

- 20 On 22 October 2019, both PJM and Atlas failed.
- 21 On that day (**the administration date**), Richard Lawrence (**Lawrence**), Richard Albarran and John Vouris (**the administrators**) were appointed joint and several administrators to each of PJM and Atlas, under s 436A(1)¹ of the *Corporations Act 2001* (Cth) (**the Act**).
- 22 The administrators determined to trade the Atlas business. They had in mind selling it as a going concern.
- 23 On 22 October 2019, Toyota appointed a receiver and manager over PJM (**the Toyota receiver**). This appointment effectively brought the PJM business as a going concern to an end because the Toyota receiver did not trade the PJM business, and no agreement was reached between him and the administrators to trade on. This appointment had the practical effect that Toyota vehicles would not be part of any going concern business sale of the Atlas business.
- 24 Nissan then retained Andrew Hewitt (**Hewitt**) of Grant Thornton, an insolvency practice, to advise it in respect of its exposure in the administration of PJM and Atlas.

¹ Section 436A(1) provides: Company may appoint administrator if board thinks it is or will become insolvent
(1) A company may, by writing, appoint an administrator of the company if the board has resolved to the effect that: (a) in the opinion of the directors voting for the resolution, the company is insolvent, or is likely to become insolvent at some future time; and (b) an administrator of the company should be appointed.

- 25 Also on 22 October 2019, the administrators reported, informally by email, to the secured creditors. They reported that the Toyota receiver had been appointed. They also reported that a group of investors (presumably Spanoan) had been in the process of purchasing the Atlas business, but that during the due diligence process, the investors had learned that PJM's debts significantly exceeded the amounts listed in its books and records, which made the completion of the transaction unviable "in that format". They reported that they were continuing to trade the business and (incorrectly as it happens) that "the investors are providing external funding through the course of the Administration to allow the ongoing trading of the business". They expressed the view that Toyota's actions may have a detrimental impact to the secured creditors' registered security and the assets that it secured.
- 26 The administrators conducted a campaign seeking expressions of interest from potential buyers of the Atlas business as a going concern. Some potential buyers expressed interest and two proposals were received, one from Spanoan and one from an organisation called Adapt A Lift.
- 27 On 25 October 2019, Spanoan told the administrators that it would not be proceeding with funding a deed of company arrangement (**DOCA**). More importantly, Spanoan also told them it would not (apparently in conflict with a commitment it had given) provide ongoing funding for the administration. It said, however, that it was committed to completing a transaction.
- 28 On 28 October 2019, the administrators circulated their initial report to the secured creditors. Amongst others, they reported what they had been told by Spanoan as to the DOCA and that it would not be providing any ongoing funding for the administration. They said that Lawrence was liaising with a number of parties regarding additional funding measures for the administration to meet ongoing costs, that he was closely monitoring the trading activities of the business and the liabilities associated with same, and that should he consider that the business was not viable to continue to trade, he would immediately engage with all secured creditors to provide them with "knowledge of same".

- 29 At this point, the administrators removed the Spanoan operatives from their management positions with Atlas.
- 30 By this time, the administrators were in possession of a draft cashflow for the Atlas business which predicted a trading loss of just over \$300,000 from 22 October 2019 to 16 December 2019.
- 31 On 28 October 2019, BMW appointed Bruno Secatore (**Secatore**) and Sam Kaso of Cor Cordis (insolvency practitioners) as receivers and managers to PJM (**the BMW receivers**). As with Toyota, this appointment had the practical effect that BMW vehicles in the PJM fleet would not be part of any going concern business sale of the Atlas business.
- 32 From 29 October 2019, the BMW receivers started taking steps to recover BMW vehicles.
- 33 On 30 October 2019, the administrators gave Nissan an irrevocable consent pursuant to section 440B² of the Act, authorising Nissan to enforce its security interests over all PJM and Atlas' present and after- acquired property at any time during the administration of PJM and Atlas.
- 34 According to the administrators, on 31 October 2019, Verimax Pty Ltd, a company associated with Pamela Judith Murphy, provided them with a deed of indemnity for all trading costs, expenses and liabilities incurred by them in connection with trading the Atlas business on and from the date of the voluntary administration. The administrators were apparently also provided with a "caveat" over Atlas' property to secure the costs of trading. Lawrence gave evidence that the indemnity and caveat transpired to be worthless.
- 35 On 1 November 2019, Hewitt was told on the telephone by the Toyota receiver that he (the Toyota receiver) and the administrators had received an offer from Spanoan (apparently to purchase the PJM business – which had the purchase/leasehold interests in the financed vehicles). The Toyota receiver expressed the opinion that it would be in the best interests of the secured creditors, including Nissan, and would ensure that Atlas staff retained their job

² Section 440B contains provisions which impose restrictions on the exercise of the rights of a person in property during an administration, but they do not apply if rights are exercised with the administrator's written consent or with the leave of the Court.

if a deal could be completed. Based on this, Hewitt formed the view that Nissan should hold off appointing receivers to Atlas for a short period while he could determine whether an agreement was able to be reached.

36 On 1 November 2019, the initial meeting of creditors of Atlas, required by s 436E of the Act, took place.

37 On 4 November 2019, Secatore (one of the BMW receivers) wrote to the administrators, relevantly, as follows:

BMW had financed a large number of motor vehicles held by the Company (the BMW motor vehicles). I understand that some of these motor vehicles may have been leased by the Company to Atlas C.T.L. Pty Ltd (Administrators Appointed) (Atlas).

I hereby request that you please immediately cease the use by the Company and / or Atlas of the BMW motor vehicles and provide the Receivers and Managers with possession of same as soon as practicable. In the meantime, please also provide my office with the current location of each of the BMW motor vehicles and details of the parties presently in possession of the motor vehicles.

38 The following day, BMW issued repossession notices for BMW vehicles. They received a reconciliation from the administrators for the vehicles over which BMW claimed first ranking security.

39 On 5 November 2019, Lawrence wrote to the BMW receivers, relevantly, as follows:

In reference to your request that the Administrators of Atlas immediately cease the use of any BMW vehicles, the logistics of this make it very difficult to achieve in a practical sense in the short term, due to the nature of the car rental business of Atlas. As discussed last night (and detailed in the fleet report) a large number of these vehicles are currently on lease to clients of Atlas and are not in my immediate possession. The best that can be achieved in a practical sense is to work with your office to achieve a mutually acceptable programme to obtain the return of the vehicles from the renters in the most timely manner. This will require the Administrators to make arrangements for the renters to return the vehicles in an orderly manner to be swapped with a non BMW financed vehicle. I believe that such a program will minimise the costs and lost time for all parties. I am happy to attend a meeting with you and the Receivers to agree on an acceptable programme if you consider this appropriate. In the interim, I will be shortly requesting all renters make arrangements for the return of any BMW financed vehicles.

40 On 6 November 2019, the BMW receivers wrote to the administrators seeking information for the purposes of facilitating return of BMW vehicles. The letter made the point that the administrators remained in possession of the BMW

vehicles and were liable for ongoing lease/finance charges of \$10,654.03 (excl. GST) per day. They requested that these charges be paid on a weekly basis.

- 41 On 7 November 2019, the administrators wrote to the BMW receivers concerning arrangements for the delivery up of BMW's vehicles to it.
- 42 On 7 November 2019, Lawrence wrote to Secatore and others advising them of discussions with an organisation called Adapt A Lift concerning a potential offer to purchase the Atlas business as a going concern. Lawrence suggested a telephone conference to progress negotiations.
- 43 Lawrence went on to advise that the sale of business campaign via expressions of interest was ongoing and, to date, in excess of 17 parties had registered their interest in purchasing the business as a going concern. These parties were completing confidentiality agreements and being issued an information memorandum. He mentioned that they had had preliminary discussions with a number of interested parties who had shown interest in the business as a going concern including consideration of taking on employee entitlements, retaining all trading sites including company's national trading footprint and entering into new lease agreements with lessors.
- 44 From 11 November 2019 onwards, the administrators, pursuant to s 443B(3)³ of the Act, gave various notices that they did not intend to exercise property rights with respect to vehicles leased from Toyota, including to the Toyota receiver.
- 45 Between 5 and 15 November 2019, the administrators were involved in conducting the sale campaign, liaising with proposed purchasers and compiling a reconciliation for each of the secured creditors.
- 46 On 15 November 2019, Adapt A Lift put a purchase proposal to the administrators which included paying a total purchase price for the Atlas business of \$1.5 million with a cash upfront payment of \$300,000, upon execution of heads of agreement, with the remaining purchase price to be paid

³ Section 443B provides: (3) Within 5 business days after the beginning of the administration, the administrator may give to the owner or lessor a notice that: (a) specifies the property; and (b) states that the company does not propose to exercise rights in relation to the property; and (c) if the administrator: (i) knows the location of the property; or (ii) could, by the exercise of reasonable diligence, know the location of the property; specifies the location of the property.

over 18 months. The proposal did not involve any arrangement for the Atlas business to retain possession or use any of the motor vehicles which had been leased to it by PJM. Secatore gave evidence, which I accept, that BMW's primary position and his internal instructions were that if the Atlas business was to retain BMW's vehicles, BMW wanted to be paid out. It was not in favour of a novation of its finance agreements to the purchaser.

- 47 By this time, the administrators had earned remuneration totalling \$1,074,743 (excl. GST) and expected to earn further remuneration of \$250,000 (excl. GST) to 27 November 2019, being the expected date of the second meeting of creditors. The administrators had also made a trading loss of \$422,213 and projected a further trading loss of \$305,940 for the period from 18 November 2019 to 30 November 2019.
- 48 On 19 November 2019, the administrators provided their major report to creditors. The report revealed the administrators' trading loss of \$422,213. The report contained financial information on the estimated return from a winding up. It is fair to say that a winding up was not expected to produce any return. The administrators recommended that Atlas be placed into liquidation.
- 49 On 22 November 2019, Nissan made it clear that it did not consent to the proposed sale of the Atlas business and on 25 November 2019, Nissan appointed Hewitt and Matthew Byrnes as receivers and managers over the whole of the assets and undertaking of Atlas (**the Nissan receivers**). The Nissan receivers commenced collecting and securing the vehicles that remained in Atlas' possession (being those that had not been disclaimed by the administrators and made available by them for collection by the relevant financier). This involved taking steps to obtain, store, market and sell vehicles the subject of Nissan's security interests. Manheim Auctions (**Manheim**) was engaged to assist in the process.
- 50 The Atlas business was shut down.
- 51 Little, if anything, was realised from the assets of Atlas or PJM, tangible or intangible. Significant sums of money were recovered from the sale of vehicles over which the secured creditors had security which had been leased or purchased by PJM and on-leased to Atlas.

- 52 On 26 November 2019, Volkswagen appointed Kenneth Michael Whittingham (**Whittingham**) a receiver and manager over the whole of the assets and undertaking of Atlas and PJM (**the Volkswagen receiver**).
- 53 On 26 November 2019, pursuant to resolutions of creditors, the administrators were appointed liquidators of PJM and Atlas respectively.
- 54 Where it is necessary or appropriate to distinguish, I will refer to the administrators as administrators when acting in that capacity and as the liquidators when acting in that capacity.
- 55 On 11 December 2019, Nissan appointed the Nissan receivers to be receivers and managers to PJM. References to the Nissan receivers are references to them holding office as such in both Atlas and PJM.
- 56 On 13 January 2020, BMW and Nissan agreed on a sale process to sell BMW financed vehicles in the possession of Atlas. Vehicles were sold and the proceeds paid into a joint account.
- 57 On 16 January 2020, the Nissan receivers and the Volkswagen receiver agreed on a sale process to realise Volkswagen financed vehicles which the Nissan receivers claimed they were entitled to collect. Some 490 Volkswagen financed vehicles were sold realising net proceeds after GST of \$5,220,832.27 (**the Volkswagen fund**). The Volkswagen fund remains intact. It comprises proceeds of only Volkswagen vehicles.
- 58 By July 2021, all of the BMW vehicles had been sold by the Nissan receivers and the BMW receivers, and the proceeds distributed in accordance with commercial arrangements reached between them.

THE EQUITABLE LIEN CLAIM

The administrators/liquidators' position

- 59 The administrators/liquidators claim that the following amounts are owed to them and secured by an equitable lien:
- (a) \$1,032,910.48 for costs and expenses incurred by them during the administration Period, being the net loss they made trading the Atlas business – see Schedule A;

- (b) \$1,007,359.86 for remuneration which they contend relates exclusively to their actions in preserving, securing or attempting to realise the Atlas assets, in effect the goodwill of the Atlas business – see Schedule B; and
- (c) \$427,399.63⁴ for their costs, expenses and remuneration as liquidators from 26 November 2019 to 31 October 2021, which they say relate exclusively to their actions in preserving or securing vehicles in the Atlas fleet.

60 The administrators/liquidators initially relied on the statutory lien provided by s 443F(1)⁵ of the Act, but they abandoned this at the commencement of the hearing.

61 They rely solely on the so-called “salvage” or **Universal principle**, which was articulated as follows by Dixon J (as his Honour then was) in a well-known passage in *Re Universal Distributing Co Ltd (in liq)* (1933) 48 CLR 171 at 174 (**Universal**) (footnotes omitted and emphasis added):

If a creditor whose debt is secured over the assets of the company come in and have his rights determined 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 realisation of such assets (*In re Marine Mansions Co. (2)*). The security is paramount to the general costs and expenses of the liquidation, but the expenses attendant upon the realisation of the fund affected by the security must be borne by it (*In re Oriental Hotels Co.; Perry v. Oriental Hotels Co. (3)*). The debenture holders are creditors who have a specific right to the property for the purpose of paying their debts. But if it is realised in the winding up, a proceeding to which they are thus parties, the proceeds must bear the costs of the realisation just as if they had begun a suit for its realisation or had themselves realised it without suit. (cf. *In re Regent's Canal Ironworks Co.; Ex parte Grissell (4)*; and see *Batten v. Wedgwood Coal and Iron Co. (5)*).

In applying this principle, only those expenses appear to have been thrown against the fund belonging to the debenture-holders which have been reasonably incurred in the care, preservation and realization of the property. In the present case the liquidator has employed a material part of his time and

⁴ Originally \$543,113 was claimed.

⁵ Sections 443D and 443F provide: 443D Right of indemnity The administrator of a company under administration is entitled to be indemnified out of the company's property (other than any PPSA retention of title property subject to a PPSA security interest that is perfected within the meaning of the Personal Property Securities Act 2009) for: (a) debts for which the administrator is liable under Subdivision A or a remittance provision as defined in subsection 443BA(2); and (aa) any other debts or liabilities incurred, or damages or losses sustained, in good faith and without negligence, by the administrator in the performance or exercise, or purported performance or exercise, of any of his or her functions or powers as administrator; and (b) the remuneration to which he or she is entitled under Division 60 of Schedule 2 (external administrator's remuneration). 443F Lien to secure indemnity (1) To secure a right of indemnity under section 443D, the administrator has a lien on the company's property. (2) A lien under subsection (1) has priority over another security interest only in so far as the right of indemnity under section 443D has priority over debts secured by the other security interest.

energies in recovering moneys, both uncalled capital and debts, which enure for the debenture-holder, and in so far as these services increase the remuneration which he receives, I see no reason why the burden should not be thrown upon the proceeds. The question is not whether moneys available for unsecured creditors should be relieved at the expense of the security. In such a case it may be said that the service of collecting enough to discharge the debenture must in any event be performed in order that a surplus may then arise in which the unsecured creditors may participate. The question in the present case is whether the liquidator can charge against the fund passing through his hands as between himself and the person to whom it is payable, so much of the remuneration fixed for work done in the winding up as is referable to the calling in and conversion of the assets producing the fund. I see no reason why remuneration for work done for the **exclusive purpose** of raising the fund should not be charged upon it.

62 The administrators/liquidators submit that an equitable lien in accordance with the Universal principle arises when:

- (1) the external administrator acts reasonably;
- (2) the administrator attempts to preserve, secure or realise assets;
- (3) there is a sufficient nexus between the work done and the salvage objective;
- (4) there is a fund (or assets) which may properly be the subject of the lien; and
- (5) it would be unconscionable for the creditors who stand to take the benefit of the fund (or assets) to do so without recognising the administrator's work.

63 They directed their submissions to seeking to establish that each of these requirements was satisfied.

64 They identified the tasks they undertook in performance of their functions and discharge of their duties as administrators of Atlas between the administration date and 24 October 2019 as follows:⁶

- (1) issued demands for the books and records against the Director and each of PJM's and Atlas's external accountant;
- (2) issued correspondence to the Director of PJM and Atlas for the submission of a Report on Company Activities and Property;
- (3) issued correspondence to all major banking institutions to identify any pre-appointment bank accounts and request a debit freeze be placed on same;
- (4) initiated automatic insurance cover through AJ Gallagher and subsequently confirmed that the Administrators had been added to the pre-appointment insurance policies of Atlas and received certificate of cover for same;

⁶ Amended Statement of Claim filed 11 March 2022 [16]; affidavit of Richard Lawrence affirmed 16 July 2021 [15].

- (5) opened new banking facilities with the Commonwealth Bank of Australia including arranging new merchant facilities for the Atlas trading sites;
- (6) engaged the services of Pickles Auctions to undertake an inspection and valuation of the PJM and Atlas plant and equipment including the entire motor vehicle fleet;
- (7) entered negotiations with investors to obtain short term funding to allow for the continued trading of Atlas pending a possible sale of the Atlas Business;
- (8) liaised with aggregators (such as Uber) to obtain their ongoing support and referral of customers to the Atlas Business;
- (9) issued correspondence to the State Revenue Office to identify any amounts outstanding in relation to land and payroll tax;
- (10) reviewed the Personal Properties and Securities Register in respect of security interests held by third parties and issued correspondence to same to obtain details of their registered security interests, reviewed responses from these secured creditors regarding their PPSR registrations and documentation supplied in regard to same;
- (11) obtained the books and records provided by the Director, external accountant, the former external accountant and investigated the financial position of PJM and Atlas;
- (12) obtained and reviewed PJM and Atlas MYOB files;
- (13) reviewed PJM and Atlas business operations including interaction between the entities;
- (14) prepared cash flow forecasts to determine the viability of ongoing trading of the Atlas Business;
- (15) issued correspondence to key suppliers regarding ongoing trading;
- (16) prepared and issued purchase orders to suppliers for ongoing trading costs;
- (17) attended the Atlas trading premises to identify the trading operations and sight the assets;
- (18) addressed both PJM and Atlas employees regarding the continued trading of the business and their ongoing employment;
- (19) commenced review and calculation of outstanding employee entitlements;
- (20) held numerous discussions with the senior management of Atlas in relation to the financial position and financial performance of Atlas and ongoing trading throughout the Administration period;
- (21) held discussions with investors regarding their intention to propose a DOCA for creditors to consider;
- (22) liaised with creditors including employee creditors of both PJM and Atlas throughout the course of the Administrations;
- (23) held numerous telephone conversations with the registered secured creditors of both PJM and Atlas regarding the Administrations in respect of their ongoing support to allow the Atlas business to continue to trade, and in addition held telephone conversations with legal representatives of various legal representatives of PJM and Atlas regarding same;

(24) attended meetings with representatives of the secured creditors of both PJM and Atlas (including their legal representatives in some cases) regarding the Administrations, trading activities, inspection of the vehicle fleet and the vehicles subject to their various charges and seeking their ongoing support to allow the Atlas Business to continue to trade;

(25) liaised with the Receiver and Manager appointed to PJM by Toyota, being Mr Hedge; and

(26) issued the initial report to creditors for both PJM and Atlas and convening the first meeting of creditors for both companies on Friday, 1 November 2019.

65 They say that from the administration date to the winding up of Atlas they conducted the following tasks in trading the Atlas business:⁷

(1) attending all trading locations of Atlas being those in Victoria, New South Wales, Queensland, Western Australia and South Australia;

(2) meetings and discussions with Atlas' employees;

(3) preparing, reviewing and maintaining cash flow projections and profitability analysis in respect of the Atlas Business;

(4) initial and ongoing monitoring of trading controls over Atlas' operations;

(5) facilitating payment of liabilities incurred in ongoing trading, including amounts owed to financiers;

(6) ensuring adequate insurance maintained during the administration period;

(7) liaising with Atlas' secured creditors regarding ongoing trading;

(8) liaising with Atlas' customers regarding ongoing support;

(9) liaising with suppliers regarding ongoing trading and opening new accounts;

(10) receiving, reviewing and approving purchase orders and sale transactions;

(11) maintaining register of approved purchase orders with supporting documentation;

(12) preparing and posting cheque requisitions and deposit instructions regarding trading receipts and trading payments;

(13) issuing invoices and correspondence to Atlas' corporate customers regarding the ongoing trading during the administration;

(14) establishing trading accounts with key suppliers across all trading locations and communicating regularly regarding the progress of the administration;

(15) attending to queries of the landlords of Atlas' trading locations and facilitating payment of rent;

(16) maintaining the register of landlord positions per trading location;

⁷ Amended Statement of Claim filed 11 March 2022 [19].

- (17) preparing and issuing notices to not exercise property rights with regards to trading locations no longer required during the administration period;
- (18) reviewing the ongoing staffing requirements of Atlas;
- (19) issuing termination of employment correspondence to employees no longer required during the administration period;
- (20) dealing with creditors advising of possessory liens over assets utilised in the ongoing trading of the Atlas Business;
- (21) liaising with management staff at all trading locations regarding day-to-day logistical issues, fuel expenses, office supplies and staffing requirements;
- (22) renewing motor vehicle registrations as and when they fell due;
- (23) maintaining ledger of motor vehicle registrations;
- (24) considering the employment of and terminating senior management;
- (25) preparing and issuing a report to secured creditors;
- (26) issuing notices to not exercise property rights with regards to motor vehicles subject to finance agreements;
- (27) liaising with Commonwealth Bank of Australia regarding establishment of trading period merchant facilities and logistics of delivering new EFTPOS terminals;
- (28) liaising with recovery agent regarding collection of direct debit receipts;
- (29) arranging continued supply of utility services and negotiating trading terms with suppliers; and
- (30) processing and payment of employee wages and superannuation accruals expenses.

66 They say that their trading activities were undertaken:

- (1) exclusively in the securing, preservation and realisation of assets of Atlas, including the Atlas Vehicles;
- (2) in the discharge of their duties as administrators of Atlas, for the purpose of securing, preserving and realising the assets of Atlas, including the vehicles in the Atlas fleet;
- (3) for the benefit of the creditors of Atlas, including the secured creditors.

67 They identify hours spent on particular tasks during the administration period in large spreadsheets (which were admitted into evidence as exhibits to affidavit evidence of Lawrence in native file form) summarised in separate schedules categorised into:

- (1) costs and expenses (trading losses of the Atlas business) during the administration period – Schedule A.
- (2) remuneration asserted to relate exclusively to preserving, securing or attempting to realise the Atlas assets during the administration period – Schedule B.

(3) motor vehicle related tasks during the winding-up – Schedule C.

- 68 The liquidators' quantification of their costs, expenses and remuneration during the winding up period to 31 October 2021 is contained in a spreadsheet in native file form, and supported by an affidavit of Lawrence affirmed 25 February 2022, but does not extend to identifying which tasks were related to preserving or securing vehicles.
- 69 It will be observed that their lien claim focuses on the goodwill of Atlas during the administration period as the asset they cared for and protected, and on vehicles as the assets after the winding up.
- 70 The administrators argue that they acted reasonably in trading the business with a view to selling it as a going concern.
- 71 They argue that at the time of their appointment they had a promise of funding for their trading and that it was appropriate to pursue the Spanoan offer in the way that they did. They draw attention to the size of the Atlas operation and put that it was reasonable to pursue a sale in circumstances when there would otherwise have been no return to creditors other than the sale of the vehicles which were generally subject to security interests.
- 72 They argue that the secured creditors consented to or acquiesced in them trading the business and undertaking the sale campaign. They draw attention to the fact that the secured creditors themselves did not appoint receivers and managers to the Atlas business but allowed the sale campaign to continue, knowing that the business was being traded at a loss and that the administrators were spending professional time trading it.
- 73 They argue that the sale campaign realised an offer for the purchase of the Atlas business and that the bulk of the price represented goodwill. They argue that the attempted sale of Atlas as a going concern was an attempt to preserve the Atlas business.
- 74 They submit that their conduct should not be assessed with the benefit of hindsight or divorced from commercial reality and that they were faced with numerous issues and had to act quickly.

- 75 They argue that the majority of their work during the administration period was an attempt to preserve, secure or realise assets of the Atlas business. They argue that the attempted sale as a going concern was an attempt to preserve the Atlas business.
- 76 They put that the reconciliation of the Atlas fleet was “self-evidently” an attempt to preserve, secure or realise the vehicles as assets and that the sale of the Atlas business as a going concern could have obviated the need for a sale of assets (as individual vehicles) with the result that the secured creditors would have had the benefit of their finance agreements remaining on foot.
- 77 They argue that the Volkswagen fund is an existing fund out of which their costs, expenses and remuneration can be properly indemnified. They put that it represents the proceeds of sale of assets of Atlas and PJM in respect of which BMW, Nissan and Volkswagen had general security interests.
- 78 Initially they argued for an apportionment or prorating between BMW, Nissan and Volkswagen of amounts representing the benefit each obtained by the administrators’ exertions, but then correctly abandoned this approach, which appeared to apply random percentages without actual regard to the particular costs incurred with respect to any particular vehicles or secured creditor. This difficulty remains, and is dealt with further below.
- 79 Their ultimate approach was to say they are entitled to be secured for the globular amount and that apportionment should be left to the secured creditors to sort out between themselves.
- 80 They submit that it is unconscientious for the secured creditors to deny their claims where:
- (1) a sale of the Atlas business and the continuation of their finance arrangements would have provided a benefit for them and they all stood to gain from the sale;
 - (2) the secured creditors knew that the administrators were trading the business while a sale of the business was attempted; and
 - (3) the secured creditors consented to or adopted a wait and see approach with respect to the work being completed, including the use of the vehicles to continue to trade while the sale campaign was undertaken.

- 81 Specifically with respect to Nissan, they rely on Hewitt's involvement with knowledge of the administration, including his awareness that there was no funding, and his decision that it would be beneficial to Nissan to wait and see the outcome of the sale process.
- 82 They submit that Hewitt did not ask for information about the trading losses and that he could have advised Nissan to appoint him as receiver and manager over the whole of the Atlas assets. They refer to Hewitt's involvement in negotiations about the sale of the Atlas business and to the fact that only when it was clear that no agreement for the sale of the Atlas business was to occur did Nissan appoint the Nissan receivers.
- 83 With regard to BMW, they rely on Secatore's discussion with the administrators about the sale campaign, return of vehicles and the status of vehicles with individual renters. They put that although BMW's preferred position was for its finance agreements to be paid out, it did not convey to the administrators that they were not prepared to novate its finance agreements but adopted a wait and see attitude and was prepared to negotiate with Adapt A Lift about a novation. They rely on the fact that Secatore authorised an employee to attend a meeting with Lawrence to discuss the assignment of the BMW fleet. They rely on the fact that although BMW had demanded that its vehicles be taken out of commission, BMW took no steps to recover vehicles (other than those disclaimed by the administrators) until BMW engaged Manheim on 22 November 2019.
- 84 With respect to Volkswagen, they put that it was kept abreast of the sales campaign and did not appoint receivers and managers over the Atlas business even though it had a security interest over the whole of Atlas' property.
- 85 Finally, they argue that it would be contrary to public policy to deny the administrators their costs, expenses and remuneration on the salvage basis where the ultimate aim of salvaging Atlas was not achieved because this would discourage appointees from attempting to continue to trade businesses in the face of the risk that they would not be remunerated.

The secured creditors' position

- 86 The secured creditors deny the existence of the claimed lien.

- 87 They put in issue the quantum of the claims made by the administrators/liquidators.
- 88 They take issue to the administrators/liquidators' approach of apportioning or prorating the claim between the individual secured creditors, and to the inclusion of activities such as identification of the property which do not come within the notions of caring for, preserving or realising it.
- 89 They argue that the requirement that the property to which the lien attaches must be the same property (or proceeds from it) that has been cared for, preserved or realised has not been met. This is because, they said:
- (1) as to goodwill, nothing was realised from it;
 - (2) as to the proceeds of the sale of BMW and Nissan vehicles, there is no existing fund created by the realisation of those assets;
 - (3) the costs, expenses or remuneration claimed were not exclusively or at all incurred in realising or attempting to realise vehicles in that:
 - (a) the Atlas fleet was not Atlas' property;
 - (b) the proposed sale of the Atlas business did not incorporate (nor could it have) a sale of the Atlas fleet; and
 - (c) leaving aside the vehicles they disclaimed – the administrators continued to use them (as part of their trading the Atlas business), putting the vehicles at risk and decreasing their value.
- 90 The secured creditors argue the Universal principle covers only costs, expenses and remuneration incurred or earned *exclusively* in caring for, preserving or realising property. They say that this requirement is not met whether the property is regarded as the goodwill of the Atlas business or the vehicles because the costs, expenses and remuneration claimed have not been incurred *exclusively* in caring for preserving or realising either (or for that matter, both).
- 91 The secured creditors argue that the administrators' decision to trade on was not reasonable because:
- (1) it should have been clear to them that even if the Atlas business was able to be sold, the purchase price would be insufficient to cover their trading losses and therefore was not for the benefit of creditors but to their detriment;
 - (2) by 19 November 2019 (the date of the report to creditors), they knew that the best price on offer for the Atlas business was \$1.5 million, which

was less than the sum of their remuneration to 27 November 2019 of \$1,324,723 and their forecast trading loss to 30 November 2019 of approximately \$644,000;

- (3) they did not seek support from or consent of the secured creditors to trade on;
- (4) they did not have any agreement (or secure agreement) from any party to cover their trading expenses and did not ensure that such funding was in place, even after Spanoan withdrew the support it had apparently committed to providing; and
- (5) they did not commence the sale of business campaign until 31 October 2019, having by that time traded at a loss for 9 days without any funding.

Consideration

- 92 The administrators/liquidators' lien claim fails both at the level of principle and at the level of proof.
- 93 It is apt to record at the outset that the only identified fund or asset remaining in the winding up and to which a lien may conceivably attach is the Volkswagen fund, which comprises entirely proceeds of Volkswagen vehicles.
- 94 The proceeds of the BMW vehicles (and all other vehicles except Volkswagen) have been entirely dissipated. Nissan once claimed an interest in the Volkswagen fund but no longer does.
- 95 There is no scope, in the manner which these proceedings have been conducted by the administrators/liquidators and defended by the secured creditors, for the administrators/liquidators to claim a lien over some unidentified asset into which assets previously in the winding up, may be traceable. No such asset was identified and no possible entitlement to any tracing or accounting was established. It is fair to say that counsel for the administrators/liquidators said very little if anything about this aspect of the case.
- 96 The Universal principle does not assist the administrators/liquidators for each of the following reasons:
 - (1) the claims for the trading losses and remuneration for exertions during the administration gives rise to no lien over the Volkswagen fund as those claims do not bear the nexus with the Volkswagen fund which the principle requires;

- (2) the administrators' decision to trade on and continue trading on was not reasonable in the sense in which the Universal principle requires it to be; and
- (3) with respect to the claim directed to asserted preservation of vehicles (as opposed to goodwill), the efforts of the administrators/liquidators were not directed to that activity.

97 At the level of proof, these claims fail because they have fallen short of proving the amount of costs, expenses and remuneration exclusively connected with the care, preservation or realisation of any particular asset so as to be able to sheet home liability in any sufficiently certain amount to any of the secured creditors.

98 I turn first to the Universal principle.

99 It is not shrouded in any complexity.

100 A creditor who holds security which forms part of a winding up or insolvent administration and which is cared for, preserved, or realised at the expense of the liquidator or administrator cannot conscientiously take advantage of the efforts of the liquidator or administrator without meeting her or his expenses in so doing. Equity creates a charge over a fund created by the realisation of the security as a result of those efforts.

101 The Universal principle was considered and affirmed by the High Court in *Stewart v Atco Controls Pty Ltd (in liq)* (2014) 252 CLR 307 (**Atco**) at 317 and following. At 320 [22-23], the Court said:

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.

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*, 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*.

- 102 Both *Universal* and *Atco* refer to the creation of a lien (or more accurately a charge) over a fund. It has, however, been held that the existence of a fund is not a prerequisite for the application of the Universal principle: see *Primary Securities Limited v Willmott Forests Limited (Receivers and Managers Appointed) (In Liq)* (2016) 50 VR 752 (**Primary**).
- 103 No doubt because of the self-evident difficulty that the Volkswagen fund was not created or brought into existence by the exertions of the administrators in trading the Atlas business and that the trading itself generated no fund (but made a substantial loss), the administrators place heavy reliance on *Primary* as supporting their proposition that the Volkswagen fund is susceptible to a lien to secure their trading losses and remuneration. But *Primary* does not assist them.
- 104 In *Primary*, the Victorian Court of Appeal surveyed the conspectus of decisions on the Universal principle since *Universal* itself. *Primary* is authority for no more than the narrow proposition that it is not a prerequisite for the application of the Universal principle that there must be in existence a fund which was realised by the lien claimant.
- 105 In *Primary*, liquidators were appointed to an insolvent company which was the responsible entity for a managed investment forestry scheme. The growers resolved to remove the responsible entity and replace it. Between the liquidators' appointment and the replacement of the responsible entity, the liquidators devoted effort and spent money managing the scheme. They sought payment of their costs and expenses from the scheme assets. It could not be said that the effect of their exertions was to create a fund. However, they were in effect interim custodians of the scheme assets and may well have realised them had the company remained the responsible entity of the scheme.
- 106 At 784 [124], Whelan and Santamaria JJA concluded:

In our view the authorities also make it clear that the principle may apply where the claimant has cared for or preserved an asset, and not simply where the claimant has realised it and created a fund. One circumstance where the principle may apply is where the claimant has acted as a kind of 'stand in', undertaking activities which the holder of the proprietary interest would have had to undertake itself had the claimant not done so. In essence, that is what happened in *Pattison v Lockwood*.⁸ On the other hand, if the claimant's

activities are properly characterised as unrelated to the interests or objectives of the holder of the proprietary interest then the claimant may have no entitlement to priority over that proprietary interest holder. It seems to us that that was the position in *Dean-Willcocks*.⁹

107 In a separate judgment, at 756 [16], Maxwell P said (emphasis added):

In a case where no fund has been created, what needs to be shown in order to establish the liquidator's lien is that:

(a) the costs and expenses incurred by the liquidator were incurred **exclusively** in caring for, preserving and/or realising property;

(b) the activity of care, preservation and/or realisation enured for the benefit of the creditors of the company (including the secured creditor); and

(c) there is property which can properly be subjected to the liquidator's charge for remuneration, costs and expenses.

108 The Court's conclusion that the liquidators' exertions in operating the responsible entity and looking after the scheme assets should not go uncompensated simply because no actual fund had been created is unsurprising. The liquidators were the custodians of the scheme assets and lost custody for the reason only that the responsible entity changed. The Court of Appeal drew on authorities in the field of trusts which recognise a trustee's right to be indemnified out of the trust's assets for costs, expenses and remuneration. There were apparently significant scheme assets to which a lien could attach.

109 The High Court is yet to opine on whether it is correct that no fund is required even though both *Universal* and *Atco* appear to say that it is. However, I am prepared for present purposes to accept that the existence of a fund, as opposed to some other asset which has been preserved or protected, is not a material distinction in the exercise of considering whether a claimant should be recompensed for its costs and expenses incurred for the benefit of the security holder of the asset. The idea that an asset, not money, may be charged under the *Universal* principle may cause difficulties in its practical application, but that is a subject into which it is not presently necessary to delve.

110 But what *Primary* does not stand for is the proposition that equity will create a charge over property (or proceeds of it) other than the property (or proceeds of

⁸ *Pattison v Lockwood* [1998] FCA 472.

⁹ *Dean-Willcocks v Nothintoohard Pty Ltd (in liq)* (2007) 25 ACLC 109.

it) which was the subject of the care, protection and realisation at the claimant's expense. To do so would be inimical to the Universal principle.

- 111 Equity recognises the charge on particular property because it is inequitable for the holder of the security to take advantage of the claimant's efforts (at its expense) in protecting, securing or realising it without meeting the claimant's costs and expenses in doing so.
- 112 The concept that the expenses and the benefit must be directly related is reflected in the requirement that the costs and expenses incurred for the **exclusive** purpose of raising the fund, or **exclusively** for the purpose of caring for, preserving and/or realising property: *Universal* at 174 and *Primary* at 756.
- 113 The policy behind the exclusivity requirement reflects equity's approach that only those costs and expenses which were incurred by the claimant necessarily to give the security holder the benefit of that very security are to be secured.
- 114 The retention of the benefit, without acceptance of the burden taken on by the claimant to give the benefit of the maintenance or realisation of the security to the security holder, makes non-recognition of the claim unconscientious.
- 115 Here, not only have the secured creditors not taken advantage of the administrators' avowed protection of Atlas' goodwill (because there is none to take advantage of), but the only asset to which the lien could or would attach is that goodwill, and it does not now exist (if ever it did) to allow a lien to attach to it. There may be conceptual difficulties in a lien attaching to bare goodwill in any event: cf. *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605.
- 116 Little or no attention was given in argument (by either side) to the fact that BMW's security was not over the whole of Atlas' undertaking, whereas Nissan's and Volkswagen's was.
- 117 It is not necessary to deal with the submission (made primarily by Volkswagen) that the Universal principle does not apply because the Atlas fleet was not Atlas' property, suffice it to say that Atlas did have some proprietary or possessory interest in the vehicles, but that is of no moment for present purposes.

- 118 The requirement for reasonableness (identified by Maxwell P) in *Primary* is simply an integer in the equation of whether a denial by the security holder of the claimant's entitlement to recompense is unconscientious. It will not be unconscientious to deny an unreasonable claim.
- 119 I uphold the secured creditors' submission that the trading loss and remuneration claim (pertinent to the trading activity) is not reasonable in the context of an assessment of whether their denial of the administrator's claim to secured recompense is unconscientious.
- 120 The starting point is that the statutory position of an administrator who decides to trade is that he or she is personally liable for the debts incurred in doing so.¹⁰
- 121 The administrators are highly experienced and were acutely aware that trading on was at their own risk. This awareness is reflected in the steps (albeit ones which turned out to be inadequate) they took to cover the risk by obtaining what they said were commitments from Spanoan and Verimax.
- 122 It was readily apparent from the cashflows that a further trading loss was predicted (if not close to inevitable).
- 123 They did not seek assurances from the secured creditors with respect to possible trading losses and were not given any.
- 124 By 19 November 2019, the time of the report to creditors, their trading had resulted in a loss of \$422,213, being \$122,000 (or approximately 40% more) than their original prediction. But still they traded on.
- 125 By this time, they had incurred remuneration of \$1,074,743 in the administration and predicted a further \$250,000 from 16 November to 27 November, making a total of \$1,324,743. The trading losses of \$422,213 took the deficit in Atlas' position to \$1,746,956, which is significantly more than the Adapt A Lift offer.
- 126 An examination of the estimated return from a winding up in the first report reveals that the secured creditors, priority creditors and unsecured creditors

¹⁰ Section 443A(1) of the Act provides: General Debts (1) The administrator of a company under administration is liable for debts he or she incurs, in the performance or exercise, or purported performance or exercise, of any of his or her functions and powers as administrator, for: (a) services rendered; or (b) goods bought; or (c) property hired, leased, used or occupied.

would, even if the Adapt A Lift offer proceeded (and Adapt A Lift performed – the prospects of which were not the subject of evidence), receive no dividend. There is no evidence that the administrators obtained any valuation of the business.

- 127 The secured creditors were fully entitled to take a wait and see approach and the administrators knew they were doing this. Trading on remained the decision of the administrators alone. BMW took its approach with knowledge of what the administrators had said about funding. Also, BMW had an undertaking from the administrators to pay the financial charges on the BMW vehicles. All that was put about Volkswagen was that it was kept abreast of developments.
- 128 No evidence was led as to the capacity of Adapt A Lift or Spanoan to have performed the terms of a purchase. No evidence of any assessment of the value of the Atlas business having been made was placed before the Court. Lawrence gave an unclear explanation for why performance of Spanoan's funding commitment was not enforced.
- 129 I reject the submission that there are public policy considerations which support the administrators' position. An administrator without proper protection in place trades at his or her own risk. There is no discernible policy which favours a predilection on the part of a voluntary administrator to trade on.
- 130 Hewitt gave evidence, which I accept in the context of the application of the Universal principle, that in his opinion once Spanoan withdrew their offer of funding and confirmed they did not intend to propose a DOCA, which occurred by 27 October 2019, a reasonable administrator would have either:
- (1) commenced a winding down of the business immediately; or
 - (2) informed the secured creditors of the expected trading losses that would be incurred if the administrators continued to trade the business (before allowing for the administrators' remuneration and costs) and sought the secured creditors' approval to fund those losses.
- 131 Counsel for Nissan described the trading on as a gamble that did not pay off. He put that equity does not come to the rescue of administrators who trade on unreasonably without valuations, without indemnity for their trading costs, and in the circumstances which are described above. I agree.

- 132 I do not think that the Universal principle covers trading losses, in the face of the statutory position, by giving recourse to some asset that happens to form part of the winding up.
- 133 On no reasonable view can it be said that the costs, expenses and remuneration claimed meet the test of exclusivity for the stated purpose. That this is so, is immediately evident from an examination of the tasks performed during the administration period and described earlier in this judgment.
- 134 Correspondingly, the only existing asset in the winding up to which a lien could conceivably attach is the Volkswagen fund. But that fund was not preserved, cared for or created by the exertions of, or at the cost and expense of the administrators. As well, BMW never had any interest or claimed interest in the Volkswagen fund.
- 135 I turn then to the claims based on the notion that the administrators incurred expense and are entitled to remuneration for activities in caring, preserving or realising vehicles. I reject that this is what they did.
- 136 The secured creditors drew attention to the following passage in Lawrence's affidavit dated 18 February 2022, which reveals the administrators' approach to the vehicles:

At paragraphs [63] to [67] of the Secatore Affidavit, Secatore deposes to issuing the Cessation Request Letter, issuing of Notices of Repossession in relation to 658 vehicles and issuing of the First Demand. When those documents were issued, the Administrators were still in the midst of the business sale campaign, and we were keeping Cor Cordis abreast of the business sale process. It would have been clear to BMW that we needed to keep the vehicles in commission to continue trading the business while sale was explored. It would not have been practicable for the vehicles to be called in immediately anyway given the number of vehicles out of Atlas' possession at the time. Regardless, BMW made it clear to us by requesting that we provide possession of the BMW Vehicles that BMW was reliant upon us to locate, call in and otherwise take possession of the BMW Vehicles. In addition, the demand issued notes for the BMW vehicles to be handed back to the Receivers and Managers as soon as practicable which is an implied acknowledgement that they were aware this could not be completed by the Administrators immediately upon issuing the notice due to the core business of Atlas being a motor vehicle to the general public.

- 137 In my view, the exertions of the administrators were not directed to the care, preservation or realisation of any vehicles, but to their continued use, and, in the case of BMW, contrary to its express wishes.

- 138 Their actions in trading the Atlas business (which needed continuous use of vehicles) were inimical to the interests of the secured creditors so far as the vehicles were concerned. The administrators placed the vehicles at risk and exposed them to wear, tear and deterioration.
- 139 As mentioned earlier, the administrators/liquidators have taken a globular approach to their claims without seeking to establish the particular amount conscience would require each individual secured creditor to pay in respect of the preservation, securing and realisation of its own security. They adopted a somewhat random division between costs attributed respectively to preservation, securing and realisation.
- 140 This approach does not enable the Court to make a finding that any specific amount was secured as against each of the secured creditors individually, even if they had established the application of the Universal principle. Neither the evidence, nor the submissions, extend to putting the Court in a position to make the necessary findings.
- 141 It will be observed that Schedule C was prepared on the basis of a division between Volkswagen, BMW and Nissan, but justification for this was not made. Counsel for the administrators/liquidators referred to the underlying material euphemistically as lacking “granular identification”.¹¹
- 142 The Universal principle allows an amount of money spent by the claimant to be charged against the creditor’s security and thus borne exclusively by the creditor. The principle leaves no room to charge against that security expenses incurred for the benefit of someone else. The principle leaves no room for the application of speculation or guesswork as to what was spent for the creditor’s exclusive benefit, and justice does not dictate that a figure be plucked out of the air: cf. *Troulis v Vamvoukakis* [1998] NSWCA 237, 14 per Gleeson CJ (as his Honour then was).
- 143 Additionally, it is apparent that many of the items included in the claim cannot be properly characterised as actions to care for or preserve any asset, but as part of general administration duties.

¹¹ T302 lines 35-6.

144 Finally, equity does not require a secured creditor to establish the amount of the claim it must pay by having a contest with some other secured creditor about what is its proportion of a globular claim. The burden of quantification rests on the claimant.

BMW'S FINANCE CHARGES

145 The administrators have an admitted liability to BMW for leasing charges during the administration for the period 30 October 2019 to 22 November 2019 when the administrators traded the business. During the hearing, BMW filed initiating process claiming judgment for the amount.

146 The administrators' position is that this liability is part of the costs and expenses incurred in protecting the goodwill of the Altas business and they are entitled to be secured for it under the Universal principle. Leaving aside the irony that BMW's position was that it wanted its vehicles back and that the administrators agreed in their personal capacity to pay these charges and now assert that BMW must in effect pay its own financing charges, they have no security for them, and BMW is entitled to judgment against them for the amount claimed.

REMUNERATION

147 The question what is reasonable remuneration for all of their unpaid activities is of course an entirely different one from what is reasonable in the context of applying the Universal principle.

148 The administrators/liquidators provided comprehensive evidence of what they did and how their charges are made up.

149 Only a perfunctory attack was made on the general quantification of their claim.

150 The administrators/liquidators submitted that the work was substantial and complex and that the seniority of the staff and hours spent was appropriately recorded and reasonable.

151 The Court was taken to recent authorities concerning the principles which govern the determination of an external administrator's remuneration. It is not necessary to deal with them.

152 Bringing the Court's independent mind to bear on whether the remuneration is fair and reasonable in the sense required for the purposes of approval, that is, whether it is fair and reasonable for work done and taking into account the circumstances of the administration and winding up, I am satisfied that the amount of the remuneration claimed by the administrators/liquidators should be approved. This approval may, however, transpire to be of limited practical benefit.

CONCLUSION

153 The administrators/liquidators' claim to be secured by an equitable lien fails and will be dismissed.

154 There will be judgment for BMW against the administrators for \$281,266.39 (updated to the date of judgment).

155 The Court will approve the administrators/liquidators' remuneration.

156 The parties are to bring in Short Minutes reflecting this outcome, and to draw to my attention any issues (other than costs) which remain to be determined. I will stand the matter over to a date convenient to the parties in respect of which the parties should liaise with my Associate.

157 I will hear the parties on costs if this proves necessary. Within 10 days, the parties are to exchange and send to my Associate brief position papers setting out their respective positions on costs. If there is no agreement, I will make appropriate directions for the resolution of costs.

158 The exhibits may be returned.

SCHEDULE A

Trading expenses during administration

Category				
	Pres ervi	Sec urin	Re ali sin	Total

	ng	g	g	
GST Liability	36,8 97.1 8	36,8 97.1 8	-	73,794 .36
PAYG Liability	40,5 03.5 8	40,5 03.5 8	-	81,007 .15
Excess & Damages	26,3 46.2 8	26,3 46.2 8	-	52,692 .57
Petrol / Fuel	6,70 6.00	6,70 6.00	-	13,412 .01
Toll Purchases/Late Tolls	1,49 0.67	1,49 0.67	-	2,981. 34
Repairs & Maintenance - Cars	918. 56	918. 56	-	1,837. 13
Tyres	454. 71	454. 71	-	909.43
Roadside Assistance	5,02 9.66	5,02 9.66	-	10,059 .32
Computer Support	7,56 9.02	7,56 9.02	-	15,138 .03
Freight & Cartage	797. 45	797. 45	-	1,594. 90

Airport Access Fee	3,14 2.45	3,14 2.45	-	6,284. 90
Rubbish Removal	268. 88	268. 88	-	537.76
Rents	9,54 4.94	9,54 4.94	-	19,089 .87
Telephone	6,51 2.09	6,51 2.09	-	13,024 .18
Electricity	1,47 4.67	1,47 4.67	-	2,949. 35
Rates	700. 02	700. 02	-	1,400. 05
Superannuation (Atlas)	17,4 57.9 4	17,4 57.9 4	-	34,915 .87
Superannuation (PJM)	2,73 3.79	2,73 3.79	-	5,467. 58
Workers Compensation	6,64 5.40	6,64 5.40	-	13,290 .79
Payroll Tax	6,04 1.27	6,04 1.27	-	12,082 .54
Contractors	806. 87	806. 87	-	1,613. 74
Management Fees	5,87	5,87	-	11,751

	5.69	5.69		.38
Broker Fees	8,63 3.70	8,63 3.70	-	17,267 .40
Customer refunds	8,44 7.12	8,44 7.12	-	16,894 .24
Total Liabilities	204, 997. 95	204, 997. 95	-	409,99 5.91
MV Lease Liabilities				
BMW Group Financial Services	112, 948. 50	112, 948. 50	-	225,89 7.00
Nissan Financial Services	25,8 47.4 3	25,8 47.4 3	-	51,694 .85
Volkswagen Financial Services	135, 354. 00	135, 354. 00	-	270,70 8.00
Lease Liabilities - BOQ	-	-	-	-
Lease Liabilities - CBA	-	-	-	-
Lease Liabilities - Pepper	-	-	-	-
Total MV Lease Liabilities	274, 149.	274, 149.	-	548,29 9.85

	93	93		
Others				
Valuation	-	23,842.98	20,282.46	44,125.44
Advertising	-	-	30,489.29	30,489.29
Total Others	-	23,842.98	50,771.75	74,614.73
TOTAL	479,147.88	502,990.86	50,771.75	1,032,910.48

SCHEDULE B

Remuneration claimed to relate exclusively to preserving or securing atlas' assets during the administration

Category				
	Preserv ing	Securi ng	Realisi ng	Total
Banking	7,844.6	634.78	-	8,479.42

	4			
Customer	7,175.9 6	876.38	-	8,052.34
Debtors	56,879. 24	52,986. 29	1,527.3 9	111,392.9 2
Employees	31,817. 09	6,352.6 9	328.50	38,498.28
Financiers	16,564. 51	72,324. 64	22,732. 81	111,621.9 6
Insurance	9,430.8 6	43.64	130.89	9,605.38
Landlord	8,161.0 8	11,479. 87	1,273.3 1	20,914.26
Motor Vehicles	103,337 .60	192,19 5.71	1,795.5 9	297,328.9 0
Sale	11,922. 08	3,307.5 9	80,821. 80	96,051.48
Site Attendance	16,822. 92	49,310. 08	559.75	66,692.75
Suppliers	5,874.7 8	3,874.5 5	-	9,749.34
Trading	200,730 .10	25,891. 24	2,351.4 9	228,972.8 3
Total	476,560	419,27	111,52	1,007,359

	.88	7.45	1.54	.86
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SCHEDULE C

Motor Vehicle Related Tasks

Category	VW			
	Preserving	Securing	Realizing	Subtotal
Financiers	5,311.03	24,293.41	7,316.85	36,921.29
Insurance	2,939.06	13.53	41.56	2,994.15
Landlord	2,654.63	3,772.89	394.89	6,822.41
Motor Vehicles	33,603.98	64,536.52	596.59	98,737.09
Site Attendance	5,141.04	14,147.62	183.23	19,471.89
Total	49,649.73	106,763.96	8,533.12	164,946.81
Category	BMW			
	Preserving	Securing	Realizing	Subtotal
Financiers	4,279.76	19,854.09	5,887.39	30,021.24

Insurance	2,380.7 3	10.97	33.57	2,425.2 8
Landlord	2,122.0 1	3,130. 18	320.1 5	5,572.3 3
Motor Vehicles	26,561. 52	48,49 3.89	478.8 7	75,534. 28
Site Attendance	4,874.4 9	13,68 6.49	128.9 0	18,689. 87
Total	40,218. 51	85,17 5.62	6,848. 88	132,243 .01
Category	Nissan			
	Preserv ing	Secur ing	Reali sing	Subtot al
Financiers	4,129.4 7	17,81 1.88	5,676. 89	27,618. 23
Insurance	2,402.2 5	10.77	32.51	2,445.5 3
Landlord	2,050.1 9	2,931. 85	314.1 9	5,296.2 4
Motor Vehicles	26,242. 16	52,24 9.04	451.9 9	78,943. 18
Site Attendance	4,576.5 0	11,17 8.42	151.7 0	15,906. 62

Total	39,400. 56	84,18 1.95	6,627. 28	130,209 .80
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Total
94,560. 76
7,864.9 6
17,690. 98
253,214 .56
54,068. 38
427,399 .63

Amendments

12 May 2022 - Para 109 Citation corrected

26 May 2022 - Amendment to Parties and Representation

Para 103 - change substantive to substantial