Supreme Court
New South Wales

Case Title:	In the matter of Renovation Boys Pty Ltd (admins apptd)
Medium Neutral Citation:	[2014] NSWSC 340
Hearing Date(s):	21 March 2014
Decision Date:	25 March 2014
Jurisdiction:	Equity Division - Corporations List
Before:	Black J
Decision:	Direction made that plaintiffs are justified in acting on basis that title in stock items of relevant categories has passed to purchasers subject to satisfaction of specific criteria. Direction made that plaintiffs are entitled to be indemnified for reasonable expenses incurred in identification, preservation and distribution of stock items. Direction made for payment of levy by relevant purchasers and for distribution or disposal of stock items by plaintiffs to purchasers subject to satisfaction of specific criteria. Leave granted for plaintiffs to dispose of company's property subject to security interest after 14 days of date of directions. Further direction made for notification and publication of final orders to affected parties. Liberty granted for interested persons to apply on no less than 48 hours' notice. Order made for plaintiffs be indemnified from company's assets for costs of proceedings. Above orders and directions stayed to 6pm on 26 March 2014.
Catchwords:	CORPORATIONS - voluntary administration - application by administrators for directions under Corporations Act 2001 (Cth) s 447D - whether matter attracts Court's jurisdiction to give directions - where three categories of company stock items are sought to be distributed or disposed - where there existed a retention of title clause in relevant terms of sale agreement - whether title in relevant categories of

stocks had passed to purchaser upon allocation of stock - whether a relevant category of goods should be sold and distributed pari passu - whether purchasers can take relevant stock free of security interests registered by suppliers - whether administrators are entitled to exercise a equitable lien in respect of identification, allocation and distribution of relevant stock to purchasers - whether an equitable lien entitles the administrators to impose a levy upon purchasers to whom title in relevant stock is made available - whether administrators are justified in providing notification to affected parties - whether administrators justified in disposing of any abandoned stock.
SALE OF GOODS - passing of property - where purchasers entered into terms of sale agreements with company - where company initially allocated groups of stock by description to group of purchasers and not by individual contracts - whether relevant goods can be properly characterised as 'unascertained' or 'future' goods - whether relevant goods were in a 'deliverable state' - whether there had been an unconditional appropriation of relevant goods.

Legislation Cited:

- Corporations Act 2001 (Cth) ss 436E, 442C(1), 442C(2)(c), 443D, 443F, 447A, 447D, 479
- Personal Property Securities Act 2009 (Cth) s 12(1), 46, 47
- Personal Property Securities Regulations 2009 (Cth) Sch 1, Pts 2.2, 2.3
- Sale of Goods Act 1923 (NSW) ss 5(1), 5(4), 21, 22, 23

Cases Cited:

- Cinema Plus Ltd (admin apptd) v Australia & New Zealand Banking Group Ltd [2000] NSWCA 195; (2000) 49 NSWLR 513
- Commonwealth Bank of Australia v Butterell (1994) 35 NSWLR 64
- Crouch v Adams [2006] NSWSC 1029
- International Art Holdings Pty Ltd (admin apptd) v Adams [2011] NSWSC 164; (2011) 85 ACSR 1
- Re Ansett Australia Ltd [2001] FCA 1439; (2001) 39 ACSR 355
- Re Ansett Australia Ltd and Korda [2002] FCA 90; (2002) 115 FCR 409; 40 ACSR 433 Re Ansett Australia Ltd and Korda [2002] FCA 90; (2002) 115 FCR 409; 40 ACSR 433
- Re Green (as voluntary administrators of Bevillesta Pty Ltd) [2011] NSWSC 417; (2011) 254 FLR 324; 84

	ACSR 215 - Re Mothercare Australia Ltd (admins apptd) [2013] NSWSC 263 - Re One.Tel Networks Holdings Pty Ltd [2001] NSWSC 1065; (2001) 40 ACSR 83 - Shirlaw v Taylor (1991) 31 FCR 222; (1991) 5 ACSR 767 - Weston v Carling Constructions Pty Ltd [2000] NSWSC 693; (2000) 35 ACSR 100
Texts Cited:	- Michael Bridge (ed), Benjamin's Sale of Goods, (8th ed 2010, Sweet & Maxwell/Thomson Reuters)
Category:	Interlocutory applications
Parties:	Jason Mark Tracy and Vaughan Neil Strawbridge in their capacity as joint and several administrators of Renovation Boys Pty Ltd (admins apptd) (Plaintiffs) Other persons heard: Mr J Walker; Mr M Goldston; Mr P Griffin
Representation	
- Counsel:	Counsel: A P Lo Surdo SC/J Shepard (Plaintiffs)
- Solicitors:	Solicitors: Gadens Lawyers (Plaintiffs)
File Number(s):	2014/78844

JUDGMENT

1 By Originating Process filed on 14 March 2014, Mr Jason Tracy and Mr Vaughan Strawbridge in their capacity as joint and several administrators of Renovation Boys Pty Ltd (admins apptd) ("Company") seek, relevantly, directions under s 447D of the *Corporations Act* 2001 (Cth) in respect of the manner in which they are permitted to deal with certain categories of stock of the Company and their entitlement to be indemnified for expenses incurred in the identification, preservation and distribution of that stock.

2 By way of background, Messrs Tracy and Strawbridge were appointed as voluntary administrators of the Company on 25 February 2014 and the first meeting of creditors under s 436E of the *Corporations Act* was held on 6 March 2014. The Company was a retailer of bathroom and kitchen products, its customers were generally homeowners carrying out renovation works and the Company traded from leased premises at Camperdown and Parramatta. The Company supplied a large number of stock lines and, at the time of the administrators' appointment, had in excess of 1200 outstanding open orders with a total value exceeding $1,500,000, many of which had been paid in full by customers, for stock that had not yet been delivered. The administrators' evidence is that the Company's only asset of any value is its stock and that it has substantial liabilities including trade creditors, inter-company loan liabilities and customer deposits.

3 The Court has previously made orders providing for notification of this application to, inter alia, customers, suppliers and trade creditors of the Company and lessors of the premises occupied by the Company by specified means and for the publication of an advertisement of the application. There is evidence that notification was given and an advertisement was published in accordance with those orders. Two of the Company's customers were heard in respect of the application and a director of a lessor of one of the premises occupied by the Company was also heard in respect of the application.

4 There is considerable urgency in this application, because of the extent of liabilities that are being incurred by the administrators in respect of the Company's operations, in circumstances that the Company has limited assets other than stock. There are complexities both in respect of questions of allocation of stock to particular customers and in respect of retention of title claims by suppliers to the Company. The Court has been assisted by comprehensive submissions by Mr Lo Surdo and Ms Shephard

who appear for Messrs Tracy and Strawbridge and I have drawn on those submissions in this judgment.

The Court's jurisdiction to give directions under s 447D of the Corporations Act

5 Messrs Tracy and Strawbridge seek directions under s 447D of the *Corporations Act* which permits an administrator in a voluntary administration to apply for directions from the Court about a matter arising in connection with the performance or exercise of any of his or her functions and powers. The administrator's power to approach the Court for directions under this section is designed to facilitate the administrator's functions and should be interpreted widely to give effect to that intention: *Re One.Tel Networks Holdings Pty Ltd* [2001] NSWSC 1065; (2001) 40 ACSR 83. The section broadly corresponds to a liquidator's power to seek directions under s 479 of the *Corporations Act*, and the applicable principles were summarised by Goldberg J in *Re Ansett Australia Ltd and Korda* [2002] FCA 90; (2002) 115 FCR 409; 40 ACSR 433 at [65], where his Honour observed that:

> "... the prevailing principle adopted by the courts, when asked by liquidators and administrators to give directions, is to refrain from doing so where the direction sought relates to the making and implementation of a business or commercial decision, either committed specifically to the liquidator or administrator or well within his or her discretion, in circumstances where there is no particular legal issue raised for consideration or attack on the propriety or reasonableness of the decision in respect of which the directions are sought. There must be something more than the making of a business or commercial decision before a court will give directions in relation to, or approving of, the decision. It may be a legal issue of substance or procedure, it may be an issue of power, propriety or reasonableness, but some issue of this nature is required to be raised. It is insufficient to attract an order giving directions that the liquidator or administrator has a feeling of apprehension or unease about the business decision made and wants reassurance."

The Court may give directions to provide guidance on matters of law or to protect the administrator against accusations that it has acted unreasonably: *Re Green (as voluntary administrators of Bevillesta Pty Ltd)*

[2011] NSWSC 417; (2011) 254 FLR 324; 84 ACSR 215 at [10]. A direction under this section protects the administrator from liability for breach of duty or unreasonable behaviour, if full disclosure was made to the Court: *Re Ansett Australia Ltd* [2001] FCA 1439; (2001) 39 ACSR 355 at [59]-[62]. I am satisfied that this is a proper case in which to give such directions, since the application involves matters of some legal complexity and the administrators can fairly seek to be protected against allegations that they have acted unlawfully or unreasonably in addressing those matters.

The issue in respect of category "A" stock

6 The administrators seek directions as to the manner in which they are able to deal with and dispose of three categories of stock items, which are described as categories "A", "C" and "E" in paragraphs 44-45 of the affidavit of Mr Jason Tracy dated 13 March 2014. Two other categories of stock identified in that affidavit are not the subject of an application for directions. The difference between the relevant categories of stock reflects different positions as to the allocation of that stock to customers as recorded in the Company's inventory management system known as "Pronto" and whether sufficient items are held by the Company to deliver the stock recorded as allocated to relevant customers.

7 I will first address the position in respect of category "A" stock as described in Mr Tracy's affidavit, which are stock items for which customers have paid in full, and where, as at the date of the administrators' appointment, those items were allocated by description in the Pronto system maintained by the Company to purchase orders of those customers for that stock - albeit that a particular item of stock of that description was not allocated to a particular customer - and where the Company had sufficient stock of that item to meet all customer orders for that item and also all other items on the particular customer's orders. This category is comprised of 1,800 stock

items totalling $255,134 of stock at cost allocated to 467 customers in total.

8 The administrators seek a direction that they are justified in treating title or property in category "A" stocks as having passed to the relevant customers, regardless of whether those items are also category "E" stock. (I will address the position in respect of category "E" stock below). The direction sought raises the legal question whether title or property to those items has passed from the Company to the customers who paid in full for those items and to which they were allocated in the Pronto system. The administrators fairly acknowledge the possibility that individual discrepancies between items and orders within this and other categories may have a bearing on whether title has passed, but submit that it is not practical to investigate the circumstances of each individual purchase order and item. It seems to me that the Court may properly give a direction in respect of stock falling with the relevant category by reference to their common characteristics, which does not, of course, require the administrators to act in accordance with that direction if matters come to their attention in respect of individual items, customers or dealings that indicate it would not be appropriate to do so.

9 The administrators point out that the Company's terms of sale, as recorded in sales confirmations created at the time of sale (Ex A1, p 484), relevantly provided that:

> "All goods remain the property of Renovation Boys until full payment is received."

That provision is not directly applicable to the category "A" and category "C" stock that are in issue in this application since the customers had paid in full in respect of stock falling in those categories. It does not specifically provide, but is not inconsistent with, title in such stock passing to the customer at the point of payment or, as I will note below, at the point of allocation of a relevant stock item to the customer. The Company's terms

of sale also provide for the Company to charge storage fees to the customer after 30 days after the goods are "available" and that it is the customer's responsibility to check goods at the time of pick up.

10 Mr Tracy's evidence, based on his investigations and information provided to him by Company staff, is that, at the time that purchase orders were placed, the Company's staff generally checked whether there was stock then presently available to satisfy the order and, if so, a notation was made to that effect on the order form (Tracy [17]-[19], Ex A1 p 484). Stock would then be allocated to customer orders that met certain conditions within the Company's Pronto system. The process of allocation involved the Company's staff "allocating" available stock to purchase orders by description and not, as I noted above, by allocating an individual item to an individual customer. Stock would be "allocated" to a customer where, first, there were sufficient unallocated stock items available in that stock line to satisfy the customer's order; second, all products on the individual customer's sales order were available and otherwise unallocated; and, third, the customer had paid for their order in full (Tracy [23]). After stock was allocated to a customer's order, that order was identified within the Pronto system by a notation "Order released with status of Ready for Picking" (Tracy [26]). That status could, however, be manually overridden by the Company's sales staff if, after contacting the customer or warehouse staff, the estimated collection or delivery date had changed, although this only occurred rarely (Tracy [27]). The goods purchased by and allocated to a customer could be either collected from the Company's premises or delivered to customers.

11 Mr Tracy's evidence is also that, occasionally, the Company's staff would manually override the allocation of stock to a customer in the Pronto system if, for example, another customer wished to purchase and collect goods on the same day, selling an item of stock that had been previously allocated to a customer with the result that the stock allocated to customers would then exceed the amount of stock held (Tracy [28]).

Presumably, this provides at least a partial explanation of how the position in respect of category "C" stock noted below arose. The relevant stock items did not have serial numbers or other means of identifying individual items and items were not picked, marked, packed or physically separated by staff until the time of delivery or pick up (Tracy [29]).

12 With this background, Mr Lo Surdo and Ms Shepard draw attention to s 21 of the *Sale of Goods Act 1923* (NSW) which relevantly provides that, where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. Section 22 of the *Sale of Goods Act* in turn provides that:

> "(1) Where there is an contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case."

13 Section 23 of the *Sale of Goods Act* specifies several rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to a buyer, unless a contrary intention appears. Rules (1) and (2) in s 23 of the *Sale of Goods Act* provide as follows:

> "Rule 1, Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.
>
> Rule 2, Where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods for the purpose of putting them in a deliverable state, the property does not pass until such thing be done and the buyer has notice thereof."

The term "specific goods" is defined in s 5(1) of the *Sale of Goods Act* as goods identified and agreed upon at the time a contract of sale is made. As Mr Lo Surdo and Ms Shepard point out, it is possible, although not established by the evidence, that a single stock item may have been

allocated to a single customer by the Company's staff making the relevant notation on a purchase order as to the availability of stock (Tracy [19]), so that it could be said that that stock item was "specific goods" within the meaning of s 5 of the *Sale of Goods Act* and that property in the item passed to the customer on the making of the contract in accordance with s 23, rule (1) or (2), where payment had been made by the customer. However, it is not known whether that occurred and it would not support a wider direction of the kind sought by the administrators.

14 Rule (5) in s 23 of the *Sale of Goods Act* in turn provides that:

> "Rule 5 (1), Where there is a contract for the sale of *unascertained* or *future goods* by description, and goods of that description and *in a deliverable state* are *unconditionally appropriated* to the contract either by the seller *with the assent of the buyer* or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made." [emphasis added]

The term "future goods" is defined in s 5(1) of the *Sale of Goods Act* as "goods to be manufactured or acquired by the seller after the making of the contract of sale". Mr Lo Surdo and Ms Shepard submit, and I accept, that, in the most likely case that numerous items were available to fill the order at the time of its placement, the goods are properly characterised as "unascertained" for the purposes of this rule until the stock was allocated to the order and, where items were not available to fill the order when it was placed, the items were "future" goods for the purposes of this rule.

15 Section 5(4) of the *Sale of Goods Act* in turn provides that goods are in a "deliverable state" when they are in such a state that the buyer would under the contract be bound to take delivery of them. The administrators point out that, on one view, the customers were bound to take delivery of the items once the items were allocated to their orders and the time for delivery or collection, as specified in the purchase order, had arrived, and that this construction is supported by the Company's reservation of the power to impose storage fees after 30 days from the date that the goods

are "available". The nature of the Company's business and the administrators' evidence does not disclose any reason to think that the items generally were not in a deliverable state. It seems to me that the administrators would properly proceed on that basis, at least absent a reason to think the contrary in respect of any particular item.

16 The concept of "unconditional appropriation" in rule (5) in s 23 of the *Sale of Goods Act* is in turn explained in *Benjamin's Sale of Goods*, 8th ed ([5.071], [5.073]) and that requirement is satisfied where the party appropriating that the property intends that it will pass by the appropriation, if assented to by the other party, and not upon the occurrence of some further event such as payment or tender of the price, and requires that appropriation "is not subject to any condition, express or implied, upon the fulfilment of which the passing of property depends". No such condition seems to have existed in this case, notwithstanding that there were occasions, apparently rarely, on which the Company subsequently reallocated stock that had previously been appropriated to the relevant customer. It seems to me that, on balance, where payment was made in full (which is the premise of category "A"), the Company's act of "allocating" the purchase order should be treated as an unconditional appropriation of the goods to the purchase order for the purposes of this rule.

17 The fact that a specific item could not be identified, at the time of appropriation or now, as having been appropriated to a contract with a particular customer, does not necessarily mean that appropriation did not occur. In *Crouch v Adams* [2006] NSWSC 1029 at [36], White J distinguished the position between there being no appropriation of goods to a contract and it being impossible to determine what goods were appropriated to an individual contract as follows:

> "There is an important distinction between there being no appropriation of goods to a contract and its being impossible now to determine what goods were appropriated to an individual contract. It does not follow that because the liquidator cannot now determine

> which machines were appropriated to which contract, that no appropriation occurred. If there were an appropriation, the property in the machines, both at law and in equity, passed to the individual buyers. If there were not, then, in my view, property in the machines, both at law and in equity, remained with the company."

18 Mr Lo Surdo and Ms Shepard properly recognise that the position in this case is less clear than that considered in *Crouch v Adams* above, where White J found (at [40]) that the relevant company had allocated particular vending machines to individual contracts although no records existed to ascertain which machine had been allocated to which contract, in circumstances that each machine was acquired by the company for delivery to a specific venue. By contrast, there is no evidence in this case that the Company generally acquired items from suppliers for delivery to particular customers, and the Company's practice is better described as allocating a group of items to a group of customers whose orders satisfied the criteria noted above. Nonetheless, it seems to me that the result of that practice was that a particular item (which immediately before had been unallocated) was then allocated to a customer, albeit that item was not then or now distinguishable from other identical items that had previously been allocated to other customers. At the least, it seems to me that there was an unconditional appropriation of a group of items to a group of customers, and those customers at least had property in those items as tenants in common, consistent with the reasoning of White J in *Crouch v Adams* above. It is, of course, not necessary to a direction to the administrators that that analysis ultimately be correct, but only that it be sufficiently cogent to justify a course of action by the administrators that would be consistent with it.

19 The administrators recognise that an appropriation must have implied or express assent of the customer, although that consent may be given in advance and without knowledge of the particular item to be appropriated: see *Crouch v Adams* above at [38] and cases cited therein. The administrators submit, and I accept, that the customer's assent to the Company's appropriation of items to the customer's purchase order in

advance should be treated as implied from terms set out in the purchase order and the customer's consent to have the items made available at the selection of the Company, from the goods that were available in stock at the time of the allocation.

20 The administrators recognise that an alternative view might be taken that category "A" items, despite being "allocated" on Pronto to the particular purchase order, were not "appropriated" to the purchase order within the meaning of the *Sale of Goods Act* until the item was identified, picked and physically made available for collection by or delivery to the customer. On this view, no property would have has passed to customers in category "A" items unless those customers could show that particular circumstances existed by which an item was appropriated to the contract. The administrators also recognise that the question whether goods were unconditionally appropriated to the purchase orders may turn on the particular facts of an order, but it is plain that the administrators do not have sufficient funds available to explore the individual circumstances of each purchase order nor would that course be in the interests of customers, creditors or the administration even if funds were available for it.

21 On balance, it seems to me that the better view is that property in category "A" stock passed to customers upon the Company's allocation of goods to the relevant purchase order, consistent with the facts that the relevant customers had paid for the goods in full, the Company had undertaken an act of allocation in respect of an item to a customer, although the particular items was not then or now individually identifiable, and those goods are available for collection and would have been collected or delivered, had the Company not been placed in administration. In these circumstances, and where the administrator does not have funds to investigate the individual circumstances of orders placed for category "A" stock, and that such a course would unreasonably delay the administration and be a waste of monies otherwise available to creditors even if it were possible, a

direction should be made that the administrators are justified in proceeding on the basis that title has passed in respect of category "A" stock to customers who have ordered such items. I will address the further questions whether such customers would take free of security interests registered by suppliers in respect of category "E" stock and whether the administrators would be entitled to exercise a lien over that stock below.

The issue in respect of category "C" stock

22 I now address the position in respect of category "C" stock as described in Mr Tracy's affidavit. This category also relates to stock for which customers had paid in full and where that stock was allocated in the Pronto system maintained by the Company to purchase orders of particular customers, but here (by contrast with category "A" stock) there are insufficient stock items to fill all customer orders to which the stock had been allocated. The Company relevantly has 167 stock items on hand to meet 235 allocated and paid customer orders, reflecting a shortfall of 68 stock items. The total value of the stock items is $10,224 which is allocated to 127 customers, with the implication being that several customers have more than one item allocated to them. No security interests registered by suppliers on the Personal Property Security Register ("PPSR") relate to stock within this category. The administrators seek a direction that they would be justified in treating title or property in category "C" stock as remaining with the Company or, alternatively, in treating title or property in category "C" stock as having passed to the purchasers of the stock, such that they are entitled to a share in the proceeds of sale of those items.

23 The administrators submit that, in circumstances where there is an over-allocation, the specific items have not been "unconditionally appropriated" to the purchase orders within the meaning of rule (5) of s 23 of the *Sale of Goods Act* and, on that basis, they seek a direction that they are justified in treating title as having been retained by the Company. I do not accept that

submission. It seems to me that the necessary consequence of the Company's procedures and the reasoning set out above is that there was, at a point in time, an unconditional appropriation of goods in this category to the relevant customers, albeit that the Company may have subsequently reallocated the items to other customers either to accommodate another customer's wish to pick up the same item on the day it was purchased or because the first customer deferred his or her collection or delivery of that stock. The fact that an appropriation was later reversed - even if the customer may have arguably impliedly consented to that course when he or she deferred a collection or delivery of the goods - does not seem to me to have the consequence that it should be treated as conditional or as not having occurred when made.

24 Alternatively, the administrators submit that, if it is determined that appropriation has occurred such that title has passed, then the customers in this category have title to the goods as tenants in common. This was the result reached in *Crouch v Adams* (at [43]-[46] and [48]-[49]) and a direction was given in that case, which the administrators here seek in the alternative, that the liquidator is justified in selling the goods and making a distribution pari passu. I consider that a direction in that form should be made, subject to the question of recovery of the administrators' costs that I will address below.

The issue in respect of category "E" stock

25 Category "E" stock as described in Mr Tracy's affidavit is, relevantly, a subset of category "A" (and also categories "B" and "D" referred to in Mr Tracy's affidavit, which are not otherwise in issue) in respect of which the suppliers of the relevant stock to the Company have registered, in the PPSR, a security interest as a conditional sale agreement (which includes an agreement to sell subject to retention of title) under s 12(1) of the *Personal Property Securities Act* 2009 (Cth) ("PPSA"). The stock subject to the registered security interest has a total value of $102,355.36 and

stock valued at $17,173 within category "A" is affected. Mr Tracy's evidence is that no such claims are registered on the PPSR in respect of category "C" stock. The administrators also point out that Sch 1, Pts 2.2 and 2.3 of the Personal Property and Security Regulations 2010 (Cth) set out the "classes of collateral" which must be described in the PPSR by serial number and they do not relevantly extend to items of the nature sold by the Company.

26 I consider that the administrators should be directed that they would be justified in treating category "E" items in the same manner as category "A" items, by reason of ss 46 and 47 of the PPSA. Section 46 of the PPSA relevantly provides:

> "(1) A buyer or lessee of personal property takes the personal property free of a security interest given by the seller or lessor, or that arises under section 32 (proceeds-attachment), if the personal property was sold or leased in the ordinary course of the seller's or lessor's business of selling or leasing personal property of that kind."
>
> (2) Subsection (1) does not apply if:
>
> (a) in a case in which personal property of that kind may, or must, be described by serial number-the buyer or lessee holds the personal property:
>
> (i) as inventory; or
>
> (ii) on behalf of a person who would hold the collateral as inventory; or
>
> (b) in any case-the buyer or lessee buys or leases the personal property with actual knowledge that the sale or lease constitutes a breach of the security agreement that provides for the security interest."

27 Section 47 of the PPSA in turn provides that:

> "(1) A buyer or lessee of personal property, for new value, that the buyer or lessee intends (at the time of purchase or lease) to use predominantly for personal, domestic or household purposes takes the personal property free of a security interest in the property if the market value (worked out at the time each part of the total new value is given) of the total new value given for the personal property is not more than:
>
> (a) $5,000; or
>
> (b) if a greater amount has been prescribed by regulations for the purposes of this subsection-that amount.

(2) Subsection (1) does not apply if:
(a) the personal property is of a kind that the regulations provide may, or must, be described by serial number in a registration; or
(b) the buyer or lessee buys or leases the personal property with actual or constructive knowledge that the sale or lease constitutes a breach of the security agreement that provides for the security interest; or
(c) at the time the contract or agreement providing for the sale or lease is entered into, the buyer or lessee believes, and it is actually the case, that the market value of the personal property is more than:
(i) $5,000; or
(ii) if a greater amount has been prescribed by regulations for the purposes of this paragraph-that amount."

28 Mr Tracy's evidence is that each of the individual stock items within this category has a market value of $5,000 or less and that he is aware of no circumstances that indicate that stock was sold other than in the ordinary course of business; was acquired by customers to be used other than predominantly for personal domestic or household use; or that a customer had actual knowledge that the purchase of this stock would be in breach of a security agreement registered in the PPSR (Tracy [44]). The suppliers were given notice of this application and none of them sought to contest that evidence. The administrators contend, and I accept, that the relevant customers are presumed to take the stock free of the security interests registered by the suppliers under s 46 or, alternatively, s 47 of the PPSA. A direction should be made that the administrators are justified in proceeding on that basis.

Direction as to whether the administrators are entitled to exercise a lien in respect of certain costs

29 The administrators also seek a direction that they are entitled to proceed on the basis that they may exercise a lien for the cost of identifying, allocating and distributing the stock in which title is with a third party. The administrators contend that course is justified so that such costs are ultimately borne by the customers who have obtained title to and take delivery of the stock, rather than by unsecured creditors of the Company or by the administrators personally. The administrators seek to allocate such

costs, on a pre-determined basis, to the customers who have obtained title to the category "A" and "C" stock (free of security interests registered on the PPSR) and to suppliers with retention of title claims to the extent that it is determined that title resides with the supplier because of a security interest registered on the PPSR. The second allocation does not arise given the findings that I have reached above.

30 An administrator has a statutory lien over property of a company under s 443F of the *Corporations Act* in respect of his or her right of indemnity under s 443D of the *Corporations Act*: *Cinema Plus Ltd (admin apptd) v Australia & New Zealand Banking Group Ltd* [2000] NSWCA 195; (2000) 49 NSWLR 513 at [69]. The administrators point out that an administrator may also assert an equitable lien that secures his or her right to recover expenses and fees out of property that he or she has incurred expenses in realising or maintaining in the course of the administration: *Shirlaw v Taylor* (1991) 31 FCR 222; (1991) 5 ACSR 767; *Commonwealth Bank of Australia v Butterell* (1994) 35 NSWLR 64 at 71, per Young J; *Weston v Carling Constructions Pty Ltd* [2000] NSWSC 693; (2000) 35 ACSR 100 at [18] per Austin J. The basis of imposition of that equitable lien was described by the Full Court of the Federal Court in *Shirlaw v Taylor* above (at 228) as follows:

> "[I]n addition to equitable liens arising from contractual dealings in property, equity may raise liens based either upon general considerations of justice or upon the principle that he who seeks the aid of equity in enforcing some claim (for example in an administration of assets) must admit the equitable rights of others directly connected with or arising out of the same subject matter."

31 The administrators point out that, in *Crouch v Adams* above at [20]-[23], White J held that a liquidator was justified in acting on the basis that he was entitled to a lien for reasonable remuneration for work done in the identification, preservation or realisation of property belonging to the purchasers of the relevant goods and that the liquidator would be justified in not delivering those goods to the relevant purchaser if he or she declined to pay a levy to meet the relevant costs. In *International Art*

Holdings Pty Ltd (admin apptd) v Adams [2011] NSWSC 164; (2011) 85 ACSR 1 at [81], Ward J observed that the principles in respect of an equitable lien in favour of a person who has administered relevant property applied not only to an administrator or receiver appointed by the Court but also to a person performing the functions of an administrator appointed under the provisions of the *Corporations Act*; noted (at [61]-[83]) that, if the administrator's statutory lien under s 443D of the *Corporations Act* was not available to the administrator in that case because, for example, the relevant assets were not "property of the company", an equitable lien may be available to the administrator; and accepted (at [112]) that work undertaken by the administrator to satisfy himself or herself as to the identification of property and the determination of parties with an interest in it was properly treated as for the benefit of those parties and gave rise to an equitable lien.

32 It seems to me that the administrators' claim to an equitable lien is justified in principle. The evidence establishes that they have incurred costs in identifying and preserving assets in which title has, I have held, passed to the relevant customers and will incur further costs in identifying, preserving and making such assets available to those customers. Had they not incurred those costs, it seems inevitable that the stock would have had to be sold or abandoned and then sold by the lessors of the relevant premises and lost to the customers. In these circumstances, it would be inequitable for those customers to receive the benefit of the stock without contributing to the costs that the administrators have incurred to preserve it and make it available to them.

33 The administrators seek a direction that they are justified, by reason of that equitable lien, in levying a proportion of costs incurred as estimated at paragraphs 52 to 57 of Mr Tracy's affidavit in respect of customers to whom the relevant stock is made available. Their evidence is that they are without funds and, without indemnification for the costs of identifying, preserving, locating and facilitating the collection of stock to which title may

have passed, they may be forced to abandon the stock (Tracy [46]-[51]). Mr Tracy's evidence is that he estimates that it will take at least 4 weeks to facilitate a stock program by which the administrators make stock available to relevant customers and realise stock as to which the Company has clear title. His evidence is also that the costs of administering the stock program are expected to total $358,651, comprising costs incurred as at 13 March 2014 of $160,049 plus estimated costs of $198,602 (Tracy [36], [53], [54], [57]). The information provided by the administrators as to costs incurred to date and remaining to be incurred in respect of the process of dealing with the stock is further broken down into various categories of employee costs, lease costs in respect of the various properties in which stock is held, costs relating to machinery used to deal with the stock such as forklifts and stockpickers, costs in respect of utilities such as electricity and telephone, insurance and other costs. The administrators have in turn allocated costs to different categories of stock, by reference to which category of stock would benefit from incurring the relevant costs, and have in turn allocated costs which relate to more than one category of stock on a pro-rata basis by reference to the retail cost of stock within the relevant categories.

34 The administrators' estimate of further costs includes an item for administrators' costs referable to category "A" and "C" stock. I had some hesitation as to whether the latter item should be treated as the subject of a lien at this point, where those costs will not have been subject to any external review. However, the administrators will necessarily and properly incur costs in administering the process to be undertaken and it seems to me that an allowance must be made for those costs now, since this is the only point at which they can practically be addressed. Any risk that the administrators' estimate of those costs is in excess of the costs that are properly allowable can be addressed by requiring an undertaking by the administrators to repay any amount of those costs that were not reasonably incurred in dealing with the relevant categories of stock.

35 The administrators note that these costs - which are by no means insubstantial - reflect the fact that, in the period 25 February 2014 to approximately mid-April 2014, they have incurred or will incur the leasing costs of the five premises housing the stock; the wages of employees; the rent and maintenance of plant and equipment such as forklifts; costs of utilities and office supplies; relocation costs; and labour hire (Ex A1, p 507). The administrators have apportioned $132,497 of the total costs to category "A" stock representing a levy of 31% of that stock value (Tracy [57]). The administrators seek a direction that they are justified in imposing a levy of 31% on stock items as a condition of those customers taking delivery of the stock. It seems to me that that approach is a reasonable one and it is difficult to imagine any other approach that could sensibly be adopted in the circumstances. Mr Tracy's evidence is that, if the actual cost of delivering stock is less than the estimates made, arrangements would be made to refund the difference on a pro-rata basis. It seems to me that the exercise of any lien by the administrators should be conditional on their giving an undertaking in that respect, which should cover the difference between the reasonable cost of delivering that stock and the estimates set out above.

36 Alternatively, the administrators sought an order under s 447A of the *Corporations Act* that Pt 5.3A of the *Corporations Act* would have effect in relation to the Company as if it provided that their right of indemnity under s 443D of the *Corporations Act* extended to debts incurred or reasonably to be incurred in the performance or exercise of their functions as administrators including in relation to the identification, preservation and distribution of property in the possession of the Company with such indemnity to attach also to any such assets notwithstanding that they may not be "property of the company" and in priority to any PPSA retention of title property. I do not consider it necessary to determine that question given the urgency of the matter, where I will direct that the administrators would be justified in relying upon their equitable lien in the relevant circumstances. As I noted above, the administrators also sought a

direction as to the position in respect of a lien if suppliers had an enforceable registered security interest. It is not necessary to address that question given the findings that I have reached above.

Notification of orders and other communications by the administrators

37 The administrators also seek directions, in paragraphs 11-13 of the Originating Process, in respect of the notification of any final orders made in this application and, in paragraph 14 of the Originating Process, with respect to the giving of notices in the administration generally, including in respect of notice of the second creditors' meeting. The administrators submit that those orders are sought to facilitate proper notice being given to customers and other creditors in circumstances where the administrators do not have full contact details for those creditors, and particularly customers.

38 I summarised the relevant case law in *Re Mothercare Australia Ltd (admins apptd)* [2013] NSWSC 263 at [8]-[9] as follows:

> "The Courts have, over time, become increasingly willing to modify the manner in which notices may be given in respect of companies in administration to address issues of costs and practicality, and have been increasingly willing to contemplate electronic means providing such notices, no doubt as such means are more widely accepted in the wider community. In the early decision of *Re Ansett Australia Ltd v Mentha* [2002] FCA 2; (2002) 115 FCR 395; (2002) 40 ACSR 419, Goldberg J was not prepared to grant orders which would have entirely dispensed with personal communication with creditors, by providing only for publication on a website. However, there are several subsequent decisions in which orders have been made, both in respect of the first and second meeting of creditors, permitting notice to be given by electronic means to those for whom email addresses are available and otherwise by notice on the administrators' website and by newspaper advertisement: for example, *ABC Learning Centres Ltd (admins apptd) (recs and mgrs apptd)* [2010] FCA 353; *Re Silvia (as administrators of FEA Plantations Ltd (admins apptd))* [2010] FCA 468; *Re Carson (as administrators of Hastie Group Ltd (admin apptd)* [2012] FCA 626 and *Carson Re Hastie Group Ltd (No 2)* [2012] FCA 717.
>
> In the present case, the Administrators have noted that it is likely to be possible to provide notice by email to creditors drawing attention to publication of the reports on the relevant website, and to combine

> such notice with notices on both the Administrators' and the companies' website and with newspaper advertisements. I consider that to be an appropriate course given the number of creditors involved in the class to which I have referred; the fact that their claims are likely to be relatively small, in circumstances that the balance sheet reflects an amount of $440,000 attributable to such claims, and not all of those claims would be redeemed in the ordinary course; and the significant costs involved in giving notice to that class of creditors. In my view, consistent with the approach adopted in *Re Silvia (as administrators of FEA Plantations Ltd (admins apptd))*, this course recognises on the one hand the need to take appropriate steps to give notice to creditors but, on the other hand, the need to avoid costs of compliance that would otherwise operate to the detriment of the creditors generally."

39 In this case, Mr Tracy's evidence is that parties who may be affected by the proposed orders include 1,291 customers, 4 suppliers, 3 lessors, 298 general trade creditors and 41 employees and that the administrators propose to upload a copy of the application and orders to their website in respect of the Company and notify affected parties by various means. Customers would be notified by text messages sent to mobile phone numbers or by text to voice messages sent to landline numbers, in circumstances that very few customers had provided email or postal addresses to the Company. That process has previously been substantially successful in respect of giving notice of this application to customers, although the administrators properly recognised that text messages did not go through to a proportion of customers, presumably because they had changed their mobile number after placing an order with the Company or that number was incorrectly entered in the Company's records at the time the order was made. Suppliers would be notified by telephone and by letter sent by email and lessors would be notified in the same manner. The five largest trade creditors of the Company, which represent nearly 62% of the dollar value of total creditors, would also be notified by telephone and letter sent by email. The administrators also propose to advise customers of any order made by the Court in respect of the administrators' expenses of returning the stock by notifying those customers by text message and posting a circular to customers on their website for the Company, and also writing to such customers by letter and post.

40 It seems to me that the approach proposed by the administrators strikes an appropriate balance between the need to take appropriate steps to give notice to creditors and, on the other hand, the need to avoid costs in giving such notice that would otherwise operate to the detriment of the creditors generally. I will make a direction that the administrators are justified in taking that approach.

Disposal of uncollected stock and PPSA property

41 The administrators recognise that some customers may not exercise their right to possession even if the Court makes orders for such stock to be made available to them, subject to the administrators' lien. The administrators note that, absent a direction from the Court, they would be exposed to the difficulty of being unable to recover costs in respect of uncollected stock and would be left to incur additional costs, for which they are unfunded, in preserving that stock. The administrators seek a direction that they would be justified, if stock remains uncollected within two weeks of their giving notice to customers, in disposing of the abandoned stock and recovering their expenses in relation to that stock from the proceeds of its realisation. I accept that, to some extent, that course involves an element of commercial judgment, but it also seems to me to be a decision as to which the administrators could be exposed to allegations of acting unreasonably, which would be unjustified in the relevant circumstances. For that reason, I consider that that is properly a matter for a direction by the Court that they would be justified in taking those steps.

42 The administrators seek leave under s 442C(2)(c) of the *Corporations Act* to dispose of property of the Company that is subject to a security interest under the PPSA after 14 days of the date of these directions on condition that the proceeds of sale are subject to the provisions of Pt 5.3A Div 8 of the *Corporations Act*. Section 442C(1) of the *Corporations Act* provides that an administrator must not dispose of property of the company that is

subject to a security interest, subject to the qualification that such a disposal may be made with the leave of the Court, which may be given if the Court is satisfied that arrangements have been made to protect adequately the interests of the secured party. I am satisfied that such arrangements will be made by treating the relevant proceeds in accordance with Pt 5.3A Div 8 of the *Corporations Act*, and that there is justification for giving such a direction given the limited funds available to the administrators and the costs of the Company continuing to occupy leased premises and employ staff so as to deal with the relevant property beyond the expiry of that two week period.

Other parties' submissions

43 As I noted above, two of the Company's customers appeared and were heard in respect of the application. Their submissions emphasised the real hardship suffered by customers who have paid for goods in full but not been able to obtain access to them. That hardship may be reduced, in respect of the category "A" stock, so far as the customers will obtain access to the stock allocated to them in the manner set out above, albeit they will unfortunately need to contribute to the administrators' costs of providing that access as noted above, notwithstanding that they have already paid for that stock. Customers who have ordered stock that falls within category "C" will, unfortunately, receive only a pro-rata distribution of the proceeds of sale of the stock they had purchased, as noted above, and other customers in other categories and other creditors may ultimately be left to prove in a liquidation.

44 A director of the lessor of the Company's North Parramatta premises, Mr Peter Griffin, appeared on the application and identified several areas of concern in respect of the payment of rental on those premises during the administration period; as to title to stock if it is abandoned; and as to the lessor's rights in respect of an extension of the convening period. Mr Griffin did not seek to set aside the extension of the convening period that the

Court had already ordered in order to facilitate any stock disposal program that may be undertaken by the administrators. Ultimately, I understand Mr Griffin to have accepted that the course that the administrators were seeking to take was broadly in the lessors' interests, so far as the release of stock to customers entitled to it would reduce the amount of any stock that might ultimately be abandoned by the administrators, and the exercise of the proposed lien over that stock should place the administrators in funds to meet rental due on the premises. I did not understand Mr Griffin ultimately to oppose the orders sought by the administrators in that respect.

45 Mr Griffin has, of course, made his concerns clear to the administrators and will have the ability to be heard further in respect of those concerns if it is ultimately necessary for the administrators to seek a further extension of the convening period, or on a further application to the Court seeking specific orders if any areas of difference between the lessors and the administrators in respect of the occupancy of the premises cannot be resolved between them. It is not necessary or appropriate to make orders in respect of the other matters he raised at this point.

Orders

46 The administrators had submitted draft short minutes of order to reflect the position for which they primarily contended. I propose to amend those short minutes in several respects for greater clarity and to reflect the findings that I have set out above.

47 I have amended the direction contained in paragraph 1 of the draft short minutes to identify the categories of stock more precisely by reference to the relevant paragraphs of Mr Tracy's affidavit. I have amended the direction proposed in paragraph 1(b) of the draft short minutes to reflect the views which I have formed in respect of category "C" stock, as noted in paragraphs 22-24 above. I will make the directions contained in

paragraphs 1(d)-(f) of the draft short minutes of order in the form proposed by the administrators, other than to amend the words "actual cost" in paragraphs 1(e) and (f) to read "reasonable cost". I will also make the directions proposed in paragraphs 1(g) and 1(i), but have renumbered the latter direction as paragraph 1(h).

48 I will grant the leave sought in paragraph 2 of the administrator's draft orders in respect of the disposal of property subject to security interests, reflecting the issue addressed in paragraph 42 above. I will also make the directions in paragraphs 3, 4, 5 and 6 of the administrators' draft orders dealing with notification of creditors and other affected parties, publication of a notice concerning the making of final orders, and communication with interested persons by email. I will also make order 7 in respect of the indemnification of the administrators from the Company's assets for the costs of these proceedings.

49 In the light of the commercial urgency of the matter, I will now make those orders as set out below but stay them until 6pm on 26 March 2014 to allow the administrators or any interested person to bring the matter back before the Court if any issue would arise in respect of the implementation of the amended orders that I may not have anticipated.

50 I make the following orders:

1 Direct, pursuant to section 447D of the *Corporations Act 2001* (Cth) ("Act") that:

(a) the Plaintiffs are justified in acting on the basis that title in the stock items in category "A" described in paragraph 44(a) of the affidavit of Jason Tracy sworn 13 March 2014 ("Mr Tracy's affidavit") has passed to a customer who has paid for a stock order in full and to whom items within that stock line have been allocated to the customer in the Company's inventory management system;

(b) the Plaintiffs are justified in acting on the basis that title in the stock items in category "C" described in paragraph 44(c) of Mr Tracy's affidavit has passed to the group of customers who have paid for a stock order in full, to whom items within that stock line have been allocated but in respect of which there are insufficient items in stock to satisfy the stock allocations, and in selling those goods and making a distribution of the proceeds pari passu to those customers;

(c) the Plaintiffs are justified in acting on the basis that title in the stock items in category "E" described in paragraph 44(e) of Mr Tracy's affidavit has passed to a customer who has paid for a stock order in full and to whom items within that stock line have been allocated to the customer in the Company's inventory management system and notwithstanding that security interests over those stock items have been registered under the *Personal Property Securities Act* 2009 (Cth) ("PPSA");

(d) the Plaintiffs are justified in acting on the basis that they are entitled to a lien for expenses incurred in the identification, preservation and distribution of stock items;

(e) the Plaintiffs are justified in acting on the basis that they have an entitlement to an indemnity in equity out of stock items for reasonable expenses incurred in the identification, preservation and distribution of stock items;

(f) the Plaintiffs are justified in requiring payment of a levy by customers to whom title in stock items has passed, payable prior to the release of such stock to those customers, representing their reasonable expenses incurred in the identification, preservation and distribution of those stock items as specified, and in the proportions set out, at paragraphs 56 and 57 of Mr Tracy's affidavit on the administrators' undertaking to refund the difference

on a pro-rata basis should the reasonable cost of delivering stock be less than the estimates set out therein;

(g) the Plaintiffs are justified in distributing stock items to a customer where:

(i) title has passed to that customer;

(ii) there are sufficient stock items on hand in that stock line to satisfy all title claims by customers;

(iii) the stock items within that stock line have been allocated to a customer in the Company's inventory management system;

(iv) the stock items are collected within 14 days from the date of these directions; and

(v) the customer has paid to the Plaintiffs a sum of money or levy representing the reasonable expenses incurred by them in the identification, preservation and distribution of the stock items in accordance with direction 1(f); and

(h) the Plaintiffs are justified in disposing of any stock not collected in accordance with direction 1(g) within 14 days of the Plaintiffs providing written notice to the customer of their intention to do so, such notice to be given by text message to mobile phone or landline or by email, and to recover the expense incurred by them in the identification, preservation, distribution and disposal of that stock from the proceeds of sale in accordance with direction 1(f).

2 Grant leave, further to directions 1(c) and 1(f) and pursuant to s 442C(2)(c) of the Act, to dispose of such property of the Company that is subject to a security interest under the PPSA after 14 days of the date of

these directions on condition that the proceeds of sale are subject to the provisions of Division 8 of Part 5.3A of the Act.

3 Direct that the Plaintiffs notify affected parties of the final orders, by:

(a) uploading a copy of the final orders to www.deloitte.com/au/renovation-boys;

(b) with respect to customers for whom the Plaintiffs have mobile numbers, by sending a text message (sms) as set out below:

> "Renovation Boys P/L (Admin'rs App'd):The Supreme Court has made final orders in relation to the Administrators' application. Customers are directed to the following website www.deloitte.com/au/renovation-boys to obtain a copy of the orders";

(c) with respect to customers for whom the Plaintiffs have landline numbers, by a computer generated message (text to voice message) to the landline telephone number, in the same terms as the message set out in sub-paragraph 3(b) above;

(d) with respect to suppliers with retention of title claims that are registered on the Personal Property Securities Register, by sending a letter attaching the orders, by email, to those suppliers;

(e) with respect to lessors of the properties occupied by the Company, by sending a letter attaching the orders, by email, to those lessors;

(f) with respect to the five largest general trade creditors, by sending a letter attaching the orders, by email, to the five largest creditors of the Company;

(g) with respect to the remaining trade creditors, for whom the Plaintiffs have mobile numbers, by sending a text message (sms) as set out at 3(b) above.

(h) with respect to employees, by sending a letter attaching the orders, by email, to those employees; and

(i) with respect to the persons appearing at the hearing of the originating process, by sending a letter attaching the orders, by email, to those persons.

4 Direct that, within 3 business days of the final orders being made, a notice be published in the Sydney Morning Herald newspaper to that effect.

5 Grant liberty to any interested person including those claiming an interest in a stock item to apply on no less than 48 hours' notice.

6 Order, pursuant to section 447A of the Act, that Part 5.3A of the Act operate in relation to the Company and only with respect to the customers and general trade creditors (other than the 5 largest trade creditors) as if:

(a) each of the customers and general trade creditors for whom the Company has an email address had nominated that email address under section 600G of the Act as the address by which they may be notified of all notices and documents relating to the Company; and

(b) each of the customers and general trade creditors for whom the Company has no email address, regulation 5.6.12(2) of the Corporations Regulations permitted notices of meetings to be given by publishing:

(i) an advertisement in the Sydney Morning Herald newspaper; and

(ii) a copy of the notice of meeting and any other accompanying documents on the web site www.deloitte.com/au/renovation-boys.

7 Order that the Plaintiffs be indemnified from the Company's assets for the costs of these proceedings.

8 The orders in paragraphs 1-7 above be stayed to 6pm on 26 March 2014.

51 After the delivery of this judgment and before these orders took effect, I made a further order, for the reasons set out in my judgment delivered on 26 March 2014 ([2014] NSWSC 354) amending order 1(f) of the orders set out above to insert in the second line, after the words "customers to whom title in stock items has passed", the additional words "and by valid retention of title holders", and to insert in the third line after the words "those customers" the words "and those retention of title holders".

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