IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA303/2023
[2024] NZCA 528

BETWEEN	BENJAMIN BRIAN FRANCIS AND SIMON DALTON AS LIQUIDATORS OF PODULAR HOUSING SYSTEMS LIMITED (IN LIQUIDATION) Appellants
AND	ILAN GROSS First Respondent
	LUMEN BUSINESS SOLUTIONS LIMITED Second Respondent
	COMMISSIONER OF INLAND REVENUE Third Respondent
	ANDREW DOUGLAS BLOOD Fourth Respondent
	DAVID PIROTTA AND KATY PERCIVAL Fifth Respondents
	LOUISE JAEGER Sixth Respondent
	ANDREW VAN STADEN Seventh Respondent
	JESU BOANIFACE Eighth Respondent
	LEIGH HUCKER Ninth Respondent
	LOUISE KELVIN AND HELEN O'HARA Tenth Respondent

ALEX WILLIAMS
Eleventh Respondent

CONVIVIUM LIMITED
Twelfth Respondent

BRETT WATERSON, MARIE WATERSON AND LEGAL BEAGLE TRUSTEES LIMITED
Thirteenth Respondents

EMPLOYEES OF PODULAR HOUSING SYSTEMS LIMITED
Fourteenth Respondent

Hearing:	16 November 2023
Court:	Gilbert, Goddard and Katz JJ
Counsel:	B D Gustafson and K K Kommu for Appellants C T Patterson for Eighth Respondent R L Pinny for RITANZ as Intervenor N W Taefi as Counsel to Assist the Court
Judgment:	17 October 2024 at 11.00 am

JUDGMENT OF THE COURT

A **The appeal is allowed.**

B **The directions given to the liquidators in the High Court are set aside.**

C **This Court gives the directions to the liquidators set out at [158].**

D **The proceeding is referred back to the High Court to deal with any matters of detail that may arise in connection with implementing this Court's directions.**

REASONS OF THE COURT

(Given by Goddard J)

Table of contents

Overview

The issue: what rights do purchasers of partly-completed pods have in those pods?

[1] Podular Housing Systems Ltd (Podular) carried on business constructing and installing modular residential buildings, which it called "pods". The pods were constructed at Podular's facilities in Hamilton and Christchurch. They were then trucked to the customer's property. Podular contracted to carry out earthworks at the purchaser's property, to construct foundations, and to install the pod on those foundations.

[2] The appellants (the liquidators) were appointed as liquidators of Podular on 12 December 2022. At that time Podular was clearly insolvent.

[3] When Podular was placed in liquidation there were 15 partly-completed pods at Podular's Hamilton facility, and three partly-completed pods at the Christchurch facility. The purchaser of each of these pods had paid a deposit and instalments of the purchase price (which were payable at specified stages in the pod's construction).

[4] Another 20 purchasers had paid deposits, but construction of their pods had not begun. They claim in the liquidation as unsecured creditors. Other claimants in the liquidation include secured creditors with general security agreements (GSAs) over all of Podular's assets, which were perfected by registration under the Personal Property Securities Act 1999 (PPSA), and preferential creditors under s 312 and sch 7 of the Companies Act 1993 (the Commissioner of Inland Revenue and Podular's employees).

[5] The liquidators applied to the High Court for urgent directions in relation to various matters, including the nature and priority of the purchasers' claims to the partly-completed pods, and the liquidators' entitlement to recover the cost of identifying, preserving and selling the pods out of the proceeds of sale of those pods.

High Court judgment

[6] Jagose J found that legal title to the partly-completed pods remained with Podular. The purchasers were not the legal owners of the partly-completed pods.[1]

[7] However the Judge found that each purchaser for whom a pod had been partly constructed had an equitable lien over that pod to the extent of the purchase moneys (including deposit) paid by them.[2]

[8] In a subsequent minute the Judge directed that the liquidators' costs and disbursements could not be deducted from the sale proceeds of the pods before remitting any balance to the purchasers (Minute).[3]

The liquidators' appeal

[9] The liquidators appeal to this Court. They say that a purchaser does not have an equitable lien over a partly-completed pod. Alternatively, if the purchaser does have an equitable lien, they say that lien does not entitle the purchaser to be repaid in priority to preferential creditors, or to creditors with PPSA security interests in the pods.

[10] The liquidators also say that the costs they have incurred in connection with identifying, preserving and selling the partly-completed pods should be met out of the proceeds of sale of those pods ahead of any claim by the purchasers under an equitable lien.

Summary of outcome on appeal

[11] We have concluded that the better view is that a purchaser did not have an equitable lien over their partly-completed pod:

(a) The main consequence of recognising an equitable lien in these circumstances would be to alter priorities as between purchasers of

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1 *Francis v Gross* [2023] NZHC 1107, [2023] 2 NZLR 762 [High Court judgment] at [19].
2 At [39].
3 *Francis v Gross* CIV-2022-404-2292, 16 May 2023 [Minute].

partly-completed pods who had made payments towards the cost of those pods, and unsecured creditors including purchasers of pods who had paid deposits but whose pods had not been commenced at the time of liquidation. There is no principled reason to do so.

(b) The implications of recognising a lien in this context are potentially wide: such a lien could come into existence in the context of agreements to construct and install many different kinds of item designed to meet a particular purchaser's specifications, including modular sections of buildings, plant and machinery, or joinery.

(c) There is no appellate authority in New Zealand that supports the recognition of a purchaser's equitable lien over personal property in this context. There is one decision of the High Court of Australia that supports recognition of an equitable lien.[4] But that court divided 3:2 on the issue, and there is considerable force in the minority's concern about conferring on some purchasers a priority over other unsecured creditors, in circumstances where they did not contract for that protection.

(d) Parliament has legislated to provide priority for buyers of goods on the insolvency of the seller in the specific context of consumer layby sales, with a cap of $30,000 on the purchase price of those goods. We do not think the courts should substantially extend this carefully circumscribed protection: any proposal to do so would in our view be a matter for Parliament.

(e) As explained below, recognition of an equitable lien in this context would give rise to difficulties in applying the relevant statutory priority regimes in the context of an insolvency. The courts should not develop the law in a manner which gives rise to such difficulties. This reinforces the point that any adjustment of priorities in cases such as

4 *Hewett v Court* [1983] 149 CLR 639.

the present is a matter best left to Parliament, which could legislate to address all the priority issues that would arise.

[12] We are firmly of the view that if the purchasers did have equitable liens over the partly-completed pods, those liens would not take priority over all competing claims to the pods, as the High Court appears to have concluded. Rather, we consider that:

(a) Security interests that attach to the pods under the PPSA are legal interests. If those PPSA security interests were acquired in good faith for value, without notice of the circumstances giving rise to the equitable liens, those interests would have priority over purchasers' equitable liens.

(b) A purchaser's equitable lien over property entitles the purchaser to have the property sold, and the net proceeds applied to meet their claim for repayment of the purchase price. It follows from the inherent nature of this right that if there were equitable liens over the pods, the liquidators would be entitled to deduct the costs they have incurred in identifying, preserving and selling the pods. The net proceeds after meeting those costs would then be available to meet claims by the purchasers (subject, of course, to other claims with priority over the equitable liens).

(c) Difficult issues would arise in relation to the relative priority of the equitable liens and claims by preferential creditors under sch 7 to the Companies Act. The claims of preferential creditors would rank ahead of claims to the pods by secured creditors with security interests in these items of "inventory" under the PPSA, but would appear to rank behind equitable liens. However that is logically impossible in circumstances where the equitable liens rank behind the PPSA security interests. These difficulties support the conclusion that equitable liens of the kind contended for in the present case should not be recognised under New Zealand law: the law should not be developed by the courts in a manner that is not compatible with relevant statutory schemes.

[13] Our reasons for these findings are set out below.

Background

Podular's business

[14] Podular was incorporated on 28 July 2020. As already mentioned, it was placed in liquidation on 12 December 2022. During its short life, Podular was in the business of building and selling architecturally designed modular residential buildings. These were constructed at facilities in Christchurch and Hamilton, and when complete were trucked to the purchaser's property and installed on foundations constructed by Podular.

[15] At the time Podular was placed into liquidation, its sole director was Mr Charles Innes. He held 5 per cent of the shares in the company. The remaining 95 per cent of the shares were held by Mr Ilan Gross.

[16] Mr Gross and a company associated with Mr Gross provided substantial funding to Podular. Podular entered into two GSAs which created a security interest in relation to all of Podular's present and after-acquired property to secure those advances. At the date of liquidation the GSAs secured advances of $1,420,000.

[17] However the main source of Podular's funding for its business appears to have been deposits and part-payments received from purchasers of pods. At the time of liquidation Podular had received substantial payments from the purchasers of the partly-completed pods, and deposits in excess of $2.3 million from another 20 purchasers that did not relate to any identified pod under construction in Podular's facilities.

[18] The company's preferential creditors as at liquidation were the Commissioner of Inland Revenue and employees with claims for unpaid salary and holiday pay.[5]

[19] There are substantial claims by other unsecured creditors.

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[5] The Inland Revenue Department filed a proof of debt which included a preferential claim for $1,043,887.42 for Goods and Services Tax and employer activities. The liquidators received preferential claims by employees in excess of $300,000.

Podular's standard form contracts

[20] The contracts that Podular entered into with purchasers were based on a standard form residential building contract, with limited modifications to reflect the fact that the bulk of the construction work would take place at Podular's facilities rather than at the property owned by the purchaser. Although the agreements have the name of a firm of solicitors on the cover page, we were advised by counsel for the liquidators that that firm had not been instructed by Podular to prepare the agreements. The poorly drafted patchwork modifications made to the standard form residential building contract seem most unlikely to have been the work of an experienced lawyer.

[21] Two versions of Podular's standard contract were included in the material before us. We take by way of example the agreement entered into between Podular and Convivium Ltd (Convivium), the nineteenth respondent in the High Court proceedings (the Convivium agreement). The liquidators say that thirteen of the relevant agreements were in this form. Three agreements were in a slightly different (and apparently earlier) form; where there is a material difference, that is noted below.

[22] Convivium is described as the "Owner" and Podular as "the Builder". The contract says it is a residential building contract. The contract records that the Owner is the owner of land at a specified address in Hastings (defined as "the Site"). The Owner agrees to contract Podular to carry out residential construction work as specified in the Schedule. The Schedule provides for Podular to construct "the Works", which are defined as "[c]onstruction of a residential dwelling on the Site in accordance with the Plans and Specifications".

[23] The contract price is $192,148.90 (inclusive of GST) payable by instalments:

(a) A deposit of $40,716.

(b) A second payment of $55,395 upon frame inspection and Council approval.

(c) A third payment of $41,320.90 on cavity inspection approval by the Council.

(d) A fourth payment of $41,892 on the final code compliance certificate (CCC) inspection at Podular's factory.

(e) A fifth payment of $6,413 on practical completion.[6]

(f) A final payment of $6,413 on completion and issue of a CCC.

[24] Podular was required to commence construction no later than 10 days from the date a building consent was obtained. Podular was responsible for obtaining the building consent and other necessary approvals and inspections. Podular undertook to complete the construction work to CCC satisfaction within 10 weeks from the date of commencement, subject to certain exceptions.

[25] As one would expect in a residential construction contract, frequent reference is made to the Building Act 2004. The agreement also includes a number of references to the Construction Contracts Act 2002, including provision for payment claims and for reference of disputes to adjudication under that Act.

[26] Clause 6.1 of the agreement provides for the Owner to take possession of the pod once a CCC has been issued and all the progress payments and other amounts due have been paid.

[27] Clause 7 of the agreement assumed some significance before the High Court. As relevant, cl 7 of the Convivium agreement reads as follows:

> **7. Materials on Site**
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> …
>
> 7.2 The legal, equitable and beneficial ownership and title to any goods or materials used for the Works by the Builder shall remain vested in the Builder until such time as the Owner has paid the Builder all monies due and payable to the Builder pursuant to this Agreement in relation to each respective good and/or material.

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6 Defined as the Works being completed except for minor defects and minor omissions which do not prevent the Works being used for the intended purpose.

[28] In the other version of the agreement, cl 7 reads:

> **7. Materials on Site**
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> …
>
> 7.2 The legal, equitable and beneficial ownership and title to any goods or materials brought onto the property by the Builder shall remain vested in the Builder until such time as the Owner has paid the Builder all monies due and payable to the Builder pursuant to this Agreement.

[29] The Convivium agreement provides that it covers foundation and excavation costs up to the amount specified in the Schedule.[7] If additional excavation and foundation work is required, Podular is responsible for carrying out that work at the cost of the Owner.

[30] Clause 18 provides for Podular to repossess goods and materials in certain circumstances. It assumes the construction work will take place on the Owner's land:

> **18. Repossession of Goods or Materials**
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> 18.1 If the Owner fails to pay the Builder by the Due Date, the Builder shall be entitled to retake possession of the goods and materials that the Builder has brought onto the Site until payment is made by the Owner. [T]he Builder shall be entitled to retake possession of goods and materials whether or not those goods and materials have been fixed to or incorporated into any building on the Site.
>
> 18.2 The Builder shall give the Owner two (2) working days' notice of its intention to remove goods and materials from the Site.
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> 18.3 The Owner gives the Builder an irrevocable authority to enter the Site for the purpose of this clause

[31] Clause 21 provides for termination of the agreement in certain circumstances, including a party's material default or insolvency. The consequences of termination for ownership of the pod are not addressed.

[32] Clause 26 appears to be an addition to the standard form. It provides that Podular "will complete part of the Works at the Builder's premises in Rotorua and part of the Work[s] at the Site".[8] Podular was responsible for "transporting/relocating the

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7 No separate amount for these costs was specified in the Schedule to the Convivium agreement.

8 So far as we are aware, Podular did not have premises in Rotorua.

Works to the Site" and for "arranging the connection of the Works to the utilities at the Site". The costs of transport and relocation are included in the contract price.

The application for directions

[33] The liquidators' initial investigation into the financial affairs of Podular identified a number of issues, including missing company records, concerns in relation to the conduct and management of the company, and uncertainty about the priorities of various categories of creditors.

[34] In particular, the liquidators were faced with competing claims to the partly-completed pods at the Hamilton and Christchurch facilities. There was some urgency in resolving these competing claims, as the facilities were leased. The Hamilton lease was about to expire. The Christchurch lease had expired, and the premises had been relet to a purchaser of a partly-completed pod.

[35] The liquidators retained quantity surveyors to identify which pods could be attributed to which contracts, and to assess the state of work on each pod, the likely value of each pod and the cost to complete each pod.

[36] The liquidators applied to the High Court for directions in relation to the conduct of the liquidation, including directions in relation to whether the purchasers of the pods had a security interest, lien or ownership interest in any of the pods that would take priority over any other security interest or statutory preference in favour of any other creditors of Podular.

[37] Directions were also sought in relation to the ability of the liquidators to deduct their fees and disbursements from the pool of assets in Podular's possession before distribution, including costs and disbursements incurred in relation to the preservation and realisation of pods at Podular's facilities and their solicitor/client costs for the application for directions.

[38] The identified creditors of Podular, including purchasers of partly-completed pods and of pods on which no work had begun, were named as the first to 25th respondents. Most of the respondents chose not to participate in the proceedings.

However the purchasers of six partly-completed pods were represented before the High Court.

[39] The purchasers of one partly-completed pod had contracted for a security interest in the pod being built for them. That interest was registered under the PPSA. Because those purchasers had a perfected purchase money security interest in the pod, they were entitled to take possession of it, and did so. No question of competing claims arose in relation to that pod, and those purchasers did not participate in the proceedings.

High Court judgment

[40] The focus of the hearing before Jagose J was on the competing claims to 16 partly-completed pods. An urgent decision was sought because Podular's lease on its Hamilton facility was due to expire on 31 May 2023. The application was heard on 4 May 2023, with judgment delivered on 10 May 2023.

[41] The application was argued before the High Court on the basis of an assumption by liquidators and the purchasers that the agreements between Podular and purchasers were contracts for the sale of goods, and that the effect of cl 7.2 as it appeared in the Convivium agreement (and other similar agreements) was to transfer ownership in the material attached to each pod when the customer paid for the installation of that material onto that pod. That was the starting point for the arguments presented about priorities, and for the liquidators' claim to a lien over the pods to meet certain costs.

[42] The Judge did not accept the parties' reading of cl 7.2. As he pointed out, under either formulation of cl 7.2, title remained with the company even after transportation to the purchaser's site until full payment had been made. This conclusion was consistent with other provisions of the agreement. As none of the pods in question had been transported to the purchaser's site, or paid for in full, title in the pods had not transferred to the relevant purchaser.[9]

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9 High Court judgment, above n 1, at [15]–[19].

[43] It followed, the Judge said, that the liquidators' claim for a lien fell away as fees and expenses properly incurred by the liquidator, and the remuneration of the liquidator, may be paid out of the assets of the company including the pods. The liquidator had no need to assert any lien against the customers.[10]

[44] We interpolate that this observation is not easy to reconcile with the Judge's subsequent minute to the effect that the liquidators could not deduct their costs and disbursements from the sale proceeds of the pods.[11] We discuss the liquidators' claim to meet certain costs out of the proceeds of sale of the pods below.

[45] The Judge then turned to the PPSA issues. Section 53 of the PPSA provides that a buyer of goods sold in the ordinary course of business of the seller takes the goods free of a security interest given by the seller, unless the buyer knows that the sale constitutes a breach of the security agreement under which the security interest was created. The Judge proceeded on the basis that the agreements were contracts for the sale of goods — namely, the pods. But in this case, the Judge said, sales of the pods remained incomplete and unperfected. So s 53 did not enable the customers to take the incomplete pods free of any security interest.[12]

[46] The Judge concluded — adopting the analysis of Venning J in *Maginness v Tiny Town Projects Ltd (in liq)*[13] — that:

(a) Each of the purchasers had paid money to Podular attributable directly to identified goods appropriated to their respective contracts. They were entitled to equitable liens over their respective pods.[14]

(b) The PPSA does not apply to this lien, as it arises by operation of law.[15]

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10 At [19], referring to Companies Act 1993, s 312(1) and sch 7, cl 1(1)(a).
11 See [8] above.
12 High Court judgment, above n 1, at [22].
13 *Maginness v Tiny Town Projects Ltd (in liq)* [2023] NZHC 494, [2023] 2 NZLR 828.
14 High Court judgment, above n 1, at [37].
15 At [37]; and Personal Property Securities Act 1999, s 23(b).

(c) Because the equitable liens fall outside the PPSA, they have priority over security interests protected by the PPSA.[16]

[47] The Judge directed that each purchaser has an equitable lien over the partly-completed pod relating to their respective contract for its construction and installation, to the extent of the purchase monies (including deposit) paid by them.[17]

[48] In a subsequent costs judgment, the Judge expressed the view that no party could be said to have either failed or succeeded on the application. Costs were directed to lie where they fell.[18]

The appeal to this Court

[49] The liquidators appeal to this Court from the High Court judgment and the Minute. They challenge the Judge's finding that an equitable lien attached to the pods. Alternatively, they argue that if there is an equitable lien it does not take priority over the claims of preferential creditors. They also seek to establish that they have an equitable lien over the pods for their salvage costs, including the cost of obtaining reports from the quantity surveyors, and for their legal costs.

[50] Initially it appeared that none of the respondent customers wished to incur the cost of opposing the appeal. To ensure a contradictor, this Court appointed Ms Taefi as counsel to assist the Court.

[51] This Court also directed that the appeal be drawn to the attention of the Restructuring Insolvency and Turnaround Association New Zealand Inc (RITANZ), to consider whether it wished to intervene in the appeal. Leave was granted to RITANZ to intervene.

[52] The eighth respondent, Mr Boaniface, subsequently clarified that he did intend to participate in the appeal. However by the time of the hearing before us, the quantity surveyors had assessed the value of his incomplete pod as nil on the basis that the cost

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16 High Court judgment, above n 1, at [35] and [37].
17 At [39].
18 *Francis v Gross* [2023] NZHC 1452 at [3].

to complete it would exceed its value when completed. Mr Boaniface had (with the agreement of the liquidators) taken possession of his partly-completed pod. In response to questions from the Court at the commencement of the hearing, counsel for the liquidators confirmed that in these circumstances no useful purpose would be served by this Court hearing argument about competing claims to Mr Boaniface's (valueless) pod, which the liquidators no longer had in their possession. The liquidators were not seeking to pursue a personal claim against Mr Boaniface to contribute to their costs. On that basis, counsel for Mr Boaniface was given leave to withdraw and did not participate in the hearing.

[53] The Court had the benefit of submissions from Mr Gustafson and Mr Kommu for the liquidators, Ms Pinny for RITANZ as intervenor, and Ms Taefi as counsel to assist the Court. Their submissions raised the following issues that need to be considered in order to determine the directions to be given to the liquidators:

(a) Are Podular's contracts with its customers contracts for works and materials or contracts for the sale of goods?

(b) Did cl 7.2 in the Convivium agreement have the effect of transferring an interest in the incomplete pod to the purchaser?

(c) Is each purchaser of a partly-completed pod entitled to an equitable lien over that pod?

(d) Does any equitable lien over a pod take priority over perfected PPSA security interests in that pod?

(e) Do the claims of preferential creditors rank ahead of any equitable liens in the pods by virtue of s 312 and sch 7 of the Companies Act?

(f) What rights does an equitable lien confer on the holder? In particular, is the claim of the lien holder confined to a right to have the pod sold, and to priority to the net proceeds of sale after meeting the costs of identifying, preserving and realising the pod?

The nature of the contracts with purchasers of pods

[54] As already mentioned, before the High Court it was largely common ground that the agreements entered into between Podular and purchasers of pods were contracts for the sale of goods. The Judge proceeded on the basis that they were contracts for the sale of goods because they were contracts "by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration".[19]

[55] The liquidators took the same approach in argument before this Court. However Ms Taefi argued that that characterisation was wrong. Rather, she submitted, the agreements were contracts for work and materials. We agree.

[56] The prevailing approach to distinguishing between contracts for the sale of goods and contracts for work and materials is to ask whether the real substance of the contract is to be found in the provision of goods or in the provision of services. That test has proved difficult to apply in practice, as Fisher J observed in *Printcorp Services Ltd v Northern City Publications Ltd*.[20]

[57] In *Hewett v Court*, the High Court of Australia held that a contract for the construction of a modular home, to be placed on foundations on the purchaser's site, was a contract for works and materials.[21] Although the High Court divided 3:2 on whether purchasers of a partly-completed home had an equitable lien over that home — an issue we return to below — they were unanimous in their characterisation of the contracts. A contract for construction of a house on foundations at the purchasers' site would clearly be a contract for work and materials. The fact that the house was constructed away from its eventual site, where it was to be placed in position (and apparently, annexed to the land) did not suggest a contract of a different kind.[22]

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19 High Court judgment, above n 1, at [21], referring to Contract and Commercial Law Act 2017, s 120.

20 *Printcorp Services Ltd v Northern City Publications Ltd* HC Tauranga CP60/89, 25 May 1990 at 17–18. See also Ian Gault (ed) *Gault on Commercial Law* (online ed, Thomson Reuters) at [SI2.03(3)(a)].

21 *Hewett v Court*, above n 4, at 646–647 per Gibbs CJ.

22 At 646–647 per Gibbs CJ, 650 per Murphy J, 655–656 per Wilson and Dawson JJ, and 662 per Deane J.

[58] Here, the position is even clearer. Podular agreed not only to construct the pod, but also to carry out earthworks on the site, construct foundations, transport the pod to the site, install the pod on the foundations, and connect utilities. Substantial work was to be done at the purchaser's site, as well as in Podular's factory. In exchange for the contract price, the purchaser was to receive a pod installed, and capable of occupation, at their property. The agreement is described on its face as a residential construction contract, and has all the usual features of such a contract. The completion of a substantial amount of construction work off-site, before completing the construction work on-site, is not a relevant distinction that could justify characterising these agreements differently from a standard residential construction contract where all or most of the work is done at the purchaser's site.

[59] It follows that the agreements between Podular and the purchasers were contracts for work and materials, not contracts for the sale of goods. As we explain below, that conclusion means we need not address the liquidators' argument that no equitable lien could arise in the present case because such a lien would be inconsistent with the statutory code applicable to contracts for the sale of goods.

The effect of cl 7.2 of the Convivium agreement

[60] The written submissions filed for Mr Boaniface contended that cl 7.2 had the effect of transferring title in discrete individual goods or materials used for the overall works as and when payment was made in relation to those goods and/or materials. Thus, it was argued, legal title to the partly-completed pod vested in each purchaser.[23] But as already mentioned, counsel for Mr Boaniface withdrew at the beginning of the hearing before us when it became apparent that there was no longer any live issue in relation to his pod.

[61] Ms Taefi, for her part, did not feel able to advance this argument. RITANZ did not make submissions on this fact-specific issue; its focus was on broader issues relating to competing priorities in an insolvent company's assets.

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[23] Or, at least in each purchaser under a Convivium agreement.

[62] We consider that cl 7.2 is, as the heading to cl 7 suggests, confined to materials brought onto the site on which the pod is ultimately to be installed. It reflects the origin of the agreement as a standard residential construction contract. Given Podular's business model, there was little scope for its operation. In the present circumstances, where the pods were all located at Podular's facilities, cl 7.2 is not relevant. Nor, as the Judge pointed out, were the instalments payable under the contract linked to specific goods or materials which could be identified as having been paid for.[24]

[63] Thus the starting point for considering the competing claims to interests in the partly-completed pods is that they were being constructed by Podular under contracts for work and materials, and legal title to each partly-completed pod remained with Podular. Against that backdrop, we turn to the question of whether each purchaser had an equitable lien over the pod that was being constructed for them.

Did a purchaser have an equitable lien over a partly-completed pod?

Equitable liens — overview

[64] An equitable lien is described in *Laws of New Zealand* as a charge over property arising by implication of equity to secure the discharge of an actual or potential debt. It is not dependent on possession, and does not entitle the lienor to possession of the property. It does not transfer any title to the property. It may be enforced only by sale of the property under a court order, or by an order for payment out of a fund subject to the lien.[25]

[65] An equitable lien may arise as a result of the relationship between the parties, or from their conduct, or by operation of law in a contractual relationship.

[66] It is difficult, if not impossible, to identify any coherent principle that underlies all forms of equitable lien.[26] The circumstances in which they arise have been

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24 High Court judgment, above n 1, at [17].

25 Maurice Casey *Laws of New Zealand* Lien: Non-Possessory or Equitable Liens (online ed) at [19].

26 Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Brookers, Wellington 2011) at 441. See also Sarah Worthington "Equitable Liens in Commercial Transactions" (1994) 53(2) Cambridge Law Journal 263 at 263.

described as a "themeless rag-bag".[27] But their existence is long established in certain contexts, including in the context of the sale and purchase of land. A vendor of land was recognised by courts of equity as having an equitable lien over the land to secure payment of the purchase price, if the land is transferred to the purchaser before payment. (This vendor's lien has been abolished by statute in New Zealand: see s 67 of the Property Law Act 2007). A purchaser of land has an equitable lien over the land to secure repayment of any part of the purchase price that has been paid, if the contract comes to an end before the land is transferred for reasons other than default by the purchaser.[28] In that context the reason for the equitable lien is said to be that it would be inequitable for the vendor to retain both the land and the purchase price for that land.

The liquidators' argument that equitable liens cannot arise in the context of contracts for the sale of goods

[67] The characterisation of the agreements between Podular and the purchasers as contracts for the sale of goods was the foundation of the liquidators' argument that a purchaser's lien cannot arise in the context of a contract for the sale of goods.[29] *Hewett v Court*, in which the majority of the High Court of Australia found that there was an equitable lien over a modular home, concerned a contract for work and materials. The liquidators submitted that the conclusion reached by the majority in that case did not provide any support for the proposition that a purchaser's lien could arise in the context of a contract for sale of goods. The Judge in the present case, and Venning J in *Tiny Town*, erred in relying on *Hewett v Court* as relevant authority in the present case. And, the liquidators added, it would be inconsistent with the detailed provisions concerning when title to future goods passes under the statutory code applicable to contracts for the sale of goods, which is now set out in pt 3 of the Contract and Commercial Law Act 2017 (CCLA).

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27 Donovan W M Waters, "Where is Equity Going? Remedying Unconscionable Conduct" (1988) 18(1) University of Western Australia Law Review 3 at 24, and see generally 22–41. See also *Laws of New Zealand*, above n 25, at [19]; *Hewett v Court*, above n 4, at 645 per Gibbs CJ, and 667–668 per Deane J; and Michael J R Crawford "The Case Against the Equitable Lien" (2019) 42(3) Melbourne University Law Review 813 at 814–815.

28 *Laws of New Zealand*, above n 25, at [19]; and Crawford, above n 27, at 829–831.

29 Michael Bridge and others *The Law of Personal Property* (3rd ed, Sweet & Maxwell, United Kingdom, 2021) at [16-049].

[68] We have concluded that the pod contracts are contracts for work and materials. So we need not address the much-debated question of whether a purchaser's lien can arise in the context of a contract for sale of goods. Nor need we address the submissions made by the liquidators in so far as they proceeded on the basis that these were contracts for the sale of goods.

Authorities on equitable liens over partly-built homes

[69] Ms Taefi's argument in support of the Judge's conclusion that an equitable lien came into existence in the present case took as its starting point the decision of the High Court of Australia in *Hewett v Court*, and the decision of Venning J in *Tiny Town*. In reliance on those authorities, Ms Taefi submitted that:

(a) an equitable lien can arise under a contract for work and materials; and

(b) this Court should apply the test developed by Deane J in *Hewett v Court*.[30]

[70] Applying that test, Ms Taefi submitted, Podular had an actual or potential indebtedness to the purchaser arising from payments made by the purchaser for the acquisition of property (the pod). Each pod was specifically identified and appropriated to the performance of the relevant purchaser's contract. The relationship between the actual or potential indebtedness and the identified property was such that Podular would be acting unconscionably or unfairly if it disposed of the pod to a third party without the consent of the purchaser or without the actual or potential liability having been discharged.

[71] The liquidators challenged the Judge's finding that each purchaser had an equitable lien over their pod. We have already rejected their argument that there could be no equitable lien because the pod agreements were contracts for the sale of goods. But in the alternative, the liquidators submitted that:

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[30] See *Hewett v Court*, above n 4, at 668 per Deane J.

(a) This Court should adopt a cautious approach to recognising equitable liens which cut across established principles of corporate insolvency and the PPSA.[31]

(b) The majority decision in *Hewett v Court* has been heavily criticised as wrong in principle. The analysis of the minority should be preferred.[32]

[72] We turn to consider the competing views of the majority and minority in *Hewett v Court.* We begin by outlining the facts, which bear a remarkable resemblance to the facts of the present case.[33]

[73] A company had contracted with the Hewetts to construct a house at the company's premises and then, when the house was practically completed, deliver it to the Hewetts' site and place it on stumps at that site. The price was payable by instalments: 20 per cent on execution of the contract, another 40 per cent on the pitching of the roof, and further instalments immediately prior to delivery and following practical completion on-site.[34]

[74] The company had substantially completed the Hewetts' house. The Hewetts had paid a deposit and a further 40 per cent on the pitching of the roof. When the directors of the company appreciated that it was insolvent, they entered into an agreement with the Hewetts under which the Hewetts paid a further amount reflecting the work done on the house to that point, and they were permitted to remove the house from the company's premises. That arrangement was challenged by the liquidator of the company as a preference. It was common ground before the High Court that the question of preference turned on whether the Hewetts were entitled to an equitable lien protecting the return of the instalments paid by them.[35]

[75] The Court was divided 3:2 on whether, in these circumstances, an equitable lien arose. As already mentioned, all five judges agreed that the contract was a contract

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31 See *Toll Logistics (NZ) Ltd v McKay* [2011] NZCA 188, [2011] 2 NZLR 601 at [60].
32 See Crawford, above n 27, at 835–836.
33 Small homes have made an outsized contribution to the law in this field.
34 *Hewett v Court*, above n 4, at 644 per Gibbs CJ.
35 At 644–645 per Gibbs CJ.

for work and materials, not a contract for sale of goods. Gibbs CJ accepted that as a general rule no purchaser's lien arises in the context of a building contract. When the work is done on the land, the landowner does not need a lien to protect them once the work has become a fixture. However the question for the Court was whether the rights and obligations for which the contract provided required implication of a lien to protect those rights or the enforcement of those obligations.[36]

[76] Gibbs CJ noted that the contract required the purchasers to pay all but $1,000 of the price before obtaining property in the home. The payment (other than the deposit) was to be made in respect of an identified building which the company was bound to complete and set up on the purchasers' land. The contract impliedly recognised that if the purchasers terminated the contract they should be entitled to the product of the work, for which they were still required to pay.[37] In these circumstances, Gibbs CJ said:[38]

> … it seems to me that the [purchasers] were entitled to a lien for the amount of the purchase money paid when the contract could not be completed through no fault of theirs. The case is so closely analogous to that of a sale that the principles which entitle the purchaser to a lien are in my opinion applicable. No doubt if the construction of the building had never been commenced there could have been no lien for the deposit, but it does not follow that once the construction had been commenced to the stage of pitching the roof there could be no lien in respect of all moneys paid, including the deposit. …

[77] Gibbs CJ recognised that there was no authority precisely on point, but considered that the rules of equity "are not so rigid and inflexible that it is necessary to discover precise authority in favour of the existence of a lien before one can be held to have been created".[39]

[78] Murphy J delivered a brief judgment concurring with Gibbs CJ. He said that in those circumstances, by implication of law, an equitable charge or lien arose over the uncompleted home when the purchaser paid the further instalment on the pitching of the roof. At this stage the particular home was appropriated to the contract.[40]

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36 At 647 per Gibbs CJ.
37 At 648 per Gibbs CJ.
38 At 648 per Gibbs CJ.
39 At 649 per Gibbs CJ.
40 At 650 per Murphy J.

[79] The third judge in the majority was Deane J. He noted that it was a fundamental assumption of the contract that, from the time construction commenced, a particular home in the course of construction would be identified as the home being constructed for installation on the purchasers' land.[41] After noting the difficulty of formulating a satisfactory statement of the circumstances in which an equitable lien will arise in all contexts, Deane J identified what he considered to be circumstances sufficient for the implication, independently of agreement, of an equitable lien between parties in a contractual relationship:[42]

> … They are: (i) that there be an actual or potential indebtedness on the part of the party who is the owner of the property to the other party arising from a payment or promise of payment either of consideration in relation to the acquisition of the property or of an expense incurred in relation to it … (ii) that that property (or arguably property including that property…) be specifically identified and appropriated to the performance of the contract … and (iii) that the relationship between the actual or potential indebtedness and the identified and appropriated property be such that the owner would be acting unconscientiously or unfairly if he were to dispose of the property (or, if it be appropriate, more than a particular portion thereof) to a stranger without the consent of the other party or without the actual or potential liability having been discharged. It may be that the above circumstances or tests, particularly (i), would be unduly restrictive if propounded as a statement of exclusion. As has been said however, they are formulated as a statement of what is sufficient rather than of what is essential. …

[80] Deane J considered that these tests were met. The company was the legal owner of the partly-completed home. It was the potential debtor of the purchasers because if it repudiated the contract and that repudiation was accepted, the company would be liable to repay the deposit and the instalments paid. Those amounts were paid as part of the price of the work and materials necessary to construct the home. The relationship between the potential debt and the partly-completed home was plain. Appropriation of the home to the contract occurred at the latest when the instalment was paid for pitching of the roof.[43]

[81] Wilson and Dawson JJ dissented. They considered there was no authority to support such an equitable lien.[44] There were barriers to recognition of an equitable lien in this context. At the time when the deposit was paid there was nothing to which

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41 At 661 and 669 per Deane J.
42 At 668 per Deane J (footnotes and citations omitted).
43 At 669–670 per Deane J.
44 At 656–657 per Wilson and Dawson JJ.

a lien could attach. No property in the house passed to the purchaser as it was constructed. There was no obligation on the part of the company to transfer that particular house to the purchasers; they might have constructed an identical house to fulfil their contractual obligations to the purchasers.[45]

[82] The minority considered that principle was against recognition of an equitable lien in these circumstances:[46]

> Nor does principle suggest that any equity arises in favour of the [purchasers]. The insolvency of the company is no reason of itself for placing the [purchasers] in a secured position so as to achieve an advantage over other creditors. The other creditors may have included persons who paid moneys by way of deposit or otherwise for transportable houses but who were unable to identify, or sufficiently identify, a particular house as the one which was being constructed pursuant to the contract between them and the company. No equity dictates that those whose houses had reached a particular point of construction, such as the pitching of the roof, should be preferred in the realization and distribution of the company's assets, to those whose contracts with the company had been performed to a lesser extent. It is necessary to look at the [purchasers'] position, disregarding the financial position of the company, and to look at it before the events took place which are said to constitute the preference. The contract between the [purchasers] and the company was not of a type which equity would specifically enforce. It was a contract for the construction of a house and its erection. As Mellish L.J. remarked in *Wilkinson v. Clements*: "Now it is settled that, as a general rule, the Court will not compel the building of houses." There are exceptions to that rule where the work to be done is sufficiently defined, damages are an inadequate remedy, and the builder has obtained possession of the site pursuant to a contract. … Whether or not the work to be done on the house in this case was sufficiently defined, there is no reason to suppose that damages would not be an adequate remedy and it is clear that the company did not have possession of the site. Moreover, the considerations which have led equity to regard the vendor of land as being under an obligation to hold it for the benefit of the purchaser in the case of a contract which would be specifically enforced are similar to those which give rise to an equitable lien in favour of the purchaser when he has paid part of the purchase money. … Those considerations are absent in the case of a contract for work and labour and the supply of materials the very nature of which makes any attempt to apply the suggested equitable principles difficult and unpredictable in result. It is hardly surprising that equity has not extended those principles so far. To do so in this case would, in our view, introduce unnecessary complexity into the ascertainment of the rights of the parties and would be destructive of that certainty which is the basis of sound commercial practice.

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45 At 658 per Wilson and Dawson JJ.

46 At 658 per Wilson and Dawson JJ (footnotes and citations omitted).

Tiny Town

[83] We turn to consider *Tiny Town*, in which Venning J adopted the approach of the majority in *Hewett v Court*.

[84] Tiny Town Projects Ltd was in the business of building and selling custom built "tiny homes". The tiny homes were built on a steel trailer at the company's premises. The company obtained a CCC for each tiny home before delivery. On completion each tiny home was transported by road to the delivery site specified by the purchaser.[47]

[85] The company was placed into liquidation in November 2022.[48] At that time it had partly completed construction of six tiny homes. Three purchasers had paid the entire purchase price for their tiny home. The homes being built for them were 95 per cent complete. The other three purchasers had paid part of the price, and the tiny homes being constructed for them were 40 to 50 per cent complete.[49]

[86] The liquidators sought directions in relation to the competing claims to the six tiny homes. The application proceeded on the basis that each contract for purchase of a tiny home was a contract for the sale of goods.[50] Venning J applied the rules set out in the CCLA in relation to when property passes under a contract for sale of future goods. He concluded that property would pass only when each tiny home was in a deliverable state. Until the company was able to provide a CCC the purchasers were not bound to take delivery. That point had not yet been reached. So property in the six tiny homes had not passed to the purchasers as at the date of liquidation.[51]

[87] The Judge went on to consider s 53 of the PPSA, which as already mentioned provides that a buyer of goods sold in the ordinary course of business of the seller takes the goods free of a security interest given by the seller (or that arises under s 45 of the PPSA) unless the buyer knows the sale is a breach of the relevant security agreement. He concluded that s 53 did not apply, as until the tiny homes were

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47 *Tiny Town*, above n 13, at [3].
48 At [10].
49 At [8]–[9].
50 At [33].
51 At [64]–[65].

completed and property had passed, they had not been "sold" as that term is used in s 53. So the purchasers could not rely on s 53 to establish claims to the tiny homes that took priority over secured creditors.[52]

[88] The Judge then considered the purchasers' argument that they had equitable liens over the tiny homes to the extent of the money paid by them. He considered that the issue was a difficult one.[53] However on balance he agreed with the submission for the purchasers that the application of developing principles of equity supported the imposition of an equitable lien.[54] The important features of the case, which supported that conclusion, included the ability to precisely identify each purchaser's tiny home, and that the home had been appropriated to the contract.[55] The company could not, in any sensible commercial sense, have sold the tiny homes to anyone other than the identified purchasers. Those purchasers had paid money towards the purchase of specific and identifiable (but not yet completed) tiny homes. There were readily identifiable subject maters to which the liens could attach.[56] The Judge referred with approval to the reasoning of Gibbs CJ in *Hewett v Court*.[57]

[89] The Judge accepted the submission that the equitable liens were excluded from the PPSA by s 23(b) of that Act.[58] He reasoned that because the equitable liens fell outside the PPSA, they took priority over security interests under the PPSA. He considered that there was an analogy with s 93 of the PPSA, which deals expressly with the situation of a lien arising out of the provision of materials or services in respect of goods subject to a security interest. Section 93 provides for such liens to take priority over other security interests under the PPSA.[59]

Did equitable liens arise in the present case?

[90] We agree with the observation of Venning J in *Tiny Town* that the question whether an equitable lien should be recognised in cases such as this is a difficult one.

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52 At [88]–[89].
53 At [108].
54 At [109].
55 At [110].
56 At [110]–[111].
57 At [112], citing *Hewett v Court*, above n 4, at 648 per Gibbs CJ.
58 *Tiny Town*, above n 13, at [115]–[116].
59 At [117]–[118].

The only appellate decision directly on point is *Hewett v Court*, where the High Court of Australia divided on this very issue.

[91] Ms Taefi submitted that all three criteria for recognition of an equitable lien identified by Deane J in *Hewett v Court* are satisfied in the present case. We accept that the first and second criteria are met — a potential indebtedness of Podular to the purchaser arising from payment for the acquisition of the pod, and specific identification of the pod to which each agreement relates. The third criterion — that the owner would be acting unconscientiously or unfairly if they were to dispose of the property to a stranger without the purchaser's consent, or without discharging the potential liability — is less clearly made out. Not every breach of contract is unconscientious or unfair to such an extent that equity responds by conferring proprietary remedies in the subject-matter of the contract. There is the same level of unconscientiousness or unfairness in the present case that there was in *Hewett v Court*: but Deane J did not articulate a principled reason for equity to respond in this scenario by recognising an equitable interest in the partly-completed home. The argument that disposal of the partly-completed home would be unfair and unconscientious, and that this justifies recognition of an equitable lien, is more conclusory than convincing.

[92] That leads into the question of whose interests are engaged, and how those interests are affected by recognition of an equitable lien. The argument for such a lien becomes more challenging once the interests of third-party creditors are taken into account.

[93] While a supplier such as Podular is solvent, there is little or no work for an equitable lien to do. If the builder repudiates the contract by refusing to complete it, or by selling the relevant pod to a third party, the purchaser could cancel and obtain monetary relief.[60] It would be open to a purchaser to seek specific performance if such relief was appropriate in the particular circumstances of their case, though damages would generally be a sufficient remedy.[61]

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60 Either in the form of an award of damages, or an order for return of the amounts paid under s 43 of the CCLA.

61 As the minority pointed out in *Hewett v Court* in the passage set out at [82] above, specific performance is not usually awarded in respect of a contract for construction of a house.

[94] Michael Crawford has persuasively argued that an equitable lien only has practical significance in a context such as the present where the company is insolvent. In that context, the function of the lien is to give the purchaser priority over unsecured creditors.[62] There is a strong argument that it is artificial and blinkered to recognise a lien in a case such as the present without considering the effect of that decision on the third parties at whose expense it will operate, and that the equitable lien recognised in *Hewett v Court* confers an unjustified benefit upon some creditors whilst imposing an undeserved detriment on others.[63]

[95] We were not referred to any case in which a purchaser under a contract for work and materials or a contract for supply of goods contended for an equitable lien in circumstances where the supplier was solvent. We agree with Mr Crawford that in practice the issue appears to arise only where there are other creditors involved, and the purpose of asserting a lien is to achieve priority over those creditors. As the minority pointed out in *Hewett v Court*, the interests of those other creditors need to be considered before a lien is recognised: they are the competing claimants in this scenario.

[96] Where a supplier is insolvent, and cannot meet all its obligations to all of its unsecured creditors, it seems odd to say that it is unconscionable for that supplier to fail to perform some or all of the supply contracts in respect of which part-payment has been made. All of the supplier's unsecured creditors will be denied full performance of that supplier's obligations. Insolvency law contemplates pro rata (ie not full) payment of the claims of those creditors. Indeed performance in full by a supplier that is insolvent may in some circumstances amount to a voidable preference, and be reversed, because it is inconsistent with pro rata distribution to unsecured creditors. That is the backdrop against which it is necessary to ask whether Podular failing to meet obligations to the purchaser of a partly-completed pod is unfair or unconscionable.

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62 Crawford, above n 27, at 820.

63 See *Hewett v Court*, above n 4, at 658 per Wilson and Dawson JJ; and Crawford, above n 27, at 837.

[97] There is nothing about the arrangements between Podular and the claimant purchasers that distinguishes their position from that of other purchasers who paid deposits but whose projects have not been commenced. All of these purchasers entered into materially similar contracts, they have all made payments — albeit of varying amounts — and they have not yet received Podular's promised performance in exchange for those payments.

[98] Suppose for example that Podular had contracted to build three pods for purchasers A, B and C under identical contracts along the lines of the Convivium agreement. Purchaser A has paid $300,000 and the pod allocated to them is part-completed and worth $200,000. Purchaser B has paid $200,000 and the pod allocated to them is part-completed and worth $200,000. Purchaser C has paid a deposit of $100,000 and no work at all has been done on their pod.[64] Putting to one side other assets, other claims, and costs of realisation, why is it unfair and unconscionable for the value of these assets ($400,000) to be divided pro rata between the three claimants, with each receiving 66.67 cents on the dollar? Why does conscience demand that A receive $200,000 (66.67 cents on the dollar), B $200,000 (100 cents on the dollar) and C nothing? This is not obviously fair as between A and B on the one hand and C on the other hand, or for that matter as between A and B.

[99] There is also considerable force in the argument that it is open to a purchaser to contract for a purchase money security interest, as some purchasers did in this case. If a purchaser has not protected themselves in this way, why should they be treated differently from, and preferred over, other purchasers who have entered into identical contracts and made payments to Podular?

[100] We struggle to identify any principled rationale that would apply in this scenario to justify equity providing the purchasers of partly-completed pods with a priority over other purchasers, and other unsecured creditors, for which they had not contracted.

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64 The failure to start work on C's pod may well be a breach of contract, underscoring the unfairness of C having no identified asset against which to assert a priority claim.

[101] The high point of Ms Taefi's argument was the admittedly strong analogy with purchasers' liens in the context of agreements for the sale and purchase of land. But argument by analogy depends on showing that there is a principle underpinning the cases relied on that extends to the present case: they must be alike on relevant dimensions in order to justify a like result. It is difficult to identify any convincing reason of principle for recognising a purchaser's lien over land owned by an insolvent vendor, and giving that purchaser priority over the claims of other creditors of that vendor. There is a strong argument that the law in relation to purchasers' liens over land is an historical anomaly that ought not to be extended further. It is even more difficult to justify extending the recognition of such liens to the scenario where personal property is being manufactured under a contract for work and materials, and the purchaser has made part payments for that work, absent some convincing reason of principle to prefer some purchasers over others.

[102] Our reservations about recognising an equitable lien in this context are reinforced by the potentially wide implications of such a conclusion. If an equitable lien is recognised in the present case, such a lien could come into existence in the context of contracts to construct modular components of buildings, specialised vehicles, plant and machinery, joinery, and many other types of asset that are built or customised to meet the requirements of particular purchasers. We struggle to see why the law should recognise a form of security interest in those contexts, providing effective priority for some customers over "work in progress" inventory, if the customer has not contracted for it. Nor would matters necessarily stop there: if an equitable lien were to be recognised in the present context, there would also be a strong argument that such liens could arise in the context of contracts for the sale of goods where the price had been paid in part, the goods to be delivered had been identified, but property had not yet passed. That is a much-debated issue[65] which we need not resolve, as we said above; we mention it only to underscore the possible implications of the approach we are being asked to endorse.

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65 See generally I J Hardingham "Equitable Liens for the Recovery of Purchase Money" (1985) 15 Melbourne University Law Review 65; J D Heydon, M J Leeming and P G Turner (ed) *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (5th ed, LexisNexis Butterworths, Australia, 2014) at [6-350] (online ed); and Michael Bridge (ed) *Benjamin's Sale of Goods* (12th ed, Sweet & Maxwell, London, 2024) at [1-008]–[1-010].

[103] In *Re Wait* Atkin LJ said, in response to a claim for an equitable lien over bulk goods to protect the interests of a purchaser of part of the bulk, that he felt "bound to repel the disastrous innovations which in [his] opinion the judgments under review would introduce into well settled commercial relations".[66] We would not express ourselves quite that strongly. But we do consider that recognising an equitable lien in the present circumstances is difficult to justify by reference to any principle that would not have wider, and potentially far-reaching, consequences. A convincing reason would be needed to take that bold step.

[104] Our hesitation about recognising an equitable lien in this context is reinforced by a comparison with the statutory regime that applies to layby sales of goods. That regime had its origin in the Layby Sales Act 1971.[67] It is now set out in subpt 1 of pt 4A of the Fair Trading Act 1986. A layby sale agreement is defined as an agreement between a supplier and a consumer for the supply of goods on terms (express or implied) that the consumer will not take possession of the goods until all or a specified portion of the total price of the goods has been paid, and the price is payable by instalments.[68] However the term excludes an agreement for the supply of goods that have a purchase price that is more than $30,000.[69]

[105] Sections 36I and 36J make express provision for the treatment of layby sale agreements where the supplier is insolvent. Broadly speaking, the consumer is entitled to complete the purchase and claim goods that are identifiable as the goods to which the agreement relates, with a first in time rule where there are insufficient goods to meet all such claims. Where the consumer is entitled to a refund of the payments they

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66 *Re Wait* [1927] 1 Ch 606, [1926] All ER 433 (CA) at 640–641.

67 The 1971 Act implemented recommendations made in 1969 by the Contract and Commercial Law reform Committee: Contracts and Commercial Law Reform Committee *Layby Sales: Report of the Contracts and Commercial Law Reform Committee on the Law Governing Layby Sales* (1969).

68 Fair Trading Act 1986, s 36B. The price must be payable in three or more instalments, or (if the agreement specifies it is a layby sale agreement) two or more instalments: s 36B. The terms "consumer" and "supply" are defined in s 2(1) of the Fair Trading Act.

69 Or, if greater, the amount specified in section 10(1A)(b) of the Disputes Tribunal Act 1988: s 36B(2).

have made (for example, because the purchase cannot be completed) the priority of the claim for a refund is set out in s 36J:

> **36J Bankruptcy, receivership, or liquidation of supplier: consumer priority**
>
> (1) This section applies if—
>
> (a) an event described in section 36I(1)(a)(i) to (iii) has occurred; and
>
> (b) the consumer described in section 36I(2)—
>
> (i) is entitled to a refund under section 36H(a); or
>
> (ii) has been unable to complete the layby sale agreement in accordance with section 36I(2) or (3), as the case may be.
>
> (2) If this section applies, the consumer—
>
> (a) is a creditor in the bankruptcy, receivership, or liquidation, to the extent of the payments made to the supplier in accordance with the layby sale agreement; and
>
> (b) is entitled to recover a sum equal to those payments with priority over—
>
> (i) all other unsecured creditors; and
>
> (ii) all creditors secured by a security interest of the kind described in subsection (3).
>
> (3) The kind of security interest referred to in subsection (2)(b)(ii) is a security interest that is over all or any part of the supplier's accounts receivable and inventory, or all or part of either of them, other than—
>
> (a) a purchase money security interest that has been perfected at the time specified in section 74 of the Personal Property Securities Act 1999; or
>
> (b) a security interest that—
>
> (i) has been perfected under the Personal Property Securities Act 1999 at the date of the event described in section 36I(1)(a)(i) to (iii); and
>
> (ii) arises from the transfer of an account receivable for which new value is provided by the transferee for the acquisition of that account receivable (whether or not the transfer of the account receivable secures payment or performance of an obligation).

(4) Debts to which priority is given by subsection (2)(b) must be paid in accordance with—

(a) section 274(3) of the Insolvency Act 2006 (in the case of bankruptcies); or

(b) section 30 of the Receiverships Act 1993 (in the case of receiverships); or

(c) section 312 and Schedule 7 of the Companies Act 1993 (in the case of liquidations).

(5) To avoid doubt, this section does not apply in relation to—

(a) a consumer referred to in section 36I(4); or

(b) a payment refunded under section 36I(5).

(6) In this section, **account receivable**, **inventory**, **new value, purchase money security interest**, and **security interest** have the meanings given to them in section 16 of the Personal Property Securities Act 1999.

[106] The result provided for in this regime is essentially what the purchasers contend for here. But the regime does not apply to them. The purchasers appear to qualify as consumers. The contracts under which they were purchasing the pods might arguably be contracts for the supply of goods (as well as services) for the purposes of this legislation. But plainly these were not layby sale agreements for the purposes of the legislation, because the purchase price of each pod was significantly greater than the $30,000 threshold specified.

[107] We make two observations about this regime.

[108] First, the scenario with which this legislation is concerned — a purchase of goods to be paid for by instalments, which cannot be completed — is closely analogous to the scenario in which a purchaser of land has an equitable lien over that land to secure repayment of amounts paid towards the purchase price. But Parliament did not enact a generally applicable priority regime in relation to supplies of goods in circumstances where title remains with the vendor until full payment of a purchase price that is payable by instalments. Rather, the regime was carefully circumscribed to apply only to contracts with consumers where the purchase price is no more than $30,000. It seems to us that the courts should be cautious before extending a similar regime to all contracts for the supply of goods (or to all contracts for the supply of

goods under a contract for work and materials), without any financial limit, where Parliament chose not to do so.

[109] Second, Parliament made detailed provision for the interplay between the priority conferred on consumers by this regime and the claims of PPSA security interest holders and of other unsecured creditors (including preferential creditors). A court recognising an equitable lien in the present case cannot adjust other statutory priority regimes to ensure coherence and consistency.

[110] We are also mindful of the cautionary note about recognition of liens sounded by this Court in *Toll Logistics*:[70]

> [60] Our conclusion is consistent with the cautious approach traditionally taken to the recognition of common law liens. We think too that an expansive approach to the recognition of liens would be inconsistent with the intentions of Parliament in enacting the PPSA. The Select Committee reported that the Bill was needed because the existing law relating to personal property securities was "overly complex, inconsistent and inaccessible". The law was not integrated nor was there a comprehensive single register. In response, the proposed Act was designed to create certainty and thereby reduce commercial costs. This objective was to be achieved "by setting out priority rules for determining disputes between holders of competing interests and creating a single register of security interests in personal property". Section 93 of the PPSA may be viewed as a limited exception to the broad intention to codify the law of security interests in personal property. While the existence of common law liens was accepted by s 93 as an exception to this general intention, anything other than a cautious approach to the recognition of common law liens is not justified.

[111] The focus of that decision was on common law possessory liens, but the same concerns arise in relation to equitable liens. Recognising the equitable liens contended for by the purchasers in this case would add to the complexity of the law in this field. It would also raise questions about consistency with the various statutory priority regimes that would then be in play. It has been suggested, in a thoughtful article by Mr Steve Flynn, that recognition of an equitable lien would give rise to serious complications in applying other aspects of New Zealand personal property securities law.[71] If the recognition of an equitable lien did give rise to insuperable difficulties in applying the PPSA and the Companies Act, that would — as Mr Flynn puts it — "[say]

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70 *Toll Logistics*, above n 31 (footnotes omitted).

71 Steve Flynn "Equitable Liens and Priority" (2024) 24(1) The Property Lawyer 28 at 30.

something about the appropriateness of recognising those liens".[72] The common law and equity should not develop in a manner that does not fit with relevant statutory frameworks. We return to this below.

[112] To this point we have identified a number of factors that point against recognition of an equitable lien under New Zealand law in these circumstances. But before reaching a conclusion, we will consider the priority that such a lien would confer on the holder. Having done so, we can return to the issue raised by Mr Flynn of compatibility with relevant statutory priority regimes, and what that might say about the appropriateness of recognising such liens.

The relative priority of an equitable lien and PPSA security interests

[113] What priority would an equitable lien have if it were recognised in this context? In the discussion that follows, we will assume that the purchasers have equitable liens over the partly-completed pods, as contemplated by the decisions of the High Court in this case and in *Tiny Town*.

[114] We accept Ms Taefi's submission that the right to an equitable lien would survive the intervening insolvency of the company. But it is still necessary to determine the relative priority of that equitable lien and other claims to the property of the company. Here, the relevant competing claims are the claims of secured creditors with a perfected security interest under the PPSA, and the claims of preferential creditors under sch 7 of the Companies Act.

[115] As already mentioned, s 23(b) of the PPSA provides that the PPSA does not apply to a lien (except as provided in pt 8), charge or other interest in personal property created by any other Act (with certain exceptions, not relevant here) or by operation of any rule of law. It was common ground before us that if a purchaser has an equitable lien over a partly-completed pod, then that lien is created by operation of law. So the PPSA does not apply to it.

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[72] At 30.

[116] Part 8 of the PPSA is concerned with the priority of various other interests in collateral, where those interests compete with security interests recognised by the PPSA. Section 93, which appears in pt 8, provides:

> **93 Lien has priority over security interest relating to same goods**
>
> A lien arising out of materials or services provided in respect of goods that are subject to a security interest in the same goods has priority over that security interest if—
>
> (a) the materials or services relating to the lien were provided in the ordinary course of business; and
>
> (b) the lien has not arisen under an Act that provides that the lien does not have the priority; and
>
> (c) the person who provided the materials or services did not, at the time the person provided those materials or services, know that the security agreement relating to the security interest contained a provision prohibiting the creation of a lien by the debtor.
>
> **Example**
>
> Person A has a perfected security interest in person B's car.
>
> Person B takes the car to a garage for repairs.
>
> The garage repairs the car but keeps possession of it until the garage receives payment for those repairs.
>
> The garage's lien has priority over person A's security interest.

[117] It was common ground before us that s 93 would not apply to the purchasers' equitable liens in the present case. The equitable liens do not arise out of materials or services provided by the purchasers.

[118] In *Tiny Town*, Venning J expressed the view that there was a close analogy between the equitable lien of the purchaser of a tiny home and the liens given priority under s 93.[73] In the present case, Jagose J was attracted by that reasoning.[74] However it does not appear that either Venning J or Jagose J had the benefit of the full argument that we heard on the significance of the equitable lien falling outside the PPSA, and on the relationship between ss 23 and 93 of the PPSA.

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73 *Tiny Town*, above n 13, at [118].

74 High Court judgment, above n 1, at [35].

[119] We begin with first principles. The PPSA greatly simplified the law in New Zealand in relation to securities over personal property. It did so by emphasising the function of a transaction over its form. In determining the relative priority of security interests to which the PPSA applies, the legal form of the security agreement and the security interest is (largely) irrelevant. In particular, it is not necessary to consider whether any title or interest of the secured creditor is legal or equitable, and it is not necessary to consider the general law in relation to competition between legal and equitable interests in personal property.

[120] But the PPSA did not replace the whole of the law of personal property. The general principles of personal property law continue to operate except to the extent that they are displaced by the PPSA.

[121] Where there are competing interests in personal property, there are three possibilities:

(a) Both interests are security interests to which the PPSA applies. In that case, their relative priority is determined by the rules in the PPSA.

(b) One interest is a security interest to which the PPSA applies. The other is not. But the PPSA makes specific provision for their relative priority. The PPSA contains a number of specific rules about the relative priority of PPSA security interests and other interests, mostly in pt 8. Section 93 is one of those specific rules.

(c) One interest is a security interest to which the PPSA applies. The other is not. The PPSA makes no specific provision for their relative priority.

[122] In that third scenario, the PPSA does not assist in determining relative priority. If an interest falls outside the PPSA, what that means is that the regime established by the PPSA for determining when an interest attaches to property, when it is perfected, and relative priorities, does not apply. Rather, general principles of personal property law must be applied.[75] It is not the case that every interest in personal property that

[75] See Flynn, above n 71, at 29.

falls outside the PPSA takes priority over interests that do come within the PPSA. Part 8 of the PPSA set out specific rules that govern the priority of certain other interests in collateral, relative to the priority of PPSA security interests. But it does not cover the field. Importantly for present purposes, s 93 has been carefully crafted to apply only to a subset of the liens and other interests excluded from the PPSA by s 23(b). In circumstances where s 93 does not apply, it is not open to a court to apply that carefully tailored provision by analogy. Rather, it is necessary to look to the general law to resolve the competition between the non-PPSA interest and the PPSA interest in question.

[123] This issue has been addressed by the Supreme Court of Canada in relation to the Canadian personal property securities laws on which New Zealand's PPSA is modelled. In *Bank of Montreal v Innovation Credit Union*,[76] the Supreme Court of Canada considered competing security interests under the Saskatchewan Personal Property Security Act 1993 and under an instrument registered under a Federal statute, the Bank Act. As the Supreme Court noted, within the domain of its application the Saskatchewan PPSA provides a complete set of priority rules for ranking the interests of both creditors and third parties in particular property. However it is not a fully comprehensive code. Section 4 of the Saskatchewan PPSA, which corresponds to s 23 of the New Zealand PPSA, provides that the Act does not apply to certain interests including "a security agreement governed by an Act of the Parliament of Canada … including an agreement governed by ss 425 to 436 of the Bank Act".[77]

[124] The Supreme Court of Canada proceeded to apply general property law principles in relation to competing legal and equitable security interests in property. In order to do so, it was necessary to characterise the PPSA security interest as a matter of property law. The Court said:[78]

> [41] The *PPSA* does not contain any provisions which identify the nature of a *PPSA* security interest in proprietary terms. This is because, as discussed above, for those interests to which the *PPSA* applies, the *PPSA* resolves priority disputes through a detailed set of priority rules rather than on the basis of title or the form of a transaction. However, because the *PPSA*'s internal

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76 *Bank of Montreal v Innovation Credit Union* 2010 SCC 47, [2010] 3 SCR 3.

77 At [23] and [59] per Charron J, referring to The Personal Property Security Act, SS 1993, c P-6.2, s 4(k).

78 Emphasis in original, citations omitted.

> provisions do not apply to *Bank Act* security, and because the security regime contained in the *Bank Act* is property-based, it is necessary for the purposes of deciding the priority dispute in this case to characterize the *PPSA* security interest as a matter of property law …
>
> [42] Two characteristics of the *PPSA* are relevant for the present case. First, it is clear that *PPSA* security interest, just as the *Bank Act* security interest, is a statutorily created interest and, as such, an interest recognized at law. While some of the historical forms of security created equitable rather than legal interests, the effect of the *PPSA*'s functional approach, which covers all of these antecedent security interests, is to treat them all equally as "security interests" under the *PPSA*. This conclusion is also the consensus found in the academic commentary, and I see no reason to depart from it …

[125] The dispute before the Court was between two competing valid legal interests in the same collateral. That competition fell to be determined applying established common law priority rules:[79]

> [51] As determined above, this dispute is between two competing valid legal interests in the same collateral. Under the common law, a priority dispute between two legal interests in the same property is determined in accordance with the maxim *nemo dat quod non habet*: … Simply put, under this rule where A conveys legal title to property first to B and subsequently to C, legal title vests in B. Since A no longer has legal title to give to C, A cannot transfer title to C. Thus, as between two competing legal interests in property, the *nemo dat* rule gives priority to the first party to take a legal interest in the property. The application of the common law rule to the present case grants priority to Innovation Credit Union's interest. As we have seen, the *Bank Act* establishes a property-based security scheme under which, by the combined effect of ss. 427(2) and 435(2), the Bank can receive no greater interest in the property than the debtor has. As such, these provisions operate in the same way as the common law *nemo dat* rule. At the time the Bank took its *Bank Act* security interest, the Credit Union already held a statutory interest in the same collateral which, in proprietary terms, is correlative to a fixed charge. Therefore, the Bank could only take its interest subject to this prior interest.

[126] Both elements of this approach — applying general property law to determine competing priority claims, and the characterisation of PPSA security interests as legal interests — were affirmed by the Supreme Court of Canada in *i Trade Finance Inc. v Bank of Montreal*.[80] In that case a security interest under the Ontario PPSA took priority over an equitable proprietary claim to securities because the secured creditor was a bona fide purchaser for value of a legal interest in the securities, without notice of the equitable claim.[81]

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79 Emphasis in original, citation omitted.

80 *i Trade Finance Inc. v Bank of Montreal* 2011 SCC 26, [2011] 2 SCR 360 at [61] per Deschamps J.

81 At [62]–[66] per Deschamps J.

[127] In New Zealand, as in Canada, the competition between a non-PPSA interest in property and a PPSA security interest in that property must be resolved by applying the rules of common law and equity in relation to competing property interests.

[128] As a matter of first principles, we consider that a security interest recognised by the PPSA is a statutory interest which would be enforced by a common law court, so must be a legal interest. If the holder of a PPSA security interest that has attached to property is a bona fide purchaser for value of that interest, their legal interest prevails over an equitable lien even if that equitable lien arose before the security interest attached to the property.

[129] An Australian academic, Mr Adam Waldman, has argued for a different approach to the categorisation of PPSA security interests under Australian law.[82] One important plank in Mr Waldman's argument is s 254(1) of the Australian Personal Property Securities Act 2009 (Cth), which provides that the general law must be preserved to the extent that it is capable of operating concurrently with that Act. He argues that the pre-PPSA characterisation of security interests as legal or equitable, depending on their form, can co-exist with the provisions of the PPSA, and therefore must be preserved.[83]

[130] There is no provision in New Zealand or Canadian personal property securities legislation that corresponds to the Australian s 254(1). So that argument is not available in New Zealand, any more than it was in Canada.

[131] Mr Waldman also argues that characterising all security interests as legal interests could have significant — and undesirable — priority consequences for competitions between security interests and certain other interests in property, including beneficial interests under trusts and equitable liens. He argues that a creditor seeking to take a legal interest that would prevail over pre-existing equitable interests of beneficiaries, or over pre-existing equitable liens, can contract for a legal security interest in fixed property. However in relation to circulating assets, they would be

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82 Adam Waldman "Resolving Priority Competitions between PPSA Security Interests and Non-PPSA interests" (2021) 44(2) UNSW Law Journal 811.

83 At 833–834.

confined to an equitable security interest in the form of a floating charge, which would not prevail over pre-existing equitable interests.[84] He considers that this would be a more satisfactory outcome from a policy perspective.[85]

[132] We are not attracted by this approach, for a number of reasons. First, it is inconsistent with the simplicity and transparency that were central objectives of the PPSA. It would encourage lenders to specify the legal character of the security interest for which they were contracting, and provide for it to be a legal interest so far as possible. Many security interests in New Zealand today are described simply as "a security interest". No attempt is made to specify their underlying legal and/or equitable character. That simplicity was an intended consequence of the PPSA, which it would be undesirable to undermine.

[133] Second, adopting that approach would mean that lenders taking a security interest would have an incentive to make inquiries into the existence of pre-existing equitable interests in the property of the company, as otherwise they would risk being subordinated to such interests in relation to circulating assets. One of the objectives of the PPSA was to remove the need for such inquiries, and thus reduce the cost of pre-lending inquiries by lenders, and (in turn) reduce the time and cost involved in obtaining finance for borrowers.

[134] We are not persuaded that Mr Waldman's suggested approach should be adopted in New Zealand. We prefer the approach of the Supreme Court of Canada, consistent as it is with underlying principles of property law and with the policy goals of New Zealand's PPSA.

[135] In the present case, what that means is that purchasers' equitable liens over pods would not have priority over PPSA security interests that attached to property of the company, including the pods, if those security interests were acquired by the secured creditor in good faith without notice of the circumstances giving rise to the

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84 With certain exceptions, of limited practical significance.

85 See Waldman, above n 82, at 842–844.

equitable liens.[86] No party sought to argue that those criteria were not met in the present case. So the equitable liens would rank behind the PPSA securities.

Priority in relation to preferential creditors

[136] The next issue that must be considered is the relative priority of the (assumed, for present purposes) purchasers' equitable liens and the claims of preferential creditors. In *Tiny Town*, the Court was not asked to give directions in relation to the relative priority of equitable liens and claims of preferential creditors. Although the issue was raised before the High Court in the present case, it was not addressed in the High Court judgment. It appears to have been assumed that because the equitable lien existed, and took priority over PPSA security interests, it would also take priority over the claims of preferential creditors.

[137] Section 312 of the Companies Act provides for payment by a liquidator of preferential creditors' claims:

> **312 Preferential claims**
>
> (1) The liquidator must pay out of the assets of the company the expenses, fees, and claims set out in Schedule 7 to the extent and in the order of priority specified in that schedule and that schedule applies to the payment of those expenses, fees, and claims according to its tenor.
>
> (2) Without limiting clause 2(1)(b) of Schedule 7, the term **assets** in subsection (1) does not include assets subject to a charge unless the charge is surrendered or taken to be surrendered or redeemed under section 305.

[138] The term "charge" is defined in s 2(1):

> **charge** includes a right or interest in relation to property owned by a company, by virtue of which a creditor of the company is entitled to claim payment in priority to creditors entitled to be paid under section 313; but does not include a charge under a charging order issued by a court in favour of a judgment creditor

[139] The equitable liens over the pods are charges for the purpose of s 312. So the pods are not assets of the company to which the liquidator may have recourse to pay preferential claims unless cl 2(1)(b) of sch 7 applies to those liens.

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[86] For the reasons explained by the Supreme Court of Canada in *i Trade*, the secured creditor is a purchaser for value. See *i Trade*, above n 80, at [58]–[67] per Deschamps J.

[140] Clause 1 of sch 7 to the Companies Act identifies the creditors' claims that have preferential status in a liquidation. They include certain employee wage and salary claims, and certain amounts payable to the Inland Revenue Department. Clause 2 of sch 7 makes provision for the priority of payments to preferential creditors. For present purposes, the critical provision is cl 2(1)(b), which provides that where the assets of the company available for preferential claims are insufficient to meet those claims, those claims have priority over the claims of any person under a security interest to the extent that the security interest:[87]

> …
>
> (A) is over all or any part of the company's accounts receivable and inventory or all or any part of either of them; and
>
> (B) is not a purchase money security interest that has been perfected at the time specified in section 74 of the Personal Property Securities Act 1999; and
>
> (C) is not a security interest that has been perfected under the Personal Property Securities Act 1999 at the commencement of the liquidation and that arises from the transfer of an account receivable for which new value is provided by the transferee for the acquisition of that account receivable (whether or not the transfer of the account receivable secures payment or performance of an obligation); and
>
> (D) is not a security interest referred to in subclause (3A) …

[141] The terms "account receivable", "inventory", "new value", "proceeds", "purchase money security interest", and "security interest" have the same meanings in cl 2(1)(b) as they have in the PPSA.[88]

[142] The term "inventory" is defined in s 16(1) of the PPSA to include goods that are raw materials or work in progress. It was common ground before us that the partly-completed pods are inventory for the purposes of the PPSA.

[143] It was also common ground that the PPSA security interests under the GSAs ranked behind the claims of preferential creditors listed in sub-cls (2)–(5) of cl 1 of sch 7, so far as the pods (which are inventory) are concerned. That follows from

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87 Companies Act, sch 7, cl 2(1)(b)(i).
88 Schedule 7, cl 2(2).

cl 2(1)(b)(i)(A). None of the exceptions in sub-paras (B), (C) or (D) applies to the PPSA security interests in the present case.

[144] Do the claims of preferential creditors rank ahead of the equitable liens? That depends on whether the equitable liens are security interests for the purposes of cl 2(1)(b)(i) of sch 7. The term "security interest" is defined in s 17 of the PPSA:

> **17 Meaning of security interest**
>
> (1) In this Act, unless the context otherwise requires, the term **security interest**—
>
> (a) means an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to—
>
> (i) the form of the transaction; and
>
> (ii) the identity of the person who has title to the collateral; and
>
> (b) includes an interest created or provided for by a transfer of an account receivable or chattel paper, a lease for a term of more than 1 year, and a commercial consignment (whether or not the transfer, lease, or consignment secures payment or performance of an obligation).
>
> (2) A person who is obligated under an account receivable may take a security interest in the account receivable under which that person is obligated.
>
> (3) Without limiting subsection (1), and to avoid doubt, this Act applies to a fixed charge, floating charge, chattel mortgage, conditional sale agreement (including an agreement to sell subject to retention of title), hire purchase agreement, pledge, security trust deed, trust receipt, consignment, lease, an assignment, or a flawed asset arrangement, that secures payment or performance of an obligation.

[145] A purchaser's equitable lien in substance secures payment for performance of an obligation. But is it "created or provided for by a transaction"? The reference in s 17(1)(a) to an interest in personal property "created or provided for by a transaction" is most naturally read as referring to an interest in personal property that the parties have agreed expressly that the creditor should have in that property. That reading is supported by the examples of security interests provided in s 17(3), all of which are

consensual security interests. An interest that arises by operation of law, and that is not expressly provided for in a transaction, appears to fall outside this definition.[89]

[146] We have already concluded that a perfected PPSA security interest in the pods ranks ahead of the purchasers' equitable liens over those pods. And as explained above, the claims of preferential creditors rank ahead of the claims of the holders of the PPSA security interests. If the term "security interest" is read as excluding the equitable liens, an impossible contradiction would arise. Preferential creditors would rank ahead of the holders of PPSA security interests, who rank ahead of the holders of equitable liens. Priority is a transitive relationship: if A has priority over B, and B has priority over C, C cannot have priority over A. That is a logical impossibility.

[147] Can the term "security interest" in the sch 7 context be read as including interests in personal property that arise by operation of law, and that in substance secure payment or performance of an obligation, such as the equitable liens in the present case?[90] That would avoid the logical difficulty identified above.

[148] The difficulty with this approach is that it goes too far: reading the term "security interest" in this manner would also catch common law liens such as those to which s 93 of the PPSA applies. The result would be that preferential creditors had priority over the holders of common law liens. It is not easy to see how that would work in practice: could the person exercising a common law possessory lien by retaining goods they had repaired be required to surrender possession of those goods to enable them to be sold for the benefit of preferential creditors? How would the lienor's claim be treated in those circumstances — would it be lost completely? As this example illustrates, an extended reading of the term "security interest" in this context would have surprising and unsatisfactory consequences. The difficulty identified above cannot be cured by an extended reading of the term "security interest" in cl 2 of sch 7.

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89 Roger Fenton (ed) *Garrow and Fenton's Law of Personal Property in New Zealand* (7th ed, vol 2, LexisNexis, Wellington, 2010) at [9.6.1]; and Gedye, Cuming and Wood *Personal Property Securities in New Zealand* (Brookers, Wellington, 2002) at [23.3].

90 The definition of the term "security interest" in s 17(1) of the PPSA applies only "unless the context otherwise requires". The same qualification must apply in the context of the cross-reference to that definition in sch 7 to the Companies Act.

Reprise: should New Zealand law recognise equitable liens over the pods?

[149] We return to the central question in this appeal: should New Zealand law recognise an equitable lien held by the purchasers of partly-completed pods to secure repayment of instalments of the purchase price?

[150] We have not identified any convincing reason of principle to do so. There are reasons of principle — in particular, fairness as between similarly situated creditors — to refrain from doing so. There is no directly relevant New Zealand appellate authority supporting such a lien, and no persuasive overseas authority. There are many reasons to be cautious about taking this step. And as explained above, recognising such a lien would give rise to inconsistences and practical difficulties in applying the statutory regimes that govern priority of claims in insolvency. We agree with Mr Flynn that such difficulties "[say] something" about the desirability of recognising equitable liens. They point strongly against it. As McGrath J said in *Paki v Attorney-General (No 2)*, "the courts should ensure that the law is not developed in a way that frustrates applicable statutory schemes".[91]

[151] We conclude that New Zealand law should not recognise an equitable lien in circumstances such as the present case. If purchasers are to have a priority claim in such circumstances, that should be provided for in legislation that addresses the extent of any such priority, and how it fits with the wider personal property securities and insolvency statutory frameworks.

Rights conferred by an equitable lien

[152] For the sake of completeness, and because the issue was fully argued before us, we address briefly the ability of the liquidators to recover costs out of the proceeds of sale of the pods, if the purchasers were found to have equitable liens over those pods.

[153] The liquidators sought to justify recovery of the costs they had incurred in identifying, preserving and realising the pods out of the proceeds of realisation on the

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91 *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 at [196] per McGrath J.

basis of a liquidator's lien. Reference was made to the decision of the High Court of Australia in *Stewart v Atco Controls Pty Ltd (in liq)*,[92] and to *Re Arcabi Pty Ltd (Receivers and Managers Appointed) (in liq)*.[93] Ms Taefi accepted that it is well established that where a liquidator has gathered a fund to be administered, the liquidator is entitled to a lien over that fund for care, preservation and realisation of assets, including the cost of identifying and protecting the assets.[94] But she questioned whether the liquidators had provided sufficient information about the costs incurred in the present case to justify deducting those costs from the proceeds of sale of the pods.

[154] We consider that there is a simpler route to the conclusion that the liquidators are entitled to deduct their relevant costs in the present case, by reference to the nature of an equitable lien. As already explained, the holder of an equitable lien is not entitled to take possession of the property. Nor do they have any ownership interest in it. Rather, the right of the lienor is to have the property sold, if necessary by order of the court. They then have a priority claim to the proceeds of sale. However that claim is confined to the *net proceeds* of sale: the costs of preserving and realising the assets must necessarily be met first, before the balance to which they have a priority claim can be identified.

[155] By the conclusion of the hearing before us, it was common ground that costs of preservation and realisation of the pods should be met out of any proceeds of sale of the pods, before meeting other claims including the claims of purchasers, even if the purchasers had equitable liens over the pods.

Costs

[156] It was appropriate for the liquidators to bring an application for directions, and to pursue the appeal to this Court, in order to ascertain entitlements to the proceeds of realisation of the pods. The liquidators are entitled to meet their actual and reasonable costs of the proceedings out of the company's assets, including the proceeds of realisation of the pods.

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92 *Stewart v Atco Controls Pty Ltd (in liq)* [2014] HCA 15, (2014) 252 CLR 307.
93 *Re Arcabi Pty Ltd (Receivers and Managers Appointed) (in liq)* [2014] WASC 310.
94 At [70] and [72].

[157] No other party sought costs before us. The terms on which RITANZ was granted leave to intervene precluded any claim for costs by RITANZ.

Directions

[158] In light of the conclusions we have reached, the appeal must be allowed and the directions given in the High Court set aside. We make the following directions under s 284 of the Companies Act:

(a) A purchaser of a partly-completed pod is not entitled to an equitable lien over that pod to secure repayment of the amounts the purchaser has paid towards the purchase price.

(b) A purchaser of a partly-completed pod is not entitled to take possession of that pod.

(c) A purchaser of a partly-completed pod is an unsecured creditor of Podular (unless they hold a valid and enforceable security interest in the pod or in other collateral).

(d) To avoid doubt, the liquidators are entitled to deduct from the proceeds of realisation of the pods their reasonable costs of identifying the claimants to the pods, and preserving and realising the pods.

(e) To avoid doubt, the liquidators are entitled to meet their actual and reasonable costs of pursuing this application for directions before the High Court and before this Court out of the assets of the company, including the proceeds of realisation of the pods.

[159] If any issues arise in connection with the implementation of these directions, they should be dealt with in the High Court. We refer the proceeding back to the High Court for that limited purpose.

Result

[160] The appeal is allowed.

[161] The directions given to the liquidators in the High Court are set aside.

[162] This Court gives the directions to the liquidators set out at [158].

[163] The proceeding is referred back to the High Court to deal with any matters of detail that may arise in connection with implementing these directions.

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