IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No. M137 of 2018

BETWEEN:

**CARTER HOLT HARVEY WOODPRODUCTS AUSTRALIA PTY LTD**

Appellant

- and -

**THE COMMONWEALTH OF AUSTRALIA**

First Respondent

**MATTHEW JAMES BYRNES** and **ANDREW STEWEART REED HEWITT** in their capacity as joint and several receivers and managers of Amerind Pty Ltd (Receivers and Managers Appointed) (in liquidation)

Second Respondent

**BRENT MORGAN** in his capacity as liquidator of Amerind Pty Ltd (Receivers and managers Appointed) (in liquidation)

Third Respondent



**APPELLANT'S REPLY**

**Part I:**

I certify that this submission is in a form suitable for publication on the internet.

**Part II:**

**Reply to first respondent's summary of argument, and overall approach**

1. The submissions of the first respondent (the Commonwealth)[1] commence by observing that if the company had been conducting business in its own right, then its employees would be priority creditors under ss 433(3) and 561 of the Corporations Act, and then ask rhetorically, "*Is the result different when the business in question*

[1] Submissions of the Commonwealth of Australia, filed on 2 November 2018

Date of document: 16 November 2018
Filed on behalf of: The Appellant
Prepared by: Telephone: (02) 9234 1500
**Polczynski Robinson** Fax: (02) 9234 1511
Level 12, 77 King Street Ref: Mr Richard Lyne
Sydney NSW 2000 Email: rlyne@plawyers.com.au

*was conducted by the company as trustee, and the company had a right of indemnity out of the assets of the trust to pay the employees*?"[2]

2. The answer to that question is "yes", for the reasons enunciated in the appellant's primary submissions filed on 5 October 2018. A statutory regime which applies to distributing the "property of the company" has no role to play in respect of property which is not that of the company, but which is held on trust by it on behalf of another or others.

3. A more apt rhetorical question is perhaps this: If a natural person as trustee was carrying on the business of a trading trust, but suffered personal insolvency, the trust assets would be distributed *parri passu* amongst trust creditors. Is the result different when the trustee is a corporation and suffered corporate insolvency? It is not.

4. The first respondent points to certain facts of this particular case which, it invites the Court to conclude, would make the result urged by the appellant an unsatisfactory one.[3] However the statutory interpretation questions falling for determination by this Court must be resolved on a principled basis which is sufficiently robust to apply to any factual scenario which may arise under the statute.

5. There will be cases where an insolvent corporation has acted (and incurred debts) as trustee of multiple trusts with different beneficiaries, or has acted (and incurred debts) in both a trustee and non-trustee capacity, or has misconducted itself as trustee in such a way as to deprive itself, in whole or part, of the benefit of the right of indemnity. These cases fall under the same statutory provisions.

**The position in other jurisdictions: New Zealand and the United Kingdom**

6. The Commonwealth has made reference to the approach in New Zealand and the United Kingdom to the matters arising on this appeal. However, the position in those jurisdictions is not contrary to the Appellant's position.

7. In New Zealand, there is authority that property held on trust by the company is not available to meet the claims of non-trust creditors, and nor is it susceptible to the

---

[2] Submissions of the Commonwealth of Australia p2, at [5].
[3] Submissions of the Commonwealth of Australia p4, at [11], [12].

priority regime.[4] The *Levin* case[5] relied upon by the Commonwealth does not say otherwise. Whilst Heath J referred to the liquidator being able to use his control of the company to cause it exercise the right of indemnity, that did not involve any finding that company law (including as to priorities between creditors), rather than trust law, governed the process of applying the proceeds of trust assets to creditors' claims. The case of *Ranolph Co Ltd*[6] referred to by the Commonwealth takes the matter little further; the amounts in respect of which the liquidators were granted priority were their fees and expenses of enforcing the indemnity, because the indemnity being a company asset meant that those costs were a company expense. To the extent that Gilbert J referred at [116] to payment of amounts recovered "*in accordance with the priorities set out in the Companies Act*", in context that was no more than a reference to payment of the liquidators' fees and expenses, because no other claims were considered.

8. In the United Kingdom, property in which the company does not have a beneficial interest is not 'property of the company'.[7] Whilst there is a priority regime for administrators' expenses and preferential debts, this regime does not permit an administrator to recover remuneration and expenses out of assets which the company holds on trust. The *Berkeley Applegate* principle rests not on the priority regime but on equitable principles.[8] The common approach is for administrators to approach the court for directions in the same way as a Court would give directions to a trustee.[9]

**The nature, and limits, of the right of indemnity as 'property of the company'**

9. The parties are ad idem that the process of statutory interpretation "one must start, and end, with the statutory text."[10] The parties remain ad idem in identifying that where the company has acted as trustee of a trust, the 'property of the company', within the meaning of s 433(3) of the *Corporations Act*, includes the company's right

---

[4] *Finnigan v Yuan Fu Capital Markets Ltd (in Liquidation)* [2013] NZHC 2899 at [1], [3], [74].
[5] *Levin v Ikiua* [2010] I NZLR400 at [118] (Heath J)
[6] *Ranolf Co Ltd (in liq) v Bhana* [2017] NZHC 1183 (Gilbert J)
[7] *Gillan and others v HEC Enterprises Ltd and others* [2016] EWHC 3179 [Ch] at [30], [31];
[8] As the Commonwealth properly acknowledges: Submissions of the Commonwealth of Australia p14, at [39] and fn 70.
[9] *Gillan* (supra, fn 8) at [32], [33].
[10] Submissions of the Commonwealth of Australia p3, at [9], citing *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519.

of indemnity.[11] The first respondent seems further to accept that the underlying assets of the trust are not themselves 'property of the company' except to the extent of the interest in those assets (if any, and however it may be characterised or categorized) which is conferred on the company by the right of indemnity.[12]

10. The parties' consensus ceases where the first respondent accuses the appellant of a "category error", which is said to be "to treat the trustee's right of indemnity as being a proprietary right somehow arising separately from, or independently of, the trust assets to which it relates."[13] This submission mischaracterises the appellant's argument. The appellant does not suggest that the right of indemnity is separate from, or independent of, the trust assets. Rather, it submits (consistently with the consensus just referred to) that the extent of the trustee's interest in the trust assets is limited to that which is conferred by the right of indemnity. Any "category error" is that of the first respondent. The error lies in taking statements from such cases as *Buckle*[14] and *Bruton Holdings*[15] to the effect that the interest so conferred may be characterised as proprietary in nature, and then failing to acknowledge that the extent of that interest is nonetheless constrained by the content of the right of indemnity.

11. The authorities do not suggest that the proprietary nature of the interest gives it content beyond that which is conferred by the right of indemnity. The right of indemnity is relevantly a right to be reimbursed where a trust debt has been paid from the trustee's own funds, and to be exonerated in relation to trust debts which have not been paid. There is no right entitling the trustee to apply trust funds to meeting non-trust debts, or to meeting some trust debts in priority to others where there is an overall insufficiency. Put simply, the characterisation of the interest created by the right of indemnity as 'proprietary' does not authorise the trustee (whether solvent or otherwise) to do anything which would travel beyond the content of the right.

---

[11] Submissions of the Commonwealth of Australia p6, at [15].
[12] Submissions of the Commonwealth of Australia p6, at [15], [20], [21].
[13] Submissions of the Commonwealth of Australia p7, at [19].
[14] *Chief Commission of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at [49]-[51].
[15] *Bruton Holdings Pty Ltd (in liquidation) v Commissioner of Taxation* (2009) 239 CLR 346 at [43].

**The second issue – "circulating security interest"**

12. The first respondent's submissions concerning the "circulating security interest" issue appear to proceed on the unstated assumption that 'the property coming into [the receiver's] hands', within the meaning of s 433(3) of the *Corporations Act*, includes property held by the company on trust. That is not, and never has been, the case. The 'the property coming into [the receiver's] hands' as referred to in s.433(3) is a subset of the 'property of the company' as referred to earlier in the same sentence of the same section. Section 433 is simply about priorities as between the company's creditors. It does not have an additional effect of requiring receivers to pay trust assets to non-trust creditors, for example. True it may be that here the company validly granted security to the bank over the trust assets, but that does not make the trust assets available to meet the general body of the company's creditors.[16]

13. Thus, the correct analysis here is accordingly to identify the relevant 'property coming into [the receiver's] hands', which falls to be distributed under s.433(3), as being the right of indemnity. It is not the trust assets themselves.

14. Nor does the fact that the bank's security also attached to assets, some of which (e.g. stock, and cash at bank) were undoubtedly "circulating assets", mean that assets which were not circulating assets but which came into the hands of the receivers fell to be distributed under s.433(3).[17] For example, had the company owned - and mortgaged to the bank - real property (and assuming that the company had not been in the business of buying and selling property), the mere fact that the bank's mortgage also attached to a small amount of cash would not result in the proceeds of sale of the real property being distributed to priority creditors.

Dated: 16 November 2018

Name: Daryl J Williams
Telephone: (03) 9225 8521
Email: daryl.williams@vicbar.com.au

[16] Here again, the interpretation adopted must be sufficiently robust to meet a variety of factual situations, not merely the ideal scenario where the company only ever acted as trustee of a single trust, and did so without misconduct: see para [7] above.
[17] c.f. Submissions of the Commonwealth of Australia p17, at [46] – [48], [51].