



HIGH COURT OF AUSTRALIA

19 June 2019

CARTER HOLT HARVEY WOODPRODUCTS AUSTRALIA PTY LTD v THE
COMMONWEALTH OF AUSTRALIA & ORS
[2019] HCA 20

Today the High Court unanimously dismissed an appeal from a judgment of the Court of Appeal of the Supreme Court of Victoria concerning the payment of priority debts and amounts out of trust assets held by an insolvent corporate trustee.

Amerind Pty Ltd ("Amerind") carried on a business solely in its capacity as trustee of a trading trust and, to that end, maintained credit facilities with Bendigo and Adelaide Bank Ltd ("the Bank"). After terminating those facilities and demanding repayment, the Bank appointed the second respondents ("the receivers") as receivers and managers of Amerind pursuant to a general security deed. Amerind's creditors then resolved that the company be wound up in insolvency.

The receivers realised Amerind's assets and satisfied its obligations to the Bank out of the proceeds. After provision for what the receivers considered to be a just estimate of their remuneration, the surplus remaining for distribution was some \$1,619,108, being the proceeds of realisation of inventory. The first respondent ("the Commonwealth"), which had advanced accrued wages and entitlements totalling \$3.8 million to Amerind's former employees, claimed to be entitled to payment out of that surplus in priority to other creditors, including the appellant ("Carter Holt"), pursuant to ss 433(3), 556(1)(e) and 560 of the *Corporations Act 2001* (Cth).

In rejecting the Commonwealth's claim, the primary judge held that s 433 of the *Corporations Act* did not apply because Amerind had no assets of its own, only a right of indemnity in respect of trust liabilities, which right was neither "property of the company" nor "comprised in or subject to a circulating security interest" within the meaning of that section. In allowing the Commonwealth's appeal from that decision, the Court of Appeal held that Amerind's right to be indemnified out of the assets of the trust was "property of the company" and that ss 433, 555 and 556 therefore necessarily applied to the distribution of the surplus. The Court of Appeal further held that, because the proceeds of realisation of the inventory were property of Amerind subject to a circulating security interest and of which the receivers had taken possession or assumed control, s 433(3) required the receivers to pay the claims in s 556(1)(e) in priority out of those proceeds. By grant of special leave, Carter Holt appealed to the High Court.

The High Court unanimously held that, in the winding up of a corporate trustee, the "property of the company" available for payment of creditors includes so much of the trust assets as the company is entitled, in exercise of its right of indemnity, to apply in satisfaction of the claims of creditors, but that proceeds from an exercise of the right of exoneration may be applied only in satisfaction of trust liabilities to which the right relates. The Court also held that s 433(3) required the receivers to pay the debts in accordance with the statutory priorities in a winding up. A majority reasoned that Amerind's right of indemnity was not "property [of the company] comprised in or subject to a circulating security interest", but the inventory itself *was* such "property of the company" and the receivers were, as Amerind would have been, entitled to apply the proceeds of its realisation in satisfaction of the claims of trust creditors.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*