

# HIGH COURT OF AUSTRALIA

KIEFEL CJ,  
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

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CARTER HOLT HARVEY WOODPRODUCTS  
AUSTRALIA PTY LTD

APPELLANT

AND

THE COMMONWEALTH OF AUSTRALIA & ORS

RESPONDENTS

*Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth*  
[2019] HCA 20  
19 June 2019  
M137/2018

## ORDER

*Appeal dismissed with costs.*

On appeal from the Supreme Court of Victoria

### Representation

D J Williams QC for the appellant (instructed by Polczynski Robinson)

J P Moore QC with J A G McComish for the first respondent (instructed by King & Wood Mallesons)

No appearance for the second respondents

Submitting appearance for the third respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth**

Corporations – External administration – Receivers and other controllers of property – Priority debts – Where corporation carrying on business solely as trustee created circulating security interest over trust assets in favour of bank – Where receivers and managers appointed by bank realised trust assets and satisfied obligations to bank – Whether surplus proceeds required to be paid in accordance with *Corporations Act 2001* (Cth), s 433 – Whether corporation's right of indemnity is property of the company "comprised in or subject to a circulating security interest" within meaning of s 433 – Whether trust assets themselves are such "property of the company" – Whether statutory order of priorities for payment of debts applicable to distribution of surplus proceeds from trust assets among trust creditors – Whether proceeds from exercise of insolvent corporate trustee's right of exoneration to be applied only in satisfaction of trust liabilities to which it relates.

Trusts – Trustees – Right of indemnity – Whether trustee's right of indemnity confers beneficial interest in trust assets – Whether such interest is "property" within meaning of *Corporations Act*, s 9.

Words and phrases – "beneficial interest", "circulating asset", "circulating security interest", "floating charge", "insolvent corporate trustee", "payment of creditors out of property", "power of exoneration", "PPSA security interest", "priority payments", "property", "property comprised in or subject to a circulating security interest", "property held by the bankrupt on trust", "property of the company", "right of exoneration", "right of indemnity", "taking possession or assuming control of property", "trust asset", "trust liabilities".

*Corporations Act 2001* (Cth), ss 9, 51, 51C, 433, 555, 556, 560.

*Personal Property Securities Act 2009* (Cth), ss 10, 12, 340.



## Introduction

1        In 1988, the Australian Law Reform Commission observed that although the trading trust had been used extensively for more than a decade, "the companies legislation makes little or no provision for corporate trustees which become insolvent"<sup>1</sup>. That observation remains true today<sup>2</sup>. The issue that arises on this appeal, which was foreseen nearly four decades ago<sup>3</sup>, essentially concerns whether creditors who would be priority creditors of an insolvent company are priority creditors when that company trades as the trustee of a trading trust.

2        The context in which the question arises is one where, for more than a century, employees have had priority in the distribution of property by liquidators over the holders of a floating charge<sup>4</sup> or, as it is now described, a circulating security interest<sup>5</sup>. The issue on this appeal is whether the relevant provision in relation to receivers in s 433 of the *Corporations Act 2001* (Cth), duplicating those in relation to liquidators<sup>6</sup>, gives the same priority to employees of a trading trust over other creditors of a trading trust. In other words, do employees of a company that is in receivership or insolvency have no statutory priority if that company happens to have been trading as the trustee of a trading trust and holding its assets on trust?

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1    Australia, Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) at 108 [240].

2    D'Angelo, "The trust as a surrogate company: The challenge of insolvency" (2014) 8 *Journal of Equity* 299 at 314.

3    *Re Byrne Australia Pty Ltd and the Companies Act* [1981] 1 NSWLR 394 at 399. See also Meagher, "Insolvency of Trustees" (1979) 53 *Australian Law Journal* 648 at 653.

4    *Preferential Payments in Bankruptcy Amendment Act 1897* (UK) (60 & 61 Vict c 19), s 2. See, in Victoria, *Companies Act 1910* (Vic), s 208(3)(b).

5    This change in terminology was introduced by the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth), Sch 1, item 87.

6    *Corporations Act 2001* (Cth), ss 556 and 561.

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3 The primary judge (Robson J) effectively answered this question "yes", essentially on the basis that assets held on trust are not the property of the company. The Court of Appeal of the Supreme Court of Victoria (Ferguson CJ, Whelan, Kyrou, McLeish and Dodds-Streeton JJA) effectively answered this question "no", with reliance upon the right of indemnity that a trustee company has to use trust assets for its own benefit and exonerate itself from its liability to trust creditors. For the reasons that follow, the answer given by the Court of Appeal was correct and the appeal must be dismissed.

### Background

4 Amerind Pty Ltd ("Amerind") carried on a business as the trustee for a trading trust, the Panel Veneer Processes Trading Trust. It traded solely as trustee of that trust. It had various debt facilities with the Bendigo and Adelaide Bank ("the Bank") which were secured by a range of securities. One of those was a debtor finance facility by which the Bank was entitled to purchase Amerind's book debts.

5 On 11 March 2014, Amerind's sole director appointed administrators ("the Administrators") to Amerind pursuant to s 436A of the *Corporations Act*. On the same day, the Bank then appointed receivers and managers ("the Receivers") to Amerind. The Bank, which had earlier demanded payment from Amerind, exercised rights under its debtor finance facility and gave written notice to Amerind's debtors, thereby perfecting a legal assignment of their debts from Amerind to the Bank.

6 The Receivers were appointed to a business with assets that included cash at bank, stock, plant and equipment, and reserve amounts contingently owed to Amerind under the Bank's debtor finance facility. For about a month after their appointment the Receivers continued to trade on a "business as usual" basis whilst seeking a purchaser for the business. On 14 April 2014, the Receivers began a wind down phase in which they realised the vast majority of the stock, including stock which was the subject of a security interest of the Bank.

7 On 13 August 2014, at the second meeting of Amerind's creditors, the creditors resolved that Amerind be wound up in insolvency. The Administrators were appointed as joint and several liquidators of Amerind. By this time, the Receivers had realised most of Amerind's assets and were in a position to retire. Additionally, all of the Bank's secured debt had been discharged and that discharge was not, and is not, contested. The Bank's discharge was by means that included payment of almost \$21 million from the debts that had been assigned to it under its security. The Receivers had a receivership surplus of \$1,619,018. However, before they could retire, the Receivers were confronted

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with competing claims in relation to that surplus. Two of the competing claims to the receivership surplus that were in issue at trial are the subject of this appeal.

8 One claim in relation to the receivership surplus was by the first respondent to this appeal, the Commonwealth of Australia. Under a statutory scheme known as the Fair Entitlements Guarantee Scheme, the Commonwealth had paid \$3.8 million in accrued wages and entitlements to former employees of Amerind. By s 560 of the *Corporations Act*, the Commonwealth had the same priority entitlement as those employees who were entitled to payment as a priority under ss 433 and 556 of the *Corporations Act*. The competing claim to the surplus was by the appellant, Carter Holt Harvey Woodproducts Australia Pty Ltd ("Carter Holt"), a creditor of Amerind, which submitted that s 433 of the *Corporations Act* did not afford priority to the Commonwealth.

9 The second respondents to this appeal are the Receivers. Since the receivership surplus has already been diminished by the costs of the Receivers' ongoing appointment including the costs of this litigation, and because the Receivers had already had substantial input into the orders of the primary judge (supported by Carter Holt) and the Court of Appeal (supported by the Commonwealth), the Receivers did not seek to make any submissions in this Court on the merits of the competing claims.

### Section 433 of the *Corporations Act*

10 The provision with which this appeal is centrally concerned is s 433 of the *Corporations Act*. That section is the modern iteration of a provision that has existed in various forms in insolvency legislation since at least 1897<sup>7</sup>. Its first iteration arose after the development in the 1870s of a new form of security, the floating charge<sup>8</sup>. As Lord Millett observed of that history<sup>9</sup>:

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7 See *Preferential Payments in Bankruptcy Amendment Act 1897* (UK) (60 & 61 Vict c 19), s 3; *Companies Act 1910* (Vic), s 114; *Companies Act 1961* (Vic), s 196.

8 *In re Panama, New Zealand, and Australian Royal Mail Co* (1870) LR 5 Ch App 318 at 322 (generally regarded as the first case in which a floating charge was recognised); *In re Florence Land and Public Works Co; Ex parte Moor* (1878) 10 Ch D 530 at 543, 546, 550; *In re Hamilton's Windsor Ironworks; Ex parte Pitman and Edwards* (1879) 12 Ch D 707 at 713-714; *In re Colonial Trusts Corporation; Ex parte Bradshaw* (1879) 15 Ch D 465 at 472. See *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710 at 717-718 [5]-[8].

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"Valuable as the new form of security was, it was not without its critics. One of its consequences was that it enabled the holder of the charge to withdraw all or most of the assets of an insolvent company from the scope of a liquidation and leave the liquidator with little more than an empty shell and unable to pay preferential creditors. Provision for the preferential payment of certain classes of debts had been introduced in bankruptcy in 1825 and was extended to the winding up of companies by section 1(1)(g) of the Preferential Payments in Bankruptcy Act 1888. Section 107 of the Preferential Payments in Bankruptcy Amendment Act 1897 now made the preferential debts payable out of the proceeds of a floating charge in priority to the debt secured by the charge."

11 With one exception, s 433 has been expressed in essentially the same form since 1982<sup>10</sup>. The exception is a change in terminology in 2012<sup>11</sup>. Prior to 2012, s 433 of the *Corporations Act* had the effect that a receiver who was appointed on behalf of the holders of any debentures of a company that were secured by a floating charge was required to pay "out of the property coming into his, her or its hands" certain debts, including employee claims, in priority to any claim for principal or interest in respect of the debentures. The section, with its century-old antecedents, prevented "[t]he debenture holder, by virtue of his (crystallised) floating charge, scoop[ing] the pool"<sup>12</sup>.

12 The change in 2012 was the consequence of the replacement by the *Personal Property Securities Act 2009* (Cth) of the concept of a floating charge with the concept of a circulating security interest. The change of language was not intended to affect existing rights under the *Corporations Act*, including the priority given to employees over unsecured creditors<sup>13</sup>. Other than preserving

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9 *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710 at 718 [9].

10 See *Companies Code*, s 331; *Corporations Law*, s 433.

11 The amendments introduced by the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth), Sch 1, item 87 commenced operation on 30 January 2012.

12 *Buchler v Talbot* [2004] 2 AC 298 at 305 [11].

13 Australia, House of Representatives, *Personal Property Securities (Corporations and Other Amendments) Bill 2010*, Explanatory Memorandum at 3 [1.2], 19 [8.1], [8.4]; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 10 March 2010 at 2100; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 13 May 2010 at 3632.



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those floating charges that existed before 2012, a "circulating security interest" is defined in s 51C(a) of the *Corporations Act* as also including "a PPSA security interest, if: (i) the security interest has attached to a circulating asset within the meaning of the *Personal Property Securities Act 2009*; and (ii) the grantor (within the meaning of that Act) has title to the asset". A "circulating asset" is defined in s 340 of the *Personal Property Securities Act* in terms similar to the old floating charge, including where, by s 340(1)(b), the "secured party has given the grantor express or implied authority for any transfer of the personal property to be made, in the ordinary course of the grantor's business, free of the security interest". The change in terminology in s 433 of the *Corporations Act* from "floating charge" to "circulating security interest" thus aligned the *Corporations Act* and the *Personal Property Securities Act*<sup>14</sup>.

- 13           Section 433(2)(a) of the *Corporations Act* provides for two alternative preconditions to the operation of the priority regime in s 433(3). Those two alternative preconditions are:

"[(1)] a receiver is appointed on behalf of the holders of any debentures of a company or registered body that are secured by a circulating security interest, or [(2)] possession is taken or control is assumed, by or on behalf of the holders of any debentures of a company or registered body, of any property comprised in or subject to a circulating security interest".

- 14           Other preconditions in s 433(2) are not in dispute on this appeal, with the result that if either of the two preconditions set out above is met then s 433(3) applies.

- 15           Section 433(3) provides:

"In the case of a company, the receiver or other person taking possession or assuming control of property of the company must pay, out of the property coming into his, her or its hands, the following debts or amounts in priority to any claim for principal or interest in respect of the debentures:

- (a) first, any amount that in a winding up is payable in priority to unsecured debts pursuant to section 562;
- (b) next, if an auditor of the company had applied to ASIC under subsection 329(6) for consent to his, her or its resignation as

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14 Australia, House of Representatives, *Personal Property Securities (Corporations and Other Amendments) Bill 2010*, Explanatory Memorandum at 6 [4.3], 7 [4.8].

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auditor and ASIC had refused that consent before the relevant date – the reasonable fees and expenses of the auditor incurred during the period beginning on the day of the refusal and ending on the relevant date;

- (c) subject to subsections (6) and (7), next, any debt or amount that in a winding up is payable in priority to other unsecured debts pursuant to paragraph 556(1)(e), (g) or (h) or section 560."

16 Sections 556(1)(e), (g) or (h) and 560 of the *Corporations Act* are the provisions that give priority to certain claims, including claims by employees and by those, here the Commonwealth, who advance funds on behalf of the employer to meet them.

### **The proceedings before the primary judge and the Court of Appeal**

17 The Receivers applied to the primary judge for directions on a number of questions, and the parties formulated an agreed list of issues<sup>15</sup>. It is not necessary to set out all of those issues and the answers provided to the questions. It suffices for this appeal to describe a number of relevant conclusions reached by his Honour in the course of answering those questions. First, the receivership surplus is trust property<sup>16</sup>. Secondly, the Bank, and therefore the Receivers, held debentures over the assets of Amerind and those debentures were secured by a circulating security interest<sup>17</sup>. Thirdly, the assets of Amerind included four classes of circulating assets that Carter Holt had alleged were not circulating<sup>18</sup>: cash at bank, purchase price paid by the Bank to Amerind under two debtor finance facilities to purchase certain accounts, realisation of stock other than through credit sales, and tax refunds and sundry receipts. Fourthly, the trustee's right to be indemnified from the trust assets is not a circulating asset within s 340 of the *Personal Property Securities Act* nor is it a floating charge, and therefore it does not fall within s 51C of the *Corporations Act*<sup>19</sup>. Fifthly, in principle the priority regime in s 433(3) of the

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15 See *Re Amerind Pty Ltd; The Commonwealth v Byrnes and Hewitt* (2018) 54 VR 230 at 234 [9].

16 *Re Amerind Pty Ltd (In liq)* (2017) 320 FLR 118 at 129 [49].

17 *Re Amerind Pty Ltd (In liq)* (2017) 320 FLR 118 at 138 [68].

18 *Re Amerind Pty Ltd (In liq)* (2017) 320 FLR 118 at 200 [442], 201 [455], [459], 202 [464].

19 *Re Amerind Pty Ltd (In liq)* (2017) 320 FLR 118 at 192 [389].

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*Corporations Act* applies to the proceeds of the various assets comprising the receivership surplus<sup>20</sup>. However, sixthly, ss 433 and 556 of the *Corporations Act* apply only to the property of the company and do not apply to trust assets or to the trustee's right of indemnity since neither of those is the property of the company<sup>21</sup>. It is this final point which sits at the heart of this appeal.

18        There were broadly two groups of issues before the Court of Appeal<sup>22</sup>. One group of issues concerned whether relevant assets fell within the ambit of property which is secured by a "circulating security interest". Carter Holt alleged that Amerind's right of indemnity from the trust assets was the only asset that could be the property of Amerind but that it was not subject to a circulating security interest and therefore the preconditions in s 433(2) were not met. The Court of Appeal rejected this submission, concluding that it was not necessary for the right of indemnity to be the subject of a circulating security interest<sup>23</sup>, but that even if it were necessary to characterise the right of indemnity as circulating or non-circulating then the character of the trust assets as "circulating" was one that "flowed through to the right of indemnity"<sup>24</sup>.

19        The Court of Appeal also dismissed a notice of contention by Carter Holt, which had disputed the characterisation by the primary judge of three classes of assets as circulating assets<sup>25</sup>. There is no appeal from that conclusion, which has the effect that the debentures under which the Receivers were appointed were secured by a "circulating security interest", over trust property which included those three classes, within the meaning of s 51C of the *Corporations Act*<sup>26</sup>.

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20    *Re Amerind Pty Ltd (In liq)* (2017) 320 FLR 118 at 139 [76], 194 [401].

21    *Re Amerind Pty Ltd (In liq)* (2017) 320 FLR 118 at 129-130 [53], 141-142 [94].

22    *Re Amerind Pty Ltd; The Commonwealth v Byrnes and Hewitt* (2018) 54 VR 230 at 233 [2].

23    *Re Amerind Pty Ltd; The Commonwealth v Byrnes and Hewitt* (2018) 54 VR 230 at 298 [315].

24    *Re Amerind Pty Ltd; The Commonwealth v Byrnes and Hewitt* (2018) 54 VR 230 at 302 [328].

25    *Re Amerind Pty Ltd; The Commonwealth v Byrnes and Hewitt* (2018) 54 VR 230 at 303 [334], 323 [417].

26    *Re Amerind Pty Ltd; The Commonwealth v Byrnes and Hewitt* (2018) 54 VR 230 at 297-298 [311]-[312].

Although the "circulating assets" that were subject to the circulating security interest were trust property, Amerind had, by a "General Security Deed", dated 19 December 2012, which defined "personal property", "security interest", and "collateral" broadly, granted a security interest in favour of the Bank over all property of any kind whether Amerind was "the beneficial owner" or held the property "as trustee of a trust".

- 20 The other group of issues concerned whether the receivership surplus was trust property and, if so, whether s 433 of the *Corporations Act* applied to it with the effect that rights held by Amerind on trust were subject to the priority regime in ss 433(3), 556, and 560. Included within this group of issues was the question whether the trustee's "right of indemnity", to exonerate itself from trust liabilities, is property of the company. The Court of Appeal held that the receivership surplus fell within s 433 of the *Corporations Act* and that the effect of this was that the surplus was subject to the priority regime in ss 433(3), 556, and 560<sup>27</sup>.

### **The issues before this Court**

- 21 Before this Court, Carter Holt's grounds of appeal were broadly twofold. First, it was said that s 433 of the *Corporations Act* did not apply because, contrary to the reasoning of the Court of Appeal, Amerind's right of indemnity was not "property comprised in or subject to a circulating security interest" within s 433(2)(a). This ground of appeal was effectively concerned with the preconditions to the operation of s 433. Secondly, it was asserted that the Court of Appeal erred by concluding that the funds held by the Receivers were proceeds of Amerind's exercise of its right of indemnity and therefore available for distribution within s 433 of the *Corporations Act*. This ground of appeal effectively asserted that the funds obtained from the sale of trust assets were trust property which was not subject to the Receivers' duty to pay, "out of the property coming into his, her or its hands", creditors of Amerind in accordance with s 433(3) of the *Corporations Act*.

- 22 Each of the Commonwealth's submissions in response focused upon a trustee company's right of indemnity. In particular, the Commonwealth relied upon the power of the trustee to use trust assets to exonerate itself from debts properly incurred in the course of trust business. The Commonwealth's primary submission was that this power of exoneration entitled the Receivers to sell trust assets to obtain a fund to be used to discharge all of the company's debts, whether or not incurred with authority in the course of trust business.

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27 *Re Amerind Pty Ltd; The Commonwealth v Byrnes and Hewitt* (2018) 54 VR 230 at 291 [285].

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The Commonwealth's alternative submission was that the power of exoneration entitled the Receivers only to discharge debts that were incurred with authority in the course of trust business. Since all of the debts of Amerind were authorised debts incurred in the course of the trust business<sup>28</sup> the appeal must be dismissed if either of these submissions is accepted.

23 An appreciation of fundamental principles of trust law is necessary to understand the operation of s 433 of the *Corporations Act*, since that provision and its antecedents were enacted against the background of, and assumed the operation of, these fundamental principles. The resolution of this appeal depends upon the application of particular principles concerning (i) the benefit in insolvency of rights held on trust, and (ii) the nature of the trustee's "right of indemnity", in particular its power of exoneration, in insolvency. Application of these principles determines the ultimate question of whether a payment to trust creditors using the trustee's power of exoneration is a payment "out of the property coming into [the receiver's] hands" within s 433(3).

### **The benefit in insolvency of rights held on trust**

24 Although the Commonwealth's written submissions focused upon scenarios involving permutations of solvency and insolvency of a trustee and a trust, the trust is not a separate entity and therefore does not have a separate solvency status from the trustee. A trustee is personally liable for debts incurred as trustee<sup>29</sup>. This is so whether or not the trustee contracted with creditors as a named trustee, and hence whether or not the creditors knew of the existence of the trust<sup>30</sup>. Similarly, the expressions "trust assets" and "trust creditors" are simply shorthand for, respectively, the rights held on trust by the trustee and those creditors of the trustee whose debts were properly incurred with authority in the course of trust business.

25 Although a trustee is personally liable to creditors, it has been established for centuries in bankruptcy law that rights held by a bankrupt on trust do not generally form part of the bankrupt's estate that is available for general

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28 *Re Amerind Pty Ltd; The Commonwealth v Byrnes and Hewitt* (2018) 54 VR 230 at 235 [14].

29 *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367; [1979] HCA 61. See also *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 at 324; [1945] HCA 37.

30 Meagher, "Insolvency of Trustees" (1979) 53 *Australian Law Journal* 648 at 652. See also *Watling v Lewis* [1911] 1 Ch 414 at 423.

distribution amongst creditors<sup>31</sup>. In this respect, the common law courts took notice of a trust<sup>32</sup>. Despite Australian bankruptcy legislation having adopted a broad definition of "property"<sup>33</sup>, it also expressly adopted this principle by excluding from the property divisible among creditors all property held by the bankrupt on trust for another person<sup>34</sup>.

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The *Corporations Act* contains a similarly broad definition of "property"<sup>35</sup> to the bankruptcy legislation but it does not contain an equivalent express exclusion of property held by a company on trust for another person. However, the same "elementary, and fundamental"<sup>36</sup> principle that generally precludes distribution of trust property from distribution among creditors has been consistently applied in Australia to trustee companies<sup>37</sup>. It has been said that, as a general proposition, it would be "extraordinary, in the context of insolvency law, if 'property of the company' included property of which it was a trustee and in which it had no beneficial interest"<sup>38</sup>. Hence, as the Court of Appeal correctly observed, the exclusion of property held on trust from the

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31 *Scott v Surman* (1742) Willes 400 at 402 [125 ER 1235 at 1236]; *Winch v Keeley* (1787) 1 Term Rep 619 at 623 [99 ER 1284 at 1286]; *Boddington v Castelli* (1853) 1 El & Bl 879 at 885 [118 ER 665 at 667].

32 *Winch v Keeley* (1787) 1 Term Rep 619 at 623 [99 ER 1284 at 1286]. See also *Gladstone v Hadwen* (1813) 1 M & S 517 at 526 [105 ER 193 at 197]; *Britten v Perrott* (1834) 2 C & M 597 at 602 [149 ER 898 at 901].

33 *Bankruptcy Act 1924* (Cth), s 4; *Bankruptcy Act 1966* (Cth), s 5(1).

34 *Bankruptcy Act 1924* (Cth), s 91(a); *Bankruptcy Act 1966* (Cth), s 116(2)(a).

35 *Corporations Act 2001* (Cth), s 9.

36 *Angove's Pty Ltd v Bailey* [2016] 1 WLR 3179 at 3190 [25]; [2017] 1 All ER 773 at 786.

37 *Re Sutherland; French Caledonia Travel Service Pty Ltd (In liq)* (2003) 59 NSWLR 361 at 425 [206]; *Re Stansfield DIY Wealth Pty Ltd (In liq)* (2014) 291 FLR 17 at 22-23 [16]; *Jones v Matrix Partners Pty Ltd*; *Re Killarnee Civil & Concrete Contractors Pty Ltd (In liq)* (2018) 260 FCR 310 at 329 [69], 333 [89], 354-355 [211]. See also *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 369-370.

38 *Re Stansfield DIY Wealth Pty Ltd (In liq)* (2014) 291 FLR 17 at 22 [16].

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property of a trustee, while express in bankruptcy, applies "by undisputed analogy in the case of corporations"<sup>39</sup>.

27       The reason that rights held on trust by an insolvent company or bankrupt individual are generally excluded from division amongst the creditors of the company or of the bankrupt individual is that a liquidator's power over the rights of an insolvent company and the statutory assignment of rights in bankruptcy have always been concerned only with those rights that enure in law "for the benefit of" the "*personal estate*" of the bankrupt or insolvent person<sup>40</sup>, even if in some cases that legal benefit might not be a "practical benefit"<sup>41</sup>. By contrast, other than as permitted by rules of law or the terms of the trust, the trustee owes a "personal obligation to deal with the trust property for the benefit of the beneficiaries, and this obligation must be annexed to the trust property"<sup>42</sup>. The trustee does not generally have any entitlement to deal with the rights held on trust for the trustee's own benefit. Courts of law took notice of the trust because "it would be absurd" for rights to have vested in bankruptcy "for no other purpose but in order that there may be a bill in equity brought against [the trustee in bankruptcy]"<sup>43</sup>. Hence, rights held on trust were, and are, generally excluded from inclusion in the statutory concepts of the "property" of the bankrupt or the "property" of the insolvent company.

28       However, the general principle that excludes those rights held on trust from division among creditors does not apply to the extent to which a trustee is

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39 *Re Amerind Pty Ltd; The Commonwealth v Byrnes and Hewitt* (2018) 54 VR 230 at 245 [62].

40 *An Act for the better relief of the creditors against such as shall become bankrupts 1604* (1 Jac 1 c 15), s 8. See *Beckham v Drake* (1849) 2 HLC 579 at 627 [9 ER 1213 at 1231]; *Rose v Buckett* [1901] 2 KB 449 at 454.

41 *Davies v The English, Scottish & Australian Bank Ltd* (1934) 7 ABC 210 at 214; *Fuller v Beach Petroleum NL* (1993) 43 FCR 60 at 68, 74-75.

42 *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510 at 518-519, citing Meagher and Gummow, *Jacobs' Law of Trusts in New South Wales*, 3rd ed (1971) at 109. See also Maitland, *Equity: also The Forms of Action at Common Law* (1909) at 17-18; Maitland, *Equity: A Course of Lectures*, 2nd ed (rev) (1936) at 17.

43 *Gladstone v Hadwen* (1813) 1 M & S 517 at 526 [105 ER 193 at 197].

permitted to benefit personally by "deriv[ing] any benefit"<sup>44</sup> from the rights held on trust. One means by which a trustee can benefit personally from the trust rights is the trustee's power to use those trust rights to indemnify itself from liabilities. The existence of that "right of indemnity" means that, to the extent of the power, the trust rights are "no longer property held solely in the interests of the beneficiaries of the trust"<sup>45</sup>.

### **The nature of the power of exoneration in insolvency**

#### *The trustee's right of indemnity*

29 Whether sourced in statute<sup>46</sup>, or as an express term or equitable implication<sup>47</sup> in the trust instrument, the trustee has two rights to obtain indemnity<sup>48</sup>. In *Chief Commissioner of Stamp Duties (NSW) v Buckle*<sup>49</sup>,

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44 *Carpenter v Marnell* (1802) 3 Bos & Pul 40 at 41 [127 ER 23 at 24]. See also *Carvalho v Burn* (1833) 4 B & Ad 382 at 393 [110 ER 499 at 503].

45 *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 370; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 246 [50]; [1998] HCA 4. Compare Meagher, "Insolvency of Trustees" (1979) 53 *Australian Law Journal* 648 at 650; Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 523 [21-15].

46 *Trustee Act 1925* (NSW), s 59(4); *Trustee Act 1958* (Vic), s 36(2); *Trustee Act 1936* (SA), s 35(2); *Trusts Act 1973* (Qld), s 72; *Trustees Act 1962* (WA), s 71; *Trustee Act 1898* (Tas), s 27(2); *Trustee Act 1893* (NT), s 26; *Trustee Act 1925* (ACT), s 59(4).

47 *Worrall v Harford* (1802) 8 Ves Jun 4 at 8 [32 ER 250 at 252]; *Savage v Union Bank of Australia Ltd* (1906) 3 CLR 1170 at 1187-1188; [1906] HCA 37; *In re Suco Gold Pty Ltd (In liq)* (1983) 33 SASR 99 at 104; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 245 [47]; *Jones v Matrix Partners Pty Ltd*; *Re Killarnee Civil & Concrete Contractors Pty Ltd (In liq)* (2018) 260 FCR 310 at 321 [38]-[39].

48 See *In re Blundell*; *Blundell v Blundell* (1888) 40 Ch D 370 at 376-377; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 245 [47]; *Bruton Holdings Pty Ltd (In liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346 at 358-359 [43]; [2009] HCA 32.

49 (1998) 192 CLR 226 at 245 [47].



this Court approved the following passage from *Scott on Trusts*<sup>50</sup>, which described the general characteristics of the two rights of indemnity:

"Where the trustee acting within his powers makes a contract with a third person in the course of the administration of the trust, although the trustee is ordinarily personally liable to the third person on the contract, he is entitled to indemnity out of the trust estate. If he has discharged the liability out of his individual property, he is entitled to reimbursement; if he has not discharged it, he is entitled to apply the trust property in discharging it, that is, he is entitled to exoneration."

30 Although both of these rights of indemnity might strictly be described as powers of indemnity, their description as "rights" emphasises that they do not exist independently of the rights that the trustee holds on trust. The powers of indemnity are concerned with a means by which trust rights can be used. They are thus part and parcel of the trust "rights" in a broad sense. For instance, a trustee's rights concerning "cash at bank" include both the right to be paid money on request and the power to direct that those funds be used to discharge debts owed to trust creditors.

31 The trustee's power to be reimbursed from the trust fund for the entirety of a payment that has been made by the trustee personally, sometimes also described as "recoupment"<sup>51</sup>, is not in issue in this appeal. This appeal is concerned with the trustee's power of exoneration, which is a power to use trust funds to discharge debts that were properly incurred by the trustee in the course of trust business. By the exercise of the power of exoneration, equity ensures that the trustee "need not pay and perhaps ruin himself before seeking relief"<sup>52</sup>. However, the value of the power of exoneration, like the value of the power of reimbursement, may decrease by "netting-off reciprocal monetary obligations"<sup>53</sup> to the extent to which the trustee has incurred a duty to increase the

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50 Scott and Fratcher, *The Law of Trusts*, 4th ed (1988), vol 3A at 345 §246.

51 *Levy v Kum Chah* (1936) 56 CLR 159 at 173; [1936] HCA 60; *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 at 336-337. See also *Re Enhill Pty Ltd* [1983] 1 VR 561 at 569. Compare the use of "contribution" generally to describe partial recovery: Mitchell, *The Law of Contribution and Reimbursement* (2003) at 9-10 [1.14]-[1.15].

52 *Savage v Union Bank of Australia Ltd* (1906) 3 CLR 1170 at 1197.

53 *In re Kaupthing Singer & Friedlander Ltd [No 2]* [2012] 1 AC 804 at 813 [8].

trust funds or, more loosely, a "liability which the trustee owes to the trust estate"<sup>54</sup>.

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The power of exoneration, like that of reimbursement, has been described as conferring upon the trustee "a proprietary interest"<sup>55</sup> in the trust assets. These labels, "trust assets" and the trustee's "proprietary interest", describe the combination and effect of the legal and equitable rights which the trustee holds on trust. Hence, where a trustee has legal title, as well as equitable or statutory powers of indemnity that are concerned with ways in which the legal title can be used, the legal title is not independent of those powers of indemnity. The legal title held by the trustee has thus been described as subject to an equitable charge or lien in favour of the trustee to secure the powers of indemnity<sup>56</sup>. As this Court explained in *Chief Commissioner of Stamp Duties (NSW) v Buckle*<sup>57</sup>, the "trust assets" are subject to competing "proprietary rights, in order of priority, of the trustee and the beneficiaries". The trustee's rights take priority over those of the beneficiaries to the extent of the trustee's powers of indemnity. Where the "trust assets" need to be sold to reimburse or exonerate the trustee, the beneficiaries' rights have lower priority than the trustee's rights. A court may authorise the sale of assets held by the trustee so as to satisfy the power of indemnity, as a step in the process of the trustee exonerating itself from authorised liabilities, in the same manner as any other equitable charge<sup>58</sup>.

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**54** *Lane v Deputy Commissioner of Taxation* (2017) 253 FCR 46 at 68 [54], citing *Cherry v Boulton* (1839) 4 My & Cr 442 [41 ER 171]. See also *Jennings v Mather* [1902] 1 KB 1 at 5.

**55** *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 370; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 246 [49]; *Bruton Holdings Pty Ltd (In liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346 at 359 [43].

**56** *Jennings v Mather* [1901] 1 QB 108 at 113-114; *Jennings v Mather* [1902] 1 KB 1 at 6; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 247 [50]; *Bruton Holdings Pty Ltd (In liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346 at 358-359 [43].

**57** (1998) 192 CLR 226 at 247 [50]. See also *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 at 335; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367.

**58** *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 247 [50]. See *Hewett v Court* (1983) 149 CLR 639 at 663; [1983] HCA 7.

33 This well-established<sup>59</sup> priority that the trustee's rights have over the equitable rights of the beneficiaries was justified in *In re Johnson; Shearman v Robinson*<sup>60</sup> by Jessel MR on the basis that:

"it would not be right that the *cestui que trust* should get the benefit of the trade without paying the liabilities; therefore the Court says to him, You shall not set up a trustee who may be a man of straw, and make him a bankrupt to avoid the responsibility of the assets for carrying on the trade".

*The operation of the right of exoneration in insolvency*

34 Trust creditors take the insolvent trustee's power of exoneration as they find it. They can enforce the power of exoneration by subrogation to the trustee's rights<sup>61</sup> but the creditor "can be no better off than the trustee"<sup>62</sup>. A trustee in bankruptcy or liquidator is constrained in the same way. It is "established beyond all question"<sup>63</sup> that the rights of a trustee in relation to trust assets, to the extent of the associated powers of indemnity, pass to her or his trustee in

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59 *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 at 335; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 247 [51], quoting *Chief Commissioner of Stamp Duties v Buckle* (1995) 38 NSWLR 574 at 586.

60 (1880) 15 Ch D 548 at 552, quoted in *Jennings v Mather* [1901] 1 QB 108 at 115. See also *In re Beddoe; Downes v Cottam* [1893] 1 Ch 547 at 558, quoted in *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 246 [49].

61 *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 at 335; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367, 370.

62 Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 520 [21-12]; *In re Johnson; Shearman v Robinson* (1880) 15 Ch D 548 at 552, 555; *In re Frith; Newton v Rolfe* [1902] 1 Ch 342 at 345-346; *In re British Power Traction and Lighting Co Ltd; Halifax Joint Stock Banking Co Ltd v British Power Traction and Lighting Co Ltd* [1910] 2 Ch 470 at 475-476; *Corozo Pty Ltd v Total Australia Ltd* [1987] 2 Qd R 11 at 19-20; *Re Enhill Pty Ltd* [1983] 1 VR 561 at 564-565.

63 *Savage v Union Bank of Australia Ltd* (1906) 3 CLR 1170 at 1196.

bankruptcy<sup>64</sup>. The same is true when control over those rights, rather than title, passes to a liquidator. And just as a trustee's ability to exercise its power of exoneration for personal benefit is limited to the terms of the power of exoneration, so too is the trustee in bankruptcy or liquidator limited by the terms of the power of exoneration in the exercise of control over the trust rights<sup>65</sup>.

35 An analogy can be drawn with the power of a purchaser of land to obtain specific performance. Just as a purchaser's proprietary rights to, and ability to benefit from, land under a contract of sale of land are commensurate with the purchaser's power to obtain specific performance of the contract of sale<sup>66</sup>, so too a trustee's proprietary rights to, and ability by its power of exoneration to benefit from, trust assets are commensurate with the trustee's power to use those assets to discharge the trustee's personal liability for liabilities properly incurred as trustee. As Allsop CJ pointed out in *Jones v Matrix Partners Pty Ltd; Re Killarnee Civil & Concrete Contractors Pty Ltd (In liq)*<sup>67</sup>, the "nature and character" of the power of exoneration, namely that it is exercisable only to pay trust creditors, is not altered in the hands of a liquidator or trustee in bankruptcy.

36 If a liquidator or trustee in bankruptcy were able to assert control over property of "the bankrupt's because it came to his hands and at the same time [were able] to reject the terms and conditions on which alone the bankrupt procured it ... [the consequence would be] manifestly unjust and contrary to principle"<sup>68</sup>. In *Vagrang Pty Ltd (In liq) v Fielding*<sup>69</sup>, the Full Court of the Federal Court of Australia put the point this way:

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64 *Jennings v Mather* [1901] 1 QB 108 at 117; *Jennings v Mather* [1902] 1 KB 1 at 5-6, 9; *Savage v Union Bank of Australia Ltd* (1906) 3 CLR 1170 at 1188, 1196; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 371.

65 *Savage v Union Bank of Australia Ltd* (1906) 3 CLR 1170 at 1188, 1197.

66 *Redman v Permanent Trustee Co of New South Wales Ltd* (1916) 22 CLR 84 at 96; [1916] HCA 47; *Brown v Heffer* (1967) 116 CLR 344 at 349; [1967] HCA 40; *Legione v Hateley* (1983) 152 CLR 406 at 456-457; [1983] HCA 11; *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 at 612, 628, 646; [1988] HCA 16; *Stern v McArthur* (1988) 165 CLR 489 at 511, 522, 537; [1988] HCA 51; *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 333 [53]; [2003] HCA 57.

67 (2018) 260 FCR 310 at 315 [4], 331-332 [79]-[82], 338 [107]. See also at 351-352 [197]; *Re Byrne Australia Pty Ltd and the Companies Act* [1981] 1 NSWLR 394 at 398.

68 *In re Rogers; Ex parte Holland & Hannen* (1891) 8 Morr 243 at 248.

"If an asset is held by the company in trust for somebody else, the liquidator is bound by the trust ... [T]he assets come to the liquidator with their history and inherent characteristics. Although the liquidator takes the assets on behalf of the creditors, third parties retain any rights which enure to them as a result of that history or those characteristics."

37 The Commonwealth's primary submission was that this conclusion was wrong and that proceeds from the sale of trust assets should be used, after payment of priority creditors, for the discharge of all other debts, not merely trust creditors. Although in this appeal the only creditors are trust creditors it is necessary to address this submission because it directly affects the interpretation of s 433 and its antecedents.

38 The Commonwealth relied upon the "distinctly fragile"<sup>70</sup> decision of the Full Court of the Supreme Court of Victoria in *Re Enhill Pty Ltd*<sup>71</sup>. In that case the Full Court (Young CJ and Lush J, Gray J agreeing with both judgments) held that a trading trustee company's right of indemnity, namely its power of exoneration, entitled it to have recourse to trust assets in a winding up under s 292(1)(a) of the *Companies Act 1961* (Vic) so that the liquidator was entitled to be paid his remuneration, costs and expenses out of moneys realised from the use or sale of the trust assets<sup>72</sup>. However, the Full Court also said that, after payment of the priority debts, the proceeds from the sale of trust assets could be used to discharge all other debts of the insolvent company and not merely those debts incurred in the course of performance of the trust duties<sup>73</sup>.

39 Young CJ reasoned that if proceeds from the sale of trust assets were only applied to discharge the debts of creditors of the trust then this would "deny the very purpose of the right to indemnity which is to exonerate the trustee's personal estate"<sup>74</sup>. His Honour thus rejected<sup>75</sup> an earlier decision of Needham J to the

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69 (1993) 41 FCR 550 at 552-553. See also *Jones v Matrix Partners Pty Ltd; Re Killarnee Civil & Concrete Contractors Pty Ltd (In liq)* (2018) 260 FCR 310 at 331-332 [79]-[82].

70 Mason, "Themes and Prospects", in Finn (ed), *Essays in Equity* (1985) 242 at 250.

71 [1983] 1 VR 561.

72 [1983] 1 VR 561 at 563, 572.

73 [1983] 1 VR 561 at 564, 570.

74 [1983] 1 VR 561 at 564.

contrary<sup>76</sup>. Lush J reached the same conclusion by treating the "limited purposes" for which the right of exoneration can be used as "dehors the [*Companies Act 1961* (Vic)]"<sup>77</sup>.

40 With respect to Young CJ, the purpose of the power of exoneration is not to exonerate the trustee's personal estate unconditionally. It is to exonerate the trustee's estate only from authorised liabilities incurred in the course of the business of the trust. And, with respect to Lush J, the "limited purposes" of the power of exoneration did not fall outside the *Companies Act*, nor do they fall outside subsequent corporations legislation. Those limited purposes are part of the nature and character of the power of exoneration itself. The liquidator took the power of exoneration with all of its characteristics. As Cozens-Hardy MR said in *In re Richardson; Ex parte St Thomas's Hospital (Governors)*<sup>78</sup>:

"If and when [a trustee in bankruptcy] pays the amount of the debt he will have a right to treat the money, which he can then sue for from the person who is bound to indemnify, as part of the estate, but unless and until he pays I fail to see how it can be in accordance with justice and common fairness that he should be allowed to augment the estate of the bankrupt in a way which results in this, that the greater the liability the greater will be the advantage to the estate. The trustee cannot be allowed to say 'I will take the money recovered under my right [of exoneration] against the claim of St Thomas's Hospital and will apply it, not towards satisfying the claim of the hospital in the way which the indemnity implies, but as part of the general assets, and I will give no effect whatever to the indemnity except so far as the hospital come in and prove for their claim in the bankruptcy.'"

41 Nine months after the Victorian decision in *Re Enhill Pty Ltd*, the Full Court of the Supreme Court of South Australia departed from that decision in *In re Suco Gold Pty Ltd (In liq)*<sup>79</sup>. In *In re Suco Gold Pty Ltd (In liq)*, a trustee

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75 [1983] 1 VR 561 at 563-564.

76 *Re Byrne Australia Pty Ltd and the Companies Act* [1981] 1 NSWLR 394 at 398, although Needham J also concluded that the liquidator could only recover if he was a creditor of the trust, which Needham J later concluded he was not: *Re Byrne Australia Pty Ltd and the Companies Act [No 2]* [1981] 2 NSWLR 364 at 367.

77 [1983] 1 VR 561 at 572.

78 [1911] 2 KB 705 at 711.

79 (1983) 33 SASR 99.

company of two unit trusts had incurred debts in the course of its duties as trustee of those trusts. The liquidator of the trustee company applied for directions as to the use of trust assets, including whether the liquidator could have recourse to the trust assets for the purpose of discharging costs and expenses of the winding up, and the liquidator's remuneration, as priority debts under s 292(1)(a) of the *Companies Act 1962* (SA) before other unsecured debts. The Full Court (King CJ and Jacobs J, Matheson J agreeing with both judgments) concluded that since the power of exoneration could be used, in each case, to pay the creditors of each of the two trusts of which the company was trustee, and since the liquidator's remuneration and the costs and expenses of winding up were to be given priority over those unsecured creditors, the liquidator was entitled to have recourse to the property of each trust for that remuneration and those costs, so far as they were incurred in relation to each trust<sup>80</sup>.

42 In an approach supported by the Commonwealth in the alternative, King CJ in *In re Suco Gold Pty Ltd (In liq)* said that the decision in *Re Enhill Pty Ltd* was "in conflict with fundamental principles of the law of trusts"<sup>81</sup>. As his Honour concluded, if a trustee in bankruptcy, or a liquidator in the case of a trustee company, were permitted to use the trust funds for a purpose other than the discharge of properly incurred trust liabilities then "the money is being used for an unauthorized purpose and is being used, moreover, for the benefit of the trustee, and of third parties, namely the non-trust creditors"<sup>82</sup>.

43 Jacobs and Matheson JJ agreed with the analysis of these principles by King CJ. Jacobs J observed that the principles concerning the power of exoneration might not apply where the trustee has paid trust creditors from her or his own assets and seeks reimbursement from the trust fund<sup>83</sup>. As King CJ pointed out, the conclusion in that case was concerned with the trustee's power of exoneration, not its power of reimbursement by which the proceeds from the sale of trust property become part of the property divisible among all creditors<sup>84</sup>. The power of reimbursement permits a trustee who has discharged trust liabilities

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80 (1983) 33 SASR 99 at 110, 113.

81 (1983) 33 SASR 99 at 105.

82 (1983) 33 SASR 99 at 105. See also *In re Richardson; Ex parte St Thomas's Hospital (Governors)* [1911] 2 KB 705 at 711, 714, 717; *Official Assignee v Jarvis* [1923] NZLR 1009 at 1019.

83 (1983) 33 SASR 99 at 114.

84 (1983) 33 SASR 99 at 108.

to benefit from the trust assets without the condition limiting that benefit to discharge of debts to trust creditors.

44 The conclusion that *Re Enhill Pty Ltd* was wrongly decided on this point does not contradict the provision in s 555 of the *Corporations Act* that, except as otherwise provided in that Act, "all debts and claims proved in a winding up rank equally and, if the property of the company is insufficient to meet them in full, they must be paid proportionately". Recognising that the power of exoneration can only be used according to its terms is not to give priority to debts incurred by the trustee with authority over other proved debts and claims. It is, instead, to confine the use of trust funds by the power of exoneration to the discharge of those debts. Further, the proportionate payment requirement in s 555 is premised upon the extent to which the property of the company can "meet" those debts. The intrinsic limit of the power of exoneration precludes it from being used to meet debts other than those incurred with authority for the conduct of the trust business.

**Are the preconditions for the operation of s 433(3) met?**

45 In its grounds of appeal, and in its written submissions, Carter Holt claimed that a precondition in s 433(2)(a) of the *Corporations Act* for the operation of s 433(3) had not been met. This involved a denial that either (i) the Receivers had been "appointed on behalf of the holders of any debentures of a company or registered body that are secured by a circulating security interest" or (ii) they had assumed control, on behalf of the Bank, which held debentures of Amerind, "of any property comprised in or subject to a circulating security interest".

46 The immediate difficulty with this submission is that, as the Court of Appeal held, and as senior counsel for Carter Holt accepted in oral submissions, the Receivers were appointed on behalf of the holders of debentures secured by a circulating security interest. That security, created by the General Security Deed, had been registered on 20 December 2012 on the Personal Property Securities Register under Pt 5.3 of the *Personal Property Securities Act*.

47 Ultimately, in oral submissions senior counsel for Carter Holt accepted that the expressed preconditions in s 433(2)(a) for the operation of s 433(3) were met. His submission effectively became that s 433(2)(a) or s 433(3) must contain an implication further limiting the operation of the priority provision in s 433(3) so that the priority is given only over circulating assets that are the property of the company. He submitted that this implication was necessary because otherwise s 433 would extend to "every item of property of the company regardless of whether it is circulating or not", contrary to the purpose of s 433, which was to provide for priority only over the distribution of circulating assets.



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His submission was effectively that since s 433 was concerned only with floating charges, now circulating security interests, the implication is necessary to avoid giving priority to the specified debts over fixed charges, which would disturb vested and established property rights.

48 Applying this alleged implication in s 433 of the *Corporations Act*, senior counsel for Carter Holt effectively submitted that s 433 could have no operation in relation to the distribution of trust assets to trust creditors by use of Amerind's power of exoneration because Amerind's power of exoneration does not fall within the definition of a "circulating asset" in s 340 of the *Personal Property Securities Act* and is therefore not one of the circulating assets over which the Bank held its security interest. Conversely, although, as the Court of Appeal held, the proceeds comprising the receivership surplus held by the Receivers are circulating assets, it was submitted that they are not "property of the company".

49 Carter Holt's submissions should not be accepted for two reasons. First, there is no need for the suggested implication. The existing preconditions in s 433(2)(a) of the *Corporations Act* prevent the specified creditors, including employees, being given priority over the holders of fixed, or non-circulating, security rights. The preconditions require the appointment of, or the control of assets by, a receiver to have arisen as a result of debentures of a company that are secured by a circulating security interest. Debentures that are secured by fixed, or non-circulating, security interests are not within the terms of s 433(2). Section 433(3) then confines the priority of the specified creditors to a priority over claims "in respect of the debentures", meaning those debentures that are secured by a circulating security interest. As the Court of Appeal correctly observed, there is no requirement in s 433 that "the right of indemnity by means of which the receiver could have recourse to the trust property must itself be subject to a circulating security interest"<sup>85</sup>.

50 Secondly, and fundamentally, the reason there is no such implied requirement in s 433 is that it is incorrect to treat rights held on trust by a company as if they existed separately and independently from its power of exoneration so that it could be said that (i) the rights held on trust, and subject to the circulating security interest, are not the property of the company, but (ii) the power of exoneration, which is the property of the company, is not subject to the circulating security interest. As explained above, Amerind's power of exoneration is the means by which its trust rights can be used for its personal

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85 *Re Amerind Pty Ltd; The Commonwealth v Byrnes and Hewitt* (2018) 54 VR 230 at 298 [315].

benefit as trustee. It is meaningless to ask whether Amerind's power of exoneration is subject to the circulating security interest independently of the legal rights to the trust assets to which the power relates. The point is that Amerind's legal rights to the trust assets, to the extent that it has power to use them for its own benefit, are thus themselves circulating assets and are "property of the company" within s 433.

51 The same reasoning applies to s 561 of the *Corporations Act*, which is the provision cognate to s 433 but relevant to liquidators rather than receivers. That section provides that if the "property of a company available for payment of creditors other than secured creditors" is insufficient to meet payment of the debts to various priority creditors, including employees, then payment of those debts:

"must be made in priority over the claims of a secured party in relation to a circulating security interest created by the company and may be made accordingly out of any property comprised in or subject to the circulating security interest".

52 Again, to the extent of the power of exoneration the rights held by the trustee on trust are the property of the company which is, again to the extent of that power, "available", in the sense of available to be used, for the payment of creditors. The trust rights held by Amerind and controlled by the Receivers are "subject to [the] circulating security interest".

**Is there a payment "out of the property coming into [the receiver's] hands"?**

53 In *Re Independent Contractor Services (Aust) Pty Ltd (In liq) [No 2]*<sup>86</sup>, Brereton J considered the applicability of s 556(1)(e) of the *Corporations Act* to the trustee company in liquidation of a trading trust. The relevant priority in that case concerned the payment of a superannuation guarantee charge in respect of services rendered to the company by employees over other unsecured debts. On the liquidator's application for directions, Brereton J held that s 556 did not require liabilities to be paid out from trust property "because s 556 is concerned only with the distribution of assets beneficially owned by a company and available for division between its general creditors"<sup>87</sup>.

54 The primary judge in this case followed the decision in *Re Independent Contractor Services (Aust) Pty Ltd (In liq) [No 2]* and treated that reasoning as

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<sup>86</sup> (2016) 305 FLR 222 at 230-232 [23]-[25].

<sup>87</sup> (2016) 305 FLR 222 at 230 [23].

leading to the conclusion that the trustee's power of exoneration was not the property of the trustee company<sup>88</sup>. Carter Holt refined this argument in oral submissions and alleged that a payment from the proceeds held by the Receivers would not be a payment "out of the property coming into his, her or its hands". This was said to be because although the power of exoneration is property coming into the Receivers' hands, a payment from the receivership surplus is a payment from trust assets, which are not property of the company held by the Receivers.

55 This submission must be rejected. To reiterate, the "trust assets" are the property of the company and are held by the Receivers, although only to the extent to which Amerind could use them for its own benefit, relevantly by Amerind's power of indemnity. Further, the statutory expression "out of the property" cannot mean that the payment must only be made immediately from the trust rights. That would preclude even the conversion of non-monetary trust rights to money and then payment of the cash. "Out of the property" must include payments made "by the use of the property". Hence, if the trustee can use its rights in relation to the trust assets, including its power of indemnity, to sell the assets for the purpose of exoneration, then a payment of a trust creditor directly from the trust assets by use of the power of exoneration is a payment made "out of" the trustee's rights in relation to the trust assets. A payment by the Receivers of trust creditors by use of Amerind's power of exoneration must be a payment "out of the property" in the Receivers' hands.

## Conclusion

56 This appeal was concerned only with two related issues of basic principle. Further issues may arise that need not be resolved on this appeal. For instance, questions might arise about the correct order of priority between trust creditors after payment of the priority debts<sup>89</sup>. Or questions might arise about the

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88 *Re Amerind Pty Ltd (In liq)* (2017) 320 FLR 118 at 138 [67]. See also *Bruton Holdings Pty Ltd (In liq) v Federal Commissioner of Taxation* (2011) 193 FCR 442 at 449 [27]; *Woodgate, in the matter of Bell Hire Services Pty Ltd (In liq)* [2016] FCA 1583 at [35].

89 See McPherson, "The Insolvent Trading Trust", in Finn (ed), *Essays in Equity* (1985) 142 at 156; Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 523 [21-15]. Compare *In re Suco Gold Pty Ltd (In liq)* (1983) 33 SASR 99 at 109.

marshalling of claims where a creditor has access to more than one fund. That question had been reserved for later hearing by the primary judge<sup>90</sup>.

57 The fundamental reason why this appeal must be dismissed flows from an appreciation that s 433 of the *Corporations Act* is not based upon a conception of a trustee company's rights that draws a sharp division between, on the one hand, the rights held on trust and, on the other hand, the trustee's powers in association with those rights, here the power of exoneration. The rights of the trustee, collectively so viewed, can be used for the benefit of the trustee in discharging debts to trust creditors and, to that extent, when the subject of a circulating security interest they are property of the company coming into the hands of a receiver. From that property the receiver must pay various debts, including employee debts, in priority to any claim for principal or interest in respect of debentures secured by that circulating security interest.

58 Apart from the underlying conception of the law of trusts that s 433 thus applies, two further considerations fortify this conclusion. The first is the obvious fit that the conclusion has with the underlying purpose of provisions such as ss 433 and 561. It would be perverse if the *Corporations Act* operated to deny employee creditors a particular priority over the holders of a circulating security interest solely for the reason that the company which employed them was, perhaps even unknown to the employees, trading as a trustee. Secondly, as Allsop CJ observed in *Jones v Matrix Partners Pty Ltd; Re Killarnee Civil & Concrete Contractors Pty Ltd (In liq)*<sup>91</sup>, s 433 was enacted in 2001 as part of the *Corporations Act* at a time when the decision in *In re Suco Gold Pty Ltd (In liq)* had stood for 17 years and "was both well-regarded and followed (though by no means universally) including in relation to priorities and liquidator's costs".

59 The appeal must be dismissed with costs.

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90 *Re Amerind Pty Ltd (In liq)* (2017) 320 FLR 118 at 215 [542].

91 (2018) 260 FCR 310 at 338 [106].

60 BELL, GAGELER AND NETTLE JJ. This is an appeal from the Court of Appeal of the Supreme Court of Victoria (Ferguson CJ, Whelan, Kyrou, McLeish and Dodds-Streeton JJA). As initially presented, it posed two questions for decision: (1) whether an insolvent corporate trustee's right to be indemnified out of trust assets is "property of the company" within the meaning of s 433(3) of the *Corporations Act 2001* (Cth); and (2) whether such a right is "property comprised in or subject to a circulating security interest" for the purpose of s 433(2)(a) by reason of a deed under which credit facilities were made available to a corporate trustee. For the reasons which follow, neither of those questions is dispositive of the appeal. Instead, the appeal should be dismissed because the trust assets themselves were property "coming into [the receivers'] hands" and out of which they were bound to pay priority "debts or amounts" in accordance with s 433(3).

### **The facts**

61 Amerind Pty Ltd (receivers and managers appointed) (in liquidation) ("Amerind") carried on a business, solely in its capacity as trustee of the Panel Veneer Processes Trading Trust ("the Trust"), of manufacturing and distributing decorative and architectural finishes. To that end, it maintained a number of credit facilities and accounts with Bendigo and Adelaide Bank Ltd ("the Bank") secured by a range of securities. On 6 March 2014, the Bank sent a notice to Amerind terminating all facilities and demanding their repayment, and, on 11 March 2014, the Bank appointed Mathew James Byrnes and Andrew Stewart Reed Hewitt as receivers and managers of Amerind ("the receivers") pursuant to the General Security Deed between the parties ("the Deed"). On 13 August 2014, Amerind's creditors resolved that the company be wound up in insolvency.

62 Following their appointment, the receivers traded on until they had realised all of the assets of the Trust, and out of the proceeds satisfied all Amerind's obligations to the Bank. After provision for what the receivers considered to be a just estimate of their remuneration, the surplus remaining available for distribution to creditors was some \$1,619,018, being the proceeds of realisation of inventory ("the receivership surplus").

63 By that time, the Commonwealth had advanced accrued wages and entitlements totalling \$3.8 million to Amerind's former employees pursuant to the Fair Entitlements Guarantee Scheme. The Commonwealth claimed that it was entitled to be paid out of the receivership surplus, pursuant to ss 433(3), 556(1)(e) and 560 of the *Corporations Act*, in priority to other creditors.

Bell J  
Gageler J  
Nettle J

26.

## The Deed

64 Clause 2 of the Deed relevantly provided that:

"2.1 For the purpose of securing payment of the *amount owing*, you:

- (a) grant a *security interest* in the *personal property* to us; and
- (b) charge the *other property* to us by way of fixed charge.

You do this ... as sole trustee of the trust for all the *collateral* comprising the trust fund of the trust ...

2.2 Without limiting clause 2.1, the *security interests* taken by us under this security deed extend to all of the *collateral* being all of your present and after acquired property."

65 Clause 10 of the Deed relevantly provided that:

"10.2 You may not, without our prior written consent, do, or agree to do, any of the following in respect of the *collateral*:

- (a) sell, assign or otherwise dispose of the *collateral*; ...

except for a disposal of *inventory* in the ordinary course of your business. ...

10.3 If you dispose of, deal with or part with possession of any interest in *inventory* in the ordinary course of business, our *security interest* will extend to the *proceeds* you receive in respect of that *inventory*."

66 Clause 40 of the Deed relevantly provided that:

"40.1 In this security deed:

...

*amount owing* means all amounts that at any time ...:

- (a) are payable, are owing but not currently payable, are contingently owing, or remain unpaid by you to us; ...

...

*collateral* means the *personal property* and *other property*:

- (a) of whatever kind and wherever situated;
- (b) whether you are the beneficial owner or hold as trustee of a trust; and
- (c) whether you hold it jointly or with one or more other persons (whether in *partnership* or not and whether named in the Details or not).

...

*other property* means all your present and after-acquired rights and interests in land and any other property, rights and interests that is not *personal property*.

...

*personal property* means all of your present and after-acquired personal property (as defined in the PPSA and to which the PPSA applies) and all present and after-acquired personal property (as defined in the PPSA and to which the PPSA applies) in which you have rights.

*PPSA* means the Personal Property Securities Act 2009 (Cth) and any regulations made pursuant to it.

...

*proceeds* includes proceeds for the purposes of the PPSA but is not limited to them.

...

*security interest*:

- (a) in relation to any personal property (as defined in the PPSA) has the same meaning as in the PPSA; and
- (b) in relation to any *other property* means any security for the payment of money or performance of obligations including a mortgage, charge, lien, pledge, trust or power.

Bell J  
Gageler J  
Nettle J

28.

...

40.2 The following words have the respective meanings given to them in the PPSA: ... *inventory* ..."

### Relevant statutory provisions

67 Section 9 of the *Corporations Act* relevantly defines "property" as follows:

"**property** means any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action ..."

68 Section 51 of the *Corporations Act* provides, so far as is relevant, that:

"**PPSA security interest** (short for Personal Property Securities Act security interest) means a security interest within the meaning of the *Personal Property Securities Act 2009* and to which that Act applies ..."

69 Section 51C of the *Corporations Act* provides that:

"**circulating security interest** means a security interest that is:

(a) a PPSA security interest, if:

- (i) the security interest has attached to a circulating asset within the meaning of the *Personal Property Securities Act 2009*; and
- (ii) the grantor (within the meaning of that Act) has title to the asset; or

(b) a floating charge."

70 Section 433 of the *Corporations Act* provides, so far as is relevant, that:

"(2) This section applies where:

- (a) a receiver is appointed on behalf of the holders of any debentures of a company ... that are secured by a circulating security interest ... of any property comprised in or subject to a circulating security interest; and



29.

(b) at the date of the appointment ... (in this section called the *relevant date*):

(i) the company ... has not commenced to be wound up voluntarily; and

(ii) the company ... has not been ordered to be wound up by the Court.

(3) In the case of a company, the receiver ... taking possession or assuming control of property of the company must pay, out of the property coming into his, her or its hands, the following debts or amounts in priority to any claim for principal or interest in respect of the debentures:

(a) first, ...;

(b) next, ...;

(c) subject to subsections (6) and (7), next, any debt or amount that in a winding up is payable in priority to other unsecured debts pursuant to paragraph 556(1)(e), (g) or (h) or section 560.

(4) ...

(5) The receiver ... taking possession or assuming control of property must pay debts and amounts payable pursuant to paragraph (3)(c) ... in the same order of priority as is prescribed by Division 6 of Part 5.6 in respect of those debts and amounts."

71 Section 555 of the *Corporations Act* provides in substance that, subject to exceptions, all debts and claims proved in a winding up rank equally and, in the event of a deficiency of assets, *pari passu*.

72 Section 556(1)(e) of the *Corporations Act*, which is in Div 6 of Pt 5.6, relevantly provides for the payment of "wages, superannuation contributions and superannuation guarantee charge payable by the company in respect of services rendered to the company by employees before the relevant date" in priority to all other unsecured debts and claims except classes of claims which do not here apply.

73 Section 10 of the *Personal Property Securities Act 2009* (Cth) ("the PPSA") defines "inventory" as follows:

Bell J  
Gageler J  
Nettle J

30.

"**inventory** means personal property (whether goods or intangible property) that, in the course or furtherance, to any degree, of an enterprise to which an ABN has been allocated:

- (a) is held by the person for sale or lease, or has been leased by the person as lessor; or
- (b) is held by the person to be provided under a contract for services, or has been so provided; or
- (c) is held by the person as raw materials or as work in progress; or
- (d) is held, used or consumed by the person, as materials."

74

Section 12 of the PPSA provides, so far as is relevant, that:

- "(1) A **security interest** means an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property).

Note: For the application of this Act to interests, see section 8.

- (2) For example, a **security interest** includes an interest in personal property provided by any of the following transactions, if the transaction, in substance, secures payment or performance of an obligation:
- (a) a fixed charge;
  - (b) a floating charge ..."

75

Section 340 of the PPSA defines "circulating asset" to include personal property in respect of which a security interest has been granted where "the secured party has given the grantor express or implied authority for any transfer of the personal property to be made, in the ordinary course of the grantor's business, free of the security interest".

## Proceedings at first instance

76 Before the primary judge (Robson J), the parties were agreed<sup>92</sup> that, in order for s 433 of the *Corporations Act* to apply to the receivers, two conditions had to be satisfied: that the receivers were in possession of "property of the company" within the meaning of s 433(3); and that that property was subject to a "circulating security interest". The primary judge held<sup>93</sup> that the receivers were not in possession of "property of the company", because the company "ha[d] no assets of its own with which to pay the trust creditors", only a right of indemnity in respect of trust liabilities; and that right was "not personal property of the trustee", but rather "held on trust for the trust creditors". In the alternative, the primary judge reasoned<sup>94</sup> that, even if Amerind's right of indemnity were "property of the company" within the meaning of s 433, it was not comprised in or subject to the "circulating security interest" created by the Deed, and, therefore, that s 433 was not engaged. The primary judge thus rejected<sup>95</sup> the Commonwealth's claim.

## Proceedings in the Court of Appeal

77 The Commonwealth's appeal to the Court of Appeal was successful. The Court of Appeal held<sup>96</sup> that Amerind's right to be indemnified out of the assets of the Trust was "property of the company" and that it necessarily followed that the provisions of ss 433, 555 and 556 applied.

78 The Court of Appeal further held<sup>97</sup> in effect that, because the Deed created a circulating security interest in the proceeds of realisation of the inventory, it was unnecessary to decide whether the Deed created a circulating security interest in the company's right of indemnity. It was enough that s 433(3) operated according to its terms to require the receivers to pay out of the proceeds

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92 *Re Amerind Pty Ltd (In liq)* (2017) 320 FLR 118 at 189 [373].

93 *Re Amerind Pty Ltd (In liq)* (2017) 320 FLR 118 at 139 [79], 142 [99], 182 [333].

94 *Re Amerind Pty Ltd (In liq)* (2017) 320 FLR 118 at 189 [374], 192 [389].

95 *Re Amerind Pty Ltd (In liq)* (2017) 320 FLR 118 at 192 [391].

96 *Re Amerind Pty Ltd; The Commonwealth v Byrnes and Hewitt* (2018) 54 VR 230 at 259 [124], 287 [269]-[271], 289 [281], 291 [285].

97 *Re Amerind Pty Ltd; The Commonwealth v Byrnes and Hewitt* (2018) 54 VR 230 at 297-298 [311], 298-299 [315]-[317].

Bell J  
Gageler J  
Nettle J

32.

of realisation of the inventory (being property of Amerind the subject of a circulating security interest and of which the receiver had taken possession or assumed control) the claims provided for in s 556(1)(e), (g) and (h), in priority to any claim for principal or interest.

79 The Court of Appeal added<sup>98</sup> that, because all of Amerind's creditors were trust creditors, it was unnecessary to decide whether the proceeds of realisation were distributable among creditors generally, as was held in *Re Enhill Pty Ltd*<sup>99</sup>, or only as between trust creditors, as was held in *In re Suco Gold Pty Ltd (In liq)*<sup>100</sup>, but that, until and unless the issue was authoritatively determined, trial judges in Victoria should continue to follow *Re Enhill*.

### **The right of indemnity**

80 A corporate trustee's right to be indemnified out of the assets of the trust confers "property" for the purposes of the *Corporations Act*. As was stated<sup>101</sup> by the plurality in *Octavo Investments Pty Ltd v Knight*, although a trustee who enters into business transactions as trustee is personally liable for debts incurred in the course of those transactions, the trustee is entitled to be indemnified (whether by recoupment or exoneration) out of the trust assets against such liabilities, and thus enjoys a beneficial interest in those assets. The corollary, as was stated<sup>102</sup> unanimously in *Chief Commissioner of Stamp Duties (NSW) v Buckle*, is that the trustee does not hold the trust assets solely for the benefit of the beneficiaries to the extent of that right of indemnity.

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**98** *Re Amerind Pty Ltd; The Commonwealth v Byrnes and Hewitt* (2018) 54 VR 230 at 289-290 [282], 291 [286].

**99** [1983] 1 VR 561.

**100** (1983) 33 SASR 99.

**101** (1979) 144 CLR 360 at 367 per Stephen, Mason, Aickin and Wilson JJ; [1979] HCA 61.

**102** (1998) 192 CLR 226 at 246 [48] per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ; [1998] HCA 4. See also *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98 at 121 [51] per Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ; [2005] HCA 53.

81 The idea of a trustee's right of indemnity conferring a beneficial interest in the trust assets has been criticised. Professor Ford, for example, argued<sup>103</sup> that a trustee's right of exoneration, being limited to the discharge of trust liabilities, should properly be characterised as conferring a personal power, not property within the meaning of s 5(1) of the *Bankruptcy Act 1966* (Cth). But criticism of that kind is misplaced. It is apt to distract attention from the practical relationship between the trustee's equitable right of indemnity and legal powers of ownership.

82 As has been understood at least since Maitland's explication of the trust<sup>104</sup>, a trustee as legal owner of the trust assets has all the powers incidental to ownership subject only to the power of the beneficiaries to compel the trustee to exercise the trustee's powers in accordance with the terms of trust<sup>105</sup>. Inasmuch as a court of equity will aid the beneficiaries in the enforcement of the terms of trust, the beneficiaries are described, especially in revenue contexts, as having a beneficial interest in, or occasionally even beneficial ownership of, the trust assets<sup>106</sup>. The beneficiaries' interest is not, however, to be conceived of as cut out

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103 Ford, "Trading Trusts and Creditors' Rights" (1981) 13 *Melbourne University Law Review* 1 at 4-5, 14, 17.

104 See Maitland, *Equity, also The Forms of Action at Common Law* (1909), lectures 9-11. See also Stone, "The Nature of the Rights of the *Cestui Que Trust*" (1917) 17 *Columbia Law Review* 467; Jordan, *Chapters on Equity in New South Wales*, 6th ed (1947) at 17. See and contrast Scott, "The Nature of the Rights of the *Cestui Que Trust*" (1917) 17 *Columbia Law Review* 269; Hohfeld, "The Relations between Equity and Law" (1913) 11 *Michigan Law Review* 537.

105 *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510 at 518-519 per Hope JA (Glass JA agreeing at 531); *Buckle* (1998) 192 CLR 226 at 242 [37] per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ. See also *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)* (2005) 220 CLR 592 at 606 [30] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; [2005] HCA 20.

106 *Linter* (2005) 220 CLR 592 at 612 [52]-[53] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; *CPT Custodian* (2005) 224 CLR 98 at 119 [44] per Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ; *ElecNet (Aust) Pty Ltd v Federal Commissioner of Taxation* (2016) 259 CLR 73 at 87-88 [50] per Kiefel, Gageler, Keane and Gordon JJ, 98-99 [86]-[87] per Nettle J; [2016] HCA 51.

of the trustee's legal estate but rather as engrafted onto it as a restriction on the manner in which the trustee may deal with trust assets<sup>107</sup>.

83

The trustee also has a right to be indemnified out of the trust assets in respect of liabilities properly incurred in the execution of the trust, which takes priority over the beneficiaries' claim on the trust assets<sup>108</sup>. Until that right has been satisfied, the beneficiaries cannot compel the trustee to exercise the trustee's powers as legal owner of the trust assets for their benefit<sup>109</sup>. A court of equity will assist the trustee to realise trust assets to satisfy the trustee's right of indemnity, in priority to the beneficiaries' interests<sup>110</sup>, and thus it is said that the trustee has an equitable charge or lien over the trust assets<sup>111</sup>. It is not, however, a charge or lien comparable to a synallagmatic security interest over property of another. It arises endogenously as an incident of the office of trustee in respect of the trust assets<sup>112</sup>.

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**107** *Re Transphere Pty Ltd* (1986) 5 NSWLR 309 at 311 per McLelland J. See White, "Insolvent Trusts: Implications of *Buckle* and *CPT Custodian*" (2017) 44 *Australian Bar Review* 1 at 9-11.

**108** *Re Exhall Coal Co Ltd* (1866) 35 Beav 449 at 452-453 per Lord Romilly MR [55 ER 970 at 971]; *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 at 335 per Dixon J; [1945] HCA 37; *Octavo* (1979) 144 CLR 360 at 369-370 per Stephen, Mason, Aickin and Wilson JJ; *Buckle* (1998) 192 CLR 226 at 246 [47] per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

**109** *In re Johnson; Shearman v Robinson* (1880) 15 Ch D 548 at 552 per Jessel MR; *In re Evans; Evans v Evans* (1887) 34 Ch D 597 at 601 per Cotton LJ; *Jennings v Mather* [1901] 1 QB 108 at 115 per Kennedy J; [1902] 1 KB 1 at 6-7 per Stirling LJ; *Buckle* (1998) 192 CLR 226 at 246 [47] per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

**110** See, eg, *Grissell v Money* (1869) 38 LJ Ch 312 per Lord Romilly MR; cf *Darke v Williamson* (1858) 25 Beav 622 at 626-627 per Romilly MR [53 ER 774 at 776].

**111** *Buckle* (1998) 192 CLR 226 at 247 [50] per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ. See also *Bruton Holdings Pty Ltd (In liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346 at 358-359 [43] per French CJ, Gummow, Hayne, Heydon and Bell JJ; [2009] HCA 32.

**112** *Worrall v Harford* (1802) 8 Ves Jun 4 at 8 per Lord Eldon LC [32 ER 250 at 252], quoted in *Buckle* (1998) 192 CLR 226 at 245 [47]. See and compare *Hewett v Court* (1983) 149 CLR 639 at 663-664 per Deane J; [1983] HCA 7.

84 Possibly, the trustee's right of indemnity could be as well described as conferring a personal power (as Professor Ford argued it should be) as a proprietary interest. But the choice of description should conform to, rather than dictate, the application of fundamental principles to "solving a concrete legal problem"<sup>113</sup>. The trustee's right to apply trust assets in satisfaction of trust liabilities is proprietary in that it may be exercised in priority to the beneficial interests of the beneficiaries<sup>114</sup>. To describe it as constituting a beneficial interest in the trust assets, and so as property, thus acknowledges the characteristic blending of personal rights and obligations with proprietary interests which is the "genius" of the trust institution<sup>115</sup>. Such a beneficial interest falls naturally and ordinarily within the definition of "property" in s 9 of the *Corporations Act*.

### Property of the company

85 In several of the authorities<sup>116</sup>, and thus in the proceedings below<sup>117</sup>, the property of a trustee available for the payment of creditors in the event of insolvency is described as being the right of indemnity. That is so in the sense that the trustee's right of indemnity confers a beneficial interest in the trust assets. As this case demonstrates, however, it is necessary to keep in mind that the property constituted of the right of indemnity as such and the property constituted of the trust assets themselves are separate and distinct, albeit that the former confers a proprietary interest in the latter. Failure to bear that in mind is liable to result in the misconception at which the primary judge arrived, and which was perpetuated in the appellant's submissions before this Court, that, because Amerind's right of indemnity as such was not property that was subject to a circulating security interest, s 433 did not apply.

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113 *Livingston v Commissioner of Stamp Duties (Q)* (1960) 107 CLR 411 at 448 per Kitto J; [1960] HCA 94.

114 *Buckle* (1998) 192 CLR 226 at 246 [47]-[48] per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

115 Waters, "The Nature of the Trust Beneficiary's Interest" (1967) 45 *Canadian Bar Review* 219 at 274.

116 *Jennings v Mather* [1901] 1 QB 108 at 117 per Kennedy J; [1902] 1 KB 1 at 6 per Sterling LJ, 9 per Mathew LJ; *Savage v Union Bank of Australia Ltd* (1906) 3 CLR 1170 at 1188 per Griffith CJ, 1196 per O'Connor J; [1906] HCA 37; *Octavo* (1979) 144 CLR 360 at 367 per Stephen, Mason, Aickin and Wilson JJ.

117 See [76]-[77] above.

Bell J  
Gageler J  
Nettle J

36.

86 In s 433(3) of the *Corporations Act*, the property of which the receiver takes possession or assumes control and out of which the receiver is required to pay the specified liabilities is the "property comprised in or subject to [the] circulating security interest", granted by a company, pursuant to which the receiver is appointed. Amerind's right of indemnity was not "property [of the company] comprised in or subject to a circulating security interest" granted by Amerind. In the absence of any suggestion that the Bank gave Amerind express or implied authority to transfer Amerind's right of indemnity in the ordinary course of business, it was not a "circulating asset" within the meaning of s 340 of the PPSA and thus any security over it was not a "circulating security interest" as defined in s 51C of the *Corporations Act*. The property "coming into [the receivers'] hands", and out of which they were to pay the priority "debts or amounts", did not include the right of indemnity itself. Nor was it the case, as the Court of Appeal reasoned might be possible<sup>118</sup>, that the character of the trust assets automatically flowed through to the right of indemnity and so brought the right of indemnity within the reach of s 433. It was the inventory itself which was the circulating asset the subject of a circulating security interest (created by cl 2.1 of the Deed), pursuant to which the receivers were appointed, which attracted the operation of s 433.

87 Certainly, as the primary judge found in effect, Amerind held the inventory on trust in accordance with the terms of the trust deed, but, contrary to the primary judge's reasoning, that did not mean that it could not be "property of the company" for the purposes of s 433<sup>119</sup>. As legal owner of the inventory, with power under the trust deed to encumber the inventory in favour of the Bank as security for the company's borrowings, Amerind was empowered to, and did, subject the inventory to a circulating security interest in favour of the Bank. Upon Amerind's default under the Deed, the receivers were empowered to, and did, take possession or assume control of the inventory pursuant to that circulating security interest. And Amerind had at that time a right of indemnity out of the whole of the inventory of which the receivers took possession or assumed control.

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**118** *Re Amerind Pty Ltd; The Commonwealth v Byrnes and Hewitt* (2018) 54 VR 230 at 302 [328]-[329].

**119** See [76] above.



## Amounts payable in a winding up

88 In *Stein v Saywell*, Barwick CJ posited<sup>120</sup> that the policy behind s 196 and s 292(4) of the *Companies Act 1961* (NSW) (legislative forerunners of s 433 and s 556 of the *Corporations Act*) was that a creditor who accepts a floating charge of a company's business assets and allows the company to be carried on and the assets the subject of the floating charge to be altered and possibly augmented by the efforts of the company and its employees will not be permitted to displace the priorities which the legislation accords to certain debts which accrue during the carrying on of the business: amongst them, the remuneration of employees. The same is true under s 433. Its purpose is to enjoin a receiver appointed by the holder of a circulating security interest to observe the order of priorities which applies to preferential creditors in the event of a winding up. It requires a receiver who has taken possession or assumed control of property the subject of a circulating security interest to pay out of that property any debt or amount that, in the event of the company being wound up, would be payable out of the proceeds of realisation of that property pursuant to s 556(1)(e), (g) or (h). In this case, s 433 applied, according to its terms, to require the receivers to pay out of the proceeds of realisation of the inventory so much of the debts identified in s 556(1)(e) as would, in the event of a winding up, be payable out of those proceeds in discharge of trust liabilities.

89 Identification of the amounts that would be payable pursuant to s 556(1)(e) in the event of a winding up is informed by the legislative context in which s 556(1)(e) appears, and in particular the close juxtaposition of s 556(1)(e) to both s 555 (which provides in part that if the "property of the company" is insufficient to meet claims they must be paid proportionately) and s 561 (which provides that, in a winding up, so far as "the property of a company available for payment of creditors" is insufficient to meet the payment of any debt referred to in s 556(1)(e), (g) or (h), such a debt must be paid in priority over the claims of a secured party in relation to a circulating security interest created by the company and may be made accordingly out of any property comprised in or subject to the circulating security interest).

90 In the winding up of a corporate trustee, the "property of the company" that is available for the payment of creditors includes so much of the trust assets as the company is entitled, in exercise of the company's right of indemnity as trustee, to apply in satisfaction of the claims of trust creditors. Thus, in this case, where the liabilities identified in s 556(1)(e) were trust liabilities, the "property of the company" that would have been available for the payment of creditors in the

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120 (1969) 121 CLR 529 at 544; [1969] HCA 16.

event of a winding up would have been so much of the trust assets as would be sufficient to pay or satisfy the claims of trust creditors. Because the trust assets were inventory, rather than money or an equivalent, and there was a deficiency, the whole of the receivership surplus was to be applied to priority "debts" and "amounts".

***Re Enhill or Re Suco Gold?***

91 A significant part of the primary judge's reasons, and a substantial part of the Court of Appeal's reasons, was directed to the question of whether an insolvent corporate trustee's right to be indemnified out of trust assets against trust liabilities constitutes property of the company that may be applied only in payment of trust creditor liabilities (as was held<sup>121</sup> in *Re Suco Gold*) or is property of the company available for distribution among creditors generally (as was held<sup>122</sup> in *Re Enhill*). Consistently with the preponderance of authority that favours<sup>123</sup> the correctness of *Re Suco Gold*, the primary judge held<sup>124</sup> that a trustee's right of exoneration in respect of trust liabilities may be applied only in satisfaction of the trust liabilities to which the right of exoneration relates. In contrast, the Court of Appeal in effect adhered<sup>125</sup> to the decision of the Full Court

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**121** (1983) 33 SASR 99 at 105 per King CJ (Matheson J agreeing at 115), 114 per Jacobs J (Matheson J agreeing at 115).

**122** [1983] 1 VR 561 at 564 per Young CJ (Gray J agreeing at 572), 569 per Lush J (Gray J agreeing at 572).

**123** *Re Byrne Australia Pty Ltd and the Companies Act* [1981] 1 NSWLR 394 at 399 per Needham J; *Re ADM Franchise Pty Ltd* (1983) 7 ACLR 987 at 988-989 per McLelland J; *Re Indopal Pty Ltd* (1987) 12 ACLR 54 at 57 per McLelland J; *Re G B Nathan and Co Pty Ltd (In liq)* (1991) 24 NSWLR 674 at 685 per McLelland J; *Sjoquist v Rock Eisteddfod Productions Pty Ltd* (1996) 19 ACSR 339 at 343 per McLelland CJ in Eq; *13 Coromandel Place Pty Ltd v C L Custodians Pty Ltd (In liq)* (1999) 30 ACSR 377 at 384 per Finkelstein J; *Jones v Matrix Partners Pty Ltd*; *Re Killarnee Civil & Concrete Contractors Pty Ltd (In liq)* (2018) 260 FCR 310 at 319-320 [30], 331 [76]-[78], 338 [106] per Allsop CJ (Farrell J agreeing at 351-352 [197]), 349 [178] per Siopis J. See also McPherson, "The Insolvent Trading Trust", in Finn (ed), *Essays in Equity* (1985) 142 at 153-154; Mason, "Themes and Prospects", in Finn (ed), *Essays in Equity* (1985) 242 at 250; Merralls, "Unsecured Borrowings by Trustees of Commercial Trusts" (1993) 10 *Australian Bar Review* 248 at 249-250.

**124** *Re Amerind Pty Ltd (In liq)* (2017) 320 FLR 118 at 182 [327], 189 [371].

**125** See [79] above.

of the Supreme Court of Victoria in *Re Enhill* that the proceeds of the trustee's right of indemnity are property of the company available for distribution among all creditors according to the order of priority established by ss 555, 556 and 560.

92 The primary judge was correct that the proceeds from an exercise of a corporate trustee's right of exoneration in respect of trust liabilities may be applied only in satisfaction of the trust liabilities to which that right relates. As was concluded<sup>126</sup> by King CJ in *Re Suco Gold*, and has since been affirmed<sup>127</sup> by the Full Court of the Federal Court of Australia in *Jones v Matrix Partners Pty Ltd*; *Re Killarnee Civil & Concrete Contractors Pty Ltd (In liq)*:

"the right of indemnity can only produce proceeds for division among the creditors generally if the trustee has discharged the liabilities incurred in the performance of the trust and is therefore entitled to recoup himself out of the trust property. If he has not discharged the liabilities, the right of indemnity entitles him to resort to the trust property only for the purpose of discharging those liabilities. He may apply the trust moneys directly to the payment of the trust creditors or he may take it into his own possession for that purpose. *If he takes trust property into his possession to satisfy his right to be indemnified in respect of unpaid trust liabilities, ... that property retains its character as trust property and may be used only for the purpose of discharging the liabilities incurred in the performance of the trust.* The exercise of the right of indemnity is for the benefit of the trustee in that it relieves him of liability for the trust debts. If the trustee is bankrupt, or being a company is in liquidation, the trustee in bankruptcy or liquidator can exercise the right of indemnity which vests in him as part of the property of the bankrupt or insolvent company. If the trust liabilities have been discharged, the trustee in bankruptcy or liquidator is entitled to recoup the bankrupt estate out of the trust property and the proceeds of the right of indemnity become part of the property divisible among the creditors. If the liabilities have not been discharged, *the trustee in bankruptcy or liquidator may, by reason of the right of indemnity which vests in him, apply the trust property to the payment of the trust liabilities*, thereby exonerating the bankrupt estate to the extent of the value of the available trust assets. In the latter circumstances there cannot be proceeds of the right of indemnity which are available for distribution among the general body of creditors." (emphasis added)

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<sup>126</sup> (1983) 33 SASR 99 at 107-108.

<sup>127</sup> (2018) 260 FCR 310 at 335-337 [100]-[101].

93 The primary judge was not correct, however, in holding that it followed that the statutory order of priority for the payment of debts was inapplicable. It is true, as his Honour observed<sup>128</sup>, that there is authority to the effect that the proceeds of an insolvent corporate trustee's right of indemnity should be distributed among trust creditors *pari passu*<sup>129</sup>, either by an application of "the general principle of equity that requires a distribution of company property in winding-up to proceed upon a footing of equality amongst all the creditors of equal degree"<sup>130</sup> or by analogy with "cases of competing claims by beneficiaries of different trusts to trace into a mixed fund"<sup>131</sup>. But so to reason by reference to general precepts of equity wrongly presupposes that s 556 and its precursors cannot apply in terms to the proceeds of realisation of a trustee's right of indemnity because such provisions are "addressed only to distribution of assets beneficially owned by the company and available for division between general creditors"<sup>132</sup>. In this respect, the oft-stated maxim that bankruptcy legislation has no application to trust assets has the capacity to mislead.

94 From the outset, courts of equity construed<sup>133</sup> the earliest bankruptcy statutes according to a presumption that assignees in bankruptcy, who were

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128 *Re Amerind Pty Ltd (In liq)* (2017) 320 FLR 118 at 141-142 [94].

129 *Re Independent Contractor Services (Aust) Pty Ltd (In liq) [No 2]* (2016) 305 FLR 222 at 230-231 [23] per Brereton J.

130 McPherson, "The Insolvent Trading Trust", in Finn (ed), *Essays in Equity* (1985) 142 at 157-158, citing *Re Alfred Shaw and Co Ltd; Ex parte Mackenzie* (1897) 8 QJL 93 at 96 per Griffith CJ.

131 Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 523 [21-15], citing *Keefe v Law Society of New South Wales* (1999) 44 NSWLR 451 and *Re Sutherland; French Caledonia Travel Service Pty Ltd (In liq)* (2003) 59 NSWLR 361. See also Meagher, "Insolvency of Trustees" (1979) 53 *Australian Law Journal* 648 at 653.

132 Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 523 [21-15].

133 See, eg, *Taylor v Wheeler* (1706) 2 Vern 564 at 566 per Wright LK [23 ER 968 at 968-969]; *Bennet v Davis* (1725) 2 P Wms 316 at 318 per Jekyll MR [24 ER 746 at 747]; *Tyrrell v Hope* (1743) 2 Atk 558 at 562 per Fortescue MR [26 ER 735 at 737]; *Ex parte Dumas* (1754) 2 Ves Sen 582 at 585 per Lord Hardwicke LC [28 ER 372 at 373]; *Mitford v Mitford* (1803) 9 Ves Jun 87 at 99-100 per Grant MR [32 ER 534 at 539]; *Ex parte Hanson* (1806) 12 Ves Jun 346 at 349 per Lord (Footnote continues on next page)

considered as volunteers, took subject to equities. To avoid circuitry of action, courts of law went further, by holding<sup>134</sup> that property the subject of a trust or assignment would not pass at all – unless the bankrupt had even "the most remote possibility of interest" in the property<sup>135</sup>. Consistently with this history, the reference to property "held by the bankrupt in trust" in successors to s 15(1) of the *Bankruptcy Act 1869* (32 & 33 Vict c 71), such as s 116(2) of the *Bankruptcy Act 1966*, is understood to mean held on trust *solely* for another person<sup>136</sup>. Accordingly, where a trustee in bankruptcy or other administrator assumes control of the property of a bankrupt, the trustee in bankruptcy or assignee takes the bankrupt's property subject to equities, but otherwise as property divisible amongst creditors<sup>137</sup>. That allows for the payment of creditors out of property held on trust to the extent that the bankrupt has a beneficial interest in the trust assets, and thus to the extent of the bankrupt's right of indemnity.

95 The position under the *Corporations Act* is comparable. The liquidator of a company assumes control of the company's assets subject to equities<sup>138</sup>, and, accordingly, must deal with assets held by the company as trustee in accordance with the terms of trust. But to the extent that the company has a beneficial

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Erskine LC [33 ER 131 at 132]; *Turner v Harvey* (1821) Jacob 169 at 173-174 per Lord Eldon LC [37 ER 814 at 816].

**134** *Scott v Surman* (1742) Willes 400 at 402-403 per Willes LCJ [125 ER 1235 at 1236-1237]; *Winch v Keeley* (1787) 1 TR 619 at 622-623 per Ashhurst J [99 ER 1284 at 1286]; *Boddington v Castelli* (1853) 1 El & Bl 879 at 885 per Parke B [118 ER 665 at 667].

**135** *Carpenter v Marnell* (1802) 3 Bos & Pul 40 at 41 per Lord Alvanley CJ [127 ER 23 at 24]. See also *Gladstone v Hadwen* (1813) 1 M & S 517 at 526-527 per Lord Ellenborough CJ [105 ER 193 at 197]; *Carvalho v Burn* (1833) 4 B & Ad 382 at 393-394 per Littledale J [110 ER 499 at 503]; *Britten v Perrott* (1834) 2 C & M 597 at 602 per Lord Lyndhurst CB, 602 per Parke B [149 ER 898 at 901].

**136** *Octavo* (1979) 144 CLR 360 at 370 per Stephen, Mason, Aickin and Wilson JJ.

**137** *Westpac Banking Corporation v Queensland* [2016] FCA 269 at [20]-[21] per Edelman J. See also *In re Richardson; Ex parte Governors of St Thomas's Hospital* [1911] 2 KB 705 at 713-714 per Fletcher Moulton LJ.

**138** See generally Glenn, *The Law Governing Liquidation* (1935) at 449-451 §312, 764-768 §532; Zwieten (ed), *Goode on Principles of Corporate Insolvency Law*, 5th ed (2018) at 119-120 [3-05]; Murray and Harris, *Keay's Insolvency: Personal and Corporate Law and Practice*, 9th ed (2016) at 446-447 [14.10]-[14.15].

Bell J  
Gageler J  
Nettle J

42.

interest in the trust assets, as it has by reason of the company's right of indemnity in respect of properly incurred trust obligations, the trust assets are property of the company available for the payment of creditors. In *Re Suco Gold*, King CJ articulated<sup>139</sup> the point thus:

"The liquidator is bound by the provisions of s 292 [of the *Companies Act*, now s 556 of the *Corporations Act*] with respect to the payment of the company's debts. He must therefore endeavour to pay the debts in accordance with the order of priority set out in that section. To the extent that each priority debt has been incurred in the performance of a particular trust he should have recourse to the property of that trust for the purpose of paying it. If there is a residue of assets of a particular trust after payment of the priority debts incurred in the performance of that trust, that residue should be applied to the payment of the other debts applicable to that trust. If there is a deficiency in the assets of a particular trust, the non-priority debts applicable to that trust would have to rank *pari passu*. The unpaid balance would, of course, rank for dividend out of the general assets of the company".

96 As Allsop CJ recently observed<sup>140</sup> in effect in *Jones v Matrix*, there is therefore no reason in principle or by reference to text or context why the statutory order of priorities should not be followed in the distribution of the proceeds of the trustee's right of indemnity among trust creditors. Nor, given the wide-spread use of companies as trustees of business trusts in Australia, and Parliament's re-enactment of s 292 of the *Companies Act* in effect as s 556 of the *Corporations Act* against the background of the decision in *Re Suco Gold* and its general acceptance, is there any reason to suppose that it is not what Parliament intended. Section 556 should be understood as applicable to such corporations and their property of all kinds.

97 Complications may arise in cases where a corporate trustee has carried on business as trustee of more than one trust or as trustee of a trust and on its own account. But the solution proposed<sup>141</sup> by King CJ – of construing s 556 in such circumstances as if the liquidator of the corporate trustee held separate funds, each for a different group of creditors – coheres to the law of trusts and has common sense to commend it. It may not provide the whole of the answer where, for example, expenses, such as the wages and salaries of employees, have

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**139** (1983) 33 SASR 99 at 109-110.

**140** (2018) 260 FCR 310 at 338-339 [108].

**141** *Re Suco Gold* (1983) 33 SASR 99 at 110.

43.

been incurred by a company partially on one account and partially on another. But as experience shows, situations of that kind are not insuperable<sup>142</sup>. As Allsop CJ concluded in *Jones v Matrix*<sup>143</sup>, they fall to be resolved by the application of principle to the text of the legislation in the particular circumstances of each case.

## Conclusion

98 It should be understood that Amerind's right of indemnity as such was not "property comprised in or subject to a circulating security interest". It could not be so, because it was not a "circulating asset" within the meaning of s 340 of the PPSA and thus any security over it was not a "circulating security interest" as defined in s 51C of the *Corporations Act*, there being no suggestion that the Bank gave Amerind express or implied authority to transfer the right of indemnity in the ordinary course of business. The inventory itself, however, was property of the company, being property "comprised in or subject to a circulating security interest" created by Amerind in favour of the Bank. To the extent of Amerind's right of indemnity, that property would have yielded proceeds of realisation from which Amerind would have been entitled to discharge properly incurred trust liabilities. The inventory was property of Amerind of which the receivers took possession or assumed control pursuant to the circulating security interest which Amerind created over the inventory in favour of the Bank. That property yielded proceeds of realisation from which the receivers were, as Amerind would have been, entitled to discharge properly incurred trust liabilities. And in the event of a winding up, those proceeds would have been property of Amerind available for the payment of creditors in accordance with s 556(1)(e) of the *Corporations Act*. That is why s 433 applied.

99 For these reasons, the appeal should be dismissed with costs.

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<sup>142</sup> See and compare *Re Byrne* [1981] 1 NSWLR 394; *Re Byrne Australia Pty Ltd and the Companies Act [No 2]* [1981] 2 NSWLR 364.

<sup>143</sup> (2018) 260 FCR 310 at 339 [108].

100 GORDON J. Amerind Pty Ltd (receivers and managers appointed) (in liquidation) ("Amerind") carried on a business solely in its capacity as trustee of the Panel Veneer Processes Trading Trust ("the trust"). As is not uncommon, Amerind had no assets of its own, other than perhaps a nominal sum settled to establish the trust, and a right in equity to be indemnified (a right of *exoneration* as opposed to a right of recoupment) from the trust assets in respect of liabilities incurred in the conduct of the trust.

101 Amerind had facilities with the Bendigo and Adelaide Bank ("the bank") secured against both fixed and circulating trust assets. On 11 March 2014, following a notice from the bank demanding repayment and terminating the facilities, Amerind's director appointed joint and several administrators to Amerind. On the same day, the bank appointed the second respondents as receivers and managers ("the receivers")<sup>144</sup>. The receivers, exercising Amerind's right of exoneration, sold the fixed and circulating assets. After paying out the bank from the sale of fixed assets, and providing for their own estimated remuneration, the receivers held a net surplus of \$1,619,018 ("the receivership surplus"). That surplus comprised, in part, proceeds from the sale of the circulating assets.

102 Determination of the issues in this appeal concerns the application of specific statutory provisions: in particular, how, if at all, s 433 of the *Corporations Act 2001* (Cth), which prescribes a priority payments regime, interacts with the receivership surplus to the extent that it comprised circulating assets.

103 Section 433 is headed "[p]roperty *subject to circulating security interest* – payment of certain debts to have priority" (emphasis added). Section 433 relevantly applies to "property of the company"<sup>145</sup> over which a receiver takes possession or assumes control, and requires that employees' claims (and the Commonwealth's claims, by operation of s 560 of the *Corporations Act*, where it has paid out the employees' claims) have priority in the distribution of "property of the company" to which the section applies<sup>146</sup>. Employees of Amerind had their entitlements partially paid out by the Commonwealth. Thus, the Commonwealth submitted that s 433 applied to the receivership surplus as "property of [Amerind]" within the meaning of s 433(3), and that it had statutory priority to that surplus.

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144 The receivers did not make any substantive submissions in this appeal.

145 *Corporations Act*, s 433(3).

146 *Corporations Act*, ss 433(3)(c) and 556(1)(e), (g) and (h).



104 The appellant, a trade creditor, submitted that s 433 of the *Corporations Act* did not apply to the receivership surplus on two grounds. First, the appellant noted that, as is uncontroversial, the receivers could only access the receivership surplus through the exercise of Amerind's right of exoneration. That is, there was no free-standing right to the receivership surplus, which comprised the proceeds from the sale of the trust assets, separate from the right of exoneration. On this basis, the appellant submitted that the receivership surplus represented "trust property" and not "property of [Amerind]" to which s 433 applied.

105 Second, the appellant submitted that the receivership surplus fell outside the scope of s 433 because, among other things, s 433 only deals with circulating assets<sup>147</sup> and the trustee's right of exoneration (the means through which the receivers could access the assets) was a fixed asset, rather than a circulating asset.

106 Both grounds should be rejected. I agree with what Bell, Gageler and Nettle JJ have written. I write separately to explain my reasons why, at a level of principle and practice, the appeal should be dismissed with costs.

107 In relation to the first ground, once the nature of the right of exoneration is properly understood, and regard had to the broad definition of "property" in the *Corporations Act*, Amerind's interest in the receivership surplus generated by its right of exoneration out of those assets was "property of [Amerind]" within the meaning of s 433.

108 In relation to the second ground, it was not in dispute that the receivers had been appointed by the bank under debentures that were secured, at least in part, by a circulating security interest as required by s 433(2)(a). At issue was the interaction of the right of exoneration (a fixed asset) with s 433(3) of the *Corporations Act*. Did the fact that a fixed asset – the right of exoneration – was the gateway to the sale of circulating assets preclude the application of s 433(3) to the circulating assets? The answer is "no". The only concern of s 433(3) is that in the distribution of circulating assets, certain claims are to have priority over other claims. To the extent that the receivership surplus represented the proceeds of the sale of circulating assets, s 433(3) applied to the receivership surplus. It is not right to say, and I do not accept, that the right of exoneration is itself a circulating asset.

109 It is convenient to deal with the appellant's two grounds separately. Before doing so, it is necessary to consider the relevant legislative provisions.

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147 See *Corporations Act*, s 433(2)(a) read with s 51C.

### The Corporations Act

110 Employees have had priority over claims secured by a floating charge, now referred to as a circulating security interest, for more than a century<sup>148</sup>. Granting employees priority over claims secured by a circulating security interest, as opposed to property secured by a fixed charge, has been criticised but no substantial change has been made.

111 The *Corporations Act* provides for employees' claims to have priority over the claims of secured creditors in relation to property secured by a circulating security interest both where a receiver is appointed to that property, and where a company is in liquidation<sup>149</sup>. Although this appeal is concerned with the appointment of a receiver to such property, the conclusions apply with equal force to a liquidator dealing with that property<sup>150</sup>, and will be relevant to other cases in which the statutory order of priority fixed by the *Corporations Act* intersects with assets realised through an insolvent corporate trustee's right of exoneration<sup>151</sup>. For this reason, the questions raised in this appeal are significant. It is therefore necessary to set out the legislative provisions that mandate priority of employees' claims in respect of circulating security interests in relation to both receivers and liquidators.

112 In relation to receivers, the key legislative provision is s 433 of the *Corporations Act*, which requires that a receiver pay out of the "property of the company" certain debts or amounts *in priority to any claim for principal or interest in respect of the debentures* secured by a circulating security interest. There are relevantly two interlocking provisions – s 433(2) and (3).

113 Section 433(2) provides that the section applies where:

"(a) a receiver is appointed on behalf of the holders of any debentures of a company or registered body *that are secured by a circulating security interest*, or possession is taken or control is assumed, by or on behalf of the holders of any debentures of a company or

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148 See generally *Preferential Payments in Bankruptcy Amendment Act 1897* (UK) (60 & 61 Vict c 19), s 2 read with *Preferential Payments in Bankruptcy Act 1888* (UK) (51 & 52 Vict c 62), s 1. In Victoria, see *Companies Act 1910* (Vic), s 208(1) and (3)(b).

149 *Corporations Act*, ss 433(3)(c) and 561(a).

150 By operation of *Corporations Act*, ss 556 and 561.

151 See, in this regard, *Jones v Matrix Partners Pty Ltd; Re Killarnee Civil & Concrete Contractors Pty Ltd (In liq)* (2018) 260 FCR 310.

47.

registered body, of any property *comprised in or subject to a circulating security interest*; and

- (b) at the date of the appointment or of the taking of possession or assumption of control (in this section called the *relevant date*):
  - (i) the company or registered body has not commenced to be wound up voluntarily; and
  - (ii) the company or registered body has not been ordered to be wound up by the Court." (emphasis added)

114 As is apparent, s 433(2) must be satisfied before the balance of the section is engaged. And in this appeal there was no dispute that the receivers had been appointed by the bank under debentures that were secured, at least in part, by a circulating security interest, as required by s 433(2)(a)<sup>152</sup>.

115 When s 433(2) is satisfied, then s 433(3) provides that:

"In the case of a company, *the receiver or other person taking possession or assuming control of property of the company must pay, out of the property coming into his, her or its hands, the following debts or amounts in priority to any claim for principal or interest in respect of the debentures:*

- (a) first, any amount that in a winding up is payable in priority to unsecured debts pursuant to section 562;
- (b) next, if an auditor of the company had applied to ASIC under subsection 329(6) for consent to his, her or its resignation as auditor and ASIC had refused that consent before the relevant date – the reasonable fees and expenses of the auditor incurred during the period beginning on the day of the refusal and ending on the relevant date;
- (c) subject to subsections (6) and (7), *next, any debt or amount that in a winding up is payable in priority to other unsecured debts pursuant to paragraph 556(1)(e), (g) or (h) or section 560.*" (emphasis added)

116 In short, where s 433(2) has been satisfied, s 433(3) is enlivened *if the receiver takes possession of property of the company*. The word "property" is relevantly defined in s 9 of the *Corporations Act* to mean:

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152 There was also no dispute that s 433(2)(b) was satisfied.

"any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action ..."

117 That definition is wide. Where a receiver takes possession of property of the company, the receiver must pay out of the property coming into his, her or its hands certain debts or amounts in priority to any claim for principal or interest in respect of the debentures. The reference to "the debentures" in s 433(3) is not unimportant; they are the same debentures referred to in s 433(2) and provide the basis for the application of the section. Moreover, the debentures are debentures of a company *that are secured by a circulating security interest*. Section 433(3) is concerned with the distribution of circulating assets, not any other property of the company, and requires payment of three categories of claims in priority to all other claims when distributing those circulating assets.

118 This appeal is concerned with the third priority category, that in s 433(3)(c), which concerns employee entitlements and directs attention to s 556(1)(e), (g) or (h) of the *Corporations Act*. Those provisions of s 556 provide:

"(1) Subject to this Division, in the winding up of a company the following debts and claims must be paid in priority to all other unsecured debts and claims:

...

(e) subject to subsection (1A) – next:

- (i) wages, superannuation contributions and superannuation guarantee charge payable by the company in respect of services rendered to the company by employees before the relevant date; or
- (ii) liabilities to pay the amounts of estimates under Division 268 in Schedule 1 to the *Taxation Administration Act 1953* of superannuation guarantee charge mentioned in subparagraph (i);

...

(g) subject to subsection (1B) – next, all amounts due:

- (i) on or before the relevant date; and
- (ii) because of an industrial instrument; and
- (iii) to, or in respect of, employees of the company; and

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- (iv) in respect of leave of absence;
- (h) subject to subsection (1C) – next, retrenchment payments payable to employees of the company."

119

Section 560 of the *Corporations Act*, also referred to in s 433(3)(c), grants the Commonwealth the same rights to priority in a winding up as the employees would have had, as follows:

"If:

- (a) a payment has been made by a company:
  - (i) on account of wages; or
  - (ii) on account of superannuation contributions (within the meaning of section 556); or
  - (iii) in respect of leave of absence, or termination of employment, under an industrial instrument; and
- (b) the payment was made as a result of an advance of money by a person (whether before, on or after the relevant date) for the purpose of making the payment;

then:

- (c) *the person by whom the money was advanced has the same rights under this Chapter as a creditor of the company; and*
- (d) *subject to paragraph (e), the person by whom the money was advanced has, in the winding up of the company, the same right of priority of payment in respect of the money so advanced and paid as the person who received the payment would have had if the payment had not been made; and*
- (e) the right of priority conferred by paragraph (d) is not to exceed the amount by which the sum in respect of which the person who received the payment would have been entitled to priority in the winding up has been diminished by reason of the payment."  
(emphasis added)

120

A parallel scheme applies in respect of liquidators by s 561(a) of the *Corporations Act*. That section provides for employee priority over claims of a secured party in relation to a circulating security interest, as follows:

"So far as the *property of a company* available for payment of creditors other than secured creditors is insufficient to meet payment of:

- (a) any debt referred to in paragraph 556(1)(e), (g) or (h) [being the employee entitlements set out above]; ...

*payment of that debt or amount must be made in priority over the claims of a secured party in relation to a circulating security interest created by the company and may be made accordingly out of any property comprised in or subject to the circulating security interest."* (emphasis added)

121 The intended effect of ss 433(3)(c) and 561(a) is that where a company is in receivership or in liquidation, employees' claims will enjoy priority over the claim of a party secured by a circulating security interest, and will be paid out of the property comprised in or subject to the circulating security interest in priority to the secured creditor. The intention of ss 433(3)(c) and 561(a) is to ensure that, as has been the case historically, employees rank before creditors secured by a circulating security interest in relation to property subject to the circulating security interest, whether a company is in receivership, or is being wound up.

**First ground: whether Amerind's right of exoneration, and proceeds from the exercise of that right, are "property of the company" within the meaning of s 433**

122 The question raised by this appeal ground is whether the fact that Amerind operated as trustee of a trading trust, and could only access trust assets through its right of exoneration, took those assets (the receivership surplus) outside the scope of "property of the company" for the purposes of s 433. Put a different way, if Amerind had been conducting the business in its own right, Amerind's employees would be priority creditors under s 433(3)(c). Is the position different because Amerind conducted the business as a trustee and had a right of indemnity out of the assets of the trust to pay the employees?

123 The question arises in the following way. The receivers, who were appointed by the bank, discharged the bank's secured debt out of Amerind's fixed assets. What remained was, relevantly, "circulating assets" over which the bank was also secured (holding a "circulating security interest" within the meaning of s 433), namely the receivership surplus. Because the bank's debt had already been discharged out of Amerind's fixed assets, there was no need to prioritise the employees' claims over the claim for principal or interest made by the bank in respect of its debt. The question remained, however, whether s 433(3) operated on the receivership surplus such that the employees' claims took priority in respect of the receivership surplus over the claims of other creditors. Here, the appellant claimed to be a secured creditor, ranking behind the bank. Did the receivers have to pay the priority creditors specified in s 433(3) out of the relevant part of the receivership surplus before the appellant?

124 In relation to the first ground, the appellant and the Commonwealth each focused on the *nature* of the trustee's right of exoneration. They were right to do so. Its interaction with s 433 of the *Corporations Act* is key to the resolution of this appeal ground.

125 The appellant contended that s 433(3) did not mandate the payment of priority creditors out of the receivership surplus. This was because, the appellant argued, the exoneration arm of a trustee's right of indemnity, properly understood, was "no more than a right to have trust assets applied to meet trust debts" and "confers upon the trustee no interest in the trust assets themselves, or the proceeds thereof". The appellant further contended that what came into the receivers' hands when they were appointed to Amerind – the relevant "property of the company" within the meaning of s 433(3) – was *the power to apply the receivership surplus to meet trust debts* (in other words, a right of exoneration), rather than *any proprietary interest in the receivership surplus*. The appellant argued that the trustee's right or power to apply the trust fund pursuant to its right of exoneration, and the trustee's corresponding interest in the fund, could and should be separated. It followed that the receivership surplus, according to the appellant, was not "property of [Amerind]" within the meaning of s 433(3); Amerind's only "property" was its right of exoneration. That is, Amerind had no "property" in the receivership surplus and thus the receivership surplus fell outside the scope of s 433(3).

126 The Commonwealth argued that Amerind had a proprietary interest in the receivership surplus, and that s 433 applied to Amerind's proprietary interest in the receivership surplus as "property of the company". By implication, this argument meant that ss 556 and 561 would have applied to Amerind's proprietary interest in the receivership surplus, had the question been posed by the liquidator of Amerind.

127 These reasons will show that the Commonwealth's argument should be accepted.

#### *Trustee's right of indemnity – principles*

128 In order to show why the Commonwealth's argument should be accepted, it is necessary to first consider the origins and nature of the trustee's right of exoneration by reference to some basic principles.

129 A trust has no legal personality, subject, of course, to statute. It is an institution developed and recognised by equity. It is an equitable obligation binding on the trustee to deal with property for the benefit of the beneficiaries

(or, in limited circumstances, a particular purpose or purposes)<sup>153</sup>. The trustee is personally liable for debts or liabilities incurred in the course of transactions concerning the trust<sup>154</sup>. The liability of a trustee remains "emphatically personal", rather than being confined by the office of trustee<sup>155</sup>. That liability arises in accordance with ordinary principles of law<sup>156</sup>.

130 Where a trustee acting within its powers incurs a debt in the course of the administration of the trust, although the trustee is ordinarily personally liable in relation to the debt, it is entitled to indemnity out of the trust estate. If the trustee has discharged the liability out of its individual property, it is entitled to reimbursement; if it has not discharged the liability, it is entitled to apply the trust property in discharging it. That is, the trustee is entitled to exoneration<sup>157</sup>. This appeal is only concerned with the right of exoneration.

131 The sources of the trustee's indemnity (whether in the form of exoneration or recoupment) are threefold: equity, the terms of the trust instrument and statute<sup>158</sup>. In relation to the first source, even before statute<sup>159</sup> empowered a trustee to be reimbursed out of trust property for expenses properly incurred,

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153 *Jones* (2018) 260 FCR 310 at 320 [31]. See also Allsop, "The Nature of the Trustee's Right of Indemnity and Its Implications for Equitable Principle", paper presented to the Society of Trust and Estate Practitioners, 18 July 2012 at 1-2.

154 *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 at 324; [1945] HCA 37; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367; [1979] HCA 61.

155 Heydon, Leeming and Turner, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies*, 5th ed (2015) at 1150 [41-140]; Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 510 [21-02]. See also *Octavo Investments* (1979) 144 CLR 360 at 367, citing *Vacuum Oil* (1945) 72 CLR 319.

156 *Jones* (2018) 260 FCR 310 at 320 [34].

157 *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 245 [47]; [1998] HCA 4, quoting *Scott on Trusts*, 4th ed (1988), vol 3A, §246.

158 *Jones* (2018) 260 FCR 310 at 321 [37].

159 See *Trustee Act 1925* (NSW), s 59(4); *Trustee Act 1958* (Vic), s 36(2); *Trustee Act 1936* (SA), s 35(2); *Trusts Act 1973* (Qld), s 72; *Trustees Act 1962* (WA), s 71; *Trustee Act 1898* (Tas), s 27(2). See, in relation to the Territories, *Trustee Act 1893* (NT), s 26; *Trustee Act 1925* (ACT), s 59(4). See also Ford, "Trading Trusts and Creditors' Rights" (1981) 13 *Melbourne University Law Review* 1 at 4 fn 10.



equity implied into every trust deed the same right<sup>160</sup>. In relation to the other sources, all States and Territories have legislatively provided for a trustee's reimbursement and exoneration<sup>161</sup>.

132 The trustee has an equitable charge or lien on trust property, which gives the trustee a right to retain trust property until the right of indemnity is satisfied and, if necessary, to sell that property<sup>162</sup>. The scope of the trustee's indemnity (whether exoneration or recoupment) is confined to expenses which are "properly" or "reasonably" incurred<sup>163</sup>. In equity, there is no direct access by the creditors to the assets of the trust. However, creditors may be subrogated to the rights of the trustee against the trust assets<sup>164</sup>.

133 Allsop CJ, in *Jones v Matrix Partners Pty Ltd; Re Killarnee Civil & Concrete Contractors Pty Ltd (In liq)*<sup>165</sup>, addressed the right of indemnity in the form of exoneration. Allsop CJ's description was rightly accepted by the appellant. His Honour confirmed that the right of exoneration generates a proprietary interest on the part of the trustee in the trust fund as follows<sup>166</sup>:

"[T]he right (in a sense personal in that it was distinct from and superior to the interests of cestuis que trust) of the trustee to use trust assets to exonerate itself arises to meet a trust liability, and can be exercised only for that purpose. *The property in the hands of the trustee remains trust*

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160 *In re Suco Gold Pty Ltd (In liq)* (1983) 33 SASR 99 at 104, citing *Worrall v Harford* (1802) 8 Ves Jun 4 at 8 [32 ER 250 at 252]. See also Ford, "Trading Trusts and Creditors' Rights" (1981) 13 *Melbourne University Law Review* 1 at 4.

161 See fn 159 above.

162 Ford, "Trading Trusts and Creditors' Rights" (1981) 13 *Melbourne University Law Review* 1 at 4. A court of equity may authorise the sale of assets held by the trustee so as to satisfy the right of reimbursement or exoneration: *Buckle* (1998) 192 CLR 226 at 247 [50]. See also Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 513 [21-04].

163 Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 516 [21-07].

164 *Jones* (2018) 260 FCR 310 at 320 [34], citing *Vacuum Oil* (1945) 72 CLR 319 at 335.

165 (2018) 260 FCR 310, in particular at 320-321 [35]-[36], 321 [39], 321-322 [42] and 331 [76].

166 *Jones* (2018) 260 FCR 310 at 324-325 [49].

*property, but subject to the trustee's proprietary interest that exists for the purpose of paying the creditors. The property is not held on trust for the beneficiaries alone; the proprietary interest of the trustee is preferential to the interests of the beneficiaries, but that interest of the trustee is shaped by its purpose and origins in the trust relationship – to pay trust creditors in order to exonerate itself from those debts. The character and limits of the interest are shaped by its purpose and origins. The obligation of the trustee to use the trust assets to pay trust creditors is reflected by, and provides the foundation for, the creditors' right of subrogation."* (emphasis added)

134 The principle that the right of exoneration generates an equitable interest in the trust fund that is proprietary in nature was subsequently restated by Allsop CJ in the same decision as follows<sup>167</sup>:

*"Thus, in one sense, what exists can be seen to be an equitable proprietary interest or charge or lien in or over trust assets; but any enforcement by a Court of Equity is not of a security interest or a right created over the interests of the beneficiaries, but rather the enforcement by a Court of Equity of a prior proprietary interest in the trust fund to support the right of indemnity".* (emphasis added)

135 The approach of Allsop CJ to the right of exoneration, and, in particular, his explanation that the right of exoneration generates a proprietary interest in the trust fund, was consistent with a number of decisions of this Court.

136 First, *Octavo Investments Pty Ltd v Knight*<sup>168</sup> established that a trustee's right of indemnity against trust property, whether for exoneration or recoupment, for liabilities properly incurred in the performance of the trust, *confers on the trustee a proprietary interest in the trust property.*

137 Second, that principle was affirmed in *Chief Commissioner of Stamp Duties (NSW) v Buckle*<sup>169</sup>, where the Court held that the trustee's right of indemnity (whether in the form of exoneration or recoupment) confers on the trustee a *beneficial proprietary interest in the trust assets* and that that interest takes priority over the interests of beneficiaries. There the Court said<sup>170</sup>:

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<sup>167</sup> *Jones* (2018) 260 FCR 310 at 332 [87].

<sup>168</sup> (1979) 144 CLR 360 at 369-370.

<sup>169</sup> (1998) 192 CLR 226.

<sup>170</sup> *Buckle* (1998) 192 CLR 226 at 246-247 [48]-[51] (footnotes omitted).

"Until the right to reimbursement or exoneration has been satisfied, 'it is impossible to say what the trust fund is'. The entitlement of the beneficiaries in respect of the assets held by the trustee which constitutes the 'property' to which the beneficiaries are entitled in equity is to be distinguished from the assets themselves. The entitlement of the beneficiaries is confined to so much of those assets as is available after the liabilities in question have been discharged or provision has been made for them. To the extent that the assets held by the trustee are subject to their application to reimburse or exonerate the trustee, they are not 'trust assets' or 'trust property' in the sense that they are held solely upon trusts imposing fiduciary duties which bind the trustee in favour of the beneficiaries.

The entitlement to reimbursement and exoneration was identified by Lindley LJ as 'the price paid by cestuis que trust for the gratuitous and onerous services of trustees'. The right of the trustee has been described as a first charge upon the assets vested in the trustee, as one upon the 'trust assets', and as conferring upon the trustee an 'interest in the trust property [which] amounts to a proprietary interest'.

However, the starting point in the class of case under consideration is that the assets held by the trustee are 'no longer property held solely in the interests of the beneficiaries of the trust'. The term 'trust assets' may be used to identify those held by the trustee upon the terms of the trust, but, in respect of such assets, there exist the respective proprietary rights, in order of priority, of the trustee and the beneficiaries. The interests of the beneficiaries are not 'encumbered' by the trustee's right of exoneration or reimbursement. Rather, the trustee's right to exoneration or recoupment 'takes priority over the rights in or in reference to the assets of beneficiaries or others who stand in that situation'. A court of equity may authorise the sale of assets held by the trustee so as to satisfy the right to reimbursement or exoneration. In that sense, there is an equitable charge over the 'trust assets' which may be enforced in the same way as any other equitable charge. However, the enforcement of the charge is an exercise of the prior rights conferred upon the trustee as a necessary incident of the office of trustee ...

Accordingly, we agree with the following treatment of the matter by Sheller JA:

*'... the trustee has a beneficial interest in the trust assets to the extent of its right to be indemnified out of those assets against personal liabilities incurred in the performance of the trust and that interest will be preferred to the beneficial interests of the cestuis que trust ...'* (emphasis added)

138 Third, in the later decision of *Bruton Holdings Pty Ltd (In liq) v Federal Commissioner of Taxation*<sup>171</sup>, this Court confirmed that a trustee's right of recoupment or exoneration is supported by a lien over trust assets which amounts to a proprietary interest therein; and in *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)*<sup>172</sup>, it held that (as was held in *Buckle*<sup>173</sup>) it is not possible to identify the trust fund until account is taken of the right of exoneration.

139 Accepting that the trustee's right of exoneration generates a proprietary interest in the trust fund not only is consistent with the above decisions, but is consistent with the nature of the trustee's interest in the fund as a *security interest* in the form of an equitable lien<sup>174</sup>. The general concept of a security involves a transaction where one person (the creditor), to whom an obligation is owed by another person (the debtor), is afforded, in addition to the personal promise of the debtor to discharge the obligation, rights exercisable against some property of the debtor in order to enforce discharge of the obligation. The concept involves a transaction, but the security is not the transaction, rather, it is the *interest or aggregation of rights which arises from such a transaction*. Such an interest is of a "proprietary" character: not necessarily in the sense of rights amounting to full ownership, but in the sense of rights available against a thing, and not merely against a person<sup>175</sup>.

140 A number of cases have adopted imprecise language in describing the nature of the proprietary interest generated in the trust assets by the trustee's right of exoneration, referring to the *right of exoneration* as the proprietary interest<sup>176</sup>. This imprecision generates confusion: what the Commonwealth described as a "category error". The proprietary interest generated by the trustee's right of exoneration *is not the right of exoneration itself*. Rather, the right of exoneration generates a proprietary interest *in the trust assets*. To label the right of

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171 (2009) 239 CLR 346 at 358-359 [43], 359 [47]; [2009] HCA 32.

172 (2005) 224 CLR 98 at 121 [51]; [2005] HCA 53.

173 (1998) 192 CLR 226 at 246 [48], citing *Dodds v Tuke* (1884) 25 Ch D 617 at 619.

174 See *Bruton* (2009) 239 CLR 346 at 358-359 [43]; Sykes and Walker, *The Law of Securities*, 5th ed (1993) at 192, 203; Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 513 [21-04].

175 Sykes and Walker, *The Law of Securities*, 5th ed (1993) at 3.

176 See *Jones* (2018) 260 FCR 310 at 329 [69], 331 [79]; *Re Amerind Pty Ltd; The Commonwealth v Byrnes and Hewitt* (2018) 54 VR 230 at 287-288 [271]-[273].

exoneration a proprietary interest is to confuse the source of the proprietary interest with the interest itself.

141 As has been seen, "property" is relevantly defined in s 9 of the *Corporations Act* as "any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action". The trustee's proprietary interest in the trust assets, generated by the right of exoneration, clearly falls within that broad definition of "property" and thus the phrase "property of the company" used in s 433(3) of the *Corporations Act*.

142 There is, however, a further reason to reject the appellant's contentions. As stated earlier, the appellant sought to sever the right of exoneration from the trustee's corresponding interest in the trust fund. The basis for this approach was unclear, except to seek to escape the application of s 433(3). The approach should be rejected. The trustee's right of exoneration confers a proprietary interest in the trust fund which takes priority over competing interests of beneficiaries. The right of exoneration and the trustee's proprietary interest in the trust fund are inextricably linked; the trustee's interest in the fund rises and falls as debts are incurred on behalf of the trust, and satisfied out of the fund, and, of course, the right of exoneration is the basis for the existence of the trustee's fluctuating proprietary interest in the trust fund<sup>177</sup>. So much is consistent with the holding of this Court in *CPT* that "[u]ntil satisfaction of rights of reimbursement or exoneration, it was impossible to say what the trust fund in question was"<sup>178</sup>.

143 Where a corporate trustee becomes insolvent, those principles do not change. Where s 433 applies, it operates, in its terms, on the trustee's interest in the trust fund to the extent that that interest is in circulating assets. Section 433 takes the property of the company as it finds it. Section 433 does not and cannot operate only on the *source* of the trustee's interest in the trust fund, namely the right of exoneration.

144 In addition to ignoring the breadth of the definition of "property" in s 9 and the nature of the trustee's right of exoneration as generating a proprietary interest in the fund, the appellant's first ground of appeal also ignores that historically employees have been given priority in the event of a corporate insolvency in relation to circulating assets (formerly floating assets) as set out

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<sup>177</sup> See *Re Independent Contractor Services (Aust) Pty Ltd (In liq) [No 2]* (2016) 305 FLR 222 at 231 [24].

<sup>178</sup> (2005) 224 CLR 98 at 121 [51], citing *Buckle* (1998) 192 CLR 226 at 246 [48]. See also *Dodds* (1884) 25 Ch D 617 at 619; *Jennings v Mather* [1902] 1 KB 1 at 9; Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 513 [21-04].

above<sup>179</sup>. This Court should be slow to attribute an intention to Parliament to create two classes of employees in insolvency: those employed by a company and those employed by a corporate trustee. The appellant put forward no principled basis for such a differentiation.

145 Thus, the Court of Appeal correctly held that s 433 operated on the trustee's proprietary interest in the trust fund and required the application of the statutory priority rules in s 433 to the receivership surplus.

*Appellant's other arguments*

146 The appellant identified three further matters which it contended supported its construction of s 433, and tended against the construction now adopted of that provision. None of these matters fell for determination in this appeal. However, these additional matters explain why, contrary to the submissions of the appellant, the construction adopted of s 433 (considered in light of the implications of the construction for ss 556 and 561) is a practical and sensible reading of the provision that does not generate absurd or unworkable outcomes. The answer to the issues in this appeal must recognise the wider, and different, circumstances that may and will arise in other insolvencies, particularly given the importance of trading trusts to Australia's economy<sup>180</sup>.

147 The matters raised by the appellant were, first, the uncertainty about whether creditors generally could be paid out of the trustee's interest in the fund (the primary position of the Commonwealth) or whether only trust creditors could be paid out (the alternative position of the Commonwealth), and whether this uncertainty provided a reason to reject the Commonwealth's construction of s 433. Second, if the Commonwealth's construction of s 433 was adopted, the appellant identified two issues: how s 433 would operate on a trustee of multiple trusts; and an alleged inconsistency between the approach adopted in relation to an insolvent corporate trustee, and the position of a bankrupt trustee.

148 A further matter raised at the hearing must also be addressed: how costs of administration, which have priority in a winding up pursuant to s 556(1)(a) of the *Corporations Act*, should be distributed where there is a corporate trustee of multiple trusts. Each of the additional matters is addressed below.

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<sup>179</sup> Protecting workers' claims is also a matter of international obligation: see Protection of Workers' Claims (Employer's Insolvency) Convention (1992).

<sup>180</sup> See *Jones* (2018) 260 FCR 310 at 319 [29]. See also Leeming, "Trustees' Rights of Indemnity, Insolvency and Statutory Distributions to Preferred Creditors" (2018) 92 *Australian Law Journal* 503 at 503.

Trust creditors or general creditors to be paid?

149 Whether general creditors are to be paid was not in issue in the appeal as Amerind only had trust creditors. However, the question was important because it spoke to the interaction between the provisions of the *Corporations Act* mandating that employees' claims have priority in relation to property subject to a circulating security interest, and equitable principles governing the right of exoneration.

150 The appellant contended that the nature of the right of exoneration mandated that only trust creditors could be paid out of the fund pursuant to the right of exoneration, and that this limitation on the nature of the trustee's interest in the fund was incompatible with the operation of s 433.

151 The Commonwealth adopted two positions – what it described as its primary and alternative contentions.

152 The Commonwealth's primary contention was that s 433 applied to Amerind's proprietary interest in the receivership surplus; but then, s 433 "swept away" the attributes of the property to which it applied, namely the limited nature of Amerind's interest in the receivership surplus. On that basis, the Commonwealth argued that Amerind's proprietary interest in the receivership surplus became "property of [Amerind]" in the hands of the receivers; and that that interest theoretically became available for distribution to *creditors generally*, but only in accordance with the priority rules mandated by s 433 (and in relation to liquidators, s 561). This approach was consistent with the decision in *Re Enhill Pty Ltd*<sup>181</sup>.

153 The Commonwealth's alternative contention was that s 433 operated on Amerind's interest in the receivership surplus, but did not alter the limitations of that interest. Thus, the assets were *only available to be applied by the receivers to meet trust debts*, but only in accordance with the priority rules mandated by s 433 (and in relation to liquidators, s 561). This approach was consistent with the decisions in *In re Suco Gold Pty Ltd (In liq)*<sup>182</sup> and of Allsop CJ in *Jones*<sup>183</sup>.

154 The Commonwealth's alternative contention should be accepted.

155 The position is straightforward where a right of reimbursement is exercised. The trust assets that are the subject of the right of reimbursement are

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**181** [1983] 1 VR 561 at 564.

**182** (1983) 33 SASR 99 at 105, 107-110.

**183** (2018) 260 FCR 310 at 336-337 [101].

the trustee's personal assets, which fall into the trustee's general estate, and will be divisible among creditors of the trustee generally according to the statutory rules of priority fixed by the *Corporations Act*, without constraint or limitation<sup>184</sup>. Relevantly to this appeal, as set out above, where a receiver is appointed to property of a corporate trustee, s 433 of the *Corporations Act* requires that employees' claims rank before a secured creditor in relation to the distribution of assets subject to a circulating security interest. And, as has been noted, parallel provision is made under the *Corporations Act* for liquidators to apply the same priority rules<sup>185</sup>.

156 In the case of a right of *exoneration*, the proprietary interest of the trustee in the trust fund is shaped by its purpose and origins in the trust relationship – to pay trust creditors in order for the trustee to exonerate itself from those debts<sup>186</sup>. Circulating assets which are the subject of the right of exoneration can *only be applied to satisfy trust debts* and are not available for distribution to creditors generally. However, that limitation does not preclude the application of the relevant statutory priority rules – here, s 433.

157 First, and fundamentally, s 433 of the *Corporations Act* does not purport to change the nature and character of property that falls under control of the receiver as property of the company<sup>187</sup>. Legal restrictions inherent in property must be respected where there is no clear statutory mandate to adopt any other approach. Having regard to the breadth of the definition of "property" in s 9, if the Commonwealth's primary position were accepted (and it should not be), property held on bare trust would be property of the corporate trustee and theoretically available for distribution to all creditors.

158 Second, to come to a different conclusion would require the priority regime in s 433 of the *Corporations Act* to be interpreted as intending to alter the relationship between a trustee and beneficiaries such that the proceeds of a trustee's right of exoneration could be used to satisfy the personal liabilities of the trustee, potentially leaving trust debts unsatisfied<sup>188</sup>. There is nothing in the text of s 433, or the other provisions of the priority regime in the *Corporations Act*, to support such an intention. Further, to find otherwise would ignore that,

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184 See *Jones* (2018) 260 FCR 310 at 323 [45].

185 *Corporations Act*, s 561(a).

186 *Jones* (2018) 260 FCR 310 at 324-325 [49].

187 See *Jones* (2018) 260 FCR 310 at 334-335 [97].

188 See *In re Suco Gold* (1983) 33 SASR 99 at 105.



in equity, creditors cannot directly get at trust assets, but instead have to be subrogated to the trustee's right of exoneration<sup>189</sup>.

### Multiple trusts

159 The appellant contended that difficulties that could arise in the case of an insolvent corporate trustee of multiple trusts constituted a "powerful indication" as to why the construction of s 433 which has been adopted was not consistent with the statutory scheme, given that s 555 mandates equal treatment of debts and claims unless otherwise provided. That contention is rejected.

160 In accordance with the earlier legal principles, a receiver or liquidator of an insolvent corporate trustee of multiple trusts should be viewed as holding multiple funds, each directed to different groups of creditors<sup>190</sup>. If Amerind had been a trustee of multiple trusts, s 433 (or s 561) would then have applied, in its terms, to each fund separately, to the extent that the fund constituted circulating assets.

161 That approach follows from the fact that, as has been seen, there is an inherent limitation on the proprietary rights of the trustee in a trust fund. The funds can only be applied to satisfy debts incurred to creditors of the relevant trust. As just seen, there is nothing in the text of s 433 (read with s 9) that suggests that s 433 intends to sweep away the limitations and attributes of each proprietary interest of the trustee in each trust fund.

162 Put in different terms, where the trustee is a trustee of multiple trusts, the attributes of the trustee's proprietary interests require that s 433 be applied separately to each fund because s 433 does not alter the nature of the assets such that the funds can be mixed and applied to meet the claims of non-trust creditors.

163 Of course, it must be accepted that that approach may lead to practical difficulties and expense. In such a case, equity may need to fill the vacuum left by the failure of the statute to deal expressly with multiple trust funds<sup>191</sup>. An available mechanism is for a receiver to apply under s 424 of the *Corporations Act*<sup>192</sup>, or a liquidator to apply under s 90-15 of Sch 2 to the

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**189** See *Jones* (2018) 260 FCR 310 at 320 [34], citing *Vacuum Oil* (1945) 72 CLR 319 at 335.

**190** See *Jones* (2018) 260 FCR 310 at 337 [103].

**191** See *Jones* (2018) 260 FCR 310 at 337 [103].

**192** Read with the definition of "controller" in s 9 of the *Corporations Act*.

*Corporations Act*<sup>193</sup> ("the Insolvency Practice Schedule"), for directions from the court to seek to resolve any issues in relation to allocation between multiple trusts. What will be appropriate will vary from case to case. Hotchpot (like marshalling) is one possibility; an illustration of the maxim that equity is equality<sup>194</sup>.

164 Indeed, Allsop CJ referred to the possibility of a liquidator or receiver applying the principles of hotchpot to multiple funds in *Jones*<sup>195</sup>, by reference to the approach of King CJ in *In re Suco Gold*<sup>196</sup>, which is discussed shortly. In *Jones*, Allsop CJ stated that<sup>197</sup>:

"Complexities may arise in circumstances of multiple trusts or of trusts and activity on the corporation's own account. *Considerations of, or akin to, marshalling or hotchpot may be relevant as to the payment of debts dealt with in the statutory order.* But these complexities will be resolved by application of principle and the text of the legislation, in a manner reflected by the approach of King CJ in *Re Suco Gold*." (emphasis added)

165 His Honour's suggestion should be adopted in the context of the application of s 433 to a trustee of multiple trusts – the trust funds should be kept separate and, where this causes practical difficulties or expense, the receiver or liquidator can apply to the court for directions. That is, equity can fill the vacuum.

166 Notably, the statutory framework for a liquidator to apply for directions has changed. Prior to its repeal and the enactment of the Insolvency Practice Schedule<sup>198</sup>, s 479(3) of the *Corporations Act* allowed a liquidator to apply to the court for directions in relation to a matter arising under a winding up. Section 90-15(1) of the Insolvency Practice Schedule now provides a source of power for the court to provide directions to liquidators, and relevantly provides

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**193** Read with s 90-20 of Sch 2 and the definition of "officer of a corporation" in s 9 of the *Corporations Act*.

**194** *Akers v Deputy Commissioner of Taxation* (2014) 223 FCR 8 at 41 [135].

**195** (2018) 260 FCR 310 at 339 [108].

**196** (1983) 33 SASR 99.

**197** (2018) 260 FCR 310 at 339 [108].

**198** By the *Insolvency Law Reform Act 2016* (Cth).

that the court may make "such orders as it thinks fit" in relation to the "external administration" of a company<sup>199</sup>.

Administration costs where multiple trusts or trust and non-trust activities

167 A similar issue to that of multiple trusts, how costs of an administration given priority under s 556(1)(a) should be allocated where there is a trustee of multiple funds, was the subject of argument. Counsel for the appellant submitted that whatever decision the Court made had to be capable of applying in a principled way to "all scenarios that might arise in relation to a [corporate] trustee". Further, counsel for the appellant contended that there was no relevant distinction between the operation of ss 433 and 556 but argued that neither applied to a trustee's right of exoneration. Given this Court has rejected the appellant's argument that s 433 (or by implication, ss 556 and 561) cannot apply where a trustee has exercised its right of exoneration, it is necessary to address this further issue.

168 Section 556(1)(a) of the *Corporations Act* provides that in the winding up of a company "expenses (except deferred expenses) properly incurred by a relevant authority in preserving, realising or getting in property of the company, or in carrying on the company's business" must be paid in priority to all other unsecured debts and claims. Two issues may arise. First, on what basis can the relevant authority (relevantly defined as a liquidator, provisional liquidator or administrator<sup>200</sup>) be paid out of the assets of the trust fund where that relevant authority has been appointed to a trustee of a trading trust? Second, how should costs of that relevant authority, properly incurred, be distributed against assets of the trust where there is a corporate trustee of multiple funds?

169 In relation to the first question, the relevant authority can be treated as a trust creditor on the same basis as King CJ dealt with a liquidator's expenses in *In re Suco Gold*<sup>201</sup>. *In re Suco Gold* considered s 292(1)(a) of the *Companies Act 1962* (SA), which provided that costs and expenses of winding up be paid

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**199** See *Ample Source International Ltd v Bonython Metals Group Pty Ltd (In liq), in the matter of Bonython Metals Group Pty Ltd (In liq) [No 8]* [2018] FCA 1614 at [89]-[93]. See also *Preston, in the matter of Sandalwood Properties Ltd* (2018) 36 ACLC ¶18-016 at 251 [45]; *Re Kelly* (2018) 16 ABC (NS) 148 at 151-153 [31]-[36].

**200** *Corporations Act*, s 556(2).

**201** (1983) 33 SASR 99.

"in priority to all other unsecured debts", a provision relevantly similar to s 556(1)(a) of the *Corporations Act*. King CJ there stated<sup>202</sup>:

"The expression '*other* unsecured debts' appears to imply that *the costs and expenses of winding up ... are regarded by the statute as debts of the company*. As the company's obligation as trustee to pay the debts incurred in carrying out the trust cannot be performed unless the liquidation proceeds, *it seems to me to be reasonable to regard the expenses mentioned above as debts of the company incurred in discharging the duties imposed by the trust and as covered by the trustee's right of indemnity*." (emphasis added)

170 King CJ went on to state<sup>203</sup>:

"On these principles which I have discussed, the liquidator is entitled to have recourse to the property of each trust for the purpose of meeting the costs and expenses of winding up, the petitioner's costs and the liquidator's remuneration, so far as they are incurred in relation to each trust. As there are no non-trust assets or liabilities, all the expenses are attributable to one or other of the trusts and must be apportioned between them. The liquidator will be able to make an estimate of the work and expense involved in the liquidation so far as it relates to each trust. *Where no apportionment is possible, the maxim that equality is equity should provide the solution to the problem of apportionment*." (emphasis added)

171 There is no reason why the approach of King CJ should not be extended to apply to an administrator or provisional liquidator of a trustee of a trading trust: their expenses should be regarded *as debts of the corporate trustee* which would have priority under s 556(1)(a) of the *Corporations Act* as expenses incurred in preserving, realising or getting in property of the company.

172 Further, distribution of those expenses between multiple trusts with a single trustee should adopt the approach of King CJ set out above<sup>204</sup>. The expenses of the winding up could be apportioned across each trust on the basis of the extent to which the work of the relevant authority related to each trust. However, if apportioning the expenses across the multiple trusts created practical difficulties, the relevant authority (namely, the liquidator, provisional liquidator or administrator) should apply to the court for directions in

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**202** *In re Suco Gold* (1983) 33 SASR 99 at 110.

**203** *In re Suco Gold* (1983) 33 SASR 99 at 110.

**204** *In re Suco Gold* (1983) 33 SASR 99 at 110.

relation to their costs. The statutory basis for the liquidator to apply to the court for directions has been set out above. Administrators, of course, have a further option under s 447A in Pt 5.3A of the *Corporations Act* to apply to the court for directions<sup>205</sup>. Adopting and adapting what Allsop CJ said in *Jones*<sup>206</sup>, these complexities, as well as others, can and will be resolved by application of principle and the text of the legislation, in a manner reflected by the approach of King CJ in *In re Suco Gold*.

### Bankruptcy

173 At the hearing of the appeal, the appellant submitted that if s 433 of the *Corporations Act* were found to apply to proceeds of the trustee's right of exoneration, this would create a distinction between the treatment of a corporate trustee in insolvency and a trustee in bankruptcy. The appellant contended that, given trust property could not be applied to meet the debts of a bankrupt, then the same approach should apply in relation to a corporate trustee. That contention should not be accepted. The right of exoneration and the proprietary interest generated in the fund means that the "trust property" in which the trustee has an interest ceases to be aptly described as property "held on trust" but instead is property of the trustee subject to limitations as to use. So much was made clear in *Buckle*<sup>207</sup>.

174 It follows that there is no apparent inconsistency between the corporate insolvency priority regime and s 116(2)(a) of the *Bankruptcy Act 1966* (Cth), which provides that property held by a bankrupt in trust for another person is not property divisible amongst the creditors of the bankrupt. In *Lane v Deputy Commissioner of Taxation*<sup>208</sup>, Derrington J held that money to be paid from trust assets to trust creditors could not be characterised as "proceeds" within the scope of the phrase "proceeds of the property of the bankrupt" as that phrase is used in ss 108 and 109(1) of the *Bankruptcy Act*. That conclusion is wrong.

### Conclusion

175 The first appeal ground must fail.

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<sup>205</sup> See *Corporations Act*, s 447A(4)(c)-(d).

<sup>206</sup> *Jones* (2018) 260 FCR 310 at 339 [108].

<sup>207</sup> (1998) 192 CLR 226 at 246-247 [48]-[50].

<sup>208</sup> (2017) 253 FCR 46 at 82 [98], 88 [119], [121].

**Second ground: whether an insolvent corporate trustee's right of indemnity is comprised in or subject to a "circulating security interest" within the meaning of s 433**

176 The appellant's contention in relation to this ground was that an insolvent corporate trustee's right of indemnity falls outside the ambit of property secured by a "circulating security interest" or "comprised in or subject to a circulating security interest" under s 433(2)(a). The second appeal ground fails because it proceeds on a misconstruction of s 433(3).

177 Section 433(2) relevantly states that the provision applies where a receiver is appointed on behalf of the holder of a debenture secured by a circulating security interest. That condition was satisfied in this appeal. It is then necessary to consider s 433(3). Section 433(3) only applies to circulating assets. The only concern of s 433(3) was and remains the application of the priority rules to those circulating assets. There is no requirement that the right of indemnity constitute a circulating asset.

178 Again, it is necessary to start with the statute.

179 In addition to s 433(3) of the *Corporations Act*, which has been extracted earlier, two further legislative provisions must be considered.

180 Section 51C of the *Corporations Act* provides that a "circulating security interest" means a security interest that is:

"(a) a PPSA security interest, if:

- (i) the *security interest has attached to a circulating asset* within the meaning of the *Personal Property Securities Act 2009*; and
- (ii) the grantor (within the meaning of that Act) has title to the asset; or

(b) a floating charge." (emphasis added)

181 The definition of "circulating asset" is to be found in the *Personal Property Securities Act 2009* (Cth). Section 340 of that Act relevantly provides that "if a grantor grants a security interest in personal property to a secured party, the personal property is a *circulating asset* if ... the personal property is *covered by subsection (5)* (unless subsection (2) or (3) applies)" (second emphasis added). Among the personal property listed in s 340(5) are an account that is the

proceeds of inventory<sup>209</sup> and an authorised deposit-taking institution (bank) account<sup>210</sup>.

182 As has been observed, the Court of Appeal held that the first requirement of s 433(2)(a), that a receiver be appointed by a holder of a debenture secured by a circulating security interest (as defined in s 51C), was satisfied and this conclusion was not challenged by the appellant.

183 However, the Court of Appeal also held that s 433(2) contained a second requirement before the section could apply, namely, the property to be distributed had to be subject to a circulating security interest. The Court accepted an argument put forward by the Commonwealth, for the first time in that Court, that the second requirement was satisfied on the basis that, because the right of indemnity gives the trustee a proprietary interest in the trust assets, the relevant question was which, if any, of those assets were circulating assets and therefore subject to the priority rules in s 433(3). It was not necessary that the *means* by which the property was available to pay the company's creditors was itself subject to a circulating security interest. The Court of Appeal said that if it was wrong in relation to that finding, then to the extent that the trust assets were circulating assets, that description befitted the right of indemnity, which was a means of recourse to those same assets.

184 On appeal to this Court, the appellant argued, consistently with its argument in relation to the first ground, that the relevant property in issue (the "property of the company") was the right of indemnity itself, not any underlying interest in the receivership surplus. The appellant maintained that the right of indemnity itself had to be comprised in or subject to a circulating security interest as defined by s 51C for s 433 to apply.

185 The Commonwealth submitted that where the requirements of s 433(2)(a) are met, as they had been, s 433 did not contain any further relevant provisions restricting its application. During the course of oral argument, counsel for the Commonwealth correctly accepted that s 433 only applies to property subject to a circulating security interest but submitted that it was not necessary for the right of indemnity to constitute property subject to a circulating security interest. That submission should be accepted.

186 There is no provision requiring the trustee's right of exoneration itself to constitute a circulating asset and, of course, the right is not a circulating asset. It is a fixed asset. Moreover, the text of s 433 does not require, and provides no basis to find, that the "gateway" to reach the circulating assets – the right of

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**209** *Personal Property Securities Act*, s 340(5)(b).

**210** *Personal Property Securities Act*, s 340(5)(c).

exoneration – must itself be a circulating asset. There were only two questions: did s 433(2) apply and, if so, did the receivers hold circulating assets to which s 433(3) required the application of certain priority rules. Here, of course, s 433(2)(a) was satisfied and the receivers held circulating assets in the form of the receivership surplus.

187           It follows that the second ground of appeal must also fail.

**Conclusion and orders**

188           The appeal should be dismissed with costs.



