IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No. M137 of 2018

BETWEEN:

CARTER HOLT HARVEY WOODPRODUCTS AUSTRALIA PTY LTD

Appellant

- and -

10

THE COMMONWEALTH OF AUSTRALIA

First Respondent

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

Second Respondent

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

Third Respondent

APPELLANT'S SUBMISSIONS

Part I:

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

Part II:

This appeal presents the following issues for consideration:

30 1. Whether the "property of the company" of a corporate trustee under s. 433(3) of the *Corporations Act* 2001 includes not only the trustee's right of indemnity but also the underlying assets to which the trustee company can have recourse.

Date of document: 5 October 2018
Filed on behalf of: The Appellant
Prepared by: Telephone: (02) 9234 1500
Polczynski Robinson Fax: (02) 9234 1511
Level 12, 77 King Street Ref: Mr Richard Lyne
Sydney NSW 2000 Email: rlyne@plawyers.com.au

2. The precise nature of, and the limitations upon, a trustee's right of indemnity where the trustee seeks exoneration in respect of unmet trust liabilities, in particular in the context of the insolvency of the trustee.

3. Whether a corporate trustee's right of indemnity from trust assets is "property comprised in or subject to a circulating security interest" for the purposes of s. 433(2) of the *Corporations Act* 2001.

Part III:

The Appellant has considered whether any notice should be given in compliance with section 78B of the Judiciary Act 1903, and considers that no such notice is called for.

Part IV:

The primary decision below is cited as:

Re Amerind Pty Ltd (receivers and managers appointed) (in liquidation) (2017) 320 FLR 118; [2017] VSC 127.

The intermediate appellate decision below is cited as:

Commonwealth v Byrnes [2018] VSCA 41.

Part V:

The relevant facts found and admitted in the court from which the proceedings are brought are as follows:

1. 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**).[1]

2. Amerind had secured facilities with the Bendigo and Adelaide Bank (the **Bank**).[2]

---

1 [2017] VSC 127 para [1], [11] and [39] (CAB 8, 10 and 14)
2 [2017] VSC 127 para [2], [13], [14] (CAB 8, 10), [2018] VSCA 41 para [3] (CAB 153)

3. On 6 March 2014, the Bank sent a notice to Amerind demanding repayment of, and terminating, its facilities.[3]

4. On 11 March 2014, Amerind's sole director appointed Brent Leigh Morgan, James Marc Imray and Geoffrey Philip Reidy of Rogers Reidy (the **Administrators**) as joint and several administrators to Amerind pursuant to s 436A of the *Corporations Act*. [4]

5. On 11 March 2014, the Bank appointed Matthew James Byrnes and Andrew Stewart Reed Hewitt as receivers and managers (the **Receivers**). [5]

6. At the time of the appointment of the Receivers, Amerind in its capacity as trustee held the following main categories of assets:

   (a) cash at bank;

   (b) stock;

   (c) property, plant and equipment (comprising vehicles, machinery and other equipment); and

   (d) reserve amounts, contingently owed to Amerind under the pre-appointment debtor facility that it had with the Bank.[6]

7. The Receivers continued to trade Amerind's business and realise the assets it held on trust. [7]

8. On 14 April 2014, the Receivers ceased to trade as usual and went into a 'wind down mode'. Amerind's liability to the Bank was repaid through the Bank's realisation of its securities. [8]

---

3 [2017] VSC 127 para [3], [23] and [24] (CAB 8 and 12)
4 [2017] VSC 127 para [4] and [25] (CAB 8 and 12)
5 [2017] VSC 127 para [4] and [25] (CAB 8 and 12)
6 [2017] VSC 127 para [32] (CAB 13)
7 [2017] VSC 127 para [6] and [28] (CAB 8 and 12)
8 [2017] VSC 127 para [34] (CAB 8 and 13)

9. On 13 August 2014, at the second meeting of Amerind's creditors, the creditors resolved that Amerind be wound up and that the Administrators be appointed joint and several liquidators. [9]

10. The Commonwealth of Australia (the **Commonwealth**) advanced accrued wages and entitlements totalling $3,803,789.77 to Amerind's former employees pursuant to a statutory scheme known as the Fair Entitlements Guarantee Scheme. [10]

11. At the time of the trial of the proceeding below:

    (a) the Bank's primary secured debt (principal and interest) at appointment of approximately $16.2 million had been repaid in full by the combination of the Receivers' activities and other recoveries the Bank had made via related party guarantees; and

    (b) the Receivers held a net surplus of approximately $1,619,018 (**Receivership Surplus**).[11]

12. The Receivership Surplus has since been reduced by the costs and expenses of the proceedings and the Receivers' ongoing appointment.

Part VI:

1. The appellant's grounds of appeal raise two discrete challenges to the correctness of the Court of Appeal's decision to overturn the declaration made by the primary judge, namely (in short):

    (a) (by grounds a, b and e in the Amended Notice of Appeal filed 20 September 2018) a challenge to the Court of Appeal's characterisation of the nature and contents of the trustee's right of indemnity from trust assets, especially where that right is sought to be exercised by way of exoneration (that is, in respect of a trust liability which the trustee has not itself paid). The appellant contends that, properly understood, the

---

9 [2017] VSC 127 para [5] and [35] (CAB 8 and 14)
10 [2018] VSCA 41 para [7] (CAB 154)
11 [2018] VSCA 41 para [8] (CAB 154)

'exoneration arm' of the right of indemnity is no more than a right to have trust assets applied to meet trust debts. It confers upon the trustee no interest in the trust assets themselves, or the proceeds thereof; and

(b) (by grounds c and d in the Amended Notice of Appeal filed 20 September 2018) a challenge to the Court of Appeal's finding that the trustee's right of indemnity was property subject to s.433(2) of the *Corporations Act* 2001, notwithstanding the operation of s. 51C of that Act, and the operation of s. 340 of the *Personal Property Securities Act* 2009. The appellant contends that the trustee's right of indemnity is not so subject, because it is not a "*circulating asset*" and hence is not property which is "*comprised in or subject to a circulating security interest*".

2. Should the appellant's contentions as to either of these challenges be upheld, the result will be that the Court of Appeal's decision cannot stand. It is convenient to consider each challenge in turn.

The nature and content of the trustee's right of indemnity by exoneration

3. The primary judge's decision below[12] reflects that the situation is fundamentally different if a company in liquidation traded and owned assets as a trustee rather than as beneficial owner. The trust structure is not irrelevant, but fundamental. It is the essence of a trust that the trustee holds the legal title and the beneficiaries of the trust the beneficial or equitable title to the trust assets. In the case of a trading trust, "[t]*he trustee is liable for the debts but the trust property belongs to the beneficiaries.*"[13]

4. Here, it was not in dispute that the company's only activity was trading in its capacity as trustee, and that all assets it held, and all debts and liabilities it incurred, were therefore held and incurred in that capacity.[14] In those

---

12 (2017) 320 FLR 118; [2017] VSC 127, at [332] and [390] (Robson J).

13 McPherson, "The Insolvent Trading Trust" in Finn, *Essays on Equity*, LBC 1985, p. 144; c.f. [2017] VSC 127, at [50]; [2018] VSCA 41, at [191].

14 [2017] VSC 127 para [1], [11], [39] and [50] (CAB 8, 10, 14 and 17)

circumstances, the trust assets cannot properly be described as "*property of the company*" in the sense of being beneficially owned by the company. Rather, they are assets of a trust of which the company is trustee, and out of which it has a trustee's right of indemnity in respect of properly incurred trust debts and liabilities.

5. It is unlikely that the framers of the *Corporations Act* 2001 ("the **Act**") and predecessor legislation would have intended to displace the usual consequences of the trust structure (including the division between the legal and beneficial ownership of assets) that has existed in the Anglo Australian legal system for many centuries, without clearly saying so. Had Parliament intended the expression "*property of the company*" as used in ss 433(3), 556 and 561 of the Act to extend to property not beneficially owned by the company but only held by it on trust, that would have been made clear.

6. It has long been the case in bankruptcy and insolvency law that only the beneficially owned assets of an insolvent company or individual are available to its, his or her personal creditors. For example, "*property held by the bankrupt on trust for another person*" is and has for many years been excluded from the "*property divisible amongst the creditors*".[15] While there is no equivalent provision in relation to insolvent corporate trustees, "*there is no doubt that property held by a company on trust does not become available for payment of the general liabilities of the company in a winding up*"[16].

7. While it is accepted that the word "*property*" is defined in s 9 of the Act as meaning "*any legal or equitable estate or interest... in real or personal property of any description...*", that does not mean that trust property can properly be described as "*property of the company*", an expression not defined in the Act[17].

8. Creditors of an insolvent corporate trustee in that capacity can still have indirect access to the trust property but it is via the corporate trustee's right

---

15 By s 116(2)(a) *Bankruptcy Act* 1966 (Cth), and predecessor provisions.
16 McPherson, op. cit. p 152.
17 The matter is taken no further by the definition of "property" for Part 5.2 purposes in s 416.

of indemnity from trust assets. The position of a secured creditor like Bendigo Bank in the present case is different in that its security can attach directly to trust assets, provided that the security was properly and lawfully given by the trustee pursuant to an appropriate power in the trust instrument (which here it was).[18]

9. None of this is inconsistent with what was said by this Court in *Octavo Investments Pty Ltd v Knight*,[19] and other cases.[20] That is, the relevant "*property of the bankrupt*" trustee was property that could be obtained by exercising the right of indemnity from the trust property, and not the trust property itself. Indeed, the reasoning of the Court of Appeal below,[21] which amounted to a finding in substance that the trust property itself was "*property of the company*" within s 433, is inconsistent with what this Court held.

10. The decisions of the South Australian Full Court in *Re Suco Gold Pty Ltd*[22] and the Victorian Full Court in *Re Enhill Pty Ltd*[23] were, to the extent that they held otherwise, wrongly decided and should not be followed[24]. Whether or not the learned primary judge was bound by *Re Enhill*, this Court is not so bound, and should depart from it where required to give effect to a correct application of the principles of the law of trusts to the situation of an insolvent corporate trustee, and to ensure a uniform application of the Act throughout Australia.

11. That is, the trust property is not "*property of the company*", and the relevant right is a right to obtain exoneration, recoupment or indemnity from the trust property for properly incurred trust debts and liabilities.

---

18 Deed of Trust dated 22 December 1976 (Exhibit ACB 7 to the affidavit of Ariel Borland sworn 29 April 2016) (ABFM 4), General Security Deed granted by Amerind in favour of the Bank dated 19 December 2012 (Exhibit MJB 12 to affidavit of Matthew James Byrnes sworn 18 November 2015)(ABFM 138)

19 (1979) 144 CLR 360 at 376-368 and 370 ("*Octavo*").

20 *Chief Commission of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at [49]-[51] ("*Buckle*"); *Bruton Holdings Pty Ltd (in liquidation) v Commissioner of Taxation* (2009) 239 CLR 346 at [43] ("*Bruton Holdings*").

21 [2018] VSCA 41, at [269]-[285].

22 (1983) 33 SASR 99 at 109 and 113.

23 [1983] 1 VR 561 at 563-564 and 572.

24 McPherson, op. cit., pp 152-154; see also Mason, in Finn op. cit. at pp 249-250.

12. It may be accepted that this right of indemnity, held by a corporate trustee, is "*property of the company*". However, it is essential to identify the precise nature, and the limits, of that right.

13. Where only the right of exoneration is in issue (as is the case here, and as is almost universal in the case of insolvent corporate trustees of trading trusts), the right is a limited one. It is a right to have trust property applied to meet trust liabilities properly incurred by it as trustee. The right of exoneration requires the trustee to pay the trust creditors equally: if there are insufficient funds to discharge the trust liabilities in full, then the trust creditors' claims rank pari passu (as suggested by the authors of Jacobs' Law of Trusts[25] and implicitly by McPherson J[26] and R P Meagher QC[27] writing extra-judicially).[28] This right is to be contrasted with the right of recoupment, were the trustee has already met a trust liability from its personal resources, and is entitled to be reimbursed for same from trust property (and is therefore personally entitled to receive and retain the proceeds of the exercise of the right).[29]

14. The right of exoneration gives at most an indirect interest in the trust property, which property remains held on trust for the beneficiaries of the trust pursuant to the trust terms, though subject to the trustee's rights of indemnity[30].

15. The Court of Appeal below erroneously found that "*the receivership surplus was not trust property*"[31], apparently without drawing a distinction between the trust property itself and the trustee's right of recoupment or exoneration out of the trust property. That finding flowed from the Court of Appeal's

---

25 JD Heydon and MJ Leeming *Jacobs' Law of Trusts in Australia* (7th ed, LexisNexis Butterworths)[2115]

26 BH McPherson, *Law of Company Liquidation* (4th ed, LBC Information Services), pp305-306; BH McPherson, "*The Insolvent Trading Trust*", in Finn (ed) Essays in Equity (LawBook. Co, 1985), p 154

27 RP Meagher, "*Insolvency of Trustees*", (1979) 53 ALJ 648, 653 (14)

28 See also *Re Independent Contractor Services (Aust) Pty Ltd (in liquidation) (No 2)* [2016] NSWSC 106; (2016) 305 FLR 222 ("*Re Independent*"), per Brereton J at [23] (FLR at 231).

29 *Lane (Trustee), in the matter of Lee (Bankrupt) v Commissioner of Taxation* [2017] FCA 953 ("*Lane*"), per Derrington J at [5], [36]-[47].

30 McPherson, op. cit., pp 144-150; *Jones (Liquidator) v Matrix Partners Pty Ltd, in the matter of Killarnee Civil & Concrete Contractors Pty Ltd (in liq)* [2018] FCAFC 40 ("*Jones v Matrix*"), at [69], [160]-[191].

31 [2018] VSCA 41, at [285].

apparent conclusion that, having been generated by realisation of trust assets by the company (through the receivers) exercising the trustee's right of exoneration, the "proceeds" of the exercise of that right were the trustee's own property.[32] As is explained further below, that conclusion is erroneous. In fact, the corporate trustee's "*property*" is the right of exoneration by recourse to trust assets, but not the trust assets themselves.[33]The realisation of non-cash trust assets into cash, even if it is achieved by exercising the right of exoneration (which is doubtful in this case),[34] is simply the conversion of those assets from one asset class to another; it does not change their character as trust assets.[35]

16. In certain circumstances, the trustee's right of indemnity can be subrogated to creditors[36], but the creditors' rights are not superior to those of the trustee. In particular, the creditors do not have a direct beneficial ownership in the trust property any more than the trustee does or did. As McPherson J said extra judicially:

> *Although not assets subject to the winding up provisions of the Companies Code, the corporate trustee acting by its liquidator in winding up is bound to apply trust assets in satisfaction of trust liabilities. Where those assets are insufficient to satisfy all trust creditors, the order of priority of payment of liabilities is, it is submitted, not that specified in s 441 but that laid down by the courts in actions for administration and other similar proceedings*[37].

17. Neither *Re Enhill* or *In Re Suco Gold* determined that the winding up (or here, receivership) provisions of the then applicable companies legislation applied to a corporate trustee,[38] and the better view, then, as now, is that:

---

32 [2018] VSCA 41, at [278] - [282], [285].
33 *Jones v Matrix*, at [4], [69] (per Allsop CJ); though see [160]-[191] (per Siopis J).
34 See paragraph [23] below.
35 See further paragraphs [24] and [25] below.
36 McPherson, op. cit., pp 150-151.
37 McPherson, op. cit., p 154.
38 McPherson, op. cit., p 156; contra [2018] VSCA 41, at [282]-[284].

> *... to the extent that the property of the company is subject to a trust, ... statutory provisions concerning the division and distribution of assets generally do not extend to assets the subject of that trust unless the company has, by reason of its right to indemnity or otherwise, a beneficial interest therein."*[39]

18. While the appellant accepts that a trustee's right of recoupment, exoneration or indemnity is in the nature of an equitable charge or lien held by the trustee, it does not follow that that gives the trustee ownership of the trust property itself. Rather, the trustee is entitled to retain the trust property and realise it if necessary in order to recoup monies which the trustee has already paid out of its own funds, to exonerate itself for unmet liabilities by paying them from trust funds, or otherwise to indemnify itself from trust funds in respect of properly incurred trust liabilities.

19. As is accepted above, the right of exoneration enables the trustee to realise assets for the purpose of meeting trust liabilities. Thus, where relevant trust assets are not already held in the form of cash, exercise of the right may be regarded as involving two steps: first, realisation of the asset into money; and secondly, payment of that money to one or more trust creditors.

20. However, the first step is only ancillary to the second. The right of exoneration does not permit realisation of trust assets for any purpose other than the meeting of trust liabilities. The trustee is not entitled to rely on the right of exoneration to, say, sell a parcel of real property held on trust, and then use any part of the proceeds of sale to meet any non-trust liability.

21. The 'realisation' step does not result in any change in the trust character of that which is held. It is simply the substitution of one asset (cash) for another (non-cash) asset. The cash proceeds are held on precisely the same terms as were the non-cash assets realised to create them. The cash proceeds are thus in the same position as any other cash held by the trustee on trust (and which, already being cash, do not require realisation). It would run

---

39 McPherson op. cit., p 156.

contrary to the trust principles enunciated above for the contrary to be suggested, and no decided authority or learned commentary suggests otherwise.

22. That said, the Court of Appeal below appears to have failed to maintain the distinction between the two steps. In responding to the careful analysis of Derrington J in *Lane*, and rejecting his Honour's reliance on the term 'proceeds' in the *Bankruptcy Act* 1966 ("the **BA**") as having no relevance in the corporate insolvency environment, the Court of Appeal observed that: "*The term 'proceeds' seems to us to be apt to describe the financial result of exercising the right of exoneration.*" [40] But this overstates the position. The 'proceeds' are only the financial result of the 'realisation' step of exercising the right of exoneration. That step is not available to be taken by a trustee in isolation. The right of exoneration may only be exercised by first realising the assets (where necessary), and then applying the proceeds to trust liabilities.[41] To the extent that *Re Enhill* decided otherwise, it is contrary to the preponderance of authority, and to principle, and should be overruled.

23. Indeed, in many cases it may not be clear whether it is the right of exoneration, or some other right, which has been employed so as to effect the realisation of non-cash trust assets. In the present case, the second respondents were appointed receivers and managers by the Bank, over the assets of the trustee company and directly over the trust assets.[42] They accordingly had ample powers to realise the trust assets, arising from the rights of their appointor and the terms of their appointment, which did not depend upon them exercising any right of exoneration which the company may have had. There is no reason to suppose that they even turned their mind to the existence of, much less purported to exercise, the right of

---

40 [2018] VSCA 41, at [278].

41 *Woodgate, in the matters of Bell Hire Services Pty Ltd (in liq)*[2016] FCA 1583, per Farrell J at [36]-[37]; *Lane* at [40]-[47].

42 *Deed of Appointment of Receivers and Managers* dated 11 March 2014 (Exhibit MJB-2 to the affidavit of Matthew James Byrnes sworn 18 November 2015) (ABFM 167)

exoneration (as opposed to the direct rights expressly conferred upon them by their appointment).

24. It would be anomalous if the answer to the key question arising in this case (and many others), namely whether the priority regime in s. 433 of the Act is to be applied to the proceeds of sale of trust assets, depended upon which of several available rights was relied upon to effect the realisation of those assets into cash form.

25. It would be further anomalous if the answer to the key question in this case differed as between assets which were already in cash form at the time of the Receivers' appointment, and assets which were realised for cash by the Receivers. None of these anomalies arise once it is appreciated that the realisation of assets into cash form, whether in reliance on the trustee's right of exoneration or otherwise, does not change the nature of the trustee's rights or interests in respect of those assets.

26. The holdings of this Court in *Octavo*[43] are not relevant to the current situation. In particular, the concept of whether a payment was made "*from* [the bankrupt's] *own money*" for the purposes of the former version of s 122(1) of the BA is quite different to whether trust property is "*property of the company*" for the purposes of ss 433(3), 556 and 561 of the Act.

27. The expression "*from his own money*" in the former version of s 122(1) of the BA directs attention to the person making the payment (i.e., to determine whether that person was solvent or insolvent at the relevant time), and not to the payment itself. It did not matter therefore that the insolvent trustee company may not have been making the payment regarded as a preference from its own money.

28. In any event, a trustee making a payment out of trust property which the trustee is entitled to make under a right of recoupment or exoneration could be said (at least for the purposes of the law relating to preferences) to be a

---

43 (1979) 144 CLR 360 at 367, 368-369, 370.

payment from the trustee's "*own money*"[44]. That is because, once the trustee had properly appropriated the trust fund for the recoupment or discharge of a properly incurred debt or liability of the trust, that money might be said to be the trustee's "*own money*" in the sense that the trustee had properly appropriated it for a proper purpose. That does not mean that the trustee ever had a beneficial interest in the trust property, or that the trust property could be described as "*the property of the* [trustee]" rather than the property of the beneficiaries of the trust.

29. Further, this Court's observations about the right of indemnity expressed in *Octavo*[45] were to the effect that when the trustee has the right of indemnity, it has a beneficial interest in the trust property which is preferred to the interest the beneficiaries in the sense that it has an equitable charge or equitable lien out of which it can satisfy its entitlements. That right is in priority to the rights of the beneficiaries, who are only entitled to take the trust property to the extent that it is not required for the trustee's rights of recoupment, exoneration or indemnity. Again, that does not make the trust property beneficially owned by the trustee. Nor does it authorise the application of trust property (or the proceeds of sale thereof) for purposes entirely foreign to the trust, such as the payment of non-trust creditors.

30. The word "*of*" in the expression "*property of the company*" as used in s 433(3) of the Act refers to property beneficially owned by the company. Ownership is only one of the kinds of proprietary interest in property recognised by our legal system. An equitable charge or lien (to secure a trustee's right of recoupment, exoneration or indemnity) is also a proprietary right, but not beneficial ownership.

31. It is unnecessary, and indeed counter-productive, to focus on what label to place on the trustee's right of indemnity. Whether or not it is appropriately described as a 'mere right or power', as posited by Professor Ford,[46] or

---

44 *Octavo Investments v Knight* (1979) 144 CLR 360 at 369.
45 (1979) 144 CLR 360 at 367-368.
46 H A J Ford, *Trading Trusts and Creditors' Rights,* (1981) 13 Melb LR at 1, 3, 4, 14 – 19 and 26

whether it is described as the trustee's 'property' (and the two may not be inconsistent), the same questions remain. What is its scope? What are its limitations?

32. Once the precise nature, and the limits, of the right of exoneration are understood, it becomes clear that the effect of the Court of Appeal's decision is to cause property to be distributed to the company's creditors pursuant to s.433 of the Act which was never the company's property to distribute. Its effect (if undisturbed by this Court) is that the right of exoneration is effectively expanded on the trustee's insolvency, by permitting trust assets to be deployed to meet non-trust liabilities of the trustee, and or permitting trust liabilities to be met other than on a pari passu basis, in a way which would undoubtedly have been a breach of trust had the trustee remained solvent. No basis in trust law is, or could be, proffered in support of such an expansion.

33. What this Court has said in *Buckle*[47] and *Bruton Holdings*[48] is not inconsistent with that analysis. A trustee's equitable charge or lien to satisfy the right of recoupment, exoneration or indebtedness constitutes a proprietary right which ranks in priority to the rights of the beneficiaries. That does not however convert trust property into "*property of the company*".

34. The learned primary judge's view, following that of Brereton J in *Re Independent,* is well supported by authority and academic and judicial opinion[49]. Brereton J's decision and reasoning in *Re Independent*[50] was in turn followed by the Federal Court of Australia in *In the Matter of Bell Hire Services Pty Ltd (in liquidation)*[51]. Had the primary judge not followed those decisions, he would have made Victoria an "*outlier*" in interpreting this important concept and provisions in national legislation, namely the Act.

---

47 (1998) 192 CLR 226 at [48], see also at [49]-[51].
48 (2009) 239 CLR 346 at [43].
49 McPherson, loc. cit.; Mason, loc. cit. (both writing extra judicially).
50 [2016] NSWSC 106; (2016) 305 FLR 222 at [19]-[20], [23]-[25].
51 [2016] FCA 1583 at [37].

Further, the reasoning in the primary decision below has been expressly approved by Markovic J of the Federal Court in *Kite v Mooney*[52].

35. There is nothing anomalous in considering that where a corporate trustee is insolvent, its right of indemnity and the equitable charge or lien that supports it are not "*property of the company*" but rather a right held on behalf of the creditors who are entitled to be subrogated to the insolvent corporate trustee's rights and indemnities. That is, the insolvent corporate trustee who is liable for trust debts is not able to appropriate the right of indemnity for itself, but only for the benefit of unpaid trust creditors[53].

36. The consequence of this holding is not to deprive employees and other priority creditors of all rights. They are still entitled to share in the proceeds of the trust assets on a "*pari passu*" basis along with other trust creditors, but because the rights of statutory priority given by ss 433(3), 556 and 561 of the Act only apply to "*property of the company*" they do not receive an additional statutory priority.

37. It is also not anomalous that a liquidator seeking to sell assets of an insolvent corporate trustee may be obliged to have resort to the Court to do so, in consequence of the decision of Brereton J in *Re Stansfield.*[54] It is a consequence of the assets being trust property rather than the beneficial or equitable property of the company[55], and of the nature of an equitable charge or lien[56], which (unlike a legal or equitable mortgage) can only be realised compulsorily by Court order appointing a receiver or by judicial sale[57].

The right of indemnity is not a circulating asset

38. The expression "*property comprised in or subject to a circulating security interest*", in s.433(2) of the Act, directs attention to s. 51C of the Act. That

---

52 *Kite v Mooney; Mooney's Contractors Pty Ltd (No 2)* [2017] FCA 653, at [121]-[141].
53 McPherson, op. cit., pp 152-158.
54 (2014) 103 ACSR 401; 32 ACLC 14-065, at [19].
55 *Re Stansfield* (2014) 103 ACSR 401; 32 ACLC 14-065, at [16]-[19].
56 Young et al., *On Equity*, Lawbook Co., Sydney, 2009, at [9.180]-[9.200], [9.230].
57 *Evenwood v Conway* [1997] WASC 14; *King Investment v Hussain* [2005] NSWSC 1076 at [51].

section identifies two (and two only) alternative types of "*circulating security interest*", namely:

a. a "*PPSA security interest*" (if the conditions in subss. (a)(i) and (ii) are met); and

b. "*a floating charge*".

39. In the Court of Appeal below[58], the Commonwealth relied only on the first of these alternatives, namely a "*PPSA security interest*". That expression is defined in s. 51 of the Act. Relevantly, it means a security interest within the meaning of the PPSA, and to which that Act applies.

40. The Commonwealth's reliance on s. 51C(a) required it to demonstrate that the two conditions in subs. (a)(i) and (ii) were satisfied. Only the first of these was in contest, namely the condition that "*the security interest has attached to a circulating asset within the meaning of the* [PPSA]".

41. Hence the question which was essential to the Commonwealth's argument, and to the reasoning of the Court of Appeal which adopted that argument, was whether the trustee's right of indemnity was "*a circulating asset*".

42. The expression "*circulating asset*" is defined for the purposes of the PPSA, and hence for the relevant purposes of the Act,[59] in s. 340 of the PPSA. As the Court of Appeal itself observed, "*The real question is whether s 340 of the PPSA applies to the right of indemnity.*"[60]

43. PPSA s. 340 commences with a "*general definition*" of the expression "*circulating asset*", in the following terms:

> *(1) For the purposes of this Act, if a grantor grants a security interest in personal property to a secured party, the personal property is a* ***circulating asset*** *if:*

---

58 See [2018] VSCA 41, at [324] where the Commonwealth's argument is identified, and at [328] where the argument is further refined.

59 By operation of s.51C(a)(ii)

60 [2018] VSCA 41, at [327].

(a) *the personal property is covered by subsection (5) (unless subsection (2) or (3) applies); or*

(b) *in any other case--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.*

44. In the present case, there was no suggestion that the secured party (Bendigo Bank) had given express or implied authority for the company to "*transfer*" the right of indemnity "*in the ordinary course of the [company's] business*". Indeed, given the nature of the right of indemnity, it is difficult to imagine circumstances where such a transfer might occur. It follows that part (b) of the "*general definition*" was not engaged, and hence the question of whether the right of indemnity was a "*circulating asset*" depended entirely on the operation of part (a).

45. Part (a) of the "*general definition*" of the expression "*circulating asset*" is engaged "*if the personal property is covered by subsection (5)*" (subject to the two presently irrelevant exceptions in subs. (2) and (3)).

46. Subsection (5) of PPSA s. 340 is in the following terms:

Current assets

(5) This subsection covers the following personal property:

(a) *an account that arises from granting a right, or providing services, in the ordinary course of a business of granting rights or providing services of that kind (whether or not the account debtor is the person to whom the right is granted or the services are provided);*

(b) *an account that is the proceeds of inventory;*

(c) *an ADI account (other than a term deposit);*

(d) *currency;*

(e) *inventory;*

(f) *a negotiable instrument.*

Example: *An example of an account mentioned in paragraph (a) is an account that is a credit card receivable.*

Note: *For the meaning of* ***inventory*** *in this subsection, see section 341.*

47. Before the Court of Appeal below, the Commonwealth (correctly) abandoned any argument that the right of indemnity was an "*account*" within s. 340(5)(a) of the PPSA.[61] Plainly, it is not. Nor is the right of indemnity even arguably within any of the other categories of personal property listed in s. 340(5). That being so, the right of indemnity is not (itself) a "*circulating asset*" within the meaning of the PPSA.

48. The conclusion just reached, namely that the right of indemnity itself does not fall within any of the categories of "*circulating asset*" in s. 340(5) of the PPSA, should have been sufficient to dispose of the Commonwealth's argument. However, the Commonwealth sought to sidestep that conclusion by directing attention, not to the right itself, but to the underlying trust assets to which the right might attach. The Commonwealth argued,[62] and the Court of Appeal held,[63] that the right of indemnity "... *was not fixed, but represented a right in respect of each item of trust property. If those items were circulating assets, then that character flowed through to the right of indemnity as well, to the extent that it might be satisfied by recourse to those assets.*"

49. It is not clear why this argument was accepted. The Court of Appeal's reasoning is not expressed in any detail. The "*property of the company*" under consideration is the right of indemnity itself, not the trust assets to which that right may in turn attach. The fact that the right of indemnity may be exercised by recourse to certain types of trust asset does not mean that the right itself takes the character of those assets. Further, since the right extends to all assets of the trust, then if this approach is to be adopted the right must be of a most chameleon character indeed. It must sometimes be a fixed asset, and sometimes be a circulating asset (and sometimes both at

---

61 [2018] VSCA 41, at [328].
62 See [2018] VSCA 41, at [328].
63 [2018] VSCA 41, at [329].

once), even though it is but a single right, and hence a single asset. There is simply no warrant for this approach. It is unsupported by either authority or principle, and it should be rejected.

50. Further, to the extent that the Court of Appeal's reasoning involves rejecting the notion that the right of indemnity is "*fixed*" in any sense, that reasoning is mistaken. As the learned primary judge held:

> *The trustee's right of indemnity is fixed. It attaches upon the incurring of a debt to all trust assets. It does not require any act of crystallisation, as required with a floating charge.*[64] *... The trustee's lien applies to all the trust assets without distinction, whether they be fixed or circulating. The value of the lien increases and decreases according to the liabilities incurred by the trustee. The trustee may dispose of trust assets free from the lien does not mean that the lien is not fixed.*[65]

51. Nor is the right of indemnity a floating charge, as the Commonwealth submitted at first instance[66] (but not in the Court of Appeal). As Brereton J said in *Re Independent*[67] the trustee's lien is not a floating charge, but rather is "*in the nature of*" a floating charge. The learned primary judge below reasoned to the same effect.[68]

52. Once it is held (applying the reasoning above) that the right of indemnity is not "*subject to a circulating security interest*" within the meaning of s. 433(2) of the Act, it must follow that s. 433(3) of the Act has no application to it (or any proceeds of its exercise). However, the Court of Appeal below appears to have found to the contrary,[69] namely that s 433(3) applies to all property in the hands of a receiver if any of it is subject to a circulating security interest. No authority is cited for that proposition, and it is plainly wrong. If it was

---

64 [2017] VSC 127 at [385]; see generally at [378]-[391].
65 [2017] VSC 127 at [386].
66 See [2017] VSC 127 at [382].
67 [2016] NSWSC 106; (2016) 305 FLR 222 at [24].
68 [2017] VSC 127 at [382]-[388].
69 [2018] VSCA 41, at [312]-[317].

correct, it would have the absurd result that the priority regime in s. 433(3) would apply to secured fixed assets of the company as well as circulating assets. While the language is clearer in s 561 of the Act, "*property*" in s. 433(3) should still be read as meaning "*property comprised in or subject to a circulating security interest*" as described in s. 433(2) of the Act, which determines the applicability of s. 433.

Part VII:

The appellant seeks the following orders:

1. The appeal is allowed.

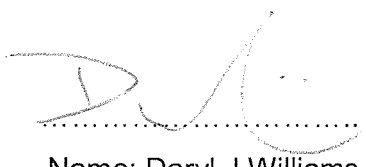
2. Paragraphs 2, 5 and 6 of the orders made by the Supreme Court of Victoria Court of Appeal in proceeding SAPCI 2017 0051 on 28 February 2018 are set aside, and in lieu thereof it is ordered that the appeal is dismissed, with costs.

3. The First Respondent pay the Appellant's costs in this Court.

Part VIII:

The duration of the appellant's oral argument is estimated at 3-4 hours.

Dated: 5 October 2018



Name: Daryl J Williams
Telephone: (03) 9225 8521
Facsimile: (03) 9225 7728
Email: daryl.williams@vicbar.com.au