FEDERAL COURT OF AUSTRALIA

Kite v Mooney, in the matter of Mooney’s Contractors Pty Ltd (in liq) (No 2) [2017] FCA 653

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| File number: | NSD 1228 of 2016 |
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| Judge: | **MARKOVIC J** |
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| Date of judgment: | 13 June 2017 |
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| Catchwords: | **CORPORATIONS** – application for directions under ss 424 and 511 of the *Corporations Act 2001* (Cth) (Corporations Act) – application for judicial advice – where insolvent company is trustee of a trading trust – where sole business of the corporate trustee was carrying on the business of the trust – where no assets held by the corporate trustee in its own right – where company ceased to be trustee of the trust upon appointment of external administrators – whether trust assets held by company as bare trustee – whether bare trustee has a right of indemnity for actions undertaken as trustee – whether the right of indemnity is “property of the company” for the purposes of the priority regimes in the Corporations Act – whether employee entitlements ought to be paid out of trust assets in accordance with statutory priority regime – whether liquidators justified in calling for proofs of debt and having recourse to trust assets to satisfy those claims – whether liquidators entitled to costs incurred by the company in realising and dealing with trust assets – whether liquidator’s remuneration and costs of the application should be paid out of the assets of the trust**TRUSTS AND TRUSTEES** – nature of the trustee’s right of indemnity – whether trustee’s right of indemnity is “property of the company” for the purposes of the priority regime in the Corporations Act – whether the property subject to the lien in support of the trustee’s right of indemnity is “property of the company” for the purposes of the priority regime in the Corporations Act – whether the trustee’s right of indemnity or the property subject to the lien in support of the trustee’s right of indemnity is available to creditors generally or is only available for creditors of the trust to meet trust liabilities  |
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| Legislation: | *Corporations Act 2001* (Cth) ss 424, 479(3), 511, 555, 556*Trustee Act 1925* (NSW) s 63 |
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| Cases cited: | *13 Coromandel Place Pty Ltd v C L Custodians Pty Ltd (in liq)* (1999) 30 ACSR 377; [1999] FCA 144*In the matter of AAA Financial Intelligence Ltd (in liquidation) ACN 093 616 445* [2014] NSWSC 1004*Agusta Pty Ltd v Provident Capital Ltd* [2012] NSWCA 26*Aussie Airlines Pty Ltd v Australian Airlines Limited* (1996) 68 FCR 406*Australian Competition and Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378*Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2011) 193 FCR 442*Caterpillar Financial Australia Limited v Ovens Nominees Pty Ltd* [2011] FCA 677*CGU Insurance Limited v One.Tel Limited (in liquidation)* (2010) 242 CLR 174*Chief Commissioner of Stamp Duties for New South Wales v Buckle* (1998) 192 CLR 226*Federal Commissioner of Taxation v Bruton Holdings Pty Ltd (in liq)* (2008) 173 FCR 472*Freelance Global v Bensted* [2016] VSC 181*Re Gerard Cassegrain & Co Pty Limited (in liquidation)* [2013] NSWSC 257*Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66*Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360*Pascoe, in the matter of Brentwood Village Limited (in liquidation)* [2014] FCA 1295*Porter v Miller Street Pty Limited* [2008] FCAFC 77*Re Amerind Pty Ltd (receivers and managers apptd) (in liq)* [2017] VSC 127*Re Berkeley Applegate (Investment Consultants) Ltd (in liq)* [1989] Ch 32*Re Byrne Australia Pty Ltd* [1981] 1 NSWLR 394*Re Byrne Australia Pty Ltd (No 2)* [1981] 2 NSWLR 364*Re Dungowan Manly Pty Ltd (in liq)* (2015) 105 ACSR 648; [2015] NSWSC 491*Re Enhill Pty Ltd* [1983] 1 VR 561*Re Gerard Cassegrain & Co Pty Limited (in liquidation)* [2013] NSWSC 257*Re Independent Contractor Services (Aust) Pty Limited (in liq) (No 2)* [2016] NSWSC 106; (2016) 305 FLR 222*Re Kayford Ltd (in liq)* [1975] 1 WLR 279*Re One.Tel Network Holdings Pty Ltd (Hall as rec and mgr)* [2001] NSWSC 1065; (2001) 40 ACSR 83*Re Rosewood Research Pty Limited* [2014] NSWSC 449*Re Staff Benefits Pty Ltd* [1979] 1 NSWLR 207*Re Suncoast Restoration Pty Ltd (in liq)* (2013) 211 FCR 203*Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99*Sutherland Re; French Caledonia Travel Service Pty Ltd (in liq)* (2003) 59 NSWLR 361*Re Universal Distributing Company Limited (in liq)* (1933) 48 CLR 171*Theobald, in the matter of Finplas Pty Ltd* [2014] FCA 31*Warner, Re GTL Tradeup Pty Ltd (in liq)* [2015] FCA 323; 104 ACSR 633*Woodgate, in the matter of Bell Hire Services Pty Ltd (in liq)* [2016] FCA 1583Heydon JD and Leeming MJ, *Jacobs’* *Law of Trusts in Australia* (8th ed, LexisNexis Butterworths, 2016) |
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| Date of hearing: | 11 October 2016 |
|  |  |
| Date of last submissions: | 21 April 2017 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Category: | Catchwords |
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| Number of paragraphs: | 153 |
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| Counsel for the Plaintiffs: | Mr C D Wood with Ms T Phan |
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| Solicitor for the Plaintiffs: | McCabes Lawyers Pty Ltd |
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| Counsel for the Defendants: | The defendants did not appear |

ORDERS

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|  | NSD 1228 of 2016 |
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| BETWEEN: | ROBERT KITE AND MARK HUTCHINS IN THEIR CAPACITY AS LIQUIDATORS OF MOONEY'S CONTRACTORS PTY LTD (IN LIQUIDATION) ACN 144 726 296First PlaintiffMOONEY'S CONTRACTORS PTY LIMITED (IN LIQUIDATION) ACN 144 726 296Second Plaintiff |
| AND: | LANCE MOONEYFirst DefendantSHELLY MOONEYSecond Defendant |

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| JUDGE: | MARKOVIC J |
| DATE OF ORDER: | 13 JUNE 2017 |

THE COURT:

1. Directs that, pursuant to s 511(1) of the *Corporations Act 2001* (Cth) (**Act**), the first plaintiffs would be justified in treating all of the assets of the Mooney Family Trust (**Trust**) as assets beneficially held by the second plaintiff (**Company**), as bare trustee, subject to any charge or lien that the Company has over the assets of the Trust to secure the payment of any debts properly incurred by the Company as trustee.
2. Declares that the Company has a right of indemnity from the assets of the Trust for debts incurred prior to 27 April 2015.
3. Orders that the first plaintiffs, in their capacity as receivers and managers, have the power to pay dividends to creditors of the Company incurred in its capacity as trustee of the Trust, including the proceeds of the sale of the business and assets of the Trust.
4. Directs that, pursuant to ss 511(1) and 424 of the Act, the first plaintiffs, in their capacities as liquidators and receivers and managers, would be justified in calling for proofs of debt of the Company for debts incurred prior to 27 April 2015 and in having recourse to the assets of the Trust to satisfy those claims.
5. Orders that, following the sale of any business and assets of the Trust and the distribution of the assets of the Trust to the creditors of the Company, provided there is no surplus after costs and expenses and payment to all of the just creditors of the Company and the Trust, the receivers retire upon the distribution of proceeds to the creditors.
6. Directs that, pursuant to ss 511(1) and 424 of the Act, the first plaintiffs, in their capacities as liquidators and receivers and managers, would be justified in not paying employee entitlements out of the assets of the Trust in accordance with the priorities set out in s 556(1) of the Act.
7. Directs that, pursuant to ss 511(1) and 424 of the Act, the first plaintiffs, in their capacities as liquidators and receivers and managers, would be justified in recovering the costs and expenses incurred by the Company and the liquidators in realising the Trust assets and otherwise dealing with the Trust assets from the Trust assets.
8. Declares that the first plaintiffs, in their capacities as liquidators and receivers and managers, are entitled to a lien over the assets of the Trust in respect of fees incurred in their capacity as voluntary administrators in conducting the voluntary administration of the Company.
9. Declares that the first plaintiffs are entitled to a lien over the assets of the Trust in respect of fees incurred in their capacity as deed administrators in controlling the administration of the Deed of Company Arrangement of the Company.
10. Declares that the first plaintiffs are entitled to a lien over the assets of the Trust in respect of fees incurred in their capacity as liquidators in conducting the winding up of the Company.
11. Orders that the costs of this proceeding be costs in the winding up.
12. Declares that the first plaintiffs have a lien over the assets of the Trust for the costs of this proceeding.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MARKOVIC J:

1. Robert Kite and Mark Hutchins, the first plaintiffs, are the liquidators of Mooney’s Contractors Pty Ltd (in liquidation) (**Company**), the second plaintiff. They are also the receivers and managers of certain assets held by the Company in its capacity as trustee of the Mooney Family Trust (**Trust**).
2. On 27 April 2015 Messrs Kite and Hutchins were appointed as joint and several voluntary administrators of the Company. At the time of or shortly after his appointment as an administrator of the Company, Mr Kite became aware of the existence of the Trust. According to Mr Kite, the Company was incorporated for the sole purpose of acting as trustee of the Trust and never traded in its own right.
3. On 7 June 2015 the Company entered into a deed of company arrangement (**DOCA**) with Messrs Kite and Hutchins as deed administrators. The Company defaulted under the terms of the DOCA and on 7 July 2016 it was placed into liquidation. Messrs Kite and Hutchins were appointed as joint and several liquidators of the Company.
4. On 29 July 2016, pursuant to orders of this Court made under s 57 of the *Federal Court of Australia Act* *1976* (Cth), Messrs Kite and Hutchins were appointed as joint and several receivers and managers over the assets of the Trust with the powers provided by s 420 of the *Corporations Act 2001* (Cth) (**Corporations Act**) (other than those in ss 420(2)(s), (t), (u) and (w)) as if the references to “the corporation” therein were to the Trust (**Receivers**).
5. Messrs Kite and Hutchins now seek directions, orders and declarations pursuant to ss 424(1) and 511 of the Corporations Act and r 14.23 of the *Federal Court Rules 2011* (Cth) (**Rules**). The Company seeks judicial advice in relation to various aspects of Messrs Kite and Hutchins’ ongoing administration of the assets of the Company. Messrs Kite and Hutchins also seek declarations and orders that they are entitled to an equitable lien over the Trust assets in respect of their fees.

# relief sought

1. On 29 July 2016 the Court ordered that the plaintiffs’ originating application filed on that day be treated as an originating process. The plaintiffs no longer press all of the relief sought in the originating process. In addition the plaintiffs now rely on s 511 of the Corporations Act, in lieu of s 479(3), as the basis for the directions sought by them in their capacity as liquidators. Accordingly the plaintiffs now seek the following relief:

…

6. The Receivers have in respect of the Trust business and property the powers that a liquidator has in respect of the business and property of a company under the Act including, without limitation:

…

(b) The power to pay dividends to the creditors of the Company incurred in its capacity as trustee of the Trust including the proceeds of the sale of the business and assets of the Trust.

7. An order that, subject to order 6, following the sale of any business and assets of the Trust, and the distribution of the proceeds of such sale to the creditors of the Company, the Receivers provide any surplus proceeds or remaining assets of the Trust to any incoming trustee of the Trust or to the beneficiaries and retire as Receiver.

…

10. A direction pursuant to section [511] of the Act or alternatively judicial advice that the Liquidators would be justified in treating all assets of the Company as assets beneficially held by the Trust, as bare trustee, subject to any charge or lien that the Company has over the assets of the Trustee in respect of debts properly incurred by the Company as Trustee.

11. A direction pursuant to section [511] of the Act or alternatively judicial advice that the Liquidators, if appointed as receivers over the assets of the Trust, would be justified in paying employee entitlements out of the assets of the Trust in accordance with the priorities in section 556(1) of the Act.

…

14. A declaration that the Company has a right of indemnity from the assets of the Trust for debts incurred prior to 27 April 2015 being the date on which the Company entered into Voluntary Administration.

…

18. A direction that the Liquidators would be justified in calling for proofs of debts of the Company, incurred prior to 27 April 2015 and to have recourse to the assets of the Trust to satisfy those claims.

…

21. A direction pursuant to section [511] of the Act, or judicial advice, that the Liquidators would be justified in recovering the costs and expenses incurred by the Company and Liquidators in realising any Trust assets, and otherwise dealing with the Trust, from the Trust assets.

…

23. A declaration that the Liquidators are entitled to a lien over the assets of the Trust in respect of fees incurred in their capacity as Voluntary Administrators in conducting the voluntary administration of the Company.

24. A declaration that the Liquidators are entitled to a lien over the assets of the Trust in respect of fees incurred in their capacity as Deed Administrators in conducting the administration of deed of company arrangement of the Company.

25. A declaration that the Liquidators are entitled to a lien over the assets of the Trust in respect of fees incurred in their capacity as Liquidators in conducting the winding up of the Company.

26. An order that the costs of this proceeding be costs in the winding up.

27. A declaration that the Liquidators have a lien over the assets of the Trust for the costs of these proceedings, or alternatively an order under section 93 of the Trustee Act or an order under section 72 of the Trusts Act that the costs of these proceedings be paid out of the assets of the Trust.

…

# notice to the defendants and other inTERested parties

1. A number of affidavits proving service on the defendants and other interested parties, including creditors, were read by the plaintiffs. The evidence established that:
2. on 28 July 2016 Lance and Shelly Mooney, the first and second defendants respectively and beneficiaries of the Trust, were notified of this proceeding and that the first plaintiffs intended to seek orders from the Court that they be appointed as receivers and managers of the assets of the Trust. At that time the originating process and various affidavits, including an affidavit of Mr Kite affirmed 27 July 2016, were provided to Mr and Mrs Mooney. In subsequent correspondence Mr and Mrs Mooney indicated that they consented to the orders being sought;
3. on 4 August 2016 Macquarie Leasing Pty Ltd, Thorn Australia Pty Ltd, Westpac Banking Corporation Limited (**Westpac**) and Commonwealth Bank of Australia, all creditors of the Company, were served with Mr Kite’s affidavit affirmed on 27 July 2016;
4. on 5 August 2016 Nissan Financial Services Australia, a creditor of the Company, was served with the originating process, the affidavit of Mr Kite affirmed on 27 July 2016, an affidavit of Jason Tang affirmed 26 July 2016 and a sealed copy of the Court’s orders made on 29 July 2016;
5. on 16 August 2016 Mooney’s Contractors Group Pty Ltd (in liquidation) (**MC Group**), a related party and creditor of the Company, was served with the originating process, the affidavit of Mr Kite affirmed on 27 July 2016, the affidavits of Messrs Hutchins and Tang each affirmed 26 July 2016 and a sealed copy of the Court’s orders made on 29 July 2016;
6. on 16 August 2016 FactorOne, a division of Scottish Pacific Business Finance Pty Ltd, was served with the affidavits of Messrs Hutchins and Tang each affirmed 26 July 2016 and a sealed copy of the Court’s orders made on 29 July 2016;
7. on 25 August 2016 the solicitors for the plaintiffs wrote to each of the following persons enclosing a sealed copy of the Court’s orders made on 24 August 2016 and notifying them of the date fixed for hearing of the originating process:
	1. Mr and Mrs Mooney and the beneficiaries of the Trust;
	2. MC Group;
	3. FactorOne;
	4. Thorn Australia Pty Ltd;
	5. Agnew’s Supa and G Agnew and J Zamparutti;
	6. Agnew Investments Pty Ltd and Colleen Agnew Super Pty Ltd;
	7. Westpac;
	8. Commonwealth Bank of Australia;
	9. Capital Finance Australia Ltd;
	10. Nissan Financial Services Australia; and
	11. Macquarie Leasing Pty Ltd;
8. on 5 October 2016 the plaintiffs’ outline of submissions was served on Mr and Mrs Mooney and the beneficiaries of the Trust. They were again informed of the hearing date;
9. on 6 October 2016 the solicitors for the plaintiffs sent an email to Mr and Mrs Mooney which included the following:

In your email to us dated 29 July 2016 (***attached***) you indicated that you both consented to the orders sought in the originating application. Can you please confirm by reply (email is fine) that this is still the case.

If your position has changed and you wish to oppose the orders sought, could you please indicate this in your response and identify the specific orders you object to.

As you are aware from our letter to you dated 25 August 2016, the matter is listed for final hearing at 9.30am on 11 October 2016. Accordingly, we would appreciate if you could please provide your response to us by no later than 5.00pm on 7 October 2016 .

In response, on 7 October 2016 Mrs Mooney informed those solicitors that she did not oppose the orders sought;

1. on 6 October 2016 Messrs Kite and Hutchins wrote to the former employees of the Company notifying them of the hearing and the effect of the orders sought in relation to employees; and
2. on 7 October 2016 the solicitors for the plaintiffs wrote to each of the persons listed in [7(6)] above enclosing the plaintiffs’ outline of submissions and confirming the hearing date. The letter to Westpac also included a further copy of the Court’s orders made on 24 August 2016 and the affidavit of Mr Kite filed 30 September 2016, as it seemed that earlier letters providing that material had been incorrectly addressed.
3. Upon commencement of the hearing the matter was called outside the court room. No party other than the plaintiffs appeared. I am satisfied, based on the evidence before me, that the defendants and the parties who may have had an interest in the proceeding received sufficient notice of it. The defendants have chosen not to appear and at least one of them has indicated that she does not oppose the relief sought by the plaintiffs.

# relevant facts

1. The plaintiffs relied on two affidavits affirmed by Mr Kite on 27 July 2016 and 30 September 2016 respectively. Before setting out the facts as they relate to the orders now sought by the plaintiffs it is relevant to note that, upon and during their appointment as voluntary administrators and then deed administrators, Mr Kite proceeded on the basis that he and Mr Hutchins were entitled to deal with the assets of the Trust and that those assets were available to satisfy the claims of creditors. They did so because of advice they received from their former solicitors referred to at [17] below. That state of affairs continued until about the time that Messrs Kite and Hutchins were appointed as liquidators in July 2016.
2. The background to the issues that now arise and the steps that Messrs Kite and Hutchins took following their appointment, first as administrators, then as deed administrators and, more recently, as liquidators of the Company, are set out below. The evidence discloses that, as a result of his investigations, Mr Kite formed the view that the Company operated solely as trustee of the Trust and that he was unable to identify any assets held by the Company in its own right.

## The establishment of the Trust and early events

1. On 21 June 2010 the Company was incorporated for the purpose of acting as the trustee of the Trust. The Trust is constituted by trust deed dated 21 June 2010 between the settlor and the Company as trustee (**Trust Deed**). The Trust Deed relevantly provides:

(1) in clause 1, “Definitions”:

(a) “Trust Fund” is defined to mean:

1.30.1 the Settled Sum;

1.30.2 any money and other property having the nature of either capital or income acquired or accepted by the Trustee as an addition to the Settled Sum; and

1.30.3 the investments and property for the time being representing those sums or any part of them;

(b) “Designated Beneficiary” and “Beneficiary” are also defined. The Designated Beneficiaries are Lance Gene Barry Mooney and Shelly Jane Margosis, who is the same person as Shelly Mooney. The term “Beneficiary” is very broadly defined and includes each Designated Beneficiary;

(2) in clause 3.2, which relates to creation of the Trust:

With effect on and from the date of this Deed, the Trustee agrees to hold the Trust Fund on trust subject to the terms of this Deed.

(3) in clause 5.2, concerning vacation of the office of trustee:

A Trustee will remain in office until the Trustee:

…

5.2.5 has a liquidator, receiver, administrator or official manager appointed or becomes an Externally Administered Body Corporate (in the case of a corporation);

1. On 10 June 2014 the Company entered into a contract with Queensland Rail Limited (**Queensland Rail**), which was an agreement in relation to the rates the Company could charge Queensland Rail for the provision by it of personnel to perform tasks as and when specified by Queensland Rail (**QR Contract**). The provision of personnel pursuant to the QR Contract was at the discretion of Queensland Rail, depending on its resourcing requirements. There was no guaranteed income to the Company.
2. On 24 April 2015 the Company, in its own capacity and in its capacity as trustee for the Trust, entered into a debtor finance facility deed with FactorOne (**FactorOne Facility**). The FactorOne Facility was secured by a general security agreement over the Company.

## Appointment of Messrs Kite and Hutchins as voluntary administrators

1. On 27 April 2015 Messrs Kite and Hutchins were appointed as joint and several voluntary administrators of the Company. Upon their appointment, by reason of the operation of clause 5.2.5 of the Trust Deed, the Company was removed as trustee of the Trust.
2. Messrs Kite and Hutchins commenced investigating the Company’s affairs. Mr Kite, when provided with the Company’s management accounts, observed that it prepared those accounts as trustee of the Trust.
3. On 29 April 2015 Mr Kite appointed Slattery Asset Advisory (**Slattery**) to undertake a valuation of the assets of the Company held as trustee of the Trust. Slattery provided a valuation dated 30 April 2015.
4. Shortly after their appointment Messrs Kite and Hutchins requested that Westpac release funds held in bank accounts in the Company’s name. In a response dated 8 May 2015 Westpac asked Messrs Kite and Hutchins to confirm certain details about the Company in its capacity as trustee of the Trust. It was in that context that Messrs Kite and Hutchins sought advice from their former solicitors and were advised that, while an insolvency event may disqualify a corporate trustee under a deed of trust, the contractual, common law and statutory right of indemnity remained unaffected, such that the liability incurred in the Company’s capacity as trustee of the Trust entitled it to an indemnity from the Trust fund, which included the funds held by Westpac.
5. On 12 May 2015 the former solicitors for Messrs Kite and Hutchins wrote to Westpac seeking, on behalf of their clients, release of the funds held in bank accounts with Westpac by the Company in its capacity as trustee of the Trust.
6. On 21 May 2015 Messrs Kite and Hutchins, in their capacity as administrators, circulated a notice of meeting and report to creditors of the Company pursuant to s 439A of the Corporations Act (**Report**). The Report set out an overview of the work that the administrators had undertaken. It also recorded that the administrators considered a proposal from Mr Mooney for a DOCA. That proposal involved, in summary, a cash contribution of $200,000 to be paid within 30 days of execution of the DOCA and further cash contributions totalling $220,000 payable from the Company’s future trading over a period of 18 months. Messrs Kite and Hutchins recommended that the creditors accept the DOCA proposal because it was likely to provide a better return to the Company’s creditors than would be achieved from an immediate winding up of the Company. On 28 May 2015 Messrs Hutchins and Kite circulated an addendum to the Report addressing an identified error in the estimated dividend calculations.
7. Mr Kite’s evidence is that he prepared the Report and assessed the DOCA proposal having regard to the objectives of his appointment as an administrator of the Company under Pt 5.3A of the Corporations Act. That is, to allow the business, property and affairs of the Company to be administered in a way that either maximised its chance of continuing or, if that was not possible, to result in a better return for creditors than if the Company were immediately wound up. Mr Kite says that at that time he did not separately consider the interests of the Trust in determining whether to suggest that the creditors enter into a DOCA but proceeded on the basis that the interests of the Company and the interests of the Trust were the same, namely, continuing the existence of the Company, if possible, and maximising returns to its creditors. At that time, Mr Kite’s understanding was that the creditors of the Company were creditors of the Trust, given that the Company traded on behalf of the Trust. He did not consider that there would be a circumstance where the assets of the Trust would not be available to meet the claims of the creditors of the Trust.

## The DOCA and Messrs Kite and Hutchins as deed administrators

1. On 1 June 2015, at a creditors’ meeting of the Company, the creditors resolved, among other things, that:
2. the remuneration of the joint and several administrators for various periods be approved; and
3. the Company execute a DOCA under s 439C(a) of the Corporations Act and that the remuneration of the administrators and deed administrators be paid in accordance with the resolution of the creditors made at that meeting.
4. Accordingly, on 7 June 2015 Messrs Hutchins and Kite entered into a DOCA as deed administrators of the Company on the terms proposed by the director of the Company, Mr Mooney, and accepted by the Company’s creditors. The other parties to the DOCA were the Company as trustee for the Trust, MC Group and Mrs Mooney.
5. Clause 10.1(d)(ix) of the DOCA provided that the Deed Fund would comprise of, among other things, all of the Company’s Work-in-Progress as at the Commencement Date. “Work-in-Progress” was defined in cl 1.1 of the DOCA to mean the “net value attributable to works undertaken by the Company both prior to the Appointment Date and during the Voluntary Administration Period for which invoices have not, as at the Commencement Date, been raised by the Company to the respective debtors who received the benefit of those works”. The Commencement Date was the date of execution of the DOCA.
6. According to Mr Kite the value of the Work-in-Progress was $176,147.91. The Company failed to remit that amount to the Messrs Kite and Hutchins to be included in the Deed Fund. Instead, the Company appeared to have utilised the Company’s facility with FactorOne to access funds in respect of the Work-in-Progress. It also failed to remit those funds to Messrs Kite and Hutchins for inclusion in the Deed Fund.
7. On 10 and 13 November 2015 there was an exchange of correspondence between the Company and the deed administrators about this issue. An arrangement was reached whereby the Company would remit the value of the Work-in-Progress into the Deed Fund over a period ending on 29 February 2016.
8. On 21 June 2016 Mr Kite, in his capacity as joint and several deed administrator, sent a letter to the Company which provided as follows:

I have concerns as to the continuation of the Deed of Company Arrangement ("DOCA"). My staff and I have previously corresponded with you / members of your staff, in relation to, inter alia, the cash flow projections for the Company and the Company's ability to continue to meet its present obligations.

In light of the above, I have formed a view that it is no longer desirable to continue with the DOCA and I am calling a meeting for creditors to consider, amongst other things, the termination of the DOCA in accordance with clause 17.4(c) of same.

My reasoning for convening the said meeting is as follows:

* The Company has failed to lodge its March 2016 Business Activity Statement with the Australian Taxation Office ("ATO"), and pay the associated liability resulting from same.
* The Company has failed to pay it post-DOCA trading liabilities including a substantial amount owing to the ATO. I am aware that the Company was subject to a payment arrangement for its post-DOCA taxation liabilities to which I am now aware it has since defaulted.
* I have received a number of telephone calls from former employees / suppliers who have claims against the Company accrued during the post-DOCA period. While I note that various arrangements / representations have been made from the Company in respect to these claims, the fact that the claims are not being paid is the ordinary course of business provided further concerns in relation to the ongoing viability of the Company.

If you wish to put forward a proposal to vary the DOCA for creditors to consider, please provide same by 2:00PM, 24 June 2016. In considering any proposal to vary the DOCA, I must advise that given my reasoning detailed in the above points, any proposed variation, absent any significant cash injection to resolve the Company's post-DOCA creditors, is unlikely to receive my support.

1. On 28 June 2016 Messrs Kite and Hutchins sent the Company a notice of default under the terms of the DOCA, notifying the Company of defaults in its obligations under the DOCA and requiring it to rectify those defaults by 6 July 2016. The notice included:

Pursuant to clause 16.2 of the DOCA, if the Company does not rectify certain types of default (specifically, defaults described in clauses 16.3 and 16.4 of the DOCA) within the time required within the notice of default, the DOCA will automatically terminate and the Company will be placed into liquidation in accordance with section 445C(c) of the Act, we, as the Deed Administrators will become the joint and several liquidators of the Company.

1. On or about 30 June 2016 Mooney’s Corp Pty Ltd (**Mooneys Corp**) agreed to assume the employees of the Company and to honour all accrued entitlements of those employees other than rail crews associated with the QR Contract. The sole director, secretary and shareholder of Mooneys Corp was Mr Mooney’s father, Darrell Mooney.
2. On or about 4 July 2016, in light of his anticipated appointment as a joint liquidator of the Company, Mr Kite became aware of more recent authorities concerning the manner in which assets of a trust ought to be dealt with on appointment of a liquidator to a corporate trustee and sought advice from his current solicitors. It was this advice that caused Messrs Kite and Hutchins to approach the Court to obtain directions as to how to deal with the assets of the Trust.

## Termination of the DOCA and appointment of Messrs Kite and Hutchins as liquidators and then as the Receivers of the assets of the Trust

1. The Company failed to rectify the defaults notified to it in accordance with the requirements of the notice of default. Accordingly, the DOCA was terminated and the Company was placed into liquidation on 7 July 2016. On that day Mr Kite and Nicholas Chan, a senior accountant from Mr Kite’s office, met with Mrs Mooney and Jonathan Ebertson, who until 30 June 2016 had been the Company’s internal accountant. At that meeting Messrs Kite and Chan were informed that the Company:
2. had leases for office space and for a yard;
3. was performing work under the QR Contract and that its only immediately foreseeable expenses under that contract were for staff employed to do the work. The only staff employed by the Company were the casual staff employed in connection with the QR Contract; and
4. owned plant and equipment, some of which was subject to finance, but it was not required to use any of the plant and equipment nor any of its assets in connection with its performance of the QR Contract.
5. On 19 and 21 July 2016 Mr Kite issued disclaimer notices to various financiers and the lessors of the premises occupied by the Company. Disclaimer notices were subsequently lodged with the Australian Securities and Investments Commission and notifications of those notices were given to Mr and Mrs Mooney in their capacities as beneficiaries of the Trust and to Mr Mooney in his capacity as director of the Company.
6. On 21 July 2016 Mr Kite inquired with Mrs Mooney about the identity of the beneficiaries of the Trust. In response, Mrs Mooney informed him that the only beneficiaries were Mr and Mrs Mooney, their five children, all of whom were minors and in relation to whom notices could be sent to her and Mr Mooney and MC Group.
7. On or about 29 July 2016 all staff associated with the QR Contract, which was to be terminated as at 7 August 2016, were informed that their last day of work would be 7 August 2016.
8. As noted above, on 29 July 2016 the Court made orders appointing Messrs Kite and Hutchins as Receivers.
9. On 2 August 2016 Mr Kite became aware that a debtor, Coleman Rail Pty Ltd, had made a payment into the Company’s pre-appointment account held with Westpac that should have been paid to FactorOne in accordance with the terms of the FactorOne Facility. Those funds were transferred by Westpac to the Receivers’ account and then by the Receivers to FactorOne on 12 and 13 September 2016 respectively.
10. On 8 August 2016 Messrs Kite and Hutchins in their capacities as liquidators and Receivers ceased the trading operations of the Company in respect of the QR Contract and terminated all employees. By letter dated 9 August 2016 Messrs Kite and Hutchins notified the employees that their employment had been terminated, effective 8 August 2016.
11. From late-July 2016 to late-September 2016 Mr Kite negotiated and documented the sale of some of the Trust’s assets, including arrangements for the lease of those assets pending finalisation of the sale. On or about 30 August 2016, and before the terms of the sale of the assets were finalised, Mr Kite instructed Slattery to prepare a further valuation providing a market valuation of each of the assets the subject of the proposed sale. Based on an analysis prepared by Mr Chan, Mr Kite was satisfied that the proposed sale was likely to realise the best result.
12. On 22 September 2016, in accordance with the terms of the FactorOne Facility, FactorOne debited $36,000 from the FactorOne Facility for liquidated damages for breach of contract arising from acts of insolvency. As at 27 September 2016 there was a surplus of funds held by FactorOne of $10,625.56 payable to the Receivers and a further $94,549.05 in uncollected debtors that FactorOne had agreed to collect free of charge. Upon recovery of those debtors there will be approximately $105,000 available in the pool of funds from the conduct of the receivership.

## Financial position of the Company

1. As at 30 September 2016 Mr Kite was of the view that there would be no surplus available to provide a return to the beneficiaries of the Trust. He deposed that:
2. the business of the Company ceased trading as at 8 August 2016;
3. the anticipated total asset pool for both the liquidation and the receivership was approximately $700,000;
4. that figure did not take account of legal fees or the Receivers’, deed administrators’ and liquidators’ fees and disbursements; and
5. no provision has been made for a potential loan asset recovery against the director of the Company or for possible voidable transactions, insolvent trading claims or any other potential claims which the liquidators may be able to pursue.

# LEGISLATIVE framework and relevant legal principles

## Applications for directions

1. Messrs Kite and Hutchins seek directions from the Court in relation to the performance of their functions as Receivers and as liquidators. Section 424(1) of the Corporations Act enables a controller of property of a company to apply to the Court for directions in relation to any matter arising in connection with the performance or exercise of any of the controller’s functions and powers as controller. Relevantly, a controller, in relation to property of a corporation, means a receiver or receiver and manager of that property: s 9 of the Corporations Act.
2. In *Re One.Tel Network Holdings Pty Ltd (Hall as rec and mgr)* [2001] NSWSC 1065; (2001) 40 ACSR 83 Austin J considered s 424(1) of the Corporations Act. At [27] and [29]-[30] his Honour said the following about the operation of that section:

27 In *Deputy Commissioner of Taxation v Best & Less (Wollongong) Pty Ltd* (1992) 7 ACSR 245 at 247 Lockhart J said that the power of the court to give directions to a controller must be interpreted liberally. He noted the diversity of the matters that may be raised before the court for directions, such as matters concerning the sale of property, borrowing, legal proceedings, giving up possession and similar matters.

…

29 However, case law recognises some limitations upon the availability of directions under s 424. As Hodgson J observed in *Re Vartex Petroleum Industries Pty Ltd* (unreported, SC(NSW), Hodgson J, No 3688 of 1989,17 August 1989, BC8901834), an application under s 424 and its statutory predecessor has some similarity to an application for judicial advice under s 63 Trustee Act 1925 (NSW), and is therefore subject to similar limitations. Case law on the statutory provision for judicial advice in trustee legislation shows that the court will not as a general rule give a trustee any opinion or advice where the question concerns the respective rights of the beneficiaries or their identity, or the matter is one of controversy between parties to the trust (although it may choose to give judicial advice, in the exercise of its discretion, where the controversy between the parties is confined to an issue of law and there are no disputed questions of fact: *MTM Funds Management Ltd v Cavalane Holdings Pty Ltd* (2000) 158 FLR 121; 35 ACSR 440). However, the procedure is appropriate where the question involves the nature and extent of the trustee’s powers or duties of management or administration: see R P Meagher and W M C Gummow, *Jacobs' Law of Trusts in Australia*, 6th ed, Butterworths, Sydney, 1997, para 2134. A common case for judicial advice is where the trustee seeks directions concerning the conduct of legal proceedings: see *Glazier Holdings Pty Ltd v Australian Men's Health Pty Ltd* [2000] NSWSC 253; BC200001836 at [133]-[142]. In a commercial context, it may be appropriate to give judicial advice to the responsible entity of a managed investment scheme, which is a statutory trustee under s 601FC(2) of the Corporations Act 2001 (Cth), as to whether it is justified in convening meetings to enable unitholders to consider a scheme of arrangement proposal: *Re Mirvac Ltd* (1999) 32 ACSR 107. However, there is an important distinction between ruling as to the propriety of the trustee's contemplated exercise of discretion, and ruling as to the wisdom of such exercise: *Re IOOF Australia Trustees Ltd* (1999) 205 LSJS 98.

30 By analogy, it has been held that s 424 cannot be resorted to for the purpose of seeking the intervention of the court to make a commercial decision for the controller. In the *Best & Less* case, Lockhart J quoted (at 247) from the judgment of Street CJ in Eq in *Re Mineral Securities Australia Ltd (in liq)* [1973] 2 NSWLR 207 at 232, where Street CJ remarked that "when the Court is required to pronounce upon the commercial prudence of a transaction, it enters upon a slippery and uncertain field". Lockhart J declined on this ground to make the direction sought by the applicant, observing (at 249) that although the applicant appeared to have conducted his receivership with considerable skill, drive and ability, "he must make his decision according to the exigencies of the situation and make his own assessment of what is commercially sensible and feasible for him to do", as he was a receiver and manager appointed privately, not by the court.

1. Rule 14.23 of the Rules permits a receiver to apply to the Court for authority to do “any act or thing in a proceeding in the receiver’s name or in the name of another party”.
2. Section 511 of the Corporations Act applies in the case of a voluntary winding up. Subsection (1) permits a liquidator, among others, to apply to the Court to determine any question arising in the winding up or to exercise all or any of the powers that the Court might exercise if the company were being wound up by the Court. Subsection (2) provides that, if the Court is satisfied that the determination of the question or the exercise of the power will be just and beneficial, it may accede wholly or partially to any application on such terms and conditions as it thinks fit or may make such order as it thinks just.
3. In *Warner, Re GTL Tradeup Pty Ltd (in liq)* [2015] FCA 323; 104 ACSR 633 at [36] Farrell J summarised the principles relevant to an application under s 511 of the Corporations Act by reference to *Re MF Global Australia Ltd (in liq)* [2012] NSWSC 994 (Black J); *Re ICS Real Estate Pty Ltd* [2014] NSWSC 479 (Brereton J); and LexisNexis, *Austin & Black’s Annotations to the Corporations Act* (at September 2014) as follows:

(a) Similar principles apply whether the court exercises power under s 479(3) or s 511, save that under s 511 the court must be satisfied that the determination of a question in the winding up of the company or the exercise of the power will be “just and beneficial”. That is, s 511(2) confers a discretion on the court which must be exercised by reference to whether it is advantageous to the liquidation. The term “just and beneficial” is said to involve a similar concept to that comprised by the expression “just and equitable”.

(b) The function served by the power of the court to give directions under s 479(3) and determine a question or exercise a power under s 511 is to give a liquidator advice as to the proper course of action to take in the liquidation. The court may give directions that provide guidance on matters of law and the reasonableness of a contemplated exercise of discretion but will typically not do so where a matter relates to making and implementing a commercial or business decision.

(c) A direction can be made under s 479(3) in a voluntary liquidation by reason of ss 506(1)(b) and 511.

(d) If the liquidator has given full and fair disclosure to the court concerning the application, the effect of a determination under s 511 is to sanction a course of conduct by a liquidator and thereby protect the liquidator from claims that he or she has acted unreasonably or inappropriately.

(e) The power under s 511(1)(a) to “determine any question arising in the winding up” accommodates the determination of substantive rights, although the court would not do so without affording potentially affected parties the opportunity to be heard.

(f) Where a question concerns the respective rights of beneficiaries of a trust or their identity it is generally considered inappropriate to give advice under s 63 of the Trustee Act.

1. Given the similarity in approach to applications made by liquidators for directions under ss 511 and 479(3), which permits a court appointed liquidator to apply to the Court for directions, it is useful to set out the observations of Black J in *Re Gerard Cassegrain & Co Pty Limited (in liquidation)* [2013] NSWSC 257 that were cited with approval by Gleeson J in *Pascoe, in the matter of Brentwood Village Limited (in liquidation)* [2014] FCA 1295 at [45]. His Honour said at [18]:

… Section 479(3) allows a liquidator to apply to the Court for directions in relation to a matter arising in a winding up. The function of a liquidator's application for directions under that section is to give the liquidator advice as to the proper cause of action for him or her to take in the liquidation; *Re Ansett Australia Ltd (admins apptd) v Korda* [2002] FCA 90; (2002) 115 FCR 409; (2002) 40 ACSR 433 at [46]. The Court will typically not give such a direction where a matter relates to the making and implementation of a business or commercial decision, where no particular legal issue is raised and there is no attack on the propriety or reasonableness of the decision, but may do so where a legal issue or an attack on the propriety of the decision is raised: *Re G B Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674 at 686-687; (1991) 5 ASCR 673; *Re Ansett Australia Ltd* at [65]. For example, the Court gave a direction to a liquidator that he would be acting properly in discontinuing appeals in *Re Addstone Pty Ltd (in liq)* (1997) 25 ACSR 357, where Mansfield J observed at 363 that one circumstance in which such a direction may be given is, “where the liquidator's proposed decision is the subject of criticism by a particular creditor or creditors as being unreasonable or mala fides.” In *Pascoe;* [*Re Matrix Group Ltd (in liq)*](https://jade.io/article/255247) above, Jacobson J observed that such a direction could be made, inter alia, where there was a legal issue of substance or procedure such as the propriety or reasonableness of the particular course. A liquidator is protected against a claim for breach of duty if he or she acts in accordance with a direction given by the Court under s 479(3) and he or she made full disclosure to the Court in the relevant application.

## Applications for judicial advice

1. In the alternative, Messrs Kite and Hutchins seek judicial advice on behalf of the Company in its capacity as trustee pursuant to s 63 of the *Trustee Act* *1925* (NSW) (**Trustee Act**), which relevantly permits a trustee to apply to the Court for an opinion, advice or direction on any question concerning the management or administration of the trust property. In *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 a majority of the High Court (Gummow A-CJ, Kirby, Hayne and Heydon JJ) held at [58]:

Only one jurisdictional bar to s 63 relief exists: the applicant must point to the existence of a question respecting the management or administration of the trust property or a question respecting the interpretation of the trust instrument. …

1. In *Re Rosewood Research Pty Limited* [2014] NSWSC 449 Darke J said at [30]:

Once the jurisdictional requirement under s 63 of the *Trustee Act* is satisfied, the Court has a discretion to provide advice of the kind contemplated by the section. That discretion is confined only by the subject matter, scope and purpose of the legislation (see the *Macedonian Church* case (supra) at [59] and [196]). It is clear, however, that the interests of the trust estate is of paramount importance (see the *Macedonian Church* case (supra) at [104], [105], [107], [125], [196] and [197]).

## Declarations

1. The test to determine whether a party has sufficient standing to seek and obtain the grant of declaratory relief was summarised in *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 68 FCR 406 at 414 by Lockhart J, with whom Spender and Cooper JJ agreed, as follows:
2. the proceeding must raise a question that is not abstract or hypothetical. There must be a real question involved and the declaratory relief must be directed to the determination of legal controversies. The answer to the question must produce some real consequences for the parties;
3. the relief must relate to present circumstances rather than circumstances that have not occurred or may never happen;
4. the party seeking the relief must have a real interest to raise it; and
5. generally, there must be a proper contradictor.

# consideration

1. Messrs Kite and Hutchins seek various orders, directions and declarations from the Court. They made detailed and extensive submissions to the Court setting out the authorities relevant to the relief sought and frankly and fully identifying where there is a controversy in those authorities.
2. The relief sought by Messrs Kite and Hutchins and the need to approach the Court in the manner that they have principally arises because the Company is the trustee of the Trust and was operated solely and held all of its assets in that capacity. That has raised issues relating to the order of priority in which certain pre-administration debts are to be paid and in relation to Messrs Kite and Hutchins’ entitlement to claim their costs and expenses. Those issues are addressed below, together with the balance of the orders sought by Messrs Kite and Hutchins. Before turning to them it is of assistance to address some issues of general application.
3. First, to the extent that Messrs Kite and Hutchins seek declaratory relief, this is a matter where, provided the entitlement to the relief is established, it would be appropriate to make declarations. The questions to be addressed by the giving of declarations are real; they relate to events which have occurred; the parties have a real interest in the outcome; and, although they have not appeared, the various creditors and Mr and Mrs Mooney are proper contradictors, in the sense that they have an interest, either as creditors or as beneficiaries and appointors, to oppose the declaratory relief sought: see *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378 at [30]-[33].
4. Secondly, as this proceeding involves the Company’s actions as trustee it is relevant to note that, when a corporate trustee properly incurs a liability on behalf of the trust, the trustee has a right of indemnity or exoneration out of the trust assets and an equitable lien or equitable charge to secure the right of indemnity. Further, when the corporate trustee enters into liquidation its right of indemnity or exoneration is retained: *Re Suncoast Restoration Pty Ltd (in liq)* (2013) 211 FCR 203 at [27] (per Reeves J).
5. I turn now to address the specific relief sought.

## Assets of the Company beneficially held by the trustee as bare trustee

1. In paragraph 10 of the originating process Messrs Kite and Hutchins and the Company seek a direction that they would be justified in treating all of the assets of the Company as assets beneficially held by the trustee as bare trustee subject to the usual charge or lien. In paragraph 14 of the originating process they then seek a declaration that the Company has a right of indemnity from the assets of the Trust for debts incurred prior to 27 April 2015, the date on which the Company entered into voluntary administration. Messrs Kite and Hutchins and the Company submitted that the declaration would effectively follow from the direction, if the Court were minded to make it.
2. I am satisfied that giving a direction in the form sought in paragraph 10 of the originating process should be made, together with the associated declaration in the form sought in paragraph 14 of the originating process. My reasons follow.
3. In light of Mr Kite’s evidence it is clear that the Company, which was incorporated on the same day that the Trust was settled, operated solely as trustee of the Trust. That conclusion is reinforced by the broad definition of “Trust Fund” included in the Trust Deed. The definition, combined with the trustee’s agreement to hold the Trust Fund on trust subject to the terms of the Trust Deed, makes it difficult to conceive of any activity or undertaking that is not covered by the terms of the Trust.
4. Upon the appointment of Messrs Kite and Hutchins as administrators, by reason of the operation of cl 5.2.5 of the Trust Deed, the Company ceased to be trustee of the Trust. In those circumstances the Company remains a bare trustee and may still hold the assets of the Trust, but its duties, rights and powers are limited to protecting the Trust assets. As bare trustee, the Company retains its right of indemnity or exoneration and its lien over the assets of the Trust: *Caterpillar Financial Australia Limited v Ovens Nominees Pty Ltd* [2011] FCA 677 (Gordon J) at [26].
5. In *CGU Insurance Limited v One.Tel Limited (in liquidation)* (2010) 242 CLR 174 the High Court (French CJ, Heydon, Crennan, Kiefel and Bell JJ) said at [36]:

… The trustee of a bare trust has no interests in the trust assets other than those which exist by reason of the office of trustee and the holding of legal title. Further, the trustee of a bare trust has no active duties to perform other than those which exist by virtue of the office of the trustee, with the result that the property awaits transfer to the beneficiaries or awaits some other disposition at their direction. One obligation of a trustee which exists by virtue of the very office is the obligation to get the trust property in, protect it, and vindicate the rights attaching to it. That obligation exists even if no provision of any statute or trust instrument creates it. It exists unless it is negated by a provision of any statute or trust instrument. …

1. In *Porter v Miller Street Pty Limited* [2008] FCAFC 77 a Full Court of this Court (Sundberg, Jacobson and Gordon JJ) considered the duty of a liquidator in relation to trust assets and said at [44]-[45]:

44 In a winding up, the duty of the liquidator is to identify the assets of the company, and in that process to ascertain whether particular assets under the control of the company are beneficially owned by the company or by others: *Nathan* at 688. The liquidator must do all “other things as are necessary for the winding up of the affairs of the company and distributing its property”: s 477(2)(m) of the Corporations Act.

45 In fulfilling those tasks, the liquidator cannot disregard the fact that the company holds property in trust for others. And to the extent that the company does hold property in trust for others, the liquidator must “act in a responsible way in the administration of the trust in the name of the company”: *Crest Realty* at 672. As we have said, what the duty to “act in a responsible way” will involve, and what degree of “administration” of the trust will be necessary, depends upon the particular circumstances: *Re Crest Realty* at 672.

1. In *Federal Commissioner of Taxation v Bruton Holdings Pty Ltd (in liq)* (2008) 173 FCR 472 (***Bruton Holdings 2008***) a Full Court of this Court (Ryan, Mansfield and Dowsett JJ) said at [79]:

As the primary Judge pointed out, the liquidators are winding up a former trustee, not a “serving” trustee. In the cases to which we have referred, as far as we can see, the position was otherwise. In the present case the liquidators cannot claim to have been performing Bruton’s duties as trustee. It no longer holds that position. It may still hold Trust property, but as a bare trustee. Its duties, powers and rights are limited to protecting the Trust assets. The liquidators’ duties, powers and rights cannot be any greater than Bruton’s. …

1. As submitted by the plaintiffs, the extent of the duties, powers and rights needs to be considered with the trustee’s lien over the trust fund. The lien is an entitlement to secure reimbursement or exoneration and confers a priority in favour of the trustee over the beneficiaries of a trust. The sale of assets held by the trustee to satisfy the right to reimbursement or exoneration can be authorised by a court of equity and, in that sense, there is an “equitable charge” over the trust assets, enforceable in the same way as any other equitable charge. However, the enforcement of the charge is an exercise of prior rights conferred upon the trustee as a necessary incident of the office of trustee: *Chief Commissioner of Stamp Duties for New South Wales v Buckle* (1998) 192 CLR 226 at 246-247 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
2. In *Agusta Pty Ltd v Provident Capital Ltd* [2012] NSWCA 26 Barrett JA (Campbell JA and Sackville AJA agreeing) said at [41]:

The right of a trustee to be indemnified out of trust property is often described as a charge or lien: see, for example, *Vacuum Oil Co Pty Ltd v Wiltshire* [1945] HCA 37; (1945) 72 CLR 319; *Octavo Investments Pty Ltd v Knight* [1979] HCA 61; (1979) 144 CLR 360. In *Chief Commissioner of Stamp Duties v Buckle* [1998] HCA 4; (1998) 192 CLR 226, the High Court preferred to regard it as a proprietary right constituting a beneficial interest enjoying priority over the beneficial interests of the beneficiaries. It is anomalous to refer to a person having a charge or lien over property of which the person is the owner. And as was emphasised by the High Court subsequently in *CPT Custodian Pty Ltd v Commissioner of State Revenue* [2005] HCA 53; (2005) 224 CLR 98, the "trust fund" enjoyed by the beneficiaries cannot be identified or quantified until the trustee's superior beneficial interest has been quantified and satisfied. The trustee's right is inseparable from and co-extensive with the trustee's obligations, both those already discharged but not yet reimbursed and those incurred but not yet discharged.

1. In *Freelance Global v Bensted* [2016] VSC 181 (***Freelance Global***) at [57] Riordan J, citing *Sutherland Re; French Caledonia Travel Service Pty Ltd (in liq)* (2003) 59 NSWLR 361 (***French Caledonia***) and *Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99 (***Re Suco Gold***), observed that liquidators of a corporate trustee acquire the power to deal with the assets of the company in lieu of the directors, including the corporate trustee’s right of indemnity and exoneration. His Honour also observed that a liquidator can, by using those personal rights, have recourse to trust property to discharge all liabilities that the trustee incurred in the administration of the trust before the winding up.

## Powers of the Receivers in relation to the business and assets of the Trust

1. In paragraphs 6(b) and 7 of the originating process Messrs Kite and Hutchins seek, in their capacity as Receivers, first, in paragraph 6(b), an order that they have, in respect of the Trust business and property, the power to pay dividends to the creditors of the Company in respect of debts incurred by the Company in its capacity as trustee of the Trust, including the proceeds of sale of the business and assets of the Trust; and, secondly, in paragraph 7, an order that, following the sale of any business and assets of the Trust and distribution of the proceeds of sale to creditors, the Receivers provide any surplus or remaining assets of the Trust to any incoming trustee or to the beneficiaries and retire as Receivers. Messrs Kite and Hutchins also seek a direction in the form set out in paragraph 18 of the originating process that they would be justified in calling for proofs of debt of the Company for debts incurred prior to 27 April 2015, the date on which the Company entered into voluntary administration, and in having recourse to the assets of the Trust to satisfy those claims.
2. Once again, I am satisfied that orders and directions of this nature should be made.
3. The order sought in paragraph 6(b) only arises if there is a surplus remaining for creditors after the costs and expenses of the receivership have been paid. The plaintiffs submit that the power to pay dividends most likely arises as a result of the liquidators’ duty and power to pay dividends to creditors of the Company and the Company’s lien over the trust assets, but they seek the order for more abundant caution. The order, together with the direction in the form in paragraph 18, will enable the Receivers to call for proofs of debt incurred while the Company was trustee and to pay those creditors.
4. The order sought in paragraph 7 should be made in a modified form. Mr Kite is of the opinion that there will be no surplus available for payment to the beneficiaries of the Trust once creditors are paid. Thus an order of that nature is required to bring the receivership to an end and should be framed to achieve that purpose.

## Right of indemnity from assets of the Trust

1. The balance of the directions, declarations and orders sought by Messrs Kite and Hutchins relate to the payment of particular claims out of the trust assets, being employee claims and Messrs Kite and Hutchins’ claims for their costs and expenses as administrators, Receivers and liquidators, including their remuneration. In relation to the latter category Messrs Kite and Hutchins submitted that there were two bases upon which a liquidator of a trust company has a right to claim costs and expenses out of the assets of a trust:
2. the first arises from the corporate trustee’s right of indemnity. Messrs Kite and Hutchins submitted that a liquidator can exercise a power over the corporate trustee to cause the company to exercise its lien. This is presumably said to be so because upon appointment the liquidator acquires powers to deal with the assets of the company in lieu of the directors: see *French Caledonia* at [201]. Messrs Kite and Hutchins further submitted that a liquidator would have a lien for his or her fees and expenses over all of the corporate trustee’s property, which would include the trustee’s lien; and
3. the second arises from the salvage principle enunciated in *Re Universal Distributing Company Limited (in liq)* (1933) 48 CLR 171 (***Universal Distributing***), which is discussed below.
4. Messrs Kite and Hutchins submitted that it is the first of the two alternatives set out above that leads to the conclusion that the liquidators can treat trust assets, in the circumstances of this case, as company assets for the payment of employee claims. The question that they submit then arises is whether those employee claims, to the extent that they are pre-administration claims, should be paid in priority to the claims of other creditors pursuant to the regime set out in s 556(1) of the Corporations Act.

### Employee entitlements

1. In paragraph 11 of the originating process Messrs Kite and Hutchins seek a direction pursuant to ss 511 or 424 of the Corporations Act, or alternatively judicial advice, that they would be justified in paying employee entitlements out of the assets of the Trust in accordance with the priorities set out in s 556(1) of the Corporations Act.
2. Section 555 of the Corporations Act provides that, except as otherwise provided, all debts and claims proved in a winding up rank equally and, if the property of the company is insufficient to pay them in full, they must be paid proportionately. Section 556(1) then provides for an order of priority of payment of certain debts and claims in a winding up. It is in the following terms:

**556 Priority payments**

(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:

(a) first, 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;

(b) if the Court ordered the winding up—next, the costs in respect of the application for the order (including the applicant’s taxed costs payable under section 466);

(ba) if:

(i) during the period of 12 months ending when the winding up commenced, an application (the ***first application***) was made under section 459P for the company to be wound up in insolvency; and

(ii) when the first application was made, the company was not under administration; and

(iii) the company began to be under administration at a time after the first application was made; and

(iv) the first application was not withdrawn or dismissed before the administration began; and

(v) the Court did not, in response to the first application, make an order under section 459A that the company be wound up in insolvency;

next, the costs in respect of the first application;

(c) next, the debts for which paragraph 443D(a) or (aa) entitles an administrator of the company to be indemnified (even if the administration ended before the relevant date), except expenses covered by paragraph (a) of this subsection and deferred expenses;

(da) if the Court ordered the winding up—next, costs and expenses that are payable under subsection 475(8) out of the company’s property;

(daa) if the company resolved by special resolution that it be wound up voluntarily—next, costs and expenses that are payable under subsection 446C(8) out of the company’s property;

(db) next, costs that form part of the expenses of the winding up because of subsection 539(6);

(dd) next, any other expenses (except deferred expenses) properly incurred by a relevant authority;

(de) next, the deferred expenses;

(df) if a committee of inspection has been appointed for the purposes of the winding up—next, expenses incurred by a person as a member of the committee;

(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);

(f) next, amounts due in respect of injury compensation, being compensation the liability for which arose before the relevant date;

(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

(iv) in respect of leave of absence;

(h) subject to subsection (1C)—next, retrenchment payments payable to employees of the company.

1. In effect, employee entitlements comprising wages, superannuation contributions and the superannuation guarantee charge payable by a company in respect of services rendered before the day on which the winding up is taken to have begun are to be paid after certain costs and expenses of the winding up and before ordinary creditors.
2. The Company, through its liquidators, seeks to pay a dividend to creditors, including employees, who have claims that arose prior to the appointment of the voluntary administrators, which is the day on which the winding up is taken to have begun: see ss 513B and 513C of the Corporations Act.
3. Notwithstanding its removal as trustee of the Trust upon appointment of the administrators, the Company continues to have the benefit of its rights of indemnity and exoneration in relation to liabilities incurred in trading the business of the Trust up to the date of appointment of the administrators: *Theobald, in the matter of Finplas Pty Ltd* [2014] FCA 31 at [23] (per Siopis J). To meet those provable claims, the liquidators would cause the Company to exercise the trustee’s lien and get in the assets of the trust.
4. The evidence establishes that the provable debts exceed the assets of the trust so that the whole of the Trust’s assets are required for the payment of creditor claims. No payment will be made to the beneficiaries of the Trust or to the shareholders of the Company.
5. As identified above, the issue that arises is whether the employee claims, which accrued prior to the appointment of the voluntary administrators, should be paid in priority to the balance of the creditors’ claims in accordance with s 556(1) of the Corporations Act. Messrs Kite and Hutchins submitted that the issue directs attention to the question of whether those employee claims accrued prior to the appointment of the administrators, in the sense of being provable debts, and that that date is significant because it is the trustee’s lien that is being invoked. In that regard I am satisfied that the evidence establishes that there are employee claims that accrued prior to the date of appointment of the administrators.
6. Messrs Kite and Hutchins submitted that the priority regime in s 556(1) of the Corporations Act would apply. They contended that that is so because the liquidator’s duty is to get in the property of the company, including equitable interests that may need to be recognised or perfected by court order, and to share all of the property between creditors. They said that obligation extends to all valuable rights, even if the legal or equitable right is imperfect or requires the assistance of a court for enforcement.
7. Resolution of the issue that arises is not straightforward. There has been a divergence of views in the decided cases as to the applicability of the statutory priority regime in the circumstances which Messrs Kite and Hutchins now face. On the one hand are the decisions in *Re Enhill Pty Ltd* [1983] 1 VR 561 (***Re Enhill***) and *Re Suco Gold* in which a Full Court of the Supreme Court of Victoria and a Full Court of the Supreme Court of South Australia respectively held that the statutory priority regime, at the time found in s 292 of the relevant Companies Acts, applied to distributions of trust property. On the other hand is an emerging line of authority based on the decision of Brereton J of the Supreme Court of New South Wales in *Re Independent* *Contractor Services (Aust) Pty Limited (in liq) (No 2)* [2016] NSWSC 106; (2016) 305 FLR 222 (***Re Independent Contractor***) in which his Honour held that the priority regime in s 556 of the Corporations Act did not so apply.
8. Messrs Kite and Hutchins submitted that I would follow *Re Suco Gold*;that, to the extent that *Re Enhill* is inconsistent with *Re Suco Gold*, *Re Enhill* was wrongly decided; and that *Bruton Holdings 2008* lends strong support to the correctness of *Re Suco Gold*. They submitted that it does not matter that some of the authorities talk of the trustee’s lien vesting in the liquidator. They say that it is the trustee’s right that is being exercised and, to the limited extent that the liquidator has any title, he or she holds it for the creditors, contributories and, perhaps, beneficiaries. They further submitted that by reason of the lien the trustee can no longer be said to have bare legal title, or even to have an equitable interest that is inferior to that of the beneficiaries, but that it has an equitable interest in trust property which is property of the Company within the meaning of s 555 of the Corporations Act. They contended that the reasoning in *Re Suco Gold* is correct as a matter of principle because the trustee’s lien confers a sufficient beneficial interest over the property to make it “property of the company” within the meaning of s 555 of the Corporations Act.
9. In order to determine whether the Court should make the direction or give judicial advice in the terms sought by Messrs Kite and Hutchins it is necessary to consider the relevant authorities.
10. The starting point is the decision of a Full Court of the Supreme Court of Victoria in *Re Enhill*. I pause to observe that *Re Enhill* has been the subject of criticism in subsequent decisions including in this Court. Notwithstanding that, Messrs Kite and Hutchins submitted that it is relevant to the present analysis, pointing in particular to the observations of Lush J.
11. In *Re Enhill* the Full Court was concerned with an application by a liquidator to apply moneys resulting from the sale of assets held by the company as trustee in paying: first, the costs and expenses of the winding up, including the liquidator’s remuneration; secondly, the costs of the petitioning creditor; and thirdly, the liabilities of the company incurred in the course of or for the purposes of its business. The only assets held by the company at the time of its winding up were trust assets. The liquidator’s application to pay his own costs and expenses in priority to other creditors relied upon s 292(1)(a) of the *Companies Act* *1961* (Vic) (the equivalent of which is now found in s 556 of the Corporations Act), which provided that, subject to the provisions of that Act, on a winding up the costs and expenses of the winding up and the liquidator’s remuneration should be paid in priority to all other unsecured debts.
12. At 564 Young CJ referred to the judgment of the High Court in *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 (***Octavo***), noting that the question that arose for determination was not decided in *Octavo* but that the High Court had recognised that a trustee’s right to indemnity gave him or her a proprietary interest which, on bankruptcy, passed to his trustee in bankruptcy or, where the trustee was a company, came under the control of the liquidator. Young CJ said:

… In these circumstances to hold that a trustee in bankruptcy could only apply the proceeds of the right of indemnity towards some only of the bankrupt’s creditors, viz. creditors of the trust business, would deny the very purpose of the right to indemnity which is to exonerate the trustee’s personal estate. In a case like the present therefore the proceeds of the trustee’s lien are available for division among the bankrupt’s creditors generally, not only among creditors of the trust business, and in the case of a company in liquidation are subject to the control of the liquidator under s. 292. …

1. At 567 Lush J identified that the issue in the case, whether the liquidator has the right to his or her costs, expenses and remuneration under s 292(1)(a), was dependent on an analysis in terms of basic principle of a trustee’s right of indemnity or lien in respect of the trust assets. His Honour continued:

… I have used the word lien as a shorthand expression covering the trustee’s right as against the beneficiaries to retain the trust assets until he is put in funds to discharge the liabilities resulting from trust trading and his related right to raise himself, out of the trust assets, the necessary funds for that purpose. Professor H. A. J. Ford, in an article entitled “Trading Trusts and Creditors’ Rights” (1981), 13 M.U.L.R. 1, has suggested that this right is not a right of property but a power. It is, however, a power which can be, and is designed to be, used for the trustee’s own benefit, and is, I respectfully think, properly to be classed as a chose in action, and therefore as property of the trustee.

1. Lush J was of the opinion that the trustee’s right of indemnity was part of his personal property and that it “exists to enable him to recoup himself for, or to provide for, the debts which he must bear personally”. His Honour was of the view that the right of lien is a beneficial right of the trustee and that “the beneficial rights of the cestuis que trustas distinct from the trustee are reduced by the existence of the right of lien, and its exercise does not further diminish them”: at 569.
2. In the result, all three members of the Full Court in *Re Enhill* reached the conclusion that the trustee’s right of indemnity or lien over the trust assets was property of the corporate trustee which was available to its liquidator for division among the trustee’s creditors generally. It followed that pursuant to the statutory priority regime 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.
3. Messrs Kite and Hutchins submitted that, despite the criticism of the court’s view in *Re Enhill* that the proceeds of the trustee’s lien were available for creditors generally and not just creditors of the trust, there is some force in the observations of Lush J that the lien is a pre-existing beneficial interest in the property of the trust. Messrs Kite and Hutchins contended that if the lien is a beneficial interest in trust property then, even if it is not the whole of the beneficial interest, it must be property of the Company for the purposes of s 555 of the Corporations Act. That submission is further considered below.
4. The next decision relevant to the analysis is *Re Suco Gold*. There a Full Court of the Supreme Court of South Australia had before it a liquidator’s summons seeking directions as to whether he might apply money resulting from the sale of assets held by Suco Gold Pty Ltd (**Suco Gold**) as trustee of two unit trusts in paying and discharging the costs and expenses of the winding up, including the liquidator’s remuneration; the costs of the petitioning creditor; and the liabilities of the company incurred by it or for the purpose of its business. Suco Gold had no assets apart from its rights of indemnity and its only debts were those incurred in carrying out the two unit trusts. Although the Full Court reached the same result as in *Re Enhill*, in coming to that result it did not follow the same reasoning.
5. At 103 King CJ referred to the decision in *Re Enhill*, noting that the Full Court had held that the liquidator was entitled to apply the moneys resulting from a sale by him of assets held by the company as trustee in payment of his costs and expenses in priority to other claims. At 105 his Honour then considered an argument based on the reasoning in *Re Enhill* that:
* as the right of indemnity is effective to protect the trustee against debts which he has incurred but not paid, he or she is entitled to transfer trust property to himself or herself sufficient to meet those debts notwithstanding that he has not paid them;
* the property then ceases to be trust property and, if bankruptcy or liquidation supervenes before payment of the debts, that property is property of the bankrupt divisible among creditors generally and not just among those creditors whose debts were incurred in the performance of the trust; and
* the trustee’s right of indemnity vests in the liquidator and, if the right of indemnity has not been exercised prior to liquidation, the liquidator is entitled to property of the trust equal in amount to the liabilities incurred in the performance of the trust notwithstanding that those liabilities have not been paid and that that property is divisible among the general body of creditors.
1. King CJ found that argument to be “in conflict with fundamental principles of the law of trusts”. His Honour said that a trustee has no legal right to use or apply the trust property other than for authorised purposes of the trust. At 105 his Honour said:

… I cannot escape the conviction that if a trustee, or his trustee in bankruptcy, or liquidator in the case of a trustee company, is permitted to use trust property, not for the discharge exclusively of liabilities incurred in the performance of the trust, but in the discharge of other liabilities as well, 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.

1. King CJ then considered a further argument based on *Re Enhill*, namely that the proposition affirmed by the High Court in *Octavo*, that the trustee’s right of indemnity is a beneficial interest in trust property which passes to the trustee in bankruptcy or the liquidator, leads to the conclusion that the trust assets, to the extent of the trust liabilities, pass to the trustee in bankruptcy or the liquidator for the benefit of the general body of creditors. His Honour considered that *Octavo* did not lead to that conclusion and rejected the reasoning in *Re Enhill* on this point, saying at 107-108:

The right of indemnity, it is true, exists for the trustee's own benefit and it passes to the trustee in bankruptcy or the liquidator. The proceeds of that right of indemnity are therefore part of the estate divisible among the creditors. It seems to me, however, that 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, it seems to me that 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.

1. At 109 King CJ then considered the facts before him in light of the principles as he had found them. In doing so he noted that the liquidator was bound by s 292; that the liquidator must therefore endeavour to pay the company’s debts in accordance with the order of priority set out therein; and that “[t]o the extent that each priority debt has been incurred in the performance of a particular trust [the liquidator] should have recourse to the property of that trust for the purpose of paying it”. His Honour continued at 110:

It is now necessary to consider the position of the liquidator's costs, expenses and remuneration in the light of the above principles. Although I have not found myself able to agree with certain of the reasoning in *Re Enhill Pty. Ltd*., it is, as a decision of the Full Supreme Court of Victoria, a highly persuasive authority for the proposition that the liquidator's costs, expenses and remuneration may be paid out of the trust property. There are clearly strong practical considerations in favour of such a course. Unless that course can be followed, the liquidation of a trustee company without assets of its own cannot proceed. It seems to me that that course can be justified by reference to the obligations of the trustee company arising out of the carrying on of the business authorized by the trusts. It is part of the duty of the trustee company to incur debts for the purposes of the trust businesses and, of course, to pay those debts. Upon winding up those debts can only be paid in accordance with the provisions of the *Companies Act*. This requires necessarily that there be a liquidator and that he incur costs and expenses and be paid remuneration. Section 292 provides that there be paid the costs and expenses of winding up, the taxed costs of the petitioner and the remuneration of the liquidator “in priority to *other* unsecured debts” (italics mine). The expression “*other* unsecured debts” appears to imply that the costs and expenses of winding up, the petitioner's costs and the liquidator's remuneration 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. If that reasoning is wrong, I would, like Lush J. in *Re Enhill Pty. Ltd.*, be prepared to rely on the principle enunciated by Dixon J. in *In re Universal Distributing Co. Ltd. (In Liquidation)*.

(footnotes omitted)

1. Before leaving *Re Suco Gold* it is relevant to note the decision of Jacobs J. His Honour also concluded that s 292(1)(a) applied to enable the liquidator to be paid his remuneration and the costs and expenses of the winding up in priority to all other unsecured debts. But his Honour reached that conclusion via a process of statutory construction, noting that, looking at the whole of the legislative scheme, there was nothing in the language or structure of the legislation to deny the proposition that “s. 292 can operate upon the trust assets to provide for the remuneration of the liquidator in priority to other claims, more particularly as the other provisions of s. 292 would seem clearly to be available to regulate the rights of creditors *inter* *se*”: at 113.
2. Messrs Kite and Hutchins submitted that, based on the research of their counsel, *Re Suco Gold* has been cited “at least 100 times”. As at the date of the hearing they had not been able to find any support for the conclusion that “it has been disapproved of” other than by Brereton J in *Re Independent Contractor*. I turn to consider that decision next, which represents the competing line of authority.
3. In *Re Independent Contractor* the liquidator of Independent Contractor Services (Aust) Pty Ltd, which had been the trustee of the Independent Contractor Services Trust, sought directions and an order that raised as an issue for determination the distribution of the trust assets and, in particular, whether the company’s liability to the Australian Tax Office (**ATO**) for superannuation guarantee charge was entitled to priority. Brereton J first considered whether the company’s liabilities to its creditors, and in particular the ATO, were covered by the trustee’s right of indemnity. He answered that question positively, finding at [19] that the company’s liabilities, including those owed to the ATO, were incurred in the course of its acting as trustee and that the company (and its liquidator) was entitled to be indemnified from the trust assets in respect of those liabilities in priority to the interests of the beneficiaries.
4. Brereton J then turned to consider whether the superannuation guarantee charge liability was entitled to priority pursuant to s 556(1) of the Corporations Act and, if not, how those liabilities would rank. His Honour considered that that issue gave rise to two subsidiary questions: first, whether the liability fell within s 556(1)(e); and secondly, if so, does s 556 apply to the rights of trust creditors in respect of trust property. His Honour answered both of those questions in the negative. The issue was thus disposed of on the basis of Brereton J’s finding that the liability to the ATO was not one in relation to an “employee” for the purposes of s 556 and for that reason was not entitled to priority under s 556(1)(e).
5. Nevertheless, his Honour went on to consider the second subsidiary question of whether s 556 would have any application to the case before him. In doing so he said at [23]:

[T]he South Australian Full Court admittedly held in *Re Suco Gold Pty Ltd* that in respect of each trust of which the company in liquidation was trustee, liabilities were to be paid from the trust property in the order laid down in *Companies Act 1962* (SA), s 292 – the predecessor of s 556. However, this is virtually universally accepted to be incorrect, although what is the correct position remains unclear. It is incorrect because s 556 is concerned only with the distribution of assets beneficially owned by a company and available for division between its general creditors. The essential alternatives are (as Daryl Williams QC suggested) that where the equities are equal, the trust creditors have priority according to the order in which the claims arose, on the basis that as each claim arose it brought with it an interest, via subrogation, in the trustee’s lien over the trust assets; or that the trust creditors’ claims rank *pari passu* (as suggested by the authors of *Jacobs’ Law of Trusts*, and implicitly by McPherson J and R P Meagher QC).

(footnotes omitted)

1. Brereton J preferred the latter view. His Honour reasoned at [24] that the creditor of a trust had a right to enforce the trustee’s indemnity only to the extent that the indemnity existed in the hands of the trustee. Where there were multiple creditors, they shared that right. His Honour noted that “[a]s the quantum of the indemnity fluctuates from time to time – as the trustee incurs debts to third parties, and incurs personal liability to the beneficiaries – as does the identity of the creditors – the better analogy is, as the authors of Jacobs’ suggest, cases of competing claims by beneficiaries of different trusts to trace into a mixed fund, which produces a ranking *pari passu*”. At [25] his Honour concluded as follows:

It follows that the company, as trustee, had, and its Liquidator now has, a right of indemnity from, and lien over, the trust assets, which has priority over the interest of the beneficiaries, for liabilities it incurred in acting as trustee. As all the company’s liabilities were incurred in its trustee capacity, all its creditors (including in particular the ATO in respect of superannuation guarantee charge and PAYGW penalty) are entitled to be subrogated to the Liquidator’s lien. The statutory priority referred to in s 556 does not apply in respect of trust assets, and the creditors share *pari passu* in the trust assets, after providing for the costs of administration including the Liquidator’s remuneration and expenses. …

1. Brereton J referred to three decisions in support of his explanation for why, in his view, the conclusion about the applicability of the statutory order of priority in *Re Suco Gold* is incorrect: *Re Kayford Ltd (in liq)* [1975] 1 WLR 279 (***Re Kayford***); *Re* *Staff Benefits Pty Ltd* [1979] 1 NSWLR 207 (***Re Staff Benefits***); and *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2011) 193 FCR 442 (***Bruton Holdings 2011***).
2. In *Re Kayford* the court considered whether moneys held in a particular bank account were held on trust for the individual customers who paid those moneys in or whether those moneys formed part of the general assets of the company available for the creditors generally. Megarry J found that the moneys were held on trust. At 282 his Honour said: “I feel no doubt that here a trust was created. From the outset the advice (which was accepted) was to establish a trust account at the bank. The whole purpose of what was done was to ensure that the moneys remained in the beneficial ownership of those who sent them, and a trust is the obvious means of achieving this”. That is, Megarry J found that, as the moneys were held on trust for the individual depositors, they could not be used and were not available for payment to the creditors of the company generally. The company had no beneficial interest in those moneys.
3. In *Re Staff Benefits* the liquidator sought directions as to the relative priorities of certain classes of creditors in the distribution of funds held by him. There were two different classes of creditors: investors and depositors. The depositors argued that the company was a trustee for the investors; that the amounts due to the depositors were liabilities of the trustee incurred in the administration of the trusts and achieve priority over the beneficiaries because of the principle that a trustee is entitled to an indemnity for the liabilities so incurred; and that the creditors are entitled to be subrogated to the trustee’s remedies. The question for the court was whether the principle of equity, or clause 7(c) of the form of agreement pursuant to which the persons invested money, or a combination of both gave the depositors priority over the investors as beneficiaries of the trusts.
4. Needham J made a direction that the depositors were entitled to priority in payment out of the funds in the liquidators’ hands. His Honour held at 213 that the principle of equity gave the trustee a prior claim for his liabilities over that of the beneficiaries and that the creditors who stand in his shoes have a like priority. His Honour rejected a submission by the investors that the company was not entitled to an indemnity or lien because it was in breach of trust.
5. Needham J then turned to consider the remaining question, which was the rate of interest applicable to the depositors’ claims. In addressing that issue Needham J had to consider whether s 112 of the *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act**), which provided for an allowance of interest “where a creditor has proved a debt that is for, or includes interest”, applied. The depositors, relying on s 116 of the Bankruptcy Act, submitted that s 112 only applied to claims against the “property of the bankrupt”. On that issue Needham J said at 215:

… In a situation where the funds available are not sufficient to meet the claims of the investors and of the depositors, it must be the case that payment of the claims of the depositors in full involves making an inroad into funds which would otherwise be held in trust for the investors. Those assets are not “assets of the company”, and the justification for preferment of the depositors is not any rule of bankruptcy administration, but the principle of indemnity and lien earlier discussed.

1. Needham J concluded that s 112 of the Bankruptcy Act did not apply and that the depositors would be entitled to claim their contractual rate of interest up until the date of the winding up order.
2. *Bruton Holdings 2011* concerned a dispute between the Commissioner of Taxation and the liquidators about whether the shortfall between Bruton’s solicitor-and-client costs and its party-and-party costs in relation to a series of proceedings should be paid out of a trust fund. The primary judge found that Bruton Holdings Pty Ltd (**Bruton**) had rights of exoneration from trust assets in respect of all obligations incurred by it in the administration of the trust. But the primary judge considered that as bare trustee of the trust assets it was not part of Bruton’s functions to institute the primary proceeding and the costs were therefore not properly incurred by Bruton in the administration of the trust fund. Despite its ultimate success in the proceedings, Bruton was not acting as trustee in discharge of its then trust obligations and thus the primary judge declared that it was not entitled to indemnification by exoneration or recoupment out of the property of the trust fund for the costs. The issue on appeal was whether the obligations of Bruton as bare trustee of the fund extended to opposing by litigation the action of the Commissioner in issuing a notice to its solicitors pursuant to s 260-5 of Sch 1 to the *Taxation Administration Act 1953* (Cth).
3. A Full Court of this Court (Stone, Jacobson and Edmonds JJ) found at [23] that the proceeding initially commenced by the liquidators was a defensive action in response to the Commissioner’s impermissible attempt to garnishee the debt and that it was necessary to protect the trust property against unauthorised appropriation.
4. Their Honours also noted that Bruton argued the appeal on an alternative basis, namely that the primary judge erred in failing to hold that s 556(1)(a) of the Corporations Act entitled it to indemnity for expenses incurred in the proceedings. The effect of the submission made by Bruton was that the litigation expenses incurred by it as a bare trustee were “properly incurred” in preserving the property of the company within s 556(1)(a). Their Honours noted that because of the view to which they had come, that the primary judge had erred in finding that it was no part of Bruton’s functions as a bare trustee to institute the proceedings, it was unnecessary for them to determine the alternative ground of appeal. However, at [27] they observed that “a difficulty arises as to whether s 556 governs the order of priority where trust assets are insufficient to meet the claims of all trust creditors”. Their Honours also noted that the authors of Jacobs’ *Law of Trusts in Australia* (7th ed, LexisNexis Butterworths, Australia, 2006) were of the view that “s 556 addresses only the distribution of assets beneficially owned by an insolvent company”.
5. Contrary to the submission put by Messrs Kite and Hutchins, in my opinion, to the extent that these cases suggest that trust assets are not beneficially held by a trustee, they lend support to the proposition put by Brereton J that the conclusion in *Suco Gold* is incorrect because “s 556 is concerned only with the distribution of assets beneficially owned by a company and available for division between its general creditors”.
6. Support for the proposition put by Brereton J is found in Heydon JD and Leeming MJ, *Jacobs’* *Law of Trusts in Australia* (8th ed, LexisNexis Butterworths, 2016), which was also referred to by his Honour (albeit the 7th edition). At [21-15] the learned authors observe that the decision in *Re Suco Gold* is “not unblemished”. They express the view that the conclusion reached in *Re Suco Gold*, that liabilities are to be paid from the trust property in the order set out in the predecessor to s 556 of the Corporations Act, cannot be correct. The authors, like Brereton J, note that s 556 is concerned only with distribution of assets beneficially owned by the company and available for division between the general creditors. But Messrs Kite and Hutchins submitted that the view expressed by Brereton J overlooks the beneficial interest created by the trustee’s lien.
7. In their written submissions, Messrs Kite and Hutchins referred to a series of decisions of single judges of this Court, commencing with *Re Matheson; Ex parte Worrell v Matheson* (1994) 49 FCR 454 and ending with *Condon (Trustee), in the matter of Rayhill (Bankrupt) v Truthful Endeavour Pty Ltd* [2015] FCA 7, which had referred to or followed various aspects of the reasoning in *Re Suco Gold*. But those cases did not address the issue before me, namely whether the trust liabilities are to be paid from the trust assets in accordance with the priorities set out in s 556 of the Corporations Act. Accordingly, I do not propose to consider those decisions in any detail.
8. Messrs Kite and Hutchins also took me to the decision in *Bruton Holdings 2008*, which considered *Re Enhill* and *Re Suco Gold* and which they submitted lent support to the correctness of *Re Suco Gold.* There a Full Court of this Court (Ryan, Mansfield and Dowsett JJ) considered whether notices requiring the respondent’s solicitors to pay moneys held in trust to the Federal Commissioner of Taxation were void and unenforceable because they constituted an “attachment” for the purposes of s 500 of the Corporations Act, as had been found by the primary judge. Bruton was a trustee of a trust with a charitable purpose. Upon the appointment of administrators it ceased to be trustee of the trust. The administrators were later appointed as liquidators of Bruton.
9. The Full Court identified a number of relevant propositions concerning the winding up of an insolvent corporate trustee with tax debts. Under the heading “Trusts and trustees” the Court noted that the case at first instance was conducted on the basis that the duties, powers and rights of Bruton as trustee of a trust for a charitable purpose were effectively the same as those established by courts of equity in connection with trusts for identified beneficiaries. The Court also noted that the case appeared to have proceeded on the basis that, with one possible exception, no relevant statutory provision and no term of the trust deed materially affected those duties, powers and rights. The exception was the Commissioner’s submission that s 254 of the *Income Tax Assessment Act* *1936* (Cth) had some effect on a trustee’s right to indemnity for tax debts. In considering that submission, which the Full Court ultimately rejected, their Honours observed at [36] that a trustee is generally entitled to an indemnity out of the assets of the trust for debts incurred in the course of performing its duties as trustee and that it has a lien over trust assets securing that right of indemnity.
10. The Full Court also considered the issue of “Trust assets in a winding up”. The Court observed that the case primarily concerned the respective rights of the Commissioner and the liquidators to apply trust moneys, being the moneys held by the solicitors, to pay either the company’s tax liability or the liquidators’ costs and expenses, including their remuneration. The Court was not concerned with the issue that is currently before me, but considered the extent to which trust assets can be applied in payment of the debts of a corporate trustee. The Court referred to the “apparently conflicting” decisions in *Re Byrne Australia Pty Ltd* [1981] 1 NSWLR 394, *Re Byrne Australia Pty Ltd (No 2)* [1981] 2 NSWLR 364 and *Re Suco Gold* on the one hand and *Re Enhill* on the other. Their Honours did not resolve the apparent conflict, although they noted the criticism of the decision in *Re Enhill*. After considering each of those decisions they said at [55]-[58]:

55 In *Ramsay v National Australia Bank Ltd* [1989] VR 59 the Full Court noted that the decision in *Re Enhill* had been criticised but found it unnecessary to consider its correctness. See also *Nolan v Collie* (2003) 7 VR 287 at 313. *Re* *Enhill* was followed by McLelland J in *Grime Carter & Co Pty Ltd v Whytes Furniture (Dubbo) Pty Ltd* [1983] 1 NSWLR 158 but not followed by his Honour in the subsequent decision of *Re ADM Franchise Pty Ltd* (1983) 7 ACLR 987. In that case his Honour followed *Suco*. In *Re Matheson; Ex parte Worrell v Matheson* (1994) 49 FCR 454 a single Judge of this Court applied *Suco*. The Honourable BH McPherson, speaking extra-curially, favoured the approach in *Suco* to that in *Re Enhill*. See Finn (ed), *Essays in Equity* (1985) pp 153, 154. In the same volume (pp 249-50) Sir Anthony Mason observed that the decision in *Re Enhill* looked “distinctly fragile”. In his essay “Unsecured Borrowings by Trustees of Commercial Trusts” (10 Australian Bar Review 248 at 249-50), JD Merralls QC observed, concerning the question presently under review “Upon this point *Re Enhill Pty Ltd* has few supporters: The present Chief Justice of the High Court has written extra-judicially that its reasons ‘look distinctly fragile’”.

56 The text book writers have taken similar views. See Gronow MGR, *McPherson’s Law of Company Liquidation* (Lawbook Co.) at [11.120]. See also Heydon JD and Leeming MJ, *Jacobs’ Law of Trusts in Australia* (7th ed, LexisNexis Butterworths, 2006) at [2114]. The learned author of *McPherson* submits that:

Assets held by the company on trust, although not available for the purposes of winding up, are nevertheless subject to the control of the liquidator acting through the company in the place of the directors. Moreover, the creditors of a trustee company the debts of which were incurred in the administration of the trust are entitled to be subrogated to the trustee company’s claim to an indemnity out of the assets of the trust. The assets that are available in this way to the creditors by subrogation are not assets available for distribution among the general creditors of the company.

In the absence of any statutory provision regulating the administration of trusts of which the company is the trustee, the liquidator is expected to act in a responsible way in the administration of the trust in the name of the company. This duty does not necessarily require the liquidator in all cases to apply to the court for the appointment of a new trustee. Indeed, it is this involvement in the administration of the trust and the winding up of the trustee company that forms the basis of the liquidator’s claim to be subrogated to the trustee company’s right of indemnity from the trust assets in respect of remuneration, costs and expenses. Only where the liquidator’s costs and expenses are necessarily incurred in performing the company’s duties as trustee will it be possible for the liquidator’s costs and expenses to be recouped from the trust assets.

57 The learned authors of *Jacobs* submit that *Byrne* and *Suco* are correct and that *Re Enhill* is incorrect. However, as to the liquidator’s costs, expenses and remuneration, they say, relying on *Suco* and other cases:

Where the trustee of a trading trust is in liquidation, the liquidator’s costs, expenses and remuneration may be paid out of trust assets, because the trustee’s obligation to pay debts can only be performed, after the liquidation has commenced, through the liquidator, whose right of remuneration is to be regarded as a debt incurred in performing the duties of the trustee.

58 This view differs from that expressed in *McPherson*. Note also the treatment of the matter in the 6th edition of *Jacobs* (RP Meagher and WMC Gummow) at [2114].

1. While an appeal to the High Court against the Full Court’s orders in *Bruton* *Holdings* *2008* was allowed (see *Bruton Holdings Pty Ltd v Federal Commissioner of Taxation* (2009) 239 CLR 346), the Full Court’s observations on the effect of a winding up of a corporate trustee were not considered by the High Court.
2. Following the hearing, Messrs Kite and Hutchins provided the Court with the judgment of Farrell J in *Woodgate, in the matter of Bell Hire Services Pty Ltd (in liq)* [2016] FCA 1583 (***Woodgate***), which was handed down after the conclusion of the hearing. That matter concerned an application for directions and advice made pursuant to s 479(3) of the Corporations Act and s 63 of the Trustee Act respectively by the liquidator of Bell Hire Services Pty Ltd (**Bell Hire**). Bell Hire, until the appointment of the liquidator, had been the trustee of the Vercoe Family Trust. The liquidator sought directions in relation to his remuneration and that he be entitled to distribute the assets of the trust, first, in payment of the petitioning creditor’s costs; secondly, in payment of his costs of the making of the application for directions; and thirdly, in payment of his remuneration.
3. Farrell J was satisfied that Bell Hire’s sole business activity was the conduct of the business of the Vercoe Family Trust, such that the assets held by the liquidator were trust property: at [18]. Her Honour was also satisfied that, as a replacement trustee had not been appointed, Bell Hire continued as bare trustee of the trust assets and retained its right of indemnity and exoneration over those assets but did not have a power of sale: at [21].
4. At [24] Farrell J held that where a trustee acts reasonably and in good faith the general rule is that the trust assets bear the costs of a trustee’s application for advice and directions, either directly or under the trustee’s indemnity. Her Honour found at [26] that, in the context of an insolvent trustee of a trading trust, it was appropriate for the liquidator to approach the Court for directions and advice and that he was justified in paying the cost of that application from the trust assets. Her Honour also held at [22] that the liquidator’s remuneration and expenses for work relating to trust assets which is “properly done for the purpose of winding up the company’s affairs” should be paid out of non-trust property of a trustee company where such property is available but that, where non-trust property is not available and a liquidator would not otherwise be required to undertake that work, it would normally be appropriate for the cost of the work to be paid from trust assets, citing *In the matter of AAA Financial Intelligence Ltd (in liquidation) ACN 093 616 445* [2014] NSWSC 1004.
5. In relation to the costs of the petitioning creditor, Farrell J followed *Re Suco Gold* on the issue of whether those costs are to be regarded as a trust debt, noting that she had not been persuaded that *Re Suco Gold* was plainly wrong on that issue. However, her Honour said at [35]-[37]:

35 However, if the costs of the winding up application are an incident of the Trust’s business, then having regard to the reasoning of Brereton J in *In the matter of Independent Contractor Services (Aust) Pty Limited ACN 119 186 971 (in liquidation) (No 2)* [2016] NSW 106, any claim by GIO as a creditor of the Trust for its costs of the winding up application must rank *pari passu* with other Trust creditors, outside the priority conferred by s 556(1)(b). That is contrary to the result in *Re Suco Gold* but consistent with the otherwise orthodox principles discussed by King CJ in *Re Suco Gold* at 104 and 107-108 and with the decision of the High Court in *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360; [1979] HCA 61. In my view, criticisms of the approach taken by Brereton J are misplaced and I will adopt that approach.

36 The fact that the trustee enjoys an indemnity secured generally over trust property and that it is proprietary in nature does not automatically bring trust property within the general pool of creditors’ claims in a winding up or the statutory order of priority for payment. A trustee company is not entitled, in exercise of its indemnity, to appropriate trust property before payment of a trust debt so that the amounts appropriated become available to the company’s creditors generally in the liquidation. It is only if the creditors of the trust have been paid out of the trustee company’s own funds that the company’s general creditors are entitled to be paid out of trust assets appropriated to satisfy the trustee’s right of recoupment; the statutory order of priority for payment then applies. Unpaid trust creditors are entitled to stand in the shoes of the trustee and to obtain payment from the trust property; the right of subrogation must be exercised in their favour; trust property is therefore not property divisible among the trustee’s creditors generally and the statutory order [of] priority does not apply.

37 It has been observed that careful attention must be paid to whether the trustee’s indemnity is being asserted as a right of recoupment or exoneration. Where it is exoneration, the trustee may resort to trust property only for the purpose of discharging trust liabilities. “Company law ends and trust law takes over” at a point earlier than where the right being exercised is the right of recoupment: see the useful discussion in D’Angelo, N “*Commercial trusts in practice: the trust as a surrogate company*” (Paper presented at the Annual Commercial and Corporate Law Conference, Supreme Court of New South Wales, 15 November 2016) and in his book *Commercial Trusts* (LexisNexis Butterworths, 2014), particularly at 5.124–5.127 under the heading “*The true nature of the exoneration limb: a power to apply assets for the benefit of creditors*”. I endorse that view. It is inconsistent with principle to apply the statutory order of priority for payment of the company’s debts out of its own property to the order of distribution of trust property. That this might result is two regimes (for trust property and property of the company) is unfortunate, but it is something which courts have had to accommodate.

1. Messrs Kite and Hutchins submitted that, while in *Woodgate* the decision in *Re Independent Contractor* was preferred over that in *Re Suco Gold* on the question of whether the claims ought to be paid in accordance with the statutory order of priority in a winding up, her Honour did not appear to have had the benefit of detailed argument on the point. That may or may not be so but, as Messrs Kite and Hutchins also submitted, her Honour’s judgment is recent, on a very similar point to that which is before me and should be given great weight. Indeed, in the absence of a submission that it is plainly wrong, which is not made, and a conclusion by me that that is so, I would follow the decision in *Woodgate*.
2. Messrs Kite and Hutchins contended that the dichotomy described by Farrell J at [37] between the right of recoupment and the right of exoneration provides a point of distinction. They said that in the present case the “trust liabilities were plainly trust liabilities” so the right of exoneration applies before “company law ends and trust law takes over”. This submission does not, in my opinion, take the matter any further. The effect of her Honour’s observation is that, if the liabilities are trust liabilities, as they seem to be, which remain unpaid such that the trustee’s indemnity is being asserted as a right of exoneration, then trust law takes over at an earlier point in time.
3. The final decision to be considered is *Re Amerind Pty Ltd (receivers and managers apptd) (in liq)* [2017] VSC 127 (***Re Amerind***), a decision of Robson J in the Supreme Court of Victoria. It too was handed down after the hearing of this matter concluded, as recently as 23 March 2017. Because it considers the very issue now before me it is necessary to consider *Re Amerind* in some detail.
4. By way of background, Amerind Pty Ltd (**Amerind**) carried on a business solely in its capacity as trustee of the Parcel Veneer Processes Trading Trust. It had a number of secured facilities with the Bendigo and Adelaide Bank Limited (**Adelaide Bank**). On 6 March 2014 Adelaide Bank sent a notice demanding repayment of and terminating the existing facilities. Shortly thereafter, the sole director of Amerind resolved to appoint administrators to the company. On the same day Adelaide Bank appointed receivers and managers to Amerind. On 13 August 2014 Amerind’s creditors resolved that it be wound up and the administrators were appointed as liquidators. In the meantime the receivers and managers had traded on and realised the assets that Amerind held on trust. Adelaide Bank was ultimately paid out and, after providing for the receivers and managers’ remuneration, there was a net surplus of approximately $1.6 million.
5. The receivers sought directions pursuant to s 424 of the Corporations Act on discrete issues concerning the distribution of the surplus and issues arising in the receivership, including a direction concerning whether the receivers were justified in distributing the receivership surplus in accordance with the priority regimes in ss 433, 556 and 560 of the Corporations Act. It is relevant to note that, like me, Robson J had the benefit of full argument on the issue before him on behalf of the receivers and managers who sought the directions and, in addition, the court granted leave to various parties having a possible claim or interest in the receivership surplus to appear as interested parties on the application. They were the Commonwealth Department of Employment (**Commonwealth**), which had paid accrued wages and entitlements to former employees of the business under the Fair Entitlements Guarantee Scheme and sought to recover those moneys as a priority under ss 433 and 556 of the Corporations Act, certain secured creditors, the former wife of the sole director of Amerind and the liquidator.
6. Having satisfied himself that it was appropriate to direct that the receivers were justified in treating the receivership surplus as a trust asset, Robson J then considered whether the priority regime in ss 433(3) (relating to property subject to a circulating security interest), 556 and 560 of the Corporation Act applied to the proceeds of the various assets constituting the receivership surplus insofar as those assets were, as at the date of the receivers’ appointment, also circulating assets of Amerind within the meaning of s 340 of the *Personal Property Securities Act* *2009* (Cth) and s 51C of the Corporation Act.
7. Relevant to that issue, Robson J found that Amerind had no assets of its own; that liabilities were incurred by it as trustee; and that the creditors were therefore trust creditors. His Honour observed at [50] that Amerind did not have its own money to meet trust liabilities; that it sought to be indemnified from the trust assets for liabilities it incurred in carrying out the trust by using trust moneys to pay the trust creditors; and thus that the moneys paid by the trustee to the creditors remained trust money, although the liability was that of the trustee.
8. His Honour noted that in those circumstances the trustee had a right in equity to be indemnified, being a right of exoneration as opposed to recoupment, from the trust assets for liabilities it incurred on behalf of the trust. His Honour also noted that that right of indemnity was supported by an equitable lien over all of the trust assets but that it was constrained to the limit of the liabilities that it secured. Creditors of the trust were entitled in equity to be subrogated to the rights of the trustee and thus, with the aid of the court, to exercise the trustee’s lien and the right to be indemnified against the trust assets. The money so recovered would be trust moneys: at [51].
9. There were two principal sets of submissions which Robson J considered. First, the Commonwealth, the liquidator and the receivers claimed that the trustee’s right of indemnity was “property of the company”. This is the same claim made by Messrs Kite and Hutchins before me. Secondly, the receivers and the Commonwealth submitted that the priority regime should apply. Insofar as there were competing authorities on the issue, the receivers, the Commonwealth and the liquidator all submitted that *Re* *Independent Contractor* should not be followed and that Robson J was bound to and should follow *Re Enhill*. One of the secured creditors given leave to appear, Carter Holt Harvey Wood Products Pty Ltd (**CHH**), submitted that the court should follow *Re* *Independent Contractor*. CHH further submitted that in doing so Robson J would not be departing from *Re Enhill* because, it submitted, insofar as *Re Enhill* said that the right of indemnity is a personal right of the trustee and an available asset of an insolvent corporate trustee, it is available to pay costs and expenses of a liquidator and Brereton J said nothing inconsistent with that.
10. In the result Robson J answered the issues posed by the submissions as follows:
11. the trust assets at all times remain trust assets which may be used to indemnify creditors for liabilities incurred on behalf of the trust. The trustee’s right of indemnity and related lien do not become “property of the company” and are not available to meet other liabilities of the company. Rather, they may only be used to satisfy liabilities on behalf of the trust: at [53]; and
12. the reasoning in *Re Independent Contractor* is to be preferred to *Re Enhill*. Accordingly, Robson J applied *Re Independent Contractor* and found that the priority regime did not apply to distributions of trust property: at [67].
13. Robson J reached his conclusion after careful analysis of the relevant authorities. In coming to his conclusion Robson J first considered whether s 433 of the Corporations Act applied. After considering the parties’ submissions, Robson J held at [76] that prima facie s 433(3) applied and the question then became whether that section and the priorities in s 556 applied to property held on trust by the relevant company.
14. Robson J then moved to consider whether the trustee’s right of indemnity constitutes “property of the company”. Relevantly, s 433(3) includes the expression “property coming into his, her or its hands”. Robson J held that that was a reference to property of the company. Accordingly, s 433(3) is enlivened if the receiver takes possession of property of the company: at [77]. His Honour noted that a receiver must pay out of the property of the company 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 and that the third priority category, as set out in s 433(3)(c), required payment of any debt or amount that in a winding up is payable in priority to other unsecured debts pursuant to ss 556(1)(e), (g) or (h) or 560.
15. Robson J undertook a review of the authorities concerning the nature of a trustee’s right of indemnity. Before doing so he relevantly noted that the case before him was concerned with exoneration, not recoupment, and that Amerind had no assets of its own with which to pay the trust creditors. Nor was there any allegation that there had been any breach of trust such that the liabilities incurred by the trustee giving rise to the indemnity were not properly incurred or that the trustee had to make good some loss or damage arising from a breach of trust. These comments apply equally to the case before me. The distinction is relevant because the authorities distinguish between a trustee’s right of exoneration and right of recoupment. In particular, in the former case the creditor is subrogated to the trustee’s right of indemnity against the trust assets and, if he or she is not paid, may take proceedings to enforce the indemnity against the trust estate.
16. It is not necessary to set out in detail Robson J’s review of the authorities, which can only be described as exhaustive, commencing with the decision in *Worrall v* *Harford* (1802) 8 Ves 4; 32 ER 250 and concluding with the decision in *Woodgate*. Having carried out that review his Honour concluded that there are possibly four different lines of reasoning leading to the conclusion that the trustee’s right of indemnity over trust assets is only available to meet trust liabilities and is not a personal asset of the trustee: at [249]-[253]. His Honour had earlier summarised those lines of reasoning, saying at [100]-[103]:

100 The four different lines of reasoning overlap and support each other. They are as follows. First, in the case where the indemnifying party has an interest in the extinction of the liability to which the indemnity relates, such an indemnifier ‘is concerned in the discharge of those liabilities by the trustee so as to free the trust property from any charge thereon.’ In that case, the money the subject of the indemnity must be used to discharge the liability which caused or created the emergence of the indemnity.

101 Secondly, assets to which the trustee is entitled to under its right of indemnity are trust assets, and trust assets may not be used for any other purpose than the authorised purposes of the trust, which includes paying debts incurred on behalf of the trust but does not include paying private debts of the trustee.

102 Thirdly, the trustee’s right of indemnity, in the case of exoneration, is subject to the creditors’ right of subrogation, which is a proprietary right. Thus the trustee’s right of indemnity is not free from the proprietary interest of its creditors.

103 Fourthly, the trustee would not be freed of the claim giving rise to the indemnity if the trustee took assets of the trust under the purported right of indemnity to meet other personal expenditure of other non-trust liabilities and did not use the assets to be freed of the claims of the trust creditors.

1. After identifying the four lines of reasoning his Honour said at [255]-[256]:

255 In my opinion, all four grounds of reasoning support the proposition that the right of indemnity that an insolvent trustee has over trust assets that arises through its incurring debts on behalf of the trust, constitutes a charge in favour of the trustee over all the assets of the trust that may also be exercised and enforced by the unpaid creditors of the trustee, where the liability to the creditors by the trustee caused the emergence of the indemnity. All four grounds lead to the conclusion that where an insolvent trustee has a right of exoneration from the trust assets that right does not form part of his personal estate but must be exercised and applied for the benefit of the trust to reduce the proprietary right of creditors over the assets of the trust estate and to achieve a true indemnification of the trustee from claims of the trust creditors.

256 The relevant principles appear to be as follows:

(a) Where a trustee lawfully carries on a business of the trust estate the trustee has a right of indemnity and a lien over all the trust estate’s assets for the liabilities incurred by the trustee in carrying on the business.

(b) Creditors of the trustee incurred on behalf of the trust have no right of action directly against the assets of the trust.

(c) The extent of the indemnity or lien of the trustee is limited to the extent of the trustee’s overall right indemnity and no more. Thus, if the trustee is liable to the estate on some ground, it is only the net amount of the entitlement of the trustee that is subject to the right of indemnity and lien.

(d) The trustee’s indemnity lien extends to all the trust’s assets (constrained to the limit of the liabilities that it secures).

(e) Creditors of the trustee have a right of subrogation and are entitled to bring in their own name an action to enforce the trustee’s right of indemnity and lien over the trust assets.

(f) The creditors’ right of subrogation is a proprietary right that includes the right to exercise the trustee’s lien and constitutes a charge upon all the assets of the trust estate.

1. Robson J then turned to consider the conflicting decisions concerning the nature of the trustee’s right of indemnity where the trustee is entitled to be indemnified out of the assets of the trust for a liability incurred on behalf of the trust. His Honour considered the question of statutory interpretation and what is required by the principle of “one common law of Australia” and held that the proper course was for him to follow the reasoning in *Re Independent Contractor*: at [257]-[260].
2. As to the question of statutory construction, Robson J looked to the legislative history of the corporations legislation over the years, noting that the Corporations Act and Companies Act, with which *Re Enhill* and *Re Suco Gold* were concerned, are different statutes but that they are *in* *pari materia*. After setting out the relevant principles his Honour drew the following conclusions at [310]-[317]:
3. the words of one legislature cannot be considered to bind the meaning intended by another legislature. The task of the court is to determine the will of the legislature that passed the Act and that task cannot logically be accomplished by looking to the expressed will of another legislature;
4. the Full Court in *Re Enhill*, which it had been submitted was binding on Robson J, considered the Companies Act, which had been passed by the Victorian Parliament in 1961. It was not correct to say that the will of the Victorian Parliament or the interpretation of that will by the courts is a binding statement as to the meaning of words used by the Commonwealth Parliament in 2001;
5. the “pages of the law reports are not blank” and the decision in *Re Enhill* remains highly persuasive. The words considered in *Re Enhill* were similar to those under consideration by Robson J;
6. the difficulty in the case arose from the fact that the same can be said about the decision in *Re Suco Gold*, which was also a decision of a Full Court considering the South Australian Companies Act, part of the national uniform legislation considered by the Full Court in *Re Enhill* and equally a precursor to the Corporations Act;
7. the same conclusion can be drawn in relation to the principle that a “legislature is assumed to know the judicial interpretation placed on the statutory words [by the court of another jurisdiction] and intended that interpretation to apply to the re-enactment”. The Commonwealth legislature may have known and intended the interpretation placed on the words in *Re Enhill*, but the same could be said for the interpretation given in *Re Suco Gold*; and
8. uniformity of interpretation of a Commonwealth Act is to be preferred wherever possible.
9. Ultimately, Robson J concluded at [330]-[333] that he did not consider that either *Re Enhill* or *Re Suco Gold* was a binding precedent in interpreting the Corporations Act but nevertheless was of the view that each decision remained highly persuasive. His Honour noted that, given the Corporations Act is a Commonwealth statute, there was a preference for uniform interpretation. In light of that, Robson J posed the following questions: whether the reasoning in *Re Enhill* or *Re Suco Gold* is sufficiently persuasive that it should be extended in its application to the Corporations Act and whether the reasoning in *Re Independent* *Contractor* is plainly wrong. His Honour gave the following answers to those questions:
* he did not think the reasoning in *Re Enhill* was sufficiently persuasive to extend its application to the Corporations Act;
* insofar as *Re Suco Gold* is consistent with the line of cases leading to the conclusion that the trustee’s right of indemnity is trust property available only to meet trust liabilities (and *Re Independent Contractor*),it was sufficiently persuasive to extend its application to the Corporations Act. But as to whether the priority regimes apply to trust property, Robson J declined to extend the application of *Re Suco Gold*; and
* he was not satisfied that the decision of Brereton J in *Re Independent Contractor* that the trustee’s right of indemnity is not personal property of the trustee but is held on trust for the trust creditors was plainly wrong. His Honour said that he agreed with the decision in *Re Independent Contractor*.
1. His Honour then turned to consider the common law and at [363]-[367] observed that he was required to apply the common law of Australia in the context of a Commonwealth statute; that the Corporations Act refers to a common law term, “property of the company”; and that common law is the common law of Australia. His Honour held that in applying the Corporations Act he was required to apply the common law of Australia as reflected in the numerous cases concerning the nature of a trustee’s right of indemnity. His Honour also noted that he must have regard to the High Court’s decision that there is only one common law of Australia and that he ought not find that the interpretation of s 433(3) is different in Victoria than it is in New South Wales. In the result Robson J found that he was not bound by *Re Suco Gold* or *Re Enhill*, which his Honour described at [362] as “anomalous”, “not representative of the common law as it is understood in other jurisdictions” and “not a proper expression of the common law of Australia”, and that he should follow *Re Independent Contractor*: at [371]. His Honour also held, relying on *Re Independent Contractor*, that the trust assets should be distributed *pari passu* among the trust creditors.
2. I invited Messrs Kite and Hutchins to provide submissions on the effect of *Re Amerind*. They submitted that they have sought the Court’s advice on whether employee entitlements are to be dealt with in accordance with s 556(1) of the Corporations Act. Relying on the decision in *Re Suco Gold*, they had advanced the view that pre-administration claims ought to be paid in accordance with the statutory order of priority in a winding up.
3. Messrs Kite and Hutchins submitted that the problem with the reasoning in *Re Independent Contractor* is that it overlooks the beneficial interest created by the trustee’s lien. They further submitted that the decision in *Re Amerind* adds little by way of analysis on the critical question of why the trustee’s lien is not “property of the company”, whose property includes equitable interests. Messrs Kite and Hutchins contended that property of the company includes all valuable rights, even if the legal or equitable right is imperfect or requires the assistance of the Court for enforcement. In the circumstances, they remained of the view that they would be justified in applying s 556 to employee claims, notwithstanding that there are two single first instance decisions against that proposition and that *Re Enhill* and *Re Suco Gold* dealt with the predecessors to s 556.
4. I am unable to accept the position put by Messrs Kite and Hutchins. With respect, Robson J reached his conclusion in *Re Amerind* after considering in detail the nature of the trustee’s indemnity and lien. His Honour was not persuaded that either was property of the company and thus that the statutory priority regime would apply. I agree. Messrs Kite and Hutchins have not demonstrated that decision or the decisions in *Re Independent Contractor* and *Woodgate* are plainly wrong. I would follow those decisions and decline to make the direction sought.
5. Messrs Kite and Hutchins requested that if I was not persuaded to make the direction sought, as I am not, that I make a direction to the contrary effect. That is, a direction that the priority regime set out in s 556 of the Corporations Act does not apply. While that is evident from these reasons, for clarity I will make a direction to that effect.

### Liquidators’ costs and expenses

1. The remaining directions and declarations sought by Messrs Kite and Hutchins relate to their costs and expenses during the three phases of the external administration of the Company:
2. in paragraph 21 of the originating process Messrs Kite and Hutchins, in their capacity as liquidators, seek a direction pursuant to s 511 of the Corporations Act, or judicial advice, that they would be justified in recovering the costs and expenses incurred by the Company and the liquidators in realising any Trust assets and otherwise dealing with the Trust from the Trust assets;
3. in paragraphs 23 to 25 of the originating process Messrs Kite and Hutchins seek declarations that they are entitled to a lien over the Trust assets in relation to the fees incurred by them variously in their capacities as voluntary administrators, deed administrators and liquidators;
4. in paragraph 26 of the originating process Messrs Kite and Hutchins seek an order that the costs of this proceeding be costs in the winding up; and
5. in paragraph 27 of the originating process Messrs Kite and Hutchins seek a declaration that the liquidators have a lien over the Trust assets for the costs of this proceeding or, alternatively, an order under s 93 of the Trustee Act or an order under s 72 of the *Trusts Act 1973* (Qld) that the costs of this proceeding be paid out of the Trust assets.
6. I am satisfied that the directions and declarations should be made. My reasons follow.
7. As set out at [68] above, there are two bases upon which Messrs Kite and Hutchins can claim their costs and expenses. The second of those depends on the existence of what is known as the “salvage principle”, as first propounded in *Universal Distributing*. There Dixon J was concerned with the competing interests of a secured creditor and a liquidator appointed to the company over whose assets that creditor held its security. The secured creditor objected to the liquidator’s remuneration and disbursements being paid out of the assets of the company in priority to his security. At 174 his Honour said:

… The debenture-holders are creditors who have a specific right to the property for the purpose of paying their debts. But if it is realized in the winding up, a proceeding to which they are thus parties, the proceeds must bear the cost of the realization just as if they had begun a suit for its realization or had themselves realized it without suit …

In applying this principle, only those expenses appear to have been thrown against the fund belonging to the debenture-holders which have been reasonably incurred in the care, preservation and realization of the property. In the present case the liquidator has employed a material part of his time and energies in recovering moneys, both uncalled capital and debts, which enure for the debenture-holder, and in so far as these services increase the remuneration which he receives, I see no reason why the burden should not be thrown upon the proceeds. …

(citations omitted)

1. The principle enunciated by Dixon J has been relied on in subsequent decisions. In *Re Dungowan Manly Pty Ltd (in liq)* (2015) 105 ACSR 648; [2015] NSWSC 491 (***Re Dungowan***)Black J, in considering a claim by the liquidator for an equitable charge over certain property, said at [85]-[87] that:

85 The liquidator submits, and I accept, that the remuneration, costs and expenses incurred by a liquidator in preserving, recovering and realising a fund on behalf of others would generally be paid out of, and are secured by an equitable lien over, the relevant fund. That proposition is well-recognised in the case law, although it raises a critical question as to what are the costs of preserving, recovering or realising the relevant fund: *Re Universal Distributing Co Ltd (in liq)* (1933) 48 CLR 171; [1933] ALR 107; [1933] HCA 2 (*Universal Distributing*); *Coad v Wellness Pursuit Pty Ltd (in liq)* (2009) 40 WAR 53; 71 ACSR 250; [2009] WASCA 68; *Re Parbery (as liquidators of Trio Capital Ltd (in liq))* (2012) 88 ACSR 700; [2012] NSWSC 597 at [18]. In *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)* (1999) 30 ACSR 377; [1999] FCA 144 at [34], Finkelstein J observed that:

[34] These cases establish, clearly enough in my opinion, that provided a liquidator is acting reasonably he is entitled to be indemnified out of trust assets for his costs and expenses in carrying out the following activities: identifying or attempting to identify trust assets; recovering or attempting to recover trust assets; realising or attempting to realise trust assets; protecting or attempting to protect trust assets; distributing trust assets to the persons beneficially entitled to them.

86 In *Stewart (in his capacity as liquidator of Newtronic Pty Ltd (in liq)) v Atco Controls Pty Ltd (in liq)* (2014) 252 CLR 307; 307 ALR 562; 98 ACSR 601; [2014] HCA 15, the High Court also considered the circumstances in which a liquidator’s equitable lien would be available over a settlement amount in liquidation, and observed that that principle in *Universal Distributing* applies where an insolvent company is in liquidation; the liquidator has incurred expenses and rendered services in the realisation of an asset; the resulting fund is insufficient to meet both the liquidator’s costs and expenses of realisation and the debt due to a secured creditor; and the secured creditor claims the fund. Their Honours noted that the application of the principle avoids the result that a secured creditor would unconscientiously take the benefit of the liquidator’s work without the liquidator’s expenses being met and observed (at [41]) that such a lien arose simply from the fact that the liquidator’s costs and remuneration were incurred in realising the assets that created the relevant fund.

87 Mr Golledge also relies on the decision in *Re Crown Meats Pty Ltd (in liq)* (2013) 93 ACSR 576; [2013] VSC 118 (*Crown Meats*)in support of the liquidator's claim to a lien. That decision has some similarities with the present case, so far as it involved a dispute as to the proceeds of sale of a property. Robson J (at [39] and the following) undertook a comprehensive review of the case law relating to the *Universal Distributing* lien. His Honour noted that such a lien could arise where the relevant work was necessary and the costs incurred to do it were reasonably incurred and could include the costs of distributing trust assets to persons beneficially entitled to them, or necessary to a “salvage objective”. …

1. More recently, in *Freelance Global* Riordan J considered the right of a liquidator appointed to a corporate trustee to recover expenses from trust assets. His Honour referred to the “salvage principle” as set out in *Universal Distributing* in terms to the effect that a person who works for the exclusive purpose of realising, caring for or preserving property to create a fund or pool of assets is entitled to a lien or charge against the fund or pool of assets for the expenses and remuneration incurred in such work. His Honour noted that the application of the salvage principle entitles a liquidator acting reasonably to be indemnified out of trust assets for its costs and expenses in identifying or attempting to identify trust assets; recovering or attempting to recover trust assets; realising or attempting to realise trust assets; protecting or attempting to protect trust assets; and distributing trust assets to the persons beneficially entitled to them: at [64].
2. Riordan J also referred to the principles in *Re Berkeley Applegate (Investment Consultants) Ltd (in liq)* [1989] Ch 32, where Edward Nugee QC, sitting as a deputy High Court judge, distinguished the cases decided on the basis of the salvage principle but held that the court could, as a condition of enforcing the trust beneficiaries’ rights and equity, require that an allowance be made for costs incurred and skill and labour expended in connection with the administration of the trust property: at [66]. That allowance of fair compensation to the liquidator was said to be an application of the principle that he who seeks equity must do equity. At [67] his Honour said:

The Court’s discretion to allow expenses and remuneration from trust assets is to be exercised sparingly and factors supporting the exercise of the discretion include the following:

(a) The work in respect of which expenses and remuneration were incurred, would have had to have been done in the interests of the beneficiaries of the trust in any event.

(b) The work has been of substantial benefit to the trust property and the beneficiaries.

(c) The administration of the trust assets is complex and requires the expertise of an experienced and capable insolvency practitioner. Such practitioners would only do the work if they are not left out of pocket for the expenses incurred; and are fairly remunerated.

(d) The liquidator was acting in accordance with the liquidator’s ‘duty to act in a responsible way’.

(e) The corporation’s own assets are insufficient to cover the costs of the winding up.

(footnotes omitted)

1. In this case there is a contest between Messrs Kite and Hutchins variously in their capacities as administrators, liquidators and Receivers and the general body of creditors. If the salvage principle applies then the general body of creditors will rank *pari passu* for the balance after Messrs Kite and Hutchins have deducted their remuneration and expenses from the fund. If it does not then the general body of creditors take *pari passu* without the deduction of that remuneration and associated expenses.
2. It is clear that Messrs Kite and Hutchins in their capacity as administrators and liquidators have exclusively expended their time and effort getting in and realising Trust assets. As the facts bear out, and as I have already observed, the Company operated solely as trustee for the Trust. It held all of its assets in that capacity and the steps it undertook were required so that Messrs Kite and Hutchins would meet their statutory duties and protect the Trust assets. Those obligations were coextensive. Further, it is clear that there are insufficient funds to meet the claims of creditors and Messrs Kite and Hutchins’ expenses, including their remuneration, such that there will be no return to beneficiaries. In all of the circumstances of this case I am satisfied that Messrs Kite and Hutchins are entitled to a lien of the type identified by Dixon J in *Universal Distributors* and the subsequent decisions which followed that judgment. I am satisfied that, relying on that lien, they are entitled to deduct their remuneration and expenses from the Trust fund before paying the general body of creditors.
3. Given my findings above I do not need to consider Messrs Kite and Hutchins’ submission that there is an alternate basis upon which the Court can allow a liquidator to take his or her remuneration and expenses out of the assets of the trust relying on *Re Dungowan* at [107].
4. Insofar as Messrs Kite and Hutchins incurred costs and expenses in their capacity as receivers, they are equally entitled to have their costs and expenses paid out of the assets of the Trust. *13 Coromandel Place Pty Ltd v C L Custodians Pty Ltd (in liq)* (1999) 30 ACSR 377; [1999] FCA 144 concerned an application by an insolvency practitioner to have his costs, charges and expenses in acting first as a receiver, then as provisional liquidator and finally as liquidator paid out of the assets that C L Custodians Pty Ltd (in liq) (**C L Custodians**) held on trust. In relation to the question of whether the receiver was entitled to have his costs and expenses of the receivership paid out of the assets of C L Custodians, notwithstanding that those assets were held on trust, Finklestein J observed at 382:

The fact that the assets do not beneficially belong to a party to the suit in which the receiver is appointed (as in this case) cannot effect the receiver’s entitlement. That this should be so accords both with principle and authority. As regards principle, a receiver is appointed by the court because the court is satisfied that such an appointment is necessary to safeguard the interests of all persons who are interested or who may be interested in the assets placed under receivership: *Tullett v Armstrong* (1836) 48 ER 371; *Owen v Homan* (1853) 10 ER 997 at 1032. Once the court has decided that particular assets should be subjected to a receiving order it is right and proper that those assets should be applied to satisfy the receiver’s costs. It would be extraordinary if a receiver’s entitlement to costs was dependent upon it being established that the assets under his control, a control authorised by the court, were beneficially owned by a party to the proceedings. There will be many cases where a receiver will be appointed over property the ownership of which is not known at the time of appointment. If the receiver is not entitled to have his costs paid out of that property unless it is determined that the property belongs to a party to the proceeding few people will be willing to undertake the onerous task of acting as receiver.

1. The final issue is the question of the costs of this proceeding. As Farrell J observed in *Woodgate* at [24], where a trustee acts reasonably and in good faith, the general rule is thatthe trust assets bear the costs of the trustee’s application for advice and directions either directly or under the trustee’s indemnity. Given the circumstances in which Messrs Kite and Hutchins found themselves, the fact that the matter involves an insolvent trustee of a trust and the conflict in the authorities, it was appropriate for Messrs Kite and Hutchins to approach the Court for directions and other relief as they did. They are justified in paying the costs of the proceeding from Trust assets.

# conclusion

1. I will make declarations, directions and orders giving effect to my reasons as set out above.

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| I certify that the preceding one hundred and fifty-three (153) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Markovic. |

Associate:

Dated: 13 June 2017