Tension in Insolvent Trading Trusts: Clarity to a Decades Long Debate

Notes from a Level Twenty Seven Chambers Seminar

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Since at least the decisions of *Re Enhill Pty Ltd* [1983] 1 VR 56 and in *Re Suco Gold Pty Ltd* (1983) 33 SASR 99 there has been uncertainty in the treatment of a trustee's 'right of exoneration' upon the occurrence of an insolvency event. That uncertainty reached boiling point following the decisions of Brereton J in *Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No 2)* (2016) 305 FLR 222 and R Derrington J in *Lane (Trustee), Re Lee (Bankrupt) v Deputy Commissioner of Taxation* (2017) 253 FCR 46.

The High Court's recent decision in *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth of Australia* [2019] HCA 20 (colloquially known as *Re Amerind*) brought welcome clarification as to the nature of a trustee's right of indemnity and its relevance and application in insolvency.

History of Proceedings

Amerind Pty Ltd, which carried on a business solely as trustee, entered receivership. When in a position to retire, the receivers held a surplus of AUD 1.6m from the sale of circulating (trust) assets. The Commonwealth claimed a priority to the (entire) surplus pursuant to ss 433, 560 and 561 of the *Corporations Act 2001* (Cth). One of Amerind's creditors argued s 433 did not apply to the surplus as it was not the '*property of the company*'. The receivers sought directions.

At first instance, Robson J agreed with the creditor and held that s 433 did not apply because the receivers were not in possession of '*property of the company*' as Amerind only had a right of exoneration (as trustee) and held no property of its own. Alternatively, the right of indemnity was not itself subject to a circulating security interest. That was unanimously overturned on appeal to the Victorian Court of Appeal. The creditor appealed to the High Court by way of special leave.

The Decision

Despite differences in reasoning, the High Court unanimously rejected the (recent) proposition emanating from *Re Independent Contractor Services*, that because assets held on trust did not fall within the meaning of the expression '*property of the company*' in ss 433 and 561 of the *Corporations Act 2001* (Cth), those sections did not apply to a trustee's right of exoneration over those assets. The Court held that the '*property of the company*' included trust assets to the extent the trustee had legal rights to the assets because of its right of exoneration (at [50]-[51] (Kiefel CJ, Keane and Edelman JJ); [84], [90] (Bell, Gageler and Nettle JJ); [141], [145] (Gordon J)).

The High Court also unanimously resolved the conflicting intermediate appellate authorities of *Re Enhill* and in *Re Suco Gold* in favour of in *Re Suco Gold* (at [44] (Kiefel CJ, Keane and Edelman JJ); [92] (Bell, Gageler and Nettle JJ); [153]-[154] (Gordon J)). In a winding up, 'trust assets' are only available to meet 'trust debts' and then, are to be paid in accordance with the relevant priority rules.

What does Re Amerind mean for Bankruptcy?

The reasoning contained in *Re Amerind* is, in a number of instances, directly applicable to the management of a bankrupt's estate. The distribution of trust assets to the extent of the bankrupt's right of exoneration will be limited to trust creditors, and more than likely will require distribution to priority creditors in accordance with s 109 of the *Bankruptcy Act* 1966 (Cth) as "proceeds" of the property of the bankrupt (at [54]-[55] (Kiefel CJ, Keane and Edelman JJ); [88]-[96] (Bell, Gageler and Nettle JJ); [174] (Gordon J)). That conclusion is contrary to *Lane* (at [95], [119]-[121] and [130]) and *Re Killarnee* (2018) 260 FCR 310 (at [174] (Siopis J); [211] (Farrell J)). Caution is recommended in proceeding in the absence of directions, at least until the resolution of the *Lane* appeal.

So where are we now Post-Amerind?

For the purposes of the priority provisions of the *Corporations Act* 2001 (Cth) (ss 433, 443D, 443E, 556, 560 and 561) the '*property of the company*' includes assets held by the company on trust to the extent of the company's right of exoneration. The distribution of those trust assets can only be made to trust creditors.

A number of issues remain unresolved despite the unanimity of the *Re Amerind* result. It would be prudent to seek advice and directions in circumstances where:

1. there is a bare trustee and realisation of trust assets is needed;
2. the trustee also acted in a non-trust or personal capacity;
3. the trustee was the trustee of multiple trusts;
4. there will be amounts remaining for distribution to non-priority trust creditors from trust assets;
5. there are no non-trust assets available to satisfy an insolvency practitioner's remuneration, costs and expenses in respect of general liquidation or bankruptcy work;
6. there has been a successful unfair preference claim paid from trust assets.

PAUL MCQUADE QC
T +61 7 3008 3960
E PAUL@QLDBAR.ASN.AU

Considered "not only technically brilliant, he is also easy to work with", Paul is noted as being "the leader in Queensland on insolvency matters" by Chambers & Partners Asia Pacific 2019. Beyond corporate and personal insolvency, Paul's commercial litigation practice also focuses on banking and finance, competition and consumer law, corporate law, contract law, equity, partnerships, property, securities and trusts.

Paul draws on the skills he developed as a Chartered Accountant to assist clients on factually and legally complex matters.

Paul is also listed by Doyle's Guide as a leading Queensland QC for Insolvency & Restructuring and Commercial Litigation & Disputes and in the Australian Financial Review's *Best Lawyers*® for Insolvency and Reorganisation.

SEAN RUSSELL
T +61 7 3236 3909
E SRUSSELLI@QLDBAR.ASN.AU

Since coming to the Bar from a boutique commercial litigation and insolvency law firm, Sean has continued his broad commercial litigation practice. He has particular experience and interest in matters concerning bankruptcy, corporate insolvency, contracts, equity, professional negligence and the Corporations Act.

Previous clients have included a diverse group of domestic and international insolvency practitioners, creditors, solicitors, miners, property developers, farmers, manufacturers and investors. They appreciate his honest and direct advisory and advocacy style in matters at all levels of the State, Federal and High Court. Sean accepts unled briefs as well as being instructed as part of larger teams when required.

MARK EADE
T +61 7 3008 3957
E MARK.EADE@QLDBAR.ASN.AU

Mark has been practising at the Bar since 2016, prior to which he was the Associate to the Honourable Chief Justice Paul de Jersey AC, Justice Peter Flanagan and Justice Ann Lyons. His broad civil practice sees him regularly briefed in insurance, personal and corporate insolvency, administrative and public law, professional negligence, succession law and general commercial matters. He advises upon and appears in proceedings in all State and Federal Courts, tribunals and inquests.

In particular, Mark has advised and appeared in a number of matters concerning the distribution of trading trust assets and the provision of an insolvency practitioner's remuneration, costs and expenses. He appeared unled in Lane (Trustee), in the matter of *Lee (Bankrupt) v Deputy Commissioner of Taxation* (2017) 253 FCR 46; [2017] FCA 943, and is briefed in the (presently stayed) appeal.

Mark is a Sub-Editor for the Incorporated Council of Law Reporting (Queensland) and has the overall editorial management for the Queensland Judgments website.

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