

(rule 44.08.2)

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY



No. M137 of 2018

BETWEEN:

CARTER HOLT HARVEY WOODPRODUCTS AUSTRALIA PTY LTD
Appellant

- and -

THE COMMONWEALTH OF AUSTRALIA
First Respondent

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

BRENT MORGAN in his capacity as liquidator of Amerind Pty Ltd
(Receivers and Managers Appointed) (in liquidation)
Third Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I:

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

Part II:

The appellant intends to advance the following propositions in oral argument:

Nature and contents of a trustee's right of indemnity (grounds a, b and e) **(Submissions at [3] – [37])**

1. The assets of a trust are not, themselves, the property of the trustee. They are accordingly not available to be divided up amongst the trustee's creditors in the event of its insolvency.

(Submissions at [3], [5] – [6])
2. Nonetheless, except to the extent that an instrument of trust may provide otherwise in a particular case (which is not so here), the trustee has certain rights in relation to trust assets. It is these rights (rather than the underlying trust assets), which are relevantly the property of the trustee.

(Submissions at [4], [6] – [12]).

3. The 'right of indemnity', although frequently expressed in singular form, is in fact a bundle of rights. It comprises two distinct principal rights, being the right of **recoupment** (where a trust liability is met from the trustee's own, non-trust, resources and the trustee is entitled to recoupment from trust assets) and the right of **exoneration** (where the trustee has an unmet liability which was incurred in its trustee capacity, and the trustee is entitled to apply trust assets to meeting that liability).

(Submissions at [13], [14])

4. The 'right of indemnity' also encompasses incidental rights, including a trustee's lien over trust assets. However, even if accurately described as proprietary in nature, the trustee's lien gives no greater rights (or powers) than are necessary to give effect to the principal rights described at 3 above.

(Submissions at [20], [30], [31])

5. The foregoing propositions derive from centuries of trust law and apply to any trustee (and, to the extent relevant, former trustee). The fact that a particular trustee is a corporation, or is or becomes insolvent, cannot expand the contents of the right of indemnity.

(Submissions at [5], [32], [37])

6. Where the right of exoneration is the relevant right (as it is here), the limitations upon that right must be recognised. Exoneration requires that trust assets are applied to meeting an unmet trust liability.

(Submissions at [5], [16], [35])

7. The right of exoneration is accordingly not a right to appropriate trust property as the trustee's own, simply because a trust liability of similar sum has been incurred. That would be a breach of trust.

(Submissions at [20], [29], [35])

8. Proposition 7 above does not cease to be correct simply because any non-cash trust assets are realised for cash, whether this is done in exercise of the right of indemnity or otherwise.

(Submissions at [15], [19] – [25])

9. It follows that, whilst the trustee's right of indemnity is the 'property of the company' within the meaning of s.433, 556 and 561 of the *Corporations Act 2001*, that property is (on the insolvency of the trustee) simply the capacity to exercise the right. Insofar as the relevant right is that of exoneration, it entitles the insolvent trustee to have trust assets applied to meeting its trust liabilities. It is accordingly erroneous to speak of any 'proceeds' of the right coming into the

hands of the insolvent trustee (or its external controllers), or being available for distribution to creditors generally.

(Submissions at [22], [23], [36], [37])

The right of indemnity is not a circulating asset (grounds c and d)

(Submissions at [38] – [52])

10. The relevant ‘property of the company’ is the right of indemnity, not the underlying trust assets. The right has its own character, independent of the character of any assets to which it may attach from time to time.

(Propositions 1 and 2 above, and Submissions at [48], [49])

11. The right of indemnity does not satisfy the definition of “circulating asset”, which is necessary for s.51C of the Corporations Act to apply to it.

(Submissions at [39] – [47])

12. The right of indemnity is fixed. Whilst the assets to which the trustee’s lien attaches may change, and the lien’s value may rise and fall, it requires no event of crystallisation and is therefore not a ‘floating charge’.

(Submissions at [50], [51]).

13. The word “property”, in s.433(3), must be read in its context as meaning “property comprised in or subject to a circulating security interest”. Only such property falls to be distributed in accordance with the priority regime established by that section.

(Submissions at [52])

Dated: 5 February 2019


Daryl J Williams QC
Senior legal practitioner

presenting the oral argument in Court