

**CARTER HOLT HARVEY WOOD PRODUCTS AUSTRALIA PTY LTD v.
THE COMMONWEALTH OF AUSTRALIA & ORS
(M137/2018)**

Court appealed from: Supreme Court of Victoria (Court of Appeal)
[2018] VSCA 41

Date of judgment: 28 February 2018

Special leave granted: 17 August 2018

Amerind Pty Ltd (“Amerind”) carried on business solely as trustee of the Panel Veneer Processes Trading Trust, manufacturing and distributing decorative and architectural finishes. Amerind had a number of facilities and accounts with the Bendigo and Adelaide Bank Limited (“the Bank”), secured by a range of securities.

On 6 March 2014, the Bank sent a notice to Amerind demanding repayment of, and terminating, the existing facilities.

On 11 March 2014, the sole director of Amerind resolved to appoint three members of the firm of Rogers Reidy, including Brent Morgan as the joint and several administrators to Amerind, (“the administrators”) pursuant to s 436A of the *Corporations Act 2001* (Cth) (“the Act”). On the same date the Bank appointed Matthew Byrnes and Andrew Hewitt as receivers and managers to Amerind (“the receivers”). On 13 August 2014 Amerind’s creditors resolved that the company be wound up, and the administrators were appointed as liquidators.

The receivers traded on after their appointment and realised the assets Amerind held on trust. The Bank recovered the sum of approximately \$20 million it was owed. After allowance for the receivers’ likely remuneration, the net surplus from the receivers’ realisation of Amerind’s assets said to be available for distribution to creditors was \$1,619,018 (“the surplus”).

The receivers applied to the Supreme Court of Victoria for directions concerning the distribution of the receivership surplus and on central issues arising in the receivership. Pursuant to orders of Sifris J dated 24 December 2015 a number of entities were given leave to appear as interested parties having filed Appearances indicating their intention to be heard in the proceeding regarding a possible claim on the surplus.

These entities included: (a) the Commonwealth Department of Employment (“the Commonwealth”) which had paid accrued wages and entitlements to the former employees of the business and now sought to recover those moneys from the surplus as a priority under ss 433 and 556 of the Act; (b) Carter Holt Harvey Wood Products Pty Ltd (“CHH”) who claimed to be a secured creditor of Amerind behind the Bank, entitled to have priority to the surplus over the Commonwealth (whom it

argued should only be able to claim on the moneys available to the unsecured creditors); and (c) the liquidator Brent Morgan (the other two liquidators having resigned) who also had an interest in the surplus.

The first issue before the trial judge was whether the receivers were justified in proceeding on the basis that the surplus was properly characterised as property held on trust (he held that they were), and if they were, whether the priority regime in ss 433(3), 556 and 560 of the Act applied to the surplus. Those sections give priority, in a liquidation of a company, to the payment of certain employee entitlements from the property of the company. In particular, s 433 provides that a receiver appointed on behalf of a debenture holder that is secured by a 'circulating security interest' (previously known as a 'floating charge') must pay out of the property coming into his hands debts in accordance with the statutory priorities in s 556 of the Act.

The receivers and the Commonwealth argued that the priority regime should apply as the various assets constituting the surplus were, at the date of the receivers' appointment, circulating assets of the company. If the company had been conducting business in own right, the employees would have been priority creditors under ss 433(3) and 561 of the Act. The Commonwealth submitted that the result should not be different when the business in question was conducted by the company as a trustee, and the company had a right of indemnity out of the assets of the trust to pay the employees. The trial judge noted that there were conflicting authorities on the point and held that the better view was that the priority regime did not apply to trust property. As a consequence the Commonwealth did not have priority.

The Commonwealth sought leave to appeal from the trial judge's orders, contending that the surplus was not trust property and that it should be applied in accordance with the priority regime. CHH contended that the Commonwealth was not entitled to priority because s 433 did not apply. The Court of Appeal noted that the issue of how a corporate trustee's right of indemnity (out of the trust's assets for the liabilities it incurred as trustee) is to be dealt with upon a winding up, or where s 433 applies, is one of long-standing controversy. The five members of the Court of Appeal unanimously granted leave to appeal and allowed the appeal. The Court made declarations, inter alia, that the receivers were justified in proceeding on the basis that that the priority regime in ss 433(3), 556 and 561 of the Act applied to the surplus insofar as those assets were, at the date of the receivers' appointment, circulating assets of Amerind within the meaning of s 340 of the *Personal Property Securities Act 2009* (Cth) ("the PPSA").

CHH has appealed to the High Court. The first respondent is the Commonwealth; the second respondents are Matthew Byrnes and Andrew Hewitt in their capacity as the receivers and managers of Amerind. The third respondent is Brent Morgan who, in his capacity as the liquidator of Amerind, has filed a Submitting Appearance.

The grounds of appeal include:

- That the Court of Appeal erred in holding that the funds held by the receivers of Amerind Pty Ltd (receivers and managers appointed) (in liquidation) in its capacity as trustee of the Panel Veneer Processes Trading Trust, are proceeds of the company's right of indemnity as trustee, and therefore available for distribution to the company's creditors pursuant to s 433 of the *Corporations Act 2001* (Cth).
- That the Court of Appeal erred in holding that the company's right of indemnity was "property comprised in or subject to a circulating security interest" within the meaning of s 433(2) of the Act.