THE INTERSECTION OF COMPANIES AND TRUSTS

THE HON CHIEF JUSTICE
JAMES ALLSOP AO*

In 1981, Professor Harold Ford wrote an article on 'Trading Trusts and Creditors' Rights'. In it, he described trading trusts, an intersection of companies and trusts that had emerged in the decade prior as an increasingly popular alternative to the proprietary company, as a 'commercial monstrosity'. It has been nearly 40 years since those comments yet there is still no coherent and unified approach by Australian courts as to their treatment under Australian company law, nor is there any clear treatment of them in the Corporations Act 2001 *(Cth). In February 2019, the High Court heard the appeal of what is commonly known as the* Re Amerind *matter. In the context of this appeal and other recent significant case law, this speech examines the development of the law on trading trusts, specifically on the issue of trust property in an insolvency administration.*

CONTENTS

I Introduction 1129
II Equity, Statute and Company Law 1130
A Principles of Equity 1130
B Statute, the Common Law and Equity 1135
III The Cases 1136
A *Octavo Investments Pty Ltd v Knight* 1136
B *Re Byrne Australia Pty Ltd and the Companies Act* 1139
C *Re Enhill Pty Ltd* 1140
D *Re Suco Gold Pty Ltd (in liq)* 1141
IV Developments in the Intervening Years 1144
V Clarification from the High Court 1148
VI Conclusion 1153

* A version of this article was originally presented by the author as: Chief Justice James Allsop, 'The Intersection of Companies and Trusts' (Harold Ford Memorial Lecture, Melbourne Law School, 26 September 2019).

I Introduction

It is a great honour to be asked to give the Harold Ford Memorial Lecture. Unfortunately, and unlike many here this evening, I did not have the pleasure of knowing Professor Ford; however, fortunately, and like many here this evening, I did have the advantage of studying company law primarily by reference to the textbook that he wrote. It was penetrating, concise, and deeply thoughtful, being the traits that marked him as a scholar and teacher.

The intersection of companies and trusts is statute and equity. The focus of what I wish to discuss tonight was the subject of an influential (and still well-read) article which Professor Ford wrote in 1981. The article was entitled 'Trading Trusts and Creditors' Rights'.[1] The article appeared to have been spurred by the then-recent High Court decision in *Octavo Investments Pty Ltd v Knight* ('*Octavo*')[2] and the growing development, at least from the 1960s for fiscal reasons,[3] of the use of the so-called 'trading trust' as a vehicle for the conduct of business, in apparent preference to the limited liability company in its own right and in its own interests. This union of trust and company and the interaction of statutory and equitable rules led Professor Ford to refer to the hybrid as a 'commercial monstrosity'.[4]

More recent growth of superannuation savings, managed superannuation funds, and the statutory and regulatory frameworks of superannuation trusts, as well as managed investments schemes,[5] mandate close attention to equitable principle and to relevant statutes, and to the interrelationship between the two.

For 38 years, with an intervening Australian Law Reform Commission ('ALRC') report,[6] the 'commercial monstrosity' has given life to a body of jurisprudence requiring the careful conceptualisation and expression of legal, statutory and equitable concepts. Judgments have been written by eminent commercial and equity judges. The High Court has, on a number of occa-

[1] HAJ Ford, 'Trading Trusts and Creditors' Rights' (1981) 13(1) *Melbourne University Law Review* 1.

[2] (1979) 144 CLR 360 ('*Octavo*').

[3] See Law Reform Commission, *General Insolvency Inquiry* (Report No 45, 1988) vol 1, 108–9 [239]–[242] ('*Harmer Report*').

[4] Ford (n 1) 1.

[5] See Australian Prudential Regulation Authority, *Statistics: Quarterly Superannuation Performance March 2019* (Report, 28 May 2019) <https://www.apra.gov.au/sites/default/files/quarterly_superannuation_performance_statistics_march_2019.pdf>, archived at <https://perma.cc/5HK6-7MDN>.

[6] *Harmer Report* (n 3).

sions, contributed to the development of the jurisprudence.[7] Recently, in *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* ('*Re Amerind*'),[8] in an appeal from a five-member Bench of the Victorian Court of Appeal,[9] in three separate but broadly conforming judgments, the High Court has settled, hopefully once and for all, the major disputes that divided Supreme Courts in the 1980s and 1990s — which appeared to be settled by the end of the first decade of the 21st century, and which then erupted once again in the second decade of this century.

II Equity, Statute and Company Law

Equity, equitable principle and statute lie at the heart of company law. The genius of the 19th century development of the limited liability company as an institution that mixed contract, fiduciary loyalty and capitalist risk-taking has always called for a command of legal skills that encompass the common law, equity and statute.

A *Principles of Equity*

Equity and equitable principle have a justification and coherence that is not merely historical and rooted in the organisation of English courts of centuries past. A conception of equity is an inhering part of any civilised system of law and justice. It involves the adaption of the general rule to the circumstances of the case informed by equity's principles.[10] As a body of law directed to, and concerned with, the conscience of parties — in particular with fraud, accident and mistake — equity maintained, through particular application to the relationships of the parties before it, the requirements of justice, fairness and conscionable conduct.

The distinctiveness of equity is a reflection of law's inherent societal and human character, affected by the deep and complex relationships of rule, principle and values. Equity is the part of the legal fabric that ameliorates

[7] See, eg, *Octavo* (n 2); *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 ('*Vacuum Oil*'); *ElecNet (Aust) Pty Ltd v Federal Commissioner of Taxation* (2016) 259 CLR 73 ('*ElecNet*'). See also the other cases referred to in this article.

[8] (2019) 93 ALJR 807 ('*Re Amerind*').

[9] *Re Amerind Pty Ltd; Commonwealth v Byrnes* (2018) 54 VR 230 ('*Re Amerind (Court of Appeal)*').

[10] Aristotle, *The Nicomachean Ethics of Aristotle*, tr FH Peters (Kegan Paul, Trench, Trübner, 6th ed, 1895) bk 5, ch 10. See also *Green v The Queen* (2011) 244 CLR 462, 472–3 [28]–[29] (French CJ, Crennan and Kiefel JJ).

hardship of rule, that accommodates structure to justice, and that provides the flexibility of rule and principle to the sometimes competing demands of the occasion, certainty and changing values. As a matter of history in our legal system, equity had a separate existence in a separate body of courts, and so, clear separate institutional coherence. That should be recognised still, not to maintain outdated organisational structures, but to recognise the true sources of different parts of our law, recognition of which assists in coherent legal development.

For instance, I venture to suggest that many of the commercial problems of corporate and financial regulation exposed in the recent Royal Commission[11] would be made more ruthlessly manageable by a full understanding and a daily application of the fiduciary principle, rather than by ever more detailed regulation that has as its (false) working assumption the ability to *define* exhaustively good faith, fiduciary responsibility, and behaviour in good commercial conscience.

Equity and its doctrines are built on maxims and principles. Its informing norms are timeless. They arise from a view as to what ought be the case: equity regards as done, that which ought to be done;[12] and fairness and equality: equality is equity.[13] Notions of fairness and justice and a demand on the person before the court to act, or to have acted, in good conscience, are reflected in equity's concern with fraud, accident and mistake,[14] and with the strength of the demands for faithfulness and confidence in the fiduciary relationship. Its doctrines reflect the interplay of personal obligation, trust and confidence, and the translation of known circumstances and relationships that are subject to doctrine and personal obligation into rights that are expressed and recognised as proprietary in character. Thus, the interest of the cestui que trust was assignable by the early 16th century when an assignment of a chose in action was illegal on the ground of maintenance.[15]

Considerations of the nature of equity affect the technique of its application, as expressed by two masters of equity, Dixon CJ and Kitto J, in *Jenyns v*

[11] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 1 February 2019) vol 1.

[12] JD Heydon, Justice MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 93–7 [3-185]–[3-240].

[13] Ibid 84–7 [3-130]–[3-140].

[14] See ibid 69–74 [3-010]–[3-040].

[15] Austin Wakeman Scott, 'The Nature of the Rights of the *Cestui Que Trust*' (1917) 17(4) *Columbia Law Review* 269, 271; Christopher Saint German, *The Doctor and Student: Dialogues between a Doctor of Divinity and a Student in the Laws of England*, ed William Muchall (Robert Clarke, rev ed, 1886) dialogue II, ch XXII.

Public Curator (Qld),[16] which emphasised the precise identification of all relevant facts being every connected circumstance relevant to the justice of the case.[17]

The passage should not be misunderstood. Equity is not to be viewed as based on personal choice, or mere intuitive human or personal responses. It is a body of doctrine and rules with thematic coherence, directed often at subjects that are abstracted and intricate; but even then, equity and any intricacies or subtleties in doctrine will be informed by the practical realities of the problem at hand, by underlying principles and their purposes, and by the values that underpin them. This relationship of rule, principle and values, especially fairness and justice in the notion of conscience, is no better expressed than by another master of equity, Deane J, in *Muschinski v Dodds*,[18] and his Honour's demand for the application of principle and doctrine, not the 'formless void of individual moral opinion'.[19] Yet his Honour recognised that notions of fairness and justice 'remain relevant to the traditional equitable notion of unconscionable conduct which persists as an operative component of some fundamental rules or principles of modern equity'.[20]

The subtleties in the formation and application of equitable doctrine often arise from the nature of the process of characterisation, which was discussed by Dixon and Evatt JJ in *Attorney-General (NSW) v Perpetual Trustee Co Ltd*[21] in the context of ascertaining a general charitable intention.[22] This process of characterisation[23] is related to, but different from, the creation of taxonomical categories. Taxonomy and organisational structure of categories have their important place, but there is an ever-present danger that taxonomy and categories will direct or drive conclusions through mechanical application, rather than merely assisting to organise principles to reach conclusions by

16 (1953) 90 CLR 113.

17 Ibid 118–19.

18 (1985) 160 CLR 583 ('*Muschinski*').

19 Ibid 616, quoting *Carly v Farrelly* [1975] 1 NZLR 356, 367 (Mahon J).

20 *Muschinski* (n 18) 616.

21 (1940) 63 CLR 209.

22 Ibid 226–7, quoted in Justice WMC Gummow, *Change and Continuity: Statute, Equity, and Federalism* (Oxford University Press, 1999) 18–19.

23 See Chief Justice James Allsop, 'Characterisation: Its Place in Contractual Analysis and Related Enquiries' (Speech, Contracts in Commercial Law Conference, 18–19 December 2015); Chief Justice James Allsop, 'The Law as an Expression of the Whole Personality' (Sir Maurice Byers Lecture, Maurice Byers Centenary Conference, 1 November 2017) [22], [44].

reference to principle.[24] Sometimes this is done in the name of simplicity, or clarity, or certainty. Further, the sometimes elusive distinction between defined rule and operative principle, and the related distinction between construction and characterisation, can be important in analysis and articulation of equitable concepts and doctrine. One can see this in the conceptualisation of equitable rights and the availability of equitable remedies, and the relationship between the two in the coming into existence or recognition of equitable proprietary interests, as distinct from lesser forms of equities.[25] The proper characterisation of rights of a residuary legatee in an unadministered estate in *Livingston v Commissioner of Stamp Duties (Qld)* ('*Livingston*'),[26] of a beneficiary under a discretionary trust in *Gartside v Inland Revenue Commissioners*,[27] of a mortgagor seeking to set aside a fraudulent sale by the mortgagee in *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* ('*Latec Investments*'),[28] of a company's continuing (beneficial) ownership of company assets in a winding-up in *Franklin's Selfserve Pty Ltd v Federal Commissioner of Taxation*[29] and *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)*,[30] and of the purchaser's or option holder's interest after contract,[31] are all examples of the analysis and characterisation of equitable conceptions. The danger lies in moving from the process of characterisation from the facts of a concrete legal problem to creating a defined category therefrom, with abstracted defined elements, which category will drive further analysis by mechanical general application. The danger is to be appreciated by recognising, as shown by *Latec Investments*, that an equitable right may be characterised differently depending on the context.[32]

In *Livingston*, in the High Court, Kitto J discussed this process with great illumination.[33] The issue was the proper characterisation of the rights of a

[24] See Heydon, Leeming and Turner (n 12) 123–4 [4-155].

[25] Ibid.

[26] (1960) 107 CLR 411 ('*Livingston*'), affd (1964) 112 CLR 12 (Privy Council) ('*Livingston (Privy Council)*'). See generally ibid 109–24 [4-030]–[4-160].

[27] [1968] AC 553. See generally Heydon, Leeming and Turner (n 12) 114–16 [4-075]–[4-080], 118–19 [4-115], 132–3 [4-220].

[28] (1965) 113 CLR 265 ('*Latec Investments*'). See generally Heydon, Leeming and Turner (n 12) 114–37 [4-165]–[4-260].

[29] (1970) 125 CLR 52.

[30] (2005) 220 CLR 592 ('*Linter Textiles*'). See also *ElecNet* (n 7).

[31] See, eg, *Lake Macquarie City Council v Luka* (1999) 106 LGERA 94 (New South Wales Court of Appeal).

[32] Such as for being devisable or for priorities: *Latec Investments* (n 28) 289–91 (Menzies J).

[33] *Livingston* (n 26) 448–54.

residuary legatee in an unadministered estate for probate duty purposes. The analysis over six pages is penetrating, but it begins by the rejection, as unhelpful for a starting point, of a debate based on a priori abstraction of the nature of rights in equity as in personam or in rem, and the arbitrary and abstracted categorisation such debate produced.[34] That debate had been between and among the finest of scholars: Pound, Scott, Hohfeld, Maitland, Ames, Langdell, Pomeroy, Austin and others.[35] It was a debate that reflected the richness of equity jurisprudence in the United States and England in the late 19th and early 20th centuries. The marvellous article by Scott in 1917[36] illuminates the interplay between the internal relationship of the trust based on faithfulness and Cardozo CJ's 'punctilio of an honor the most sensitive'[37] and the property entrusted, and how this is affected by the context of the practical and concrete legal problem that calls forth the analysis. The trustee is the buffer between the world and the beneficiary.[38] Faithful duty by the trustee is not the beneficiary's only protection. Rights of the character of property in the beneficiary will be recognised to protect it externally, against the world.[39] But while faithfulness is the trustee's obligated honour, it is within a relationship. The relationship generates the trustee's protections, including the right of indemnity out of the property, in a form that gives the trustee and its creditors protection conformable with the nature and character of the relationship.

[34] Ibid 448–9.

[35] See, eg, Roscoe Pound, *Interpretations of Legal History* (Cambridge University Press, 1923) 158–60; Roscoe Pound, 'Book Review: The Distinctions and Anomalies Arising Out of the Equitable Doctrine of the Legal Estate' (1913) 26(5) *Harvard Law Review* 462, 462–4; Scott (n 15); Wesley Newcomb Hohfeld, 'The Relations between Equity and Law' (1913) 11(8) *Michigan Law Review* 537; Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) *Yale Law Journal* 710, 767–70; FW Maitland, *Equity: A Course of Lectures*, eds AH Chaytor, WJ Whittaker and John Brunyate (Cambridge University Press, 2nd rev ed, 2011) 23–42; James Barr Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (Harvard University Press, 1913) 76, 197; CC Langdell, 'A Brief Survey of Equity Jurisdiction' (Pt 1) (1887) 1(2) *Harvard Law Review* 55. See generally John Norton Pomeroy and John C Mann, *A Treatise on the Specific Performance of Contracts* (Banks & Company, 3rd ed, 1926); John Austin, *Lectures on Jurisprudence*, ed Robert Campbell (John Murray, 5th rev ed, 1885) vol 1, 364–92.

[36] Scott (n 15).

[37] *Meinhard v Salmon*, 164 NE 545, 546 [2] (NY, 1928).

[38] Scott (n 15) 290.

[39] Ibid.

B *Statute, the Common Law and Equity*

The relationship between statute and the general law is often directed to the common law and statute. In 1908, Pound discussed different ways in which courts address legislative innovation: first, by absorption into the body of law as affording not only a rule, but also a principle from which to reason; secondly, by recognising it as a rule, but refusing to use it as a principle from which to reason; and thirdly, by recognising it as a rule, but only applying it strictly and narrowly.[40] The latter two approaches reflect a view of statute as the 'alien intruder' to the common law system.[41] Pollock, for instance, 'saw the common law as a self-contained, scientific system' of some beauty.[42] But, as Justice Leeming points out in a valuable paper, equity was different: it did not '[regard] itself as a self-sufficient system of principle'.[43] Except in some areas of its exclusive jurisdiction, equity's premise was the existence of rules calling for amelioration, adjustment or supplementation.[44] Equity thus did not see intrusion by statute in the same defensive way. New statutes were responded to as were any other rules: by amelioration or supplementation by equitable principle, to the extent necessary. So, the *Statute of Frauds* and its salutary public policy objectives (of lessening the risk of one kind of fraud) would not be permitted to be used to create another type of fraud: hence, the doctrine of part performance.[45] Statute and equity are thus constitutionally adapted to harmony and coherence.

At the centre of the debate that we are about to discuss is a statute.[46] The legislature has for many years set out an order of priorities that is to obtain in

[40] Roscoe Pound, 'Common Law and Legislation' (1908) 21(6) *Harvard Law Review* 383, 385. See also *Jones v Matrix Partners Pty Ltd; Re Killarnee Civil & Concrete Contractors Pty Ltd (in liq)* (2018) 260 FCR 310, 340–1 [119] (Allsop CJ) ('*Re Killarnee*') and the cases and articles cited therein.

[41] Harlan F Stone, 'The Common Law in the United States' (1936) 50(1) *Harvard Law Review* 4, 15 ('a statute is not an alien intruder in the house of the common law'), quoted in Justice Mark Leeming, 'Equity: Ageless in the "Age of Statutes"' (2015) 9(2) *Journal of Equity* 108, 123 ('Equity'). See generally Justice Mark Leeming, 'Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room' (2013) 36(3) *University of New South Wales Law Journal* 1002 ('Development of the Common Law').

[42] Leeming, 'Equity' (n 41) 123. See, eg, Frederick Pollock, 'The Continuity of the Common Law' (1898) 11(7) *Harvard Law Review* 423.

[43] Leeming, 'Equity' (n 41) 124.

[44] Ibid.

[45] Leeming, 'Development of the Common Law' (n 41) 1008.

[46] *Corporations Act 2001* (Cth) ('*Corporations Act*'). The cases discussed in this article often concern similar insolvency regimes which predated the *Corporations Act*.

a winding-up.[47] Those priorities reflect public policy, some of which is longstanding. No aspect of those policies offends equitable values or principles. One such policy, the protection of the rights and interests of employees in the insolvency of the employer, has long been a subject of parliamentary concern.[48] That concern reflects a fundamental value of equity in the protection of the vulnerable. The section applies to 'property of the company', a phrase defined in the widest way to include any legal or equitable estate or interest whatsoever.[49] Though, of course, it is accepted that the phrase does not include property that is wholly beneficially owned by another, which the company holds on trust for another.

The coming discussion will see the difficulties that have been perceived, notwithstanding the width of the definition of property, in accommodating equitable principle to the tolerably simple language of the statute.

III The Cases

A Octavo Investments Pty Ltd v Knight

Let me begin the journey of the cases. *Octavo* was a straightforward preference case, if one ignores the trust element. The debtor, Coastline, carried on a frozen food distribution business, unsuccessfully. It was wound up in insolvency.[50] In the months prior to liquidation and within the preference period, Coastline made payments to a creditor, Octavo, being a company owned by Coastline's five directors. The effect was to give Octavo a preference. No statutory defence applied. Too simple, one would have thought. But Coastline had carried on business as trustee of a trust for the benefit of five family companies associated with the five directors. There was one trust, and all creditors could be described as trust creditors — that is creditors of the trustee, Coastline — arising in the proper carrying on of the business of the trust. Again, too simple. Three arguments were put. We only need to focus upon the first: that all property in Coastline's hands was trust property and so did not answer the description in s 116 of the *Bankruptcy Act 1966* (Cth) of

[47] See, eg, ibid ch 5 pt 5.6 div 6 sub-div D.

[48] For a detailed analysis of the law and policy regarding employee entitlements in insolvencies, see Helen Anderson, *The Protection of Employee Entitlements in Insolvency: An Australian Perspective* (Melbourne University Press, 2014).

[49] See *Corporations Act* (n 46) ss 9 (definition of 'property'), 513AA, 555, 559, 561.

[50] For the facts of the case discussed in this paragraph, see *Octavo* (n 2) 363–4 (Stephen, Mason, Aickin and Wilson JJ).

'property divisible among the creditors of the bankrupt'.[51] Whilst the rebuttal of the arguments began with the statement that '[w]e do not understand the general principles concerning the bankruptcy of a trading trustee to be in dispute',[52] it was the subtlety of some of those general principles and of their particular application that have given rise to differences of opinion over nearly 40 years. The principles expressed in *Octavo* were as follows. A trustee who, in discharge of the trust, enters business transactions, is personally liable for debts incurred in those transactions.[53] The trustee is entitled to be indemnified against those liabilities from the trust assets and possesses, for enforcement of the right, a charge or right of lien over the whole of the trust assets, unless the terms of the trust qualify that right or lien.[54] The trustee may also have a right of indemnity against the beneficiaries personally. Thus, not only do the beneficiaries have a beneficial interest in the trust assets, but so also does the trustee in the supporting lien or charge. This beneficial interest of the trustee takes precedence over the interests of the cestuis que trust, who cannot call for a distribution of trust assets until the trustee's beneficial interest has been satisfied.[55] The rights of the (trust) creditors with respect to trust assets are limited. There is no right in the creditors to take the assets in execution,[56] but in the event of the insolvency of the trustee 'the creditors [are] subrogated to the beneficial interest enjoyed by the trustee'.[57] Their Honours then said that '[t]hese principles lead naturally to the conclusion that the beneficial interests which, by subrogation, the creditors … have in the assets held by a bankrupt trustee form part of the property of the bankrupt divisible amongst his creditors'.[58]

[51] This, of course, was at a time when the *Corporations Act* (n 46) adopted, mutatis mutandis, certain provisions of the *Bankruptcy Act 1966* (Cth) ('*Bankruptcy Act*') for some consequences of insolvency.

[52] *Octavo* (n 2) 367 (Stephen, Mason, Aickin and Wilson JJ).

[53] Ibid, citing *Vacuum Oil* (n 7).

[54] *Octavo* (n 2) 367 (Stephen, Mason, Aickin and Wilson JJ), citing *Vacuum Oil* (n 7); *Dowse v Gorton* [1891] AC 190.

[55] *Octavo* (n 2) 367 (Stephen, Mason, Aickin and Wilson JJ), citing *Vacuum Oil* (n 7).

[56] *Octavo* (n 2) 367 (Stephen, Mason, Aickin and Wilson JJ), citing *Savage v Union Bank of Australia Ltd* (1906) 3 CLR 1170, 1186 (Griffith CJ) ('*Savage*'), *Re Morgan; Pillgrem v Pillgrem* (1881) 18 Ch D 93.

[57] *Octavo* (n 2) 367 (Stephen, Mason, Aickin and Wilson JJ), citing *Vacuum Oil* (n 7), *Ex parte Garland* (1804) 10 Ves Jr 110; 32 ER 786, 789 (Eldon LC).

[58] *Octavo* (n 2) 367–8 (Stephen, Mason, Aickin and Wilson JJ), citing *Savage* (n 56) 1188 (Griffith CJ), *Jennings v Mather* [1901] 1 QB 108, 116 (Kennedy J), *Governors of St Thomas's Hospital v Richardson* [1910] 1 KB 271.

The proper conceptualisation of this right of indemnity and of the interest therefrom is central to appreciating what are ultimately different metaphors or thought structures of equitable rights that impinge directly on how the statute applies.

Returning to *Octavo*, the second and third arguments need not detain us.[59] The first argument was central: the money paid by way of preference was trust property and so was not from property divisible among creditors. This proposition and its implications has and have resonated for 40 years. Their Honours accepted that a proper description of the assets of the trading trust could be 'trust property', but it was inadequate in circumstances where the trustee was entitled to be indemnified against the liabilities out of trust property, and for that purpose was 'entitled to retain possession of the property as against the beneficiaries'.[60] The trustee's interest in the trust property amounted to a proprietary interest.[61] The trustee's interest in that property passed to the trustee in bankruptcy for the benefit of all creditors of the trust.[62] That the creditors could not take the property in execution did not matter. They were 'subrogated to the rights of the trustee' and in bankruptcy 'those rights … are to be realized *in their favour*'.[63] Here one finds involved the competing elements of the conceptualisation or metaphor — the right or power of indemnity, the proprietary interest in trust assets, and the origins of the rights in the trust relationship.

A number of issues left unclear or undecided were to inform the differences between judges over the succeeding years, in particular: the nature of the right of indemnity; the nature of the lien or charge or proprietary interest in the trust assets; the relationship or connection between the two; the significance of the trustee's interest in the trust property being such as to pass to the trustee in bankruptcy; and the significance of the trustee being trustee

[59] The second argument can be put to one side as a matter of construction. The phrase 'from his own money' did not describe an element of the impugned transaction, but was part of the description of the insolvent condition of the debtor: *Octavo* (n 2) 368 (Stephen, Mason, Aickin and Wilson JJ), discussing *Bankruptcy Act* (n 51) s 122(1). Alternatively, 'from his own money' may well have been satisfied by paying out of trust assets in respect of which the trustee has the legal estate and also a beneficial interest to secure the right of indemnity: *Octavo* (n 2) 369 (Stephen, Mason, Aickin and Wilson JJ). The third argument focused on the surrender of the right of indemnity as the true source of complaint, not the payment. This was rejected: it was the payment that denied the liquidator access to the charge.

[60] *Octavo* (n 2) 369–70 (Stephen, Mason, Aickin and Wilson JJ).

[61] Ibid 370.

[62] Ibid.

[63] Ibid (emphasis added).

of more than one trading trust, or having its own non-trust business. One aspect of the right of indemnity that was not drawn out in *Octavo* was the important distinction to be made by reference to whether the trustee had already paid the creditor before utilising the right of indemnity. If it had, it was recouping itself from the funds; if it had not, it was reaching into trust assets to exonerate itself of personal liability. To this we will return.

Professor Ford was critical of the characterisation in *Octavo* of the right of exoneration as a proprietary interest.[64] Whilst the right of recoupment was personal and a right of property, he saw the right of exoneration as a fiduciary power to apply trust property to pay trust debts.[65] This way of looking at the matter was the fault line of the debate only recently resolved by the High Court.

B Re Byrne Australia Pty Ltd and the Companies Act

The first problem arose in 1981 in New South Wales in relation to the costs of the liquidator in *Re Byrne Australia Pty Ltd and the Companies Act* ('*Re Byrne*')[66] and *Re Byrne Australia Pty Ltd and the Companies Act [No 2]* ('*Re Byrne [No 2]*').[67] The trustee was a company that had unsuccessfully carried on a building business under a deed providing for a discretionary trust for the benefit of two families. Only one business had been carried on; the claims of all creditors arose from the carrying on of that one business. The only other claims arose from the costs of the liquidation, including the remuneration of the liquidator. The liquidator (represented by junior counsel, Mr WMC Gummow) submitted (relying on *Octavo*) that the company had property (the proceeds of the right of indemnity) to be applied in accordance with s 292 of the *Companies Act 1961* (NSW) (the first priority being the costs and expenses of the winding-up and remuneration of the liquidator).[68] Needham J (a highly experienced equity and companies judge) focused on the restriction of the use of the funds from the exercise of the right of indemnity for the benefit of trust creditors. That the right of indemnity and the charge or lien were property of the company did not mean that by their exercise the

[64] Ford (n 1) 4–5.

[65] Ibid.

[66] [1981] 1 NSWLR 394 ('*Re Byrne*').

[67] [1981] 2 NSWLR 364 ('*Re Byrne [No 2]*').

[68] *Re Byrne* (n 66) 396–7 (Needham J).

trust assets could be used to pay non-trust debts.[69] Thus, for the liquidator to obtain payment for his costs he would have to show that he was a trust creditor in that regard. This he failed to do in *Re Byrne [No 2]*.[70]

Re Byrne and *Re Byrne [No 2]* were decisions of great practical significance. Liquidators of such trustee companies might be left without means of payment for their important tasks of administration. Likewise, the petitioning creditor who spends funds to wind up the company (qua company, not qua trustee) may also be left high and dry.

C Re Enhill Pty Ltd

Six months after *Re Byrne [No 2]*, in June 1982, the Full Court of the Victorian Supreme Court convened in *Re Enhill Pty Ltd* ('*Re Enhill*')[71] to deal with the practical and urgent problem caused by *Re Byrne*. The Bench was distinguished. It included the Chief Justice (Sir John Young) and Sir George Lush. *Re Byrne* was not followed. Importantly for later disputes, the solution was not found in the proper construction of the statute, but in the consideration of (and disagreement about) equitable principle.

Once again, the problem concerned an unsuccessful small business carried on by a corporate trustee. Again, the corporate trustee carried on no business on its own account.[72] It owed the Commissioner of Taxation a (priority) debt and was wound up in insolvency on the petition of that creditor. Its only assets were trust assets. There were other (trust) creditors. The company was hopelessly insolvent, having assets of only about $7,000, a (priority) debt to the Commissioner of $23,000 and other (trust) creditors of $70,000. The liquidator's costs were $2,500. If the result in *Re Byrne* was correct, the liquidator and petitioning creditor were at risk for their costs (including remuneration). The Court differed from Needham J in *Re Byrne* at the critical point of the freedom to use the proceeds of the exercise of the right of indemnity.

The funds — being the proceeds of the exercise of the right — were free of constraint from their origins as trust property and available to pay any creditor, subject to one qualification.[73] The qualification was that the position

[69] Ibid 399.

[70] *Re Byrne [No 2]* (n 67) 367 (Needham J).

[71] [1983] 1 VR 561 ('*Re Enhill*').

[72] For the facts of the case discussed in this paragraph, see ibid 562 (Young CJ).

[73] Ibid 564.

might be different if the party from whom the trustee derives the indemnity is concerned with the application of the money which it pays.[74] The judgments saw the right of indemnity and its proceeds as personal to the trustee and any restriction upon the trustee or their trustee in bankruptcy, as suggested in *Re Byrne*, as elevating the unsecured trust creditors to a position of security vis-à-vis general non-trust creditors.[75] Lush J made the important point that the trustee may have already paid the creditors from his own property, and the right of indemnity being then one of recoupment.[76] Undoubtedly, the right of indemnity in that circumstance is a purely personal right. The point, however, was used to characterise the right of indemnity (as an undifferentiated conception) as purely personal property in any circumstance, including where the trustee had not already paid the trust creditor and was seeking exoneration directly from the trust assets.

D Re Suco Gold Pty Ltd (in liq)

Within six months (in February 1983), the debate moved to Adelaide, when argument took place in *Re Suco Gold Pty Ltd (in liq)* ('*Re Suco Gold*')[77] before the Full Court[78] in which *Re Enhill* was challenged. Once again in an application for directions, the focus was upon the costs and expenses of the liquidator and the costs of the petitioning creditor, this time in the context of the corporate trustee having carried on two trusts of two mining businesses, with creditors for such separate trust business. The reasons of King CJ have assumed particular importance in later cases, and received approval in *Re Amerind*.[79] Once again, *Octavo* was the starting point. The Chief Justice agreed with the primary analysis of equitable principle by Needham J in *Re Byrne* and fundamentally disagreed with the analysis of principle by Young CJ and Lush J in *Re Enhill*.[80] The core of the Chief Justice's opinion, vindicated in

[74] Ibid, citing *Re Law Guarantee Trust and Accident Society Ltd; Liverpool Mortgage Insurance Co's Case* [1914] 2 Ch 617, 633 (Buckley LJ) ('*Liverpool Mortgage*'). Buckley LJ was making a point of distinction with *Re Richardson; Ex parte Governors of St Thomas's Hospital* [1911] 2 KB 705 ('*Re Richardson*').

[75] *Re Enhill* (n 71) 563–5 (Young CJ), 567, 571–2 (Lush J).

[76] Ibid 569.

[77] (1983) 33 SASR 99 ('*Re Suco Gold*').

[78] King CJ, Jacobs and Matheson JJ.

[79] See *Re Amerind* (n 8) 822 [42]–[43] (Kiefel CJ, Keane and Edelman JJ), 833–4 [95]–[97] (Bell, Gageler and Nettle JJ), 844–5 [169]–[172] (Gordon J).

[80] *Re Suco Gold* (n 77) 108–10.

Re Amerind, was derived from the distinction clearly drawn by Stirling J in *Re Blundell; Blundell v Blundell*[81] in 1888 between the right of recoupment and the right of exoneration. The latter was expressed by the Chief Justice to be the entitlement 'to resort to the trust property *for the purpose of discharging the liability* thereby freeing his personal estate from the burden of the liability'.[82] The Chief Justice described the approach in *Re Enhill* as 'in conflict with fundamental principles of the law of trusts'.[83] The Chief Justice was clear that if the trustee has not already paid the creditor then its right of access to trust property is limited to the purpose derived from the trust — to pay trust creditors.[84] The Chief Justice expressed the matter in a way that was to resonate in the High Court judgments in *Re Amerind*:

> If he takes trust property into his possession to satisfy his right to be indemnified in respect of unpaid trust liabilities … 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.[85]

Important to understanding the later differences of opinion about the operation of the statutory priority provisions is the conceptualisation of what the trustee or liquidator receives when the right of exoneration is exercised: whether it is trust property or whether it is property reflecting the trustee's own proprietary interest (properly understood in nature and character) in the trust property. The answer to this question of conceptualisation or characterisation is illuminated by Professor Ford's difficulty with *Octavo*. Is it (as Professor Ford thought) a power to use someone else's assets — that is, trust assets to pay trust debts — or is it a proprietary right to use your own interest in the assets in which the beneficiaries are also interested to pay trust debts?

[81] (1888) 40 Ch D 370, 376–7.

[82] *Re Suco Gold* (n 77) 105 (emphasis added).

[83] Ibid. In so saying, King CJ (at 105–9) preferred (as Needham J had in *Re Byrne* (n 66) 398) the reasoning of the Court of Appeal (England and Wales) in 1911 in *Re Richardson* (n 74) and of the New Zealand Court of Appeal in *Official Assignee v Jarvis* [1923] NZLR 1009 to found the general proposition that the trustee (and so their trustee in bankruptcy or its liquidator) was bound to use the proceeds of the exercise of the right of exoneration to pay the trustee creditors. This was in preference to the view of Young CJ in *Re Enhill* (n 71) 564 that, as a general rule, there was no such limitation on uses of the funds, based on *Liverpool Mortgage* (n 74) 633 (Buckley LJ).

[84] *Re Suco Gold* (n 77) 107–8.

[85] Ibid 108.

Returning to *Re Suco Gold*, the Chief Justice then applied these principles to the context of two trading trusts.[86] The proceeds of the right of exoneration were to be dealt with separately for each trust, *as separate funds* within one liquidation, but (and this is where King CJ diverged from *Re Byrne [No 2]*) each such fund was governed by the order of priorities in s 292 of the *Companies Act 1962* (SA). The priority creditors were paid according to the statutory order and non-priority trust creditors ranked thereafter pari passu. If there was an unpaid balance for the latter, they would rank for a dividend out of any general assets of the company.[87] The Chief Justice did not refer to it, but if there were general assets and general creditors, the principles of hotchpot would have to be considered if unsecured trust creditors had access to two funds (the proceeds of the right of exoneration and general assets) while unsecured general creditors only had access to one fund (general assets).[88]

In relation to the liquidator's costs, King CJ (disagreeing with *Re Byrne [No 2]*) characterised the liquidator's and petitioner's costs and expenses as trust debts, since they were necessary for the liquidation, which was, in turn, necessary for the payment of the trust debts incurred properly in the carrying on of the trust.[89]

Jacobs J agreed with the Chief Justice, but he added some comments that focused more closely than King CJ on the statute, construing s 292 as not being restricted to operating only upon funds available for the creditors generally, but as operating also upon funds derived from the exercise of the right of exoneration.[90] Jacobs J saw the manifest intention in s 292 to pay the identified priority debts out of assets of the company, which included assets produced by the exercise of the right of exoneration.[91] So, even if the liquidator's and petitioning creditor's costs were not trust debts, and even if all the assets in the hands of the liquidator were derived from trust assets through

[86] Ibid 109–10.

[87] Of which there were none in this case: ibid.

[88] For the working out of a simple example, see JD Heydon and Justice MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) 523 [21-15]. In an analogous situation, see *Akers v Deputy Commissioner of Taxation* (2014) 223 FCR 8, 40–2 [134]–[140] (Allsop CJ).

[89] *Re Suco Gold* (n 77) 110. The trust business and the payment of its debts could not be wound up and paid without a liquidator and a petitioning creditor, and they must incur costs. Section 292 of the *Companies Act 1962* (SA) provided for these costs as debts of the company. They were to be seen as necessary for the discharging (to completion) of the duties imposed by the trust deed, and so debts of the company characterised as trust debts.

[90] *Re Suco Gold* (n 77) 111–13.

[91] Ibid 113, 115.

the exercise of the right of exoneration, the statute required a type of debt to be paid and paid in priority to other creditors entitled to the fund. This view of the manifest intention of the statute found favour in *Re Amerind*.[92]

IV Developments in the Intervening Years

This less than satisfactory contemporaneous position began to stabilise in the 1980s and 1990s, but not without uncertainties. There was a broad view (except in Victoria) as to the correctness of *Re Byrne* and *Re Suco Gold* about the operation of equitable restrictions on the use of funds from the exercise of the right of exoneration.[93] With this there seemed to be acceptance of the analysis of King CJ regarding the need for multiple funds to be administered in one liquidation should there be more than one trust business or a non-trust business in addition to a trust business.[94] There appeared to be general acceptance of the analysis of King CJ as to why liquidator's costs and expenses were, or could be, characterised in whole or in part as trust debts.[95] There was also some acceptance, though not without controversy, that the statutory order of priorities was applicable to funds derived from the exercise of the right of exoneration.[96] That controversy came from the view amongst respected commentators that the statutory order was limited to funds generally available for distribution amongst all creditors, and did not apply to funds produced by the right of exoneration.[97]

As luck would have it, there came just at the right time the assistance of the ALRC.[98] In August 1987, the Commission published a discussion paper and

[92] *Re Amerind* (n 8) 831–3 [91]–[99] (Bell, Gageler and Nettle JJ).

[93] See Heydon and Leeming (n 88) 522 [21-14]. See also Justice BH McPherson, 'The Insolvent Trading Trust' in PD Finn (ed), *Essays in Equity* (Law Book, 1985) 142, 153; *Re ADM Franchise Pty Ltd* (1983) 7 ACLR 987, 988–9 (McLelland J) (Supreme Court of New South Wales) ('*Re ADM*').

[94] See Heydon and Leeming (n 88) 523 [21-15]; *13 Coromandel Place Pty Ltd v C L Custodians Pty Ltd (in liq)* (1999) 30 ACSR 377, 384–6 (Finkelstein J) (Federal Court of Australia) ('*13 Coromandel Place*').

[95] *Re ADM* (n 93) 988–9 (McLelland J); *Re Indopal Pty Ltd* (1987) 12 ACLR 54, 57 (McLelland J) (Supreme Court of New South Wales); *Sjoquist v Rock Eisteddfod Productions Pty Ltd* (1996) 19 ACSR 339, 343 (McLelland CJ in Eq) (Supreme Court of New South Wales); *13 Coromandel Place* (n 94) 383–4 (Finkelstein J).

[96] *Re ADM* (n 93) 989 (McLelland J), citing *Re Suco Gold* (n 77).

[97] Heydon and Leeming (n 88) 523 [21-15]; McPherson (n 93) 154.

[98] On 20 November 1983, the Attorney-General of the day (Gareth John Evans AC QC) accepted the suggestion of the ALRC to set up a general reference on insolvency: *Harmer*

in late 1988 it published a final report.[99] The Commissioners were distinguished lawyers and practitioners.[100] In separate chapters on corporate trading trusts in both the discussion paper and report, and in six simple suggested statutory provisions, the Commission attended to all relevant points of difficulty. The Commission recognised that the difficulties involved in the fusion of the two institutions (company and trust) were not limited to the debate in *Re Byrne*, *Re Enhill* and *Re Suco Gold*,[101] and also the difficulties in determining the appropriate principles to be applied in distributing property in the hands of the liquidator.[102]

The recommendations for statutory reform were simple and concise. Relevantly for present purposes, the payment of debts out of the proceeds of the right of indemnity was simply provided for effectively by recognising the statutory order.[103] There was a helpful suggestion dealing with circumstances where the company had been trustee of more than one trust that provided that if the regime was 'inappropriate or impracticable or would result in injustice', the Court would be able to 'make such order as [was] just, including an order modifying the application of [the provisions]'.[104] None of the recommendations were taken up. One can only wonder why, given the calibre of the Commissioner, their assistants and consultants.[105]

Report (n 3) vol 1, 3–4; Law Reform Commission, *Insolvency: The Regular Payment of Debts* (Report No 6, November 1977) xi.

99 Law Reform Commission, *General Insolvency Inquiry* (Discussion Paper No 32, August 1987) ('*Harmer Discussion Paper*'); *Harmer Report* (n 3).

100 The Commissioner-in-charge was Mr Ron Harmer; his Assistant Commissioners were Mr Richard Fisher, Professor Michael Chesterman and, until late 1985, Sir Maurice Byers and Professor David St Leger Kelly. Consultants included Professor Bob Baxt, Professor Harold Ford, Justice Bruce McPherson, Professor James O'Donovan, and Mr (later Justice) Neville Owen, amongst other distinguished and expert consultants: *Harmer Report* (n 3) vol 1, xxxvi–xxxvii.

101 There was also the uncertainty about the powers of liquidators to administer, after winding-up, the affairs of the trust, as well as of the company: ibid vol 1, 108 [240], 110–11 [246]. For instance, a trust deed may operate to deny the capacity of the trustee to act once winding-up commenced. There was the position of creditors who may not be entitled to look to the trustee's indemnity because of a limitation in the trust deed.

102 Ibid vo1 1, 109 [240], 116 [262].

103 Ibid vol 1, 117 [265].

104 Ibid vol 2, app A, 65.

105 The failure to adopt any of the suggestions left the following problems. First, on the authority of a single-judge decision in New South Wales, a liquidator could administer trust property if the company in liquidation continued as trustee because the 'affairs' of a company were the totality of its affairs, including affairs as trustee. However, if the company's position as trustee ceased with winding-up, as provided for in many trust deeds, questions of authority over the

For many years, we all muddled along. In Victoria, *Re Enhill* was followed. Elsewhere, *Re Suco Gold* was followed. The debate about the statutory order of priorities festered. Some of the above problems began to work themselves into some order, such as the principles for the payment of liquidator's costs from trust and non-trust assets.[106]

Meanwhile, the High Court in *Chief Commissioner of Stamp Duties (NSW) v Buckle* ('*Buckle*') in 1998,[107] *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* ('*CPT Custodian*') in 2005,[108] and *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* ('*Bruton Holdings*') in 2009[109] clarified the nature of the trustee's right of indemnity as giving a proprietary interest in the assets subject to the trust: a 'preferred beneficial interest in the trust fund',[110] though not ownership, nor a mere security over the assets.

Then, in 2016 and 2017, the debate erupted again — this time not in relation to the liquidator's costs, but in relation in particular to employee-related liabilities. In February 2016, Brereton J in *Re Independent Contractor Services (Aust) Pty Ltd (in liq) [No 2]* ('*Re Independent Contractor Services [No 2]*')[111] refused to follow *Re Suco Gold* in relation to the statutory regime of priorities applying to the proceeds of the exercise of the right of exoneration. *Re Suco Gold* was said (somewhat over-expansively) to be 'virtually universally accepted to be incorrect', reference being made to text-writers and cases.[112]

trust funds arose. The interests of beneficiaries intruded after any right of exoneration was exercised. Just because the trustee was insolvent did not mean the trust was. Did the liquidator have authority to sell trust assets in the exercise of the right of exoneration? Was there a need for the appointment of a receiver to do so, and if so, in what circumstances? Secondly, the rights of the liquidator and petitioning creditor for their costs were doubtful, both as to recovery and the doctrinal basis therefor. Thirdly, there was real debate about the funds and assets to which the statutory priorities applied. This was not just a matter that concerned the liquidator and the petitioning creditor, but all those interests, especially employees, in the statutory priority list. Fourthly, how would multiple trusts of one insolvent trustee be treated?

106 See *Re AAA Financial Intelligence Ltd (in liq)* [2014] NSWSC 1004, [13] (Brereton J).

107 (1998) 192 CLR 226 ('*Buckle*').

108 (2005) 224 CLR 98 ('*CPT Custodian*').

109 (2009) 239 CLR 346 ('*Bruton Holdings*').

110 *Buckle* (n 107) 247 [51] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ), quoting *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1995) 38 NSWLR 574, 586 (Sheller JA).

111 (2016) 305 FLR 222 (Supreme Court of New South Wales) ('*Re Independent Contractor Services [No 2]*').

112 Ibid 230 [23] (Brereton J), citing (at n 22) Andrew R Keay, *McPherson: The Law of Company Liquidation* (LBC Information Services, 4th ed, 1999) 305–6, McPherson (n 93) 154, Justice JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) 577 [2115], Harold Ford et al, Lawbook, *The Law of Trusts* (online) [14.7310], *Re Kayford Ltd (in liq)* [1975] 1 WLR 279, *Re Staff Benefits Pty Ltd and the Companies Act* [1979]

His Honour's views were followed in 2016 in the Federal Court in *Woodgate; Re Bell Hire Services Pty Ltd (in liq)* ('*Re Bell Hire Services*') by Farrell J;[113] in March 2017 in the Victorian Supreme Court in *Re Amerind Pty Ltd (in liq)* ('*Re Amerind (First Instance)*') by Robson J;[114] in June 2017 in the Federal Court in *Kite v Mooney [No 2]* by Markovic J;[115] and in August 2017 in the Federal Court in a bankruptcy context in *Lane v Deputy Commissioner of Taxation* ('*Lane*') by Derrington J.[116]

In this context, the appeal from *Re Amerind (First Instance)* was assigned five judges,[117] and at about the same time an application for liquidator's directions in the Federal Court in *Jones v Matrix Partners Pty Ltd; Re Killarnee Civil & Concrete Contractors Pty Ltd (in liq)* ('*Re Killarnee*') was assigned three judges in the original jurisdiction.[118]

The appeal from *Re Amerind (First Instance)* was successful. The statutory order of priorities applied.[119] *Re Byrne* in that respect was rejected, as was the line of first instance decisions following *Re Independent Contractor Services*. But there was no expression of preference for *Re Suco Gold* or *Re Enhill* as the foundation for that conclusion. Whether that masked a difference of opinion on the Court need not detain us. Until settled, trial judges in Victoria were instructed to follow *Re Enhill*.

The Full Court of the Federal Court delivered its judgment in *Re Killarnee* three weeks later. There was unanimity that *Re Enhill* was wrong.[120] There was no unanimity, however, as to priorities. I considered *Re Suco Gold* to be correct and that the statutory order of priorities applied.[121] Siopis J considered *Re Independent Contractor Services [No 2]* and following cases to be correct, and that employees ranked pari passu (with no statutory priority) as trust creditors.[122] Farrell J, subject to one consideration, agreed in this respect with

1 NSWLR 207, *Bruton Holdings Pty Ltd v Federal Commissioner of Taxation* (2011) 193 FCR 442, 448–9 [27] (Stone, Jacobson and Edmonds JJ).

113 [2016] FCA 1583, [35] ('*Re Bell Hire Services*').

114 (2017) 320 FLR 118, 141–2 [94] ('*Re Amerind (First Instance)*').

115 (2017) 121 ACSR 158, 195 [140] ('*Kite*').

116 (2017) 253 FCR 46, 93 [144] ('*Lane*').

117 Ferguson CJ, Whelan, Kyrou, McLeish and Dodds-Streeton JJA. See *Re Amerind (Court of Appeal)* (n 9).

118 Allsop CJ, Siopis and Farrell JJ. See *Re Killarnee* (n 40).

119 *Re Amerind (Court of Appeal)* (n 9) 289 [281] (Ferguson CJ, Whelan, Kyrou, McLeish and Dodds-Streeton JJA). See also at 291 [285]–[286].

120 *Re Killarnee* (n 40) 319–20 [30] (Allsop CJ), 348 [174] (Siopis J), 352 [197] (Farrell J).

121 Ibid 335–7 [100]–[102].

122 Ibid 345–6 [150]–[158].

Siopis J.[123] Her Honour did not consider that the statutory order of priorities applied directly, and thus found that the proper order of distribution was as provided by equitable principle.[124] Amending her views in *Re Bell Hire Services*, Farrell J considered that equity should now follow the statute in respect of employees, embodying as it did longstanding public policy.[125]

The three judges in *Re Killarnee* were unanimous as to equitable obligations applying to the proceeds of the right of exoneration to be paid to trust creditors, but were in complete disagreement on the doctrinal basis thereof and the operation of the statute.

The crucial element to understand in the reasoning of all the judges who have refused to follow *Re Suco Gold*, in regard to the application of the statute, is that they viewed the right of exoneration not (as I have been expressing the matter) as producing proceeds in the hands of the liquidator upon the exercise of the right, but rather as dealing with trust assets by directing them to trust creditors.[126] As Derrington J crisply put it in *Lane*:

> Whilst the right of exoneration is property of the bankrupt, it is not capable of being realised so as to create 'proceeds' which might be applied pursuant to [the priority provisions of the statute]. It is merely a limited right to use trust funds to discharge trust debts and that is the only manner in which a bankruptcy trustee may exercise it in the course of the administration of the bankrupt's estate.[127]

This expression of the matter was more than an echo of Professor Ford's view to which I earlier referred.

V Clarification from the High Court

The field awaited the views of the High Court in the *Re Amerind* appeal. The case concerned the affairs of a company, Amerind, which acted as a corporate trustee that had granted a general security deed under which a bank provided

123 Ibid 355–6 [213]–[214].

124 Ibid 352 [201], 355 [212].

125 Ibid 355–8 [214]–[223].

126 See *Re Independent Contractor Services [No 2]* (n 111) 231–2 [24]–[25] (Brereton J); *Re Bell Hire Services* (n 113) [34]–[38] (Farrell J); *Re Amerind (First Instance)* (n 114) 140 [84], 141–2 [92]–[94] (Robson J); *Kite* (n 115) 174–5 [61], 186 [108] (Markovic J); *Re Killarnee* (n 40) 348–9 [174]–[178] (Siopis J), 352–3 [201], 354–6 [211]–[214] (Farrell J).

127 *Lane* (n 116) 53 [5].

credit.[128] The security expressly covered trust assets. The company had no assets in its own right. Receivers were appointed, the assets sold and the bank was paid out. Thereafter the creditors resolved to wind the company up to access the surplus from the asset sales of $1.6 million, representing the proceeds of sale of the inventory. The Commonwealth claimed the surplus as a priority for its payment of wages and entitlements to former employees, in a form of statutory subrogation.

The joint judgment of Bell, Gageler and Nettle JJ had the agreement of Gordon J, who wrote an important concurring judgment.[129]

The starting point of the joint judgment and the rock upon which the judgment is based is the proposition in *Octavo* and *Buckle* that the trustee does not just hold the assets solely for the benefit of the beneficiaries; it has a proprietary interest in the assets.[130] Their Honours referred to a 'practical relationship'[131] between the right of indemnity and the legal powers of ownership of the trustee. A trustee has all the legal powers of ownership subject to its obligations from, and the powers of beneficiaries to compel compliance with, the terms of the trust.[132] The beneficiaries will receive aid in enforcement of their rights such that they will be described as having a beneficial interest, sometimes beneficial ownership, of trust assets.[133] But, importantly, it is wrong to conceive of the beneficiaries' interest as cut out (as if physically) from the trustee's legal estate. If one is to conceptualise by metaphor, the beneficiaries' interest is engrafted onto the trustee's legal ownership as a restriction on the manner in which it can deal with the assets.[134] Fundamental to understanding the problem is the correct conceptualisation of the trust, beneficial interests, and the relationship between

[128] For the facts of the case discussed in this paragraph, see *Re Amerind* (n 8) 813–14 [4]–[8], 816 [19] (Kiefel CJ, Keane and Edelman JJ), 834 [100] (Gordon J).

[129] Ibid 835 [106]. There was also broad conformity relevantly with the other joint judgment of Kiefel CJ, Keane and Edelman JJ.

[130] Ibid 828 [80] (Bell, Gageler and Nettle JJ).

[131] Ibid 828 [81].

[132] Ibid 828–9 [82].

[133] The same issue has been addressed in stamp duty and other contexts: see *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* [1980] 1 NSWLR 510, 518–21 [15]–[20] (Hope JA, Glass JA agreeing at 531 [49]) ('*DKLR*'); *Buckle* (n 107) 242 [37], 245–7 [46]–[51] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *CPT Custodian* (n 108) 116–19 [37]–[47] (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ); *Linter Textiles* (n 30) 611–14 [50]–[59] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *ElecNet* (n 7) 87–9 [48]–[53] (Kiefel, Gageler, Keane and Gordon JJ).

[134] *Re Amerind* (n 8) 828–9 [82] (Bell, Gageler and Nettle JJ).

ownership and equitable duty. The trustee's lien or charge was described as arising 'endogenously' — that is, derived internally, from the trust relationship.[135] If one wanted a spatial metaphor, it was not external and 'over' 'real' beneficial interests such as a floating security. It was internally generated as part of the trustee's proprietary rights in the property the subject of the trust.

Whether the right of exoneration was called a power or a proprietary interest did not matter. Their Honours said that 'the choice of description should conform to, rather than dictate, the application of fundamental principles to "solving a concrete legal problem"', citing Kitto J in *Livingston*, who was concerned with the characterisation of the equitable rights of a beneficiary of an unadministered estate.[136] Their Honours, as Kitto J had in *Livingston*, were warning against categorisation or taxonomy becoming a substitute for application of principle according to proper purpose. Their Honours said the trustee's interest should be described as a beneficial interest in the trust assets and so property,[137] being a blending of personal rights and obligations with proprietary interests[138] — the genius of the trust institution. That was 'property' within the meaning of the word in the *Corporations Act 2001* (Cth).

The joint judgment emphasised that it was a mistake to focus only upon the right of indemnity as property. It was not the property within the reach of s 433.[139] It 'was not a "circulating asset" within the meaning of s 340 of the [*Personal Property Securities Act 2009* (Cth)] and [so] any security over it was not a "circulating security interest" as defined in s 51C of the *Corporations Act*'.[140] The inventory (the so-called trust assets) was covered by the security. The company had a right of indemnity that conferred or generated a proprietary interest in the inventory.[141] In analysing how the proceeds from the exercise of the right of exoneration may be used, the joint judgment approved *Re Suco Gold*.[142] The important passage in King CJ's judgment in *Re Suco Gold*,[143] explaining why *Re Enhill* was wrong, was set out in extenso.[144] The

135 Ibid 829 [83].

136 Ibid 829 [84], citing *Livingston* (n 26) 448 (Kitto J).

137 *Re Amerind* (n 8) 829–30 [84].

138 That is, involving all the powers of ownership constrained by obligation.

139 *Re Amerind* (n 8) 830 [86], 834 [98].

140 Ibid.

141 Ibid 834 [98].

142 Ibid 831–2 [91]–[92].

143 *Re Suco Gold* (n 77) 107–8.

144 *Re Amerind* (n 8) 832 [92] (Bell, Gageler and Nettle JJ), quoting ibid.

proceeds of the exercise of the right, being the realisation of the proprietary interest in the inventory, could only be used, in equity, to pay trust debts.

The question of priorities (by reference to the statute) was then addressed. It was wrong to presuppose that s 556 cannot apply in terms to the proceeds of realisation of the right of exoneration.[145] The liquidator took not only the right of exoneration, but also the property (trust assets) that the trustee or company owned (albeit in a constrained manner) and in which it had a proprietary interest; but, that property is taken with the equities attaching to it.[146] The proceeds may have a restriction upon them (only payable to trust creditors) but the words of the priority provision apply to the proceeds, because they are the product of the realisation of the proprietary interest of the company in the (trust) assets (the inventory). The words of s 556 are ample, they have a clear statutory purpose, and they were a re-enactment of s 292 after *Re Suco Gold*, and its 'general acceptance'.[147]

The joint judgment also agreed with the solution proposed by King CJ of multiple funds in the one liquidation for different groups of creditors.[148] This would be worked out practically by reference to equitable principle.[149]

It is essential to understand the subtle simplicity of the reasons.[150] The property (the inventory) is owned by the trustee albeit in a constrained way. The right of exoneration is a proprietary right that generates a proprietary beneficial interest in the assets. To exercise the right of exoneration is to take and use property which is that of the company, the proprietary beneficial interest (in the nature of a lien or charge) separate from and prevailing over the beneficial interests of the beneficiaries. That property, being proceeds of the exercise of the right, has a limitation on it: it can only be used for payment of trust creditors. But, it is nevertheless property of the company (even if it has such limits on its use) and is subject thus to the priority provisions of the statute. There are two fundamental errors in the approach of *Re Byrne*, *Re Independent Contractor Services [No 2]*, and the cases following them. First, the right of exoneration is not merely a power or right to transfer trust assets to creditors. The right of exoneration creates a beneficial proprietary interest in the assets of the trust; the exercise of the right creates proceeds that are also

145 *Re Amerind* (n 8) 832 [93].

146 Ibid 833 [95].

147 Ibid 833 [96].

148 Ibid 833 [97], citing *Re Suco Gold* (n 77) 110.

149 *Re Amerind* (n 8) 834 [97], citing *Re Killarnee* (n 40) 338–9 [108] (Allsop CJ). See also *Re Amerind* (n 8) 845 [172] (Gordon J).

150 See especially *Re Amerind* (n 8) 834 [98] (Bell, Gageler and Nettle JJ).

property of the company, because the exercise transforms the proprietary interest of the company in the (trust) assets into funds able to be used by the company for proper purposes — to pay trust creditors and so exonerate itself. Secondly, there is no proper basis for the assumption that the notion of property of the company to which the Act speaks must only be property of the company generally available to all creditors, and not property of the company being property owned by the company (properly constrained) that contains a proprietary interest of the company, albeit with restrictions on use by equitable obligation to pay only some creditors.

The concurring reasons of Gordon J also emphasised that it was wrong to view the right of exoneration as only giving a right to apply trust assets to pay trust debts. The right gives rise to a proprietary interest in the trust assets, one that is the company's but that is shaped by its purposes and origins in the trust relationship — to pay trust creditors.[151] The lien or charge was not a security interest *over* the interests of the beneficiaries, but a prior interest *in* the fund.[152] This proprietary character of the lien or charge generated by the right of exoneration is stated authoritatively in *Octavo*,[153] *Buckle*,[154] *CPT Custodian*,[155] and *Bruton Holdings*.[156] Gordon J spoke of the imprecision in describing the right of exoneration as the proprietary interest. This, her Honour said, had contributed to the confusion.[157] The proprietary interest is not the right of exoneration, but the proprietary interest by way of lien or charge in the property the subject of the trust that is generated by the right of exoneration. To call the right of exoneration a proprietary interest was to confuse the source of the proprietary interest with the interest itself.[158] Thus, like Bell, Gageler and Nettle JJ, her Honour would not see the characterisation of the right as a mere power (as Professor Ford did) as central to any analysis. What was central to the underlying doctrine and to the application of the statute

151 See ibid 843 [156], citing *Re Killarnee* (n 40) 324–5 [49] (Allsop CJ).

152 *Re Amerind* (n 8) 839 [134]–[135], citing *Re Killarnee* (n 40) 332 [87] (Allsop CJ).

153 *Octavo* (n 2) 369–70 (Stephen, Mason, Aickin and Wilson JJ), cited in *Re Amerind* (n 8) 839 [136] (Gordon J).

154 *Buckle* (n 107) 246–7 [48]–[51] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ), quoted in *Re Amerind* (n 8) 840 [137] (Gordon J).

155 See *CPT Custodian* (n 108) 120–1 [50]–[51].

156 *Bruton Holdings* (n 109) 358–9 [43], 359 [47] (French CJ, Gummow, Hayne, Heydon and Bell JJ), cited in *Re Amerind* (n 8) 840 [138] (Gordon J).

157 *Re Amerind* (n 8) 841 [140].

158 Ibid.

was the existence of the proprietary interest of the trustee in the trust assets, and the nature and character of that interest.

The judgment of Kiefel CJ, Keane and Edelman JJ differed in respect of s 433 as to what was the property of the company that was subject to the circulating security interest.[159] Despite this difference, the analysis by Kiefel CJ, Keane and Edelman JJ as to the nature of the power of exoneration in insolvency broadly conforms with the views of Bell, Gageler and Nettle JJ and Gordon J. The judgment of Kiefel CJ, Keane and Edelman JJ also dealt with s 555 and its injunction that 'all debts … proved in a winding up rank equally and … must be paid proportionately'.[160] This provision was not offended by some property (the proceeds of the exercise of the power of exoneration) being, of their nature, only available to some creditors. Section 555 is premised on the extent to which property of the company can meet debts;[161] the 'intrinsic limit' 'of the power of exoneration precludes it from being used to meet debts other than [trust debts]'.[162]

VI Conclusion

Why did this all take so long to unravel and then clarify? Perhaps the legislature should have stepped in. It certainly was given an opportunity. But the application of equitable principle in the context of insolvency and corporations statutes is a matter of core competence of the courts.

The difficulties can perhaps be ascribed to an over-emphasis on categories or labels directing the course of thinking and leading to confusion, to an assumption that the statute was in a different universe of discourse to the operation of equitable principle, and thus to the failure to construe the statute in the proper context of equitable principle. Or, it may be better understood as reflecting no more than a choice of the most convenient and harmonious reconciliation of equitable principle and public policy of the statute in the solution of a concrete legal problem.

[159] For Bell, Gageler and Nettle JJ and Gordon J it was the inventory itself which yielded proceeds of realisation from which trust liabilities could be discharged: ibid 834 [98] (Bell, Gageler and Nettle JJ, Gordon J agreeing at 835 [106]). For Kiefel CJ, Keane and Edelman JJ, it was the rights of the company to use the trust assets for its own benefit by paying trust creditors: at 823–4 [50], 824 [55].

[160] Ibid 822 [44].

[161] Ibid 823 [44].

[162] Ibid. This is similar to the phrase 'aris[ing] endogenously' in the judgment of Bell, Gageler and Nettle JJ: at 829 [83].

The analysis and characterisation of rights and interests can sometimes be assisted by metaphor; but metaphor has its dangers. As the Full Court of the Federal Court said in *D'Arcy v Myriad Genetics Inc*:[163]

> [C]are should be taken in resort to metaphor in analysis in this field. Metaphor can assist thought, in particular, by the evocation of structure and form by imagination; but it can also blind the eye of the mind by oversimplification. It may risk blinding real illumination that is achieved through analysis of the facts, including the scientific principles involved, by the utilisation of a striking evocation of a simplified structure of analysis that is derived from the metaphor chosen, rather than from the facts as existing.[164]

In this area of insolvency, metaphor may not be colourful, but it is present. It can be seen in the conceptualisation of ideas by reference to shape, place and movement. The view that ownership was divisible into legal and equitable parts, being separate bundles or things, that at all times had to be located somewhere such that if the place changed, there had to have been movement, and thus a transfer, was an error. As Hope JA said in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)*: '[A]n absolute owner in fee simple does not hold two estates, a legal estate and an equitable estate. He holds only the legal estate, with all the rights and incidents that attach to that estate.'[165] In legal reasoning, especially concerning concepts of subtlety that lack rigid definition, there can be utility, but danger lies, in giving physical form and structure in the imagination to conceptions, principles and relationships. Imagination, and the imagined form of thoughts, can be seen as a foundation of transmissible human ideas and conceptions through the collective imagination;[166] but imagined structure can become a false default for the conception, the principle and the relationship, and their application to the context of the concrete legal problems that may involve the harmonious interplay of equity and statute. The judgments in *Re Amerind* repay careful reading, and re-reading, for their illumination of this danger.

[163] (2014) 224 FCR 479.

[164] Ibid 482 [4] (Allsop CJ, Dowsett, Kenny, Bennett and Middleton JJ).

[165] *DKLR* (n 133) 519 [16]. See generally *Livingston (Privy Council)* (n 26) 22–3 (Viscount Radcliffe for the Court); *Buckle* (n 107) 242 [37] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Linter Textiles* (n 30) 606 [30], 612 [52]–[53] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). See also the joint judgment of Bell, Gageler and Nettle JJ in *Re Amerind* (n 8): at 828–9 [82].

[166] Yuval Noah Harari, *Sapiens: A Brief History of Humankind* (Vintage, 2015) 27–34.