CASE NOTE

CARTER HOLT HARVEY WOODPRODUCTS AUSTRALIA PTY LTD V COMMONWEALTH[*]

THE TRUE NATURE OF THE TRUSTEE'S RIGHT OF INDEMNITY

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This case note considers the High Court's recent decision in Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth *(2019) 93 ALJR 807 (*'Re Amerind'*). In* Re Amerind*, the Court resolved a longstanding controversy, holding that the interest a corporate trustee has pursuant to its right to be indemnified against trust liabilities is property divisible among the trustee's creditors in its winding-up under the* Corporations Act 2001 *(Cth). This note considers the background to the decision and explains the Court's reasoning. It shows that the Court's reasoning supports the fundamental yet overlooked proposition that the interest the trustee has is a legal interest in the trust property. This conclusion supports the view that a retiring trustee is entitled to retain sufficient trust property as against a new trustee to ensure that its right of indemnity is satisfied.*

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

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Cite as:
Marcus Roberts, '*Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth*: The True Nature of the Trustee's Right of Indemnity'
(2020) 43(3) *Melbourne University Law Review* (advance)

I Introduction

A trustee that incurs liabilities in the execution of its trust has a right to be indemnified against those liabilities from the trust assets. As Jessel MR put it, '[t]he trust assets having been devoted to carrying on the trade, it would not be right that the *cestui que trust* should get the benefit of the trade without paying the liabilities'.[1]

But what is the nature of that right? In Australia, where trading trusts are common,[2] the question is not academic. Indeed, when a corporate trustee is wound up in insolvency and the question is whether the trustee's right, or the interest conferred by that right, falls for distribution among the trustee's creditors under or outside the *Corporations Act 2001* (Cth) ('*Corporations Act*'), the answer can dictate whether certain classes of creditors get everything or nothing.

Until recently, the law was in disarray. In *Re Enhill Pty Ltd* ('*Re Enhill*'),[3] the Full Court of the Supreme Court of Victoria held that the trustee's interest fell for distribution under the *Companies Act 1961* (Vic) among all of the trustee's creditors. In *Re Suco Gold Pty Ltd (in liq)* ('*Re Suco Gold*'),[4] the Full Court of the Supreme Court of South Australia held that the trustee's interest fell for distribution under the *Companies Act 1962* (SA) among the trustee's trust creditors only. In *Re Independent Contractor Services (Aust) Pty Ltd (in liq) [No 2]* ('*Re Independent Contractor Services*'),[5] Brereton J, sitting at first instance in the Supreme Court of New South Wales, held that the

[1] *Re Johnson; Shearman v Robinson* (1880) 15 Ch D 548, 552.

[2] See Nuncio D'Angelo, *Commercial Trusts* (LexisNexis Butterworths, 2014) 76–9 [2.92]–[2.97].

[3] [1983] 1 VR 561 ('*Re Enhill*').

[4] (1983) 33 SASR 99 ('*Re Suco Gold*').

[5] (2016) 305 FLR 222 ('*Re Independent Contractor Services*').

trustee's interest fell for distribution outside the *Corporations Act*. It is doubtful that the Acts were relevantly distinguishable.

In *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* ('*Re Amerind*'),[6] the High Court quelled the controversy, effectively endorsing *Re Suco Gold*. This note will explain the Court's reasoning, commenting on what it says about the nature of the trustee's right of indemnity more broadly, and what the decision means for the related and extant controversy as to whether a retiring trustee is required to deliver trust property to a new trustee, even if it has an outstanding right of indemnity.

Part II briefly states the fundamental principles concerning the liability of trustees and the right of indemnity, defining some terms used in this note. Part III describes the relevant statutory regime. Part IV summarises the key cases which preceded *Re Amerind*. Part V describes the High Court's decision in *Re Amerind*. For the sake of brevity, the first instance decision,[7] which followed *Re Independent Contractor Services*, and the decision of the Court of Appeal,[8] which affirmed *Re Enhill*, are passed over. Part VI provides commentary on the High Court's decision.

II Fundamental Principles and Defined Terms

It is trite law that trusts are not legal persons. Trusts cannot incur debts. Trustees are personally liable for debts incurred in the execution of their trusts, and their creditors are entitled to look to their personal assets for satisfaction of those debts.[9] In one sense, therefore, it is misleading to speak of 'trust debts' and 'trust creditors'.[10]

But where a trustee incurs a debt properly in the execution of its trust, the trustee is entitled to be indemnified against its liability from the trust assets.[11] If the trustee has discharged the liability from its own funds, it has a right of recoupment. Otherwise, it has a right of exoneration and is entitled to use trust assets directly in the discharge of the liability.[12]

6 (2019) 93 ALJR 807 ('*Re Amerind*').

7 *Re Amerind Pty Ltd (in liq)* (2017) 320 FLR 118 (Supreme Court of Victoria) ('*Re Amerind (First Instance)*').

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

9 *Re Amerind* (n 6) 817 [24]–[25] (Kiefel CJ, Keane and Edelman JJ).

10 See ibid 817 [24].

11 *Worrall v Harford* (1802) 8 Ves Jun 4; 32 ER 250, 252 (Lord Eldon LC).

12 *Re Blundell; Blundell v Blundell* (1888) 40 Ch D 370, 376–7 (Stirling J).

A trustee with a right of indemnity is entitled to retain trust assets as against the beneficiaries, who, conversely, are not entitled to call for the property under the rule in *Saunders v Vautier*.[13] The right of indemnity exists where a trustee has incurred a debt properly in the execution of its trust. To describe such a debt, it is useful to use the term 'trust debt'. The persons to whom such debts are owed are usefully called 'trust creditors'. As long as it is borne in mind that these terms are a shorthand, their capacity to mislead is avoided.

The terms 'trust assets' and 'trust property' can also be misleading. To most people, the natural meaning of these terms is the *res* held by the trustee on trust. Sometimes, however, the terms are used to mean 'the property to which the beneficiaries are entitled in equity',[14] which, as will be seen, is not the same thing. In this note, the former meaning is intended unless otherwise expressed.

Finally, the cases reveal confusion over whether the trustee's right of indemnity is itself property[15] or whether the right of indemnity is not property but rather 'generates'[16] or 'confers'[17] a proprietary interest in the trust assets. The High Court has confirmed that it is the latter and this note proceeds on that basis,[18] using the term 'trustee's interest' as a shorthand for the interest just described.

III The Statutory Regime

Before considering the cases that form the background for the High Court's decision in *Re Amerind*, it is useful to set out the relevant provisions in the

[13] (1841) 4 Beav 115; 49 ER 282, 282 (Lord Langdale MR). See *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98, 120–1 [50]–[51] (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ) ('*CPT Custodian*').

[14] *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties* [1984] 1 Qd R 576, 587 (McPherson J) ('*Kemtron*'). See also *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226, 246 [48] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('*Buckle*').

[15] See, eg, *Jones v Matrix Partners Pty Ltd; Re Killarnee Civil & Concrete Contractors Pty Ltd (in liq)* (2018) 260 FCR 310, 329 [69], 331 [79] (Allsop CJ) ('*Re Killarnee*'); *Re Amerind (Court of Appeal)* (n 8) 287–8 [271]–[273] (Ferguson CJ, Whelan, Kyrou, McLeish and Dodds-Streeton JJA).

[16] *Re Amerind* (n 6) 841 [140] (Gordon J).

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

[18] Ibid 828 [80] (Bell, Gageler and Nettle JJ), 841 [140] (Gordon J).

statutory insolvency regime in the *Corporations Act*. The cases deal with equivalent regimes in predecessors to the *Corporations Act*.

The starting point is s 555, which provides:

> Except as otherwise provided by this Act, all debts and claims proved in a winding up rank equally and, if the property of the company is insufficient to meet them in full, they must be paid proportionately.

'Property of the company' is undefined, but 'property' is defined as

> any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description [including] a thing in action …[19]

Unlike the *Bankruptcy Act 1966* (Cth) ('*Bankruptcy Act*'),[20] the *Corporations Act* does not expressly exclude from the operation of s 555 property held by a company on trust. It is accepted, however, that the *Bankruptcy Act* exclusion applies 'by undisputed analogy'.[21] Of course, this begs the question whether the exclusion applies to the *res* held by the trustee on trust or 'the property to which the beneficiaries are entitled in equity'.[22]

The default rule in s 555 is qualified by s 556, which provides that certain debts have priority in the winding-up of a company. These include, relevantly, winding-up costs[23] and employee entitlements.[24]

Relevantly to the decision in *Re Amerind*, s 556 is picked up by s 433, which provides, broadly, that where a receiver, acting on behalf of the holders of debentures of a company, takes possession of 'property [ie property of the company] comprised in or subject to a circulating security interest',[25] the receiver must pay 'out of the property coming into his, her or its hands' certain debts referred to in s 556 'in priority to any claim for principal or interest in respect of the debentures'.[26] 'Circulating security interest' means, inter alia, a security interest within the meaning of the *Personal Property*

19 *Corporations Act 2001* (Cth) s 9 (definition of 'property') ('*Corporations Act*').

20 *Bankruptcy Act 1966* (Cth) s 116(2)(a).

21 *Re Amerind (Court of Appeal)* (n 8) 245 [62] (Ferguson CJ, Whelan, Kyrou, McLeish and Dodds-Streeton JJA), quoted in *Re Amerind* (n 6) 818 [26] (Kiefel CJ, Keane and Edelman JJ).

22 *Kemtron* (n 14) 587 (McPherson J).

23 *Corporations Act* (n 19) ss 556(1)(a)–(df).

24 Ibid s 556(1)(e).

25 Ibid s 433(2)(a).

26 Ibid s 433(3).

Securities Act 2009 (Cth).[27] The central question in *Re Amerind* was whether s 433 applied.

IV Background

This part provides important context by describing five cases decided before *Re Amerind*. It does so in more detail than is customary in a case note because, when considering *Re Amerind*, it helps to understand both the controversy that existed before the decision and the reflections on the nature of the trustee's right of indemnity contained in the cases.

A Octavo Investments Pty Ltd v Knight

The fountainhead of Australia's jurisprudence on the trustee's right of indemnity is *Octavo Investments Pty Ltd v Knight* ('*Octavo*').[28] The facts were as follows.[29] Coastline Distributors Pty Ltd conducted business solely as trustee of a trading trust. Its business did not go well. Two years after it commenced trading, it was wound up. Except for nominal paid-up capital, Coastline's only assets were trust assets. In the six months before it was wound up, Coastline had made payments totalling $49,750 to Octavo Investments Pty Ltd. The liquidators of Coastline sought to recover these payments as unfair preference payments.

Section 293(1) of the *Companies Act 1961* (Qld) provided that transfers that would be void or voidable against a bankrupt were void or voidable against a company 'in like manner'. Section 122(1) of the *Bankruptcy Act* provided that a transfer by a bankrupt in favour of a creditor within the six-month period before the commencement of the person's bankruptcy 'having the effect of giving that creditor a preference, priority or advantage over other creditors' was void.

As Octavo put its case, the main question was whether the money paid by Coastline to Octavo was 'trust property' that would not in any event have been distributable among Coastline's creditors if Coastline had been an individual trustee.[30] If it was, so it was said, the payment did not have the effect of giving Octavo a preference over other creditors.

[27] Ibid s 51C(a)(i).

[28] (1979) 144 CLR 360 ('*Octavo*').

[29] See ibid 363–4 (Stephen, Mason, Aickin and Wilson JJ) for the facts outlined in this paragraph.

[30] Ibid 369.

The main judgment was delivered by Stephen, Mason, Aickin and Wilson JJ. In short, their Honours held: (1) where a trustee has a right of indemnity, the trustee has an 'interest in the trust property [that] amounts to a proprietary interest'; and (2) if the trustee becomes bankrupt, that interest passes to the trustee's trustee in bankruptcy 'for the benefit of the creditors of the trust trading operation'.[31]

The key passage, worth quoting in full, is as follows:

> It is common ground that a trustee who in discharge of his trust enters into business transactions is personally liable for any debts that are incurred in the course of those transactions. However, he is entitled to be indemnified against those liabilities from the trust assets held by him and for the purpose of enforcing the indemnity the trustee possesses a charge or right of lien over those assets. The charge is not capable of differential application to certain only of such assets. It applies to the whole range of trust assets in the trustee's possession except for those assets, if any, which under the terms of the trust deed the trustee is not authorized to use for the purposes of carrying on the business.
>
> In such a case there are then two classes of persons having a beneficial interest in the trust assets: first the cestuis que trust, those for whose benefit the business was being carried on; and secondly, the trustee in respect of his right to be indemnified out of the trust assets against personal liabilities incurred in the performance of the trust. The latter interest will be preferred to the former, so that the cestuis que trust are not entitled to call for a distribution of trust assets which are subject to a charge in favour of the trustee until the charge has been satisfied.[32]

Shortly after *Octavo* was decided, Professor Ford published an article in this journal criticising the decision as 'a hard case making bad law'.[33] Professor Ford considered that a trustee who has a right to exoneration 'has no more than a power over the trust property'.[34] This contention has been foreclosed, in particular by *Chief Commissioner of Stamp Duties (NSW) v Buckle* ('*Buckle*'),[35] discussed below, and *Re Amerind* itself. It may be put to one side. The more important point is that *Octavo* did not address the issue that arose in *Re Enhill*

[31] Ibid 370.

[32] Ibid 367 (citations omitted).

[33] HAJ Ford, 'Trading Trusts and Creditors' Rights' (1981) 13(1) *Melbourne University Law Review* 1, 27.

[34] Ibid 26.

[35] *Buckle* (n 14). See below Part IV(E).

and *Re Suco Gold*.[36] Indeed, although it has been suggested otherwise,[37] the better view is that *Octavo* did not decide that the trustee's interest is 'property of the company' for the purposes of the *Corporations Act* and its predecessors, as the Court was concerned only with the construction of the phrases 'property of the bankrupt' and 'property divisible among the creditors of the bankrupt' under the *Bankruptcy Act*. The central questions with which this note is concerned were, therefore, left open, although they were, of course, to be answered in accordance with the principles articulated in the case.

B Re Enhill Pty Ltd

Re Enhill concerned the liquidation of Enhill Pty Ltd, a corporate trustee that carried on business solely as trustee of a trading trust.[38] The only assets of the company were trust assets, and the liquidator sought an order authorising him to apply the assets in payment of his costs and expenses. The relevant provision was s 292(1) of the *Companies Act 1961* (Vic).

There were two main issues: first, whether s 292(1) applied; second, whether the trustee's interest was divisible among trust creditors only or among all of the trustee's creditors. The background to the decision was the decision of Needham J in *Re Byrne Australia Pty Ltd and the Companies Act [No 2]*,[39] where it was held that a liquidator of a corporate trustee is not a trust creditor.[40] Young CJ and Lush J delivered separate judgments, Gray J agreeing with both.

On the first issue, both Young CJ and Lush J considered that s 292(1) applied. Young CJ considered that the Court was 'bound to treat [*Octavo*] as authority for the proposition that the right of a trustee to be indemnified out of the assets of the trust, or the proceeds of the exercise of that right, are assets of the trustee in a winding up'.[41] It followed that s 292(1) applied.

Lush J agreed that s 292(1) applied, but, rather than relying on *Octavo*, his Honour considered that this followed from the conclusion that the trustee's

[36] *Re Byrne Australia Pty Ltd and the Companies Act* [1981] 1 NSWLR 394, 398 (Needham J) ('*Re Byrne Australia*'), cited in *Re Suco Gold* (n 4) 108 (King CJ).

[37] *Re Amerind (Court of Appeal)* (n 8) 253 [100] (Ferguson CJ, Whelan, Kyrou, McLeish and Dodds-Streeton JJA).

[38] See *Re Enhill* (n 3) 562 (Young CJ) for the facts outlined in this paragraph.

[39] *Re Byrne Australia* (n 36).

[40] Ibid 399.

[41] *Re Enhill* (n 3) 563.

interest was 'personal property' of the trustee,[42] which in turn flowed from the following propositions:

1 'property is a bundle of rights';

2 'a trading trustee is personally liable for debts incurred in trading';

3 'the trustee has the right to indemnify himself against his personal liability out of the trust assets and the related and perhaps overlapping right of lien';

4 'when the trustee's rights come into existence, the rights of the beneficiaries are to that extent reduced'; and

5 'a trust creditor, being unable to levy execution on the trust property, may claim to be subrogated to the trustee's right of indemnity'.[43]

With respect, it is difficult to understand why these five propositions support the conclusion that the trustee's interest is personal property of the trustee. Only propositions three and four are on point, and both are stated at such a level of abstraction as to be of little assistance.

On the second issue, both Young CJ and Lush J considered that the trustee's interest was divisible among all of the trustee's creditors. Young CJ considered that, in *Octavo*, Stephen, Mason, Aickin and Wilson JJ had not expressed any limitation on the purposes to which the trustee's interest might be put, nor had their Honours' reasoning suggested any limitation.[44] His Honour also considered that

> to hold that a trustee in bankruptcy could only apply the proceeds of the right of indemnity towards some only of the bankrupt's creditors, viz creditors of the trust business, would deny the very purpose of the right to indemnity which is to exonerate the trustee's personal estate.[45]

Lush J appeared to assume that the liquidator was a trust creditor,[46] but his Honour expressed his opinion in obiter. Unlike Young CJ, Lush J considered that there were indications in the judgment in *Octavo* that the trustee's

[42] Ibid 567.

[43] Ibid 567–8.

[44] Ibid 564.

[45] Ibid.

[46] Ibid 569–70.

interest was divisible only among trust creditors.[47] His Honour considered, however, that this was mere obiter dictum.[48] His Honour stated that, as a matter of principle, in the bankruptcy of an individual trustee:

> The right of lien emerges as a beneficial right separate from the trusteeship and … [t]here is no reason of general application why this property should not, in the hands of the trustee in bankruptcy, be available to all creditors, both personal and trust.[49]

C Re Suco Gold Pty Ltd (in liq)

Shortly after *Re Enhill* was decided, the Full Court of the Supreme Court of South Australia handed down its decision in *Re Suco Gold*, declining to follow *Re Enhill*. The case concerned the winding-up of a company that carried on business as trustee of two trading trusts.[50] Again, the question was whether the liquidator could have recourse to the trust assets to discharge his costs and expenses.

Judgments were delivered by King CJ and Jacobs J, Matheson J agreeing with both. King CJ, like Young CJ in *Re Enhill*, considered that *Octavo* stood for the proposition that a 'trustee company's right of indemnity is a right of property which passes to the liquidator'.[51] His Honour considered, however, that the trustee's interest was divisible only among trust creditors; and where the trustee was trustee of more than one trust, the trustee's interest was divisible only among the trust creditors of the trust in relation to whose assets the interest arose.[52] His Honour considered that the *Companies Act 1962* (SA) regulated the rights of trust creditors inter se.

His Honour's primary reason for holding that the trustee's interest was divisible only among trust creditors was that the trust property remained trust property and could be applied only for trust purposes. In a powerful passage, King CJ said:

> A trustee, however, has no legal right to use or apply the trust property other than for the authorized purposes of the trust. In particular he has no legal right

47 Ibid 570, citing *Octavo* (n 28) 370 (Stephen, Mason, Aickin and Wilson JJ).

48 *Re Enhill* (n 3) 570. *Re Enhill* was, of course, decided before *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 ('*Farah*').

49 *Re Enhill* (n 3) 570.

50 See *Re Suco Gold* (n 4) 101 (King CJ) for the facts of the case.

51 Ibid 104.

52 Ibid 108–9.

> to apply the trust property for his own benefit or for the benefit of third parties. I cannot escape the conviction that if a trustee, or his trustee in bankruptcy, or liquidator in the case of a trustee company, is permitted to use trust property, not for the discharge exclusively of liabilities incurred in the performance of the trust, but in the discharge of other liabilities as well, the money is being used for an unauthorized purpose and is being used, moreover, for the benefit of the trustee, and of third parties, namely the non-trust creditors.[53]

His Honour considered that the liquidator was a trust creditor for the following reasons:

1 'it [was] part of the duty of the trustee company to incur debts for the purposes of the trust businesses';

2 '[u]pon winding up those debts [could] only be paid in accordance with the provisions of the *Companies Act*'; and

3 this required 'that there be a liquidator and that he incur costs and expenses and be paid remuneration'.[54]

The liquidator was, therefore, entitled to priority under the Act.

Jacobs J approached the question on a narrower basis than King CJ. His Honour agreed with the 'general proposition' that 'trust assets are available only for the trust creditors', for the reasons given by King CJ.[55] But his Honour appeared to make an exception for s 292(1)(a), holding that, at least in the case of a court-ordered winding-up, the liquidator was entitled to their costs and expenses under that section whether or not they were a trust creditor. The reason was that '[t]o hold otherwise would defeat, or at least frustrate, the legislation', which contemplated the appointment by the Court of a liquidator who, presumably, would refuse the appointment were they not entitled to remuneration for their services.[56]

D Re Independent Contractor Services (Aust) Pty Ltd (in liq) [No 2]

Although *Re Enhill* and *Re Suco Gold* reached different conclusions as to whether the trustee's interest was divisible among all of the trustee's creditors or only the trustee's trust creditors, both decisions affirmed that the trustee's

[53] Ibid 105 (citations omitted).

[54] Ibid 110.

[55] Ibid 114.

[56] Ibid 113.

interest fell for distribution under the predecessors to the *Corporations Act*. This orthodoxy was, however, eschewed in *Re Independent Contractor Services*.

A corporate trustee in liquidation had collected payments on behalf of contractors but had failed to make required superannuation contributions.[57] The Australian Taxation Office ('ATO') lodged a proof of debt in relation to the unpaid superannuation contributions. The question was whether the ATO had priority under s 556 of the *Corporations Act*.

Brereton J, sitting at first instance in the Supreme Court of New South Wales, held that it did not. The relevant part of his Honour's judgment was strikingly short and is worth quoting in full:

> [A]s to whether s 556 has any application in this context, the South Australian Full Court admittedly held in *Re Suco Gold Pty Ltd* that in respect of each trust of which the company in liquidation was a trustee, liabilities were to be paid from the trust property in the order laid down in the *Companies Act 1962* (SA) s 292 — the predecessor of s 556. However, this is virtually universally accepted to be incorrect, although what is the correct position remains unclear. It is incorrect because s 556 is concerned only with the distribution of assets beneficially owned by a company and available for division between its general creditors.[58]

Brereton J cited no authority supporting the proposition that *Re Suco Gold* was 'virtually universally accepted to be incorrect'. With respect, the decision is unsatisfactory insofar as it relies on an assertion as to the construction of s 556 that is difficult to reconcile with the High Court's stated approach to statutory construction.[59] Further, it assumes that trust assets are beneficially owned by the beneficiaries of the trust and so confuses the identification of the trust *res* with the trustee's and beneficiaries' respective proprietary interests in the *res*. Nonetheless, *Re Independent Contractor Services* was

[57] See *Re Independent Contractor Services* (n 5) 224–9 [1]–[20] (Brereton J) for the facts of the case.

[58] Ibid 230 [23] (citations omitted).

[59] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381–2 [69]–[71] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*'); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

subsequently followed in a number of first instance decisions, including the decision at first instance in *Re Amerind*.[60]

Having held that the Act did not apply, Brereton J concluded that a pari passu distribution was appropriate.[61] It is worth noting, however, that this is not a necessary consequence of the trustee's interest falling for distribution outside the *Corporations Act*. Brereton J considered, but rejected, the first-in, first-out distribution method.[62] Subsequently, in *Jones v Matrix Partners Pty Ltd; Re Killarnee Civil & Concrete Contractors Pty Ltd (in liq)* ('*Re Killarnee*'),[63] Farrell J considered that equity should follow the statutory order of priority.[64] The important point for present purposes is simply that Brereton J held that the Act did not apply.

E Chief Commissioner of Stamp Duties (NSW) v Buckle

Before finally turning to the decision in *Re Amerind*, it is necessary to discuss the High Court's decision in *Buckle*, which contains important dicta relied on by a majority of the High Court in *Re Amerind*. The case concerned the application of stamp duty legislation to a discretionary family trust.[65] Mr Buckle held land in New South Wales as trustee of the family trust. By cl 2.2 of the deed of settlement by which the trust was settled on Mr Buckle, the trust fund was on the 'distribution date' to vest in such of the beneficiaries as the trustee might appoint. Failing such appointment, the trust fund was to vest in Mr Buckle's surviving children in equal shares as tenants in common. By a supplementary deed, Mr Buckle varied cl 2.2 so that the takers in default of appointment became his named daughter, as to one third, and his named son,

[60] *Re Amerind (First Instance)* (n 7) 138 [67] (Robson J). See also *Kite v Mooney; Re Mooney's Contractors Pty Ltd (in liq) [No 2]* (2017) 121 ACSR 158, 195 [140] (Markovic J) (Federal Court).

[61] *Re Independent Contractor Services* (n 5) 231 [24]. See also Justice BH McPherson, 'The Insolvent Trading Trust' in PD Finn (ed), *Essays in Equity* (Law Book, 1985) 142, 154–6; JD Heydon and Justice MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) 523 [21-15].

[62] *Re Independent Contractor Services* (n 5) 230–1 [23]–[24], citing Daryl R Williams, 'Winding Up Trading Trusts: Rights of Creditors and Beneficiaries' (1983) 57(5) *Australian Law Journal* 273, 276–7.

[63] *Re Killarnee* (n 15).

[64] Ibid 355–8 [214]–[223]. It is difficult to see how equity could override the proprietary interest of the holder of a circulating security interest, as contemplated by s 433 of the *Corporations Act*.

[65] See *Buckle* (n 14) 233–4 [3]–[5], 234–6 [11]–[17] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) for the facts outlined in this paragraph.

as to two thirds. Section 66 of the *Stamp Duties Act 1920* (NSW) charged conveyances of property in New South Wales 'with ad valorem duty in respect of the unencumbered value of the property thereby conveyed'. The land that was the subject of the trust was valued at $4,056,143. The Chief Commissioner of Stamp Duties (NSW) assessed the supplementary deed to ad valorem duty in respect of the value of the land.

There were two issues. First, what was the property that was conveyed by the supplementary deed? Did it comprise 'the sum of the interests in the trust fund, making up full equitable ownership',[66] or did it comprise 'interests of a lesser nature'[67] being the vested but defeasible interests of the takers in default of appointment? Second, was Mr Buckle's right of indemnity in respect of certain trust loans to be disregarded as an 'encumbrance'[68] for the purposes of assessing the value of the property transferred?

The High Court (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) held that property conveyed by the supplementary deed was not the full equitable ownership of the land but the 'interests of a lesser nature', the value of which 'had to reflect the vicissitudes which were an essential element of the structure created by the Deed of Settlement'.[69] This being so, the Commissioner conceded that 'valuation [of the property] would be so difficult and the amount of duty so small as to make it impracticable to assess more than nominal duty',[70] so the second issue did not arise. Nonetheless, the Court addressed the second issue in the following passage:

> [T]he starting point in the class of case under consideration [ie a case where the trustee has a right of indemnity] is that the assets held by the trustee are 'no longer property held solely in the interests of the beneficiaries of the trust'. The term 'trust assets' may be used to identify those held by the trustee upon the terms of the trust, but, in respect of such assets, there exist the respective proprietary rights, in order of priority, of the trustee and the beneficiaries. The interests of the beneficiaries are not 'encumbered' by the trustee's right of exoneration or reimbursement. Rather, the trustee's right to exoneration or recoup-

[66] *Chief Commissioner of Stamp Duties v Buckle* (1995) 38 NSWLR 574, 584 (Sheller JA), quoted in ibid 238–9 [27].

[67] *Buckle* (n 14) 243 [40] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

[68] Ibid 247 [50].

[69] Ibid 243 [40].

[70] Ibid 238 [26].

> ment 'takes priority over the rights in or in reference to the assets of beneficiaries or others who stand in that situation'.[71]

This passage provides the foundation for the reasoning of the High Court in *Re Amerind*, to which this note now turns.

V *Re Amerind*

A *The Facts*

The facts of *Re Amerind* were as follows.[72] A company, Amerind Pty Ltd, conducted business solely as trustee of a trading trust. Other than nominal paid-up capital, it had no assets of its own. In the course of carrying on the business, Amerind incurred debts to, among others, a bank, which held secured debentures, and the appellant, Carter Holt Harvey Woodproducts Australia Pty Ltd. Amerind encountered financial difficulty and the bank appointed receivers. Shortly afterwards, a liquidator was appointed. The receivers discharged the bank's secured debt, leaving a modest surplus. The Commonwealth advanced wages and entitlements to Amerind's former employees under a statutory scheme pursuant to which the Commonwealth was subrogated to the former employees' priority claims in Amerind's winding-up.

The issue was whether s 433 of the *Corporations Act* applied to the distribution of the trustee's interest so that the employees' claims took priority. This raised two questions: first, whether the trustee's interest was 'property of the company'; second, whether, to satisfy the precondition to the operation of s 433, the property was 'property comprised in or subject to a circulating security interest'.[73] The appellant accepted that the trust property was 'property comprised in or subject to a circulating security interest' but said that the determining factor was that the trustee's right of indemnity was not.

B *The Decision*

The High Court unanimously found that the trustee's interest in the trust property pursuant to its right of indemnity was 'property of the company'. The right of indemnity was not itself property. The trust property was property

[71] Ibid 246–7 [50] (citations omitted).

[72] See *Re Amerind* (n 6) 813–14 [4]–[9] (Kiefel CJ, Keane and Edelman JJ) for the facts outlined in this paragraph.

[73] Ibid 817 [21].

comprised in or subject to a circulating security interest, so s 433 applied. The High Court also unanimously held, in obiter, that the trustee's interest was divisible only among trust creditors. Separate judgments were delivered by Kiefel CJ, Keane and Edelman JJ; Bell, Gageler and Nettle JJ; and Gordon J.

1 *Kiefel CJ, Keane and Edelman JJ*

Kiefel CJ, Keane and Edelman JJ began by considering the meaning of the phrase 'property of the company'. Without engaging in an orthodox *Project Blue Sky* interpretation of the Act,[74] their Honours stated that

> a liquidator's power over the rights of an insolvent company and the statutory assignment of rights in bankruptcy have always been concerned only with those rights that enure in law 'for the benefit of' the '*personal estate*' of the bankrupt or insolvent person …[75]

Their Honours contrasted the position of a trustee, who 'does not generally have any entitlement to deal with the rights held on trust for the trustee's own benefit'.[76] Their Honours further contrasted the position of a trustee who, by reason of its right of indemnity, '*can* benefit personally from the trust rights … [by using] those trust rights to indemnify itself from liabilities'.[77]

On the question whether the preconditions to the operation of s 433 were satisfied, their Honours stated that

> it is incorrect to treat rights held on trust by a company as if they existed separately and independently from its power of exoneration so that it could be said that (i) the rights held on trust, and subject to the circulating security interest,

[74] See *Project Blue Sky* (n 59) 381–2 [69]–[71] (McHugh, Gummow, Kirby and Hayne JJ).

[75] *Re Amerind* (n 6) 818 [27] (emphasis in original), citing *Bankrupts Act 1603*, 1 Jac 1, c 15, s 8, *Beckham v Drake* (1849) 2 HL Cas 579; 9 ER 1213, 1231 (Parke B), *Rose v Buckett* [1901] 2 KB 449, 454 (Collins LJ).

[76] *Re Amerind* (n 6) 818 [27]. It is interesting to note the apparent adoption here of the 'rights against rights' analysis of equitable property popularised by Professors McFarlane and Stevens: see Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4(1) *Journal of Equity* 1. Cf RC Nolan, 'Equitable Property' (2006) 122 (April) *Law Quarterly Review* 232; Tatiana Cutts, 'The Nature of "Equitable Property": A Functional Analysis' (2012) 6(1) *Journal of Equity* 44; JE Penner, 'The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust' (2014) 27(2) *Canadian Journal of Law and Jurisprudence* 473.

[77] *Re Amerind* (n 6) 818 [28] (emphasis added).

> are not the property of the company, but (ii) the power of exoneration, which is the property of the company, is not subject to the circulating security interest.[78]

The correct approach was that it was Amerind's '*legal* rights to the trust assets' that were property of the company.[79] The trust assets being property comprised in or subject to a circulating security interest, s 433 was engaged.

As for the *Re Enhill* v *Re Suco Gold* question, which, strictly speaking, did not arise,[80] their Honours essentially endorsed the reasoning of King CJ in *Re Suco Gold*. Their Honours considered that '[t]he intrinsic limit of the power of exoneration precludes it from being used to meet debts other than those incurred with authority in the conduct of the trust business'[81] and that payment other than to meet such debts would be payment 'for an unauthorized purpose'.[82]

2 *Bell, Gageler and Nettle JJ*

Bell, Gageler and Nettle JJ adopted a more orthodox approach to the construction of the phrase 'property of the company'. Their Honours stated that

> [i]dentification of the amounts that would be payable pursuant to s 556(1)(e) in the event of a winding up is informed by the legislative context in which s 556(1)(e) appears, and in particular the close juxtaposition of s 556(1)(e) to both s 555 (which provides in part that if the 'property of the company' is insufficient to meet claims they must be paid proportionately) and s 561 (which provides that, in a winding up, so far as 'the property of a company available for payment of creditors' is insufficient to meet the payment of any debt referred to in [ss] 556(1)(e), (g) or (h) such a debt must be paid in priority over the claims of a secured party in relation to a circulating security interest created by the

[78] Ibid 823 [50].

[79] Ibid 824 [50] (emphasis added). See also at 830 [85]–[87] (Bell, Gageler and Nettle JJ).

[80] One could query whether the High Court's determination of this point is binding. It is certainly 'seriously considered dicta': *Farah* (n 48) 151 [134] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). But Heydon J has suggested that High Court dicta are binding only when they are seriously considered *and* conform with 'long-established authority': *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 161 [473]. It is doubtful that the latter condition, if it be a condition, is satisfied. See also Lawbook, *The Laws of Australia* (online at 31 January 2020) [25.4.430].

[81] *Re Amerind* (n 6) 823 [44]. See also *Re Killarnee* (n 15) 331 [76]–[79] (Allsop CJ), 351–2 [197] (Farrell J).

[82] *Re Amerind* (n 6) 822 [42], quoting *Re Suco Gold* (n 4) 105 (King CJ).

> company and may be made accordingly out of any property comprised in or subject to the circulating security interest).[83]

It followed that

> [i]n the winding up of a corporate trustee, the 'property of the company' that is available for the payment of creditors includes so much of the trust assets as the company is entitled, in exercise of the company's right of indemnity as trustee, to apply in satisfaction of the claims of trust creditors.[84]

Their Honours noted that the trustee's right of indemnity was not itself 'property comprised in or subject to a circulating security interest'.[85] Like Kiefel CJ, Keane and Edelman JJ, however, their Honours considered that this was irrelevant. The trust property was property comprised in or subject to a circulating security interest. It was, pursuant to the trustee's right of indemnity, property of the company. Section 433 was engaged.

As for the *Re Enhill* v *Re Suco Gold* question, Bell, Gageler and Nettle JJ also endorsed the views of King CJ in *Re Suco Gold*, particularly as exposited by Allsop CJ in *Re Killarnee*.[86] Their Honours obliquely considered the argument that, though outside the *Corporations Act* a trustee might be able to exercise its right of exoneration so as to pay trust creditors only, that limitation was erased by the Act.[87] Their Honours observed that, '[f]rom the outset, courts of equity construed the earliest bankruptcy statutes according to a presumption that assignees in bankruptcy, who were considered as volunteers, took subject to equities',[88] and their Honours considered that '[t]he position under the *Corporations Act* [was] comparable'.[89]

3 *Gordon J*

Gordon J agreed with Bell, Gageler and Nettle JJ, creating a majority.[90] Her Honour's primary contribution lay in the provision of more extended dicta concerning, first, the position where an insolvent trustee is trustee of multiple trusts and, second, the position where an individual trustee is bankrupt.

[83] *Re Amerind* (n 6) 831 [89].

[84] Ibid 831 [90].

[85] Ibid 834 [98].

[86] *Re Killarnee* (n 15) 331 [76]–[79], 335–9 [100]–[108].

[87] *Re Amerind* (n 6) 832–3 [94]–[96].

[88] Ibid 832 [94] (citations omitted).

[89] Ibid 833 [95].

[90] Ibid 835 [106].

As to the first issue, her Honour endorsed the view expressed by King CJ in *Re Suco Gold* that the relevant provisions of the *Corporations Act* were to be applied to the trustee's interests in the separate trusts as if the trustee's interests constituted different funds.[91] Her Honour considered that where the statute was silent on the resolution of issues peculiar to the situation, equity would fill the 'vacuum'[92] by, for example, invoking principles 'akin to … marshalling or hotchpot'.[93] Her Honour considered that liquidators' and administrators' costs should be borne from the different funds in proportion to the work done by those persons in relation to the trusts to which the funds related.[94]

Gordon J found it necessary to address the second issue because the appellant had suggested that a finding that the *Corporations Act* applied would lead to an inconsistency in the treatment of the trustee's interest in bankruptcy as opposed to insolvency.[95] Her Honour noted that the fact that trust property subject to a right of exoneration 'is property of the trustee subject to limitations as to use' meant that the property did not fall within the definition of 'property held in trust' in the *Bankruptcy Act*.[96] There was, therefore, no inconsistency.

VI Commentary

Of the many aspects of the decision in *Re Amerind* that call for comment, this note focuses on two: first, what the decision says about the nature of the trustee's right of indemnity; second, what the decision says about the as yet unresolved question whether a retiring trustee is entitled to retain possession of trust property as against a new trustee.

A *The Nature of the Trustee's Right of Indemnity*

A large part of the confusion surrounding the nature of the trustee's right of indemnity arises from linguistic imprecision. First, to speak of a 'right' of indemnity might suggest that the right is itself property. This was denied in

[91] Ibid 843 [160].

[92] Ibid 843 [163].

[93] Ibid 844 [164], quoting *Re Killarnee* (n 15) 339 [108] (Allsop CJ).

[94] *Re Amerind* (n 6) 845 [172].

[95] Ibid 845 [173]–[174].

[96] Ibid, disapproving *Lane v Deputy Commissioner of Taxation* (2017) 253 FCR 46.

Buckle,[97] as Gordon J emphasised in *Re Amerind*.[98] Kiefel CJ, Keane and Edelman JJ preferred to describe the respective rights of exoneration and recoupment as powers.[99] But as Bell, Gageler and Nettle JJ have now authoritatively stated, focus on the distinction between powers and property 'is apt to distract attention from the practical relationship between the trustee's equitable right of indemnity and legal powers of ownership'.[100] The important point is that the trustee's 'property' is an interest in the trust property, not the right of indemnity itself.

Another distraction is found in the labels 'charge' and 'lien', as applied to the incidents of the trustee's right of indemnity. These were effectively eschewed in *Buckle*,[101] and with good reason. The terms have often been used interchangeably,[102] though they are 'quite distinct creatures'.[103] They suggest something in the nature of security for a debt,[104] though the 'trustee has no debtor'.[105] And, as Barrett JA has observed, it is 'anomalous to refer to a person having a charge or lien over property of which the person is the owner'.[106]

In a string of cases starting with *Octavo*, the High Court has confirmed the following key principles concerning the interest of a trustee pursuant to its right of indemnity:

97 *Buckle* (n 14) 246–7 [50] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

98 *Re Amerind* (n 6) 841 [140].

99 Ibid 819 [30].

100 Ibid 828 [81].

101 Diccon Loxton, 'In with the Old, Out with the New? The Rights of a Replaced Trustee against Its Successor, and the Characterisation of Trustees' Proprietary Rights of Indemnity' (2017) 45(4) *Australian Business Law Review* 285, 290.

102 See, eg, *Re The Exhall Coal Co (Ltd)* (1866) 35 Beav 449; 55 ER 970, 971 (Lord Romilly MR) ('first charge'); *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319, 335 (Dixon J) ('lien'); *Octavo* (n 28) 367 (Stephen, Mason, Aickin and Wilson JJ) ('charge or right of lien').

103 D'Angelo (n 2) 178 [4.63], citing Edward I Sykes and Sally Walker, *The Law of Securities* (Law Book, 5th ed, 1993) 199.

104 See *Re Amerind* (n 6) 840–1 [139] (Gordon J).

105 Allison Silink, 'Trustee Exoneration from Trust Assets — Out on a Limb? The Tension between Creditor Expectations and the "Clear Accounts" Rule' (2018) 12(1) *Journal of Equity* 58, 69–70.

106 *Agusta Pty Ltd v Provident Capital Ltd* (2012) 16 BPR 30397, 30406 [41] (New South Wales Court of Appeal).

1 The trustee's interest is a proprietary beneficial interest in the trust property that takes priority over the interests of beneficiaries.[107]

2 To the extent of the trustee's interest, the trust property is not 'property held solely in the interest of the beneficiaries'.[108] The trust property is, in that sense, not trust property.

3 Until the trustee's right of indemnity has been satisfied, it is impossible to know what the trust property is.[109]

4 The trustee's interest is not an encumbrance on the beneficiaries' interest.[110] The trustee's interest is not the right of indemnity itself.[111] Rather, the trustee's interest is an interest in the trust property.

What remains is to tie the threads together and explain how the High Court has, in the cases culminating in *Re Amerind*, revealed the true nature of the trustee's right of indemnity.

In short, although the matter is not free from doubt,[112] it now appears clear that the trustee's interest is a legal one. It comprises the legal powers incidental to ownership coupled with the *absence* of restrictions normally placed on the exercise of such powers by equity when the legal owner holds the assets on trust for another. To see why this is so, it is helpful to go back to first principles.

As Lord Browne-Wilkinson observed in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*:[113]

> A person solely entitled to the full beneficial ownership of money or property, both at law and in equity, does not enjoy an equitable interest in that property.

[107] *Octavo* (n 28) 369–70 (Stephen, Mason, Aickin and Wilson JJ); *Buckle* (n 14) 246–7 [50] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Re Amerind* (n 6) 819–20 [32] (Kiefel CJ, Keane and Edelman JJ), 829–30 [84] (Bell, Gageler and Nettle JJ), 839–40 [136]–[137] (Gordon J).

[108] *Octavo* (n 28) 370 (Stephen, Mason, Aickin and Wilson JJ). See also *Buckle* (n 14) 246 [48] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

[109] *Buckle* (n 14) 246 [48] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *CPT Custodian* (n 13) 121 [51] (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ).

[110] *Buckle* (n 14) 247 [50] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

[111] *Re Amerind* (n 6) 830 [85] (Bell, Gageler and Nettle JJ), 841 [140] (Gordon J).

[112] *Boensch v Pascoe* (2019) 94 ALJR 112, 118 [2] (Kiefel CJ, Gageler and Keane JJ).

[113] [1996] AC 669.

> The legal title carries with it all rights. Unless and until there is a separation of legal and equitable estates, there is no separate equitable title.[114]

When the legal owner holds property on trust for another, its powers as legal owner are not divested in favour of the beneficiary.[115] Rather, as Hope JA observed in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties*:[116]

> [T]he right of the beneficiary … is a right to compel the legal owner to hold and use the rights which the law gives him in accordance with the obligations which equity has imposed upon him. The trustee, in such a case, has at law all the rights of the absolute owner in fee simple, but he is not free to use those rights for his own benefit in the way he could if no trust existed. Equitable obligations require him to use them in a particular way for the benefit of other persons.[117]

Normally, a trustee cannot use trust property to pay its own debts. When those debts are trust debts, and it has a right of indemnity, it can. The fetters equity places on the trustee's legal powers of ownership are loosened. Put differently, '[u]ntil [the trustee's] right [of indemnity] has been satisfied, the beneficiaries cannot compel the trustee to exercise the trustee's powers as legal owner of the trust assets for their benefit'.[118]

The trustee is still subject to limits on how it may exercise its legal powers of ownership. As the High Court has now confirmed, where a trustee has a right of exoneration, it may use trust property to pay trust creditors only.[119] If it needs to realise property, it must apply for an order for judicial sale, which may be postponed if the sale would frustrate the fundamental purpose of the trust.[120] And it cannot be doubted that, even if the trustee's trust liabilities exceeded the value of the trust assets, the beneficiaries could compel the trustee to commence proceedings against a third party damaging trust property using the procedure in *Vandepitte v Preferred Accident Insurance*

114 Ibid 706.

115 *Re Amerind* (n 6) 829 [82] (Bell, Gageler and Nettle JJ).

116 [1980] 1 NSWLR 510.

117 Ibid 519 [16].

118 *Re Amerind* (n 6) 829 [83] (Bell, Gageler and Nettle JJ).

119 Ibid 822–3 [44] (Kiefel CJ, Keane and Edelman JJ), 831–2 [92] (Bell, Gageler and Nettle JJ), 843 [161]–[162] (Gordon J).

120 *Darke v Williamson* (1858) 25 Beav 622; 53 ER 774, 776 (Romilly MR). But see Heydon and Leeming (n 61) 513 [21-04], doubting whether *Darke v Williamson* is good law.

Corporation of New York.[121] Put simply, the trustee's dealings with the property remain subject to the supervisory jurisdiction of courts of equity.

This does not change the fact that the trustee's interest is a legal interest *in the trust property*. Indeed, it is because the trustee's interest is a legal interest in the trust property that, in *Re Amerind*, it did not matter that the trustee's right of indemnity was not itself 'property comprised in or subject to a circulating security interest'; it was sufficient that the trust property was.

Re Amerind has clarified the point, sometimes lost, that talk of 'charges' and 'liens' is metaphorical. The trustee's interest is not an encumbrance on the beneficiaries' rights to the trust property.[122] It is not an equitable interest. The description is merely useful because it indicates that the combination of the powers of legal ownership and absence of certain equitable restrictions typically placed on the powers of legal ownership exercisable by a trustee *resembles* the incidents of an equitable charge or lien.

McPherson J made this point when his Honour said that the trustee's right

> is often spoken of as a 'charge' over the assets; but this is really a conclusion deriving from the fact that in proceedings in court for administration of the trust, the claim of the trustee to be indemnified will be given effect by directing that liabilities properly incurred by him are paid out of the trust assets in priority to the claims of beneficiaries to their interests in the trust property.[123]

The same point was made, perhaps less explicitly, in *Buckle*, where the High Court said:

> A court of equity may authorise the sale of assets held by the trustee so as to satisfy the right to reimbursement or exoneration. *In that sense*, there is an equitable charge over the 'trust assets' which may be enforced in the same way as any other equitable charge.[124]

The trustee does not literally have a charge or lien over the beneficiaries' interest in the trust property. To say that the trustee has the bare legal interest in trust property, albeit with a supplementary and derivative equitable

[121] [1933] AC 70, 79 (Lord Wright) (Privy Council).

[122] *Buckle* (n 14) 247 [50] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Re Killarnee* (n 15) 332 [86] (Allsop CJ).

[123] *Kemtron* (n 14) 585 (McPherson J) (citations omitted). See also McPherson (n 61) 156: 'although it is common in this context to refer to a "charge" or even a "first charge", all that is meant is that the claim of the trustee … to have liabilities discharged must be satisfied out of the trust fund in priority to the claims of the beneficial owners of that fund'.

[124] *Buckle* (n 14) 247 [50] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) (emphasis added) (citations omitted).

interest, while the beneficiaries have the beneficial equitable interest, is to posit a false dichotomy. The true position, as Bell, Gageler and Nettle JJ put it, is that the nature of the trustee's interest reflects 'the characteristic blending of personal rights and obligations with proprietary interests which is the "genius" of the trust institution'.[125]

B *The Right of a Retiring Trustee to Retain Possession of Trust Property as against a New Trustee*

The characterisation of the trustee's interest as a legal one is not academic. It affects the answer to other questions concerning the trustee's right of indemnity. One of these is whether a retiring trustee is entitled to retain possession of trust property as against a new trustee.

This issue, like the question whether, prior to *Re Amerind*, the *Corporations Act* applied to the trustee's interest, is the subject of conflicting authority. In *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* ('*Lemery*'),[126] Brereton J held that a retiring trustee is not entitled to retain possession of trust property as against a new trustee.[127] In short, his Honour:

1 proceeded on the basis that the trustee's right of indemnity 'is secured by an equitable lien … [that] extends to all of the trust assets, save only those that are specifically excluded by the trust instrument';[128]

2 distinguished equitable liens and possessory liens, doubting that equitable liens could confer a right to possession;[129] and

3 distinguished the position of a beneficiary, against whom it was unarguable that the trustee had a right to retain possession of the trust property: first, on the basis that transfer to the beneficiary would destroy the trustee's lien, whereas transfer to a new trustee would not;[130] second, on the basis that the right of a trustee against a beneficiary 'is a manifestation of

[125] *Re Amerind* (n 6) 829–30 [84].

[126] (2008) 74 NSWLR 550 ('*Lemery*').

[127] Ibid 561 [50].

[128] Ibid 553 [16]–[17].

[129] Ibid 555 [26].

[130] Ibid 557 [36], 561 [49].

> set-off' that has no application to the position of an old trustee as against a new trustee.[131]

Lemery finds support in *Jacobs' Law of Trusts*.[132] It was also recently approved by the Supreme Court of Bermuda in *Meritus Trust Co Ltd v Butterfield Trust (Bermuda) Ltd* ('*Meritus*'),[133] where Kawaley CJ adopted Brereton J's reasoning and added that the statutory scheme for the vesting of trust property under the *Trustee Act 1975* (Bda) — which has equivalents in each of the Australian states and territories[134] — was, 'in a general sense, inconsistent with the notion of the old trustee enjoying retention of asset rights capable of being asserted by a former trustee as against a new trustee'.[135] As the Chief Justice summarised it, the scheme provided that, as a general rule, 'trust assets' *automatically* vested in the new trustee, and where an exception to the rule existed (as in the case of shares only transferable in books kept by a company), the old trustee was required to execute the necessary instruments of transfer.[136]

The alternative to *Lemery* and *Meritus* is, of course, that the old trustee is entitled to retain possession of the trust property. In *Re Suco Gold*, King CJ said, without elaborating, that '[t]he right of possession of the trustee, until his right of indemnity is exercised, is superior to those of a new trustee or the *cestuis que trust*'.[137] In *Apostolou v VA Corporation of Australia Pty Ltd* ('*Apostolou*'),[138] Finkelstein J rejected *Lemery* on the basis that there was no reason to distinguish 'between a claim for possession by a beneficiary … and a claim for possession by a new trustee'.[139] But the difficulty with these decisions

131 Ibid 560–1 [47].

132 Heydon and Leeming (n 61) 513 [21-04]. See also Geraint Thomas and Alastair Hudson, *The Law of Trusts* (Oxford University Press, 2nd ed, 2010) 649 [22.81], citing *Re Pauling's Settlement Trusts [No 2]* [1963] Ch 576.

133 [2017] SC (Bda) 82 Civ ('*Meritus*').

134 See below n 150.

135 *Meritus* (n 133) [9]. See Elspeth Talbot Rice, 'I'm a Trustee, Get Me Out of Here (with Indemnities and Security)' (2019) 25(2) *Trusts and Trustees* 182.

136 *Meritus* (n 133) [7], [9]. See also Lynton Tucker, Nicholas Le Poidevin and James Brightwell, *Lewin on Trusts* (Sweet & Maxwell, 19th ed, 2015) 668–9 [17-033].

137 *Re Suco Gold* (n 4) 109. See also *Tolhurst Druce & Emmerson v Maryvell Investment Pty Ltd* [2007] VSC 271, [213]–[214] (Dodds-Streeton J); *Rosenberg v Fifteenth Eestin Nominees Pty Ltd [No 2]* [2010] VSC 38, [51] (Habersberger J); *Prior v Simeon [No 2]* [2011] WASC 61, [20] (Corboy J); Austin Wakeman Scott, William Franklin Fratcher and Mark L Ascher, *Scott and Ascher on Trusts* (Wolters Kluwer, 5th ed, 2007) vol 4, 1627 [22.1.1].

138 (2010) 77 ACSR 84 (Federal Court) ('*Apostolou*').

139 Ibid 95 [51].

is that they appear to support the surprising proposition that, for example, a retiring trustee is entitled to retain *all* of the trust property of a trust estate worth $100 million, even if the debts in respect of which it has a right of indemnity come to only $10 million.[140]

In *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties*,[141] McPherson J considered that a retiring trustee was entitled to retain sufficient assets to satisfy its right of indemnity.[142] This approach finds support in a comprehensive review of the case law undertaken by Diccon Loxton.[143] It has 'practical wisdom'.[144] And it is also correct as a matter of principle.

It is convenient to begin by considering the objection that, if an old trustee were entitled to retain trust property, the trustee would necessarily be entitled to retain *all* of the trust property. In *Octavo*, the High Court said that the trustee's interest 'applies to the whole range of trust assets in the trustee's possession'.[145] But this should not be taken to mean that, even after the extent of the trustee's right to reimbursement or exoneration has been finally determined, the trustee remains entitled to retain possession of all of the trust property.

The trustee's right is in the nature of a running account. The trustee may incur more trust liabilities or it may *pro tanto* become disentitled to an indemnity as a result of a separate breach of trust. Thus, in *Jennings v Mather*,[146] Kennedy J said that '*until the accounts are made up* [the trustee] is entitled to a lien over all the assets of the estate'.[147] And in *Buckle*, the Court said that '[u]ntil the right to reimbursement or exoneration has been satisfied, "it is impossible to say what the trust fund is"'.[148] But where accounts have been settled, a court of equity is perfectly capable of determining, in the interests of the beneficiaries but without prejudice to the old trustee, which

[140] See *Lemery* (n 126) 559 [40] (Brereton J); Heydon and Leeming (n 61) 513 [21-04].

[141] *Kemtron* (n 14).

[142] Ibid 587. See also *Hillig v Darkinjung Pty Ltd* (2006) 205 FLR 450, 454–5 [17]–[18] (Barrett J) (Supreme Court of New South Wales).

[143] Loxton (n 101) 302–6. See also *Re Winter Holdings (WA) Pty Ltd* [2015] WASC 162, [37] (Acting Master Gething).

[144] Cf *Re Killarnee* (n 15) 338 [106] (Allsop CJ).

[145] *Octavo* (n 28) 367 (Stephen, Mason, Aickin and Wilson JJ).

[146] [1901] 1 QB 108.

[147] Ibid 114 (emphasis added).

[148] *Buckle* (n 14) 246 [48] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ), quoting *Dodds v Tuke* (1884) 25 Ch D 617, 619 (Bacon V-C). See also *CPT Custodian* (n 13) 121 [151] (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ).

assets the old trustee is entitled to retain to satisfy its right of indemnity. Contrary to what was said in *Lemery* and *Meritus*, *Re Suco Gold* and *Apostolou* are not inconsistent with this proposition. In neither of those cases was it said that an old trustee is entitled to retain all of the trust property *after* accounts have been taken and it has been determined that the value of the trust property exceeds the old trustee's liabilities.

What of the answer given in *Lemery* and *Meritus*? This is where the true nature of the trustee's right of indemnity, elucidated by *Re Amerind*, provides clarification. The reasoning in those cases proceeded on the basis that the trustee had an actual equitable lien. It was reasoned that equitable liens are not possessory; therefore, an old trustee had no right of possession as against a new trustee.[149] With respect, this is clearly wrong. As has been shown, the trustee does not have an equitable lien. Rather, the trustee's legal powers in the trust property, released from the fetters equity normally places on them, *resemble* an equitable charge or lien. *Lemery* fails at the threshold.

That the trustee's interest is a legal one also lends support to Finkelstein J's view in *Apostolou* that there is no principled basis for distinguishing between the rights of a trustee as against a beneficiary and the rights of an old trustee as against a new trustee. In either case, if the trustee is compelled to transfer legal title to the property, the trustee's interest is necessarily destroyed. It is conceivable that an equitable simulacrum could spring up in place of the trustee's former legal interest, but this finds no support in the case law.

The reliance in *Meritus* on the statutory scheme in the *Trustee Act 1975* (Bda) is also misplaced. For an Australian audience, it is more convenient to refer to the *Trustee Act 1958* (Vic), with cross-references to equivalent Acts in the other states and territories. Section 45(1) of the Victorian Act provides:

> Where a new trustee is appointed the execution of the instrument of appointment shall, subject to this section without any conveyance vest in the persons who become and are the trustees, as joint tenants and for the purposes of the trust, the *trust property* for which the new trustee is appointed.[150]

[149] *Lemery* (n 126) 556 [29], 561 [50] (Brereton J). See also *Meritus* (n 133) [17]–[20] (Kawaley CJ).

[150] *Trustee Act 1958* (Vic) s 45(1) (emphasis added). See also *Trustee Act 1925* (ACT) s 9(1); *Trustee Act 1925* (NSW) s 9(1); *Trustee Act 1893* (NT) s 13(1); *Trusts Act 1973* (Qld) s 15(1); *Trustee Act 1936* (SA) s 16(1); *Trustee Act 1898* (Tas) s 15(1); *Trustees Act 1962* (WA) s 10(1).

The phrase 'trust property' is undefined, but the better view is that it refers to the property to which the beneficiaries are entitled.[151] If the old trustee has an interest in the trust property pursuant to its right of indemnity, the property is not 'trust property' for the purposes of the section.[152] And if the extent of the indemnity has not been settled, the trustee is, notwithstanding the terms of the Act, entitled to retain possession of all of the trust property until the accounts have been settled.

VII Conclusion

Re Amerind has resolved an important issue that frequently confronts liquidators and their advisors: how are trust assets distributed in the winding-up of an insolvent trustee of a trading trust? The result, which as a matter of practice is surely preferable, is that the assets are distributed just as if the business were a company. But the decision has broader implications. It casts light on the nature of the trustee's right of indemnity generally. In doing so, it has helped to answer questions not directly addressed in the judgment. This note has sought to draw attention to these implications against the background of conflicting but now resolved case law.

[151] I am grateful to the anonymous referee who pointed out that the history of this section is complex and ambiguous. Section 45(1) of the Victorian Act derives from s 34(1) of the *Conveyancing and Law of Property Act 1881*, 44 & 45 Vict, c 41, which provides that, if a deed appointing a new trustee contains a declaration that 'any estate or interest in any land subject to the trust, or in any chattel so subject', shall vest in the new trustee, the property shall so vest without any conveyance or assignment. The quoted phrase more aptly describes the trust *res* than the beneficiary's interest. But unlike s 45(1) of the Victorian Act, s 34(1) applies only where a deed expressly states that property shall vest in the new trustee. If an appointor has no power to vest property subject to the trustee's right of indemnity, as would appear to follow from *Re Amerind*, the section is simply not engaged. That being so, s 34(1) of the UK Act should not cast too long a shadow over s 45(1) of the Victorian Act. The text, context and purpose of the sections are subtly different.

[152] *Xebec Pty Ltd (in liq) v Enthe Pty Ltd* (1987) 18 ATR 893, 898 (Derrington J) (Supreme Court of Queensland); *Apostolou* (n 138) 94 [49] (Finkelstein J); Harold Ford et al, Lawbook, *The Law of Trusts* (online at 31 January 2020) [8.400].