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Trust me: Does trust property go where it should after insolvency?

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At this conference ten years ago, I explored some of the imponderables of the insolvency of registered managed investment schemes and trusts more generally.[2] The waters were murky. The last decade has not caused them to clear. The question for discussion today is whether trust property goes where it should in an insolvency administration. The answer is problematic. The law in Australia after the recent decisions in *Amerind*[3] and *Killarnee*[4] is best described as uncertain and unsatisfactory; and that description is likely to remain apt whatever may be the outcome of the pending High Court appeal in *Amerind*.[5]

The source of the problem hardly needs repetition: to use trusts to conduct commercial enterprises, particularly with companies as trustees, is to ask them to perform a role for which they were never intended and for which they are poorly fitted.[6] But we cannot change the past. The challenge is to apply in today's commercial settings principles of trust law that were developed in other times for other purposes.

The common case that we see every day involves a company with minimal capital whose sole activity is to carry on some business as trustee of a

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[1] Acting Judge of Appeal, Supreme Court of New South Wales. I am grateful to Nuncio D'Angelo and Maeve McGregor for comments on a draft of this paper. © R I Barrett 2018.
[2] R I Barrett, "Insolvency of registered managed investment schemes" [2008] NSWJSchol 14.
[3] *Commonwealth v Byrnes and Hewitt* (2018) 354 ALR 789; [2018] VSCA 41 (Ferguson CJ, Whelan, Kyrou, McLeish and Dodds-Streeton JJA).
[4] *Jones (Liquidator) v Matrix Partners Pty Ltd, Re Killarnee Civil & Concrete Contractors Pty Ltd* (2018) 354 ALR 436; [2018] FCAFC 40 (Allsop CJ, Siopis and Farrell JJ).
[5] Special leave to appeal was granted on 17 August 2018: *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth of Australia* [2018] HCATrans 156 (Gageler, Nettle and Edelman JJ).
[6] It is almost forty years since Professor Harold Ford declared this "union of the law of trusts and the law of limited liability companies" a "commercial monstrosity": H.A.J Ford, "Trading trusts and creditors rights" (1981) 13 MULR 1, 1.

unit trust or discretionary trust. The company has no substance or purpose independently of its trustee status, owns no property other than trust property and incurs no debts other than trust debts. As the cases show, that state of affairs is difficult enough. Things are all the more difficult in the less commonly encountered class of case where the company also has non-trust activities or is the trustee of several trusts. And a further layer of complexity is added if the trustee ceases to hold office automatically upon insolvency administration being imposed and is then a bare trustee.

The focus of this paper is corporate insolvency. As the recent decision in the *Lane* case[7] emphasises, similar issues arise in personal bankruptcy. The bankruptcy situation will be mentioned only incidentally.

We need to start with the basic and otherwise uncontroversial proposition that a trustee is personally liable for all the debts it incurs, whether as trustee or otherwise, and has a right to resort to the trust property in respect of debts properly incurred as trustee in the execution of the trust.[8] The right of indemnity, to use its generic description, comprises two distinct species of right or entitlement.[9] In the unlikely event that the trustee has paid a trust debt out of its personal pocket (which it might do if, for example, the fund was temporarily illiquid), its right is a right of recoupment or reimbursement out of trust property – a right to replenish the personal pocket. If the debt has been incurred but not yet paid, the right is a right of exoneration – to obtain from the trust fund that which is required to pay the debt and thereby discharge the trustee's personal liability to the trust creditor.

[7] *Lane (Trustee), Re Lee (Bankrupt) v Deputy Commissioner of Taxation* (2017) 253 FCR 46; [2017] FCA 953.

[8] The right is an incident of the office of trustee and is confirmed by statute in many jurisdictions. The fragile nature of the right and the precarious position occupied both by the trustee and by creditors who are subrogated to the trustee's right are well documented and merely noted here: see, for example, Nuncio D'Angelo, "The unsecured creditor's perilous path to a trust's assets: Is a safer, more direct US-style route available?" (2010) 84 ALJ 833, 842-843.

[9] These are succinctly explained in *Custom Credit Co Ltd v Ravi Nominees Pty Ltd* (1992) 8 WAR 42, 52-53.

The right of the trustee to be indemnified for trust debts out of trust property is often described as a charge or lien,[10] but that description of right is somewhat inapt where the trustee still holds legal title to the assets.[11] In light of *Chief Commissioner of Stamp Duties (NSW) v Buckle*,[12] however, it is probably best viewed today as a "preferred beneficial interest" in the trust property. Although "preferred beneficial interest" does not roll off the tongue as easily as "charge" or "lien", it is an expression that is more conceptually and technically correct.[13]

Because the quantum of the trustee's preferred beneficial interest fluctuates as trust debts are incurred and paid, the interests of the beneficiaries[14] cannot be quantified and therefore cannot be satisfied until the trustee's prior right has been satisfied, or at least quantified and allowed for. In this way, the trustee's preferred beneficial interest operates as a qualification upon, but does not encumber,[15] the beneficiaries' interests. It "is inseparable from and co-extensive with the trustee's obligations, both those already incurred and discharged but not yet reimbursed and those incurred but not yet discharged".[16]

So much for the trustee's position. Let us now look at things from the unpaid creditor's viewpoint. The creditor's right of action is against the trustee. That right pays no attention to trustee status or lack of it. One person (the trustee) owes money to another person (the creditor) and that second person can sue the first to recover the debt in the usual way. Let us assume that judgment is obtained. What next?

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[10] See, for example, *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319, 355; [1945] HCA 37; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367, 370; [1979] HCA 61.

[11] *Agusta Pty Ltd v Provident Capital Ltd* (2012) 16 BPR 30,397; [2012] NSWCA 26 at [41].

[12] (1998) 192 CLR 226, 246-247 [48]-[51]; [1998] HCA 4.

[13] See *Agusta Pty Ltd v Provident Capital Ltd* (2012) 16 BPR 30,397; [2012] NSWCA 26 and 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 ABLR 285, 291-293.

[14] In the case of a discretionary trust there are, strictly speaking, no "beneficiaries" unless the discretion has been exercised: see, for example, *Re MINMXT Holdings Pty Ltd* [2017] NSWSC 156 at fn 4. In the present context, references to "beneficiaries" include potential discretionary beneficiaries.

[15] *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226, 247 [50]; [1998] HCA 4.

[16] *Agusta Pty Ltd v Provident Capital Ltd* (2012) 16 BPR 30,397; [2012] NSWCA 26 at [41].

A natural inclination of the creditor might be to seek to levy execution on the property of his judgment debtor, the trustee company. But if all the company has is trust property, a writ of execution will not be a productive course, at least in a case where there are several creditors. Equity will not allow trust property to be subjected to the common law process of levy of execution in those circumstances. That proposition has been confirmed at least twice by the High Court in decisions three-quarters of a century apart.[17] While the principle is clear, the rationale for it may not be, except by reference to some general proposition that common law remedies will not be allowed to harm equitable rights. Justice Richard White recently identified[18] four possible reasons emerging from cases decided between 1881 and 2012 and pointed to apparent imperfections in all of them.

So, with execution at law unavailable, the judgment creditor might look to some form of equitable execution through an application for the appointment of a receiver. There are old cases in which a creditor with a judgment at law has encountered the problem that the property of the judgment debtor against which execution would logically be levied is equitable property. In *Neate v Duke of Marlborough*,[19] it was an equitable interest in freeholds to the extent of 3000 pounds per year. In *Anglo-Italian Bank v Davies*,[20] it was an equity of redemption in freehold lands, the judgment debtor being a mortgagor. In each case, a receiver was appointed to obtain satisfaction for the judgment creditor by realisation of the particular equitable property.

In the case of a trading trust, there must be substantial doubt whether equity would assist a single creditor in this way, particularly if there were any suggestion of insolvency. Equity would be conscious of the rights of the other

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[17] *Savage v Union Bank of Australasia Ltd* (1906) 3 CLR 1170, 1186-1187 (Griffith CJ), 1191-1192 (Barton J); [1906] HCA 37; *Octavo Investments Pty Ltd v Knight* (1979)144 CLR 360, 367; [1979] HCA 61; and see *Agusta Pty Ltd v Provident Capital Ltd* (2012) 16 BPR 30,397; [2012] NSWCA 26 at [46]ff.

[18] R W White, "Insolvent trusts: Implications of Buckle and CPT Custodian" (2017) 44 Aust Bar Rev 1.

[19] (1838) 3 My & Cr 407.

[20] (1878) 9 Ch D 275.

creditors. The only realistic possibility, perhaps, is some form of general administration of the trust property in equity for the benefit of all interested in it, perhaps under the kind of order for general administration that Young J considered (but did not make) in *McLean v Burns Philp Trustee Co Pty Ltd*.[21] The court would not be inclined to make orders for the distribution of trust property unless everyone with an arguable interest was on notice.[22] These waters are largely unchartered in modern times.

The much more likely (and certainly more common) outcome where a corporate trustee cannot pay its debts is winding up of the company, either with or without preliminary voluntary administration. Let us now track the process of the winding up.

The core task of the liquidator is to cause the company's property to be collected and applied in discharging its liabilities. In both voluntary winding up[23] and winding up by the court,[24] the general rule laid down by the *Corporations Act* is that debts and claims rank equally and, if the property of the company is insufficient to meet all in full, they must be paid proportionately. This general rule is qualified by s 556 which gives certain claims priority and decrees an order of priorities among them. A number of sections are directed towards getting in the company's property. Section 474 (1) requires the liquidator to "take into his or her custody, or under his or her control, all the property which is, or which appears to be, property of the company". Section 483(1) enables the court to order someone such as a trustee, receiver, agent or employee to deliver to the liquidator any "property of the company in the person's hands". And s 477(2)(c) gives the liquidator power to "sell or otherwise dispose of, in any manner, all or any of the property of the company".[25]

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[21] (1985) 2 NSWLR 623, 636.
[22] See for example *Horwath Corporate Pty Ltd v Huie* (1999) 32 ACSR 413, 414 [8]; [1999] NSWSC 583.
[23] *Corporations Act 2001* (Cth), s 501.
[24] *Corporations Act 2001* (Cth), s 555.
[25] The several powers quoted are, in terms, conferred on a liquidator in a winding up by the court. Section 506(1)(b) causes them to be exercisable by a liquidator in a voluntary winding up.

In the case of a corporate trustee, what is "the property of the company"? There is, I think, no real doubt that the trust assets themselves, not being beneficially owned by the trustee, are not "property of the company". But what about the trustee's preferred beneficial interest in the trust property? In the case (unusual in the real world) where the company has paid trust debts from its own pocket and has a right of reimbursement out of trust property, that right of reimbursement and its proceeds must clearly be property of the company in the fullest sense. The right exists exclusively for the personal benefit of the trustee who has paid. Today, in the light of explanations given in both *Amerind* and *Killarnee*, it is clear that the trustee company's right of exoneration out of trust assets is also property of the company.[26] To that limited extent – that is, to the extent of the trustee company's preferred beneficial interest entitling it to take trust property to satisfy unpaid trust debts – the trust property therefore comes under the control of the liquidator.

A problem that was not new in 2016 but was thrown into sharp relief in that year by the *Independent Contractor* decision nevertheless remains.[27] Because only a limited interest in the trust property comes under the control of the liquidator and the trustee company is now deprived of normal corporate governance, there is a partial administrative vacuum: no one is looking out for the residual interests that the beneficiaries continue to have in the trust property as a whole. Also, because only the preferred beneficial interest of the trustee comes under the liquidator's control as property of the company, the liquidator has no general power to sell items of the trust property itself.[28]

According to one school of thought, this disability of the liquidator arises only where the company is ousted from office by the trust deed when winding up begins and thereupon becomes a bare trustee with no active duties to perform. The disability is not confined in that way. It operates even if the office of the

[26] *Amerind* (2018) 354 ALR 789; [2018] VSCA 41 at [124], [269], [271], [273]; *Killarnee* (2018) 354 ALR 436; [2018] FCAFC 40 at [68]-[69], [79] (Allsop CJ), [142] (Siopis J), [210]-[211] (Farrell J).

[27] *Re Independent Contractor Services (Aust) Pty Ltd (No 2)* (2016) 305 FLR 222; [2016] NSWSC 106.

[28] *Killarnee* (2018) 354 ALR 436; [2018] FCAFC 40 at [89].

company as trustee is not terminated when winding up begins. The liquidator is not the general agent of the company.[29] Unlike a board of directors to which the constitution gives authority to exercise all corporate powers not reserved to the members in general meeting, a liquidator has specific statutory authority only. Restrictions upon that authority necessarily affect the extent to which the company in liquidation can function as trustee at the liquidator's instigation. Under s 477(2)(c), the liquidator's power to sell extends only to "the property of the company". It follows that where "the property of the company" is only the trustee's preferred beneficial interest (plus, no doubt, the legal estate), the power does not allow the liquidator to sell trust property as beneficial owner; and this is so both where the trustee continues to have a power of sale under the trust instrument and where it has become a bare trustee. This position was recognised in *Killarnee*.[30]

Particularly after the *Independent Contractor* case, a practice arose under which a liquidator, once appointed, would ask the court to make a parallel appointment as receiver so that administration of the winding up and residual administration of the trust could proceed together, and the liquidator, as receiver, was given by the court an undoubted power extending to the trust property as such. *Amerind* and *Killarnee* have done nothing to clarify that area and liquidators are still seeking parallel appointment as receivers.[31] The majority in *Killarnee* did, however, approve an alternative course: conferral by the court on the liquidator (not, it may be noted, the company as trustee) of a power of sale in the way that the holder of an equitable lien or charge may be authorised to sell.[32] While the concept of giving the company as trustee a power similar to that typically conferred on the holder of a charge or lien is

[29] For recent discussion of the position of the liquidator as an agent, see Beth Nosworthy and Christopher Symes, "The liquidator: a hybrid of agent, fiduciary and officer" (2016) 31 Aust J of Corporate Law 65.

[30] *Killarnee* (2018) 354 ALR 436; [2018] FCAFC 40 at [89].

[31] See for example *Re MJM(WA) Enterprises Pty Ltd* [2018] NSWSC 944. The same thinking is now spilling over into voluntary administration of corporate trustees. See for example *Freeman; Re Blue Oasis Holdings Pty Ltd* [2018] FCA 822; *Trenfield; Re Crusader Managers Pty Ltd* [2018] FCA 876

[32] (2018) 354 ALR 436; [2018] FCAFC 40 at [91] (Allsop CJ), [198] (Farrell J).

understandable, it is difficult to see how any court order could increase the powers given by statute to a liquidator.[33]

It is useful, at this point, to focus more closely on the rights of the unpaid trust creditor. By a process of subrogation, the creditor has what Lord Eldon[34] called "something very like a lien" upon the trust property. The words "very like" were, I suggest, well chosen. There is no lien as such but rather what might be regarded as a derivative right related to the trustee's preferred beneficial interest arising from the trustee's right of exoneration.[35] An important point made both in *Amerind* and by the majority in *Killarnee* is that the creditor's right cannot be viewed as an interest in the trust property as such.[36] It is a right, recognised by equity, against the trustee to see the trustee's preferred beneficial interest preserved and vindicated so that the precedence it has over the interests of the beneficiaries is not compromised. Looking at things from the other direction, the individual trust creditor has a right to insist that the beneficiaries do not usurp or encroach on the beneficial interest of the trustee. If, for some reason, the trustee were not inclined to protect its beneficial interest, the trust creditor could no doubt rely on its right of subrogation in a proceeding in equity either to compel the trustee to do so or to seek in a direct way whatever safeguard the trustee was neglecting to obtain.[37]

One issue in relation to the right of exoneration and the preferred beneficial interest it represents is whether it carries with it (or is qualified by) what has been called a requirement of "directness". The question is whether the trustee entitled to exoneration, having gone to the trust cashbox and extracted the money needed to pay a given trust creditor, must hand that money directly and immediately to that creditor, or may instead put the money in its personal

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[33] The powers of the company as trustee, as distinct from the powers of the liquidator, might also be enhanced by orders made under trustee legislation: see for example *Re Matthew Forbes Pty Ltd* [2018] VSC 331 where orders were made under s 63 of the *Trustee Act* 1958 (Vic).
[34] *Ex parte Garland* (1804) 10 Ves Jun 111, 119.
[35] See *Amerind* (2018) 354 ALR 789; [2018] VSCA 41 at [29]-[31]; *Killarnee* (2018) 354 ALR 436; [2018] FCAFC 40 at [68].
[36] *Amerind* (2018) 354 ALR 789; [2018] VSCA 41 at [29]-[31], [57], [284]; *Killarnee* (2018) 354 ALR 436; [2018] FCAFC 40 at [68] (Allsop CJ), [196] (Farrell J).
[37] See generally Nuncio D'Angelo, "Directors of insolvent trustees and trusts: duties and liabilities in respect of beneficiaries and trust creditors" (2017) 35 C&SLJ 75, 93.

pocket for the moment and pay the creditor later. It was said in *Amerind* (disapproving a view taken in *Lane*[38]) that there is no such requirement of directness; and that all that is necessary is that the money taken out of the trust cashbox be eventually paid to the trust creditor.[39] If it were applied in some other way, there would obviously be a breach of trust actionable at the suit of the beneficiaries.

This view is consistent with an important point made by Lush J in *Enhill* about the right of exoneration:

> [I]f the trustee's right has been extinguished by satisfaction, that is if the trustee himself has exercised it, it cannot be exercised a second time by the creditor. Accordingly, if the trustee, having exercised his right of lien, failed to pay the proceeds to the creditor, the creditor would be left unpaid and with no available right of subrogation.[40]

I think the same view was, at least implicitly, taken by Allsop CJ in *Killarnee*, particularly in that part of the judgment where he quotes Sir George Jessel MR in *In re Johnson*.[41] The situation described by the Master of the Rolls in that case was one in which the trustee has taken money out of the trust estate to pay the trust debts, and instead of using the money for that purpose, has put it into his own pocket. In such circumstances, it was said, the trust creditor has no equity because it is the defaulting trustee, not the beneficiaries, who has taken the benefit of the trust moneys. "[T]he title of the creditor, so to speak, to be put in the place of the trustee", said the Master of Rolls, is here "a title to get nothing, because nothing is due to the trustee."

When it is recognised that the trust creditor's right of subrogation does not create any equitable interest in the trust property, a particular possibility raised in some earlier commentary can be discarded. Daryl Williams suggested

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38 *Lane (Trustee), Re Lee (Bankrupt) v Deputy Commissioner of Taxation* (2017) 253 FCR 46, 53 [5], 61 [36], 63 [41], 87 [114]; [2017] FCA 953.
39 *Amerind* (2018) 354 ALR 789; [2018] VSCA 41 at [279].
40 *Re Enhill Pty Ltd* [1983] 1 VR 561, 568.
41 (1880) 15 Ch D 548, 552. See *Killarnee* (2018) 354 ALR 436; [2018] FCAFC 40 at [48].

in 1983[42] that because the creditors have, via subrogation, equitable interests in the trust property, the maxim "prior in time is prior in right" caused them to be ranked in order of the incurring of their debts. That cannot be accepted. It is incompatible with the current view about the absence of any beneficial interest in the trust creditors. They rank equally among themselves, subject to any statutory priorities that may operate.[43]

So, to summarise:

(1) The trust creditor is an unsecured creditor of the trustee and, just like any other creditor of the trustee, can obtain a money judgment accordingly.

(2) The trust creditor cannot resort to execution at law against the trust assets (except perhaps if there are no other creditors) but it may enlist the help of the court to seek a form of equitable execution.

(3) The trust creditor is entitled to insist that the trustee do three things: i) keep out of the hands of the beneficiaries trust property sufficient to pay its debt; ii) assert against the beneficiaries the trustee's preferred beneficial interest; and iii) preserve trust property from the beneficiaries' demands accordingly.

(4) It is that right of the trust creditor to insist that the trustee keep the beneficiaries at bay that is the product of the creditor's subrogated position.

(5) The trust creditor has no right to compel the trustee to give it trust property or to apply that property in any particular way.

(6) In terms of general law priority, the trust creditors rank equally among themselves and with any non-trust unsecured creditors.

When it comes to participation in the winding up of the trustee company, the trust creditor simply proves as an unsecured creditor. If there are non-trust

[42] D R Williams, "Winding up trading trusts: rights of creditors and beneficiaries" (1983) 57 ALJ 273, 277.

[43] As Gaudron, McHugh, Gummow and Hayne JJ observed in *Spies v The Queen* (2000) 201 CLR 603, 636 [93]; [2000] HCA 43, the "basic principle" in insolvency is one of "pari passu participation by creditors".

creditors who are unsecured, the proof lodged by a trust creditor is indistinguishable from theirs. It is worth noting here an important point made by Kitto J in the *Motor Terms* case[44] in 1967: a creditor's right to recover the debt by ordinary legal proceedings "is taken from him" when winding up commences and the "right of participation in distributions under the authority of the court is substituted for a pre-existing right of suit". The same applies to the trust creditor: a right to participate in the statutory administration conducted by the liquidator replaces the right of the trust creditor to sue the trustee in debt.

The burning issue goes to the way in which the trustee's preferred beneficial interest derived from the right of exoneration is to be dealt with by the liquidator as "property of the company". Before *Amerind* and *Killarnee*, there were, in general terms, three possibilities.

The first, for which *Enhill* is authority, is that the preferred beneficial interest to which the trustee company is entitled is property available for deployment in the winding up and is available to meet the claims of all its creditors, trust and otherwise, according to the statutory order of priorities.

The second possibility (exemplified by *Suco Gold*) is that the preferred beneficial interest is available for deployment in the winding up but is to be applied to the claims of the trust creditors only. Within those confines, however, the statutory order of priorities is to be applied.

The third possibility (supported by the decisions of Needham J in the *Byrne Australia* cases[45] predating both *Enhill* and *Suco Gold*) was that all equitable interests were outside the operation of the companies legislation and fell to be divided pari passu among the trust creditors. It is this approach that

[44] *Motor Terms Co Pty Ltd v Liberty Insurance Ltd* (1967) 116 CLR 177, 180; [1967] HCA 9.
[45] *Re Byrne Australia Ltd* [1981] 1 NSWLR 394; *Re Byrne Australia Ltd (No 2)* [1981] 2 NSWL.R 364.

was preferred in 2016 in the *Independent Contractor* case[46] and some later cases.[47]

One thing that is clear in the wake of *Amerind* and *Killarnee* is that the third possibility is not accepted and that the preferred beneficial interest of the trustee company comes within the disposition of the liquidator.[48] But in those cases it was still necessary to know whether and, if so, how the statutory regime regarding distributions and priorities applied. This was because certain of the debts were owed to employees. In *Amerind*, there was also a substantial amount owed to the Commonwealth because it had made advances towards employee entitlements. Both employee entitlements themselves and the Commonwealth's statutory reimbursement right enjoyed a degree of priority over other liabilities under the statutory regime.

The decision in *Amerind* was that the statutory regime applied to distribution among trust creditors. The court expressly declined to decide whether non-trust creditors, had there been any, would have ranked equally with the trust creditors.[49] But it did say that courts in Victoria should follow *Enhill* (expressly reversing Robson J at first instance on this point) and that the trust creditors were not distinguishable from non-trust creditors (or would not have been if there had been any).[50]

In *Killarnee,* Allsop CJ held the opposite, observing that "*Enhill* is wrong in its view as to the availability of the proceeds of the right of exoneration generally to all creditors and should not be followed in that regard", and that *Suco Gold* should be followed in relation to the application of the *Corporations Act*.[51]

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[46] See *Re Independent Contractor Services (Aust) Pty Ltd (No 2)* (2016) 305 FLR 222, 231 [24]-[25]; [2016] NSWSC 106.
[47] See for example. *Kite v Mooney; Re Mooney's Contractors Pty Ltd (No 2)* [2017] FCA 653 at [140].
[48] *Amerind* (2018) 354 ALR 789; [2018] VSCA 41 at [276], [281]; *Killarnee* (2018) 354 ALR 436; [2018] FCAFC 40 at [79]-[82] (Allsop CJ), [210]-[211] (Farrell J).
[49] *Amerind* (2018) 354 ALR 789; [2018] VSCA 41 at [282].
[50] Ibid at [286].
[51] *Killarnee* (2018) 354 ALR 436; [2018] FCAFC 40 at [4], [30] (Allsop CJ); see also [197], [208] (Farrell J).

The majority decision in *Killarnee* was that the trust property had, in the hands of the liquidator, certain inherent equitable characteristics that made it applicable primarily to trust purposes, being satisfaction of the claims of trust creditors and payment of the remuneration of the liquidator (without whom the trust could not be administered once winding up began). Subject to that, however, the statutory order of priorities was held to apply.

This treatment in *Killarnee* was explained by means of a number of metaphors. Farrell J said that the trustee's preferred beneficial interest is "property of a particular character, with its content and shape determined by the purpose for which it came into existence – the payment of creditors the liability to whom was incurred in executing the trust".[52] Allsop CJ saw it as a limited proprietary interest attended by an "inhering equitable obligation", its "nature and character" being that it is exercisable only to meet a trust liability properly incurred. The content of the interest, in his Honour's view, "is shaped by its purpose and origins in the trust relationship – to pay trust creditors in order to exonerate [the trustee] from those debts".[53] He further said:

> The inhering nature of the right [of exoneration] is derived from its equitable source and can be, and should be, maintained under the regime of the *Corporations Act*, albeit with any necessary qualifications brought about by the terms of the Act in respect of payment of costs associated with the operation of the statutory insolvency regime and the operation of such provisions under the influence of cognate equitable principle.[54]

Given that trust creditors have no equitable interest in the trust property or even in the trustee's preferred beneficial interest in it, the "inhering equitable obligation" to which Allsop CJ referred cannot be one owed to those creditors. It is presumably owed to the beneficiaries. Although the beneficiaries are not worried if trust debts remain unpaid, they are certainly concerned to ensure that trust property is not misapplied.

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[52] *Killarnee* (2018) 354 ALR 436; [2018] FCAFC 40 at [211].
[53] Ibid at [49].
[54] Ibid at [4].

The view taken by the majority in *Killarnee* corresponds very largely with *Suco Gold*: the property of the trustee is to be applied according to the statutory scheme, but first and foremost for the trust creditors. This *Killarnee* regime applies not because the trust creditors have an interest in the trust property but because, even in the absence of equitable interests on their part, certain modes of application and expectations of priority or precedence inhere in the trustee's beneficial interest, which is given "content" and "shape" accordingly.

Another point arising in each case went to the nature, in the liquidator's hands, of the proceeds of successful preference recovery actions. In both cases, it was held that the proceeds fell to be dealt with for the benefit of all creditors and according to the statutory scheme even if the payment by the company found to have been preferential was from trust assets. Only in *Amerind* was it necessary for the matter to be analysed.[55] Curiously, to my mind, the court referred only to a number of late 20th century cases[56] holding that, under bankruptcy provisions, preference recovery proceeds were not caught by a floating charge given by the company. That conclusion contributed to the finding in *Amerind* that the proceeds were to be applied according to the statutory scheme. No reference was made to the more recent cases[57] which have emphasised that the voidable transaction provisions in force since 1993 do not undo prior transactions, do not create a right of action in the company and do not create a right of recovery in the liquidator: rather, they create a statutory mechanism for augmenting the insolvent estate by countering the effects of pre-liquidation transactions of certain kinds. That analysis would lead even more decisively to the same result.

[55] *Amerind* (2018) 354 ALR 789; [2018] VSCA 41 at [69]-[77]. In *Killarnee*, the parties had conceded the result and the court accepted their agreement without endorsing it: (2018) 354 ALR 436; [2018] FCAFC 40 at [93]-[94] (Allsop CJ), [149] (Siopis J), [199] (Farrell J).

[56] *Sheahan v Carrier Air Conditioning Pty Ltd* (1997) 189 CLR 407; [1997] HCA 37; *NA Kratzmann v Tucker (No 2)* (1968) 123 CLR 295; [1968] HCA 44; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360; [1979] HCA 61.

[57] *Tolcher v National Australia Bank Ltd* (2004) 182 FLR 419; [2004] NSWSC 6; *Hall v Ledge Finance Ltd* [2005] NSWSC 645 at [12]; *New Cap Reinsurance Corporation v A E Grant* (2009) 257 ALR 740; [2009] NSWSC 662 at [19]-[21]; *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2014) 87 NSWLR 728, 749 [127]; [2014] NSWCA 148.

An interesting point arises in this latter context. Assume a payment made out of trust property before winding up is later challenged as preferential and, on application made by the liquidator under s 588FF(1), the person to whom the payment was made is ordered to pay an equivalent sum to the company. Assume also that the sum thus received, plus what comes in by virtue of the trustee's preferred beneficial interest, is more than enough to enable the liquidator to pay 100 cents in the dollar to the creditors, all of whom are trust creditors. What does the liquidator do with the surplus? Does it go to the trust beneficiaries, to the shareholders or partly to one and partly to the other?

With that question hovering in the air, let me go back to the proposition that the law is uncertain and unsatisfactory. The reason hardly needs repetition. Courts only determine the points brought before them[58] and, tantalising as the prospect may sometimes be, cannot lay down the law in any comprehensive way. And as we see graphically in this area, they do not always see eye to eye. There is to be a High Court appeal in *Amerind.* But even if *Enhill* is rejected in favour of *Killarnee* and *Suco Gold,* many difficult questions will remain. The three members of the court who sat on the special leave application referred in passing to some of them; but it is by no means clear that all the troubling issues will be addressed.

There is, quite simply, a compelling case for legislative intervention. In an area as important as this to everyday commercial life, we cannot go on poring over words written by judges about specific cases and trying to fashion them into an all-purpose blueprint. We should not have the spectacle of liquidators in simple and straightforward administrations routinely spending scarce resources on applications to have themselves made receivers, for directions and for the fixing of receivers' remuneration. State law reform bodies in Victoria and New South Wales have recently addressed (with diametrically opposed results[59]) a

[58] See for example *Bell Group NV v Western Australia* (2016) 260 CLR 500; [2016] HCA 21 at [75].

[59] Victorian Law Reform Commission Report, *Trading Trusts – Oppression Remedies* (May 2015); NSW Law Reform Commission Report 144, *Laws relating to beneficiaries of trusts* (July 2018).

possible statutory oppression remedy for beneficiaries of trusts; and in New South Wales, there have been recommendations about statutory limitation of the personal liability of beneficiaries for trust debts.[60] One wonders whether these matters throw up any significant real-world problems when compared with the stark practical difficulties in the insolvency area. The Law Council of Australia made a submission[61] to the Commonwealth government last year highlighting some (but by no means all) of the uncertainties that surround the insolvency of corporate trustees. I am not aware of any reaction to that submission. Those uncertainties underscore suggestions made to the Productivity Commission in 2015 that aspects of our trust law could in some ways inhibit Australia's international competitiveness.[62]

The basic problem is one of conflation. The *Corporations Act* compels an unhappy blending of the statutory process of winding up of the company and the non-statutory administration of the financially deficient trust estate. But the tools a liquidator has are inadequate and unsuitable for the second of these tasks. The two distinct administrations need to be separated, but in such a way that a single liquidator can conduct them in parallel. Several approaches can no doubt be postulated. At the risk of gross over-simplification, I will suggest one. In the first place, if a company subject to winding up is a trustee, the liquidator should have a clear and distinct power to get in and realise the trust property – not just the trustee's preferred beneficial interest – as well as any non-trust property. The question whether the trustee's preferred beneficial interest is itself "property of the company" should be made irrelevant. The proceeds of realisation of the trust property should be applied by the liquidator in paying trust debts and not be available to meet the claims of non-trust creditors. By contrast, the proceeds of realisation of non-trust assets should be available to meet the claims of both trust and non-trust creditors rateably, but with trust creditors participating at that stage only to the extent to which the trust property

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[60] NSW Law Reform Commission Report 144, *Laws relating to beneficiaries of trusts* (July 2018).

[61] The submission and its covering letter dated 16 June 2017 are available on the Law Council's website at lawcouncil.asn.au.

[62] Productivity Commission 2015, *Barriers to growth in services exports*, Research Report, Canberra, 168-171.

has left their claims unsatisfied. There will thus be two distinct funds administered together by the liquidator. The proceeds of any liquidator recovery actions will be allocated to one fund or the other according to whether the money committed to the particular voidable transaction was or was not trust property. Each fund will bear any expenses solely referable to it, while shared expenses (such as the liquidator's remuneration) will be borne by both funds in proportion to some relevant comparative measure. In the application of each fund for the benefit of those creditors entitled to share in it, the statutory order of priorities will apply. If either fund results in a surplus, that surplus will go to the relevant residual constituency, being the trust beneficiaries in the one case and the shareholders in the other – indeed, in the former eventuality, the solution would logically be for the surplus in the liquidator's hands to continue to be subject to the relevant trusts but under appropriate new trusteeship.

A few moments' consideration of this rough idea will no doubt throw up a myriad of questions. There may be better options. But the clear need, as I see it, is to start somewhere on a legislative solution.

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