

# SUPREME COURT OF QUEENSLAND

CITATION: *Re Humphreys & Anor* [2018] QSC 241

PARTIES: **ROBERT COLIN HUMPHREYS AS LIQUIDATOR OF  
HARTS TRANSPORT (QLD) PTY LTD (IN  
LIQUIDATION) (A.CN. 081 358 563)**  
(first applicant)  
**and**  
**HARTS TRANSPORT (QLD) PTY LTD (IN  
LIQUIDATION) (A.CN. 081 358 563) IN ITS  
CAPACITY AS TRUSTEE OF THE JL & BA HART  
FAMILY TRUST**  
(second applicant)

FILE NO/S: SC66/2018

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Mackay

DELIVERED ON: 16 October 2018

DELIVERED AT: Mackay

HEARING DATE: 15 October 2018

JUDGE: Crow J

ORDER: **The Court directs that:**

- 1. Pursuant to clause 90-15 of the *Insolvency Practice Schedule* the applicants are justified in distributing the unfair preference proceeds and the assets of the JL & BA Hart Family Trust:**
  - a) Firstly, in payment of those debts and claims (including the first applicant's expenses and remuneration) entitled to priority by s 556 of the *Corporations Act 2001* (Cth) and in the order set out in s 556;**
  - b) Secondly, as to the balance, proportionately among the admitted creditors of Harts Transport (Qld) Pty Ltd (in liquidation) A.C.N. 081 358 563.**

**The order of the Court is that:**

- 1. The applicants' costs of and incidental to this**

**application be paid from the assets of the JL & BA  
Hart Family Trust on the indemnity basis.**

CATCHWORDS: CORPORATIONS – TRUSTS AND TRUSTEES – LIQUIDATION – where the company traded solely as trustee of the trust – where notwithstanding the company’s liquidation, it has remained the trustee – where under the control of the first applicant as liquidator, the trust assets have been realised by the company – where because the company remains the trustee there was no need for the first applicant to seek to be appointed receiver in order to be authorised to sell the trust assets – where the trust assets are insufficient to meet the amounts owing by the company (as trustee) to creditors – where the company (as trustee) is entitled to have recourse to trust assets to discharge the liabilities the company has incurred as trustee (the right of exoneration) – where the factual circumstances mean the company’s recourse to its right of exoneration will exhaust all assets of the trust – whether the priority regime established by the *Corporations Act* 2001 (Cth) applies to the distribution of the proceeds of the trustee’s right of exoneration amongst trust creditors – whether the trust assets are to be applied by the applicants in accordance with the priority regime established in s 556 of the *Corporations Act* 2001 (Cth) – whether the company’s interest in the trust assets in the form of its right of exoneration is property of the company within the meaning of the *Corporations Act* 2001 (Cth) – whether the trustee’s right of exoneration is property of the company

*Corporations Act* 2001 (Cth) s 501, s 560, s 556  
*Trusts Act* 1973 (Qld) s 72, s 96

*Jones (liquidator) v Matrix Partners Pty Ltd, in the matter of Killarnee Civil and Concrete Contractors Pty Ltd (In Liq)*  
[2018] FCAFC 40, considered

*Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99, considered  
*Independent Contractor Services (Aust) Pty Ltd (in Liq) (No 2)* (2016) 305 FLR 222, cited

*Commonwealth v Byrnes (in their capacity as joint and several receivers and managers of Amerind Pty Ltd (recs and mgrs apptd) (in liq))* (2018) 354 ALR 789, considered  
*Woodgate, in the matter of Bell Hire Services Pty Ltd (in liq)*  
[2016] FCA 1583, cited

*In the matter of MINMXT Holdings Pty Ltd (In liquidation)*  
[2017] NSWSC 156

*Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, cited

SOLICITORS: Macrossan and Amiet Solicitors for the applicants

- [1] **Crow J:** The application is for directions or orders pursuant to clause 90-15 of the *Insolvency Practice Schedule*<sup>1</sup> and/or s 96 of the *Trusts Act 1973* (Qld).
- [2] The first applicant is the liquidator of Harts Transport (Qld) Pty Ltd (“the company”). The second applicant is the company in its capacity as trustee of the JL & BA Hart Family Trust (“the trust”).
- [3] The application is brought because of ongoing uncertainty arising from conflicting authority. The conflict is well-summarised by Allsop CJ in *Jones (liquidator) v Matrix Partners*.<sup>2</sup>
- [4] Notice of the application has been given to all known creditors of the company and/or the trust.<sup>3</sup>
- [5] The relevant factual background is that the company traded solely as trustee of the trust. Notwithstanding the company’s liquidation, it has remained the trustee. Under the control of the first applicant as liquidator, the trust assets have been realised by the company.
- [6] Because the company remains the trustee there was no need for the first applicant to seek to be appointed receiver in order to be authorised to sell the trust assets.
- [7] The trust assets are insufficient to meet the amounts owing by the company (as trustee) to creditors. The debts to creditors were incurred by the company in its capacity as trustee of the trust.
- [8] There is no suggestion or any evidence that the liabilities were incurred other than in proper discharge of the functions and duties of the company as trustee of the trust.
- [9] The company (as trustee) is entitled to have recourse to trust assets to discharge the liabilities the company incurred as trustee (the right of exoneration). In the factual circumstances here, the company’s recourse to its right of exoneration will exhaust all assets of the trust.
- [10] In *Jones (liquidator) v Matrix Partners*<sup>4</sup> Allsop CJ expressed the general position as follows:<sup>5</sup>

“Subject to the terms of the trust, the trustee is entitled to be indemnified against debts and liabilities incurred in the proper execution of its duties and powers under the trust out of the assets of the trust. Subject to the terms of the trust, such right of indemnity has priority over the claims of the beneficiaries, and is secured by a lien. Such indemnity may arise for satisfaction before or after the trustee has paid the debt or liability in question. If the trustee has used its own funds to pay the debt or meet the

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<sup>1</sup> *Corporations Act 2001* (Cth) Schedule 2 – Insolvency Practice Schedule (Corporations).

<sup>2</sup> *Jones (liquidator) v Matrix Partners Pty Ltd, in the matter of Killarnee Civil and Concrete Contractors Pty Ltd (In Liq)* [2018] FCAFC 40 at [2] – [4].

<sup>3</sup> See affidavit of R C Humphreys filed 3 October 2018 at paragraph 24.

<sup>4</sup> *Jones (liquidator) v Matrix Partners Pty Ltd, in the matter of Killarnee Civil and Concrete Contractors Pty Ltd (In Liq)* [2018] FCAFC 40.

<sup>5</sup> At [35].

liability, the entitlement of access to the trust assets is a personal asset of the trustee, unattended by equitable obligation arising from the trust. If the trustee has not paid the debt, it has a right of exoneration from the trust assets; that is a right to use the trust assets to exonerate itself from liability for the debt or liability that has been incurred in carrying out the duties or functions of trustee. In either case, the trustee has a lien over the trust assets for the right of indemnity. The right of indemnity is a beneficial interest in the trust property that will be preferred to any beneficial interest of the cestuis que trust in the trust assets.”

- [11] The sources of the trustee’s right of indemnity are threefold; equitable principle, the terms of the trust<sup>6</sup> and statute.<sup>7</sup>
- [12] It seems clear<sup>8</sup> that the proceeds of the right of exoneration are only available to trust creditors. The divergence of opinion centres on the issue of whether the priority regime established by the *Corporations Act 2001* (Cth) applies to the distribution of the proceeds of the trustee’s right of exoneration amongst trust creditors.
- [13] The central issue requiring directions of the Court is whether the trust assets are to be applied by the applicants in accordance with the priority regime established in s 556 of the *Corporations Act 2001* (Cth).
- [14] At the heart of the debate is the issue of whether the company’s interest in the trust assets in the form of its right of exoneration is property of the company within the meaning of the *Corporations Act 2001* (Cth). The trust assets themselves are plainly enough not property of the company, but differing views exist regarding whether the trustee’s right of exoneration is property of the company.
- [15] If the right of exoneration is property of the company within the meaning of the *Corporations Act 2001* (Cth), then it would seem to follow that the proceeds of that right are to be disbursed in accordance with the priority scheme established by the Act.
- [16] In the factual circumstances here, with possibly one exception, the monies held by the first applicant are trust assets. The exception relates to an amount of \$68,354.76 being proceeds of an unfair preference claim.
- [17] Whilst there may be doubt about whether the proceeds of unfair preference claim are trust assets (the cause of action being vested in the liquidator) there seems to be no reason to doubt that the proceeds of the unfair preference claim must be distributed in accordance with the priority regime established under the *Corporations Act 2001* (Cth).<sup>9</sup>

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<sup>6</sup> See clause 15 of the trust deed.

<sup>7</sup> See *Trusts Act 1973* (Qld) s 72.

<sup>8</sup> Except perhaps in Victoria, which seems to be the only jurisdiction that continues to adhere to the view expressed in *Re Enhill Pty Ltd* [1983] 1 VR 561 to the effect the right of exoneration proceeds form part of general assets available to all creditors. That dispute is of no moment here as there are no non-trust creditors.

<sup>9</sup> This is consistent with the answers given by the Full Federal Court in *Jones (liquidator) v Matrix Partners Pty Ltd, in the matter of Killarnee Civil and Concrete Contractors Pty Ltd (In Liq)* [2018] FCAFC 40 – although the Court acted on concessions made by the parties the reasons do not disclose any reason to doubt the correctness of the outcome.

[18] In relation to the issue of whether the trust assets are to be applied in accordance with the *Corporations Act* 2001 (Cth) priority regime, the authorities have differed. In recent decisions there have been three competing approaches:

- a) The view that the priority regime established by the *Corporations Act* 2001 (Cth) applies to the disbursement of trust assets.<sup>10</sup>
- b) The view that the priority regime established by the *Corporations Act* 2001 (Cth) does not apply but that in the exercise of the Court's equitable jurisdiction a court should authorise the distribution of trust assets in accordance with the priorities provided by s 556(1) of the *Corporations Act* 2001 (Cth).<sup>11</sup>
- c) The view that the priority regime in the *Corporations Act* 2001 (Cth) does not apply and that the trust assets should be distributed amongst trust creditors proportionately.<sup>12</sup>

[19] Notwithstanding the recent delivery of two separate appellate decisions, uncertainty remains. On 17 August 2018 the High Court granted special leave to appeal the decision of the Victorian Court of Appeal in *Commonwealth v Byrnes*.<sup>13</sup>

[20] There does not seem to be any Queensland decision dealing directly with this issue, although *Re Suco Gold Pty Ltd (in liq)*<sup>14</sup> has been cited with approval in several cases.<sup>15</sup>

[21] In the decision of the full Federal Court in *Jones (liquidator) v Matrix Partners*, although Farrell J considered herself bound to follow the decision in *Commonwealth v Byrnes*, her Honour's reasons nevertheless demonstrated that she considered the decision to be incorrect and instead favoured a different approach.<sup>16</sup> Farrell J was also

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<sup>10</sup> *Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99; *Commonwealth v Byrnes (in their capacity as joint and several receivers and managers of Amerind Pty Ltd (recs and mgrs apptd) (in liq))* (2018) 354 ALR 789; *Jones (liquidator) v Matrix Partners Pty Ltd, in the matter of Killarnee Civil and Concrete Contractors Pty Ltd (In Liq)* [2018] FCAFC 40 per Allsop CJ.

<sup>11</sup> *Jones (liquidator) v Matrix Partners Pty Ltd, in the matter of Killarnee Civil and Concrete Contractors Pty Ltd (In Liq)* [2018] FCAFC 40 per Farrell J, Siopis J agreeing. Allsop CJ also agreed that if he was wrong regarding the application of the priority regime, he otherwise agreed with the reasoning of Farrell J regarding the exercise of equitable jurisdiction.

<sup>12</sup> *Jones (liquidator) v Matrix Partners Pty Ltd, in the matter of Killarnee Civil and Concrete Contractors Pty Ltd (In Liq)* [2018] FCAFC 40 per Siopis J; *Independent Contractor Services (Aust) Pty Ltd (in Liq) (No 2)* (2016) 305 FLR 222; *Woodgate, in the matter of Bell Hire Services Pty Ltd (in liq)* [2016] FCA 1583; *Amerind Pty Ltd (recs and mgrs apptd) (in liq)* (2017) 320 FLR 118 (reversed on an appeal in *Commonwealth v Byrnes (in their capacity as joint and several receivers and managers of Amerind Pty Ltd (recs and mgrs apptd) (in liq))* (2018) 354 ALR 789); *Kite (in their capacity as liquidators of Mooney's Contractors Pty Ltd (in liq)) & Anor v Mooney & Anor (No 2)* (2017) 121 ACSR 158; *In the matter of MINMXT Holdings Pty Ltd (In liquidation)* [2017] NSWSC 156; *Lane (trustee); Lee (Bankrupt), Re v Deputy Commissioner of Taxation* (2017) 253 FCR 46 (this involved a case dealing with the *Bankruptcy Act* not the *Corporations Act*).

<sup>13</sup> *Commonwealth v Byrnes (in their capacity as joint and several receivers and managers of Amerind Pty Ltd (recs and mgrs apptd) (in liq))* (2018) 354 ALR 789.

<sup>14</sup> (1983) 33 SASR 99.

<sup>15</sup> *Lerinda Pty Ltd v Laertes Investments Pty Ltd as Trsutee for the Ap-Pack Deveney Unit Trust* [2010] 2 Qd R 312; *Moloney & Anor v Marler & Darvall* [2004] QSC 228; *Adams v Zen 28 Pty Ltd & Ors* [2010] QSC 36; *Re Dalewon Pty Ltd (in liquidation)* [2010] QSC 311; *Ramsay v McElroy* [2004] 1 Qd R 667; *Park & Muller (Liquidators of LM Investment Management Ltd) v Whyte (No 2)* [2017] QSC 229.

<sup>16</sup> The effect of which is summarised in paragraph [18]b) of these reasons.

the judge in *Woodgate, in the matter of Bell Hire Services Pty Ltd*<sup>17</sup> and on that occasion had taken the view summarised in [18] (c) of these reasons following the decision of Brereton J in *In the matter of Independent Contractor Services (Aust) Pty Ltd (in liquidation) (No 2)*.<sup>18</sup>

- [22] Here the applicants seek appropriate directions from the Court in order that the winding up of the company and trust may be completed without further delay.
- [23] The primary submission made by the applicants is that this Court should find that the priority regime established by the *Corporations Act 2001* (Cth) does apply to the disbursement of trust assets and make appropriate directions or orders to that effect.
- [24] Such an approach is consistent with the decision of the Victorian Court of Appeal in *Commonwealth v Byrnes*, and the decision of the Full Court of the Supreme Court in South Australia in *Re Suco Gold Pty Ltd (In Liquidation)*. It is also consistent with the result in the full Federal Court in *Jones (liquidator) v Matrix Partners*.
- [25] Despite the competing views in the various decisions, the weight of appellate authority now favours a finding that the priority regime in the *Corporations Act 2001* (Cth) applies.
- [26] The reasons why a trustee's right of exoneration must be considered property of the company are perhaps best expressed in the reasons for judgment of Allsop CJ in *Jones (liquidator) v Matrix Partners*.<sup>19</sup> Relevant to the current circumstance where the company has only ever acted as corporate trustee for one trust and carried on no other business are the comments of Allsop CJ:<sup>20</sup>

“Each of the provisions of s 556 has its own underlying legal policy and its own terminology. The analysis is easiest where the company has only ever acted as here as corporate trustee for one trust. In such circumstances, the property of the company that includes the right of exoneration and the funds obtained from its exercise is to be distributed in accordance with the statutory command: ss 501 and 556. In such circumstances, the words of the statute are to be applied to direct the distribution of the property of the company.”

- [27] As to the issue of whether the intermediate appellate decisions are binding on this Court the position is as set out by the High Court in *Australian Securities Commission v Marlborough Gold Mines Ltd*<sup>21</sup> where the High Court said:<sup>22</sup>

“Although the considerations applying are somewhat different from those applying in the case of Commonwealth legislation, uniformity of decision in the interpretation of uniform national legislation such as the Law is a sufficiently important consideration to require that an

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<sup>17</sup> [2016] FCA 1583.

<sup>18</sup> (2016) 305 FLR 222.

<sup>19</sup> *Jones (liquidator) v Matrix Partners Pty Ltd, in the matter of Killarnee Civil and Concrete Contractors Pty Ltd (In Liq)* [2018] FCAFC 40 at [69] - [108].

<sup>20</sup> *Jones (liquidator) v Matrix Partners, in the matter of Killarnee Civil and Concrete Contractors Pty Ltd (In Liq)* [2018] FCAFC 40 at [102].

<sup>21</sup> *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485.

<sup>22</sup> At 492.

intermediate appellate court — and all the more so a single judge — should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong.”

- [28] The above statement was later affirmed by the High Court in *Farah Constructions v Say-Dee Pty Ltd*<sup>23</sup> in the following terms:<sup>24</sup>

“Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong.<sup>25</sup> Since there is a common law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law.”

- [29] The reasons of Allsop CJ in *Jones* set out cogently and persuasively the view that the priority regime established by the *Corporations Act 2001* (Cth) applies. Although there are some differences in reasoning the same conclusion was reached by a five-member bench of the Victorian Court of Appeal in *Commonwealth v Byrnes*.<sup>26</sup> This was also the approach taken in the earlier South Australian Full Court decision in *Re Suco Gold*.
- [30] The conclusion that the right of exoneration is property is also consistent with several High Court decisions.<sup>27</sup>
- [31] I respectfully adopt the approach of Allsop CJ in *Jones*, which has the same conclusions and is similar to the approach of the Victorian Court of Appeal in *Commonwealth v Byrnes*.
- [32] The *Corporations Act 2001* (Cth) priority regime applies and the relevant priorities are those contained in ss 556(1)(a),(de) (e), (g) and (h). The employee entitlements having been paid by the Commonwealth under the Fair Entitlements Guarantee the Commonwealth has the same right of priority that the employees otherwise would have had.<sup>28</sup>
- [33] There had previously also been some conflict in the authorities regarding the liquidator’s right to recoup remuneration from trust property. A considerable amount of the doubt has stemmed from an understanding that the priority regime in the *Corporations Act 2001* (Cth) did not apply. The competing views were discussed by Jackson J in *Park & Muller (Liquidators of LM Investment Management Ltd) v White No 2*.<sup>29</sup> I respectfully adopt the approach of Jackson J.

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<sup>23</sup> (2007) 230 CLR 89.

<sup>24</sup> At 151 – 152 [135].

<sup>25</sup> *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492 per Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ.

<sup>26</sup> A summary of the reasoning can be found at [269] – [281] of the reasons.

<sup>27</sup> In *Jones* Allsop CJ considered that the conclusion was compelled by the High Court decisions in *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360; *Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226; *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346. Other judicial colleagues have taken the view that those authorities do not determine the issue.

<sup>28</sup> *Corporations Act 2001* (Cth) s 560.

<sup>29</sup> [2017] QSC 229 at [70] – [93].

[34] After analysing the relevant authorities, Jackson J concluded that, at least in circumstances where the only business of the company is that the company acted as trustee of the relevant trust, a liquidator was entitled to a complete indemnity for the general costs of the liquidation.<sup>30</sup>

[35] I make the following orders:

The Court directs that:

1. Pursuant to clause 90-15 of the *Insolvency Practice Schedule* the applicants are justified in distributing the unfair preference proceeds and the assets of the JL & BA Hart Family Trust:
  - a) Firstly, in payment of those debts and claims (including the first applicant's expenses and remuneration) entitled to priority by s 556 of the *Corporations Act 2001* (Cth) and in the order set out in s 556;
  - b) Secondly, as to the balance, proportionately among the admitted creditors of Harts Transport (Qld) Pty Ltd (in liquidation) A.C.N. 081 358 563.

The order of the Court is that:

1. The applicants' costs of and incidental to this application be paid from the assets of the JL & BA Hart Family Trust on the indemnity basis.

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<sup>30</sup> At [90] and [93]. That view is consistent with *Re Suco Gold*. See also *Independent Contractor Services* per Brereton J at [27] and the authorities cited at footnote 31 of Brereton J's reasons.