

SUPREME COURT OF QUEENSLAND

CITATION: *Re CMI Industrial Pty Ltd (In Liq); Byrnes & Ors v CMI Limited* [2015] QSC 96

PARTIES: **IN THE MATTER OF CMI INDUSTRIAL PTY LTD (IN LIQUIDATION) ACN 129 401 832**
MATTHEW JAMES BYRNES, GREGORY JOHN KEITH, GRAHAM ROBERT KILLER and MICHAEL GERARD McCANN AS LIQUIDATORS OF CMI INDUSTRIAL PTY LTD (IN LIQUIDATION) ACN 129 401 832
(applicants)
v
CMI LIMITED ACN 050 542 553
(respondent)

FILE NO: BS12069 of 2014

DIVISION: Trial Division

PROCEEDING: Originating application

DELIVERED ON: 27 April 2015

DELIVERED AT: Brisbane

HEARING DATE: 27 March 2015

JUDGE: Mullins J

ORDER:

- 1. The priority creditor entitlement is limited to the proceeds of the realisation of the receivables, raw materials, work-in-progress and finished goods held by CMI Industrial Pty Ltd as at the date of the receivers' appointment in the amount as determined by the receivers (in accordance with the method set out in the receivers' memorandum comprising exhibit GRK-6 to the affidavit of Graham Robert Killer filed on 16 December 2014) to be due to priority creditors for the purposes of ss 433 and 561 of the *Corporations Act 2001* (Cth).**
- 2. The applicants' costs of the application on the indemnity basis must be paid from the priority creditor entitlement in priority to priority creditors.**

CATCHWORDS: CORPORATIONS – RECEIVERS, CONTROLLERS AND MANAGERS – PRIORITY OF DEBTS – EMPLOYEE ENTITLEMENTS – where applicants were appointed administrators and subsequently appointed liquidators of the company – where receivers were appointed to the company by holder of fixed and floating charge – where the respondent

also held a fixed and floating charge – where receivers paid liquidators an amount for distribution to priority creditors from the value of the opening inventory calculated at the date of their appointment – where receivers operated the businesses of the company after appointment and made profits – where applicants sought directions under s 511(1) of *Corporations Act 2001* (Cth) as to the distribution of the receivers’ inventory trading profits – where respondent claimed the receivers’ inventory trading profit should be paid to it in accordance with its charge – whether receivers’ inventory trading profit should be paid to satisfy priority employee entitlements or to the respondent

Corporations Act 2001 (Cth), s 9, s 51C, s 433, s 511, s 556, s 560, s 561

Cook v Italiano Family Fruit Company Pty Ltd (in liq) (2010) FCR 474; [2010] FCA 1355, cited

Fisher v Madden (2002) 54 NSWLR 179; [2002] NSWCA 28, considered

General Credits Ltd v Chemineer Nominees Pty Ltd (in Liq) (1986) 4 ACLC 570, considered

Inland Revenue Commissioners v Goldblatt [1972] Ch 498, considered

Re Great Southern Ltd (Receivers and Managers Appointed) (in Liq); ex parte Thackray (2012) 260 FLR 362; [2012] WASC 59, considered

Korda v Silkchime Pty Ltd (2010) 243 FLR 269; [2010] WASC 155, considered

McEvoy v Incat Tasmania Pty Ltd (2003) 130 FCR 503; [2003] FCA 810, considered

Re Pearl Maintenance Services Ltd [1995] 1 BCLC 449, considered

Re Saker [2014] FCA 771, considered

Steinberg v Herbert (1988) 14 ACLR 80, considered

Stein v Saywell (1969) 121 CLR 529; [1969] HCA 16, cited

Westminster Corporation v Haste [1950] Ch 442, considered

Whitton v ACN 003 266 886 Pty Ltd (Controller Appointed) (In Liq) (1996) 42 NSWLR 123; [1996] NSWSC 534, followed

COUNSEL: A B Fraser for the applicants
A M Pomerence QC and L P Clark for the respondent

SOLICITORS: Minter Ellison for the applicants
Allens for the respondent

[1] The applicants are the liquidators of CMI Industrial Pty Ltd (in liquidation) (the company) and apply for directions under s 511(1) of the *Corporations Act 2001* (Cth)

(the Act) in respect of a question arising in the winding up of the company. The applicants were first appointed joint and several administrators of the company on 26 April 2012 and were then appointed liquidators on 29 May 2012 pursuant to a resolution of the company's creditors.

- [2] Receivers were appointed to the company on 26 April 2012 by Ford Motor Company of Australia Limited which was the holder of a fixed and floating charge granted by the company on 23 December 2011. There were two other secured creditors who had priority over the Ford charge: National Australia Bank Limited which held a fixed and floating charge granted on 15 April 2008 and the respondent which held a fixed and floating charge granted on 16 April 2008. The secured debt to the NAB has been discharged in full.
- [3] On 17 February 2014 the receivers paid an amount of \$1,281,901.62 to the liquidators for distribution to priority creditors from the sale of the opening inventory at the commencement of the receivers' appointment.
- [4] Following their appointment, the receivers continued to operate various businesses of the company whilst seeking purchasers for those businesses and for that purpose purchased additional inventory for manufacture and processing. The going concern sale campaigns were ultimately unsuccessful and the assets the subject of the businesses were subsequently sold by the receivers. As a result of continuing to trade for some period using the additional inventory purchased subsequent to their appointment, the receivers have generated what is described by the respondent as "the receivers' inventory trading profit". The respondent claims the receivers' inventory trading profit should be distributed to it, in accordance with its charge, but, in the absence of direct binding authority, the applicants consider there is some uncertainty as to the respondent's claim and present the contrary position that the receivers' inventory trading profit should be paid to the priority creditors as part of their statutory entitlement.
- [5] The receivers hold the surplus funds, pending resolution of the question whether those funds should be paid to satisfy employee entitlements pursuant to s 433 and/or s 561 of the Act or whether they should be paid to the respondent. The amount that remains owing for these priority creditors greatly exceeds the surplus funds and the value of the assets the subject of the floating charge at the date the receivers were appointed. The receivers (with the consent of the applicants and the respondent) did not participate actively in this application. In fact, the parties have reached agreement on the form of order, depending on whether the applicants' submissions or the respondent's submissions are ultimately successful.

The legislation

- [6] Subsections (2) and (3) of s 433 of the Act provide:
 - “(2) [Application of section] This section applies where:
 - (a) a receiver is appointed on behalf of the holders of any debentures of a company or registered body that are secured by a circulating security

interest, or possession is taken or control is assumed, by or on behalf of the holders of any debentures of a company or registered body, of any property comprised in or subject to a circulating security interest; and

- (b) at the date of the appointment or of the taking of possession or assumption of control (in this section called the **relevant date**):
 - (i) the company or registered body has not commenced to be wound up voluntarily; and
 - (ii) the company or registered body has not been ordered to be wound up by the Court.
- (3) **[Priority of debts or amounts]** In the case of a company, the receiver or other person taking possession or assuming control of property of the company must pay, out of the property coming into his, her or its hands, the following debts or amounts in priority to any claim for principal or interest in respect of the debentures;
 - (a) first, any amount that in a winding up is payable in priority to unsecured debts pursuant to section 562;
 - (b) next, if an auditor of the company had applied to ASIC under subsection 329(6) for consent to his, her or its resignation as auditor and ASIC had refused that consent before the relevant date – the reasonable fees and expenses of the auditor incurred during the period beginning on the day of the refusal and ending on the relevant date;
 - (c) subject to subsections (6) and (7), next, any debt or amount that in a winding up is payable in priority to other unsecured debts pursuant to paragraph 556(1)(e), (g) or (h) or section 560.”

[7] The definition of “circulating security interest” is found in s 51C of the Act and relevantly includes a floating charge which is then defined in s 9 of the Act as:

“**floating charge** includes a charge that conferred a floating security at the time of its creation but has since become a fixed or specific charge.”

[8] For the purposes of s 433 of the Act, s 433(9) relevantly provides that the references in Division 6 of Part 5.6 to the relevant date are to be read as references to the date of the appointment of the receiver.

[9] Paragraphs (e), (g) and (h) of s 556(1) of the Act provide:

“(e) subject to subsection (1A) – next:

- (i) wages, superannuation contributions and superannuation guarantee charge payable by the company in respect of services rendered to the company by employees before the relevant date; or

...

(g) subject to subsection (1B) – next, all amounts due:

- (i) on or before the relevant date; and
- (ii) because of an industrial instrument; and

- (iii) to, or in respect of, employees of the company; and
- (iv) in respect of leave of absence;
- (h) subject to subsection (1C) – next, retrenchment payments payable to employees of the company.”

[10] Section 560 of the Act gives priority to a creditor who had made advances to the company for the purpose of making the payment that was made by the company on account of wages, superannuation contributions or in respect of leave of absence or termination of employment under an industrial instrument.

[11] Section 561 of the Act which applies on the winding up of a company also gives priority of the specified employees’ entitlements over the claims of a secured creditor in respect of property the subject of a circulating security interest and provides:

“So far as the property of a company available for payment of creditors other than secured creditors is insufficient to meet payment of:

- (a) any debt referred to in paragraph 556(1)(e), (g) or (h); and
- (b) any amount that pursuant to subsection 558(3) or (4) is a cost of the winding up, being an amount that, if it had been payable on or before the relevant date, would have been a debt referred to in paragraph 556(1)(e), (g) or (h); and
- (c) any amount in respect of which a right of priority is given by section 560;

payment of that debt or amount must be made in priority over the claims of a secured party in relation to a circulating security interest created by the company and may be made accordingly out of any property comprised in or subject to the circulating security interest.”

Authorities

[12] Both parties rely on many authorities that deal in some way with the operation of s 433 of the Act or an equivalent provision. No authority has decided the specific issue raised by this application. There are many helpful statements in the authorities relevant to the operation of s 433 of the Act, but they have to be considered in the context of the cases in which they were made.

[13] As was noted by Finkelstein J in *McEvoy v Incat Tasmania Pty Ltd* (2003) 130 FCR 503 at [8], the history of s 433 can be traced back to 1897. Finkelstein J then at [8] to [16] set out the history of the provision between 1961 and 1975, including the relevant amendment made to reverse the effect of the view expressed in *Stein v Saywell* (1969) 121 CLR 529, 552 that the then provision did not apply to a receiver appointed under a debenture secured by a charge which had been floating, but had become specific before his appointment.

[14] The purpose of s 433 is neatly summarised by Le Miere J in *Korda v Silkchime Pty Ltd* (2010) 243 FLR 269 at [46]:

“The purpose and effect of s 433 and its statutory predecessors is to protect the position of preferential creditors by giving preferential claims priority over the claims of floating chargees who would have otherwise ‘scooped the pool’ of the chargor’s assets.”

- [15] The ongoing liability of a receiver for breach of the obligation to pay the preferential creditors under an English equivalent to s 433 of the Act was the subject of *Westminster Corporation v Haste* [1950] Ch 442. The plaintiff had assessed the company for general rates which were unpaid when the defendant was appointed receiver by debenture holders and took possession of the company’s assets. A month after the receiver was appointed, a petition was presented to wind up the company and that was done. Rates were a priority debt under the relevant *Companies’ Act*. The defendant carried on the business of the company for some 10 years after his appointment as receiver. He had enough funds to pay the rates in November 1945. In 1948 the plaintiff began the action against the defendant for the amount of the rates as damages for breach of duty, alleging the defendant had exhausted the assets of the company by making payments to ordinary creditors who were not entitled to preference. Danckwerts J held at 447 that the relevant provision was not merely a negative provision that protected the receiver if he did not pay the debenture holders, but “it is a provision which requires him to pay the preferential creditors out of any assets coming to the hands of him as receiver” and that if he had any assets out of which the payment could have been made, he was under a liability in tort to the plaintiff. Because the defendant had sufficient funds in 1945, the plaintiff obtained judgment for the amount of its claim.
- [16] Another English case concerning a claim for breach of statutory duty under a provision equivalent to s 433 of the Act against a receiver who did not pay the preferential creditors is *Inland Revenue Commissioners v Goldblatt* [1972] Ch 498. The debenture holder appointed the receiver who took possession of the company’s assets and collected all the moneys due to the company. About two months later the debenture holder revoked the receiver’s appointment and requested him to deliver up all moneys and goods to the company and agreed to indemnify him against all liabilities he incurred as receiver. The company then assigned to the debenture holder all its assets in satisfaction of the claims under the debenture. Neither the receiver nor the debenture holder paid the plaintiffs who were preferential creditors in respect of moneys due for income tax and profits tax. Goff J at 505 applied the statement made by Danckwerts J in *Westminster* at 447 and found a breach of duty for which the receiver was liable.
- [17] A number of authorities on provisions which were forerunners to s 433 of the Act were concerned with the extent and nature of an employee’s entitlements to which priority is given under the relevant provision. That was part of the subject matter of *Steinberg v Herbert* (1988) 14 ACLR 80, but the case was also concerned with the issue of the date at which the relevant provisions (s 331 and s 441(1)(g) of the *Companies (WA) Code*) fixed the order and extent of priority. The case concerned the amount claimed by a director who was also an employee for a payment in lieu of long service leave. Long service leave was given priority under the relevant provisions. The receivers sought directions from the court, but before the application had concluded, s 441(1)(g) was amended to limit the priority for long service leave up to a maximum of \$1,500 in respect of an employee who had been a director of the company. By a majority, it was

held that the effect of the relevant provisions of the *Code* was to fix the order and extent of priority as at the date the receiver was appointed.

- [18] After referring to that part of s 331 of the *Code* that stated that at the date the receiver was appointed, he “shall pay, out of the property coming into his hands, the following debts or amounts in priority . . . , any debt or amount that in a winding-up is payable in priority to other unsecured debts pursuant to paragraph 441(g)”, Brinsden J stated at 89-90:

“The order of priority (and the extent of that priority) was fixed at the date the receiver was appointed. The provision in sub-s (2) that the receiver shall pay out of the property coming into his hands debts in priority set out, is a provision which requires him to pay the preferential creditors out of any assets coming into his hands as receiver: *Westminster Corporation v Haste* [1950] Ch 442 at 447. If he has had any assets out of which this payment could have been made, (and he has), he is under a liability in tort to pay it to the creditor entitled. The relevant date therefore is the date of appointment of the receiver and it is at that date the order of priority is determined in accordance with the provisions of s 331(2) as they appeared at the date of this receiver’s appointment. The fact that subsequently the order of priority is varied, or the amount of priority reduced, is irrelevant since the amended provisions of s 331(2) were not the provisions having effect as at the date of appointment.”

- [19] The other member of the majority, Kennedy J, stated at 96-97:

“Although, almost inevitably, the payment of preferred creditors must be delayed for some time to enable a receiver to realise assets coming into his hands, the critical time for the determination of those creditors’ rights appears to me to be the time at which the floating charge crystallised, upon the appointment of the receiver (or, perhaps, upon the entry of the receiver: see per Dixon J in *Australian Mutual Provident Society v Geo Myers & Co Ltd (in liq)* (1931) 47 CLR 65 at 83). Preferential claims arising after crystallisation are not within the statutory provision and they remain subordinate to a floating charge: *Re Griffin Hotel Co Ltd* [1941] Ch 129. Furthermore, any right of set off is determined at the same time: *Business Computer Ltd v Anglo African Leasing Ltd* [1977] 1 WLR 578. The fact that the preferred creditors may not be able forthwith to be paid, whilst the receiver realises sufficient of the assets of the company in order to enable him to pay them is, in my view, immaterial.”

- [20] These passages from the judgments of Brinsden and Kennedy JJ were relied on by the majority in *Fisher v Madden* (2002) 54 NSWLR 179 to support the conclusion at [39] and [41] in that case that, if retrenchment had occurred on or before the appointment date of the receiver, employee Ms Fisher did not have a priority debt for a retrenchment payment at the appointment of the receiver date which would only come into existence if and when the Industrial Relations Commission varied her contract of employment subsequent to the appointment of the receiver to include a provision for severance pay, even though the contract might be varied *ab initio*.

- [21] *General Credits Ltd v Chemineer Nominees Pty Ltd (in Liq)* (1986) 4 ACLC 570 concerned the appointment by the plaintiff mortgagee under a mortgage and a debenture charge of agents who took possession of the assets of the company which were mainly book debts. Subsequently the directors of the company as guarantors paid out the loan and interest to the mortgagee and elected not to pursue any right of recovery. The mortgagee remained in possession of all the assets of the company which had by then gone into liquidation and the liquidator claimed the assets. The court had to decide whether the mortgagee should pay the funds to the liquidator or whether it was under an obligation under s 331 of the *Companies (Victoria) Code* to make priority payments to employees. The Deputy Commissioner of Taxation submitted that s 331 had no operation as the principal and the interest under the debenture charge had been repaid. Gobbo J found (at 574) the critical time was the time when possession was taken, as that was when the obligation under s 331 came into existence. Gobbo J held (at 575) that s 331 applied, as there was a continuing operation for s 331, notwithstanding the later payment out of the debenture holder, explaining (at 574):

“It is clear that the obligation created by the section goes further than merely ensuring that the receiver or person taking possession refrains from paying out the debenture holder. See *Woods v Winskill* (1913) 2 Ch 303; *Westminster Corporation v Haste* (1950) 1 Ch 442; *Inland Revenue Commissioners v Goldblatt* (1972) Ch 498 and *Re Custom Card (NSW) Pty Ltd* (1979) CLC 40-514 (1979) 1 NSWLR 241. These cases support an interpretation of the obligation cast by sec 331 that is positive rather than negative and they also provide some support for the argument put before me that the obligation should not be seen as a narrow one if the policy of protecting the class of preferential creditors was properly to be achieved.”

- [22] The English equivalent to s 433 of the Act was considered in *Re Pearl Maintenance Services Ltd* [1995] 1 BCLC 449. The two companies had entered into a factoring agreement with TSB and related debentures. The companies sold their book debts to TSB which then collected them and paid the amount collected less the factoring charge to the companies. TSB appointed the receivers to the companies under its debentures on 25 February 1994. The companies ceased business on 2 March 1994. Although TSB’s interests under the debentures were fully discharged by 9 March 1994, it continued to collect book debts for the receivers pursuant to an agreement between the receivers and TSB. The companies went into voluntary liquidation on 12 April 1994.
- [23] The first issue was whether the charges over the book debts created by the debentures were floating charges and that was held to be so. The next issue was whether the proceeds of the book debts assigned to TSB under the factoring agreement were floating charge assets for the purpose of the receivers’ duties under the relevant statutory provision. It was argued on behalf of the liquidator that the assignment of the book debts to TSB under the factoring agreement meant that the companies ceased to have a beneficial interest in the book debts upon which the floating charge “could bite”. Carnwath J stated at 456:

“The problem of categorisation for present purposes only arises under s 40, when it becomes necessary to decide the scope of their duty to the preferential creditors. The answer must be found in the proper construction of that section. By sub-s (1), it applies in the case of a debenture ‘secured

by a charge which, as created, was a floating charge'. Although not repeated in sub-s (2), those words also implicitly limit the scope of the assets in respect of which the preferential creditors have priority (see *Re Lewis Merthyr Consolidated Collieries Ltd* [1929] 1 Ch 498). As I see it, they require one to go back to the document which created the charge, even in relation to assets which were not in the company's hands, or even in existence, at the time the charge was created. As I have already found, the charge over the book debts was created as a floating charge. That having been established, it does not seem to me to matter very much when or by what route those book debts find their way into the receivers' hands. The nature of the charge *as created* remains the same. Once within the receivers' hands they would come within the scope of the duty under s 40(2), and remain subject to it so long as the duty continued."

- [24] In *Whitton v ACN 003 266 886 Pty Ltd (Controller Appointed) (In Liq)* (1996) 42 NSWLR 123, Mr Whitton was appointed receiver of a printing company by a secured creditor and later on the same day he was appointed agent for the secured creditor as mortgagee in possession. Two days later his appointment as receiver was terminated, but its significance was to establish that there had been an event of default (namely the appointment of a receiver) on which the secured creditor was entitled to take possession as mortgagee. When Mr Whitton was appointed agent for the mortgagee in possession, his authority to act as receiver became incapable of effective exercise. The business continued to be conducted under Mr Whitton's control as agent until he sold the business on the day before the meeting of creditors placed the company into voluntary liquidation. The liquidator sought declarations from the court concerning entitlement to funds during the period the business was conducted under the control of Mr Whitton. There were also various claims brought by employees claiming to be priority creditors and also against Mr Whitton on the basis he had incurred personal liability for some of the employees' claims.
- [25] Bryson J had to decide whether the deed of charge in favour of the secured creditor was a floating charge within the meaning of s 433(2) of the *Corporations Law* or a fixed charge. Bryson J construed the deed of charge and concluded at 146 there was a fixed charge over the moneys received by Mr Whitton after crystallisation of the charge on account of book debts which existed and had not been assigned by the company at the time of that crystallisation.
- [26] The next issue that Bryson J considered was whether, on the basis of the construction of the deed of charge, a fixed charge was created over debts of the company which arose after crystallisation of the charge, arising from the use of the property, comprising cash, money at bank, stock and work in progress, owned by the company at the time of crystallisation of the charge. It was in relation to that issue that Bryson J stated at 146:
- "As I have already held in relation to question 1.2.1, book debts are made subject to a fixed charge and not a floating charge and there is no reason to suppose that a floating charge could exist for a book debt at any time.
- The concept that a floating charge could exist over a book debt or any other asset which did not come into existence until after crystallisation and the fixing of all charges is not one which I am able to grasp. Any rights to

preference under s 433 could extend only to property which was subject to a floating charge before crystallisation on 8 March 1995. Cash, money at bank, and stock in trade then would be; it is out of these assets that the controller is obliged by s 433 to pay the preferential debts, and if he does not do so and uses them, even in an economically rational way, to bring some other assets into existence such as book debts for completed work, his liability for damages for breach of his statutory duty is measured by reference to the value of the assets subject to the floating charge on 8 March 1995, and not by reference to the value of anything towards the later creation of which they contributed. (Of course there might well be other elements in the calculation of those damages.) In my opinion the controller's liability neither increases with success nor diminishes with failure of any venture in which he utilises assets which have been subject to a floating charge."

[27] As Bryson J had concluded the relevant deed of charge operated as a fixed charge in respect of book debts, the statements made in the second paragraph in the above quote are strictly *obiter dicta* on the issue of whether trading profits made by the receiver post-appointment where there was a floating charge, as created, in respect of the assets used by the receiver to generate the trading profits post-crystallisation are subject to the statutory entitlement given to the priority creditors by s 433(2) of the Act.

[28] The relationship between s 433 and s 561 of the Act has been described as "complementary" including in *Re Great Southern Ltd (Receivers and Managers Appointed) (in Liq); ex parte Thackray* (2012) 260 FLR 362, where voluntary administrators had been appointed to Great Southern Ltd (GSL) on 16 May 1999 who subsequently became the liquidators in a creditors' voluntary winding up pursuant to a creditors' resolution on 19 November 2009. Receivers and managers were appointed to GSL pursuant to a fixed and floating charge on 18 May 2009. They applied for directions as to whether s 433 or s 561 or both applied to the payment of employee entitlements. (The employee entitlements were different in that case, depending on which provision applied.) Master Sanderson explained at [7]:

"Section 433 and s 561 provide for certain priorities as concern debts or claims within s 556(1). The statutory purpose of s 433 and s 561 is readily identifiable. The legislation is intended to benefit the employees of companies which cannot pay their debts in full: see *Stein v Saywell* [1969] HCA 16; (1969) 121 CLR 529, 544, 550. The provisions establish a potential priority right to payment out of floating charge assets. The provisions recognise the efforts of employees can enhance the floating charge assets and the employees as thus entitled to a priority: see *Re Lewis Merthyr Consolidated Collieries Ltd* (1929) 1 Ch 498, 507."

[29] Master Sanderson concluded at [28] that there was room for the operation of both s 433 and s 561, as "s 433 operates as at the date of the appointment of the receiver and there is no warrant in any section for suggesting it would cease to act". Further consideration of the relationship between s 433 and s 561 of the Act was then given on the application by the liquidators of GSL for directions when the receivers proposed to transfer to the liquidators the funds they held in accordance with the orders made by Master Sanderson: *Re Saker* [2014] FCA 771 at [32]-[33], [41]-[42] and [45].

The Ford fixed and floating charge

- [30] As the operation of both s 433 and s 561 of the Act is affected by the relevant floating charge as created, it is necessary to consider the terms of the Ford deed of fixed and floating charge pursuant to which the receivers were appointed. (Although the applicants made submissions based on the content of the Form 504 which was lodged on behalf of Ford on 26 April 2012 with ASIC notifying the appointment of the receivers, the operation of the deed of charge as a floating charge depends on the terms of the charge.)
- [31] Under clause 2.1 the company, as beneficial owner of the Charged Property, charged the Charged Property in favour of Ford as security for the payment of the Secured Money. The “Charged Property” is defined in clause 1.1 of the deed to mean “all the present and after acquired property of the company wherever situated.” Under clause 2.2 of the deed, the Charge is specified to be a fixed charge on all present and after acquired property described in paragraphs (a) to (p) of clause 2.2. Stock and work-in-progress are expressly excluded from the operation of the Charge as a fixed charge. The proceeds of Trading Debts are also excluded from the operation of the Charge as a fixed charge. “Trading Debt” is defined to mean a debt which arises in the course of the company’s ordinary business. Under clause 2.3 of the Deed, but subject to clause 2.4, the Charge is a floating charge on all of the rest of the Charged Property. Under clause 2.4 the floating charge became fixed upon the chargee taking any step to enforce the Charge after an event of default occurred.
- [32] The deed of charge was therefore in standard terms and no longer operated as a floating charge after any step to enforce the Charge, such as the appointment of the receivers.

The respondent’s deed of charge

- [33] The respondent’s deed of charge was also in standard terms. At the time of its creation it created a floating charge over the company’s stock-in-trade and the proceeds of any debt or other debt and was subject to crystallisation into a fixed charge on the occurrence of certain specified events, including the appointment of any receiver or receiver and manager (by the respondent or another creditor) in respect of the charged property.

The applicants’ submissions

- [34] The applicants submit that s 433 of the Act is enlivened where a receiver is appointed by the holder of the floating charge. The use of the words “coming into” in s 433(3) evinces an intention by the Legislature that the obligation on the receiver is an ongoing one that applies to all property that comes into the hands of the receiver that would have been the subject of the floating charge, irrespective of whether it belonged to the company, or was even in existence, at the time of the appointment. If s 433 were intended to be limited to property that existed as at the date of the appointment of a receiver, such limitation would be found within the express terms of the provision.

- [35] The applicants rely on the Form 504 notification lodged by the receivers on 26 April 2012 with ASIC which provides at item 3 that the receivers were appointed to “all present and after acquired property of the Company ...” and submit that when that property came into existence and into the hands of the receivers as they traded subsequent to their appointment, it was “after acquired” property and would have been the subject of the floating charge and therefore became subject to the ongoing obligation in s 433(3). The applicants submit the floating charge continues to attach to assets after crystallisation, including the trading profits received by the receivers. The trading profits generated post-appointment constitute property of the company that comes within the floating charge as created.
- [36] The applicants rely on *Westminster, Goldblatt and Pearl Maintenance Services* as consistent with the proposition that the priority creditor provisions extend to property acquired post-crystallisation of a floating charge.
- [37] The applicants submit that the construction of s 433 advanced by the respondent is not consistent with the statutory scheme, having regard to the complementary operation of s 561 that applies upon the winding up of a company. There is no limitation within s 561 of the Act as to the property the subject of the payments to priority creditors.
- [38] The applicants put an alternative argument that the receivers are also liable under s 561 to use the receivers’ inventory trading profit to pay the priority creditors. The applicants rely on observations made by Finkelstein J in a case that was concerned only with the operation of s 561: *Cook v Italiano Family Fruit Company Pty Ltd (in liq)* (2010) FCR 474 at [74]-[75] and [78]-[80].
- [39] The applicants seek to distinguish the authorities relied on by the respondent such as *Steinberg* and *Fisher* on the basis those authorities are concerned with the date for fixing the quantum of the priority debts and not the date on which the assets the subject of the statutory entitlement in favour of the priority creditors is fixed.

The respondent’s submissions

- [40] The respondent submits the established principle (articulated by Bryson J in *Whitton* at 146) is that the property which is the subject of the obligation under s 433(3) of the Act is that which comes into the hands of the receivers on the date of the appointment and that was the subject of the floating charge as created. The respondent submits that property does not extend to any profit obtained from the receivers using the assets of the business following the appointment, as once s 433 of the Act is enlivened, the relevant date for its operation is the date of the appointment of the receiver. The respondent also submits that the description of property “coming into” the receivers’ hands refers to the property identified by the operation of s 433 at the date of the appointment of the receivers, but which may be collected over time.
- [41] The respondent accepts that s 433 and s 561 of the Act should be construed consistently and that the nature of the property that is the subject of the circulating security interest to be distributed to priority creditors should be construed the same for the purpose of both provisions.

- [42] *Westminster* and *Goldblatt* were concerned with the action in tort for the breach of statutory liability against the receiver and not such a question as is the subject of this application. *Pearl Maintenance Services* was concerned with identifying the book debts that were the subject of the floating charge as created, even though they were subsequently assigned under the factoring agreement to TSB, so that when the proceeds of the book debts were paid to the receivers, they were caught by the equivalent statutory provision to s 433.
- [43] The respondent submits that the established principle is consistent with the object of s 433 and s 561 of the Act and in confining the statutory erosion of the proprietary rights of the holder of the floating charge, as:
- (a) it permits for priority creditors to be paid from the proceeds of realisation of the assets of the subject of a floating charge while the business was “carried on freely”;
 - (b) it prevents the holders of the floating charges from “scooping the pool” of the chargor’s assets as at the date of appointment of the receiver; and
 - (c) it protects the priority creditors from the potential consequence of any diminishing of any assets in the hands of the receiver that might occur with failure of any venture by which the receiver utilises the assets to carry on the business after appointment as receiver.

Do the priority creditors have a statutory entitlement to the receivers’ inventory trading profit?

- [44] The issue raised by this application depends on the construction of s 433 of the Act, but in the context of the history of this long-standing provision, and the characterisation of the receivers’ inventory trading profit for the purpose of applying s 433. Although the applicants also seek to hold the receivers liable for paying the priority creditors out of the receivers’ inventory trading profit under s 561 of the Act, the issue under that provision also depends on the characterisation of the receivers’ inventory trading profit for the purpose of the provision. In this case, there can be no different result under s 561 from the result under s 433.
- [45] Section 433 of the Act is a remedial provision that favours the specified priority creditors giving them a statutory entitlement to be paid from assets that would have otherwise not been available, because those assets would have become the subject of a fixed charge, when the floating charge crystallised on the appointment of the receivers.
- [46] The scheme of the priority, in the case of a receivership, revolves around the date of the appointment of the receivers and operates in respect of the assets that are identified on the basis that they would have been the subject of the floating charge, as created, had the charge not crystallised on that date. This is supported by the *dicta* in *Steinberg* at 89-90 and 96-97 and *Chemineer* at 574-575.
- [47] The scheme under s 433 of the Act does not extend to conferring any statutory entitlement to the priority creditors in respect of the trading profit made by the receivers conducting the business of the company after the date of their appointment, as was the view expressed in the *dicta* in *Whitton* at 146.

- [48] None of *Westminster*, *Goldblatt* or *Pearl Maintenance Services* provides the support the applicants sought to draw from them. Although *Westminster* did concern a receivership where the receiver traded on, the focus on the decision was on the continuing duty of the receiver to comply with the statutory obligation to pay the priority creditors out of the identified assets, when he had previously used the relevant assets to pay creditors who were not entitled to preferential payment. There was trading by the receivers for five days after appointment in *Pearl Maintenance Services*, but that decision was not concerned with the trading on by the receivers, but the characterisation of the book debts that had been factored before the appointment of the receivers. The statement of Carnwath J at 456 about not being concerned about the route that the proceeds from the book debts found their way into the receivers' hands related to this characterisation argument and had nothing to do with post appointment trading issues.
- [49] The fact that a receiver is under a continuing obligation under s 433 of the Act to pay the priority creditors from the identifiable assets is not inconsistent with the date for identifying the assets being fixed at the date of the appointment of the receiver.
- [50] To the extent that it is argued that the use of the expression "out of the property coming into his, her or its hands" in s 433(3) suggests assets received after the date of appointment of the receivers, those words need to be construed in the context of when s 433 applies, as expressly set out in s 433(2)(a). The property "coming into" the hands of the receiver must be property that falls within the designation in s 433(2)(a). That property is identified by the operation of s 433(2)(a) which operates at the date of the appointment of the receivers. The statutory entitlement cannot apply unless the identified property comes into the hands of the receiver: *Silkchime* at [58], [60] and [61].
- [51] The priority creditors do not have a statutory entitlement under s 433 of the Act to the receivers' inventory trading profit, as that profit was not an asset identifiable at the date of the appointment of the receivers.

Orders

- [52] As the respondent's submissions have succeeded, the orders that will be made are those proposed by the respondent. By agreement among the parties, it is only the applicants' costs that are dealt with in the proposed order. The orders are therefore:
1. The priority creditor entitlement is limited to the proceeds of the realisation of the receivables, raw materials, work-in-progress and finished goods held by CMI Industrial Pty Ltd as at the date of the receivers' appointment in the amount as determined by the receivers (in accordance with the method set out in the receivers' memorandum comprising exhibit GRK-6 to the affidavit of Graham Robert Killer filed on 16 December 2014) to be due to priority creditors for the purposes of ss 433 and 561 of the *Corporations Act 2001* (Cth).
 2. The applicants' costs of the application on the indemnity basis must be paid from the priority creditor entitlement in priority to priority creditors.