

# **CITY INSOLVENCY DISCUSSION GROUP**

Wednesday, 6 February 2018

## **TOPIC**

*Recent Developments in Voidable Transaction Claims:  
Recovery from Corporate Trustees*

## **PRESENTED BY**

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# **RECENT DEVELOPMENTS IN VOIDABLE TRANSACTION CLAIMS: RECOVERY FROM CORPORATE TRUSTEES**

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# Introduction



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- Craddock Murray Neumann Lawyers opened in Perth in July 2018.
- We have offices in every state, except Tasmania.
- Strong focus on insolvency law, migration law and debt recovery.
- Frequently acts for the ATO for wind ups, bankruptcy, defended tax debts and advice on insolvency issues.

# Disclaimer



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- The information in this presentation is of a general nature and is not legal advice.
- Any opinions or views expressed in, or inferred from, this presentation are solely those of the presenter.

# Structure of Presentation



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- Issues with Corporate Trustees
- Trustee's Indemnity
- Insolvency of Corporate Trustee
- The Cases of Amerind and Killarnee
- Dissent on Distribution
- Key Points

# Issues with Corporate Trustees



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- A trust is not a legal entity – it is the trustee.
- A trustee has legal ownership of property, but not the equitable ownership – The ownership is ‘split’.
- Corporate trustees can (and do) act in their own right, in their capacity as trustee for a trust and, at times, as trustee for numerous trusts.
- Sometimes it is not clear in what capacity the Company is acting

# Issues with Corporate Trustees



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- Corporate trustees are governed by the trust deed with respect to their powers and obligations.
- A trustee is entitled to be indemnified from the assets of the trust against all debts and liabilities properly incurred in the execution of its duties and powers as trustee.
- The precise nature of this indemnity is often dictated by the terms of the trust deed. Otherwise, a trustee can rely on section 71 of the *Trustees Act 1962 (WA)*.
- The indemnity is secured by way of a lien over the trust assets, which has priority over the interests of the beneficiaries.



# Trustee's Indemnity: Distinction

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- The right of indemnity may be divided into:
  - The right of recoupment, or reimbursement; and
  - The right of exoneration.
- The difference between the two is that *recoupment* is the trustee recovering what it has already paid and *exoneration* is the trustee being entitled to be indemnified what it has not paid (i.e. unpaid debts).
- The exercise of the right of exoneration can cause issues in the event of the corporate trustee's insolvency.

# Insolvency of Corporate Trustee



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- A common clause in trust deeds is for the corporate trustee to be automatically removed from office on the event of liquidation.
- An important legal consequence is that the Company will still be considered to be a bare trustee of the trust assets.
- The practical effect of this consequence is that the Company may no longer have any power to sell trust property.

# The Cases of *Amerind* and *Killarnee*



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- Two recent decisions have clarified some of the issues concerning corporate trustees:
  - Jones v Matrix Partners Pty Ltd, in the matter of Killarnee Civil & Concrete Contractors Pty Ltd (in liq) [2018] FCAFC 40 (“Killarnee”)
  - Commonwealth of Australia v Matthew James Byrnes & Anor as Joint and Several Receivers and Managers of Amerind Pty Ltd(R&M appointed)(in liq) & Ors [2018] VSCA 41 (“Amerind”)
- Amerind was decided shortly before the judgment in Killarnee was handed down.
- Although both decisions are from Full Courts of Appeal, I will focus on Killarnee as it was decided later in time and had the benefit of reading the decision in Amerind before its judgment was handed down.
- Further, Amerind is subject to an appeal in the High Court with special leave being granted on 16 August 2018.

# Relevant Facts of Killarnee



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- Killarnee was a case determined in the Full Federal Court in WA.
- Killarnee Civil & Concrete Contractors Pty Ltd carried on business in the concrete and construction industry trading through the Thompson Family Trust.
- At no time did it trade on its own account or on behalf of another trust.
- All assets were held on behalf of the trust and all claim and liabilities incurred were done in accordance with the objects and purposes of the trust.

# Relevant Facts of Killarnee



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- On 1 September 2014, administrators were appointed and the company continued to trade under the direction of an appointed board of directors.
- During this period of time, the company resolved to sell certain assets, including trade debts, the business and plant and equipment.
- From these sales, the company received about \$9.5 million.
- This money was partially applied to the administrators' fees and expenses and \$500,000 to Westpac as a secured creditor.
- On 9 December 2014, the company's creditors resolved to wind the company up.
- At this time, the terms of the trust deed caused the company to cease being the trustee.

# Relevant Facts of Killarnee



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- The liquidators (who were also the administrators) then realized approximately \$10.29 million (including the balance from the administration).
- Part of this \$10.29 million was the recovery of a \$4.5 million unfair preference claim from the ATO.
- However, at the time this money was realized, a new trustee had not been appointed nor had any receivers or managers been appointed.
- It was not until June 2016 that documents were drawn up to replace the trustee.

# Questions for the Court in Killaree



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1. Were the trust assets available to the liquidators of the company to sell as at the date of liquidation?
2. Are the proceeds of realization and the unfair preference proceeds to be applied by the liquidators in accordance with the Corporations Act priority regime?
3. Should the liquidators get court directions to deal with the proceeds of realization as assets in the winding up?
4. Alternatively, should the liquidators be directed by the court to distribute the proceeds of realization to unsecured creditors *pari passu* after payment of costs?

# Answers Given in Killarnee



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1. The court was unanimous in holding that the assets of the trust were **not** assets in the winding up of the company.
2. The court was unanimous in holding that the unfair preference proceeds should be applied in accordance with the Corporations Act priority regime. The majority held that the realized assets should also be applied as per the Corporations Act.
3. The majority held that the liquidators should be directed to deal with the realized assets as if they were assets in the winding up. By implication, this meant that all the realized assets would be distributed as per the Corporations Act.
4. The court unanimously held that the liquidators should not be directed to deal with the assets *pari passu* after costs.

# What Does Killarnee Mean?



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- Chief Justice Allsop essentially provides the leading judgment with Siopis J being the dissenter on question 2 and partially on question 3.
- With respect to question 1, the court held that s.477(2) does not empower a liquidator to sell trust assets in circumstances where the company has been removed from office.
- However, the court in Killarnee all agreed that the trustee's right of exoneration is property of **the company** (as distinct from the trust). This provides the answer to question 3.
- This leads to an effective “work around” of the limitations of s.477(2) in that the liquidators can be subrogated to the company's right of exoneration.
- It must be remembered that the existence of a lien does not provide a power of sale.
- However, in order to utilize this “work around”, a liquidator must first obtain directions from the court.

# What Does Killarnee Mean?



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- With respect to the question of distribution, the Chief Justice followed the decision of King CJ in *Re Suco Gold Pty Ltd (in liq)* 1983 33 SASR 99, a decision pre-dating the Corporations Act.
- This decision was based on public policy grounds to ensure that legislated priority creditors (i.e. employees) were not disadvantaged in a liquidation by the *pari passu* approach.
- Importantly, the majority in Killarnee held that all realized proceeds should be distributed as per the Corporations Act.

# Dissent from Siopis J re Distribution



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- The dissent from Siopis J on the question of distribution hinges on a distinction between whether the assets realized are property of the company or property of the trust.
- In his view, any assets realized under the right of exoneration are **not** property of the company as contemplated by ss.501, 555 and 556 of the Corporations Act.
- Rather, such funds result in trust assets that must be applied to trust creditors pursuant to common law principles of indemnity and lien – following the decision of Needham J in *Re Staff Benefits* [1979] 1 NSWLR 207.

# Dissent from Siopis J re Distribution



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- The touchstones to determine the distinction between whether the assets realized are property of the company or property of the trust appear to be:
  - If assets are realized pursuant to prior rights conferred upon the trustee *as a necessary incident of the office of trustee*, then the assets are **trust assets**;
  - If assets are realized pursuant to rights accrued by the company at the date of liquidation, then the assets are **company assets**.

That is: the liquidator takes the company's property as they find it.

# Key Points to Take Away



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- To recover trust assets in cases where the corporate trustee is removed, liquidators will need to apply for directions.
- Alternatively, they can appoint a receiver.
- The current state of the law is all property realized, before or after the liquidation, will likely be distributed pursuant to the priority regime in the Corporations Act.
- However, the issue of distribution can not be considered settled law given the dissent of Siopis J and the pending appeal in the High Court.
- Therefore, liquidators should turn their minds as to whether the property that is being realized could be considered trust property or company property.

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Next CIDG Session

**Wednesday, 6 March 2019**



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