FEDERAL COURT OF AUSTRALIA

Lane (Trustee), in the matter of Lee (Bankrupt) v Deputy Commissioner of Taxation [2017] FCA 953

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| File number(s): |  |
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| Judge(s): | **DERRINGTON J** |
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| Date of judgment: | 18 August 2017 |
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| Catchwords: | **BANKRUPTCY AND INSOLVENCY** – trustee in bankruptcy’s right to insolvent trustee’s right of exoneration – discussion of the nature of the right of exoneration – whether the funds are to be distributed to all creditors or only to trust creditors – whether right of indemnity “property divisible among the bankrupt’s creditors” or trust property  **BANKRUPTCY AND INSOLVENCY** – trustee’s right of indemnity – whether bankruptcy changed the nature of the right of exoneration – whether the priority regime in s 109 of the *Bankruptcy Act 1966* (Cth) applies to the use of the right of exoneration – trust creditors paid *pari passu* – whether the right of exoneration ought to be exhausted before dividends are paid – “hotchpot” principle considered  **BANKRUPTCY AND INSOLVENCY** – costs expenses andremuneration of trustee in bankruptcy **–** use of the right of indemnity to meet the costs expenses and remuneration of bankruptcy trustee **–** consideration of *Berkeley Applegate* principles – consideration of *Universal Distributing* principles – reasonableness of remuneration of trustee  **TRUSTS AND TRUSTEES –** trustee’s right of indemnity  **–** nature of the trustee’s right of indemnity – trustee’s equitable lien supporting the right of exoneration – whether trustee’s right of indemnity is trust property |
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| Legislation: | *Bankruptcy Act 1966* (Cth), ss 5, 58, 108, 109, 116, 117, 122, 132, 133, 134, 140, 433  *Bankruptcy Act 1966* (Cth) sch 2 *Insolvency Practice Schedule (Bankruptcy)*ss 5-15, 90-15(1), 90-20(1)(a)  *Corporations Act 2011* (Cth), ss 473, 555, 556, 562  *Bankruptcy Regulations 1996* (Cth), r 6.02  *Companies Act* *1961* (Qld), s 293  *Companies Act 1961* (Vic)  *Companies Act 1962* (SA), s 292  *Trustee Act 1925* (NSW)  *Trusts Act 1973* (Qld), ss 72, 76, 101 |
|  |  |
| Cases cited: | *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)* (1999) 30 ACSR 377  *Adsett v Berlouis* (1992) 37 FCR 201  *Agricultural Land Management Limited v Jackson (No. 2)* (2014) 48 WAR 1  *Akers v Deputy Commissioner of Taxation* (2014) 223 FCR 8  *Australian Securities and Investment Commission v Letten (No. 17)* (2011) 286 ALR 346  *Australian Securities and Investments Commission v Idylic Solutions Ltd* (2009) 76 ACSR 129  *Balkin v Peck* (1998) 43 NSWLR 706  *Bastion v Gideon Investments Pty Ltd (in liq)* (2000) 35 ACSR 466  *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2011) 193 FCR 442  *Bufalo v Official Trustee in Bankruptcy* [2011] FCAFC 111  *Cherry v Boultbee* (1839) 4 Myl & Cr 442; 41 ER 171  *Cirillo v Citicorp Australia Ltd* [2004] SASC 293  *Cleaver v Delta American Reinsurance Company (in liq)* [2001] 2 AC 328  *Combis in the matter of Reehal Holdings Pty Ltd (in liq)* [2017] FCA 793  *Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226  *Coumanios v Giunti* [2017] FCA 678  *CTP Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98  *Cummings v Claremont Petroleum NL* (1986) 185 CLR 124  *Dixon v Wieselmann* (2013) 93 ACSR 576  *Dowse v Gorton* [1891] AC 190  *Elders Trustee and Executor Company Limited v EG Reeves Pty Ltd* (1987) 78 ALR 193  *Fletcher v Collis* [1905] 2 Ch 24  *Freelance Global v Bensted Ltd (in liq)* [2016] VSC 181  *Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (in liq)* [2002] NSWCA 29  *Grime Carter & Co Pty Ltd v Whytes Furniture (Dubbo) Pty Ltd* [1983] 1 NSWLR 158  *Hardoon v Belilios* [1901] AC 118  *Hewett v Court* (1983) 149 CLR 639  *Hood’s Trustees v Southern Union General Insurance Co of Australasia Ltd* [1928] 1 Ch 793  *In re Akerman* [1891] 3 Ch 212 at 219  *In re Blundell; Blundell v Blundell* (1889) 40 Ch D 370  *In re Johnson* (1880) 15 Ch D 548  *In re Johnson* [1880] 15 Ch D 548  *In re Kaupthing Singer & Friedlander Ltd (No 2)* [2012] 1 AC 804  *In re Marine Mansions Co* (1867) LR 4 Eq 601  *In re Oriental Hotels Co* (1871) LR 12 Eq 126  *In Re Regent’s Canal Ironworks Co* (1875) 3 CH D 411  *In re Richardson* [1911] 2 KB 705  *In Re Stucley* [1906] 1 Ch 67  *In re Suco Gold* (1983) 33 SASR 99  *In the matter of North Food Catering Pty Ltd* (2014) 32 ACLC 14-049  *Jennings v Mather* [1902] 1 KB 1  *Kelly v Mina* [2014] NSWCA 9  *Kite v Mooney; In the matter of Mooney’s Contractors Pty Ltd (in liq) (No.2)* [2017] FCA 653  *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* (2008) 74 NSWLR 550  *Lerinda Pty Ltd v Laertes Investments Pty Ltd* [2010] 2 Qd R 312  Liverpool Mortgage Insurance Co’s Case [1914] 2 Ch 617  *Mannigel v Aitken* (1983) 77 FLR 406  *McDonald v Young* [2012] FCAFC 127  *Melbourne Tramways Trust v Melbourne Tramway & Omnibus Company Ltd* (1887) 13 VLR 487  *MF Global Limited (in liq) (No 2)* [2012] NSWSC 1426  *Mooney’s Contractors Pty Ltd* (2017) FCA 653  *Nissen v Grunden* (1912) 14 CLR 297  *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90  *Octavo Investments v Knight* (1979) 144 CLR 360  *Official Assignee v Jarvis* [1923] NZLR 1009  *Owen v Delamere* (1871) LR 15 Eq 134  *Re AAA Financial Intelligence Ltd (in liq) ACN 093 616 445 (in liq)* [2014] NSWSC 1004  *Re ADM Franchise Pty Ltd* (1983) 7 ACLR 987  *Re Amerind Pty Ltd (in liq)* [2017] VSC 127  *Re Application of Sutherland* (2004) 50 ACSR 297  *Re Australian Home Finance Pty Ltd* [1956] VLR 1; (1955) 63 Arg LR 247  *Re Berkeley Applegate (Investment Consultants) Ltd (in liq)* [1989] Ch 32  *Re Byrne Australia Pty Ltd (No.2)* [1981] 2 NSWLR 364  *Re Byrne Australia Pty Ltd* [1981] 1 NSWLR 394  Re Clarke; Ex parte Beardmore [1894] 2 QB 393  *Re Doyle* (1943) 13 ABC 128  *Re Dungowan Manly Pty Ltd (in liq)* (2015) 105 ACSR 648  *Re Enhill Pty Ltd* [1983] 1 VR 561  Re Evans, Evans v Evans [1887] 34 Ch D 397  *Re Exhall Coal Company (Limited)* (1866) 35 Beav 449 [55 ER 970]  *Re Freeman’s Settlement Trusts* (1887) 37 Ch D 148  *Re French Caledonia Travel Service Pty Ltd (in liq)* (2003) 59 NSWLR 361  *Re Harrington Motor Co Ltd; Ex parte Chaplin* [1928] 1 Ch 105  *Re Hillion Protection Pty Ltd (in liq)* [2014] NSWSC 1299  *Re Independent Contractor Servicers (Aust) Pty Ltd (in liq)* (2016) 305 FLR 222  *Re Kaupthing Singer and Friedlander Ltd (in administration) (No 2)* [2012] 1 AC 804  *Re Kayford Ltd* [1975] 1 All ER 604  *Re Law Guarantee Trust and Accident Society Ltd: Liverpool Mortgage Insurance Co’s Case* [1914] 2 Ch 617  *Re Mamounia Pty Ltd (in liq)* [2017] VSC 230  *Re Matherson* (1994) 49 FCR 454  *Re MF Global Australia Ltd (in liq) (No 2)* [2012] NSWSC 1426  *Re Pumfrey* (1882) 22 Ch D 255  *Re Raybould* [1900] 1 Ch 199  *Re Rhodesia Goldfields Ltd* [1910] 1 Ch 239  *Re Stansfield DIY Wealth Pty Ltd (in liq)* (2014) 291 FLR 17  *Re Suco Gold Pty Ltd* (1983) 33 SASR 99  *Re Trio Capital Ltd (in liq)* (2012) 88 ACSR 700  *Re Universal Distributing Co (in liq)* (1933) 48 CLR 171  *Rogers v Asset Loan Co* (2006) 4 ABC(NS) 293  *Rothmore Farms Pty Ltd v Belgravia Pty Ltd* (1999) 2 I.T.E.L.R. 159  *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385  *Sanderson as liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr* [2017] 118 ASCR 333  *Savage & Whitelaw v Union Bank of Australasia Ltd* (1906) 3 CLR 1170  *Seafish Tasmania Pelagic Pty Ltd v Burke, Minister for the Sustainability, Environment, Water, Population and Communities* [2013] FCA 782  *Selangor United Rubber v Cradock (No 4)* [1969] 1 WLR 1773  *Sonenoco (No.77) Pty Ltd v Silva* (1989) 24 FCR 105  Stewart v Atco Controls Pty Ltd (in liq) (2014) 252 CLR 307  *Vacuum Oil Pty Ltd v Wiltshire* (1945) 72 CLR 319  Whyte v Williams (1903) 29 VLR 69; 9 ALR 98  *Wilson v Official Trustee in Bankruptcy* [2000] FCA 1251  *Woodgate, in the matters of Bell Hire Services Pty Ltd (in liq)* [2016] FCA 1583  *Worrall v Harford* (1802) 8 Ves 4  *Zen Ridgeway Pty Ltd v Adams* [2009] 2 Qd R 298 |
|  |  |
| Date of hearing: | 2 June 2017 |
|  |  |
| Date of last submissions: | 19 July 2017 |
|  |  |
| Registry: | Queensland |
|  |  |
| Division: | General Division |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 206 |
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| Counsel for the Applicants: | Mr M Eade |
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| Solicitor for the Applicants: | Cooper Grace Ward |
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| Counsel for the First Respondent: | Ms A Wheatley |
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| Solicitor for the First Respondent: | Australian Tax Office |
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| Counsel for the Second to Fifth Respondents: | The Second to Fifth Respondents did not appear |

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| **Table of Corrections** |  |
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| 4 September 2017 | The appearances for the Respondents have been corrected |

ORDERS

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|  | | QUD 198 of 2017 |
| IN THE MATTER OF THE BANKRUPT ESTATE OF WARWICK GORDON LEE | | |
| BETWEEN: | MORGAN GERARD JAMES LANE  First Applicant  RAJENDRA KUMAR KHATRI  Second Applicant | |
| AND: | DEPUTY COMMISSIONER OF TAXATION  First Respondent  JANET MAY LEE  Second Respondent  WESTPAC BANKING CORPORATION (and others named in the Schedule)  Third Respondent | |

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| JUDGE: | DERRINGTON J |
| DATE OF ORDER: | 18 AUGUST 2017 |

SUBJECT TO RECEIVING FURTHER SUBMISSIONS WITHIN SEVEN (7) DAYS AS TO THE PRECISE WORDING, THE ORDERS OF THE COURT WILL BE AS FOLLOWS:

1. That the name of the Respondent be amended to “Deputy Commissioner of Taxation” and that the matter shall continue as if the action were started against that office holder.
2. The Applicants are entitled to the following directions:
   1. That, subject to order 4 hereof, the sum of $599,782.02 being the proceeds of sale of assets of the Warwick Lee Family Trust (“the Funds”) are subject to Mr Lee’s right of exoneration out of the trust assets and, subject to the following orders herein, are available to be distributed to trust creditors to the exclusion of non-trust creditors.
   2. The Applicants are entitled to distribute the Funds prior to the payment of any dividend from the bankrupt’s estate.
   3. The Australian Taxation Office is not entitled to priority out of the Funds pursuant to s 109(1)(e) of the *Bankruptcy Act 1966* (Cth).
   4. The provisions of ss 108 and 109 of the *Bankruptcy Act 1966* (Cth) do not apply in relation to the distribution of the Funds which are to be paid to the trust creditors *pari passu*.
   5. In the distribution of the personal estate of the bankrupt amongst all creditors, the trust creditors must bring into “hotchpot” the amount which they have received from the Funds as trust creditors.
   6. The Applicants are entitled to paid from the Funds (prior to any payment to any creditors) the amount of $89,326.56 (being 46.76% of $191,032) for their costs, expenses and remuneration relating to work undertaken in respect of causing the trust creditors to be paid by the application of the trustee’s right of exoneration.
3. It is declared that, pursuant to s 76 of the *Trusts Act 1973* (Qld) that the Applicants, in their capacity as trustees in bankruptcy of the estate of Mr Warwick Gordon Lee, acted honestly and reasonably and ought fairly be excused for any breaches, failures or omissions relating to the administration of the bankrupt estate, arising from the payment of $139,137.04 for their remuneration from the right of indemnity funds.
4. The parties have liberty to relist the remainder of the Application for further hearing in relation to the question of the characterisation of the proceeds received by the Bankruptcy Trustees from the Australian Taxation Office as an unfair preference.
5. Liberty to apply.
6. The Bankruptcy Trustees’ costs being their costs in the administration.
7. Otherwise the question of the costs of any other party is reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DERRINGTON J:

## Introduction

1. The application before the Court is for directions and relief pursuant to ss 90-15(1) and 90-20(1)(a) of the *Insolvency Practice Schedule (Bankruptcy)* (Schedule 2 of the *Bankruptcy Act* *1966* (Cth) (the Act)) in relation to the administration of the bankrupt estate of Mr Warwick Gordon Lee (Mr Lee). The directions and forms of relief sought by Mr Lee’s trustees in bankruptcy in this application are numerous and traverse a wide range of significant and complex issues. Central to many of the questions raised is the issue of whether Mr Lee’s right of indemnity out of certain assets which were held by him on trust can be utilised for the purposes of meeting the claims of “non-trust” creditors or the claims of the trustees in bankruptcy for their costs, expenses and remuneration of the administration of the estate. Other questions arise as to the entitlement of the Australian Taxation Office (ATO) to priority over other “trust creditors” in respect of an asserted Superannuation Guarantee Charge and as to the proportions in which funds may be distributed amongst the creditors.

### Nomenclatures used in these reasons

1. It is important to keep steadily in mind that each debt incurred by Mr Lee in his capacity as trustee was one for which he was personally liable. The “trust” is not a legal entity which has rights or to which duties and obligations are owed (*Agricultural Land Management Limited v Jackson (No. 2)* (2014) 48 WAR 1 at 58; [302]). It is merely the label given to that bundle of rights and obligations, both personal and proprietary, which constitute the relationship between a beneficiary and a trustee (*Kelly v Mina* [2014] NSWCA 9 at [103]). As a trust has no separate existence, so far as third parties are concerned the trustee’s obligations to those parties are not limited in any way by reference to the assets of the trust, save in the case of an express agreement (*Elders Trustee and Executor Company Limited v EG Reeves Pty Ltd* (1987) 78 ALR 193 at 253). In the context of the *Bankruptcy Act*, any of the trustee’s creditors were entitled to make the application for the sequestration order regardless of whether the debt to them was incurred in the course of the administration of the trust or otherwise.
2. Despite the above, and although it is legally inaccurate to imply that a trust has some independent existence apart from the trustee in whom the trust obligations are reposed, in these reasons the creditors of Mr Lee whose debts arose in the proper performance by him of his obligations as trustee are referred to by the short-hand expression “trust creditors”. The debts owing to “trust creditors” are referred to as “trust debts”. Conversely, the creditors whose debts arose in the course of Mr Lee’s personal dealings are identified as “non-trust creditors” and their debts are referred to as “non-trust debts”.
3. Throughout these reasons the expression ‘insolvent trustee’ shall be used to distinguish that trustee from the trustee administering the insolvent trustee’s estate, which is referred to as a ‘bankruptcy trustee’.

## Summary of principles regarding the use of a trustee’s right of exoneration in a bankruptcy

1. As a result of the large number of directions which the Bankruptcy Trustees have sought in this application and the uncertain state of the law in relation to the matters under consideration, the reasons for judgment in this matter are necessarily extensive. That being so, it is appropriate to attempt to succinctly identify some general principles which ought to guide a bankruptcy trustee when dealing with a bankrupt trustee’s right of indemnity out of trust assets.
2. A trustee has, amongst other rights of indemnity, a right to indemnification from the assets of the trust in respect of trust debts which have been properly incurred and for any tortious liability which has been not-improperly incurred.
3. The right of indemnity from the trust assets falls into two discrete parts. A right of recoupment (being the right to recoup money from the trust assets in respect of liabilities which the trustee has previously discharged from their own funds) and a right of exoneration (being a right to discharge trust liabilities directly from the assets of the trust).
4. The value of the trustee’s right of indemnity can only be fully ascertained upon the taking of the accounts of the trust, which includes the application of the “clear accounts rule”. In general terms, the value of the indemnity is equal to the extent to which the balance of the accounts favours the trustee regardless of the quantum of trust debts owing.
5. The trustee has an equitable lien which supports their rights of indemnity (both exoneration and recoupment). The consequence of the existence of the right of indemnity and lien is that the trustee has a beneficial interest in the assets held upon the terms of the trust and, to that extent, the beneficiaries’ interest in the trust property is diminished.
6. On the occasion of the trustee’s insolvency all existing trust creditors are equally entitled to be subrogated to the trustee’s right of exoneration and supporting lien although not to the right of recoupment.
7. Both the right of recoupment and the right of exoneration will form part of the personal property of the insolvent trustee which will pass to the bankruptcy trustee as “property of the bankrupt divisible amongst creditors”. Neither is trust property. The benefit of the supporting equitable lien will also pass to the bankruptcy trustee. It also is not trust property.
8. The exercise of the right of recoupment by a bankruptcy trustee will result in trust funds being transferred beneficially to the estate of the bankrupt which are then available to meet the claims of both trust and non-trust creditors. The distribution of such funds accords with the usual distribution of the proceeds of the bankrupt’s property pursuant to the priority regime in the *Bankruptcy Act 1966* (Cth) (the Act).
9. The right of exoneration is much more limited. Its exercise by the bankruptcy trustee will only result in the transfer of trust funds directly to the trust creditors in payment of their debts. The exercise of the right does not result in the beneficial receipt of funds by the bankrupt’s estate which might be used to meet the claims of non-trust creditors.
10. Whilst the right of exoneration is property of the bankrupt, it is not capable of being realised so as to create “proceeds” which might be applied pursuant to ss 108 and 109 of the Act. It is merely a limited right to use trust funds to discharge trust debts and that is the only manner in which a bankruptcy trustee may exercise it in the course of the administration of the bankrupt’s estate.
11. As all trust creditors have equal rights of subrogation to the right of exoneration and supporting lien, it follows that the payments to them consequent upon the exercise of the right of exoneration occurs *pari passu*.
12. In the distribution of the proceeds of the bankrupt’s property under ss 108 and 109, the “hotchpot” principle applies such that the trust creditors must bring into account the amounts which they have received by the application of the right of exoneration, prior to participating in the distribution.
13. The limited nature of the right of exoneration has the consequence that it is not capable of being used to pay the costs, expenses and remuneration of the bankruptcy trustees. However, the principles in *Re United Distributing* and *Berkeley Applegate* provide a justification for allowing payment to the bankruptcy trustees of certain amounts from the pool of funds generated by their work before the right of exoneration is exercised.
14. The costs, expenses and remuneration which might be paid to the bankruptcy trustees pursuant to the principles in *Re United Distributing* and *Berkeley Applegate* are limited to that relating to the performance of work necessary for exercising the right of exoneration. However, where the sole business of the bankrupt was acting as trustee, it is likely that a substantial proportion of the costs, expenses and remuneration of the administration of the estate will be chargeable out of the pool of funds produced by the bankruptcy trustees.
15. Whether the amount of the bankruptcy trustee’s entitlement can be debited against the interest of the trust’s beneficiaries as opposed to the interest of the trust creditors in the pool of funds created need not be determined in this case as no “trust assets” remained.

## Background facts

1. The Warwick Lee Family Trust was established by a deed dated 11 March 1998. The trustees initially appointed under that deed were Mr Lee and his wife, Wendy Ellen Lee. By the time of his bankruptcy in February 2013, Mr Lee was the sole trustee. The trust was a discretionary trust of which, inter alia, Mr Lee, Mrs Lee and Mr Lee’s children were “beneficiaries” in the sense that they were objects of the exercise of the trustee’s discretionary power to distribute income and in whom the corpus of the trust vested on the Vesting Day.
2. Prior to his bankruptcy, Mr Lee, as trustee, operated the business of a Subway franchise located in the suburb of Brassall in the State of Queensland. In the course of the operation of that “fast-food” business, Mr Lee employed a number of staff and incurred a number of significant liabilities. Importantly, for the claims of the Deputy Commissioner of Taxation in this matter, he did not employ anyone in his private capacity. Apparently, the Subway business was not a financial success. It was advertised for sale and a contract for its purchase by an unrelated third party was entered into on 18 December 2012. Settlement took place on 19 February 2013. Three days later, on 22 February 2013, Mr Lee was made bankrupt on a debtor’s petition. Mr Rajendra Kumar Khatri and Mr Morgan Gerard James Lane were appointed as the trustees in bankruptcy of Mr Lee’s estate. For convenience, and to distinguish them from the trustee of the Lee Family Trust, they are referred to herein as the “Bankruptcy Trustees”.
3. On the day prior to the execution of the contract of sale of the Subway business, being 17 December 2012, the trust deed of the Warwick Lee Family Trust was amended to remove a provision which would have disqualified Mr Lee from continuing to act as trustee in the event of his bankruptcy. No explanation has been proffered as to why that occurred. Nevertheless at all material times he has remained as the trustee of the Warwick Lee Family Trust.
4. From the material filed by the Bankruptcy Trustees, it is apparent that the operation of the trust was somewhat disorganised and unsophisticated. This has little relevance to the core issues to be determined, but it does have some significance with respect to the quantum of remuneration sought by the applicants. In any event, after a not-inconsiderable amount of work, the Bankruptcy Trustees have ascertained the nature and scope of Mr Lee’s personal estate. Necessarily, that required that they also ascertain the nature and scope of the trust estate.
5. The net proceeds of the sale of the Subway franchise, in the sum of $448,659.49, were received by the Bankruptcy Trustees in the period from 20 March 2013 to 28 May 2013. The evidence shows that monies were received “in response to a demand being made by the Trustees in Bankruptcy pursuant to Mr Lee’s right of indemnity”. By way of a letter dated 26 February 2013 to Mr Graham Roberts of Cooper Grace Ward, who was then Mr Lee’s solicitor, the Bankruptcy Trustees asserted that the trustee’s right of indemnity under the Warwick Lee Family Trust vested in them and, on that basis, they requested the transfer to them of the sale proceeds. Prior to any such transfer of the funds pursuant to that request, Mr Roberts held them for his client, Mr Lee, who, in turn, held them as trustee of the Warwick Lee Family Trust. It seems, therefore, that the funds which were then held in trust (and which were subject to the equitable lien protecting the trustee’s right of indemnity) were paid out of the trust and to the Bankruptcy Trustees in a purported realisation of the trustee’s personal right of indemnity. However, the Bankruptcy Trustees have indicated that they have kept these funds separate from the personal estate of Mr Lee and they are prepared to deal with the funds in the manner in which the Court directs. It is presumed that, by this the Bankruptcy Trustees accept that if the funds ought not to have been paid to them by Mr Lee’s solicitors consequent upon their demand, they will deal with the funds as they ought to have been dealt with in the first instance.
6. In the course of the administration of Mr Lee’s estate, the Bankruptcy Trustees recovered an unfair preference payment of $322,447.58 from the ATO which had been paid by Mr Lee in discharge of taxation liabilities arising from the operation of the Subway franchise. On the return of the money from the ATO it was apportioned between the trust on the one hand and Mr Lee’s personal estate on the other. The rationalisation for this was that Mr Lee had used an amount of $171,659.00 of his own funds to pay part of the tax debt such that it was appropriate to return an equal amount to his estate on the transaction being rendered void. The Deputy Commissioner has asserted that the whole of the funds should form part of the personal estate of Mr Lee so as to be available for all creditors. This was a submission made in writing well after the oral hearing had been concluded and it is dealt with at the end of these reasons.
7. In their written submissions the Bankruptcy Trustees identified that at the date of the filing of this application the creditors of Mr Lee in his capacity as trustee were the following:
   1. ATO (superannuation liability in respect of the Subway employees) in the amount of $128,574.88;
   2. ATO (trust tax liability) in the amount of $1,037,171.40;
   3. Bevmont Pty Ltd as trustee for the Lee Family Trust in the amount of $330,000; and
   4. Janet May Lee in the amount of $73,727.37.
8. Further, the Bankruptcy Trustees assert that Mr Lee’s personal creditors were as follows:
   1. ATO (personal taxation liability) in the amount of approximately $295,291.71;
   2. Janet May Lee in the amount of $27,000;
   3. Westpac Bank in the amount of $26,363.26; and
   4. the Lee Family trust in the amount of $399,720 (which appears to be a loan made to Mr Lee by the trust).
9. The ATO has given notification that its claim against Mr Lee of $128,574.88 is the subject of a Superannuation Guarantee Charge (SGC) with the result being that it is entitled to the payment of that amount as a priority pursuant to s 109(1)(e) of the Act. This superannuation liability arose in the course of conducting the Subway franchise and it is a liability of the trust. However, r 6.02 of the *Bankruptcy Regulations 1996* (Cth) limits the amount of any such priority under s 109(1)(e) at a set amount per employee with the consequence that the ATO’s priority amount will be capped at $100,969.52. That leaves a shortfall to be recovered as a non-priority trust debt in the sum of $27,605.36.
10. The asset and liability position of the bankrupt’s estate and the trust are as follows:
    1. Mr Lee’s estate has assets of $183,750.22 and creditors of $876,949.85; and
    2. The trust creditors total $1,317,165.35 and the trust assets are said to be $599,782.02.
11. The Bankruptcy Trustees have now finalised all recovery actions, have ascertained all known unsecured creditors and are in a position to distribute the funds under their control. However, due to some legal uncertainties they seek directions as to the appropriate method of disposal. In that respect, at paragraph 20 of their written submissions (filed 22 May 2017) they submit:

A number of the issues the subject of the directions sought have no direct legal authority that has been located, and others are the subject of conflicting or inconsistent single judge and intermediate appellate decisions.

There is no doubt that there exists some not-insubstantial uncertainty and confusion in this area of the law as is evidenced by the numerous inconsistent authorities and commentaries which surround it. In that environment it is not surprising that the Bankruptcy Trustees made this application for directions and other relief. It appears from the material filed that all persons who have an interest in the outcome of this application have been served or notified of it. Only the Deputy Commissioner of Taxation has appeared to make submissions.

## The making of an application for directions under the *Bankruptcy Act*

1. As mentioned, this application purports to be made by the Bankruptcy Trustees pursuant to ss 90-15(1) and 90-20(1)(a) of sch 2 of the Act which affords the Court power to make any orders it thinks fit in relation to the administration of a regulated debtor’s estate. By s 5-15 of that schedule, a “regulated debtor” includes a person who is bankrupt. Section 90-15(1) appears to have replaced, in part, the now repealed s 134(4) which had permitted a bankruptcy trustee to make an application to the court for directions.
2. For present purposes the relevant parts of s 90-15 provides:

**90-15 Court may make orders in relation to estate administration**

*Court may make orders*

(1) The Court may make such orders as it thinks fit in relation to the administration of a regulated debtor’s estate.

…

*Examples of orders that may be made*

(3) Without limiting subsection (1), those orders may include any one or more of the following:

(a) an order determining any question arising in the administration of the estate;

…

(f) an order in relation to remuneration, including an order requiring a person to repay to the estate of a regulated debtor, or the creditors of a regulated debtor, remuneration paid to the person as trustee.

1. The power conferred by this section is wide and obviously intended to facilitate the resolution of contentious matters as they arise in the course of the administration of a bankrupt’s estate. It is not limited to the making of directions as was the former s 134(4) which was encumbered with various inherent limitations (See *Bufalo v Official Trustee in Bankruptcy* [2011] FCAFC 111 and the cases cited therein). The power granted by s 90-15 is sufficiently wide to make the directions or give the relief which is sought in the Application.

## Whether the funds are to be distributed to all creditors or only to “trust creditors”

1. The first question raised by the Bankruptcy Trustees in relation to the use of the funds held by them allegedly as proceeds of the right of indemnity is stated in the following terms:

Whether the $599,782.02 received by the applicants pursuant to Warwick Gordon Lee’s right of indemnity as trustee… be distributed amongst creditors of Mr Warwick Gordon Lee as trustee or amongst creditors of both Mr Warwick Gordon Lee as trustee and Mr Warwick Gordon Lee personally.

1. As posed, the question fails to acknowledge some of the more difficult issues surrounding the nature of a trustee’s right of indemnity and the manner in which it might be dealt with by those who administer the insolvency of a trustee and in whom such indemnity is vested. Much has been said in the recent authorities and commentaries concerning these issues and there is a danger that adding to that discussion might only serve to confuse rather than elucidate. However, whilst both of the parties before the Court acknowledged the acute difficulty of the issues raised, each asserted that their consideration was essential to the directions and the relief which the Court is asked to give.

### The statutory regime pursuant to which the issue arises

1. In this matter it is the provisions of the Act which fall to be construed and applied. In many of the authorities to which reference was made in the course of argument, it was the cognate insolvency provisions of the relevant companies’ legislation which were the subject of consideration. Whilst, in some cases, differences in the various insolvency regimes may provide a legitimate ground for distinguishing certain decisions, the essential issue raised in cases of this ilk, concerns the manner in which a trustee’s right of indemnity can be utilised by those responsible for administering the estate or property of the insolvent trustee. Neither the nature of that right nor the manner in which it is held by a trustee, will alter depending upon whether the trustee is an individual or a corporation. On the other hand, the method by which the property of the insolvent trustee might be disposed of under the alternative insolvency regimes may provide some legitimate ground of differentiation. That being so, it is necessary to consider the legislative context in which the assets and rights of the bankrupt are to be administered under the Act.
2. Section 58 of the Act causes certain property to vest in the bankruptcy trustees on an individual’s bankruptcy. Relevantly, that section provides:

**58 Vesting of property upon bankruptcy-general rule**

(1) Subject to this Act, where a debtor becomes a bankrupt:

(a) the property of the bankrupt, not being after-acquired property, vests forthwith in the Official Trustee or, if, at the time when the debtor becomes a bankrupt, a registered trustee becomes the trustee of the estate of the bankrupt by virtue of section 156A, in that registered trustee; …

1. The expression “the property of the bankrupt” as it is used in s 58 is defined in s 5 of the Act, inter alia, as follows:

***the property of the bankrupt,*** in relation to a bankrupt means:

1. Except in subsections 58(3) and (4):

(i) the property divisible among the bankrupt’s creditors; and

(ii) any rights and powers in relation to that property that would have been exercisable by the bankrupt if he or she had not become a bankrupt; …

1. The meaning of the phrase “property divisible among the bankrupt’s creditors”, is explained in s 116 of the Act in the following terms:

**116 Property divisible among creditors**

1. Subject to this Act:
2. all property that belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy, or has been acquired or is acquired by him or her, or has devolved or devolves on him or her, after the commencement of the bankruptcy and before his or her discharge; and
3. the capacity to exercise, and to take proceedings for exercising all such powers in, over or in respect of property as might have been exercised by the bankrupt for his or her own benefit at the commencement of the bankruptcy or at any time after the commencement of the bankruptcy and before his or her discharge;

…

is property divisible amongst the creditors of the bankrupt.

1. Subsection (1) does not extend to the following property:
2. property held by the bankrupt in trust for another person.
3. In the interpretation of the expression “the property divisible among creditors”, consideration must also be given to the separate definition of “property” in s 5 which is:

“***Property*** means real or personal property of every description, whether situate in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property.”

1. Reference also needs to be made to the provisions empowering the bankruptcy trustees to pay the claims of the creditors. These provisions are contained in Division 2 of Part VI which is headed “Order of Payment of Debts”. In particular s 108 provides:

108 **Debts proved to rank equally except as otherwise provided**

Except as otherwise provided by this Act, all debts proved in a bankruptcy rank equally and, if the proceeds of the property of the bankrupt are insufficient to meet them in full, they shall be paid proportionately.

1. Section 109 of the Act imposes an order of priority in respect of the payment of debts from the “proceeds of the property of the bankrupt” and the chapeaux of s 109(1) provides:

109 **Priority payments**

(1) Subject to this Act, the trustee must, before applying the proceeds of the property of the bankrupt in making any other payments, apply those proceeds in the following order:

Thereafter, the subparagraphs of subsection (1) establish the priority regime for payments from the proceeds which are realised from the bankrupt’s property.

1. The expression “proceeds” in the phrase “proceeds of the property” as used in ss 108 and 109, has the usual meaning of the “sum, amount, or value of land, investments, or goods, etc., sold, or converted into money” as defined in *Jowitt’s Dictionary of English Law* (4th ed), p 1920. Indeed, given the context, it is likely that it means the “net proceeds” of realisation after the expenses of sale are deducted. (See the definition of “proceeds” in *Stroud’s Judicial Dictionary* (9th ed)).
2. It can be immediately observed from this suite of provisions that the “property of the bankrupt” which vests in a bankruptcy trustee is not necessarily the property which is actually distributed to the creditors once the estate is otherwise fully administered. Whilst under s 58(1)(a) the bankruptcy trustee takes possession of all of the “property of the bankrupt” (ss 58 and 116), it is only from the “proceeds” of the realisation process that payments are made to the creditors under ss 108 and 109 (cf s 134(1)(ac)). Occasionally, some of the bankrupt’s property is not capable of being realised so as to produce “proceeds”. It may be of such a nature that possession of it results in additional expense to the holder. This may occur in the case of a lease or mortgaged land where the income or anticipated realisation to be derived is less than the cost of its retention and maintenance. In those circumstances the bankruptcy trustee has power to disclaim the onerous property (s 133 of the Act). Other property of the bankrupt, which may be in the nature of rights or powers, may be productive of little or no realisation due to their inherent limitations. Consequently, the “proceeds” which are to be used to meet the creditors’ claims in accordance with the priority provisions, are not equivalent to the “property of the bankrupt” which vests in the bankruptcy trustee on the making of the sequestration order.
3. It did not seem to be disputed before the Court that an insolvent trustee’s right of indemnity from trust assets might be within the description of “property” which vests in a bankruptcy trustee, although it was also acknowledged that there are a variety of inconsistent authorities on this issue. Generally, the authorities (albeit from a corporate insolvency context) which hold that the right of indemnity is not property which vests in the bankruptcy trustees, do so on the basis that the indemnity is effectively “trust property”, see for instance *Re Independent Contractor Servicers (Aust) Pty Ltd (in liq)* (2016) 305 FLR 222 and *Re Amerind Pty Ltd (in liq)* [2017] VSC 127.
4. Putting aside for one moment the impact of s 116(2)(a) of the Act, it can be readily accepted that an insolvent trustee’s equitable right to be indemnified in respect of liabilities incurred in the not-improper administration of a trust, would be within the concept of “property divisible amongst the creditors of the bankrupt”. The right to be indemnified out of trust assets is personal property, being a right to exercise power with respect to “property” within the meaning of s 116(1)(b) as informed by the definition of s 5. Not insignificantly, there are also a number of authorities which have held that a trustee’s right of indemnity is part of a trustee’s personal estate which will pass to a bankruptcy trustee in the event of the trustee’s insolvency. Some of the more significant are *Savage & Whitelaw v Union Bank of Australasia Ltd* (1906) 3 CLR 1170 at 1188 and 1196; *Octavo Investments v Knight* (1979) 144 CLR 360 at 367-368 *(Octavo)* and *In re Suco Gold* (1983) 33 SASR 99 at 102 (*Re Suco Gold*). On one view, the binding effect of these authorities might be thought of as foreclosing most of the issues concerning the first question asked of the Court on this application. However, as certain recent decisions have suggested that a trustee’s right of indemnity is actually property held “on trust” such that it falls within the meaning of s 116(2)(a) (or not property of the company in a corporate insolvency), the question requires further consideration. It is also appropriate to acknowledge that there exists an argument that the decision in *Octavo* did not expressly identify the scope of creditors whose claims may be met by the use of the right of indemnity. In that case all of the creditors were trust creditors and it has been said that the High Court did not expressly hold that the right of indemnity could not be utilised to meet the claims of non-trust creditors. This is also a matter which requires detailed consideration.

### Nature of the trustee’s right of indemnity

1. In the course of submissions it was suggested that one explanation for the inconsistency amongst the authorities concerning the use of a trustee’s right of indemnity in an insolvency context, was a somewhat less than strict adherence to the doctrine of precedent in relation to certain High Court decisions, including *Octavo*. Whilst there is possibly some force in that submission, it is more likely that, properly analysed, conflicts between some of the authorities are more apparent than real and that the distinguishing of the various High Court authorities can be legitimately defended. However, it is true that it is not possible to reconcile all of the authorities, some of which are diametrically opposed.
2. It is apt to keep in mind in the consideration of the authorities that the rights of exoneration and recoupment from the trust assets which are considered in this matter, are only part of the protection afforded to a trustee in relation to liabilities not-improperly incurred in the performance of a trust. For example, in the absence of contrary provisions in the trust instrument, a trustee is also entitled to a personal indemnity from the beneficiaries who are all *sui juris* and absolutely entitled to the trust assets in relation to all debts and liabilities incurred in the performance of the trust; (*Hardoon v Belilios* [1901] AC 118; *Balkin v Peck* (1998) 43 NSWLR 706); a trustee has a right to retain the interest of a beneficiary who owes the trustee money (*Re Akerman* [1891] 3 Ch 212 at 219); trustees have a right to contribution and/or indemnity from any co-trustee in relation to the trust debts and liabilities; and a trustee can impound the interest of a beneficiary who has instigated or requested that the trustee act in a way which involves a breach of trust (*Fletcher v Collis* [1905] 2 Ch 24 at 30-32). The essential point is that the trustee has a number of rights which are inherent to their position and which operate to hold them harmless from liabilities incurred in the fulfilment of their duties. The entitlement to an indemnity from the trust assets is merely part of that suite of rights. Whilst these various rights have the effect of preventing or avoiding any diminution of the trustee’s personal estate, they do not all operate by way of replenishing the trustee’s estate once the trustee has personally incurred a debt or liability. Some of them operate by exonerating the trustee from liability by ensuring that a trustee is not required to discharge a trust liability in the first place.
3. As the trustee is personally liable for the debts incurred in the conduct of a trust, it is a necessary incident of the office of trustee that they have an entitlement to indemnity out of the trust assets for all charges, expenses and liabilities appropriately incurred. That principle, which was stated by Lord Eldon LC in *Worrall v Harford* (1802) 8 Ves 4; 32 ER 250, it is now enshrined in most State legislation regulating trusts. For the purposes of the trust instrument before the Court the relevant legislative provision is s 72 of the *Trusts Act 1973* (Qld) *(Trusts Act)* which provides:

**72 Reimbursement of trustee out of trust property**

A trustee may reimburse himself or herself for or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers.

In this case, the trust instrument itself also makes provision for the trustee to have a right of indemnity from the assets of the trust in a similar manner. By clause 21 of the trust instrument it is provided that:

**INDEMNITY OF TRUSTEES**

21. The Trustee shall be indemnified and held harmless out of the Trust Fund against all claims, costs, damages, losses, fees, expenses, taxes, duties and impositions which arise in connection with or in consequence of this Deed or the Trusts hereby created except to the extent that the same arises from the Trustee’s own dishonesty provided that the Trustee shall have not right of indemnity against any one or more of the Beneficiaries.

The right of indemnity in the trust instrument is wider than that which exists in equity or under the *Trusts Act*, in respect of the range of liabilities for which the trustee is indemnified. In equity, the trustee’s right of indemnity only extends to liabilities incurred by the trustee in the “proper performance of the trust” and to tortious liability where that liability has been incurred in the “not improper” performance of the trust (*In re Blundell; Blundell v Blundell* (1889) 40 Ch D 370 at 376-7; *Re Suco Gold Pty Ltd* (1983) 33 SASR 99 at 104 per King CJ). By comparison, the scope of the indemnity provided for in the trust deed in this case extends to any expense or liability arising in connection with the trust save to the extent to which it arises by the trustee’s own dishonesty. Otherwise, the expression “shall be indemnified and held harmless” in clause 21 connotes the same procedure for satisfying the indemnity as exists in equity; namely the reimbursement of expenses paid by the trustee or the direct payment of liabilities from the assets of the trust.

### Two alternative rights of indemnity – recoupment and exoneration

1. As appears from the statement of the principle in s 72 of the *Trusts Act*, the right of a trustee to be indemnified *from the assets* *of the trust* falls into two distinct parts. *First*, where a trustee has discharged a trust debt out of their own funds, the trustee is entitled to reimbursement out of the trust funds in an equivalent amount. That occurs by money being transferred from the trust funds to the trustee who receives an absolute, beneficial interest in that money. That right in relation to satisfied trust liabilities is often referred to as the right of “recoupment”. *Second*, the trustee is entitled to meet unsatisfied trust debts *directly* from the trust assets by utilising the right of “exoneration”. Pursuant to this right, the trustee directly applies trust assets to discharge the indebtedness by paying trust funds directly to the trust creditor (*Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 245–246; *Re Suco Gold Pty Ltd* (1983) 33 SASR 99 at 105; *Re Exhall Coal Company (Limited)* (1866) 35 Beav 449 [55 ER 970] per Lord Romilly MR; see also the discussion of the right in H J A Ford, *Trading Trusts and Creditors’ Rights,* (1981) 13 Melb LR at 1, 3, 4, 14 – 19 and 26 and the discussion in Hon BH McPherson, “*The Insolvent Trading Trust”* in Finn PD (ed), *Essays in Equity* (Law Book Co, 1985), Chapter 8 at p 147). This process of “exoneration” does not involve the trustee obtaining any beneficial interest in the assets which are used to discharge the trust debts. The nature of the right has been identified by the learned authors of *Ford & Lee:* *The Law of Trusts* (Thomson Reuters Westlaw AU online version) at [13:030] in the following terms:

In a trust of any magnitude the trustees will necessarily incur administration expenses. They are entitled to, and for administrative reasons preferably should, meet those expenses *directly* from the trust fund. This inherent right of the trustee is articulated in trustee legislation

(Emphasis added)

1. The duality of the trustee’s right of indemnity out of trust assets appears in the statement of principle found in *Halsbury’s Laws of England,* Trusts and Powers (Vol 98, 2013, LexisNexis online edition) at [342]:

A trustee is entitled to be reimbursed from the trust funds, or may pay out of the trust funds, expenses properly incurred by him when acting on behalf of the trust… (Footnotes omitted)

As expressed in that passage, the right of the trustee is either to be reimbursed for expenses already paid by the use of his or her own funds, or to raise funds from the trust estate for the purposes of satisfying the liabilities which have been incurred. This position is recognized succinctly in the commentary to the *American Third Restatement of the Law of Trusts* (at § 88) p 256 in the following manner:

The trustee’s right of indemnification (§ 38(2)) entitles the trustee either to pay proper expenses directly from the trust estate (exoneration) or to obtain reimbursement from the trust when the trustee has personally paid those expenses.

That duality is also referred to by the learned authors of *Scott and Ascher on Trusts* (5th ed, Wolters Kluwer) at § 22.1.1, p 1627:

The trustee may use trust funds to pay expenses properly incurred in administering the trust. A trustee who properly incurs an obligation on behalf of the trust is entitled to discharge the obligation out of trust funds, though applicable law designates the obligation as the trustee’s own. A trustee has, in other words, not merely a right of reimbursement for trust expenses already paid out of the trustee’s own funds, but also a right of exoneration, i.e., the power to use trust funds to discharge obligations that have arisen out of trust administration.

(Footnotes omitted)

1. The important distinction between these two aspects of the trustee’s right of indemnity is usefully assayed in Ong D, *Ong on Subrogation* (The Federation Press, 2014), Chapter 2 and in Mitchel and Watterson, *Subrogation, Law and Practice* (Oxford University Press) at Chapter 12. In the former work (at pp 31 – 32) the learned author identifies that a trustee is restricted in the use of the right of exoneration to using it *for the purpose* of discharging his liability to the trust creditors *and no other.*
2. Lest it be thought that the distinction identified above is “hair-splitting”, it ought to be observed that the duality of the right of indemnity from trust assets reflects a similar attribute in the right of indemnity which the trustee has as against the beneficiary. In the latter case, a trustee is entitled to discharge the trust liabilities by use of their own funds and then seek to be reimbursed by the beneficiary, or obtain an order in equity requiring the beneficiary to pay the creditor once the debt falls due; *Subrogation, Law and Practice* at p 428; para [12.11]. The learned authors of *Jacob’s Law of Trusts in Australia* (8th ed, Butterworths, 2006) at [21-05], p 515identify that the “usual order will be one requiring the beneficiary to pay the creditor or otherwise procure the release or discharge of the trustee”. Where the trustee has already paid the debt, the beneficiaries will be required to pay an equivalent amount to the trustee.
3. As the discussion below identifies, some of the authorities concerning the trustee’s right of indemnity from the trust assets do not always maintain this critical distinction between the right of “recoupment” or “reimbursement” on the one hand and the right of “exoneration” on the other. However, the distinction is fundamental. If what comes into the hands of a bankruptcy trustee is a trustee’s right of recoupment, it is a right to take money from the trust funds for the benefit of the insolvent trustee’s estate. It is, in effect, the payment of an amount owing to the trustee for the purposes of reimbursing the trustee’s personal estate. Such a payment is received by the bankruptcy trustee as part of the bankrupt’s personal estate and is available to meet the claims of both trust and non-trust creditors. However, the position is markedly different when what the bankruptcy trustee receives is merely a right or entitlement to have trust assets applied to discharge trust debts. That is a considerably more limited right.
4. The distinction between the right of recoupment (or reimbursement) on the one hand and the right of exoneration on the other was emphasised in *In re Richardson* [1911] 2 KB 705. That case concerned a bankruptcy trustee’s entitlement to the benefit of the insolvent trustee’s right of indemnity from a beneficiary. At 711, Cozens-Hardy MR, in effect, held that where the trustee has paid a trust debt out of his own money, the right of reimbursement is the trustee’s own property absolutely and, if the trustee is insolvent, any bankruptcy trustee might use that right of reimbursement for the benefit of all of the creditors of the trustee’s estate. However, the right of exoneration is merely a power which is exercisable by the trustee solely for the purposes of paying the expenses of the trust. That latter conclusion is in keeping with the remedy which would be awarded in an action to enforce the right; being that the beneficiary would be ordered to pay the creditor directly once the debt has become owing Mitchell and Watterson, *Subrogation, Law and Practice* (Oxford University Press, (Rev ed) 2007) at p 428; *The Law of Contribution and Reimbursement* (Oxford University Press, 2003, para [14.38]–[14-45]). Although in *In Re Richardson* the Master of the Rolls was dealing with a trustee’s right of indemnity from a *sui juris* beneficiary rather than any right of exoneration out of the trust assets, the relevant distinction between exoneration and recoupment necessarily appears from his Lordship’s reasons.
5. The decision of *In re Richardson* also supports the proposition that, whilst in a bankruptcy administration a right of exoneration might vest in the bankruptcy trustee, it does not change its character to become a right to use trust funds to pay non-trust creditors. If the right of exoneration is limited in the trustee’s hands, it is equally limited in the hands of the bankruptcy trustee. Neither the trustee nor, in his stead, the bankruptcy trustee, is entitled to use funds which are the subject of the right of exoneration to discharge non-trust liabilities (*In re Richardson* [1911] 2 KB 705 at 714, per Fletcher Moulton LJ). These principles hold true even though in *In Re Richardson* the right of exoneration from the beneficiary may have been wider in different circumstances.
6. The nature of the right of exoneration as a mere right or power to use trust funds to meet debts incurred in the operation of the trust, can also be detected in the origins of the rights of trust creditors to be subrogated to that right on the trustee’s insolvency. This right evolved as a remedy in an administration action where the creditors of the executors, were entitled to prove in the estate under the administration decree and, where their debts were accepted, they would be paid directly out of the estate. The trustee was not entitled to assume beneficial ownership of the funds for the purposes of discharging the trust debts (see the discussion by HJA Ford in *Trading Trusts and Creditors’ Rights,* (1981) 13 Melb LR 1, 18 – 19).
7. In the context of this consideration of the nature of the rights of recoupment and exoneration, it is important to observe that there is no “third entitlement” of a trustee to indemnification for trust expenses and liabilities out of the assets of the trust estate. Particularly, there is no right for the trustee to take from the trust a sum of money equivalent in amount to the existing trust debts and for the trustee to appropriate that money to themselves with the intention of paying the trust debts out of their own assets which have been swelled by the trust funds. Prima facie, that would constitute a breach of trust on the basis that the trustee would be profiting from his position by assuming beneficial ownership of trust property (*In re Johnson* (1880) 15 Ch D 548 at 552). There does not appear to be any express judicial authority for the existence of such a right save that the reasons of Lush J in *Re Enhill Pty Ltd* [1983] 1 VR 561 at 568, might be taken as inferentially supporting its existence. It is a view that was rejected by the reasoned observations of King CJ in *Re Suco Gold* at pp 105–106 who held that, if the trustee takes trust funds into his possession for the purposes of meeting trust debts, the funds do not lose their character as trust property (see also *Re Matherson* (1994) 49 FCR 454 at 466.) Despite that, it should be recognised that in *Grime Carter & Co Pty Ltd v Whytes Furniture (Dubbo) Pty Ltd* [1983] 1 NSWLR 158, McLelland J identified that this “third entitlement” of a trustee to appropriate funds beneficially to themselves was assumed to exist in the decision in *Re Enhill.* His Honour said (at p 161):

In the judgment of the Full Court of the Supreme Court of Victoria in *Re Enhill Pty Ltd* (1982) 7 ACLR 8, the existence of this third element in a trustee's entitlement to indemnity was certainly assumed, and must be taken as having been decided. In that case the court expressly declined to follow the decision of Needham J in *Re Byrne Australia Pty Ltd and the Companies Act* [1981] 1 NSWLR 394 (and see *Byrne Australia Pty Ltd and the Companies Act (No 2)* [1981] 2 NSWLR 364) in which it had been held that a trustee's entitlement to indemnity out of trust assets in respect of trust liabilities did not authorize appropriation of trust funds to the trustee's general estate free of any obligation to apply them in satisfaction of trust liabilities. In each case a specific question before the court was whether trust assets might be applied by the liquidator of a company which was a trading trustee, in satisfaction of the costs and expenses of the winding up, including the liquidator's remuneration. This question was decided in the negative in *Re Byrne Australia Pty Ltd* and in the affirmative in *Re Enhill Pty Ltd*.

1. The difficulty with his Honour’s approach was the acceptance of an implicit assumption of the existence of a hitherto unknown “third entitlement” as part of the trustee’s right of indemnity in the absence of any supporting authority or principled analysis justifying its existence. Whether that was a correct approach or not need not be considered further as the decision in *Grime Carter & Co* predated that of the South Australian Full Court decision in *Re Suco Gold* which eschewed the existence of any such entitlement. Indeed, subsequently in Re ADM Franchise Pty Ltd (1983) 7 ACLR 987, McLelland J recanted his earlier reliance on *Enhill*. Instead, he followed *Re Suco Gold* and accepted that no such third entitlement existed.
2. An accurate analysis of the nature and scope of the trustee’s right of exoneration as opposed to the right of recoupment, was undertaken by Farrell J in *Woodgate, in the matters of Bell Hire Services Pty Ltd (in liq)* [2016] FCA 1583 (*Bell Hire Services*). There, the liquidator of a corporate trustee applied for directions under both the *Corporations Act 2011* (Cth)and the *Trustee Act 1925* (NSW). The insolvent company’s sole undertaking had been that of conducting a business as trustee of a family trust. No replacement trustee had been appointed and the company retained possession of the trust assets. In dealing with an argument as to how the costs of the winding up were to be paid, Farrell J succinctly identified the distinction between the right of recoupment and the right of exoneration and the different ways in which they might be utilised by a liquidator. At [36] – [37] her Honour said:

[36] The fact that the trustee enjoys an indemnity secured generally over trust property and that it is proprietary in nature does not automatically bring trust property within the general pool of creditors’ claims in a winding up or the statutory order of priority for payment. A trustee company is not entitled, in exercise of its indemnity, to appropriate trust property before payment of a trust debt so that the amounts appropriated become available to the company’s creditors generally in the liquidation. It is only if the creditors of the trust have been paid out of the trustee company’s own funds that the company’s general creditors are entitled to be paid out of trust assets appropriated to satisfy the trustee’s right of recoupment; the statutory order of priority for payment then applies. Unpaid trust creditors are entitled to stand in the shoes of the trustee and to obtain payment from the trust property; the right of subrogation must be exercised in their favour; trust property is therefore not property divisible among the trustee’s creditors generally and the statutory order priority does not apply.

[37] It has been observed that careful attention must be paid to whether the trustee’s indemnity is being asserted as a right of recoupment or exoneration. Where it is exoneration, the trustee may resort to trust property only for the purpose of discharging trust liabilities. “*Company law ends and trust law takes over”* at a point earlier than where the right being exercised is the right of recoupment: see the useful discussion in D’Angelo, N *“Commercial trusts in practice: the trust as a surrogate company*” (Paper presented at the Annual Commercial and Corporate Law Conference, Supreme Court of New South Wales, 15 November 2016) and in his book *Commercial Trusts* (LexisNexis Butterworths, 2014), particularly at 5.124–5.127 under the heading “The true nature of the exoneration limb: a power to apply assets for the benefit of creditors”. I endorse that view. It is inconsistent with principle to apply the statutory order of priority for payment of the company’s debts out of its own property to the order of distribution of trust property. That this might result is two regimes (for trust property and property of the company) is unfortunate, but it is something which courts have had to accommodate.

1. Her Honour’s exhortation to precision when identifying the nature of the trustee’s right of indemnity is most appropriate and, when an issue arises concerning the manner in which the right of exoneration might be dealt with, it is necessary to constantly keep in mind her Honour’s adept description of the very limited nature of that right being that “the trustee may resort to trust property only for the purpose of discharging trust liabilities”.

### The equitable lien which supports the rights of exoneration or recoupment

1. The trustee’s right of indemnity (whether it be the right of “recoupment” or “exoneration”) is protected by an equitable lien or charge which, subject to any term in the trust deed to the contrary, entitles the trustee to retain possession of the trust assets against the beneficiaries (or possibly new trustees; as to which see *Rothmore Farms Pty Ltd v Belgravia Pty Ltd* (1999) 2 I.T.E.L.R. 159, referred to in Hayton D, Matthews P and Mitchell C, *Law of Trusts and Trustees* (18th ed) (Butterworths: LexisNexis, 2010), para [81-33]) until the trustee’s liabilities have been discharged. The lien is enforceable against the trust assets even after they have passed from the original trustee’s possession and have vested in a new trustee. It also has the effect of conferring a priority in the administration of the trust in favour of the trustee over the beneficiaries (*Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 (*Buckle*) at 245 – 246; *Re Exhall Coal Company (Limited)* (1866) 35 Beav 449 [55 ER 970]).
2. The impact of the existence of the right of indemnity and associated lien on the trust assets is far from clear. In *Buckle* it was suggested that, despite the existence of the trustee’s indemnity and lien, the beneficial interest of the beneficiaries in the assets of the trust remains “unencumbered”, although the proprietary rights in respect of those assets were ordered in such a way that the trustee’s interest prevailed. It was explained that, the assets which were held upon the terms of the trust were not “trust assets” to the extent to which they were subject to the trustee’s right of indemnity because the “trustee’s right to exoneration or recoupment ‘takes priority over the rights in or in reference to the assets of beneficiaries or others who stand in that situation’” (at 247). That said, the High Court also accepted that the trustee’s interest was a “beneficial interest” in the trust assets to the extent of the value of the right of indemnity and that a court would authorise the sale of trust assets to satisfy the right to recoupment or exoneration. In substance that is effectively an equitable charge over the “trust assets” which protects the trustee’s rights. However, the Court was clear that the trustee’s interest in the trust assets did not amount to a security interest or right (at 247). Similar views were expressed in *Octavo* (at 367) where it was held that the effect of the indemnity and lien is that the trust assets are subject to the beneficial interests of the trustee in priority to that of the beneficiaries. The consequence of this was (at 370) that the trustee’s interest in the trust property amounted to a “proprietary interest” and was not property held in trust for another person for the purposes of s 116(2) of the *Bankruptcy Act.* In *Re Suco Gold Pty Ltd* (1983) 33 SASR 99 at 104 King CJ identified the “beneficial interest” as only consisting of the right of indemnity and a supporting lien.
3. After a careful analysis of these issues by Robson J in *Re Amerind Pty Ltd (in liq)* [2017] VSC 127 at [96] *(Amerind),* his Honour reached the contrary conclusion, namely that the right of indemnity itself was “trust property” and not a personal asset of the trustee. As such, it was a right which could only be used to meet trust debts rather than the personal debts of the trustee. In part, his Honour reached this conclusion on the basis that the lien which supported the right of indemnity gave the trustee (and the creditors by subrogation) an interest in the trust assets and any money arising from the enforcement of the lien would necessarily be trust money (see *Amerind* at [51], [53] and [256]). With respect to the learned Judge, that reasoning tends to elevate the equitable lien above the right of exoneration which the lien exists to protect. Additionally, the lien merely impacts upon the beneficiaries’ beneficial ownership of the trust assets by affecting those rights to the extent to which the lien will be enforced by the Court at the suit of the trustee. As was said in *Buckle*, “to the extent that the trust assets held by the trustee are subject to their application to reimburse or exonerate the trustee, they are not “trust assets” or “trust property” in the sense that they are held solely upon trusts imposing fiduciary duties which bind the trustee in favour of the beneficiaries.” (at 246; [48]). The comments in the unanimous decision of the High Court in *CTP Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98, 120-121; [50]-[51] are to a similar effect. There the High Court identified that the assets of the trust could not be identified until the rights of reimbursement and exoneration were satisfied. In other words, the trust assets were those assets which were held by the trustees less the amount of value of the trustee’s right of indemnity. In this respect Robson J’s view that the trustee’s right of indemnity is “trust property” does not seem to be entirely consistent with the views of the High Court as expressed in the two cases mentioned above.
4. The nature of the trustee’s right in the assets held on trust arising from the right of indemnity has, historically, been regarded as a “right” over the assets which are held on trust and, as such, when ascertaining the trust assets, the value of the trustee’s charge is to be deducted from the *trust property as a whole* (*Re Exhall Coal Company (Limited)* (1866) 35 Beav 449 [55 ER 970]). The concept of the “trust property as a whole” is different to that of the “property belonging to the beneficiaries”. The latter can only be ascertained after the value of the trustee’s charge is deducted from the former as the property which is held upon trust is subject to the incidents of the trustee’s office in priority to the rights of the beneficiaries. One of those incidents is the right of indemnity which applies indifferently across all of the assets held on trust. In this respect the interest of the trustee in the assets held on trust is more aptly identified as being a paramount beneficial interest in the assets of the trust rather than a security interest or part of the “trust property” (*Buckle* at 247; *Octavo* at 367; Ong D, *Ong on Subrogation*, The Federation Press, 2014 at p 17).
5. Additionally, as the lien which protects the right of exoneration is merely an equitable lien, it is only enforceable by judicial sale or by the appointment of a receiver and the making of an order by the Court that the trustee is to be reimbursed or exonerated. A trustee has no further “ownership rights” which, necessarily, would need to exist before a trustee would be entitled to the remedy of foreclosure or sale out of Court (*Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* (2008) 74 NSWLR 550 at 553-554 at [18]; *Melbourne Tramways Trust v Melbourne Tramway & Omnibus Company Ltd* (1887) 13 VLR 487 at 490; *Re Pumfrey* (1882) 22 Ch D 255 at 262; *In Re Stucley* [1906] 1 Ch 67). Given the above, it is difficult to ascertain how these limited rights in the trustee could be described as amounting to “trust property” which is legally owned by the trustee but which beneficially belongs to the beneficiaries and which is only to be used for their benefit.
6. The fluctuating and fluid nature of the right of indemnity and supporting lien is reflected in its characteristic that it is not limited to the assets in the trust at the time when the trust liability was incurred, but applies over all assets of the trust under the control of the trustee (*Dowse v Gorton* [1891] AC 190 at 206; *Re Amerind Pty Ltd (in liq)* [2017] VSC 127 at [102]). Additionally, it is not limited temporally or in relation to any specific asset of the trust and it does not apply differentially to particular assets of the trust (*Octavo* at 367).
7. The right of exoneration is also subject to the state of accounts as between the trustee and the beneficiaries. If that is in favour of the beneficiaries, there is nothing to which any creditor might be subrogated. This was identified by Jessel MR in *In re Johnson* (1880) 15 Ch D 548 at 552 – 3 where his Lordship said:

But if the trustee has wronged the trust estate, that is, if he has taken money out of the assets more than sufficient to pay the debts, and instead of applying them to the payment of the debts has put them in his own pocket, then it appears to me there is no such equity, because the *cestuis que trust* are not taking the benefit. The trustee having pocketed the money, the title of the creditor, so to speak, to be put in the place of the trustee, is a title to get nothing, because nothing is due to the trustee. It does not appear to me that in the case the creditor, who has never contracted for anything who has only got the benefit of this equity, if I may say so, by means of the trustee, through the lucky accident of there being a trust, ought to be put in a better position than any other creditor.

This passage highlights that a trustee’s entitlement to indemnity is subject to the rule in *Cherry v Boultbee* (1839) 4 Myl & Cr 442; 41 ER 171 which is sometimes mistakenly referred to as the “clear accounts rule”. The effect of that rule is that a trustee’s right of indemnity might be limited by any “offsetting” liability which the trustee owes to the trust estate. The extent of the right of indemnity is the net value of the expenses properly incurred less any amount which is owed by the trustee to the estate.

1. During the course of submissions, it was suggested that the “clear accounts rule” only applied to tortious wrongs which were committed by the trustee and that there were no allegations in this case of any such wrongdoing which would operate to limit the trustee’s right of exoneration. That submission understates the limits of the “clear accounts rule” or, at least, the more general rule of which the “clear accounts rule” is but an example. There is no doubt that the general principle operates in circumstances where the trustee has engaged in a breach of trust which has resulted in loss to the trust, such that no right of indemnity exists until the trustee remedies his default (*RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385 at 397 per Brooking J; *Australian Securities and Investment Commission v Letten (No. 17)* (2011) 286 ALR 346 at 353 [20] per Gordon J). However, the rule also extends to any occasion where the trustee is otherwise indebted to the “trust”. The following passage from *Jacobs’ Law of Trusts* (8th ed) at 514 identifies the rule as extending to debts as well as tortious liabilities:

The trustee does not always have a right of indemnity. In the first place, it is submitted that where the trustee is a debtor to the trust (which can occur without any breach of trust), the indemnity cannot be exercised without the debt first being repaid by the trustee (unless the trust instrument provides to the contrary): this follows from the rule in *Cherry v Boultbee*. Hence, if there is any doubt about the matter, both the indemnity and the lien protecting it may be suspended pending investigation of the trustee’s accounts.

1. The reference in that quote to the rule in *Cherry v Boultbee* might well be taken as being a reference to a more general rule that “a person cannot share in a fund in relation to which he is also a debtor without first contributing to the whole by paying his debt” (*In re Akerman* [1891] 3 Ch 212 at 219 (per Kekewich J) and recently, *In re Kaupthing Singer & Friedlander Ltd (No 2)* [2012] 1 AC 804 at 815. This wider rule applies to all debts regardless of whether they are ascertained or ascertainable at the relevant time. In *Re Rhodesia Goldfields Ltd* [1910] 1 Ch 239, Swinfen Eady J refused to allow a right of indemnity to be enforced until a claim that the trustee was indebted to the trust had been resolved. His Honour said at 247:

In my judgment the rule is of general application that where an estate is being administered by the Court, or where a fund is being distributed, a party cannot take anything out of the fund until he has made good what he owes to the fund. It is immaterial whether the amount is actually ascertained or not. If it is not actually ascertained it must be ascertained in order that the rights of the parties may be adjusted, and it would be a strange travesty of equity to hold that in distributing the fund Partridge was entitled to be paid at once all that was due to him out of the company’s money, and subsequently to find, after it had been established that he owed money to the fund, that the amount could not be recovered from him.

1. This passage was cited with approval by Ungoed-Thomas J in *Selangor United Rubber v Cradock (No 4)* [1969] 1 WLR 1773 at 1778, and, more recently, by the House of Lords in *In re Kaupthing Singer & Friedlander Ltd (No 2)* [2012] 1 AC 804 at [18]. However, a contrary view as to the extent to which any claim against the trustee had to be ascertained was suggested in the New South Wales Supreme Court (*Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (in liq)* [2002] NSWCA 29). Despite these interesting authorities, ultimately, there does not appear to be any dispute as to what liabilities will be taken into account when considering the balance of account between the trustee and the beneficiary (Mitchell and Watterson, *Subrogation, Law and Practice,* Oxford University Press, (Rev ed), 2007, p 432).
2. In the present matter, the evidence discloses that the trust debts total $1,569,473.65 and, it is presumed that they were all incurred in the proper, or at least not-improper, performance of the trust. In the ordinary course, that would result in Mr Lee being entitled to exoneration from the trust assets in that amount. However, it is said that Mr Lee is indebted to the trust in an amount of $399,720. The impact of that is to reduce the quantum of the right of indemnity (exoneration) to $1,169,753.65 although in a pragmatic sense, that does not actually impact upon the worth of the indemnity as the value of the trust assets is only $599,782.02. Consequently, whilst there remain assets which are held upon the terms of the trust, there no longer exists any “trust assets” in the sense of assets held only for the beneficiaries and subject to the fiduciary duties of the trustees. The trustee’s right of exoneration has completely overwhelmed the rights of the beneficiaries.
3. This side excursion into the scope of the clear accounts rule has a particular relevance in the context of the insolvency administration of a trustee. The foregoing brief discussion discloses that the ascertainment of the scope of an insolvent trustee’s right of exoneration or recoupment may be no simple matter. It will often require a consideration and understanding of the state of the accounts of the trust and of the personal accounts of the trustee as well as an examination of the stewardship of the trust by the trustee. These actions will necessitate expense and effort and, where the insolvent trustee’s accounts are not well maintained, that may be a lengthy and expensive exercise. This is a pertinent consideration when a Court is asked to give directions about the extent to which an insolvency administrator might be entitled to receive benefits from any fund generated by them for the purposes of utilising the right of exoneration to meet the claims of creditors.

### Creditors’ rights to subrogation

1. Some authorities which have examined the manner in which a trustee’s right of indemnity might be dealt with on insolvency have identified that the trust creditors’ right of subrogation to the indemnity is important in ascertaining whether the indemnity can be used to meet the claims of non-trust creditors. There is, no doubt, a clear tension between the existence of the trust creditors’ right to subrogate themselves to the right of exoneration and the proposition that it is available to be used to meet the claims of all creditors. Prima facie, if bankruptcy trustees are entitled to use the right of exoneration to meet the claims of all creditors, the trust creditors’ right to subrogation would be inutile.
2. One matter which requires emphasis at this point is that the trust creditors’ right of subrogation only arises in relation to the trustee’s right of exoneration. It does not, and cannot, arise in relation to the trustee’s right of recoupment. By definition, the trustee’s indebtedness to the trust creditors will have been discharged to the extent to which the payment by the trustee of trust debts out his or her own funds has given rise to the right of recoupment.
3. It is also of particular importance that the trust creditors’ rights of subrogation to the trustee’s right of exoneration only crystallise when the trustee is insolvent or it is otherwise reasonable to assume that obtaining a judgment against the trustee would be pointless (*Owen v Delamere* (1871) LR 15 Eq 134 at 139–140 perSir James Bacon VC; *Re Pumfrey* (1882) 22 Ch D 255 at 263 where Kay J identified that before the right of subrogation arose, it had to be shown that the trustee could not pay and that every reasonable means of making him pay had been exhausted). Prior to the insolvency of the trustee or to the inability of the trustee to pay, trust creditors have no right to execute against the trust assets. Their only right is to pursue the trustee in an action for “debt”. However, in the event of the trustee’s insolvency, they become entitled to be subrogated to the trustee’s beneficial interest created by the right of indemnity (*Vacuum Oil Pty Ltd v Wiltshire* (1945) 72 CLR 319). A modern statement of those principles was succinctly expressed by Wilson J in *Zen Ridgeway Pty Ltd v Adams* [2009] 2 Qd R 298 at [12] – [13]:

[12] … The creditor's right is derivative of the trustee’s, and cannot exceed the extent of the trustee's legitimate claim on the trust estate. Further, it is subject to whatever interests in the trust assets the trustee has lawfully created in favour of third parties.

[13] However, the right of access to the trust assets by way of subrogation is inchoate unless the trustee is insolvent or it is otherwise reasonable to assume that obtaining a judgment against the trustee would be pointless. The following passage from *Deancrest Nominees Pty Ltd v Nixon* is apposite to this case:

‘… it has been held that a creditor does not have a right of subrogation simply by virtue of the existence of a debt owed to it by a trustee, but it must reasonably appear, at least, that any attempt to recover the debt from the trustee would be fruitless. That is, the right of subrogation does not exist simply as an alternative means by which a creditor may recover a debt owed by a trustee. In the present case, there is nothing to suggest that the debt could not reasonably be recovered by Deancrest from the trustees concerned.’

(Footnotes omitted)

1. It was this principle, that the trust creditor’s right of subrogation only arises on the trustee’s insolvency, that was particularly important to the conclusion of King CJ in *Re Suco Gold* at p 108 that the right of exoneration could not be used to meet the claims of all creditors. There is much force in his Honour’s reasoning and, indeed, it complements the precise identification of the right of exoneration as being merely a right to meet the claim of trust creditors out of the assets of the fund. Prior to insolvency that is the only purpose for which the trustee could have used the right and, when insolvency intervenes, the creditors are entitled to seek an order that the right be exercised for their benefit. There is nothing which suggests that the intervention of bankruptcy changes the nature of the right. That being so, it is difficult to see how the right might be used to meet the claims of non-trust creditors.
2. The above analysis is also consistent with the nature of the remedy to which a trust creditor is entitled when seeking to enforce the right of subrogation. The remedy is not for payment of a money sum from the trustee, but for a judicial sale of trust assets and the discharging of their debts with the proceeds (*Re Raybould; Raybould v Turner* [1900] 1 Ch 199, 201-202).

### Some authorities in more detail

1. Given the variety of conclusions which have been reached in the competing authorities as to whether, on insolvency, a trustee’s right of exoneration can be utilised to meet the trustee’s personal creditors, it is necessary to consider some of those decisions in greater detail. Before doing so, however, it is worth observing that, although, some authorities have sought to distinguish *Octavo* on the basis that it did not deal with an insolvency under the present iteration of the companies’ legislation (as opposed to the previous regime where certain provisions of the *Bankruptcy Act* were incorporated), the substantive point of differentiation has not always been clearly identified. Under s 116 of the Act the issue is whether the right of indemnity is “property of the bankrupt” and so divisible among the general creditors. Under the *Corporations Act* the question is whether it is property of the company pursuant to s 555 and s 556. It is difficult to discern that the relatively minor differences in these regimes for administering personal bankruptcies and corporate insolvencies, or differences in the sequential iterations of company legislation, generate any sufficient rationale for recasting the nature of a trustee’s right of indemnity. Whether the right vests in a bankruptcy trustee or remains in a company under the control of a liquidator does not seem to relevantly impact on its nature nor the manner in which it is able to be used. At the very least, there has been no sufficient explanation as to why that would be the case.
2. Counsel for the Bankruptcy Trustees relied upon the decision of Clyne J in *Re Doyle* (1943) 13 ABC 128 as supporting the proposition that the right of exoneration might be applied to meet the claims of non-trust creditors. That decision, however, proceeded upon the basis of some incorrect assumptions. *First*, at p 132 it was thought that the beneficiaries would have a continuing interest in seeing that any indemnity provided by them would be applied in payment of the trust creditors as those creditors had a right of subrogation to the trustee’s indemnity from the trust assets. However, once a beneficiary has paid the trust creditor or paid to the trustee an amount equivalent to the trust debt (assuming that is how the indemnity operates), the trustee’s right of exoneration from the trust assets no longer exists and the trust creditors have no rights of subrogation. *Second*, also at p 132, it was said that the trust creditors’ rights of subrogation to the trust assets comes to an end if the beneficiary assigns their interest in the trust. Clyne J relied upon *Ashburner’s Principles of Equity* (2nd ed) at p 161 in support of that proposition. However, such a proposition is not consistent with the nature of the right of exoneration and the entitlements of the trust creditors, and it is not a proposition which appears at p 161 of the text cited or otherwise in that text. The decision is not of assistance in relation to the right of exoneration from the trust assets.
3. In *Octavo* the insolvent trustee company, Coastline Distributors Pty Ltd, whose only business was as trustee of a trust, had made payments to Octavo Investment Limited within the six month period prior to its winding up. It was asserted by the appellant that the payments were not voidable preferences because they were made out of “trust funds” in the course of the trust business and not from Coastline’s “own money”, such that the transaction was beyond the scope of s 122 of the *Bankruptcy Act* as applied by s 293 of the *Companies Act* *1961* (Qld). That was rejected by the High Court which identified (at pp 367–368) that the beneficial interest which the trust creditors have by way of subrogation in the assets held by the insolvent trustee forms part of the property of the bankrupt which is divisible amongst the creditors. It held that in order for the payment to be void as against the bankruptcy trustee, it did not need to be a payment from the bankrupt’s own money. Alternatively, it held that a payment out of trust assets in respect of which a bankrupt had the legal estate and a beneficial interest by reason of the right of indemnity, may well have been a payment out of the bankrupt’s own money (at p 368). In this latter respect the majority said (at 369):

Even if we are mistaken in this conclusion, the words “from his own money” may well be satisfied if a trustee makes payments to a creditor out of trust assets in respect of which he has not only the legal estate but also a beneficial interest to secure his right to an indemnity.

1. In rejecting the argument that, what the liquidator was seeking to do by the action was to render void the surrender of the right of indemnity and associated lien, the plurality said at p 369:

Section 122 applies, amongst other transactions, to a payment made by a prospective bankrupt to a creditor which has the effect of giving that creditor a preference, priority or advantage over other creditors. If the present payments had not been made by Coastline to Octavo then the liquidator of Coastline would have had access to the charge over those moneys for the benefit of all its creditors. The payments therefore were to the prejudice of the creditors generally and it is those payments which attract s 122.

Those comments might be taken as suggesting that the right of indemnity was available to be used to meet the claims of trust creditors and non-trust creditors alike. However, it is far more probable that the comments were intended only to apply to the trust creditors given that the trustee, Coastline Pty Ltd, only operated as a trust and had no non-trust creditors.

1. The Court then turned its attention to whether the money paid to Octavo Pty Ltd was “trust property” and, therefore, was not property divisible amongst Coastline’s creditors. It identified that the trustee’s right to be indemnified from the trust assets together with the associated lien meant that the trustee’s interest was a proprietary interest in the assets held on trust but was not, itself, trust property. The fact that the assets over which the trustee’s right existed were trust assets did not render the trustee’s right of indemnity a “trust asset” as well. At p 370, their Honours said:

The fact that the trust property itself cannot be taken in execution by the creditors of the trustee is not to the point. Those creditors are nevertheless subrogated to the rights of the trustee in relation to that property, and in the event of the trustee becoming bankrupt, it is those rights which are to be realized in their favour.

1. That conclusion was sufficient to allow the Court to hold (in the case of a personal bankruptcy) that a trustee in bankruptcy becomes vested of the insolvent trustee’s beneficial interest in the trust estate such that any previous payments by the trustee to trust creditors using the right of indemnity attracts the operation of s 122 of the *Bankruptcy Act*. It also held that the payment by the trustee to a trust creditor out of the assets of the trust in reliance upon the right of exoneration was a payment which was apt to be rendered void by s 122 because it was a use of the trustee’s beneficial interest in the assets held on trust rather than the trust assets themselves. The plurality said at p 371:

We take the view that the passing to the trustee in bankruptcy of the trustee’s beneficial interest in the trust estate, even if that is all that passes, is sufficient to attract the operation of s 122 of the *Bankruptcy Act*. Once it is recognized that a trustee may enjoy a right of indemnity over trust property in respect of liabilities incurred by him in the administration of the trust, it follows that the creditors of a trust business may have resort to the assets of the trust to the extent of the liabilities incurred by the trustee. Section 122 is apt in the case of an individual trading trustee to render void as against the trustee in bankruptcy a payment out of the trust property in circumstances which have the effect of giving the payee a preference, priority or advantage over other creditors.

1. It is apparent from the reasons of the plurality, that, although the right of exoneration was a right over the assets held on trust, the right itself was not trust property. It is also apparent that the Court held that the right of exoneration was capable of being used by the trustee in bankruptcy to meet the claims of the trust creditors who were otherwise entitled to be subrogated to that right. This was certainly the view of Needham J in *Re Byrne Australia Pty Ltd* [1981] 1 NSWLR 394 at 398, who correctly identified that there was no suggestion in *Octavo* that there were any creditors other than the creditors of the trust business and no suggestion that the proprietary interest which the trustee had in the trust fund was property divisible among creditors other than those who had a right to be subrogated to the trustee’s right of indemnity.
2. When considered in the above light, there is nothing unusual or unorthodox in the High Court’s reasoning, nor is it inconsistent with the limited nature of the right of exoneration which is only a right to apply trust property to meet trust debts. The High Court merely identified that the bankrupt trustee’s right to exoneration in respect of trust debts is property of the bankrupt which vests in the trustee in bankruptcy and which is available to meet the claims of those who might otherwise have been subrogated to that right; namely the trust creditors.
3. The authorities which shortly followed *Octavo* were concerned with the manner in which the right of indemnity might be used in a winding up and, in particular, whether it might be used to meet the costs, expenses and remuneration incurred by a liquidator of corporate trustees.
4. The first was the decision in *Re Byrne Australia Pty Ltd* [1981] 1 NSWLR 394, where Needham J at 398 correctly identified that *Octavo* was not authority “for the proposition that, where a trustee company carries on business with a trust fund and incurs liabilities and then is wound up, the whole of the trust fund is property divisible amongst all the company’s creditors, whether trust creditors or not.” His Honour accurately identified that the indemnity right (being the right of exoneration) was inexorably linked to the existence of trust creditors who had a right of subrogation to the trust assets for the purposes of having their debts paid. That being so, his Honour concluded that the right of indemnity could only be used to meet the liabilities of the trust creditors. As the liquidator, at least at that point in time, could not be said to be a “trust creditor”, he was not entitled to be paid his costs and remuneration out of the proceeds of the right of indemnity. That position was subsequently confirmed in *Re Byrne Australia Pty Ltd (No.2)* [1981] 2 NSWLR 364.
5. The decision of the Full Court of the Supreme Court of Victoria in *Re Enhill Pty Ltd* [1983] VR 561 soon followed but, there, the Court adopted a significantly different approach. In that case directions were sought concerning the entitlement of the liquidator of an insolvent corporate trustee to be paid his costs, expenses and remuneration of winding up out of the proceeds of the sale of trust assets and in priority to all creditors. The trustee company had only carried on business as a trustee and all of its debts were incurred in that capacity. In his reasons, Young CJ held that the majority in *Octavo* did not impose any limitation on the use to which the trustee in bankruptcy or liquidator could apply the proceeds of the right of indemnity. Some may argue that such a view overlooks the indication by the High Court that the right of exoneration was to be applied to those entitled to be subrogated to it; namely trust creditors. The Chief Justice determined that the right of indemnity could be put to a much wider use. He said (at p564):

In these circumstances to hold that a trustee in bankruptcy could only apply the proceeds of the right of indemnity towards some only of the bankrupt’s creditors, viz. creditors of the trust business, would deny the very purpose of the right to indemnity which is to exonerate the trustee’s personal estate. In a case like the present therefore the proceeds of the trustee’s lien are available for division among the bankrupt’s creditors generally, not only among creditors of the trust business, and in the case of a company in liquidation are subject to the control of the liquidator under s292.

It should be observed that the learned Chief Justice did not explain how it was that the lien might be converted into “proceeds” which were divisible amongst creditors. As identified above, the lien merely existed such that the trustee might enforce the right of exoneration by obtaining an order for sale and the discharging of the claims of the trust creditors. However, that process would not result in funds coming into the possession of the trust company for distribution amongst creditors. That said, in *Enhill* there was no clear indication whether the right of indemnity being considered was the right of exoneration or the right of recoupment. Were it the latter, the observations of the learned Chief Justice would be appropriate. That said, the facts set out in the reasons of the Chief Justice at p 562 would suggest that all that was in issue was the right of exoneration. On that basis, there is an absence in the learned Chief Justice’s reasons of any explanation of how the right to apply the assets of the trust to discharge the trust liabilities might be converted into money in which the trustee has a beneficial interest so as to be used to discharge the debts of all creditors.

1. With respect to the first sentence of the passage from the reasons of the Chief Justice quoted above, the rationale relied on does not appear to support the conclusion. The Chief Justice suggests that the right of indemnity would not exonerate the trustee’s personal estate if it could not be applied to the discharge of all of the trustee’s creditors. However, the indemnity being considered was to exonerate the trustee from trust debts and not from the trustee’s personal debts. If the right of exoneration were used to satisfy non-trust debts, it would necessarily leave the trust debts unpaid or partly unpaid. If that were so, the right of exoneration would not have achieved its purpose.
2. Nevertheless, Young CJ determined that the effect of the occurrence of the bankruptcy was to “separate” the bankrupt’s estate from the trust estate and, it would appear, that necessarily defeated the trust creditors’ right of subrogation (at 564 – 565). One might speculate that the learned Chief Justice assumed that the lien was much like any other security for indebtedness which might be separately enforced so as to enable the recovery of funds. In fact, all that the lien protected was the right to have the trust funds applied to meet the trustee’s personal liability to trust creditors.
3. The other substantive judgment in that case was delivered by Lush J who founded his conclusion upon the footing that the trustee’s right of exoneration was the right to take funds from the assets of the trust and hold them beneficially for the purposes of meeting the liabilities of the trust (see pages 567 – 568). If that were correct, a trustee would be entitled to take proceeds out of the trust and appropriate them to herself or himself at which point they would become the absolute beneficial owner of them. His Honour seemed to rely upon certain comments in *Re Johnson* for this proposition, however, in that case Lord Jessel MR did not identify any right of a trustee to remove money from the trust and appropriate it to themselves. On the contrary, his Lordship seemingly identified that such conduct would be a breach of trust which would, by the operation of the “clear accounts rule”, thereby impinge upon any future right of indemnity. Additionally, the identification of the trustee’s right by Lush J, appears to be at odds with the trust creditors’ right of subrogation on the insolvency of the trustee; *Owen v Delamere* (1871) LR 15 Eq 134 at 139 – 140; perSir James Bacon VC. None of the authorities cited by Lush J appear to support the notion that trustees have a right to pay themselves out of the assets of the trust for the purposes of on-payment to the trust creditors. It would appear from the passage at p 569 (lines 39–48) of Lush J’s reasons that his Honour fell into error by equating the trustee’s right of exoneration with the much wider entitlements in relation to the right of recoupment. Whilst the trustee’s right of recoupment is a wholly personal right of the trustee to be used for replenishing the trustee’s estate after the trustee has personally discharged the trust liabilities, the same cannot be said of the right of exoneration.
4. As a result of the approach adopted by Lush J, his Honour determined that the trustee’s right of indemnity, whether that be recoupment or exoneration, was the trustee’s “personal property” which was a *chose-in-action* capable of passing to a liquidator or a bankruptcy trustee. His Honour further concluded that the right of indemnity or its proceeds would be available to meet the claims of both trust and non-trust creditors. However, somewhat inconsistently, his Honour held that the trust creditors had a right to be subrogated to the trustee’s lien in respect of the trust liabilities in the case of insolvency or even prior to insolvency in some cases (*Re Raybould* [1900] 1 Ch 199). That would seem to negate the suggestion that the right could be utilised to meet the claims of all creditors. It was also unusual that his Honour relied upon the decision of the Court of Appeal (UK) in *Jennings v Mather* [1902] 1 KB 1 in support of his conclusion as that case supports the proposition that, on the insolvency of the trustee, the right of indemnity is to be used only to meet the debts of the trust creditors (see, in particular, the discussion of Stirling J at p 7).
5. Despite the undoubted eminence of the members of the Court in *Re Enhill*, the decision has not been widely supported since it was delivered. Its essential difficulty lies in its conflation of the right of recoupment with the right of exoneration which leads to the erroneous assumption that a trustee has a right to appropriate funds to themselves beneficially for the intended purposes of meeting trust debts. As has been previously identified, McLelland J in Re ADM Franchise Pty Ltd (1983) 7 ACLR 987, rejected that suggestion and there is an absence of authority or principle to support it.
6. In the line of significant authority on this topic, the next relevant decision is that of the Full Court of the Supreme Court of South Australia in *Re Suco Gold Pty Ltd* (1983) 33 SASR 99. That decision is discussed elsewhere in these reasons and it not necessary to consider it in detail here. However, the following conclusions can be taken from the various judgments of the Court:
   1. *First* (at p 104)*,* the beneficial interest of the trustee in the right of indemnity and the supporting lien passed to the liquidator and was property divisible among the company’s creditors.
   2. *Second* (at p 105)*,* that the right of indemnity out of the trust assets has the twin aspects of the right of recoupment and the right of exoneration, with the latter being the right to use trust assets to discharge the trust liabilities.
   3. *Third* (at p 105)*,* that a trustee has no right to transfer trust property to itself in an amount which is sufficient to meet unsatisfied trust debts.
   4. *Fourth* (at p 108)*,* where a trustee takes money out of a trust into his own possession for the purposes of paying trust debts, that money retains its character as trust property such that it may only be used for the purposes of meeting the debts of the trust.
   5. *Fifth* (at p 108)*,* on insolvency the right of exoneration is not available to meet the claims of non-trust creditors.
   6. *Sixth* (at p 109), that the liquidator is bound to apply the priority provisions of the company’s legislation to the payment of trust debts by use of the right of exoneration (this proposition has been rejected by a number of subsequent authorities).
   7. *Seventh* (at p 110)*,* the costs, expenses and remuneration of a liquidator arise from the carrying on of the business of the trust and, as such, that they are to be “*regarded”* as trust debts payable out of the trust assets or right of exoneration. It seems that the payment of the costs, expenses and remuneration of the trustee were to have priority over the claims of other trust creditors because they were subject to the priority regime of the *Companies Act.* This conclusion is a little unusual given that, if the liquidator’s expenses and remuneration were treated as trust debts, it is not easy to see how they would not rank *pari passu* with the other trust creditors.
7. The relatively recent decision of Brereton J in *Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No 2)* (2016) 305 FLR 222 is important in the present context. That case involved the liquidation of a corporate trustee which operated a trust business of making persons (called “contractors”) available to third party customers such that the “contractors” would perform services for those customers. The asserted beneficiaries of the trust were the various contractors (or entities controlled by those persons) who provided the services to the third parties on behalf of the trustee company. The trustee company received payments in respect of the work of the contractors and purportedly held those funds on trust. It made regular payments from the trust funds to the contractors as beneficiaries, presumably in proportion to the work undertaken by them. The trustee company had operated upon the presumption that the contractors were not its “employees” and, consequently, it made no deduction for superannuation contributions in respect of those persons. Its conclusions in that respect were wrong. It did have an obligation to make superannuation contributions and, having failed to do so, became liable to a superannuation guarantee charge to the Australian Tax Office (ATO). The company was placed into liquidation. The ATO lodged a proof of debt which, in part, related to the superannuation guarantee charge. The contractors also lodged claims for amounts which they asserted belonged to them as beneficiaries. The liquidator applied to the Court for directions that he would be justified in distributing the balance of the trust assets to the ATO in partial satisfaction of the superannuation guarantee charge or, alternatively, to the contractors who had provided services on behalf of the company. This necessitated a consideration by the Court of the nature of the trustee’s right of indemnity and, further, of the applicability of the statutory priority regime in s 556 of the *Corporations Act* to the exercise of the right of exoneration.
8. In a relatively brief judgment on this topic, Brereton J held that the liability of the trustee to pay the superannuation guarantee charge was a debt or liability incurred in the operation of the trust for which the trustee was entitled to indemnification. That being so, the first question which arose was whether that ATO debt or liability was entitled to priority in accordance with s 556(1)(e) of the *Corporations Act*. Brereton J identified that a subsidiary question was whether “s 556 applied to the rights of trust creditors in respect of trust property” (at p 229 [20]). In answering that subsidiary question his Honour considered the decision of the Full Court in *Re Suco Gold Pty Ltd*. He observed that the conclusion of King CJ that liabilities were to be paid from the trust property in the order laid down in the priority provisions of the relevant company legislation was “virtually universally accepted to be incorrect”. His Honour held that s 556 was only concerned with the distribution of assets “beneficially owned by a company and available for division between its general creditors”. Apparently, his Honour did not regard the trustee’s right of exoneration to be property owned by the company and divisible between the general creditors. In his view the company in liquidation, as trustee, had a right of indemnity from, and lien over, the trust assets for liabilities it incurred in acting as trustee and that those rights had priority to the interests of the beneficiaries (at p 231 [25]). He further held that, as all the company liabilities were incurred by the company in its capacity as trustee, all creditors were to be subrogated to the liquidator’s lien such that the statutory priority did not apply in respect of the trust assets and the creditors participated *pari passu* after providing for the costs of administration including the liquidator’s remuneration and expenses (pp 231- 232; [25]).
9. In essence, Brereton J rejected the notion that the trustee’s right of indemnity was property of the company which might be utilised in the winding up and in accordance with the priority provisions. He determined that the right of indemnity (exoneration) was a “trust asset” which was to be shared between the trust creditors. From one perspective that might be said to be at odds with the views reached by the High Court in *Savage* and *Octavo*. That aside, it is important that Brereton J characterised the right of indemnity (exoneration) as the trustee’s entitlement to “resort to and apply trust assets for the discharge of liabilities incurred in the authorised conduct of the trust” (at p 227 [11]). In that sense, his Honour accurately observed that the use of the right by the liquidator was limited to discharging the liabilities owed to trust creditors. For that reason, the result of his Honour’s reasoning on this point is consistent with the result reached in *Octavo*.
10. Although the decision in *Bell Hire Services* has been referred to earlier in these reasons, it is appropriate to consider it in slightly more detail. That case concerned an application for directions by the liquidator of a company whose only business had been to act as trustee of a family trust. In the course of so acting it carried on a business and incurred substantial debts. As mentioned earlier, Farrell J identified the nature of the right of exoneration as being the entitlement of the trustee to resort to trust property *only* for the purpose of discharging trust liabilities. Her Honour determined, albeit not without some doubt, that *Re* *Suco Gold* should be followed such that the costs of the winding up application and the remuneration of the liquidator were payable out of the trust estate as a “trust debt”. However, it was correctly observed that if the costs of the winding up were, in fact, an incident of the trust business, they would rank *pari passu* with the other trust creditors and s 556 of the *Corporations Act* would not apply. Her Honour accepted that this was contrary to the result in *Re* *Suco Gold* but was “consistent with the otherwise orthodox principles discussed by King CJ” in that case. In this latter respect, her Honour indicated that she preferred the approach of Brereton J in *Independent Contract Services.* Of course, here, her Honour was only referring to the application of the priority provisions in s 556 in relation to the right of exoneration. From her reasons it is apparent that her Honour followed *Re* *Suco Gold* to the extent that it held the right of exoneration was not trust property, and not the contrary view of Brereton J in *Independent Contract Services.* As between the costs of the winding up application and the liquidator’s remuneration, her Honour was of the view that the latter had priority.
11. An extensive review of the authorities was undertaken by Robson J in *Re Amerind Pty Ltd (in liq)* [2017] VSC 127, where his Honour reached the conclusion, in relation to the provisions of the *Corporations Act*, that an insolvent trustee’s right of indemnity from trust assets is not property of the company for the purposes of s 433(3) and s 556 of the *Corporations Act*. Again, that appears to be contrary to the conclusions of the High Court in *Savage* and *Octavo* although it must be said that Robson J sought to distinguish the latter decision on a number of different grounds, not in the least being that the decision in *Octavo* applied a different statutory regime to the one which his Honour was considering. However, whilst it may be correct that different statutory schemes were being considered, it is not particularly easy to ascertain how those differences alter the nature of the right of exoneration as a trustee’s own property.
12. The facts in *Amerind* were not complex. The company acted solely in its capacity as the trustee of the “Panel Veneer Processes Trading Trust” which manufactured and distributed decorative and architectural finishes. After experiencing financial difficulties, the company was placed into administration, a secured creditor appointed receivers and, subsequently, the company’s creditors resolved that it be wound up. After the realisation of the secured assets and the repayment of the security holders, the receivers retained a surplus of funds and sought directions as to its appropriate distribution. An initial question was whether the surplus in the hands of the receivers was “trust property”? On this issue his Honour preferred the approach of Brereton J in *Independent Contractor Services* and observed that the trustee’s right of indemnity and related lien do not become property of the company so as to be available to meet non-trust liabilities of the company. It was only available to satisfy the liabilities incurred on behalf of the trust (see paras [53], [79], [94]). At that latter paragraph his Honour said:

[94] In my opinion for the reasons discussed below, the proper course for me is to adopt the reasoning of Brereton J in *Re Independent*, being that s 556 of the *Corporations Act* only applies to property of the company and does not apply to trust assets, that the trustee’s right of indemnity is not property of the company, and that where there are multiple creditors of the trust, the creditors share *pari passu* in the right to be subrogated to the trustee’s equitable lien to enforce the trustee’s indemnity. Similar reasoning also applies to s 433.

1. Robson J undertook a lengthy and considered analysis of the relevant authorities and his conclusions can be found in his observations in paragraph [96] of his reasons:

[96] For the following reasons, I do not accept that the corporate trustee’s right of indemnity (and lien) is not property held in trust, but that it is the corporate trustee’s own beneficial ‘personal property.’ The right of indemnity is over trust assets. The indemnity must be used to meet trust liabilities. The indemnity is not an exclusive right of the trustee. It may be exercised by the trust creditors through the right of subrogation. The indemnity is a right to be indemnified against claims by trust creditors. That requires that the indemnity be used to meet trust liabilities. The indemnity is not a personal asset of the trustee. It is trust property.

1. In the course of his judgment, his Honour identified four lines of reasoning which led him to conclude that the trustee’s right of indemnity over trust assets was trust property which was only available to meet trust liabilities. They were:
2. (At [100]) That it is always in the interests of the trust that trust assets be used to meet trust liabilities and that is particularly so where a trading trust has goodwill which needs to be protected or enhanced. This reasoning is analogous to that of Salmond J in *Official Assignee v Jarvis* [1923] NZLR 1009 which concerned the situation where an indemnifying party has an interest in the extinction of the liability to which the indemnity relates (see also *Re Richardson*).
3. (At [101]) that trust assets ought not to be available to meet liabilities to non-trust creditors because the right of indemnity to which the trustee is entitled is that the trust assets are only to be used for authorised purposes; namely, the extinguishment of trust debts. Were it otherwise, the trustee would be utilising trust property for their own benefit or the benefit of third parties. Moreover, because the trust creditors are entitled to be subrogated to the trustee’s rights of indemnity, the indemnity cannot be regarded solely as a personal asset of the trustee but is subject to the equitable rights of the trust creditors. This reasoning effectively adopts some of the reasoning of King CJ in *Re Suco Gold* although it is not harmonious with the conclusion that the right of exoneration is a trust asset.
4. (At [102]) That the trust property is subject to the trustees’ indemnity and supporting lien and the creditors of the trust have a similar charge over the trust assets under their right of subrogation. Those rights of the trust creditors were proprietary rights in the assets such that the right of indemnity cannot be property of the trustee which might be used to pay its personal creditors. This effectively applies to the reasoning of Brereton J in *Re Independent Contractor Services*.
5. (At [103]) That the trustee’s right is one of “indemnity” which required the trustee to become free of the claim of the trust creditor. That could not occur if the right of indemnity was used in part, to discharge the liabilities owed to non-trust creditors.
6. His Honour subsequently concluded:

[255] In my opinion, all four grounds of reasoning support the proposition that the right of indemnity that an insolvent trustee has over trust assets that arises through its incurring debts on behalf of the trust, constitutes a charge in favour of the trustee over all the assets of the trust that may also be exercised and enforced by the unpaid creditors of the trustee, where the liability to the creditors by the trustee caused the emergence of the indemnity. All four grounds lead to the conclusion that where an insolvent trustee has a right of exoneration from the trust assets that right does not form part of his personal estate but must be exercised and applied for the benefit of the trust to reduce the proprietary right of creditors over the assets of the trust estate and to achieve a true indemnification of the trustee from claims of the trust creditors.

1. In the result, his Honour held that the right of exoneration was not the property of the insolvent company for the purposes of being used to meet the claims of the non-trust creditors, but was trust property. The fact that trust creditors were entitled to be subrogated to the trustee’s indemnity necessarily precluded the right of indemnity from being properly described as the property of the trustee. It might be observed, however, that the fact that the trust creditors had a proprietary interest in the right, tends to negate the suggestion that the right was, itself, trust property.
2. The *prima facie* inconsistency between the ratio in *Octavo,* to the effect that the right of indemnity of a trustee was not trust property but property of the trustee which was capable of passing to an external insolvency administrator, and the conclusions reached in *Re Independent Contractor Services* and *Re Amerind* is patent. Although that apparent inconsistency is ameliorated somewhat by the various grounds on which *Octavo* was sought to be distinguished by Robson J in *Re Amerind*, it is not necessary to consider those grounds further in these reasons.
3. Since the hearing of argument in this matter, her Honour Markovic J, has delivered judgment in *Kite v Mooney; In the matter of Mooney’s Contractors Pty Ltd (in liq) (No.2)* [2017] FCA 653 (*Kite v Mooney*). That case also concerned an application by liquidators of a corporate trustee for directions as to the manner in which they might deal with the trustee’s right of exoneration. In her reasons, (at [70] – [137]) her Honour undertook an exhaustive and careful analysis of the authorities on the question of whether or not the priorities regime in the *Corporations Act* applied to the exercise of the trustee’s right of exoneration. At para [140] Markovic J indicated her preference for the approach of Brereton J in *Independent Contractor Services* as followed by Robson J in *Re Amerind*, to the effect that the right of exoneration was trust property such that the priority provisions did not apply to the manner in which it was exercised. Having reached that conclusion her Honour relied upon the “salvage principle” established by the decision in *Re Universal Distributing Co (in liq)* (1933) 48 CLR 171 (*Re Universal Distributing*) and, perhaps, the decision of *Re Berkeley Applegate (Investment Consultants) Ltd (in liq)* [1989] Ch 32 (*Berkeley Applegate*)to order that the liquidator’s costs, expenses and remuneration were a first charge on the assets of the trust (to the extent to which they were incurred in the administration of the trust).

## Conclusion with respect to the ability to use the right of exoneration for meeting non-trust creditor’s claims

1. It is possible to detect in the various authorities, some of which are considered above, that the courts have struggled to deal with two diverging considerations. On the one hand, the right of exoneration is essentially a power associated with the administration of the trust relationship, with its main objective being the discharge of liabilities which the trustee has incurred on behalf of the beneficiaries. In form, and in substance, it is a power to use funds for a singular purpose and the creditors of the trust have a corresponding entitlement to be subrogated to that power. On the other hand, as a number of authorities including *Octavo* have found, the power or right rather clearly falls within the wide description of “property of the bankrupt” or “property of the company” as those phrases are used in the Act and the *Corporations Act*. That conclusion would seem to necessitate the use of that property for division amongst all of the creditors of the trustee and in accordance with the relevant priority regimes. The contradiction which arises is that the right of exoneration is property which can only be used for the purposes of meeting the claims of trust creditors (whom themselves have an entitlement of subrogation to the right) but the various insolvency regimes appear to include it with the definition of property of the insolvent trustee which might then be divided amongst all creditors. Given that conundrum, the conclusion that the right of exoneration remains trust property and, therefore, only capable of being used to meet the claims of trust creditors, becomes palatable. Indeed, were it not for the decisions in *Savage* and *Octavo* and the force of the authorities which have followed *Octavo*, that is a conclusion which a court might readily reach.
2. However, the conundrum identified above may be more apparent than real. If the precise nature of the right of exoneration is kept steadily in mind, its singular purpose, to be used to meet only the claims of trust creditors, can be reconciled with its characterisation as property of the bankrupt or company within the context of the relevant insolvency regimes. In essence, the right of exoneration is a right of a limited nature and, even when it passes to the bankruptcy trustee, it cannot be exercised other than by causing trust funds to be applied to meet trust debts. In the course of any insolvency administration the external administrator is entitled to exercise the powers of the insolvent trustee to the extent to which they will benefit the estate. That will include the realisation of property where that is possible. The right of exoneration however is not capable of being realised, although it can be used in the administration to cause or require the payment of the debts of the trust creditors. In this respect, the distinction between the concepts in the bankruptcy legislation of “property of the bankrupt which is divisible among the creditors” and of the “proceeds” of the property has to be maintained. It is the “proceeds” of the realisation process which are applied proportionately as required by the operation of s 108 or in the priority dictated by s 109. There is nothing in Division 4 of Part VI, “Realisation of Property”, which would prevent a bankruptcy trustee from exercising a power of the bankrupt which had the effect of directly benefiting some creditors over others, albeit with indirect benefits flowing to the remaining creditors.
3. The decision of the High Court in *Octavo* in relation to the provisions of the *Bankruptcy Act* (albeit in a corporate insolvency context) is binding on this Court. That decision concerned whether or not the trustee’s right of indemnity was “property divisible amongst the creditors” within the meaning of s 116(1)(a) of the Act. It cannot be seriously doubted that the High Court concluded that the right of indemnity was not a trust asset and was, therefore, property “divisible amongst the creditors”. However, the High Court did not suggest that the right of exoneration amounted to “proceeds of property of the bankrupt” which were to be applied as required by ss 108 and 109. In fact, the Court was clear that the right of exoneration was only to be used to meet the claims of the trust creditors who were entitled to be subrogated to the right. That conclusion is entirely consistent with the recognition of the right as a limited right or power of the trustee to apply trust funds only for the purpose of discharging trust liabilities. That is so whether it is exercised by the trustee prior to bankruptcy or by the bankruptcy trustees subsequent to a sequestration order being made. The bankrupt, as trustee, had no power, pursuant to that right, to appropriate funds in an amount equal to the liabilities which had been incurred as trustee so as then to be in a position to use them to meet the claims of all creditors. Further, there is nothing in the *Bankruptcy Act* which, upon the making of the sequestration order, transmogrified the right of exoneration into such a right.
4. It is instructive to consider what the position would be if, shortly prior to bankruptcy, the original trustee was replaced and the new trustee was in possession of the trust assets when the sequestration order was made. In those circumstances the bankruptcy trustees would be required to apply to the court for an order that the trust assets be applied in payment of the trust debts or an order that the new trustee indemnify the former trustee from liability for those debts. If necessary, an order for the judicial sale of some of the trust assets could be made along with an order appointing receivers to carry out the sale. The Bankruptcy Trustees would not be entitled to the payment of an amount of money (see *Lemery Holdings* (2008) 74 NSWLR 550 at [18]). In *Re Pumfrey* (1881) 22 Ch D 255 it was held that the trustee who seeks to enforce the lien is required to apply to the court for an order to that effect (at 262) (see also *Hewett v Court* (1983) 149 CLR 639, 663). The equitable lien which arises does not exist to enforce the payment of money to the erstwhile trustee, but to secure the right to have the trust funds applied in discharge of the trust debts. In addition, the trust creditors themselves might seek an order, relying upon their right of subrogation, for payment to them out of the trust assets. That is not something which the Bankruptcy Trustees could oppose.
5. It follows that even though the right of exoneration is the “property of the bankrupt” of which the bankruptcy trustees took possession, the only use to which it can be put in the course of the administration of the bankruptcy is to discharge liabilities owing to trust creditors. It is not capable of being used to meet the claims of non-trust creditors although they will benefit by having the claims on the remaining property of the bankrupt reduced.
6. When the right of exoneration is identified in this manner, the authorities to which reference has been made are capable of greater reconciliation in outcome if not also reasoning. This approach is concordant with the High Court’s decision in *Octavo* and consistent with the outcomes in *Re Suco Gold Pty Ltd (in liq)* and *Re Amerind Pty Ltd (in liq)*.
7. The above reasoning coheres with the existence of the trust creditor’s rights of subrogation. When the limited nature of the right of exoneration is fully appreciated, full respect is accorded to the established “favoured” position of trust creditors on a trustee’s insolvency. In the course of submissions the Bankruptcy Trustees submitted that the trust creditors obtained this benefit by “mere happenstance” or it being a “lucky incidence” of doing business with a person who happened to be a trustee. They relied upon that as a substantiation for the conclusion that the right of exoneration should be available to all creditors. There are a number of answers to this proposition. First, if, as a matter of law, it is the case that the special rights of trust creditors to be subrogated to the trustee’s right of indemnity afford them an advantage in the insolvency context, there is no reason to deny them that right on some perceived notion of general “fairness”. Second, it is not apparent that those who traded with Mr Lee’s Subway franchise were not aware that he was conducting business as a trustee. The trading trust has become a ubiquitous part of modern commerce such that it may well be that the trust creditors, or some of them, knew of their rights and entitlements. Even though the franchisor was not a creditor in the administration of Mr Lee’s estate, given the size of its business around Australia, it is most likely that it was acutely aware of the nature of its rights arising from trading with its franchisee, Mr Lee, who operated his business as a trustee. Third, the “favoured position” of trust creditors is now so well established that it is not appropriate for a Court at first instance to ignore it. If any reform is required in this area it is clearly a matter for the legislature. Fourth, it is simply not possible to use a power to pay trust creditors out of trust funds, to meet the claim of non-trust creditors.
8. The above analysis is also coherent with the manner in which other forms of property of the trustee might be dealt with in insolvency. For example, in *Re Richardson* shows that a trustee’s right of indemnity from a beneficiary might be treated in a similar fashion to the right of exoneration out of trust assets even though its enforcement will only directly benefit a particular trust creditor. A similar result would occur if a right of contribution from a co-trustee in respect of trust debts or liabilities was sought to be enforced by a bankruptcy trustee. In that scenario, the co-trustee would be entitled to pay the trust creditors directly to discharge the trust debts. The bankruptcy trustee could not beneficially receive funds from the co-trustee and disburse them among all of the insolvent trustee’s creditors. That would leave the co-trustee remaining partially liable to the trust creditors despite having paid the full amount of his or her contribution.
9. It follows that the right of indemnity from a beneficiary and the right of contribution from a co-trustee have similar characteristics to the right of exoneration out of the trust assets in that they will be enforced by the bankruptcy trustees even though they will only result in payments being received by trust creditors. They are all “rights” or “powers” with respect to property albeit of a limited nature with the result being that they cannot be realised or turned into “proceeds” which might be distributed amongst all creditors.

## A possible parallel with s 117 of the Act

1. The manner in which the bankruptcy trustees must deal with the right of exoneration in the course of the administration of the bankrupt’s estate is also not dissimilar to the manner in which they would deal with a right of indemnity under a policy of insurance which is within the scope of s 117 of the Act. That section provides:
2. Where:
3. a bankrupt is or was insured under a contract of insurance against liabilities to third parties; and
4. a liability against which he or she is or was so insured has been incurred (whether before or after he or she became a bankrupt);

the right of the bankrupt to indemnity under the policy vests in the trustee and any amount received by the trustee from the insurer under the policy in respect of the liability shall, if the liability has not already been satisfied, be paid in full forthwith to the third party to whom it has been incurred.

…

1. In s 117(1) the right of the bankrupt to indemnity under the policy vests in the bankruptcy trustee which is consistent with s 116(1) in that the bankrupt’s rights to be indemnified in respect of third party claims fall within the concept of “property of the bankrupt”. Putting aside for one moment the effect of s 117, most contractual rights of a bankrupt under policies of insurance and their coextensive *choses in action* would pass to the trustee in bankruptcy as part of the general assets divisible amongst creditors (see *Re Harrington Motor Co Ltd; Ex parte Chaplin* [1928] 1 Ch 105; *Hood’s Trustees v Southern Union General Insurance Co of Australasia Ltd* [1928] 1 Ch 793). In most cases, those rights or *choses in action* would be capable of being turned into money which would then form part of the “proceeds of the property of the bankrupt” and be available for apportioning amongst the creditors. It follows that, but for the operation of s 117, any money received by a bankruptcy trustee under a policy of liability insurance would be divided amongst all the creditors including the third party in respect of whose liability the bankrupt was insured. The major impact of s 117 is that it imposes limits on the use to which certain property of the bankrupt can be put and requires that money received under the policy be paid forthwith only to the party, the liability to whom was indemnified.
2. In the course of the administration of a bankrupt’s estate, a bankruptcy trustee would be obliged to enforce against the bankrupt’s insurer any claim under a policy which might meet the claim of a third party against the estate. Whilst the right of indemnity under the policy may only result in one creditor’s claim being satisfied, it would nevertheless be the duty of the bankruptcy trustee to ensure that occurred. Necessarily, the meeting of that creditor’s claim by use of the insurance funds will reduce the totality of the claims upon the remainder of the bankrupt’s estate and, to that extent, this operates to the benefit of all creditors. A liquidator of an insolvent corporation has similar obligations under s 562 of the *Corporations Act*.
3. This reference to the operation of s 117 is not to suggest that a trustee’s right of exoneration is the equivalent of a bankrupt’s right of indemnity under a policy of liability insurance, even though there are parallels. It is merely to identify that there are occasions where the bankruptcy trustee is required to deal with property of a limited nature which enures for the benefit of a single creditor.

## The “property of the bankrupt”

1. It is apparent from the above discussion that this Court must accept that the right of exoneration is a right which falls within the scope of the expression “property of the bankrupt” as it is used in s 58(1)(a) of the Act. If there is any difference, it is also property which falls within the expression “property divisible among creditors” within the meaning of s 116(1)(a) and (b) (see *Rogers v Asset Loan Co* (2006) 4 ABC(NS) 293 at [37] citing *Cummings v Claremont Petroleum NL* (1986) 185 CLR 124 and *Cirillo v Citicorp Australia Ltd* [2004] SASC 293 at [75]–[79]). A trustee’s right to use the trust funds to meet trust debts incurred in the performance of a trust is, at least, a capacity to exercise power “in, over or in respect of property” which might have been exercised for the bankrupt’s own benefit within the meaning of s 116(1)(b). That conclusion is in accordance with the decision in *Octavo* to the extent that it held that a trustee’s right of indemnity was property of the bankrupt within the meaning of ss 58 and 116 of the Act.
2. Even if *Octavo* was not binding, as a matter of principle it is difficult to accede to the proposition that a right in respect of the trust assets which could be exercised by the bankrupt for the purposes of discharging his or her personal liabilities would be “trust property” and hence not within the scope of ss 58 and 116(1). The mere fact that the use of the right might be limited by reference to specific debts, does not support the conclusion that the right is not “property of the bankrupt”. Moreover, the fact that the trust creditors have entitlements of subrogation to the right and a corresponding lien to enforce it, makes it less likely that it could be regarded as being held solely for the benefit of the beneficiaries and therefore a “trust asset” or part of the trust.
3. It should also be remembered that the bankruptcy trustee takes the property of the bankrupt subject to any equities affecting it (*Sonenoco (No.77) Pty Ltd v Silva* (1989) 24 FCR 105 at 124-5). In the case of the right of exoneration, that includes the rights of the trust creditors to be subrogated to the rights of the trustee including the ability to exercise the equitable lien. Again, that tends to negate any suggestion that the right is trust property or that it can be used to the detriment of the trust creditors’ rights of subrogation.
4. Nor does the fact that the right is secured by an equitable lien over the trust assets take the right beyond the scope of ss 58 and 116 and render it an asset of the trust as suggested in *Re Amerind*. The equitable lien merely secures the ability of the trustee to exercise the right whenever the trust assets are removed from the trustee’s possession or where the beneficiaries demand payment of their entitlements without making provision for discharging the trustee’s liabilities.
5. It follows that the right of exoneration is a right which is “property of the bankrupt” and which is, *prima facie*, divisible among the creditors of the bankrupt within the meaning of s 116(1)(b). That is so, regardless of the fact that it is not capable of being realised and that it can only be exercised in a limited way by requiring that the trust assets be used to discharge the claims of the trust creditors. It is not “trust property” within s 116(2)(a).

## Did bankruptcy change the nature of the right of exoneration?

1. In the course of oral argument, Counsel for the Deputy Commissioner of Taxation submitted that the operation of the bankruptcy regime altered the nature of the right of exoneration in the hands of the Bankruptcy Trustees, such that it became available for “distribution” amongst all creditors. It was submitted that, in their hands, the right of exoneration could be used to obtain payment of money out of the trust funds in an amount equal to the claims of the trust creditors and those funds might then be used to meet the claims of all creditors. This, it was submitted, arose either as a result of the insolvency regime “cutting through” otherwise established rights, or that the “overarching theme” of the insolvency regime had the effect of rendering the rights in the hands of the bankruptcy trustee wider than they were in the hands of the bankrupt. No specific provision of the Act was identified as having this transformative effect upon the bankrupt’s property and rights as they vested in the Bankruptcy Trustees. The Deputy Commissioner’s submission was supported, to some extent, by Counsel for the Bankruptcy Trustees although on slightly different grounds. Mr Eade submitted that the position in relation to the right of exoneration was similar to the position of a contractual right of indemnity where the person to be indemnified has become insolvent. In such circumstances, so the argument went, the bankrupt’s contractual right of indemnity in relation to a particular debt can be applied for the benefit of all creditors unless the indemnifier had an interest in seeing that the indemnified debt was discharged. Reliance was placed on the decision of the Court of Appeal in *Re Law Guarantee Trust and Accident Society Ltd: Liverpool Mortgage Insurance Co’s Case* [1914] 2 Ch 617. That case concerned the construction of a re-insurance contract and, it is noted, Buckley LJ identified that the particular issue turned upon the construction of the language of the contract. After discussing the construction of that language, at 633, his Lordship considered the position in relation to equitable obligations to indemnify and said:

The equitable doctrine is that the party to be indemnified can call upon the party bound to indemnify him specifically to perform his obligation, and to pay him the full amount which the creditor is entitled to receive, and that whether having received it he applies it in payment of that creditor or not is a matter with which the party giving the indemnity is not concerned. ... The case is otherwise where the party giving the indemnity is concerned with the application of the money which he pays. This was the case in *Re Richardson*. The wife who was bound to indemnify was there concerned in seeing that the money which she paid went to the lessor so as to relieve the property of which she was beneficial owner from the consequences of non-payment of rent and damages for breach of covenant.

(Footnotes omitted).

Kennedy LJ agreed that there was nothing in the reinsurance contract which required the payment of the indemnity to the debenture holders and that was especially so given that they were not parties to the contract of indemnity and the indemnifier had no interest in seeing how the indemnity moneys were applied.

1. In the present matter there is no “contract” of indemnity. The subject matter under discussion is the right of exoneration. There is only one method by which the right can be exercised and that is by the application of trust funds to paying the claims of trust creditors. It is not a contract which can be construed to require payment to the person indemnified of an amount of money equal to that needed to meet the liability to a third party. That is a critical difference between the present situation and that which arose in the Liverpool Mortgage Insurance Co’s Case [1914] 2 Ch 617.
2. Additionally, the trust creditors have a right of subrogation to the right of exoneration and accompanying lien. In effect, that means that they have a right to be subrogated to the proprietary interest of the trustee in the assets of the trust. They are entitled to orders that their debt be paid directly out of the trust funds without those monies passing through the hands of the trustee (Re Evans, Evans v Evans [1887] 34 Ch D 397). There is nothing in the authorities to suggest that the equitable right of subrogation dissipates upon the trustee’s insolvency. The contrary is true. Those rights of subrogation are inchoate until insolvency or the trustee is otherwise unable to pay the trust debts. The crystallisation of those equitable rights upon the trustee’s insolvency is not consistent with the notion that the trustee’s right to have the trust assets applied in discharge of the trust debts is abrogated by the trustee’s insolvency. Were the Commissioner’s submission to be accepted, the insolvency of the trustee would be both the occasion for the crystallising of the right of subrogation and the reason for its destruction.
3. The Deputy Commissioner’s submission also overlooks the fact that any property received by a bankruptcy trustee is subject to all of the liabilities and equitable interests existing prior to the bankruptcy (Re Clarke; Ex parte Beardmore [1894] 2 QB 393; Whyte v Williams (1903) 29 VLR 69; 9 ALR 98). In relation to the right of exoneration, one of those equitable interests is the trust creditors’ entitlement to be subrogated to it. In accordance with the well-established authorities, that interest is not diminished by the trustee’s bankruptcy.
4. No other authority was cited to the Court and none has been located which supports the contention that, on the bankruptcy or winding up of a trustee, the right of exoneration evolves into a broader right from which the trustee or company liquidator can obtain a direct payment of an amount equal to the debts in respect of which the right of exoneration exists. Such a notion is inconsistent with the various decisions concerning the right of indemnity given that, if such a principle existed, the contentious matters in those authorities would not have arisen. It was also specifically rejected by McLelland J in *Re ADM Franchise Pty Ltd* (1983) 7 ACLR 987 at 988-989.
5. It follows that the submission that a trustee’s right of exoneration is broadened by the bankruptcy of the trustee should be rejected. In the hands of the Bankruptcy Trustees the right remained as it was in the trustee’s hands, namely a right to apply trust funds in discharge of trust debts.

## The use to which the right of exoneration may be put under the *Bankruptcy Act*

1. Pursuant to s 58(1) of the Act, upon the debtor becoming bankrupt, the property of the bankrupt vests in the bankruptcy trustee or, if the trustee is appointed by the creditors, the property vests on the date of that appointment (s 132(1)). Once the bankruptcy trustee has possession of the property or it is otherwise vested in them, they are required to administer the estate. Division 4 of Part VI of the Act affords a bankruptcy trustee powers for undertaking that task. By s 134 numerous specific powers are granted to enable the bankruptcy trustee to deal with the property, including the power to generate funds in various ways such as by leasing, carrying on a business, and charging or mortgaging any property. It is worth observing that, whilst s 116(1)(b) specifically includes within the description “property divisible amongst the creditors of the trustee”, the “capacity…to exercise powers in, over or in respect of property”, there is no specific power granted by s 134 authorising the exercise of those powers for the purposes of generating funds. It may be that the entitlement to exercise the bankrupt’s powers in the administration of the bankrupt’s estate arises from the more general authorisations in s 134(1)(n) to “superintend the management of the whole, or part, of the property of bankrupt” or in s 134(1)(o) to “administer the property of the bankrupt in any other way”. It is also relevant that s 134(3) affords the bankruptcy trustee a wide discretion as to the manner in which the estate is administered by providing, “Subject to this Act, the trustee may use his or her own discretion in the administration of the estate.”
2. In the administration of the estate, a bankruptcy trustee is bound to deal with the assets that come into their hands with a view to achieving the maximum return from them so as to best satisfy the claims of the creditors (see *Adsett v Berlouis* (1992) 37 FCR 201 at 209 citing with approval the observations of Smithers J in *Mannigel v Aitken* (1983) 77 FLR 406 at 408 – 409). In the present matter, the relevant subject matter of the bankrupt’s estate is a right to use trust funds (not otherwise available for use in the bankruptcy) for the purposes of meeting the claims of the bankrupt’s trust’s creditors and that is all that the Bankruptcy Trustees might do with it. That is not undertaking a sale of the right nor its conversion into funds. Put simply, the right is not one which is capable of being “realised” so as to produce a monetary return. Quite rightly, no argument was made to this Court that the money to be paid from the trust assets to trust creditors could be characterised as “proceeds” within the scope of the expression “proceeds of the property of the bankrupt” as it is used in s 108 and s 109(1) of the Act.
3. This approach to the orderly administration of the bankrupt’s estate is consistent with the approach which would be taken in relation to other forms of restricted or limited property. It would be the approach adopted by a bankruptcy trustee in relation to an entitlement to claim on a policy of insurance which is subject to the limitations imposed by s 117 of the Act. It is also the approach which would be adopted if the bankrupt trustee had a right of indemnity against a beneficiary such as that which arose in *Re Richardson.* The right would need to be enforced against the beneficiary for the benefit of the single trust creditor with the non-trust creditors only deriving the indirect benefit of a reduction of the total quantum of claims against the trustee’s personal estate. Yet a similar situation would arise where the bankrupt trustee’s right was one for contribution from a co-trustee in relation to trust debts. In the course of the administration that right of indemnity would be enforced only for the direct benefit of the trust creditors.
4. For the purposes of s 108 of the Act it is the “proceeds of the property of the bankrupt” which are to be used to pay the creditors and, if they are insufficient, the creditors are to be paid proportionately. From what has been identified above, no “proceeds” can be derived from the right of exoneration. The consequence is that the right is not subject to either the provisions concerning distribution of proceeds under s 108, nor the priority provisions of s 109. In the context of the provisions of the Act, the right can only be used to meet the claims of trust creditors.

## Whether the right of exoneration ought to be exhausted before dividends are paid?

1. A further matter on which the Bankruptcy Trustees seek directions is whether the right of exoneration should be exhausted before dividends are paid to creditors from the proceeds of property under s 108. It was submitted that the right of exoneration should first be used to discharge the claims of trust creditors, prior to any distribution of the “proceeds” of the bankrupt’s property. If that occurs, the “trust creditors” will, at best, only participate in the bankrupt’s personal estate for the remaining amount of their debt.
2. The administration of the bankrupt’s estate will necessitate the exercising of the right of exoneration by the Bankruptcy Trustees and the realisation of property capable of being turned into money. Once those tasks are completed the Bankruptcy Trustees will be in a position to ascertain the value of the estate which is available for distribution. Until that stage is reached, it is impossible for the bankruptcy trustees to make the priority payments required by s 109 or to declare a dividend under s 140. Therefore, it logically follows that the right of exoneration must be exercised before any consideration is given to making a distribution to creditors under s 109.
3. Although it has been held that the trust creditors’ rights of subrogation to the right of exoneration does not make them “secured creditors” (*Buckle* at 247), they are certainly akin to secured creditors in some respects. In a very real sense, the amount which remains owing to the trust creditors by the insolvent trustee is the total amount of their debt less the value of their subrogated right of indemnity. In the context of legislation where the creditors are to be treated equally, it would be an unusual situation were the trust creditors to be able to assert the full amount of their claim so as to participate in the proceeds of the property of the bankrupt, only to be entitled to turn around and seek an additional payment from the trust assets.
4. In addition, significant administrative difficulty would arise if the trust creditors were able to receive dividends from the personal estate of the bankrupt prior to receiving the benefit of their right of subrogation. Were that to occur, it would follow that a right of “recoupment” to the extent of the amount paid to the trust creditors from the personal estate would arise or vest in the bankrupt’s estate. The bankruptcy trustees would then be required to realise that right of recoupment which would lead to the establishing of a further fund for distribution amongst all of the creditors, including the trust creditors. That, in turn, would lead to a further right of recoupment arising and the scenario would continue almost *ad infinitum*. It is not likely that the legislature would have intended such an absurd result.
5. Consequently, the administration of the estate should occur by the trust creditors’ claims being paid out of the right of exoneration prior to their participation in the receipt of any dividends under s 108 and s 109 from the assets of Mr Lee’s personal estate. Although not founded upon the same reasoning, this was the approach adopted by King CJ in *Re Suco Gold* (at 109 – 110).
6. In relation to this question, the Bankruptcy Trustees asserted the existence of a difficulty arising from the fact that Mr Lee was a “debtor” to the trust in the sum of $399,729 which resulted from a loan which he, as trustee, made to himself in his personal capacity. It was suggested that this would complicate the manner in which the bankrupt’s estate might be administered. Putting aside whether or not Mr Lee’s utilisation of the funds was a breach of trust, the amount said to be owing to the “trust” by Mr Lee is negated by the greater amount of his right of exoneration. Put more accurately, the right of exoneration is reduced by the amount which Mr Lee “owes” to the “trust”. As has been identified earlier, the state of the account as between Mr Lee and the beneficiaries, is such that Mr Lee’s right of exoneration from the assets of the trust has a value of $599,782.02. Mr Lee did not remain a debtor to the trust.

## Whether the priority regime in s 109 applies to the use of the right of exoneration?

1. Yet a further issue on which the Bankruptcy Trustees seek advice is whether s 109 applies to the exercise of the right of exoneration in favour of the trust creditors. This was particularly important to the Deputy Commissioner of Taxation who has claimed priority for the payment of the Superannuation Guarantee Charge under s 109(1)(e) of the Act. That provision provides:

**109 Priority payments**

(1) Subject to this Act, the trustee must, before applying the proceeds of the property of the bankrupt in making any other payments, apply those proceeds in the following order:

…

(e) fifth, in payment of amounts (including amounts payable by way of allowance or reimbursement under a contract of employment or under an industrial instrument, but not including amounts in respect of long service leave, extended leave, annual leave, recreation leave or sick leave), not exceeding in the case of any one employee $1,500 or such greater amount as is prescribed by the regulations for the purposes of this paragraph, due to or in respect of any employee of the bankrupt, whether remunerated by salary, wages, commission or otherwise, in respect of services rendered to or for the bankrupt before the date of the bankruptcy;

1. The Bankruptcy Trustees do not contest that the amount claimed by the Deputy Commissioner falls within the scope of s 109(1)(e). However, they do assert that the amount for which priority is permitted is limited to $100,969.52 and a non-priority amount remains in approximately the sum of $27,605.36. It does not appear that the Deputy Commissioner contests that the limitation applies to that extent. It follows that the only question is whether the priority regime applies to the exercise by the Bankruptcy Trustees of the right of exoneration? If it does, the Deputy Commissioner will be entitled to priority over the other trust creditors.
2. As has been shown earlier in these reasons, the right of exoneration which vested in the Bankrupt Trustees was merely the power to apply, or cause to have applied, trust property to the discharge of trust debts. It is not property which might be sold so as to produce “proceeds” which can be applied as prescribed by s 109. Nor can it be logically said that the trust funds to be applied to the discharge of the trust debts are, themselves, “proceeds” of the right of indemnity. The trust funds are not derived from the sale or disposal of the right of indemnity. They are, until they are utilised by the exercise of the right of exoneration, trust assets which s 116(2) provides are not within the description of the “property of the bankrupt”. It follows that s 109 cannot apply to the exercise of the power of exoneration in the hands of the Bankruptcy Trustees.
3. In *Re Independent Contractor Services,* Brereton J reached the same conclusion by a different route. His Honour described the conclusion reached in *Re Suco Gold* that the corporate trustee’s right of exoneration was to be applied pursuant to the priorities provisions of the *Corporations Act* as “virtually universally accepted to be incorrect” (see also the comments of Robson J in *Re Amerind* at [55] – [94]). His Honour held that the priority provisions were only applicable to the distribution of assets which were beneficially owned by the insolvent trustee and available for division between its general creditors (at pp 230-231, [23]) and that the right of exoneration was trust property. Whilst the first part of his Honour’s conclusion may be correct, the second part is more problematic. As indicated earlier in these reasons, it is difficult to read the conclusions of the High Court in *Octavo* as meaning anything other than that the right of exoneration is property which is beneficially owned by the trustee. That appears to be at odds with the assumptions underlying Brereton J’s conclusions.
4. Perhaps a different path to the same ultimate conclusion is to acknowledge the correctness of the proposition identified so clearly by Farrell J in *Bell Hire Services* at [37] to the effect that the right of exoneration is merely a limited right to pay trust debts from property which is not owned by the trustee; namely the trust funds. Once that point is realised it follows that the payment to the trust creditors is not a payment from the property of the company as is contemplated by ss 555 and 556 of the *Corporations Act*.
5. The determination in *Re Suco Gold* that the priority provisions applied in respect of the discharging of trust creditor’s claims by use of the right of exoneration, has not enjoyed widespread support. On occasion it has been suggested that such a principle would only apply where the trustee company acted solely as trustee and had no other liabilities of its own (see the analysis of Campbell J in *Re French Caledonia Travel Service Pty Ltd (in liq)* (2003) 59 NSWLR 361 at 422-429; [194]-[217], although that approach was rightly questioned by Riordan J in *Freelance Global v Bensted Ltd (in liq)* [2016] VSC 181 at [82]).
6. In the Full Court of this Court in *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2011) 193 FCR 442 at 449; [27], it was observed, in the context of the liquidation of a corporate trustee, that the suggestion that the priority provisions would govern the distribution of trust assets where the assets were insufficient to meet the claims of all trust creditors was somewhat difficult. Indeed, it appears that there is good reason for accepting the view that the priority provisions (of either the *Corporations Act* or the *Bankruptcy Act*) only apply to the distribution of “proceeds” of the assets which are beneficially owned by the insolvent trustee (see *Jacobs’ Law of Trusts in Australia*, 8th edition, Lexis Nexis Butterworths, Australia, 2016 at para [21.15]; McPherson J, “*The Insolvent Trading Trust”* in Finn PD (ed), *Essays in Equity*, 142 at 154; *Lerinda Pty Ltd v Laertes Investments Pty Ltd* [2010] 2 Qd R 312 at 316-317, [14]; *Re Stansfield DIY Wealth Pty Ltd (in liq)* (2014) 291 FLR 17 at 25, [29]). However, it must be acknowledged that the provisions of ss 555 and 556 of the *Corporations Act* do not expressly identify that what is distributed by the force of those sections are the “proceeds” of the property of the company. The provisions of ss 108 and 109 of the *Bankruptcy Act* are more explicit and easily allow for the conclusion that property which cannot be turned into proceeds is not within their scope. Nevertheless, it would appear that ss 555 and 556 do contemplate the payment of debts by use of the company’s property. That can only occur if that property is realised by sale or otherwise and “proceeds”, in the form of money, are produced. It would seem to follow that if the property in question was not capable of being realised, it would not be within the scope of ss 555 and 556. A trustee’s right of exoneration is such property.
7. The question of whether or not the priority provisions applied to the disbursement of trust funds to trust creditors was considered at length by Robson J in *Re Amerind* (see paragraph [94ff]). His Honour adopted the view that the right of indemnity was a “trust asset” and, for that reason, the priority provisions of the *Corporations Act* would not apply and the funds ought to be distributed *pari passu* amongst trust creditors. He did so in reliance upon the decision of Brereton J in *Re Independent Contractors* and on the basis that he was not bound by *Re Enhill* or *Re Suco Gold*. This approach was subsequently adopted by Markovic J, in *Mooney’s Contractors Pty Ltd* (2017) FCA 653 at [140].
8. A crucial, albeit implicit, foundation of the decisions in *Independent Contractor Services* and *Re Amerind*, is that the decision of the High Court in *Octavo* does not preclude the conclusion that a trustee’s right of indemnity is “trust property”, as opposed to property of the company. As the passages from *Octavo* which have been cited earlier in these reasons reveal, that is not terribly easy to sustain. When the majority of the High Court in *Octavo* identified (at the top of p 370) that the trustee’s right of exoneration “will pass to the trustee in bankruptcy for the benefit of creditors of the trust trading operation”, they could not have meant anything other than that the right was property divisible amongst the creditors of the bankrupt and, therefore, not trust property. If the right of exoneration were trust property, it would not pass to the trustee in bankruptcy. It is, with respect, sufficiently clear that the High Court accepted that as the right of exoneration is exercisable for the purposes of relieving the personal liability of the trustee, it is not held solely for the interests of the beneficiaries and, therefore, it is not properly characterised as “trust property”. As that decision concerned the construction of the *Bankruptcy Act,* this court is bound by it in relation to the matters under consideration.
9. The only conclusion which is open is that although the right of exoneration is not trust property and it passes to the bankruptcy trustee on the making of the sequestration, it can only be used in the administration of the bankrupt’s estate by requiring the discharge of the debts owing to the trust creditors to be paid from the trust funds. Moreover, regardless of what the position might be in the corporate insolvency context pursuant to ss 555 and 556 of the *Corporations Act*, under the Act the priority provisions of ss 108 and 109 apply only to the “proceeds of the property of the bankrupt”. The right of exoneration is incapable of producing “proceeds” within the meaning of those sections such that, whilst it may be property of the bankrupt, it is not property which is capable of being turned into “proceeds” for distribution pursuant to s 108 and s 109 of the Act.
10. It follows that the answer to the Bankruptcy Trustees’ question in this respect is that s 109 of the Act does not control the manner in which the Bankruptcy Trustees are entitled to utilise the right of exoneration in discharging the claims of the trust creditors.

### Whether the trust creditors take pari passu

1. Counsel for the Bankruptcy Trustees made the further submission that, if s 109 did not apply to the exercise of the right of exoneration, then it ought to be applied in such a manner that each of the trust creditors should be paid an amount which is proportionate to the amount which their debt compares to the totality of trust debts; that is *pari passu*. Such an approach is one which is adopted by the learned authors of *Jacob’s Law of Trusts in Australia* (Lexis Nexis Butterworths, 8th edition, 2016) at 523, [21-15] and is consistent with the general equitable principle that the distribution of an insolvent’s property should proceed on the footing of equality amongst creditors of equal degree.
2. An alternative approach, which was identified in the course of submissions, is that priority ought to be given to the trust creditors in the order in which their debts arose. That view was advanced by Williams QC in an article, “*Winding Up of Trading Trusts: Rights of Creditors and Beneficiaries”* (1983) 57 ALJR 273, 277, although it is not one which has attracted any judicial support. Needless to say, the temporal fortuity of the incurring of debts to creditors does not appear to be a sound basis for prioritising their repayment where, as between the trustee and the creditors or those creditors *inter se*, no relevant competing equitable interests arise. At the time such trust debts are incurred (being prior to the trustee’s insolvency) the trust creditors merely have the rights of creditors at common law, neither more nor less. A creditor who may be “first in time” does not then obtain any entitlement to be subrogated to the right of exoneration and supporting lien. That right of subrogation is inchoate until the trustee has been shown to be unable to pay the debt or becomes insolvent. It is only then that the trust creditors’ rights crystallise and they do so simultaneously. The right of each of the trust creditors is in respect of the undifferentiated whole of the trust assets irrespective of when the assets were acquired or when the debts were incurred. In other words, apart from differences in value, the nature and content of their rights of subrogation are identical with the consequence being that none can claim any superior entitlement to the trust assets. That being so, it naturally follows that any distribution of the fund available to meet the right of exoneration must occur *pari passu*.
3. It is appropriate at this juncture to observe that it may be that the crystallisation of the right of subrogation is deferred to an even later point in time where, upon the taking of accounts, it transpires that there is a balance on the account as between the trustee and the beneficiary in favour of the trustee (*Jacob’s Law of Trusts* (8th ed), 2016; para [21.15]). If that is the relevant occasion for identifying when the right of subrogation arises, any trust creditor existing at that point in time would be entitled to participate in it.
4. A practical reason for rejecting the prioritisation of trust debts on a temporal basis is that it is likely to result in significant administrative difficulty where, as between the trustee and a trust creditor, the ultimate liability is the end product of a running account. That may well be the position in relation to a debt owed to the Deputy Commissioner of Taxation in respect of the superannuation guarantee charge. In such circumstances, there would be great difficulty in ascertaining, when, as between the various creditors, the respective liabilities actually arose.
5. In *Bell Hire Services* Farrell J also concluded that the exercise of the right of exoneration by the liquidator of a trustee required discharging trust creditors in a *pari passu* manner given that they would all have been equally entitled to exercise their subrogated right to a lien over the trust assets. Whilst, as her Honour observed (at [37]), it may be unfortunate that this gives rise to two regimes for the payment of debts in the administration of an insolvent trustee’s estate, that was the necessary consequence of recognising the now well-established, equitable entitlements of trust creditors.
6. In the result, the approach identified by Brereton J in *Re Independent Contract Services* (and by McMurdo J in *Lerinda Pty Ltd v Laertes Investments Pty Ltd* [2010] 2 Qd R 312 at 315) to the effect that there should be equality amongst all creditors of equal degree, should be adopted, such that the discharging of trust debts by the application of the right of exoneration should occur *pari passu*.

## Trust creditors bringing payment from trust assets to account

1. The Bankruptcy Trustees also seek directions as to the manner in which the personal estate of the bankrupt should be distributed as between trust creditors and non-trust creditors. Submissions on this issue were predicated upon the basis that the trust creditors have been entitled to the application of the right of exoneration to the exclusion of non-trust creditors. The question which then arises is whether the rights of trust creditors to benefit from the personal estate of the bankrupt trustee are to be deferred until the non-trust creditors have received the same proportionate payment as the trust creditors have from the right of exoneration? In other words, ought the trust creditors, when participating in the distribution of the proceeds of the bankrupt’s personal estate, bring into “hotchpot” the amount which they have received by use of the trustee’s right of exoneration.
2. The Bankruptcy Trustees identified this to be yet another difficult issue in this application. They submitted that the better view was that the trust creditors are not required to bring into account any payment received from the right of indemnity when participating in the distribution of the proceeds of the property of the bankrupt. The foundation of this submission was that the right of exoneration was trust property and, therefore, not part of a “common fund” for the purposes of the hotchpot principle.
3. There is relatively little authority on this topic, but the weight of it supports the view that the “hotchpot” principle should apply where trust creditors have been able to benefit from the property of the bankrupt to the exclusion of non-trust creditors. In relation to its application in the winding up of an insolvent trading trust; McPherson J, writing extrajudicially in “*The Insolvent Trading Trust”* in Finn PD (ed), *Essays in Equity* (Law Book Co, 1985, 142 at 158), said:

Hence, a person who is a creditor of the company in consequence of its activities as a trading trustee is entitled to prove in the winding-up together with the private creditors of the company; but he is not entitled to receive a dividend from the private assets of the company until the dividend paid to other creditors at least equals that paid to the trust creditors out of the trust funds. (*Re Oriental Inland Steam Co.* (1874) 30 LT 317; affd 9 Ch App 557; *Re Standard Insurance* Co [1968] Qd R 118, applying *Banco de Portugal v Waddell* (1880) 5 App Cas 161 at 168. Cf also the Rule in *Cherry v Boultbee* (1839) 4 My & Cr 442, discussed McPherson, op cit pp 366-367). That, in the end, is what is meant by saying that it is only by the “lucky accident” (*Re Johnson* (1880) 15 Ch D 548 at 552-553, per Jessell MR) of there being a trust that a trust creditor is put in a better position than any other creditor of the company. In practice it will confer on him no advantage unless in the end the assets of the trust produce a dividend that amounts to more than that payable out of the private assets to the general private creditors of the insolvent company.

1. Such an approach accords with the maxim that “equity is equality” (*Akers v Deputy Commissioner of Taxation* (2014) 223 FCR 8 at [135]) and the general insolvency principle that, to the extent possible, all creditors of a bankrupt are to be treated equally in the administration and distribution of the bankrupt’s estate.
2. Both the application of “hotchpot” principle and its historical development were considered by the Privy Council in *Cleaver v Delta American Reinsurance Company (in liq)* [2001] 2 AC 328. That case concerned the liquidation in the United Kingdom of a foreign corporation which was also in the process of being liquidated elsewhere. It is fair to say that the transaction which was the subject of the litigation had a moderate degree of complexity to it. However, the “hotchpot” principles relating to cross-border insolvencies are relatively easy to identify. They provide that a creditor who has obtained a benefit from the distribution of the property of an insolvent company in a foreign jurisdiction, is not entitled to receive a dividend from the English liquidation of the same company unless it brought into hotchpot their foreign dividend. It was observed that the rule only applied where the foreign benefit had been derived from a “common fund” as was the situation in that case. If the benefit had been obtained from assets which were not otherwise available to the “common fund”, the rule had no application. That principle is often reflected in the fact that secured creditors are not subject to the hotchpot principle in an insolvency context as property which is the subject of security has never been regarded as being part of a “common fund” which is distributable amongst all creditors. For that reason, a secured creditor might estimate the value of their security and prove, unimpeded, in the liquidation or insolvency for any balance owing (see *Cleaver* esp at p 340; [26]).
3. An adumbrated history of the hotchpot principle can be found in the decision of Barrett J in *Australian Securities and Investments Commission v Idylic Solutions Ltd* (2009) 76 ACSR 129 at 138-139. Relevantly, for present purposes, it is only necessary to refer to paragraph [60] of his Honour’s reasons:

[60] The hotchpot concept is a reflection of the maxim “equality is equity” (with “equality”, in an appropriate case, understood as proportionate equality), supplemented by the maxim “he who seeks equity must do equity”. The equality (or proportionate equality) that equity in general will promote can only be struck after a person seeking the benefit of it has, as a preliminary, borne whatever burden equity demands be borne in order to ensure that the ultimate equality (or proportionate equality) is not distorted by the effects of unconscientious retention of separately received benefit.

1. The Bankruptcy Trustees submitted that the hotchpot principle did not apply in the present case because the right of exoneration was not property which formed part of the personal estate of the bankrupt such that the trust creditors were not benefiting from the "common fund" which is distributed under ss 108 and 109. However, for the reasons which have been stated above, that submission also cannot be accepted. The right of exoneration is part of the bankrupt’s personal property which was divisible amongst the creditors and which vested in the Bankruptcy Trustees on the making of the sequestration order. The payments to the trust creditors via the right of exoneration are, therefore, payments out of a “common fund”. That remains so, even though the debts to trust creditors are discharged in part by the use of trust funds.
2. Although the Bankruptcy Trustees submitted that the trust creditors were “secured creditors” for the purposes of the *Bankruptcy Act*, the authorities are to the contrary (see *Buckle* at 247; *Lerinda Pty Ltd v Laertes Investments Pty Ltd* [2010] 2 Qd R 312). Indeed, it can be remarked that if they were secured creditors, the fifty or so authorities cited by the Bankruptcy Trustees for the purposes of the application would have been otiose as there could have been no argument as to which creditors were entitled to priority.
3. The same result is reached by an application of s 108 of the Act. That section has two aspects to it. First, that all debts proved in a bankruptcy must rank equally. The second is the legislative direction to discharge the debts of the bankrupt proportionately if the proceeds of the property of the bankrupt are insufficient to meet them in full. It follows that when the Bankruptcy Trustees attend to the distribution of the “proceeds” of the property of the bankrupt they are required, to the best of their ability, to ensure that the debts proved in the bankruptcy are paid proportionately and, unless otherwise provided for, equally. Where, in the course of the administration the trust creditors have received partial payment of their debts by use of the right of exoneration, the legislative direction necessarily requires that the “proceeds” are to be applied in favour of the non-trust creditors until that point is reached where their debts have been paid in the same proportion as the trust creditors’ debts. Thereafter, the remainder of the proceeds, if any, are to be applied proportionately across all debts. This application of s 108 of the Act to the circumstances of an insolvent trustee reflects both the hotchpot principle and the overriding scheme of the *Bankruptcy Act* that the bankrupt’s creditors are to be treated equally.

## Use of the right of indemnity to meet the costs, expenses and remuneration of the Bankruptcy Trustees

1. Yet a further direction sought by the applicants is that they be entitled to be paid their costs, expenses and remuneration of the bankruptcy administration from the proceeds of the right of exoneration or directly from the trust assets. They seek approval for the payment of:
   1. $139,137.04 (being an amount already paid pursuant to creditors’ approval);
   2. $36,894.96 (the amount incurred to date but unpaid); and
   3. $15,000 (in respect of future remuneration until the finalisation of the bankruptcy).
2. Whilst there may be a question about whether approval is required for the payment of the costs, expenses and remuneration of the Bankruptcy Trustees, given that the intention is to utilise the trust assets to meet those financial imposts, it is an appropriate subject for this Court to consider pursuant to the power granted to the Court by ss 90-15 and 90-20(1)(a) of the *Insolvency Practice Schedule*.
3. The entitlement of a bankruptcy trustee to recover the reasonable costs and expenses of their administration of a bankrupt estate as well as a reasonable remuneration arises under the general law (see *McDonald v Young* [2012] FCAFC 127 at [67]-[68]; *Wilson v Official Trustee in Bankruptcy* [2000] FCA 1251). Those entitlements are accorded priority to the claims of the bankrupt’s creditors by s 109(1)(a) of the Act but only in respect of the distribution of the “proceeds of the property of the bankrupt”. In this application, the Bankruptcy Trustees seek an order or direction that they be entitled to meet their costs, expenses and their remuneration from the money which was, or is to be, obtained from the sale of the trust assets; being the Subway franchise. They submit that those funds, which are held in their accounts, are the proceeds of Mr Lee’s right of exoneration and should be used to discharge their claimed entitlements.
4. As is apparent from the earlier discussions in these reasons, the right of exoneration is not property from which a bankruptcy trustee is able to obtain “proceeds” which can be distributed under s 109. Whilst some authorities have held that the right is a trust asset, the better view is that it is property of the trustee, albeit of a limited nature. That being said, the nature of that right is uncertain and, for that reason, the Courts have experienced some difficulty in identifying a principled path by which the entitlements of bankruptcy trustees and liquidators might be met when the only available asset is a trustee’s right of exoneration.
5. Before considering the authorities, it is appropriate to acknowledge that the payment to insolvency practitioners of their costs, expenses and remuneration with respect to insolvency administrations is, unquestionably, a most significant matter. Although bankruptcy trustees no doubt undertake their work as part of their professional practice, it is work which has an important public interest element. It is in the interests of both society as a whole, and of the economy, that insolvent estates be properly administered in a way that is economically efficient for the creditors and the bankrupt. That is true whether the bankrupt is a trustee or otherwise. The importance attached to the payment of the bankruptcy trustees’ entitlements by the Legislature is manifest in the priority that they have in the application of the proceeds of the property of the bankrupt pursuant to s 109. In the circumstances where the bankrupt is a trustee, however, particular difficulties arise. Under the Act, property which the bankrupt held on trust is not property divisible amongst the creditors nor can it be used to pay the bankruptcy trustees. Nevertheless, the importance attached to the work of bankruptcy trustees and liquidators, has seemingly encouraged successive courts to ascertain ways and means of ensuring that, to some extent, the entitlements of bankruptcy trustees or liquidators are paid from trust assets or from the right of exoneration. There is, however, no consistency in how this is achieved.
6. Despite the above, it must also be accepted that, from time to time, an insolvency administration may not result in a bankruptcy trustee or liquidator being paid their full entitlements. That is an inherent hazard of the nature of their undertaking. Often, the extent to which an insolvency practitioner will recover a suitable return from an administration will depend upon the structure and value of the estate or company being administered and, on occasion, no amount of due diligence will protect the insolvency practitioner from loss. That is an unfortunate risk, but it is not the role of the court to remediate that if it cannot be achieved within established principles.
7. A trichotomy has formed in the various authorities concerning the rights of insolvency administrators to recover their costs, expenses and remuneration from trust assets. The first category of cases are those which attempt to discern something within the relevant insolvency regime which might permit the use of trust property or the right of exoneration to satisfy the entitlements of the liquidators or bankruptcy trustees in priority to other creditors. The decision of King CJ in *Re Suco Gold* falls into that category. There, the Chief Justice held that s 292 of the *Companies Act 1962 (SA)* gave the liquidator’s costs, expenses and remuneration priority by, first, “regarding” them as trust debts and, second, by holding that s 292 applied to the payment of trust debts. Other cases have found alternative justifications in the statutory regimes. Exemplars of that include the judgment of Jacobs J in *Re Suco Gold* and those of Lush J in *Re Enhill*. Some cases, of which *Bell Hire Services* is one, have reached the conclusion that there is nothing in the legislation which affords any priority to the claims of the liquidators. In the decisions of Needham J in *Re Byrne Australia Pty Ltd* and *Re Byrne Australia Pty Ltd (No 2)* his Honour considered the statutory regime in detail but ultimately concluded that it did not permit the expenses of the administration to be met from the trust assets at all.
8. The second category of cases rely upon the inherent or statutory supervisory power of the courts over trustees and trusts to justify the payment of costs, expenses and remuneration to the insolvency administrator. The power relied upon is said to arise from the general law of equity which enabled the courts to vary the rigid principle that trustees were to act voluntarily where the circumstances warranted the paying of remuneration; (*Re Freeman’s Settlement Trusts* (1887) 37 Ch D 148; *Nissen v Grunden* (1912) 14 CLR 297); or from the powers in various State statutes conferring a similar authority (s 101 of the *Trusts Act 1974 (Qld)* is relevant in this particular case). The decision of Black J in *MF Global Limited (in liq) (No 2)* [2012] NSWSC 1426 is an example of this as is the decision of Campbell J in *Re Application of Sutherland* (2004) 50 ACSR 297. Whilst, that general power to authorise the payment of remuneration may be appropriate in the regulation of the rights of trustees and beneficiaries *inter se* on the basis that it would be unconscientious for the beneficiaries to obtain the benefit of any exceptional voluntary exertions of the trustee, the same cannot be said of the alteration of rights as between the liquidator of a trustee and creditors of that trustee. Another difficulty with this approach is that it directs the payment of costs, expenses and remuneration to the insolvency administrator rather than to the trustee of the trust. This tends to significantly broaden the scope of power purportedly being exercised. In such cases, the exercise of power is not the mere approval of the reasonableness of payments, the validity of which is accepted. It is the exercise of a power which depends upon the circumstances of the case and which impacts upon trust and non-trust creditors alike, all of whom are not usually represented at the hearing of an application. Whilst the pragmatism of such an approach cannot be doubted, especially in the case of relatively small administrations, the underlying doctrinal justification is more obscure.
9. The third category of cases are those which justify the appropriation to the liquidator or bankruptcy trustee of trust funds to meet their entitlements by reason of the benefit derived by the trust creditors from the exertions of the insolvency administrators. The cases in this category include, *Berkeley Applegate* and Re Universal Distributing and those which have followed them, not in the least of which are the decisions of Black J in *Re Trio Capital Ltd (in liq)* (2012) 88 ACSR 700 and *Re Dungowan Manly Pty Ltd (in liq)* (2015) 105 ACSR 648. It can be readily accepted that this category consists of two parallel principles, one being equitable (*Berkeley Applegate*) and the other (*Re Universal Distributing*) probably originating at common law. (Cf the treatment of the Re Universal Distributing principle by the High Court in Stewart v Atco Controls Pty Ltd (in liq) (2014) 252 CLR 307 although that consideration tended to focus on the equitable charge which arose to protect the entitlement rather than the salvage principles from which the entitlement originated).
10. Whilst these three disparate strands of reasoning appear in the authorities, it is not infrequently the case that the differences between them, and in particular, between the second and third categories is not always maintained. Indeed, resort is often had to the principles in *Berkeley Applegate* and *Re Universal Distributors* to support conclusions which are primarily reached on basis of the first and second categories.

### Some authorities concerning the right to recover costs, expenses and remuneration

1. The following authorities provide an illustration of the various and diverse approaches to the justifications for payment of an insolvency administrator’s costs, expenses and remuneration from trust assets.
2. The decision in *Re Enhill Pty Ltd* has been briefly considered above. There the Court dealt with the winding up of an insolvent corporate trustee pursuant to the provisions of the *Companies Act 1961* (Vic). It took the view that the “proceeds of the trustee’s lien are available for division amongst the bankrupt’s creditors generally, not only among creditors of the trust business, and in the case of a company in liquidation are subject to the control of the liquidator under s.292” (at 564 per Young CJ; see also 569 per Lush J). The approach in *Re Enhill* was to regard the right of exoneration as a right in the trustee to beneficially appropriate trust funds to itself in an amount equal to the liabilities incurred in the performance of the trust regardless of whether or not the funds would be used to discharge those liabilities. It was a logical extension of that conclusion that such funds were property divisible amongst all of the trustee’s creditors and, indeed, property from which the liquidator’s priority claim for remuneration and expenses might be paid under the *Companies Act 1961* (Vic). As explained earlier in these reasons, the foundation of the decision has subsequently been shown to be in error by McLelland J in *Re ADM Franchise Pty Ltd* (1983) 7 ACLR 987.
3. The decision in *Re Suco Gold* provides a stark exemplar of the difficulty encountered when the court accurately identifies the limited nature of the right of exoneration, but then attempts to meet the claims of the external administrators of the insolvent trustee from that right. There, the Court correctly identified the right of exoneration as being the entitlement to discharge trust liabilities by use of trust funds (at 105, per King CJ), with the consequence that the trustee had no right to use or apply the trust property for any other purpose. At 107-108, King CJ said:

It seems to me, however, that the right of indemnity can only produce proceeds for division among the creditors generally if the trustee has discharged the liabilities incurred in the performance of the trust and is therefore entitled to recoup himself out of the trust property. If he has not discharged the liabilities, the right of indemnity entitles him to resort to the trust property only for the purposes of discharging those liabilities. He may apply the trust monies directly to payment of the trust creditors or he may take it into his own possession for that purpose. If he takes the trust property into his possession to satisfy his right to be indemnified in respect of unpaid trust liabilities, it seems to me that the property retains its character as trust property and may be used only for the purpose of discharging the liabilities incurred in the performance of the trust.

Given that conclusion, it is surprising that the Court allowed the liquidator’s costs, expenses and remuneration to be paid from funds which could be used “only” for the purposes of discharging trust creditors. Somewhat incongruously, after rejecting the decision in *Re Enhill* in so far as it held that the right of exoneration was property which was able to be used to meet the claims of all creditors,King CJ relied upon it as being “highly persuasive authority for the proposition that the liquidator’s costs, expenses and remuneration may be paid out of the trust property”. That was particularly unusual given that the conclusion in *Re Enhill*, that the trust assets might be used to meet the liquidator’s costs, expenses and remuneration, was only reached as a consequence of the determination that the right of exoneration beneficially placed trust funds at the disposal of the trustee. That point of principle had been expressly rejected by King CJ and the other members of the Court. Nevertheless, after stating that there were strong practical considerations in favour of allowing the use of trust funds to meet the liquidator’s expenses and remuneration, King CJ held that it could be “justified by reference to the obligations of the trustee company arising out of the carrying on of the business authorised by the trusts” and that on winding up the company’s debts may only be paid in accordance with the provisions of the *Companies Act 1961* (Vic). That necessarily required a liquidator to incur costs and expenses and be paid remuneration. The learned Chief Justice then referred to the existing provision of the *Companies Act*, s 292 which provided for the payment of the expenses and remuneration of the liquidator in priority to other unsecured debts and said (at p 110):

As the company’s obligation as trustee to pay the trust debts incurred in carrying out the trust cannot be performed unless the liquidation proceeds, it seems to me to be reasonable to regard the expenses mentioned above as debts of the company incurred in discharging the duties imposed by the trust and as covered by the trustee’s right of indemnity.

(Emphasis added)

The learned Chief Justice was, no doubt, troubled by the approach of effectively “deeming” liabilities to be “trust debts”, with the consequence that he identified an alternative basis upon which the trust funds could be used to meet the liquidator’s claims:

If the reasoning is wrong I would, like Lush J in *Enhill Pty Ltd* be prepared to rely on the principle enunciated by Dixon J in *Re Universal Distributing Co Ltd (in liquidation)*.

(Citations omitted)

As appears from the discussion which follows, recent authorities have identified the twin principles in *Re Universal Distributing Co* and *Berkeley Applegate* as providing a more solid foundation for granting relief to insolvency distributors.

1. The orders made by the Court in *Re Suco Gold* (see p 111) were to the effect that the cost, expenses and remuneration of the liquidators and the costs of the winding up application were to be paid in priority to the trust creditors. Unfortunately, the primary basis on which the Court held that the liquidator’s costs, expenses and remuneration were to be paid from the trust assets; being that they were to be “regarded” as trust debts; does not adequately explain how it is that they were to be accorded priority over the other trust creditors. If it were the case that the liquidator’s costs, expenses and remuneration were trust debts, it would necessarily follow that they would rank *pari passu* with all other trust debts.
2. In *Re Suco Gold*,Jacobs J agreed with the Chief Justice as to the entitlement of the liquidators to be paid from the trust assets or right of exoneration. His Honour relied upon a construction of s 292 of the *Companies Act 1962* (SA) as permitting the use of trust assets for the meeting of those expenses. He held (at p 113) that the right of trust creditors to prove in the liquidation was specifically identified in the provisions of the *Companies Act* to be subject to the priority regime:

Looking at the whole legislative scheme, therefore, I can find nothing in the language or structure of the legislation to deny the proposition that, in a case such as this, s 292 can operate upon the trust assets to provide for the remuneration of the liquidator in priority to other claims, more particularly as the other provisions of s 292 would seem clearly to be available to regulate the rights of creditors *inter se*. To hold otherwise would defeat, or at least frustrate, the legislation. The liquidator is appointed by the Court, and is answerable to the Court, and is clearly entitled to remuneration for his services whether fixed by the Court or by the creditors whose proofs have been admitted. He would not be available to act at all unless the Act is allowed to speak according to its tenor; and indeed, unless the Act so speaks, the Court itself would be in no better position to recover the costs and expenses of the winding up, if the winding up were undertaken by the Court without the intervention of a liquidator. I cannot think that the legislature intended such a result, and I am not persuaded that the language of the Act, or the general law, compels such a result.

His Honour concluded (at p 115) that the priority regime in the *Companies Act* applied to the insolvent trustee’s right of exoneration and, therefore, it was available for meeting the liquidator’s claims. Whilst it is difficult to discern in his Honour’s reasons how it might be that the trustee’s right to apply trust funds *only* in discharge of the trust creditor’s debts might be reformulated into a right to use trust money for other purposes, perhaps the answer is in Lush J’s observations (ibid) that, “I prefer to rest my decision upon what appears to me to be the manifest intention of the legislation, derived from the structure and language of the Act”.

1. Whilst the outcome in *Re Suco Gold* in relation to the costs, expenses and remuneration of the liquidator is pragmatic, undoubted tension remained between the nature of the right of exoneration and the ability to use it for those purposes. The conclusion of Jacobs J appears to come perilously close to contravening the prescription which exists in the statutory insolvency regimes (albeit implicitly in the *Corporations Law*) that trust assets are not to be used to meet the claims of ordinary creditors and the costs and expenses of the administration of the insolvency.
2. An important decision in this context is that of Brereton J in *Re Independent Contractor Services (Aust) Pty Ltd (in liq)* (2016) 305 FLR 222. It has been discussed above and, it will be recalled, in it his Honour determined that the right of exoneration was a trust asset to which s 556 of the *Corporations Act* did not apply. The further question considered by Brereton J concerned the ability to utilise the assets of the trust to meet the liquidator’s costs, expenses and remuneration. Given that his Honour accepted that property which is not beneficially owned by a company is not available to meet the claims of its creditors (*Re Australian Home Finance Pty Ltd* [1956] VLR 1; (1955) 63 Arg LR 247; *Re Kayford Ltd* [1975] 1 All ER 604), it is somewhat counter intuitive that he determined that the funds might be used to meet the liquidator’s claims. In this respect his Honour made the rather broad statement that:

[27] The liquidators of a company which is the trustee of the trading trust and has no other activities, are entitled to be paid their costs and expenses, whether for administering the trust or for “general liquidation work”, out of the trust assets.

His Honour referenced the following cases as supporting that proposition: *Re Suco Gold Pty Ltd (In Liq)* (1983) 33 SASR 99; *Grime Carter & Co Pty Ltd v Whytes Furniture (Dubbo) Pty Ltd* [1983] 1 NSWLR 158; *Re French Caledonia Travel Service Pty Ltd (in liq)* (2003) 59 NSWLR 361; 184 FLR 280 at [201]; *Bastion v Gideon Investments Pty Ltd (in liq)* (2000) 35 ACSR 466 at [70]; *In the matter of North Food Catering Pty Ltd* (2014) 32 ACLC 14-049; *Re AAA Financial Intelligence Ltd (in liq) ACN 093 616 445 (in liq)* [2014] NSWSC 1004 at [13]. His Honour had made an almost identical comment in the last of these cases where he had described the statement as being the “first principle” to be applied when considering claims by liquidators for their costs, expenses and remuneration from trust assets held by an insolvent trustee company. It seems to be implicit in his Honour’s statement of principle that the insolvent trustee company has remained as trustee despite the winding up order and has retained ownership of the assets which were the subject of the trust.

1. The reliance by his Honour on *Re Suco Gold* as supporting that “first principle” necessarily suggests that it should be more accurately stated as being that the costs, expenses and liability for remuneration arising out of the liquidation are trust debts of the trustee and must be met *by the exercise of the right of exoneration from the trust assets*. The difficulty with this is that the approach in *Re Suco Gold* which deems the liquidator’s imposts to be “trust debts”, does not afford any sound basis for according the payments to the liquidator any priority over the other trust creditors. In fact, in his subsequent decision in *Re Independent Contractor Services*, Brereton J himself asserted that *Re Suco Gold* was in error in applying the priority provisions of the *Corporations Act 2001* (Cth) to payments out of the assets of the trust. Despite all of that, it seems to be implicit in the comments of Brereton J in *Re AAA Financial* above that, not only are the assets of the trust available to meet the costs, expenses and remuneration of the liquidator, but that the liquidator is entitled to priority over the other trust creditors.
2. Justice Brereton also specifically cited *Grime Carter and Co v Whytes Furniture (Dubbo) Pty Ltd* [1983] 1 NSWLR 158, a decision of McLelland J, in support of the proposition that the liquidator was entitled to recover amounts in relation to the costs, expenses and remuneration from the trust assets. However, that decision and its reasoning must be doubted given McLelland J’s subsequent judgment in *Re ADM Franchise Pty Ltd* (1983) 7 ACLR 987, where he repudiated the underlying reasoning which led him to the conclusion in *Grime Carter & Co* that the trust assets were available to meet the costs, expenses and remuneration of a liquidator.
3. His Honour further relied upon the decision of Campbell J in *Re French Caledonia Travel Services Pty Ltd (in liq)* (2003) 59 NSWLR 361; [201] in support of his first principle. That decision, however, merely relied upon the approach of King CJ in *Re Suco Gold* to the effect that the costs and expenses in the liquidation process should be “regarded” as debts of the trustee incurred in discharging the trustee’s duties. The decision of Austin J in *Bastion v Gideon Investments Pty Ltd (in liq)* (2000) 35 ACSR 466, [70] was also cited by Brereton J in support of his first principle. Again, there is some inconsistency in that Austin J purported to follow the inconsistent decisions of *Enhill* and *Suco Gold*,neither of which formed the basis of Brereton J’s conclusion that the right of exoneration was a trust asset.
4. Lastly, Brereton J relied upon his earlier decision in *In the matter of North Food Catering Pty Ltd* (2014) 32 ACLC 14-049. There he referred to a number of authorities which had adopted a variety of approaches to support the payment of the costs, expenses and remuneration of liquidators of trustee companies and said:

17 Those cases appear to me to establish clearly enough that in the present case the liquidators are entitled to be paid their remuneration, whether for administering the trust assets or for general liquidation work, out of the trust assets, since the company has no assets other than trust assets.

Unfortunately, his Honour did not identify which of the various foundational principles caused him to reach that conclusion. His Honour did refer to the decision of Black J in *Re MF Global Australia Ltd (in liq) (No 2)* [2012] NSWSC 1426, which, in part, adopted the approach of Campbell J in *Re Application of Sutherland* (2004) 50 ACSR 297, which, itself, relied upon the inherent power of a Court to allow a trustee’s costs, expenses and remuneration out of the assets of a trust.

1. From this brief review of the “first principle” of Brereton J in *AAA Financial* (which was repeated in *Re Independent Contractors*), it is apparent that the authorities on which his Honour relied are, themselves, based upon a variety of inconsistent foundations. That is not to say that his Honour’s first principle is not broadly correct. However, a more precise focus upon the underlying rationale for the principle might assist in elucidating its boundaries. In particular, an understanding of its juridical basis would disclose whether liquidators should be entitled to be paid out of the trust assets *per se* or only those assets in respect of which the insolvent trustee has a right of exoneration. The terms in which the first principle are stated suggest that liquidators of a trustee company which had no right of exoneration would, nevertheless, be entitled to recover their claims for their work in the winding up out of the trust assets. It would be most unusual were the first principle to extend that far and no case suggests that the beneficial interest of beneficiaries in trust assets ought to be applied in this manner.
2. The decision of Farrell J in *Bell Hire Services* is also important in this context and particularly so given that her Honour identified that the insolvent trustee’s right of exoneration was merely the right to cause the trust assets to be applied to discharge trust debts. However, it appears that her Honour adopted the view that the power to order that the liquidators be paid their costs, expenses and remuneration was unconnected with the right of exoneration and that the discretion of the Court to make an order in this respect was at large. At paragraph [22] her Honour said:

[22] The liquidator's remuneration and expenses in respect of work relating to trust assets which is properly done for the purpose of winding up the company's affairs should be paid out of non-trust property of a trustee company to the extent that such property is available. However, if non-trust property is not available and a liquidator would not otherwise be required to undertake that work, it would normally be appropriate for the cost of the work to be paid from trust assets: see *Re AAA Financial Intelligence Ltd (in liq ACN 093 616 445)* [2014] NSWSC 1004 (AAA) per Brereton J at [13].

This approach appears to be inconsistent with her Honour's consideration of how the costs of the winding up application ought to be dealt with. Her Honour held that those costs had to be treated as trust debts in accordance with the decision in *Re Suco Gold,* but that they did not enjoy any priority over other trust debts such that they ranked *pari passu* with other trust creditors.

1. A careful review of the significant authorities concerning the entitlement of a liquidator of a corporate trustee to be paid their costs, expenses and remuneration from trust assets was recently undertaken by Robson J in *Re Mamounia Pty Ltd (in liq)* [2017] VSC 230 at [111] – [162]. There is no need for that discussion to be repeated here. Importantly, his Honour ultimately determined at [169] that the correct approach was to apply the principles established in *Re Universal Distributing* which entitled the liquidator of a trustee company to access trust assets for his reasonable expenses and remuneration incurred in taking steps to investigate and conduct certain public examinations to ascertain and assess the validity of the claims by certain creditors and the related parties against the trust assets as well as the existence of any claims against various entities. This was founded upon his Honour’s earlier identification (at [111]) that the principle to be derived from *Re Universal Distributing* permitted payment from the fund of money created by the liquidator of so much of the remuneration “fixed for work done in the winding up which was referable to the calling in and conversion of the assets producing the fund” and which would include expenses reasonably incurred in the care, preservation and realisation of the property.
2. The exact nature of the principles which underlie the Court’s power to permit the external administrator of an insolvent trustee to recover from trust assets its costs, expenses and remuneration in priority to the trust creditors, does not emerge from the disparate authorities on this topic. That is not surprising given that the antecedent question of what are the rights of the insolvency administrator to access the right of exoneration or the trust assets is, itself, uncertain. Nevertheless, what is clear is the appreciation that the administration in the insolvency of a trustee necessarily has the consequence that trust creditors will have their claims met or dealt with in one way or another. In the circumstances where no new trustee is appointed, the discharging of such debts can only occur through the liquidation process which, in itself, will often involve substantial work in administering the trust. The net result is that trust creditors will be paid, in whole or in part, as a consequence of the work undertaken by the insolvency administrator.
3. In *Re Universal Distributing* the company being wound up had issued debentures which were secured by a floating charge over all of its undertaking. Its assets were insufficient to meet the claims of the debenture holders, yet the liquidator sought to be allowed his remuneration and disbursements from the proceeds realised in the sale of those assets. The debenture holders objected to the granting of this priority to the liquidator at the expense of their secured entitlements. Central to the decision of Dixon J was the notion that, regardless of how the assets were realised, the cost of doing so would inevitably be borne by the debenture holders. If they were realised at the suit of the holders themselves, they would bear the realisation costs as they could only ever receive the net proceeds of sale after the Court appointed receivers’ costs had been deducted. Necessarily, that foundational conclusion resulted in a distinction being drawn between the work which was necessary to be carried out in the preservation and realisation of the secured assets on the one hand, and the conduct of the winding up on the other. In this respect Dixon J concluded at pp 174 - 175:

In applying this principle, only those expenses appear to have been thrown against the fund belonging to the debenture-holders which have been reasonably incurred in the care, preservation and realisation of the property. In the present case the liquidator has employed a material part of his time and energies in recovering moneys, both uncalled capital and debts, which enure for the debenture-holder, and in so far as these services increase the remuneration which he receives, I see no reason why the burden should not be thrown upon the proceeds. The question is not whether moneys available for unsecured creditors should be relieved at the expense of the security. In such a case it may be said that the service of collecting enough to discharge the debenture must in any event be performed in order that a surplus may then arise in which the unsecured creditors may participate. The question in the present case is whether the liquidator can charge against the fund passing through his hands, as between himself and the person to whom it is payable, so much of the remuneration fixed for work done in the winding up as is referable to the calling in and conversion of the assets producing the fund. I see no reason why remuneration for work done for the exclusive purpose of raising the fund should not be charged upon it.

1. The principle in *Re Universal Distributing* has been applied in a variety of cases to justify the payment to a liquidator or a bankruptcy trustee their costs, expenses and remuneration in relation to the realisation of trust funds which are otherwise subject to the subrogated lien of trust creditors. In *Re Dungowan Manly Pty Ltd (in liq)* (2015) 105 ACSR 648 at [85] Black J suggested that the *Re Universal Distributing* principle extended the liquidators entitlement to recover expenses for work performed for the purpose of “identifying or attempting to identify trust assets; recovering or attempting to recover trust assets; realising or attempting to realise trust assets; protecting or attempting to protect trust assets; distributing trust assets to the persons beneficially entitled to them”. He did so by reference to the comments of Finkelstein J in *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)* (1999) 30 ACSR 377 at [34]. It is, perhaps, arguable that the comments of Finkelstein J were actually directed to the related principle in *Berkeley Applegate* rather than that in *Re Universal Distributing*, although Finkelstein J, himself, may not have differentiated between them. Whether or not that is so may not matter given that any difference in the range of activities for which compensation might be allowed within the scope each principle is probably insignificant.
2. In the recent decision of *Freelance Global v Bensted Ltd (in liq)* [2016] VSC 181 at [64], Riordan J considered that the *Universal Distributing* principle entitled a liquidator of a trust company who has acted reasonably, to be indemnified out of the trust assets for their costs and expenses in “identifying or attempting to identify trust assets; recovering or attempting to recover trust assets; realising or attempting to realise trust assets; protecting or attempting to protect trust assets; and distributing trust assets to the persons beneficially entitled to them” (see also the discussion by Markovic J in *Kite v Mooney (No 2)* at [142]ff). In *Dixon v Wieselmann* (2013) 93 ACSR 576 at 588; [41], Robson J identified that it was not necessary to demonstrate that the work and expenses actually had the consequence of adding value or benefiting the persons interested in the property. What was necessary in order to establish the entitlement to remuneration and the recovery of costs was that the work was necessary, that the costs were reasonably incurred, and that there was a sufficient nexus with the “salvage objective”.
3. It has been observed that the right created by the *Universal Distributing* principles gives the entity undertaking the work in the realisation of the assets a charge over the proceeds derived by their work (Stewart v Atco Controls Pty Ltd (in liq) (2014) 252 CLR 307; *Coumanios v Giunti* [2017] FCA 678 at [75]).
4. Many of the cases to which reference has been made have also relied upon the somewhat parallel equitable principle which was applied by Mr Edward Nugee QC sitting as a Deputy High Court Judge in *Re Berkeley Applegate (Investment Consultants) Ltd (in liq)* [1989] Ch 32. In that matter the liquidator of an insolvent trustee company, before incurring substantial expenses, took the precautionary step of seeking advice from the Court as to his entitlement to an indemnity out of the assets held on trust for his costs, expenses and remuneration. In his reasons, at pp 49 – 50, His Honour considered a number of authorities concerning the application of the maxim that “he who seeks equity must do equity”. He regarded that maxim as meaning that “a person who comes to seek the aid of a court of equity to enforce a claim must be prepared to submit in such proceedings to any directions which the known principles of a court of equity may make it proper to give” (*Halsbury’s Laws of England*, “Equitable Jurisdiction” Vol 47(2), paragraph [110]). He identified that, in the case before him, the debenture holders required the assistance of a court of equity to secure their rights and, on that basis, he said (at p 50):

“As a condition of giving effect to their equitable rights, the court has in my judgment a discretion to ensure that a proper allowance is made to the liquidator. His skill and labour may not have added directly to the value of the underlying assets in which the investors have equitable interests; but he has added to the to the estate in the sense of carrying out the work which was necessary before the estate could be realised for the benefit of the investors. As was the case in *Scott v Nesbitt* (1808) 14 Ves 438, [1803–13] All ER Rep 216, if the liquidator had not done this work it is inevitable that the work, or at all events a great deal of it, would have had to be done by someone else, and on an application to the court a receiver would have been appointed whose expenses and fees would necessarily have had to be borne by the trust assets. On the evidence before me, the beneficial interests of the investors could not have been established without some such investigation as has been carried out by the liquidator.

His Honour then stated that the allowing of a fair compensation to the liquidator was a proper application of the rule that, “he who seeks equity must do equity”. His Honour continued (at pp 50 – 51):

The authorities establish, in my judgment, a general principle that where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property. It is a discretion which will be sparingly exercised; but factors which will operate in favour of its being exercised include the fact that if the work had not been done by the person to whom the allowance is sought to be made, it would have had to be done either by the person entitled to the equitable interest (as in *Re Marine Mansions Co* (1867) LR 4 Eq 601 and similar cases) or by a receiver appointed by the court whose fees would have been borne by the trust property (as in *Scott v Nesbitt* (1808) 14 Ves 438, [1803–13] All ER Rep 216), and the fact that the work has been of substantial benefit to the trust property and to the persons interested in it in equity (as in *Boardman v Phipps* [1966] 3 All ER 721, [1967] 2 AC 46). In my judgment this is a case in which the jurisdiction can properly be exercised.

1. His Honour observed that this principle had a variety of applications and was akin to the salvage doctrine. In this respect the underlying rationale was similar to that relied upon by Dixon J in *Re Universal Distributing*. His Honour also noted that the principle applied so as to afford to the person actually undertaking the work in question the benefit of the entitlement to reimbursement and remuneration. That overcame the difficulty that, if the amount of the costs and remuneration was paid to the insolvent corporate trustee, they would have to be applied in accordance with the requirements of the insolvency provisions. In the result, his Honour allowed the liquidator his proper expenses and remuneration out of the fund which had been created.
2. Many of the authorities on which Mr Nugee QC relied concerned the rights of debenture holders in the context of a corporate liquidation, and the competing claims of liquidators who had undertaken work in the realisation of the company’s property including that covered by securities. (See *In re Marine Mansions Co* (1867) LR 4 Eq 601; *In re Oriental Hotels Co* (1871) LR 12 Eq 126; *In Re Regent’s Canal Ironworks Co* (1875) 3 CH D 411 amongst others). Needless to say, in such situations the secured creditors are interested to be paid their debts out of the realisations obtained by the liquidator and, to that extent, it is undeniable that the actions of the liquidators enure for their benefit. However, the same clarity in respect of the receipt of a benefit by the trust creditors does not always translate to the tripartite situation of a trust (trustee, beneficiary and creditor) where a corporate trustee is being wound up or an individual trustee’s affairs are being administered in bankruptcy. In *Berkeley Applegate* the trustee, along with the trust, was being wound up for the benefit of the investor / beneficiaries in the mortgage scheme. The expenses incurred in the winding up of the trust were necessarily incurred as part of its administration and it was appropriate that the liquidators received their costs, expenses and remuneration out of the trust assets such that the burden appropriately fell upon the beneficiaries. The position is quite different when the trustee is being wound up or their estate is being administered, yet the trust, itself, remains solvent and is intended to continue in existence. In that scenario, the identification of assets, their realisation for the purposes of creating a fund from which the right of exoneration might be used, and the payment of creditors is primarily for the benefit of the trust creditors rather than the beneficiaries. It would follow from the general principles identified by Mr Nugee QC that the liquidators’ costs, expenses and remuneration should be borne by the trust creditors who will benefit from being paid from the right of exoneration, rather than permitting the liquidators to take additional funds from the trust assets. That said, it is foreseeable that arguments might be made in a converse scenario that the payment of trust creditors might advance the interests of the both beneficiaries and the trust creditors, depending upon the circumstances of the case.
3. In *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)* (1999) 30 ACSR 377, Finkelstein J considered the scenario where a trustee and its trusts were being wound up for the benefit of the beneficiaries as well as the creditors. His Honour noted that the principles in *Berkeley Applegate* and *Re Universal Distributing* required that attention be directed to identifying the entities for whose benefit the work by the liquidator was conducted. In that case, it was held that to the extent to which the work was done by the liquidator in what was, effectively, the administration of the trust, the costs, expenses and remuneration were to be paid out of the trust assets (at p 385). To the extent to which the work done was in the ordinary winding up of the company, referred to by his Honour as “general liquidation matters”, it was to be paid for out of the assets beneficially owned by the company. Where the company in liquidation only acted as a trustee of the relevant trust, *and* the trust itself is insolvent, it might be that much of the work involved in “general liquidation matters” was necessary in the proper administration of the trust and, therefore, chargeable against the trust assets. On the other hand, where the insolvent trustee has only non-trust creditors but insufficient assets of its own to meet the costs, expenses and remuneration of a liquidator or bankruptcy trustee, it is difficult to identify any basis on which an order might be made permitting recourse to the trust assets or the right of exoneration to satisfy the shortfall.
4. The parallel principles found in *Berkeley Applegate* and *Re Universal Distributing* provide a much surer foundation to support an order that an insolvency administrator have recourse to trust assets or to the right of exoneration to meet the costs, expenses and remuneration of their administration. Generally, there will be no need to distinguish between the two principles as they each cover the relevant expenses under consideration. It should, however, be kept in mind that much will depend upon the circumstances of the case. In most cases where the trust, itself, is insolvent in the sense that the right of exoneration overwhelms the beneficiaries’ interests in the assets held on trust, no great difficulty arises. The insolvency regimes require that the trust creditors be paid in the course of the liquidation or administration and, for that to occur, the trust itself needs to be wound up. Consequently, the insolvency administrators are entitled to be paid from the fund they create for the purposes of applying the right of exoneration. Where, in such a case, the only business of the trustee was to operate the trust, there are good arguments in favour of the view that all the costs of the administration can be paid out of the fund created to meet the right of exoneration (*Combis in the matter of Reehal Holdings Pty Ltd (in liq)* [2017] FCA 793 at [29]). Where, however, the insolvent trustee has other non-trust creditors, only those amounts referable to the creation of a fund and the payment of trust creditors might be met from the fund so created. Further, where a right of exoneration does not exist at all, there are likely to be strong arguments to the effect that the liquidators will not be entitled to access any trust funds to meet their costs, expenses and remuneration of the administration.

### The application of the Berkeley Applegate/Universal Distributing principles in the present matter

1. Here the question as to whether the burden of the Bankruptcy Trustees’ imposts ought to fall on the trust creditors or the beneficiaries does not need to be decided. The right of exoneration overwhelms the value of any property held upon the terms of the trust with the consequence that there are no remaining “trust assets” in which any beneficiary has an interest. That being so, the only property relevant to the work undertaken for the purposes of meeting the trust creditors’ claims is the right of exoneration and the “fund” of money created pursuant to that right. It follows that the burden of meeting the Bankruptcy Trustee’s imposts will fall on the trust creditors for whose benefit that work will enure.
2. Necessarily, the scope and value of the right of exoneration and the use to which it might be put can only be known after substantial work is completed in relation to the insolvent trustee’s affairs. Such work, includes identifying the assets of the trustee and distinguishing between those which are beneficially owned and those which are held on trust; identifying the liabilities of the trustee and distinguishing between the trust and non-trust liabilities; recovering the trust assets which are sufficient to meet the right of exoneration; realising or attempting to realise trust assets; ascertaining the state of account as between the trustee and the beneficiaries; and, if there is a balance in favour of the trustee, exercising the right of exoneration from the fund of money created. Unless this work is undertaken the right of exoneration cannot be applied in favour of the trust creditors. Any receiver appointed by the Court at the suit of the trust creditors would need to perform those tasks in order to secure payment to those entitled. In cases such as the present, the intervention of the trustee’s insolvency has prevented the trustee from being able to discharge the trust debts and the Act obliges the Bankruptcy Trustees to assume the trustee’s responsibility and discharge the trust debts. Regardless of how the matter is viewed, the work identified had to be completed and paid for in order that the trust creditors’ claims are met.
3. This is also a case where the trust creditors require the assistance of the Court to secure their rights to the extent to which they assert that they are entitled to payment from the trust assets by use of the right of indemnity. In their capacity as creditors they may claim in the bankruptcy in the usual way. However, in order to secure their advantage as trust creditors they need to rely upon the trustee’s equitable right of exoneration and the additional equitable entitlement to be subrogated to that right. It should be kept in mind that the right of subrogation is more of a remedy than it is a right and, being a remedy available in equity, it is only granted where the court considers appropriate (*Lerinda Pty Ltd v Laertes Investments Pty Ltd* [2010] 2 Qd R 312 at [7]). Although the process of obtaining the court’s assistance in the enforcement of their rights is modified by the statutory bankruptcy regime for proving debts, the trust creditors are still required to assert their entitlements in equity to achieve their preferential treatment. Additionally, outside of the proving of debts in bankruptcy, the enforcement of the lien over the trust assets, on which the trust creditors necessarily rely, would require the assistance of the Court.
4. From the facts just identified it is apparent that the *Berkeley Applegate* principle is applicable to the present matter. The Court can require, as a condition of the trust creditors being paid by the exercise of the right of exoneration, that the costs, expenses and remuneration of the Bankruptcy Trustees relating to their payment be met from the pool of funds “created” by the Bankruptcy Trustees. Those imposts are to be paid in priority from the funds which have been made available to satisfy the right of exoneration. This is not to suggest that the right of exoneration can be put to any unauthorised use. However before that right can be exercised, a pool of funds is required to be established from which the payments to the trust creditors can be made. The bankruptcy trustee or liquidator whose work has created that fund is entitled to be paid from it the reasonable costs, expenses and remuneration for doing so. The fulfilment of that entitlement is imposed in equity upon the trust creditors and their right to receive payment pursuant to the subrogated right of exoneration.
5. The above analysis has occurred within the scope of the *Berkeley Applegate* principles, however, the same result would be reached by the application of the decision in *Re Universal Distributing.* The work which was done by the Bankruptcy Trustees was necessary to ensure that the trust creditors received the benefit of their subrogated right of exoneration. The appointment of the Bankruptcy Trustees following the intervention of the trustee’s insolvency, created the relevant “necessity” which required them to administer the trust so as to create the pool of funds from which the trust creditors’ claims could be met. The legislative imperatives required that work to be done, at least, for the purposes of ascertaining the assets of the bankrupt which might be used to meet the claims of creditors. If that had not been undertaken by the Bankruptcy Trustees the trust creditors would have been required to make an application to the Court for an order that their lien be enforced, that receivers be appointed to take possession of trust property and that they sell it. The Court’s leave would be required to make such an application and, where there exists a bankruptcy trustee who is able and willing to act to undertake the statutory duties, it might be unusual were a Court to upset the orderly administration of the estate by granting leave. If a receiver was appointed, a necessary part of their obligations would be the identification of all of the trustee’s creditors and distinguishing between the trust and non-trust creditors. The receiver would also have to, effectively, undertake an account in relation to the trust to ascertain the extent of the trustee’s right of exoneration, if any. If a right of exoneration existed, the receiver would then have to realise the available trust assets so as to aggregate funds which might be used to meet the trust creditors’ claims. As the circumstances required the Bankruptcy Trustee to perform all of these tasks, the “salvage principle” in *Re Universal Distributing* applies such that the trust creditors are not entitled to receive the benefit of the right of exoneration without accounting to the Bankruptcy Trustees in respect of their costs, expenses and remuneration relating to that entitlement. The Bankruptcy Trustees are entitled to a charge on the fund of money created to preserve their entitlement as against the trust creditors.
6. The consequence of the above is that the *Re Berkeley Applegate* and *Universal Distributing* principles provide similar outcomes. Either provides a more rational path to an order entitling the Bankruptcy Trustees their costs, expenses and remuneration than do the approaches of deeming those imposts to be priority trust debts or, by an expansive construction of the powers of the Court to allow trustees remuneration from the trust assets.

### Scope of the work for which costs, expenses and remuneration should be allowed

1. It follows from the above discussion that the work in respect of which the Bankruptcy Trustees are entitled to their costs, expenses and remuneration in priority to the claims of the trust creditors, is that which was undertaken to ensure that the right of exoneration could be used to meet the claims of trust creditors. It includes work concerned with:
   1. the identification of the trustee’s assets and liabilities and distinguishing between trust and non-trust assets;
   2. the identification of trust creditors and distinguishing between them and non-trust creditors;
   3. the ascertaining of the state of the accounts between the beneficiaries and the trustee;
   4. the recovering or attempts to recover trust assets;
   5. the securing of trust assets (or their value);
   6. the realisation or the attempted realisation of trust assets to create a fund to meet the right of exoneration;
   7. the distribution of funds which are the subject of the right of exoneration to those who are entitled to them;
   8. any matter in the administration of the trust which is ancillary to the above to the extent to which it was reasonably necessary to be undertaken for the purposes of the identified tasks.
2. The benefit which the trust creditors receive from the work of the bankruptcy trustees in cases of this kind includes the ascertainment of their debts and the accumulation of funds from which the debts might be paid. Work may well have been performed to that end which does not result in an accretion to the pool of funds. Indeed, work may well be performed which actually results in a diminution of the value of that fund. The reasonable pursuit of recovery action against a trustee or a third party which does not succeed is a good example. Nevertheless, so long as the action was reasonably taken in an attempt to realise the assets so as to create funds from which the trust creditors might be paid, the associated costs, expenses and remuneration are recoverable by the insolvency administrators.

## Reasonableness of remuneration

1. The Bankruptcy Trustees also seek directions or relief in relation to the reasonableness of their remuneration, expenses and charges. Given the relatively small size of this estate and the relatively modest amounts involved it is not inappropriate that the Court determine this matter as part of the wider application. However, a court would often be justified in refusing to give a direction of this nature when it is sought as an addendum to a much more substantive and complicated application as is the case here. Recent authorities mandate that the courts must necessarily give careful and complete consideration to any applications by insolvency practitioners in respect of their remuneration and reimbursement. That is so whether the application is made in a personal or a corporate insolvency. Those authorities identify that courts are now much more astute to carefully examine such claims and, it follows, an appropriate amount of time is required in any hearing to allow the applicants to justify them.
2. The total of the “remuneration” in respect of which directions are sought is $191,032 though it is presumed that this includes costs and expenses as well. It seems that the liquidators have already met some of their claims from the funds held in the personal estate of Mr Lee or, to the extent to which they relate to the utilisation of the right of exoneration, from the trust funds in their possession.
3. As is appropriate in the insolvency administration of a trustee or erstwhile trustee, the Bankruptcy Trustees have maintained two separate operating accounts or ledgers in respect of their remuneration, costs and expenses. One is attributable to work in relation to the trust funds and the other to work done on the bankrupt’s personal estate. Costs, charges and remuneration claims have been appropriately apportioned to those accounts. The evidence before the court discloses that 46.76% of the total cost, expense and remuneration relates to the work done in relation to the trust funds. That apportionment ought to be accepted and, on the basis that the percentage conforms to what has been said in the above discussions, the relevant amount can be paid from the funds in the hands of the Bankruptcy Trustees which represents the pool of funds to be used to satisfy the right of exoneration.
4. The Bankruptcy Trustees have sought to calculate their remuneration on a time costing basis. In recent years, this method has been the subject of some controversy with Brereton J questioning its appropriateness (*Re AAA Financial Intelligence Ltd (in liq)* [2014] NSWSC 1270 at [45] at [53]; *Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No 2)* (2016) 305 FLR 222 at 233-234; [31]-[33] and *Re Hillion Protection Pty Ltd (in liq)* [2014] NSWSC 1299). As one of Australia’s leading corporations lawyers whose learning and experience in this area is unrivalled, his Honour’s views require the utmost respect. Indeed, they would resonate with the views of any experienced legal or insolvency practitioner. Recent experience has shown that charging on a time-costing basis can lead to situations where any financial benefit to a liquidation is dwarfed by the insolvency practitioner’s costs. That is not to say that such an outcome is necessarily inappropriate. It is frequently the case that insolvency administrators are confronted with extremely complex corporate and financial arrangements which are exacerbated by poor compliance with appropriate accounting standards. In such circumstances it is not surprising that the cost of merely ascertaining the nature, structure and financial state of the undertaking is a most expensive exercise. Nevertheless, the “time costing” basis of charging for such work can, and often does, lead to poor and inefficient practices within legal and accounting offices. That being so, in order for a liquidator or bankruptcy trustee to convince a Court of the appropriateness of their time costed claims, they will necessarily be required to establish the reasonableness of the work done, the length of time that the work was done, and the rates at which various staff are charged. However, the production to the court of vast amounts of data disclosing individual entries for individual pieces of work with associated assertions of time spent and charge out rates is unlikely to be sufficient. More often than not, much of that information has limited meaning without an appropriate analysis of the nature of the work done and an explanation for its necessity.
5. Recently, in *Sanderson as liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr* [2017] 118 ASCR 333, on appeal from Brereton J, the New South Wales Court of Appeal considered the principles to be applied on an application for the approval of liquidator’s remuneration under the *Corporations Act 2001* (Cth). Whilst the consideration by that Court of s 473(3) and (10) of the *Corporations Act* is not directly referable to the court’s discretion in the present matter, the principles there identified have more than a passing relevance. At first instance Brereton J favoured the calculation of remuneration on an *ad valorem* basis rather than on a time costing basis. His Honour considered that to be appropriate in circumstances where the time costed value of the liquidator’s work was proportionately excessive when compared to the resulting benefits to the company. The Court of Appeal (consisting of Bathurst CJ, Beezley P, Gleeson JA, Barrett AJA and Beach AJA) acknowledged that it was well settled that the onus is on the liquidator to establish that the remuneration claimed is reasonable and that the court is to determine the appropriateness of the remuneration on a consideration of the material before it and by bringing an independent mind to bear on all relevant issues (at [54]). It noted that, in making that determination, proportionality is a “well recognised factor in considering the question of reasonableness” (at [55]). The question of proportionality must be considered in terms of the work done when compared to the size of the property, the subject of the insolvency administration or the benefit to be obtained from that work. Moreover, the work which has been performed must be appropriately proportionate to the difficulty and importance of the task in the context in which it is to be performed. In considering the reasonableness of the remuneration claimed, the percentage that the remuneration constitutes of the total realisation in the administration is a useful objective measure. On the other hand the Court of Appeal accepted that the mere fact that work performed does not significantly, or at all, augment the funds available for distributions does not necessarily negate a liquidator’s claim to be remunerated for it. That is particularly so in cases where it was reasonable to pursue recovery action albeit that the proceedings were not successful (at [58]). In such circumstances it cannot be said that a “time costing” approach will always be inappropriate even though the criticisms of that approach must be kept in mind.
6. In this matter the total amount of the costs, expenses and remuneration claimed by the Bankruptcy Trustees are large when compared to the size of the estate, although the work undertaken appears to have been necessary. On the basis that the calculations provided in submissions broadly coincides with the entitlements of the Bankruptcy Trustees pursuant to the *Berkeley Applegate* and *Universal Distributing* principles, it is appropriate to make the direction that the Bankruptcy Trustees are entitled to receive 46.76% of $191,032 or $89,326.56 from the proceeds of sale of the Subway business in partial discharge of their claim for costs, expenses and remuneration of the administration of the estate of Mr Lee. The remainder of the Bankruptcy Trustees’ costs, expenses and remuneration are payable from the proceeds of the sale of the assets in Mr Lee’s personal estate.

## Declaration as to the reasonableness of the Bankruptcy Trustee’s conduct

1. Not content with the above directions and relief, the Bankruptcy Trustees also seek the making of declarations which will afford them relief from their conduct in causing the payment of the sum of $139,137.04 to themselves from the funds which are available to meet the claims of trust creditors. The power to make the declaration arises under s 76 of the *Trusts Act 1973* (Qld) although they can only be made on the basis that Bankruptcy Trustees have acted honestly and reasonably.
2. It is appropriate to make the declaration sought. The Bankruptcy Trustees and their legal advisers have acted reasonably and honestly throughout the administration. As these reasons establish, the law in this area is both uncertain and complex. Even if it was the case that the wide variety of cases on the various topics could not be reconciled, there was certainly sufficiently strong authority which justified the payment of the sum of $139,137.04 for the costs, expenses and remuneration. That remains so despite the fact that the Bankruptcy Trustees may have to return some money to the trust. They will, however, be able to obtain payment for the remaining costs, expenses and remuneration from the personal estate of Mr Lee to the extent to which there are funds available after the payment of the priority debts.

## A question not answered

1. After the oral hearing of this matter Markovic J handed down her decision in *Kite v Mooney* and, at the request of the Court, the parties provided written submissions in relation to the effect of that decision. Without leave of the Court, the Commissioner of Taxation filed additional submissions relating to the question of the characterisation of money which was received by the Bankruptcy Trustees from the Commissioner as a void preference. The provision of those additional submissions did not occur with the consent of the applicants. It is not appropriate for a party to make additional written submissions to the Court in such circumstances. The practice of parties providing gratuitous written submissions to the Court in addition to those in respect of which leave is given is not to be encouraged. As was said by McHugh ACJ and Gummow, Callinan and Heydon JJ in *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 at [192] in relation to such conduct:

This is unsatisfactory. It is impermissible to file further submissions without leave, and this cannot be evaded by adding on to submissions filed with leave other material for which leave should have been obtained.

(Footnotes omitted)

See also *Seafish Tasmania Pelagic Pty Ltd v Burke, Minister for the Sustainability, Environment, Water, Population and Communities* [2013] FCA 782 at [4] where, in relation to those observations of the High Court, Logan J said:

[4] Those observations, though made in relation to the exercise of appellate jurisdiction, are no less pertinent in relation to the exercise of original jurisdiction. There is an important principle which underlies those observations. That is, the judicial power of the Commonwealth must be exercised in open court, save in respect of a restricted class of case (of which the trial was not one) which may truly be dealt with in chambers, and fairly.

1. It is not doubted that that the provision of the additional submissions was done with the best of intentions and in an attempt to fully resolve all matters concerning the administration of the estate of Mr Lee. However, the point sought to be raised by the Commissioner would impact upon the rights of the trust creditors. Those persons would not have been aware from the material served upon them for the hearing of this matter that this point was to be agitated in the course of the hearing. They are entitled to fair notice of it.
2. In those circumstances, and in accordance with the principles referred to above, it is not appropriate for the additional question to be agitated. The matter can be relisted for argument with respect to this further issue after all parties who might be affected by it are duly notified.

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| I certify that the preceding two hundred and six (206) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Derrington. |

Associate:

Dated: 18 August 2017

SCHEDULE OF PARTIES

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|  | QUD 198 of 2017 |
| Respondents |  |
| Fourth Respondent: | BEVMONT PTY LTD AS TRUSTEE FOR THE LEE FAMILY TRUST |
| Fifth Respondent: | WARWICK GORDON LEE |