FEDERAL COURT OF AUSTRALIA

Kitay, in the matter of South West Kitchens (WA) Pty Ltd [2014] FCA 670

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| Citation: | Kitay, in the matter of South West Kitchens (WA) Pty Ltd [2014] FCA 670 |
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| Parties: | **MERVYN JONATHON KITAY IN HIS CAPACITY AS LIQUIDATOR OF SOUTH WEST KITCHENS (WA) PTY LTD (IN LIQUIDATION) ACN 111 679 568 and SOUTH WEST KITCHENS (WA) PTY LTD (IN LIQUIDATION) ACN 111 679 568** |
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| File number: | WAD 108 of 2014 |
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| Judge: | **MCKERRACHER J** |
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| Date of judgment: | 24 June 2014 |
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| Corrigendum: | 24 June 2014 |
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| Catchwords: | **INSOLVENCY** – conduct of liquidators – trust deed precluded company from continuing to act as the trustee after the appointment of the liquidator – liquidators sought court order for sale of property – liquidator may exercise the power of sale granted pursuant to s 477 of the *Corporations Act 2001* (Cth) –liquidator’s statutory power of sale in s 477(2)(c) is not limited by terms of private trust agreement insofar as the assets of the company are held on trust – seeking the assistance of the Court may be appropriate on some occasions but the liquidator is not required in each such instance to obtain a Court order for the sale of trust assets |
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| Legislation: | *Corporations Act 2001* (Cth) s 477(2)(c)  |
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| Cases cited: | *Apostolou v VA Corporation Aust Pty Ltd* (2010) 77 ACSR 84*Apostolou v VA Corporation of Aust Pty Ltd* [2011] FCAFC 103*Bastion v Gideon Investments Pty Ltd (in liq)* (2000) 35 ACSR 466*Caterpillar Financial Australia Limited v Ovens Nominees Pty Ltd* [2011] FCA 677*CSR Ltd v Eddy* (2005) 226 CLR 1*Fletcher, in the matter of Starrit Pty Ltd (in liq)* [2012] FCA 803*Re Indopal Pty Ltd* (1987) 12 ACLR 54*Kerr, in the matter of Angel’s Castle Pre-School Pty Ltd (In Liquidation)* [2010] FCA 786*Neeeat Holdings (in liq)* (2013) 299 ALR 744*Pleash, in the matter of Suncoast Restoration Pty Ltd (in liq)* (2013) 211 FCR 203*Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99*Theobald, in the matter of Finplas Pty Ltd* [2014] FCA 31*UTSA Pty Ltd (in liq) v Ultra Tune Australia Pty Ltd* (1996) 21 ACSR 457  |
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| Date of hearing: | 27 May 2014 |
|  |  |
| Place: |  |
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| Division: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 34 |
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| Counsel for the Plaintiffs: | Mr DW John |
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| Solicitor for the Plaintiffs: | Herbert Smith Freehills |

 FEDERAL COURT OF AUSTRALIA

Kitay, in the matter of South West Kitchens (WA) Pty Ltd [2014] FCA 670

CORRIGENDUM

1. The Declaration in the orders page and the last page of the judgment read:

**THE COURT DECLARES:**

1. That the first plaintiff has the power, pursuant to s 477(2) of the *Corporations Act 2001* (Cth), to sell, dispose, or otherwise deal with the property of the South West Kitchens Unit (Hybrid) Trust (**Trust Assets**) (including the proceeds of sale of any Trust Assets) in the course of the winding up of the second plaintiff.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Corrigendum to the Reasons for Judgment herein of the Honourable Justice McKerracher. |

Associate:

Dated: 24 June 2014

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| WESTERN AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | WAD 108 of 2014 |

IN THE MATTER OF SOUTH WEST KITCHENS (WA) PTY LTD (IN LIQUIDATION) ACN 111 679 568

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| BETWEEN: | MERVYN JONATHON KITAY IN HIS CAPACITY AS LIQUIDATOR OF SOUTH WEST KITCHENS (WA) PTY LTD (IN LIQUIDATION) ACN 111 679 568First PlaintiffSOUTH WEST KITCHENS (WA) PTY LTD (IN LIQUIDATION) ACN 111 679 568Second Plaintiff |
| JUDGE: | MCKERRACHER J |
| DATE OF ORDER: | 27 MAY 2014 |
| WHERE MADE: | PERTH |

THE COURT DECLARES THAT:

1. A declaration that the first plaintiff has the power, pursuant to s 477(2) of the *Corporations Act 2001* (Cth), to sell, dispose, or otherwise deal with the property of the South West Kitchens Unit (Hybrid) Trust (**Trust Assets**) (including the proceeds of sale of any Trust Assets) in the course of the winding up of the second plaintiff.

THE COURT ORDERS THAT:

1. The costs of these proceedings be costs in the winding up of the second plaintiff and paid from the Trust Assets.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| WESTERN AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | WAD 108 of 2014 |

IN THE MATTER OF SOUTH WEST KITCHENS (WA) PTY LTD (IN LIQUIDATION) ACn 111 679 568

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| BETWEEN: | MERVYN JONATHON KITAY IN HIS CAPACITY AS LIQUIDATOR OF SOUTH WEST KITCHENS (WA) PTY LTD (IN LIQUIDATION) ACN 111 679 568First PlaintiffSOUTH WEST KITCHENS (WA) PTY LTD (IN LIQUIDATION) ACN 111 679 568Second Plaintiff |
| JUDGE: | MCKERRACHER J |
| DATE: | 24 JUNE 2014 |
| PLACE: | PERTH |

**REASONS FOR JUDGMENT**

# OVERVIEW

1. The first plaintiff (**Liquidator**) is the liquidator of the second plaintiff (**SW Kitchens**). The Liquidator seeks directions from the Court in relation to the sale of trust property in circumstances where there is potentially conflicting authority as to the Liquidator’s power.
2. At the time the Liquidator was appointed by voluntary winding up:
	* + 1. SW Kitchens was trustee of South West Kitchen Unit (Hybrid) Trust (**Trust**);
			2. all of the assets of SW Kitchens were owned as trustee of the Trust; and
			3. the trust deed for the Trust provided that SW Kitchens was disqualified from acting as trustee if it was wound up.
3. The Liquidator wishes to sell the Trust assets (**Trust Assets**) of SW Kitchens in the ordinary course of the winding up of that company, but is concerned that recent authority suggests there is some doubt as to his power to do so where SW Kitchens has been disqualified by the trust deed from acting as a trustee of the Trust.
4. However, if the Liquidator has power to sell the Trust Assets pursuant to s 477(2)(c) of the *Corporations Act 2001* (Cth) (**CA**), the Liquidator seeks a declaration that he has such power and that it may be exercised in relation to the Trust Assets. In the alternative, the Liquidator seeks an order pursuant to s 479(3) CA and s 88 and s 92 of the *Trustees Act 1962* (WA) (**Trustees Act**) giving him permission to realise the Trust Assets in the course of the winding up.

# THE STATUTE

1. Section 477 CA is cast in very broad terms but relevantly to this application s 477(2)(c) provides as follows:

**477 Powers of liquidator**

…

(2) Subject to this section, a liquidator of a company may:

(c) sell or otherwise dispose of, in any manner, all or any part of the property of the company; and

…

1. A liquidator under a voluntary winding up has the same power of sale under s 477(2)(c) CA by virtue of s 506 CA which extends the powers and duties of a liquidator in a voluntary winding up to those conferred by the CA on a liquidator in a winding up in insolvency or by the Court.

# BACKGROUND

1. As the affidavit in support reveals, the Trust was created by the trust deed in November 2004 (**Trust Deed**) and SW Kitchens was appointed as trustee of the Trust. By cl 35(1)(b) of the Trust Deed, the trustee is disqualified from holding office if (amongst other things) as a company, it liquidates (voluntarily or otherwise).
2. The Liquidator was appointed on 6 March 2014 under s 497 CA.
3. It follows that on the appointment of the Liquidator, SW Kitchens became disqualified from holding office as the trustee of the Trust.
4. There are modest Trust Assets capable of being sold. They are valued at between $66,011 and $86,361. They are the only assets of SW Kitchens. The liabilities exceed $800,000. The Liquidator intends, if permitted, to sell the Trust Assets at auction with a view to distributing the proceeds to the creditors of SW Kitchens pro rata after satisfying the costs incurred in the liquidation.
5. While there is a clear power of sale under s 477(2)(c) CA, the question is whether the disqualification of the trustee from acting as a trustee by virtue of the Trust Deed precludes the exercise of that power of sale of the Trust Assets by the Liquidator.
6. A trustee has a right of indemnity out of the trust assets for expenses and liabilities incurred and a right of exoneration from liability: s 71 of the Trustees Act. A trustee is entitled to the benefit of an equitable lien over the trust assets as a means of securing its rights of indemnity and/or exoneration: *Theobald, in the matter of Finplas Pty Ltd* [2014] FCA 31 (at [23(g)]); *Apostolou v VA Corporation Aust Pty Ltd* (2010) 77 ACSR 84 (at [35]); *Caterpillar Financial Australia Limited v Ovens Nominees Pty Ltd* [2011] FCA 677 (at [14]); and *Pleash, in the matter of Suncoast Restoration Pty Ltd (in liq)* (2013) 211 FCR 203 (at [27]).
7. When a liquidator is appointed to a trustee company, the liquidator acquires the same rights of indemnity and exoneration: *Finplas* (at [23(g)]); *Apostolou* (at [48]); and *Caterpillar* (at [16]-[17]). Despite the removal of a trustee (or disqualification as trustee) of a trust, the trustee generally retains that right of indemnity and exoneration: *Finplas* (at [23(e)]); *Apostolou* (at [49]); and *Caterpillar* (at [20]).
8. However, the equitable lien securing the trustee’s right of indemnity and exoneration does not give to the (removed) trustee a power of sale, rather, it is a security which is enforceable by the trustee only by judicial sale or appointment of a receiver with a power of sale: *Finplas* (at [23(g)]); *Apostolou* (at [39]); and *Caterpillar* (at [24]).

# COMPETING considerationS

1. Beyond these foundational concepts, the issue presently arising and on which there may be some doubt on the authorities, is whether in circumstances where a trustee company ceases to be able to be trustee upon falling into liquidation:
	* + 1. a liquidator may nonetheless exercise the power of sale granted to liquidators pursuant to s 477 CA rather than the trustee’s power (as held in *Apostolou*); or
			2. the liquidator is required in each such instance to obtain a court order to sell trust assets because the equitable lien does not provide a power of sale (as appears to be the underlying assumption, if not always expressly stated in *Finplas*; *Caterpillar*; and *Suncoast*).
2. In *Apostolou*, the liquidator of a corporate trustee sold trust assets in the course of the winding up of the company. Finkelstein J held that:
	* + 1. in addition to a trust instrument, a liquidator has a separate authority to sell property, which is conferred by s 477(2)(c) CA;
			2. given that the right of indemnity passes to the liquidator who may resort to the trust property to make good that right (*Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99 (at 878 and 881), there is no reason in principle why the liquidator’s statutory power of sale is not available to enable the claim to be satisfied (at [48]);
			3. it would be highly inconvenient if a liquidator could not rely on his statutory power and instead was required to go to court to have the power of sale conferred on the liquidator (at [48]);
			4. the power of sale conferred by s 477(2)(c) CA may be exercised in respect of property in which the company in liquidation has an equitable interest, provided the liquidator has the legal title to dispose of (at [48]); and
			5. the statutory power of sale may be exercised by the liquidator of a trustee company even where the trust instrument itself does not confer a power of sale (see *UTSA Pty Ltd (in liq) v Ultra Tune Australia Pty Ltd* (1996) 21 ACSR 457.
3. On appeal, in *Apostolou v VA Corporation of Aust Pty Ltd* [2011] FCAFC 103 (Perram, Nicholas and Yates JJ), there was a challenge to the delay allegedly occasioned by the liquidator seeking a court order for sale of the property.
4. The appeal was dismissed, the Full Court noting (at [46]) without demurring:

The primary judge reasoned that, in the present case, the liquidators had **two sources of power** to sell the St Kilda property in order to enforce the right of indemnity. First, clause 8.3 of the deed constituting the VA Unit Trust conferred a power of sale on the trustee. After reviewing a number of authorities, the primary judge concluded that, where a trustee has legal title to property coupled with such a power of sale, the trustee may resort to that power in order to get in funds against which to exercise the trustee’s right of indemnity: see at [40]-[46]. **His Honour also considered that there was no reason why, in the present case, the liquidators could not resort to the power of sale conferred by s 477(2)(c) of the Corporations Act to enable the indemnity to be enforced. No issue arises on this appeal concerning his Honour’s conclusions in this regard**.

(emphasis added)

1. It cannot be said that the issue arose squarely before the Full Court and it is necessary to consider other cases from which a contrary view might be inferred.
2. *Caterpillar* was decided the year after *Apostolou*. Apparently the Court was not referred to the *Apostolou* reasoning. Quite possibly this was because the relief sought was the grant of an order under s 63 of the *Trustees Act 1958* (Vic) to the liquidator of the corporate trustee in relation to a motor vehicle owned by the corporate trustee. In this case, (as with all the authorities from which the absence of a power of sale might be inferred), the Court was not taken either to *Apostolou* or to s 477(2)(c) CA. The Court was asked to proceed in each instance on an assumption that the liquidator had no power to sell assets because the company became a bare trustee of trust assets immediately upon the winding up of the company and the appointment of a liquidator. There is no doubt as to the correctness of that conclusion as to the position of a bare trustee. The reasoning behind this is evident, for example, in the analysis in *Caterpillar* (at [26]). Nonetheless, in *Caterpillar*, it is also apparent (from [37]-[41]) that the Court proceeded on the assumption that the sale of the motor vehicle by the liquidator was beyond power. Having concluded that the conduct of the liquidator was honest and reasonable, the Court granted a declaration under s 1318 CA and further or alternatively, s 67 of the *Trustees Act 1958* (Vic).
3. The real question in this application though is whether a liquidator does have statutory power over and above those to which the company would be limited by virtue of the terms of a trust deed.
4. The only case which has juxtaposed the apparently conflicting authorities is the decision of Kenny J in *Neeeat Holdings (in liq)* (2013) 299 ALR 744 where her Honour considered *Caterpillar* then said (at [20]-[21]):

20. In the earlier case of *Apostolou v VA Corporation Aust Pty Ltd* (2010) 77 ACSR 84; [2010] FCA 64, Finkelstein J held that the liquidator had the right to sell the assets of the trust even in the event of the appointment of a new trustee. His Honour said (at [48]):

In the circumstances we are considering (that is where a corporate trustee holds legal title to trust property over which it also has a proprietary claim) the right of indemnity passes to the liquidator who may resort to the trust property to make good that right: Re *Suco Gold Pty Ltd (in liq)* (1983) 7 ACLR 873, 878, 881. There is no reason in principle why the liquidator’s statutory power of sale is not available to enable the claim to be satisfied. To the contrary, it would be highly inconvenient if it could not and, instead, the liquidator was required to go to court. In my view, the power of sale conferred by s 477 may be exercised in respect of property in which the company in liquidation has an equitable interest, provided the liquidator has the legal title to dispose of. The statutory power of sale may be exercised by the liquidator of a trustee company even where the trust instrument itself did not confer a power of sale. See, for example, *UTSA Pty Ltd (in liq) v Ultra Tune Australia Pty Ltd* (1996) 21 ACSR 457 where it was held that an unassignable chose in action could be sold by a liquidator under the statutory power of sale.

21. He continued (at [50]):

[E]ven if trust property includes property in which the former trustee retains an equitable interest, the retiring trustee is entitled to retain possession of the trust property, subject to a court order to the contrary, until it is paid what it is due or until it sells the property. I acknowledge that *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* (2008) 74 NSWLR 550; ... holds that a retiring trustee cannot retain possession of trust property as against a new trustee. With respect, in my opinion there is no doubt that a retiring trustee can hold trust property to secure his right of reimbursement against both the beneficiaries and a new trustee.

1. Again, her Honour was not required to decide whether the power of sale under s 477 CA continued notwithstanding the trustee’s loss of power as trustee because the relief sought from the Court was pursuant to s 479(3) CA and s 63 of the *Trustees Act 1958* (Vic) and s 89(1) of the Trustees Act.
2. In *Finplas*, another decision in which the Court was apparently not referred to *Apostolou* or s 477(2)(c) CA, the Court found that on their appointment the liquidators acquired the benefit of the trustee’s right to indemnity and/or exoneration and the equitable lien which supported these rights, but as a bare trustee of the trust assets, Finplas did not have the power to sell the trust assets, nor did it have a right to sell the assets by reason of the equitable lien held over the assets, save with the assistance of the Court. It followed then (at [23(h)]) that when liquidators arranged to sell the plant and equipment owned by Finplas, they did not have the power to sell those assets. Relief was granted by way of declarations under s 75 of the Trustees Act.
3. In *Suncoast* the Court reached the same conclusion but, again, it seems, without being referred to *Apostolou* or s 477(2)(c) CA. *Caterpillar* was also followed in *Fletcher, in the matter of Starrit Pty Ltd (in liq)* [2012] FCA 803 but, again, *Apostolou* was not cited in this case, nor was the power of sale in s 477 CA drawn to the attention of the Court.
4. There is one case where *Apostolou* was considered in a slightly different context. In *Kerr, in the matter of Angel’s Castle Pre-School Pty Ltd (In Liquidation)* [2010] FCA 786, the office of the trustee was vacated because the company entered into liquidation, but the appointors intended or were able to appoint a new trustee. In that case, there was property of considerable value in issue and uncertainty as to whether a business (being a kindergarten and various assets) was being conducted by the company beneficially or in its capacity as trustee. A further significant difficulty was that the liquidator had experienced problems in gaining timely access to the company’s books. In *Kerr*, Jacobson J noted that, notwithstanding the existence of a power of sale, there was good reason for liquidators to apply to the Court for permission to sell as the matters were not straightforward and it was appropriate to seek the protection of a court order. His Honour said, however, that while he agreed with Finkelstein J in *Apostolou*,approaching the Court in a complicated matter would be appropriate, the liquidator had power to sell the land. But there was the added complication over and above *Apostolou* as there was uncertainty as to whether the business was conducted by the company in its own right or as trustee of the trust. In that situation there was the possibility of appointing a new trustee. This further complication made it sensible to seek to appoint Mr Kerr as a receiver and manager, rather than simply to seek directions in accordance with the approach in *Apostolou*. In doing so, his Honour followed the course taken by McLelland J in *Re Indopal Pty Ltd* (1987) 12 ACLR 54 (at 57) and a similar approach was taken by Austin J in *Bastion v Gideon Investments Pty Ltd (in liq)* (2000) 35 ACSR 466. His Honour did note that the appointment of a receiver and manager would only be made unless the case in favour of it was a strong one, because receivership is an expensive process which could adversely affect the rights of third parties.
5. Insofar as the facts outlined to me in the evidence in support of the current application are concerned, no difficulties of such a nature arise in this case. The Trust Assets are of modest value and can be disposed of at an auction. It is a simple winding up.

# ANALYSIS

1. The decisions considered in these reasons are mainly *ex parte*. Applications to be excused for contraventions or applications seeking directions often do not have the benefit of a contradictor for costs reasons. That is true, of course, in this case.
2. However, it does appear that in *Apostolou*, the possibility of the power and the appropriateness of the power under s 477 was expressly considered. In the other cases, it was not raised. If the decisions are inconsistent (which I am by no means certain about given that different relief was sought in the other cases), I would give greater weight to the decision in which the specific power under s 477 CA was considered until appellate authority directs otherwise: *CSR Ltd v Eddy* (2005) 226 CLR 1 (at [13]-[14]).
3. The effect of the Trust Deed to preclude a company continuing to act as trustee after the appointment of the liquidator cannot be doubted. Equally, there appears to be no reason in policy or in principle, and none referred to in the authorities discussed, as to why a liquidator’s power of sale which is part of his or her statutory duties in a broader public interest should be limited by the terms of a private trust agreement.
4. There appears to be no constraint on the power of sale under s 477(2)(c) CA. It does not impose any limitation on the power of sale insofar as the assets of a company are held on trust. Of course, the company has to have legal ownership of the assets in order for them to be sold but generally, and certainly in this case, the former Trustee, SW Kitchens, will have both legal ownership of the Trust Assets as a bare trustee and beneficial interest in the Trust Assets as the holder of the equitable lien. It is also to be noted in passing that s 501 CA provides that subject to the provisions of the CA, the property of a company must, on its winding up, be applied in satisfaction of its liabilities. Once again, there is no statutory exception expressed in relation to property held by the company on trust.
5. In the absence of any statutory constraint, or other complication there appears to be no other reason why the liquidator ought not be permitted in a straightforward case to discharge his or her duties to conduct the liquidation in the ordinary manner. The proceeds of asset sales will, after satisfying costs and expenses of the liquidation, be distributed pro rata to creditors.
6. I agree with Finkelstein J in *Apostolou* that such a procedure makes good commercial sense, avoiding the need for liquidators of trustee companies on every occasion to approach the Court to seek approval to sell trust assets. Of course, as in *Apostolou*, there may be some occasions on which seeking the assistance of the Court is appropriate, but it should not be necessary on every occasion.

# CONCLUSION

1. Accordingly, for those reasons:

THE COURT DECLARES THAT:

1. A declaration that the first plaintiff has the power, pursuant to s 477(2) of the *Corporations Act 2001* (Cth), to sell, dispose, or otherwise deal with the property of the South West Kitchens Unit (Hybrid) Trust (**Trust Assets**) (including the proceeds of sale of any Trust Assets) in the course of the winding up of the second plaintiff.

THE COURT ORDERS THAT:

1. The costs of these proceedings be costs in the winding up of the second plaintiff and paid from the Trust Assets.

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| I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice McKerracher. |

Associate:

Dated: 24 June 2014