
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : ROBERT ALLAN JACOBS as Receiver and Manager
of PLUTON RESOURCES LTD (RECEIVER AND
MANAGER APPOINTED) (In Liq) -v- HUGHES
[2018] WASC 414

CORAM : ACTING JUSTICE STRK

HEARD : 14 DECEMBER 2018 AND ON THE ADDITIONAL
PAPERS FILED BETWEEN 14 AND 24
DECEMBER 2018

DELIVERED : 28 DECEMBER 2018

FILE NO/S : COR 200 of 2018

BETWEEN : ROBERT ALLAN JACOBS as Receiver and Manager
of PLUTON RESOURCES LTD (RECEIVER AND
MANAGER APPOINTED) (In Liq)
Plaintiff

AND

BRYAN KEVIN HUGHES
First Defendant

DANIEL JOHANNES BREDEKAMP
Second Defendant

DEPARTMENT OF JOBS AND SMALL BUSINESS
Interested Party

Catchwords:

Corporations - Receivers and managers - Retention of moneys by former receivers and managers - Potential liability under s 433 *Corporations Act 2001* (Cth) - Application made by current receiver and manager against former receivers and managers for transfer of retention fund - Proper construction of s 433 - Equitable lien

Legislation:

Corporations Act 2001 (Cth), s 423(1)(b), s 433, s 561, cl 90-15 & cl 90-20 of the *Insolvency Practice Schedule 2016 (Corporations)* being sch 2 to *Corporations Act 2001* (Cth)
Fair Entitlements Guarantee Act 2012 (Cth), s 28, s 31
Personal Property Securities Act 2009 (Cth), s 61
Supreme Court Act 1935 (WA), s 25(6)

Result:

Application dismissed

Category: B

Representation:

Counsel:

Plaintiff : T D Castle & C K Pearce
First Defendant : W Zappia
Second Defendant : W Zappia
Interested Party : S K Dharmananda SC

Solicitors:

Plaintiff : Blackwall Legal LLP
First Defendant : HWL Ebsworth Lawyers
Second Defendant : HWL Ebsworth Lawyers
Interested Party : Clayton Utz

Case(s) referred to in decision(s):

ASIC v Lanepoint Enterprises Pty Ltd (No 2) (2006) 64 ATR 524; [2006] FCA 1493
Commonwealth v Byrnes (2018) 330 FLR 149; [2018] VSCA 41
Flexible Manufacturing Systems Pty Ltd v Fernandez [2003] FCA 1491; (2003) 22 ACLC 47
General Credits Ltd v Chemineer Nominees Pty Ltd (in liq) (1986) 4 ACLC 570
Inland Revenue Commissioner v Goldblatt [1972] 1 Ch 498; (1972) 2 WLR 953
Korda v Silkchime Pty Ltd (recs and mgrs apptd) atf Silkchime Unit Trust (2010) 78 ACSR 675
Moodemere Pty Ltd (in liq) v Waters [1998] VR 215
Nicobar Pty Ltd v Abrokiss (2003) 48 ACSR 259; [2003] NSWSC 1247
Re CMI Industrial Pty Ltd (in liq) (2015) 105 ACSR 635; [2015] QSC 96
Re Great Southern Ltd; Ex Parte Thackray [2012] WASC 59
Re Lewis Merthyr Consolidated Collieries Ltd [1929] 1 Ch 498
Re Universal Distributing Co Ltd (in liq) (1933) 48 CLR 171
Steinberg v Herbert (1988) 14 ACLR 80
Westminster Corporation v Haste [1950] Ch 422; [1950] 2 All ER 65
Whitton v ACN 003 266 886 Pty Ltd (controller appointed) (in liq) (1996) 42 NSWLR 123; (1996) 14 ACLC 1799

ACTING JUSTICE STRK:

1 This is an application made by the current receiver and manager
of Pluton Resources Ltd (receiver and manager appointed) (in
liquidation) (Pluton), against the former receivers and managers of
Pluton under s 423(1)(b) of the *Corporations Act 2001* (Cth), and cl 90-
15 and cl 90-20 of the *Insolvency Practice Schedule 2016*
(*Corporations*) (IPS), being sch 2 to the *Corporations Act*.

2 The Current Receiver presses for an urgent determination of the
application and, in all the circumstances, it is desirable for this decision
to be available to the parties as soon as possible. In the circumstances,
these reasons are provided in a somewhat truncated form.

3 The external administration history of Pluton is involved. For
the purpose of these reasons, it is sufficient to record as follows.¹

4 The Current Receiver was appointed by General Nice Recursos
Offshore Commercial De Macau Limitada (GNR), a secured creditor of
Pluton, on 17 August 2018; and the defendants (the Former Receivers)
were appointed as receivers and managers of Pluton by GNR on
8 September 2015, and retired on the same day as the Current Receiver
was appointed.

5 The Former Receivers and the Current Receiver were appointed
pursuant to a security deed entered into as between Pluton and GNR on
29 April 2013 (Security Deed).²

6 During the term of the Former Receivers' appointment, the
directors of Pluton appointed various voluntary administrators pursuant
to *Corporations Act* s 436A; Pluton executed a deed of company
arrangement; and the court appointed the administrators of the deed of
company arrangement as the liquidators of Pluton, after orders were
made terminating the deed of company arrangement.

7 The Former Receivers were agents of Pluton. The agency
initially arose by operation of the Security Deed cl 9.2,³ and later,
pursuant to orders made under *Corporations Act* s 420C.⁴

¹ Affidavit of Robert Allan Jacobs filed 12 November 2018 pars 3 - 7.

² Affidavit of Robert Allan Jacobs filed 12 November 2018 'RAJ4', pars 3 - 4; affidavit of Bryan Kevin Hughes filed 30 November 2018 par 6.

³ Affidavit of Robert Allan Jacobs filed 12 November 2018 page 166; Defendants' outline of submissions filed 3 December 2018 par 8.

⁴ Order of Sanderson M on 24 April 2018 in COR 65 of 2018.

Residual funds

8 For the purposes of this application, I have accepted the
following facts as presented in the affidavits deposited by Robert Jacobs
and Bryan Hughes.⁵

9 Pluton holds a 50% interest in the Cockatoo Island haematite
mining operation (Cockatoo Island Project). Pluton is the manager of
the Cockatoo Island Project.⁶

10 As at the date of appointment of the Former Receivers, the assets
of Pluton included cash at bank to the value of \$524,190.⁷ \$500,000 of
the cash at bank was deposited on or about 8 September 2015 by GNR
at the request of the first defendant, Bryan Hughes, to fund the initial
costs of the receivership.⁸

11 The assets available to the Former Receivers (including
circulating assets) were consumed in the preservation of the Cockatoo
Island Project.⁹

12 Initially, funding was received from GNR. However, once GNR
and its parent company encountered financial difficulties, the Former
Receivers sought funding from a prospective purchaser of the Cockatoo
Island Project. The prospective purchaser was Gold River Investment
Limited (Gold River), a company controlled by Mr Cai. Mr Cai was
the principal behind GNR and its parent, and was effectively the same
source of funding before GNR's parent was liquidated.¹⁰

13 The Former Receivers and Gold River entered into a funding
deed, which was executed on 13 June 2018.¹¹ From 23 March 2018
until about 3 August 2018, Gold River advanced funds to Pluton under
the Funding Deed. The total amount advanced by Gold River was
\$2,508,127.¹²

14 On the date of their retirement, the Former Receivers held
\$840,542.60 in Pluton's receivership account (Residual Funds). That

⁵ Affidavit of Robert Allan Jacobs filed 12 November 2018 and the affidavit of Bryan Kevin Hughes filed 30 November 2018.

⁶ Affidavit of Bryan Kevin Hughes filed 30 November 2018 par 11.

⁷ Affidavit of Bryan Kevin Hughes filed 30 November 2018 par 18.

⁸ Affidavit of Bryan Kevin Hughes filed 30 November 2018 pars 19, 22 - 23.

⁹ Affidavit of Bryan Kevin Hughes filed 30 November 2018 par 36 - 39.

¹⁰ Affidavit of Bryan Kevin Hughes filed 30 November 2018 par 41.

¹¹ Affidavit of Bryan Kevin Hughes filed 30 November 2018 par 44; affidavit of Robert Allan Jacobs filed 12 November 2018 'RAJ20'.

¹² Affidavit of Bryan Kevin Hughes filed 30 November 2018 par 45.

amount was the remainder of the funds advanced by Gold River to Pluton under the Funding Deed.¹³

15 The Former Receivers say that since their retirement, they have used some of the Residual Funds to cover their remuneration and some liabilities they incurred as receivers and managers prior to and after the termination of their appointment as receivers and managers of Pluton.¹⁴ As at 30 November 2018, \$594,674 of the Residual Funds remained under the control of the Former Receivers.¹⁵

The application advanced by the Current Receiver

16 The Current Receiver presses an application under *Corporations Act* s 423(1)(b), and the IPS cl 90-15 and cl 90-20. By the application, he seeks that the Former Receivers pay the Residual Funds to him. Alternatively, he seeks an order that the Former Receivers pay a proportion of the Residual Funds to him, with some amount to remain in the hands of the Former Receivers to satisfy personal liabilities of the Former Receivers in their role as the former receivers and managers of the Company, and on a date to be fixed by the court the Former Receivers pay any remaining funds to the Current Receivers.

17 In the written outline of submissions filed on 12 November 2018 on behalf of the Current Receiver, it was asserted that the Residual Funds are not 'circulating assets' of Pluton available to the Former Receivers as at the date of their appointment, and that neither *Corporations Act* s 433 nor s 561 apply to the Residual Funds. It was said that therefore, the Residual Funds should be paid to the Current Receiver, subject to any 'other liabilities' of the Former Receivers, and sought a direction that the Former Receivers file further evidence about the quantum and basis of any such liability.

18 As discussed below, the position of the Current Receiver was recast after receipt of the written submissions filed on behalf of the Former Receivers on 3 December 2018.

The position of the Former Receivers

19 The Former Receivers do not contend that the Residual Funds are circulating assets, or that *Corporations Act* s 433 or s 561 directly apply to those funds. Instead, the Former Receivers' case is that they

¹³ Affidavit of Bryan Kevin Hughes filed 30 November 2018 par 46.

¹⁴ Affidavit of Bryan Kevin Hughes filed 30 November 2018 par 47.

¹⁵ Affidavit of Bryan Kevin Hughes filed 30 November 2018 par 47.

have a right to an indemnity out of the Residual Funds in order to satisfy liabilities arising from a potential breach of their obligations under *Corporations Act* s 433, and liabilities relating to expenses incurred while they were receivers and managers of Pluton.

20 The Former Receivers suggested that the question for the present application was whether:¹⁶

- (a) on a proper construction of the Deed of Indemnity, the former Receivers were entitled to retain funds of Pluton falling within the scope of GNR's perfected security interest for the purpose of satisfying their right of indemnity under that deed; and
- (b) further or alternatively, whether by cl 3 of the Deed of Indemnity, the secured creditor agreed to postpone.

The argument advanced by the Current Receiver in reply

21 In reply, the Current Receiver took issue with the position advanced by the Former Receivers on three grounds.¹⁷

22 First, the position advanced on behalf of the Former Receivers was premised on a mistaken interpretation of *Corporations Act* s 433.

23 Secondly, there is no proper basis for the Former Receivers to withhold the Residual Funds to meet expenses identified in the affidavit of Bryan Hughes filed 30 November 2018, said to have been incurred during the term of their appointment.¹⁸

24 Thirdly, the evidence filed on behalf of the Former Receivers disclosed that they paid \$245,869 of the Residual Funds to meet liabilities said to have been incurred by them as receivers. The evidence suggests that some of these amounts were incurred after they had retired as receivers, and therefore, such were not valid claims upon the Residual Funds. The Current Receiver pressed for orders to be made compelling the Former Receivers to prepare accounts which provide full and complete information for the court and other interested parties to confirm that the payments were properly made.

¹⁶ Defendants' outline of submissions filed 3 December 2018 par 6. The reference to the Deed of Indemnity is a reference to a deed dated 8 September 2015 between the Former Receivers, GNR (the secured creditor), and GNR's parent company.

¹⁷ Plaintiff's submissions in reply filed 12 December 2018.

¹⁸ Affidavit of Bryan Kevin Hughes filed 30 November 2018 [51], Annexures 'BKH14' and 'BKH15'.

Position of the Department of Jobs and Small Business

25 Before the first return date of the application, the solicitors for the Current Receiver served a copy of the originating process on the Fair Entitlements Guarantee Branch of the Department of Jobs and Small Business. Having regard to the legislative scheme applicable to payment of employee entitlements,¹⁹ the Current Receiver suggested that the Department of Jobs and Small Business would appear to be an appropriate contradictor, able to assert a claim for payments under the *Corporations Act* s 433 or s 561, if such a claim were available.

26 The Commonwealth of Australia, represented by the Department of Jobs and Small Business, intervenes in this proceeding pursuant to leave granted on 16 November 2018.

27 The Commonwealth's position is that it may have a claim against the Former Receivers for breach of *Corporations Act* s 433, but the evidence filed by the parties does not contain the information necessary to determine the existence or quantum of such a claim nor enable the Commonwealth to take a final position on any claim.

28 The Commonwealth says that two issues fall to be determined, but that there is insufficient evidence to determine the same.²⁰

The issues that fall to be determined

11. It is, first of all, necessary to determine the value of the circulating assets of the Company as at the date of the appointment of the Former Receivers.
12. The Former Receivers have taken the view that the only (potential) circulating asset of the Company as at the date of their appointment was the Company's cash at bank (in the amount of \$524,190). In relation to that cash at bank, the Commonwealth submits that: first, it is a 'circulating asset' for the purposes of s 433 of the Act, since it is covered by subsection 340(5) of the *Personal Property Securities Act 2009* (Cth) (PPSA) and neither subsection 340(2) nor subsection 340(3) of the PPSA applies to that property; and, second, there is no dispute that that circulating asset existed as at the date of the Former Receivers' appointment.
13. However, there appears to be other amounts - in addition to that cash at bank - which the Former Receivers received during the first six months of their appointment, that could potentially be

¹⁹ *Fair Entitlements Guarantee Act 2012* (Cth) s 28, s 31.

²⁰ Submissions of the Department of Jobs and Small Business filed 12 December 2018 pars 11 - 20.

circulating assets (or proceeds of such assets) existing or identifiable as at the date of the Former Receivers' appointment, and to which s 433 of the Act may therefore apply. However, there is currently insufficient evidence to determine whether those assets are in fact assets to which s 433 applies.

14. Absent such evidence, it is not possible to determine the total value of the Company's circulating assets as at the date of Former Receivers' appointment.
15. The second issue for determination is the quantum of costs actually incurred by the Former Receivers that were properly deductible from the pool of circulating assets (to which s 433 applied) in advance of any payment to priority creditors under that section.
16. There is presently insufficient material to determine this second issue. The Former Receivers' evidence only addresses the costs of preserving, administering and realising the cash at bank. The Former Receivers state that they incurred costs in the care and preservation of the Cockatoo Island Project mine (which is a non-circulating asset of the Company) and have used the circulating assets that came into their hands to meet those costs, but the particulars of those other costs are not presently in evidence. Further, the Former Receivers have not addressed, in their submissions, the basis on which they would be entitled to throw their costs incurred in respect of the non-circulating assets against the circulating asset fund.

The evidentiary lacuna

17. The evidentiary shortcomings were first identified by the solicitors for the Commonwealth in a letter to Former Receivers dated 21 November 2018, prior to the filing of their evidence. The solicitors for the Commonwealth also sent a further letter to all the parties on 7 December 2018 raising this issue.
18. The Commonwealth cannot presently ascertain what assets were subject to a circulating security interest as at the date of appointment of the Former Receivers, or the value of those assets.
19. The Commonwealth cannot presently ascertain what costs the Former Receivers incurred in respect of the care, preservation and realisation of the circulating assets of the Company, and what of those costs were payable out of the circulating asset fund in priority to the priority creditors under s 433.
20. Not all costs incurred by a receiver will diminish the fund from which priority creditors are paid. There must be some

connection or correlation between the work done and the recovery, care or preservation of the relevant asset. The extent and degree of such connection raises questions of fact and law which, based on the submissions and evidence filed to date, are incapable of precise and proper resolution in this proceeding. (Footnotes omitted.)

29 The Commonwealth asserted that the parties ought to file further evidence and submissions concerning the value of the circulating assets as at the date of the appointment of the Former Receivers, and the nature and quantum of the costs of the Former Receivers say they incurred in respect of the care, preservation and realisation of the circulating asset fund.

The hearing on 14 December 2018

30 The application was listed for directions on 14 November 2018, and then for substantive hearing on 14 December 2018.

31 At the commencement of the hearing, the Commonwealth pressed its application to adjourn, maintaining the position summarised above.

32 In response, counsel for the Current Receiver made the following submission and concessions.²¹

... The former receivers are agents of the company. They have the company's money. The new receiver seeks the company's money to be transferred to him. The former receiver said, 'We are concerned we have a liability and if we have a liability then we will need to keep money on hand to provide for it' and we accept that that's so. If there is a liability or risk of a liability, then of course they should keep the money. They have a deed of indemnity. We're not talking about that.

The question is whether there is any prospect that they have a liability and that depends upon the proper construction of section 433.

...

If we're wrong on section 433 then that will be the end of this proceeding.

33 At the hearing on 14 December 2018, the question for the court to determine, as framed by Counsel for the Current Receiver, was whether the liability of a receiver to make the payment contemplated by

²¹ ts 8, 15 (14 December 2018).

Corporations Act s 433 only arises at the time when a payment is made to the debenture holder.²²

34 Without objection, further programming directions were made for the filing of written submissions on the proper construction of s 433, on the basis that should the Current Receiver's construction be accepted, that would be determinative of the matter.²³ Section 433 is reproduced in full at sch A to these reasons.

Form of the application

35 The application is pressed on behalf of the Current Receiver under *Corporations Act* s 423(1)(b), and IPS cl 90-15 and cl 90-20.

36 Section 423(1)(b) allows the court to conduct an inquiry as to the manner in which a controller has carried out his or her duties. The application of the section involves a two-step analysis. That is, whether the complainant has established a prima facie case that there is something that requires inquiry; and if so, whether the court should, in its discretion, order an inquiry.²⁴ In light of the relief sought, and the manner in which the Current Receiver ultimately chose to frame and argue the application, s 423(1)(b) is not an appropriate basis for the orders sought.

37 The alternative basis upon which the application is pressed is under IPS cl 90-15 and cl 90-20. The Current Receiver appears to petition an order pursuant to cl 90-15(3)(a), being an order determining any question arising in the external administration of a company. I am prepared to determine the application on the alternative basis pressed, although the application, as finally framed, might properly have been made as an application for a declaration under the *Supreme Court Act 1935* (WA) s 25(6), or pursuant to the inherent jurisdiction of this court.

The five propositions pressed on behalf of the Current Receiver

38 The Current Receiver says that the issue joined between the parties in relation to the proper interpretation of *Corporations Act* s 433, is whether the critical time for the determination of a receiver's liability is the date of appointment of the receiver, as submitted on behalf of the Commonwealth. The Current Receiver says that this in

²² ts 9 and 11 (14 December 2018), as noted in the submissions of the Department of Jobs and Small Business filed 19 December 2018 par 2.

²³ At the hearing on 14 December 2018, Counsel on behalf of the Current Receiver confirmed that no argument would be pressed pursuant to *Corporations Act* s 561 (ts 27 (14 December 2018)).

²⁴ LexisNexis, *Austin & Black's Annotations to the Corporations Act* (current to October 2018) [5.423].

turn requires an examination of what is meant by the 'positive obligation on a receiver' under s 433(3), and a consideration of the authorities.²⁵

39 In summary, the Current Receiver contends for the following propositions:²⁶

- (a) first, the rights of priority employee creditors (being the creditors referred to in ss.556(1)(e), (g) or (h) or s.560) are determined on the 'relevant date', being the date of appointment of the receiver (see s.433(9));
- (b) second, on and from the relevant date, the receiver owes a duty to priority creditors to comply with s.433, which has been referred to in a shorthand way as a 'positive duty', rather than a 'negative duty';
- (c) third, and critically the 'positive duty' under s.433 is not:
 - (i) a 'positive duty' to make a payment at any particular time;
 - (ii) a 'positive duty' to quarantine the proceeds of circulating assets at any particular time;
 - (iii) a 'positive duty' to make a 'provision' for payment to the priority employee creditors, in contradistinction to the express statutory obligation to make 'provision' for priority auditor creditors as stated in s.433(6)-(8); or
 - (iv) a 'positive duty' to realise any particular circulating asset for the benefit of priority creditors;
- (d) fourth, rather, the 'positive duty' involves two elements:
 - (i) to make a payment to priority creditors before making any payment to secured creditors out of the proceeds of circulating assets; and
 - (ii) to treat the interests of priority creditors as analogous to the interests of secured creditors in respect of decisions made by the receiver during the course of the receivership, either generally or specifically in respect of circulating assets; and
- (e) fifth, there is no issue that the Defendants acted in the best interests of the Company by expending money on the care and

²⁵ Plaintiff's further submissions in reply filed 14 December 2018 par 3.

²⁶ Plaintiff's further submissions in reply filed 14 December 2018 par 4(a) - (e).

maintenance of the assets of the Company (and in particular the sea wall) and on the process of selling the assets in this case (see PSR [7]).

40 The Current Receiver suggests that if the propositions are accepted, it follows that the Former Receivers have not breached any duty arising under or in respect of *Corporations Act* s 433, and there is therefore no reason for the Current Receivers to retain the Residual Funds.²⁷

41 The position advanced on behalf of the Current Receiver requires the court to proceed on the basis that the facts set out below are relevant, and that they have been established, or are not in dispute.²⁸

7. To assist the court, the following facts are relevant, and are not understood to be in dispute:

- (a) the Defendants were appointed as receivers of the Company on 8 September 2015, which is the relevant date for the purposes of s.433(9);
- (b) as at the relevant date, there were priority employee claims (some of which may be in dispute), the amount of which exceeds the amount of the Residual Funds of \$840,542.60 held by the Defendants at the end of their receivership;
- (c) as at the relevant date, or thereafter (to the extent relevant, but without admission), the Defendants were in possession of the proceeds of circulating assets of the Company which have been expended by them;
- (d) it is necessary for the Defendants to retain the Residual Funds to satisfy any liability which they may have (although no liability is conceded) if a breach of s.433 could be established; and
- (e) it was necessary for the defendants, and it remains necessary for Plaintiff, to incur costs for the care and maintenance of the Company's assets, for the reasons set out in the Hughes' Affidavit and the Jacobs' affidavit. (footnotes omitted.)

42 The Current Receiver acknowledges that there is a potential dispute between the Commonwealth and the Former Receivers as to the value of the circulating assets. However, the Current Receiver says that he is prepared to accept for the sake of argument, without any finding

²⁷ Plaintiff's further submissions in reply filed 14 December 2018 par 5.

²⁸ Plaintiff's further submissions in reply filed 14 December 2018 par 7.

of fact by the court, that the relevant circulating assets, or proceeds thereof, had a value exceeding the amount of the Residual Funds.²⁹

Determination

Application of *Corporations Act* s 433

43 *Corporations Act* s 433(2) provides that if a receiver is appointed and, as at the date of the appointment the company has not commenced to be wound up voluntarily, or has not been ordered to be wound up by the court, then s 433 applies. Counsel on behalf of the Current Receiver confirmed that no argument was pressed pursuant to *Corporations Act* s 561.³⁰

44 The Current Receiver's first proposition is also not in issue. It is common ground that the rights of priority employee creditors are determined on the 'relevant date', in this case, being 8 September 2015.³¹

Property to which *Corporations Act* s 433 applies

45 Section 433(3) applies to 'property' that is subject to (described previously as) a floating charge which the Former Receivers received in their capacity as receivers.³² With the introduction of the *Personal Property Securities Act 2009* (Cth), it applies to circulating assets that exist at the date of the receivers' appointment and which are subject to a circulating security interest.³³

46 The Former Receivers have proceeded on the basis that that the only circulating asset of Pluton at the date of their appointment was Pluton's cash at bank in the amount of \$524,190.³⁴ As noted above, this is not conceded by the Commonwealth.

47 The Commonwealth says that there appear to be other amounts, in addition to the cash at bank, which the Former Receivers received during the first six months of their appointment, that could potentially be circulating assets (or proceeds of such assets) existing or identifiable as at the date of the Former Receivers' appointment, and to which *Corporations Act* s 433 may apply. The Commonwealth contends that

²⁹ Plaintiff's further submissions in reply filed 14 December 2018 footnote 3.

³⁰ ts 27 (14 December 2018).

³¹ *Corporations Act* s 433(9).

³² *Korda v Silkchime Pty Ltd (recs and mgrs apptd) atf Silkchime Unit Trust* (2010) 78 ACSR 675 [41], citing with approval *Re Lewis Merthyr Consolidated Collieries Ltd* [1929] 1 Ch 498.

³³ *Commonwealth v Byrnes* (2018) 330 FLR 149 [317]; [2018] VSCA 41.

³⁴ Affidavit of Bryan Kevin Hughes filed 30 November 2018 pars 18 - 24; defendants' outline of submissions filed 3 December 2018 par 27.

there is currently insufficient evidence to determine whether those assets are in fact assets to which s 433 applied.

48 I agree with the Commonwealth that absent such evidence, it is not possible to determine the total value of Pluton's circulating assets as at the date of Former Receivers' appointment.

Positive obligation on the Former Receivers to pay

49 The second proposition pressed on behalf of the Current Receiver is that on and from the relevant date, the Former Receivers owed a duty to priority creditors to comply with s 433, which has been referred to in a shorthand way as a 'positive duty', rather than a 'negative duty'.

50 On a superficial level, the parties all acknowledge the existence of a 'positive obligation' or 'positive duty' under s 433. It is also common ground that a receiver will be liable in tort for failing to satisfy the positive obligation. What is in issue in this proceeding is the nature of the positive obligation to pay, and whether the Former Receivers are at risk of liability.

Textual analysis - *Corporations Act s 433*

51 The Current Receiver submits that the scope of the 'positive duty' is revealed in the text of s 433, and argues that it would be textually inconsistent with s 433 for the Former Receivers to have any liability in the circumstances of this case.³⁵

52 In summary, the Current Receiver says that 'Section 433 does not create a priority of payment to unsecured priority creditors over the costs of the receivership, which may include continuing the business of the company or preparing the asset sale. It is simply concerned with the order in which dividends are paid, to ensure employee entitlements are paid before secured creditors where the moneys are derived from 'circulating assets'.³⁶

53 As the Former Receivers did not pay any dividends, the Current Receiver asserts that 'no question of the operation of s 433 arises. Further, no question of tort or other liability could arise, for the simple reason that the [Former Receivers] have not paid any dividend, and thus have done no wrong'.³⁷ Further, the Current Receiver says that the

³⁵ Plaintiff's submissions in reply filed 12 December 2018 par 4 - 6; Plaintiff's further submissions in reply filed 14 December 2018 par 8 - 13.

³⁶ Plaintiff's submissions in reply filed 12 December 2018 par 5. See also pars 4 and 6.

Commonwealth's submission 'amounts to an attempt to assimilate the position of priority employee creditors to that of priority auditor creditors, without regard to the statutory distinction drawn between the two, and for that reason alone, ... ought to be rejected'.³⁸

54 The textual analysis promoted on behalf of the Current Receiver is not supported by the authorities that deal with the operation of s 433, or an equivalent provision.³⁹ I refer in particular to the decision of Le Miere J in *Korda v Silkchime*, where at [58] his Honour considers the nature of the duty under s 433(3).

The obligation created by s 433(3) is that the receiver must pay 'out of the property coming into his hands' the priority debts in priority to any claim for principal or interest in respect of the debentures. It is, as I have said, well established that the section is not merely a negative provision to the effect that the receiver is protected if he does not pay the debenture holders. It is a provision which requires him to pay the preferential creditors out of any property coming into his hands. However, there must be some qualification to that duty. Obviously, a receiver is not obliged to pay to the preferential creditors amounts in excess of the value of the property, or the amount which can be realised from the property. To do so would require of the receiver that he do more than pay the preferred creditors, 'out of the property coming into his hands'.

Elements of the 'positive duty'

55 The Current Receiver, by the third asserted proposition, explains what he says the positive duty is not. By the fourth asserted proposition, he explains what he says are the two elements of the duty, and contends that the decision of Le Miere J in *Korda v Silkchime* directly supports the fourth proposition.⁴⁰ It does not.

56 It is submitted that the first of the two elements of the 'positive duty' is for a receiver to make a payment to priority creditors before making any payment to secured creditors out of the proceeds of circulating assets.

³⁷ Plaintiff's submissions in reply filed 12 December 2018 par 6.

³⁸ Plaintiff's further submissions in reply filed 14 December 2018 par 13.

³⁹ *Re CMI Industrial Pty Ltd (in liq)* (2015) 105 ACSR 635; [2015] QSC 96 [12] - [29] and [45], and the authorities referred to, which include *Korda v Silkchime* (2010) 78 ACSR 675; *Westminster Corporation v Haste* [1950] Ch 422; [1950] 2 All ER 65; *Inland Revenue Commissioner v Goldblatt* [1972] 1 Ch 498; (1972) 2 WLR 953; *Steinberg v Herbert* (1988) 14 ACLR 80, 96 - 97; *General Credits Ltd v Chemineer Nominees Pty Ltd (in liq)* (1986) 4 ACLC 570, 574; and *Whitton v ACN 003 266 886 Pty Ltd (controller appointed) (in liq)* (1996) 42 NSWLR 123; (1996) 14 ACLC 1799, 146.

⁴⁰ Plaintiff's further submissions in reply filed 14 December 2018 pars 14 - 17.

57 However, as explained above, Le Miere J makes plain in *Korda v Silkchime* that s 433(3) is not merely a negative provision to the effect that the receiver is protected if he does not pay the debenture holders. It is a provision which requires him to pay the preferential creditors out of any property coming into his hands.

58 The second of the two elements of the 'positive duty' is said to be for a receiver to treat the interests of priority creditors as analogous to the interests of secured creditors in respect of decisions made by the receiver during the course of the receivership, either generally or specifically in respect of circulating assets.

59 The acknowledgment by Le Miere J of there being 'some qualification' to the duty to pay the preferential creditors out of any property coming into a receiver's hands is said to be the basis for the second of the two elements.

60 The Current Receiver notes that a receiver has a duty to act in the best interests of the company and its creditors, which duty arises either at common law (as per *Korda v Silkchime*), or under the *Corporations Act* s 420A. He argues that such duties qualify the 'positive duty' under s 433, as found by Le Miere J in *Korda v Silkchime*.⁴¹

61 The Current Receiver then invites the court to accept, in this case, that it was necessary for the Former Receivers to incur costs for the care and maintenance of Pluton's assets, for the reasons deposed to by Robert Jacobs and Bryan Hughes; that there is no issue that the Former Receivers acted in the best interests of Pluton by expending money on the care and maintenance of the assets of Pluton (and in particular the sea wall), and on the process of selling the assets in this case; and, accordingly, that the Former Receivers have not breached any duty arising under or in respect of s 433.⁴²

62 Careful consideration of the reasons of Le Miere J in *Korda v Silkchime*, reveals that the qualification described at [60] and [61] of his Honour's decision was not one that touched upon or related to the positive payment obligation to which a receiver is subject under s 433. Rather, I accept that the qualification at [60] and [61] pertained to the nature and extent of a receiver's obligation and/or entitlement to conduct work or incur expenses in realising circulating assets that would then become the subject of the receiver's payment obligations

⁴¹ Plaintiff's further additional submissions in reply filed 24 December 2018.

⁴² Plaintiff's further submissions in reply filed 14 December 2018 par 7(c), and par 4(e) and par 5.

under s 433. As noted at [59], the court was concerned (relevantly) with the question of whether a receiver is under any duty to '... undertake work or expend money to realise assets to generate funds from which the preferred creditors may be paid'.⁴³

63 The Commonwealth correctly maintains that the two questions that must be asked and answered are not addressed by a global assertion that the Former Receivers acted in the best interests of Pluton or in the best interest of creditors. The question is whether the Former Receivers breached their duty under s 433 in respect of circulating assets coming into their hands.

64 Part of the necessary factual inquiry, which cannot presently be undertaken, is to identify the costs that the Former Receivers deducted from the pool of circulating assets (once the value of the pool is known), and to determine whether those costs were properly deductible in advance of any payments to priority creditors under s 433, in accordance with the principle in *Re Universal Distributing Co Ltd (in liq)*.⁴⁴ That is, a receiver may be entitled to be paid some of his or her expenses in priority to the priority creditors under s 433, depending on the nature of those expenses and their connection to the fund in the particular case. The extent to which the Former Receivers may claim, in priority to the priority creditors under s 433, the costs, expenses and remuneration which they have reasonably incurred will turn on the precise circumstances in which the cost and expense was incurred, and their relationship to the preservation and realisation of the circulating assets to which s 433 applies.

65 I also agree with the Commonwealth that the submissions advanced on behalf of the Current Receiver assume the existence of a factual finding that the Former Receivers were entitled to deduct from the pool of circulating assets all of the costs they incurred in, for example, maintaining the sea wall. That is, the submissions made on behalf of the Current Receiver assume the existence of the very fact that arises for determination if the question of the Former Receivers' liability is to be decided.⁴⁵

66 In support of the second of the two elements of the 'positive duty', the Current Receiver also refers to and seeks to rely upon the

⁴³ Defendants' supplementary submissions filed 19 December 2018 par 16.

⁴⁴ Submissions of the Department of Jobs and Small Business filed 19 December 2018 par 17; *Re Universal Distributing Co Ltd (in liq)* (1933) 48 CLR 171, 174 – 175 (Dixon J). See also the submissions of the Department of Jobs and Small Business filed 12 December 2018 par 10

⁴⁵ Submissions of the Department of Jobs and Small Business filed 19 December 2018 par 18.

decision of the Court of Appeal in *Steinberg v Herbert*,⁴⁶ in particular the reasons of Kennedy J at pages 96 - 97. It is submitted that Kennedy J implicitly assumed that which Le Miere J expressly determined. That is, that a receiver will undertake actions (and therefore incur costs) in the ordinary course of the receivership; and any 'positive obligation' arising out of s 433 is therefore subject to such actions and costs and a receiver does not become liable for taking such actions where they are proper and necessary.⁴⁷

67 I find that the decision of the Court of Appeal in *Steinberg v Herbert* does not support the fourth proposition as advanced on behalf of the Current Receiver, nor do the reasons of Sanderson M in *Re Great Southern Ltd*.⁴⁸

68 The Current Receiver noted, for the avoidance of doubt, that he does not propose to use the Residual Funds to pay any dividends to the secured creditor, but intends to use them to progress the sale process.⁴⁹ I have not had regard to the intention as asserted, as it is irrelevant to the question to be determined. Further, any suggestion that it is appropriate to treat the appointment of the Current Receiver as a continuation of the appointment of the Former Receivers for the purpose of s 433 is to misconstrue the nature of each separate appointment and the operation of s 433.

69 On 12 December 2018, the Current Receiver filed a second affidavit to which, among other documents, was annexed a letter from Gold River dated 11 December 2018.⁵⁰ In the letter, Gold River's support of the Current Receiver's application is noted; the purpose for which funds were advanced to Pluton from March 2018 is explained; and it is asserted that Gold River was not informed, nor did it understand, that the funds it lent would be used to satisfy liability for employee payments.

70 The matters raised by Gold River have not weighed in my determination of the application. They are irrelevant to the question to be determined.

⁴⁶ *Steinberg v Herbert* (1988) 14 ACLR 80.

⁴⁷ Plaintiff's further submissions in reply filed 14 December 2018 par 21.

⁴⁸ *Re Great Southern Ltd; Ex Parte Thackray* [2012] WASC 59.

⁴⁹ Plaintiff's submissions in reply filed 12 December 2018 par 8.

⁵⁰ Supplementary affidavit of Robert Allan Jacobs filed 12 December 2018 'RAJ24'.

Conclusion

71 For the reasons set out above, it cannot be said that no question of the operation of *Corporations Act* s 433 arises in this case.

72 In light of the concessions made on behalf of the Current Receiver on 14 December 2018, I find that the Former Receivers are entitled to retain what they presently hold of the Residual Funds for the purposes of meeting any extant liability. I do so on the basis that I make no findings as to whether the Former Receivers satisfied their obligations under *Corporations Act* s 433.

73 Although concessions were made on behalf of the Current Receiver, I have considered the right of the Former Receivers to continue to hold what is left of the Residual Funds, and on the materials before me I am satisfied of the same. In summary, I am satisfied that:

- (a) the Former Receivers, being privately appointed receivers who acted as agents of Pluton, have a right of indemnity enforceable over that company for liabilities owed to third parties in respect of the acts done during the course of their appointment;⁵¹
- (b) the right of indemnity is secured by an equitable lien, which entitles the Former Receivers to retain any property of Pluton in their possession. I note that such a lien only exists if there is an extant liability, no lien exists in respect of possible future claims.⁵² On the facts before me, the risk of extant liability is established to the requisite extent;
- (c) it may be questionable whether a receiver appointed out of court has an equitable lien against charged funds which take priority over a secured creditor,⁵³ and in these proceedings, the Former Receivers go further to say that generally, the equitable lien does not take priority over secured creditors.⁵⁴ However, in these proceedings, GNR (the secured creditor) has by contract with the Former Receivers subordinated its interests to the

⁵¹ *ASIC v Lanepoint Enterprises Pty Ltd (No 2)* (2006) 64 ATR 524; [2006] FCA 1493 at [47] - [48] (French J) (overturned on appeal, but not on this finding of principle), citing *Moodemere Pty Ltd (in liq) v Waters* [1998] VR 215 at 222 (Murphy J) and 229 (Tadgell J).

⁵² *Flexible Manufacturing Systems Pty Ltd v Fernandez* [2003] FCA 1491; (2003) 22 ACLC 47 at [27] - [28].

⁵³ *ASIC v Lanepoint Enterprises Pty Ltd (No 2)* (2006) 64 ATR 524; [2006] FCA 1493 at [47] - [48], referring to *Nicobar Pty Ltd v Abrokiss* (2003) 48 ACSR 259; [2003] NSWSC 1247 at [60], [62] and [64] (Young CJ).

⁵⁴ Defendants' outline of submissions filed 3 December 2018 par 11.

equitable lien, which secures the Former Receivers' right of indemnity;⁵⁵

- (d) as against GNR, the Former Receivers also have the benefit of their contractual rights under the Deed of Indemnity, including the contractual right (subject to the terms of that deed, including cl 2.2) to be indemnified under cl 2.1, and the contractual right under cl 3 to:⁵⁶

apply moneys received by the [Former] Receivers during or as part of the Receivership including, without limitation, moneys paid to the Receivers by or on behalf of [GNR and its parent company] or recovered as part of the Receivership, in payment of amounts to which the [Former Receivers] are entitled including under the Deed of Appointment, the Security and this deed.

- (e) on a proper construction of the Deed of Indemnity, the Former Receivers are entitled presently to retain the Residual Funds, being funds of Pluton falling within the scope of GNR's perfected security interest, for the purpose of satisfying their potential right of indemnity under the Deed of Indemnity.

74 Again, this is on the basis that I make no findings as to whether the Former Receivers satisfied their obligations under *Corporations Act* s 433, or whether any qualification of the contractual indemnity under cl 2.2 might apply.

75 As noted above, the Former Receivers say as at 30 November 2018, \$594,674 of the Residual Funds remained under the control of the Former Receivers.⁵⁷ I understand from the submissions made on behalf of the Former Receivers on 14 December 2018, that the Former Receivers will provide to the Current Receiver information as to how some of the Residual Funds have been used since their retirement and that no orders are required to compel the same.

76 I will otherwise hear from the parties as to the appropriate form of orders and costs.

⁵⁵ By operation of cl 3 of the Deed of Indemnity dated 8 September 2015 between the Former Receivers, GNR (the secured creditor), and GNR's parent company: affidavit of Robert Allan Jacobs filed 12 November 2018 'RAJ19' pages 335 - 349, when read with cl 2.1 of the Security Deed between Pluton and GNR, and *Personal Property Securities Act 2009* (Cth) s 61(2).

⁵⁶ Affidavit of Robert Allan Jacobs filed 12 November 2018 'RAJ19' page 343.

⁵⁷ Affidavit of Bryan Kevin Hughes filed 30 November 2018 par 47.

Schedule A - Section 433 Corporations Act 2001 (Cth)

Property subject to circulating security interest--payment of certain debts to have priority

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

registered body must pay, out of the property of the registered body coming into his, her or its hands, the following debts or amounts in priority to any claim for principal or interest in respect of the debentures:

- (a) first, any amount that in a winding up is payable in priority to unsecured debts pursuant to section 562;
 - (b) next, any debt or amount that in a winding up is payable in priority to other unsecured debts pursuant to paragraph 556(1)(e), (g) or (h) or section 560.
- (5) The receiver or other person taking possession or assuming control of property must pay debts and amounts payable pursuant to paragraph (3)(c) or (4)(b) in the same order of priority as is prescribed by Division 6 of Part 5.6 in respect of those debts and amounts.
 - (6) In the case of a company, if an auditor of the company had applied to ASIC under subsection 329(6) for consent to his, her or its resignation as auditor and ASIC had, before the relevant date, refused that consent, a receiver must, when property comes to the receiver's hands, before paying any debt or amount referred to in paragraph (3)(c), make provision out of that property for the reasonable fees and expenses of the auditor incurred after the relevant date but before the date on which the property comes into the receiver's hands, being fees and expenses in respect of which provision has not already been made under this subsection.
 - (7) If an auditor of the company applies to ASIC under subsection 329(6) for consent to his, her or its resignation as auditor and, after the relevant date, ASIC refuses that consent, the receiver must, in relation to property that comes into the receiver's hands after the refusal, before paying any debt or amount referred to in paragraph (3)(c), make provision out of that property for reasonable fees and expenses of the auditor incurred after the refusal and before the date on which the property comes into the receiver's hands, being fees and expenses in respect of which provision has not already been made under this subsection.
 - (8) A receiver must make provision in respect of reasonable fees and expenses of an auditor in respect of a particular period as required by subsection (6) or (7) whether or not the auditor has made a claim for fees and expenses for that period, but where the auditor has not made a claim, the receiver may estimate the reasonable fees and expenses of the auditor for that period and make provision in accordance with the estimate.

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- (9) For the purposes of this section, the references in Division 6 Part 5.6 to the relevant date as to be read as references to the date of the appointment of the receiver, or of possession being taken or control being assumed, as the case may be.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

EA

Research Associate to the Honourable Chief Justice Quinlan

28 DECEMBER 2018