

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
CORPORATIONS LIST

Not Restricted

S ECI 2016 1126

IN THE MATTER of RE MAMOUNIA PTY
LTD (IN LIQ)

MAMOUNIA PTY LTD (IN LIQUIDATION)
ACN 007 091 349

First Plaintiff

SHANE DEANE AND NICHOLAS GIASOUMI
IN THEIR CAPACITY AS JOINT AND
SEVERAL LIQUIDATORS OF MAMOUNIA
PTY LTD (IN LIQUIDATION) ACN 007 091 349

Second Plaintiff

<u>JUDGE:</u>	ROBSON J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	3 April 2017
<u>DATE OF JUDGMENT:</u>	11 May 2017
<u>CASE MAY BE CITED AS:</u>	Re Mamounia Pty Ltd (in liq)
<u>MEDIUM NEUTRAL CITATION:</u>	[2017] VSC 230

CORPORATIONS – Application by liquidators for directions – Liquidators winding up a company that acted as a trustee carrying on a family restaurant – Company now a bare trustee – Liquidators seek a direction that they are justified in being reimbursed out of the trust assets for the reasonable cost and expenses in conducting investigations and examinations into claims by creditors and possible claims by the company – Held liquidators justified in proceeding on the basis that they are entitled as of right to be reimbursed their reasonable costs and expenses incurred in such investigations and examinations as those activities fall within the salvage principles in *Universal Distributing* – Section 511 *Corporations Act 2001* (Cth).

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	M J Galvin QC with R Zambelli	Piper Alderman

TABLE OF CONTENTS

Introduction.....	1
Background to the application	2
The liquidators' dilemma.....	8
The matters requiring inquiry and examination.....	9
Cash at bank.....	10
Ordinary unsecured creditors (unrelated)	10
Lien claims by former lawyers	10
Related party claims.....	11
Matters requiring further investigation	13
Mediation	14
The Claims of the Kurban family	16
Nabil Kurban.....	16
Raif Kurban.....	16
Walid Kurban.....	17
Six Point Star as trustee for the Six Point Star trust	19
The Original Pizza Family Company as trustee for the Original Pizza Family	20
Fadi and Andriana Kurban.....	20
Simon and Marlene Kurban.....	21
Smarjs as trustee for the Simon and Marlene Kurban Family Trust	22
Consideration of the relevant authorities	22
The scope of the proposed examinations.....	41
Determination	42

HIS HONOUR:

Introduction

- 1 Mamounia Pty Ltd (in liq) was the trustee of a trading trust that owned and carried on a family restaurant and pizza business called “Colombo’s” and land where the restaurant business was conducted on Whitehorse Road, Box Hill. As a result of a falling out between the five brothers involved in the business and the beneficiaries of the trust, Mamounia has been put into liquidation, initially as a members voluntary liquidation.
- 2 The business and freehold have been sold and the liquidators have realised some \$1.3 million trust assets in the liquidation. Mamounia owes non-family creditors some \$800,000. The liquidators have satisfied themselves that these sums should be paid. The family members and their related entities have made claims against Mamounia that on one basis amount to nearly \$9 million. The liquidators have not been able to satisfy themselves that these claims should be paid. If all claims were proved, Mamounia would be insolvent and there would be the potential for insolvent trading claims to be made.
- 3 On 6 June 2016, Mr Shane Deane and Mr Nicholas Giasoumi (the liquidators) were appointed the joint and several liquidators of Mamounia by way of a resolution passed at an extraordinary general meeting of the members of Mamounia, for the purposes of a members’ voluntary winding up.
- 4 There was never a declaration of solvency by the directors for the purposes of a members’ voluntary winding up, which, under the provisions of the *Corporations Act 2001* (Cth) (Corporations Act), means that the winding up is by default, a creditors’ voluntary winding.
- 5 On 10 June 2016, Mamounia and the liquidators issued an originating process seeking, inter alia, declarations that their appointment as liquidators was valid. On 20 June 2016, I made various orders on the return of the originating process, including that the further hearing of the originating process be adjourned to a date to be fixed.
- 6 In the absence of receiving undertakings from the family members and their related entities that they will not prove for an interim dividend in the liquidation of Mamounia so that all

non-related unsecured creditors can be paid an interim dividend of up to 100 cents in the dollar, the liquidators seek, inter alia, directions:

- (a) that they are justified in applying trust assets in conducting a examinations of family members concerning claims that they have, or claims that Mamounia may have against them;
- (b) as to whether they are entitled to draw and pay their remuneration and expenses incurred in the conduct of public examinations and, if appropriate, the recovery of preferential payments from funds recovered and realised in the liquidation of Mamounia, including funds representing trust property, or the proceeds of realisation of trust property.

7 For the reasons that follow, I propose to direct that the liquidators are so justified.

Background to the application

8 Mamounia was incorporated on 19 October 1988. Mamounia was appointed the trustee of the Kurban Family Trust established by a deed dated 13 December 1988. The principal beneficiaries are five brothers Nabil Kurban, Fadi Kurban, Walid Kurban, Gaby Kurban and Simon Kurban. The brothers were all appointed directors of Mamounia on 24 October 2008.

9 Since 20 June 2000, Nabil has been the sole director of Mamounia. Prior to 6 June 2016 Nabil was the sole shareholder of Mamounia, holding 5 shares. On 6 June 2016, Nabil transferred one share in Mamounia to Hala Kurban for \$1.00.¹

10 Mamounia's constitution² contained the following clauses:

- (a) That no business may be transacted at a general meeting unless a quorum of two members is present (clause 63); and
- (b) The number of directors of Mamounia shall be not less than two (clause 90).

¹ Exhibit SD-4; SD-5.

² Exhibit SD-3.

11 An extraordinary general meeting of Mamounia was held on 6 June 2016, at which the following resolutions were passed:

- (a) To affirm all past and present resolutions passed by members of the company when constituted by Nabil Kurban alone;
- (b) To amend the Article 90 of the company's Articles of Association from 'the number of directors shall not be less than two nor more than nine provided that the company from time to time by resolution increase or reduce the number of directors' to read 'the number of directors shall not be less than one nor more than nine provided that the company from time to time by resolution increase or reduce the number of directors;'
- (c) To affirm all past and present resolutions passed by the board of directors when constituted by Nabil Kurban alone, including this convening of a meeting of the members.³

12 Mamounia had no other function or business other than as trustee of the Kurban Family Trust and did not trade in its own right. Mamounia has no assets of its own save for the right of indemnity it has in respect of debts incurred on behalf of the trust. Mamounia is no longer trustee of the business assets under the terms of the trust; under clause 17, it ceased to be trustee on it going into liquidation. Mamounia now holds the assets as bare trustee.

13 Mamounia was incorporated to acquire (and operate) the business known as Colombo's Family Restaurant for an amount of \$325,000. The purchase consisted of the restaurant "Colombo's Family Restaurant" and the take away department, "Colombo's Pizza House" (the Balwyn business) which both operated from leased premises at 248-250 Whitehorse Road, Balwyn. The Balwyn business was intended to be run as a family business by the Kurban family and professional advice was obtained on creating a formal ownership structure. The five primary beneficiaries of the trust were all involved in the operation of the Balwyn business.

³ Exhibit SD-6.

- 14 As a result Mamounia and the Kurban Family Trust were established in which the Balwyn business would be held. The purpose of the Kurban Family Trust was to use the equity that was built up through the Balwyn business to support the beneficiaries of the trust.
- 15 Between December 1988 and March 2016, the Balwyn business was the primary asset of the Kurban Family Trust. The principal activity of Mamounia has been the operation of the Balwyn business.
- 16 From time to time, the proceeds of the Balwyn business have been paid out allowing the purchase of a number of properties by the beneficiaries and related parties. The Kurban Family Trust supported the purchase of properties in a number of ways, including directly funding the purchase, by using the Balwyn business as security for purchases and/or by Mamounia acting as guarantor for purchases.
- 17 In around 1995, Mamounia was offered the opportunity to purchase the freehold premises from which the Balwyn business operated, being 248-250 Whitehorse Road, Balwyn (the Balwyn premises).
- 18 Kelpax Pty Ltd was incorporated on 5 May 1995 with the Kurban brothers, aside from Nabil, as directors. Kelpax purchased the Balwyn premises in 1996. At some stage, the Balwyn premises was transferred to Six Point Star Pty Ltd of which Simon and Fadi were originally directors. Fadi was removed as a director in 2007. In June 2014, the other four Kurban brothers were appointed directors of Six Point Star, along with Simon.
- 19 In or about November 2015, Six Point Star sold the Balwyn Premises to an unrelated party for \$8.6 million. The sale completed in January 2016.
- 20 In or around 2014, Mamounia began to experience financial difficulties and sought advice from accountants. In or around 7 July 2015, Mamounia received a statutory demand for payment issued by the ATO for \$260,071.40.
- 21 In or around September 2015, an offer was made by Colombo's Balwyn, to Mamounia, for the purchase of the Balwyn business.

- 22 On 23 December 2015, a contract for the sale of the Balwyn business was executed between Colombo's Balwyn and Mamounia with a sale price of \$1,950,000. The sale of the business was settled on 30 March 2016 and the balance of the proceeds are the subject of orders of Judd J made 17 March 2016.
- 23 On 3 December 2015, Simon and his wife Marlene, along with corporate entities of which they are directors (Kelpax and Smarjs Pty Ltd) commenced proceedings in this Court against Mamounia and other defendants (Gaby and his former wife Michelle) with claims of unrepaid loans by Smarjs to Mamounia, and by Simon and his wife to Mamounia, and that a distribution of \$191,146 was made by Mamounia to Simon and his wife, which they allege they have not received.
- 24 On 3 March 2016, Fadi issued proceedings in this Court against Mamounia and Nabil seeking orders, inter alia, that Mamounia be restrained from selling the Balwyn business without prior consent of the Court and that the contract of sale of the Balwyn business be set aside.
- 25 On 7 March 2015, Simon and Marlene issued further proceedings in this Court against Mamounia seeking interlocutory orders for, inter alia, the provision of documents, and that Mamounia and Nabil be restrained from paying out any moneys from Mamounia, other than for taxes or superannuation.
- 26 From the funds from the sale of the Balwyn business, Mamounia has made, to date, payments of \$10,000 to Meridian Lawyers on account of Mamounia's legal costs and expenses directly arising out of the sale of the Balwyn business; \$410,917 to the ATO; and \$66,370 to CME Capital Australia Pty Ltd. The balance of the proceeds, as at June 2016, was \$1,509,623.
- 27 Since 20 June 2016, when I previously made orders under the liquidators' originating process, including that the proceeding be adjourned to a date to be fixed, the liquidators have undertaken an extensive investigation into the affairs of Mamounia and have prepared a detailed preliminary liquidators' report. The report has been circulated to the Kurban brothers. The liquidators have also convened a mediation between themselves, on behalf of Mamounia, and each of the Kurban brothers, with a view to addressing the various issues identified in the liquidators' report.

28 Initially, the liquidators sought the following further orders on their originating process:

- (a) Upon each related entity, as defined in section 9 of the Corporations Act, wishing to claim as a creditor in the liquidation of Mamounia, undertaking not to prove for an interim dividend only in the liquidation of Mamounia, the liquidators may proceed to distribute an interim dividend of up to 100 cents in the dollar to unsecured creditors admitted to proof in the liquidation of Mamounia, including interest payable under s 563B of the Corporations Act.
- (b) Upon the liquidator certifying the payment in full of all unsecured creditors' claims in the liquidation of Mamounia, other than any claim of a related entity, the liquidation of Mamounia be stayed for a period of 4 months (or such further or other period as the Court may order) subject to the following directions:
 - (i) the liquidators will continue to retain under their control all property of Mamounia;
 - (ii) the director of Mamounia is not to resume management of Mamounia; and
 - (iii) the liquidators of Mamounia may pay from the property of Mamounia the reasonable costs of retaining a mediator to mediate any matters in dispute as between Mamounia and any related entity.
- (c) Alternatively, to the orders set out above, if the undertaking specified above are not provided the liquidators are justified in indemnifying themselves from the assets of the Kurban Family Trust for the liquidators' reasonable remuneration and expenses (including reasonable costs of retaining solicitors and counsel) in:
 - (iv) conducting examination and seeking production of books under Part 5.9 of the Corporations Act in relation to matters indemnified in the preliminary liquidators' report dated 16 November 2016, and any further matters the liquidators determine require investigation; and
 - (v) instituting and prosecuting any preference recovery actions under section 588FA

of the Corporations Act.

- (d) Further, that the liquidators are justified in indemnifying themselves from the assets of the Kurban Family Trust for the liquidators' reasonable remuneration and expenses (including the reasonable costs of retaining solicitors and counsel) to the date of the order in bringing in the originating process.

29 The liquidators contend that the rationale for this order was as follows.

- (a) The liquidators presently hold sufficient funds to pay out in full the claims of all arm's length unrelated creditors. Various related entities have lodged claims in the liquidation for in excess of \$2.9 million.
- (b) The claims of the related entities are variously disputed by other related entities and, equally, Mamounia may have separate claims against some or all such related entities.
- (c) The funds in the liquidators control are not sufficient to pay out in full the claims of the related entities as well as those of the unrelated parties and the remuneration and costs of the liquidators in investigating and resolving the claims of the related entities and bringing any claims on behalf of Mamounia against any one or more of them will be substantial and will likely materially diminish the possible return to.
- (d) The proposal, if acquiesced to by those members of the Kurban family seeking to claim as creditors, will permit all arm's length creditor claims to be paid in full and will provide an opportunity for the Kurban family to resolve their differences by mediation without the costs burden of the ongoing liquidation continuing. If the Kurban family is unable to resolve the matters in dispute as between them by way of mediation or otherwise the liquidation can resume subject to further direction of the Court.

30 If the Kurban brothers and related entities were to acquiesce to the proposal, and if the validated claims of the Kurban brothers and related entities exceeds the balance after payment of the unrelated creditors, they would receive less than pari passu with other

creditors, contrary to their rights in equity.

31 As at the date of the hearing before me, the Kurban family had not given the requested undertakings. Accordingly, the liquidators pressed for the orders enabling them to conduct the proposed investigations and examinations.⁴

32 Mr Deane deposes that he believes that the making of the orders sought will permit the most efficient course for the winding up of the affairs of Mamounia.

The liquidators' dilemma

33 In the course of the performance of their statutory duties, the liquidators have identified avenues of enquiry and potential causes of action for the recovery of property for the benefit of creditors. The only resources that the liquidators have are assets of the Kurban Family Trust. The liquidators seek a direction that they are justified in incurring remuneration, costs and expenses associated in pursuing these matters further by conducting public examinations. Until these claims are determined, the liquidators are not in a position to distribute interim dividends to the unsecured unrelated creditors, nor to assess the solvency of Mamounia and therefore, the potential for any insolvent trading claims.

The matters requiring inquiry and examination

34 On 16 November 2016, Mr Deane sent a preliminary liquidators' report to each of the Kurban brothers. The report set out the status of his investigations as at that date, a history of the conduct of Mamounia, and contentious matters identified in the liquidation which would have implications for the creditors of Mamounia. Since preparing the report, Mr Deane has continued with his investigations including conferring from time to time with the Kurban brothers. Mr Deane deposes that he does not propose to provide any further report by way of qualification or further information at this point in time. Mr Deane is aware that there are various allegations that have been made which, if substantiated, may cause him to revisit some of the assumptions and conclusions expressed in his report.

35 In his report, Mr Deane addresses issues around the valuation of the Colombo restaurant

⁴ [70] p18.

business. Mr Deane deposes that if the allegation that the revenue recorded in the books of the company was materially understated (due to unrecorded cash receipts), is made out, then the valuation obtained might well be questioned, whereupon, the conclusion that the sale price appeared to be at a commercial value, would need to be reconsidered.

36 Mr Deane deposes that in respect of the valuation of the restaurant business formerly operated by the company, he intends to engage a specialist valuer and forensic specialist to analyse accounts and point of sale documentation in his possession, to provide an opinion on the value of the business incorporating all known sales and expenses. Mr Deane notes that he does not consider the sale of the business to be a voidable transaction.

Cash at bank

37 To date, Mr Deane has received the sum of \$1,301,736.33 into the account opened for the liquidation of Mamounia. A further sum of \$454,454.89 is being held on trust by Meridian Lawyers to secure the liens asserted over the funds by both Meridian Lawyers (Meridian) and Altus Lawyers (Atlas).

38 To date, Mr Deane has paid expenses totalling \$134,635.34 inclusive of GST. Mr Deane is yet to draw remuneration, but has had remuneration approved by creditors up to a total amount of \$252,654.60, inclusive of GST, and at 23 February 2017, had an accrued remuneration claim of \$231,179.30.

Ordinary unsecured creditors (unrelated)

39 At paragraph 7.3.2 of the his report, Mr Deane details the ordinary unsecured and unrelated creditors of Mamounia. Mamounia's report as to affairs (RATA) disclosed 46 unrelated ordinary unsecured creditors. Mr Deane has since received proofs of debt from a further three unrelated creditors.

40 The unrelated ordinary unsecured creditor claims total \$810,074.83, according to the RATA, and \$633,121.79 according to the proofs of debt received. The proofs of debt include the sum of \$216,158.22 claimed by Meridian, over which Meridian claim a lien and which amount Meridian currently holds in its trust account.

41 The majority of the unrelated ordinary unsecured creditor claims relate to either trade creditors of the Balwyn business, or legal fees of Mamounia.

42 Mr Deane has twice called for proofs of debt in this liquidation to ascertain the quantum and bona fides of the claims. Based on his investigations, he is of the view that there is currently sufficient cash at bank to pay the claims of unrelated ordinary unsecured creditors with a sufficient surplus remaining for the further conduct of the liquidation.

Lien claims by former lawyers

43 Altus and Meridian both provided legal services to Mamounia up to the date of liquidation; each claim liens over various sums relating to files held by them where Mamounia is the client. The liquidators have come to an agreement with Meridian and Altus whereby Meridian is currently holding the total combined sum over which Altus and Meridian claim liens in its trust account, pending determination of the validity of the liens and a review of Altus and Meridian's files.

44 Both Meridian and Atlus claim particular liens over certain funds, and a possessory lien over the full amounts claimed to be owing.

45 On Mr Deane's instructions, and in consultation and with the agreement of both Meridian and Altus, the liquidators' solicitors, Piper Alderman, have engaged costs consultants (Britton Costs) to review the files of each Altus and Meridian and provide Mr Deane with a certificate of assessment in relation to each of Altus' and Meridian's claims for fees, setting out Britton Costs' professional opinion of the amount that is reasonably due and owing by Mamounia to each firm.

46 Mr Deane is presently reviewing these matters with his solicitors, with a view to reaching a resolution of the claims of Meridian and Altus to payment of legal fees and their respective claims to a lien over the lien fund.

47 On the basis that the lien fund is being held in Meridian's trust account, and has not been factored into the cash at bank sum as set out above, Mr Deane is of the view that the payment of the claims of Altus and Meridian will not affect Mamounia's ability to pay the unrelated

ordinary unsecured creditor claims.

Related party claims

48 At paragraph 7.4 of the report, Mr Deane sets out a series of transactions and claims against Mamounia in the liquidation by various related parties, being the Kurban brothers, various of their spouses and entities related to or controlled by them (related parties).

49 The RATA included related party claims totalling \$698,409.01. Subsequent to his appointment, Mr Deane has received additional related party claims and proofs of debts. As at the date of the preliminary report, the related party claims for which proofs of debt have been received, total \$2,913,499. 75.

50 The related party claims include the following:

Ordinary unsecured creditors (related)	Amount claimed in RATA	Proof of debt received	Possibly owing Mamounia
Fadi Kurban	12,899.20		4,896.82
Nabil Kurban	36,755.55	36,755.55	
Raif Kurban	19,652.36	17,967.34	
Walid Kurban	399,521.04	400,348	2,267.12 7,500
Gaby Kurban			72,895.25
Six Point Star as trustee for the Six Point Star Trust	219,684.67	835,584	
The Original Pizza Family Company as trustee for the Original Pizza Family Trust	9,996.19	9,996.19	
Additional Creditors			
Fadi and Adriana Kurban		120,000	
Marlene Kurban		70,000	
Simon and Marlene Kurban		41,896.38	
Simon Kurban		281,146.00	42,684.68
Contingent Claims			
Colombos Balwyn	Unknown		
Fadi Kurban	Unknown		
Smarjs as Trustee for the Simon & Marlene Kurban Family Trust	Nil	1,062,532.50	
Total			
		\$2,913,499.75	

51 Since the date of the preliminary report, there have been additional related party claims together with indication that further related party claims will be lodged which may increase

the related party claims by an amount in excess of \$8 million. As at 31 March 2017, Mr Deane had not received those claims.

52 Mr Deane deposes that the related party matters are contentious and extensive. It is his view that the related party matters are unlikely to be resolved without legal advice and potentially, public examination of a number of parties. The related party claims are further discussed below.

53 The liquidators submit that it is necessary to determine the validity of the claims of the related entities in order to ascertain the solvency of Mamounia. In view of the large amounts claimed, if these debts were proved, Mamounia may have been trading whilst insolvent.

Matters requiring further investigation

54 In part 8 of the liquidators' report, Mr Deane outlines the material matters requiring further investigation, some of which may result in further recoveries for the benefit of the company. These include investigations into the following:

- (1) potential deficiencies in the books and records of the company, including a large number of cash transactions in relation to sales and the payment of part time employees;
- (2) potential insolvent trading claims; the company was cash flow insolvent while trading and substantial related party claims were incurred that are not recorded in the accounts, insolvency may have occurred much earlier;
- (3) potential preference claims, including payments to the ATO and CME Capital Australia;
- (4) ownership of motor vehicles and payment of motor vehicle related expenses;
- (5) outstanding taxation lodgements with the ATO;
- (6) sale of restaurant business prior to liquidation;
- (7) alleged large cash transactions;

- (8) payment of wages 'off the books' for approximately 12 casual employees, any unreported PAYG withheld, unpaid superannuation and additional payroll tax liabilities;
- (9) purchase and sale of 248-250 Whitehorse Road by Six Point Star;
- (10) purchase and sale of 42 Elliot Avenue Balwyn;
- (11) financing of the purchase of various properties by related parties, including homes of one or more of the Kurban brothers;
- (12) claiming of government apprenticeship incentives.

55 The liquidators' report states that in relation to practically all the claims made by related parties, further investigation is required, and that in investigating these matters, various claims that may be brought on behalf of Mamounia, including against various related parties, may be identified and the liquidators will be in a position to better determine the solvency of the company.

Mediation

56 Having regard to the extensive related party claims, the liquidators formed the view that it was in the interests of all stakeholders, particularly the unsecured unrelated creditors, to attempt to reach agreement of the matters requiring further investigation and of the claims of related parties without recourse to litigation. Accordingly, the liquidators proposed to the related parties that they participate in a mediation.

57 On 29 November 2016, a private mediation took place at which each of the Kurban brothers was present. Mr Deane engaged Mr Daryl Williams QC to conduct the mediation and met Mr Williams fee and the costs of the venue from the property of Mamounia.

58 The matters as between Mamounia and the related parties were not resolved.

59 On 12 December 2016, Mr Deane instructed Piper Alderman to send an open letter to each of the brothers (via their legal representatives where applicable). The letter referred to the report and set out the liquidators' proposal whereby:

- (a) the primary beneficiaries of the Kurban Family Trust and all other related parties would withdraw their claims to date, or otherwise undertake not to prove in the liquidation for any interim distribution to creditors;
- (b) the liquidators would approach the Court for directions that:
 - (vi) the liquidators pay a first and final dividend to all arm's length creditors; and
 - (vii) after payment of the first and final dividend to all arm's length creditors, the liquidation would be stayed for a period of up to six months, in order to allow the related parties to resolve all outstanding matters as between themselves without the costs and pressures of the liquidation weighing upon them;
- (c) if the related parties were unable to resolve all the outstanding matters within the period of the stay, the stay would be lifted and the liquidators would proceed to wind up the affairs of Mamounia in accordance with their duties and obligations under the Corporations Act.

60 On 16 December 2016, the solicitors for the liquidators received a letter from Alderuccio Solicitors, solicitors for Walid. The letter states that that Walid intends to pursue his proof of debt.⁵ The letter further requests that the liquidators seek the consent of all 'required parties' for Walid's claim to be included with the unrelated ordinary unsecured creditors and be paid a first and final dividend.

61 If Walid's claim is included in the unrelated ordinary unsecured creditors, Mr Dean deposed that he remains of the view that there is sufficient cash at bank to pay the claims of unrelated ordinary unsecured creditors (including Walid) with sufficient surplus remaining for the further conduct of the liquidation, subject to the estimate of costs of the further matters to be pursued. As such some funds may need to be held over in respect of this claim.

62 The Kurban brothers are represented as follows and have provided responses to the liquidators as follows:

⁵ Walid has provided a proof of debt for \$400,348.00.

Walid Kurban	Alderuccio Lawyers - letter dated 16 December 2016
Simon Kurban	Billings Cloak Lawyers - without prejudice meeting held on 22 February 2016 with liquidator and no written response as at date of this affidavit
Nabil Kurban	Eastern Bridge Lawyers - letter dated 21 December 2016
Gabi Kurban	Goldsmiths Lawyers - letter dated 15 December 2016 confirming consent to payment of interim dividend to Walid Kurban.
Fadi Kurban	GPZ Lawyers- without prejudice response received only dated 16 February 2017

63 On 21 December 2016, a meeting of the committee of inspection (committee meeting) was convened. At the committee meeting, the liquidators' proposal to pay arm's length creditors was discussed. Fadi, Walid and Simon did not expressly confirm their position at the committee meeting.

The Claims of the Kurban family

Nabil Kurban

64 The claim advanced by Nabil was included in the RATA as at 6 June 2016. The claim relates to his personal credit card, which he utilised to pay company liabilities. The proof of debt lodged provided copies of his credit card statements. The liquidators are awaiting further documentation, such as tax invoices to support the claim that payments were made on account of the company.

Raif Kurban

65 Raif is the father of the Kurban brothers. The proof of debt submitted by Raif was included in the RATA as at 6 June 2016. Raif has submitted a proof of debt in respect of a loan made to the company in the amount of \$17,967.34 in respect of his claim for payments made on account of the company on his personal credit card. Raif's claim includes interest charges, although no written agreement has been provided in support of the claim and insufficient support has been provided to confirm payments were made on account of the company.

66 The liquidators' investigations disclose amounts withdrawn from the company of which Raif received the benefit. Nabil advised that cash amounts were paid to Raif; from 2013-2014 Raif was paid \$300 per week as a living allowance and \$5,000 per trip to Lebanon; from March 2015 the company paid \$1000 per month for purchases made on Raif's credit card.

Walid Kurban

67 The proof of debt submitted by Walid Kurban of \$400,348.00 is made up of the following claims:

(a) \$388,000 - Loan agreement

(b) \$7,500 - Legal fees paid to Meridian Lawyers on behalf of the company

(c) \$4,848 - Interest on Loan agreement

68 A copy of the loan agreement, dated 24 September 2014, has been provide in support of Walid's claim. The loan amount is in respect of Walid's 60 per cent share of the after tax proceeds from the sale of 62 Elliott Avenue Balwyn under contract dated 6 May 2014. The loan agreement states 'net proceeds have been agreed to be distributed to the company to assist in repayment of current outstanding tax liabilities of the company and associated family trust beneficiaries. It is also acknowledged that a property located at 42 Elliott Avenue Balwyn is to be transferred to Walid.' The loan agreement is for an unsecured loan with a term of 14 months, with interest only payments in an amount of \$1,616 per month. If/when 42 Elliott Avenue Balwyn is transferred with 100 per cent clear ownership to Walid (or other residential property of similar value) within the loan term, the loan shall be considered immediately repaid.

69 The company's records disclose monthly payments of \$1,616 to Walid from October 2014 to March 2016.

70 The company records contain another version of the loan agreement dated 11 June 2014. This loan agreement provides for a loan amount of \$410,000 relating to Walid's 60 per cent share in 62 Elliott Avenue Balwyn and the repayment of \$1,025 per month. Otherwise with similar terms to the loan agreement of 24 September 2014.

- 71 Financial statements for the year ended 30 June 2014, disclose an unsecured loan owed to the company in an amount of \$5,200,000 in relation to the Westpac Bank facility. Mr Deane found that the Westpac Bank refinance amount included \$1,066,607 to extinguish the CBA loan in the name of Kelpax relating to the property at 62 Elliott Avenue Balwyn.
- 72 The company records also contain a copy of the sale agreement of the property situated at 62 Elliott Avenue Balwyn and a copy of the funds disbursement agreement and authority dated 6 April 2014, which states that the ‘residual balance, if settlement proceeds, [is] to be immediately gifted and paid in full to Mamounia Pty Ltd as trustee for the Kurban family trust to be applied to tax amounts now due for the Kurban family trust and its beneficiaries.’ This amount is estimated as \$578,500. This agreement was signed by Walid in respect of his 60 per cent interest in 62 Elliott Avenue Balwyn and Simon as director of Kelpax, in respect of its 40 per cent interest in the same. This agreement was provided to the Westpac Bank.
- 73 On 17 September 2014, the ATO received \$280,000 for outstanding taxation liabilities. This is consistent with the date of settlement of 62 Elliott Avenue Balwyn.
- 74 The balance of the primary loan amount claimed has not been supported by the creditor and is not evidenced in the company books and records.
- 75 Further investigations and potentially legal advice, are required in respect of this claim, where conflicting intentions and documents exist in relation to funds from 62 Elliott Avenue Balwyn and given other related parties (Fadi and Andriana) have advanced a claim to proceeds from that property.
- 76 Regarding (b), Meridian’s trust account received \$15,000 from Walid on account of Mamounia for the caveat dispute in relation to 42 Elliot Avenue Balwyn. Walid’s claim provides that \$7,500 has been repaid.
- 77 Company records disclose communications from Walid’s legal representative and Meridian assert, inter alia, that Walid is entitled to the proceeds of 42 Elliott Avenue Balwyn. Accordingly, further investigations are required into these legal fees, where these may have been provided to protect Walid’s own interest in the property.

Six Point Star as trustee for the Six Point Star trust

78 The beneficiaries of Six Point Star are Simon, Nabil, Gaby, Walid and Fadi. Six Point Star was a previous registered proprietor of 246-250 Whitehorse Road Balwyn, and claims \$835,584.00 in respect of:

(a) \$200,000 paid on the settlement of 246-250 Whitehorse Road to Westpac Bank to pay the company's overdraft facility;

(b) a loan to the company in an amount of \$213,184 from its settlement funds, made to the purchaser of the 246-250 Whitehorse Road property to represent a six month bond for its occupancy;

(c) a claim of unpaid rent in an amount of \$384,000 plus GST.

79 Mr Deane has found that the payments subject to (a) and (b) were made out of the funds from settlement of the trading premises and that the management accounts disclose application of those funds to loans. The Westpac Bank facility records showed that a refinance of the company and other related party facilities resulted in two Westpac Bank facilities in Mamounia's name, totalling \$6,385,000. Facilities in the name of Six Point Star were included in this refinance with the company being the sole entity servicing that facility from August 2010, until it was extinguished upon the settlement of the property on 20 January 2016. Further records in Mr Deane's possession indicate that Mamounia was paying the costs of the property.

80 The claim of unpaid rent is made pursuant to a lease agreement executed in September 2015 (and its disclosures dated October 2015), wherein the lease commencement date is 1 January 2015.

81 Prior to the existence of the lease, the company had occupied and traded from the premises since its acquisition. The property was purchased by another related entity, Kelpax as trustee for the Kurban investment trust, in 1998. Six Point Star became the proprietor in 2005.

82 Nabil advised that the lease was executed solely to support a sale of the property and of the company's business. The liquidators report states that in the absence of the lease between Six

Point Star and Mamounia, the business and the property may not have achieved the level of its sale price and could not have been sold as a going concern. Nabil advised that the company never paid rent to Six Point Star, either pursuant to this lease agreement or otherwise.

83 An external accountant for Mamounia and Six Point Star and other related entities, advised that Mamounia did not pay rent to Six Point Star, however rent was recorded in a journal entry of the payments made by Mamounia to Mamounia's Westpac Bank facility, and was not intended to be paid to Six Point Star.

84 The claim for unpaid rent is contrary to the advice the liquidators have received and advice that further legal advice may be required.

85 The company may have a right of recovery in respect to the sale of the property and its proceeds.

The Original Pizza Family Company as trustee for the Original Pizza Family

86 The Original Pizza Family Company claims an outstanding balance for a loan in the amount of \$9,996.19. The principle amount was for \$20,000. The company records evidence receipt of \$20,000. No written loan agreement has been provided. The liquidator is continuing to reconcile the company's loan account with the debtor amount.

Fadi and Andriana Kurban

87 Fadi and Andriana claim \$120,000 pursuant to a loan agreement dated 7 September 1999. The loan agreement was provided with the claim.

88 The agreement provides for a loan of \$92,000 to the directors of Mamounia and Kelpax companies for the purchase of the properties at 60 and 62 Elliott Avenue Balwyn on behalf of the Kurban family and its business interests, with accruing interest of 9 per cent per annum.

89 The company records do not disclose the company having ever been the proprietor, or having the control of either property.

90 There is no evidence that the loan amount was received by or on behalf of the company.

91 Nabil advised that he does not consider the written loan agreement to be valid and disputes that the signature on the loan agreement is genuine. The company's management accounts do not contain any corresponding disclosure in its liabilities.

92 The liquidators do not consider there to be sufficient evidence to support this claim as a valid claim in the liquidation.

Simon and Marlene Kurban

93 Marlene has claimed \$70,000 in unpaid trust distributions for the years ended 30 June 2012 and 30 June 2013 from the Kurban Family Trust.

94 Simon has claimed \$281,146.00 for unpaid trust distributions for the years ended 30 June 2012, 2013 and 2014. No other beneficiary has claimed for unpaid trust distributions.

95 Nabil advised that trust distributions were made in cash, without receipts, on a weekly basis throughout the financial year to the primary beneficiaries, then retrospectively brought to account at the end of the financial year by a minute for amounts distributed. Nabil advised that there were no undistributed amounts and the minute would reflect payments and an income split to spouses and children for taxation purposes. Simon was the chief financial officer for these financial periods.

96 The amounts claimed are consistent with the trust distribution minutes for each of the financial years.

97 Simon and Marlene have submitted a proof of debt for \$41,896.38 for loans made to the company pursuant to a loan agreement dated 30 June 2012 for the principle amount of \$34,000.00.

98 Nabil disputes the validity of the signature on the loan agreement and advises that it is not his signature.

99 The loan agreement postdates the claimed cash loan amounts made to the company. The company records do not support any loan in favour of the creditor or an advance of funds received in accordance with a loan agreement.

Smarjs as trustee for the Simon and Marlene Kurban Family Trust

100 Smarjs has submitted a proof of debt for \$1,062,532.50 for funds loaned to the company pursuant to a loan agreement dated 23 December 2012 for the principle amount of \$862,272.63.

101 Nabil disputes the validity of the loan agreement and advises that the signature is not his.

102 The loan agreement postdates the claimed loan amounts made to the company. The primary loan amounts include amounts claimed to have been advanced to the company direct, some cash and some electronic funds transfer and also to pay the ATO direct on account of the company. The management accounts and externally prepared financial statements do not contain a reference consistent with this claim.

103 The liquidators are continuing to investigate this claim and note that seven of the ten claimed loan amounts were not receipts by the company received from or on account of Smarjs.

Consideration of the relevant authorities

104 The liquidators submit that the authorities support the proposition that a liquidator of a corporate trustee of a bare trust, carrying on no other business other than that of the trust and the liquidation, is entitled to his or her remuneration of both administering the trust and of general liquidation work. This includes the conduct of investigations and other activities which are necessary to discharge the liquidators' statutory duties and/or required to identify and realise trust property and to identify trust liabilities.

105 The issue raised by the question for directions goes to the entitlements and duties of the liquidators. The liquidators are not the trustee of the trust but have taken over the function of the directors and have imposed on them further duties to wind up the company in accordance with the Corporations Act.

106 It is well established that the trustee has the right to indemnify itself from the trust assets for liabilities properly incurred on behalf of the trust. The issue in this case raises the rights of the liquidators in carrying out their duties under the Corporations Act (as opposed to the trustee) which are directed at properly identifying the claims made against Mamounia as

trustee by the five brothers and identifying any claims Mamounia has as trustee against the five brothers.

- 107 The liquidators also seek a direction on whether they would be entitled to apply the trust assets in conducting preference proceedings against two creditors which the liquidators believe received a preference. As noted above, this would only be necessary if the claims of the related entities are validated.
- 108 The liquidators wish to conduct examinations of some, if not all, of the Kurban brothers, being the five beneficiaries of the trust, in relation to the claims made by them against Mamounia and the possible claims that Mamounia may have against them. The claims made by the brothers, and their father Raif, are set out above.
- 109 Under s 556 of the Corporations Act, the liquidators of a company are entitled to be paid their remuneration, costs and expenses out of the assets of the company.⁶ Their priority is governed by the Corporations Act.
- 110 The liquidators referred to some twenty cases that address the entitlement of liquidators to be paid their remuneration, costs and expenses out of trust assets held by the company in liquidation.
- 111 In *Re Universal Distributing Co Ltd (in liq)*,⁷ the company went into liquidation. The assets realised were not sufficient to meet the liability owing under debentures which were secured by the undertaking and its uncalled capital. Dixon J held that the liquidator was entitled to charge against the assets he had realised ‘so much of the remuneration fixed for work done in the winding up referable to the calling in and conversion of the assets producing the fund.’⁸ Dixon J held that expenses ‘reasonably incurred in the care, preservation and realisation of the property’ charged to the debenture holders could be deducted from the fund realised by

⁶ Section 556(1) Subject to this Division, in the winding up of a company the following debts and claims must be paid in priority to all other unsecured debts and claims: (a) first, expenses (except deferred expenses) properly incurred by a relevant authority in preserving, realising or getting in property of the company, or in carrying on the company’s business.

⁷ (1933) 48 CLR 171 (*‘Re Universal’*).

⁸ *Re Universal*, 173.

the liquidator.⁹

- 112 In *Re Crest Realty Pty Ltd (No 2) (in liq)*,¹⁰ a corporate real estate agent went into liquidation under a creditors' voluntary winding up. The estate agent held moneys on trust for clients in a separate trust account that it was required by law to maintain. The bank at which the account was held refused permission for the liquidator to operate the trust account and contended that a new trustee ought to be appointed. The liquidator sought directions.
- 113 The bank argued that the liquidator's duties were restricted, so far as property was concerned, to property of the company and not trust property. Needham J did not agree. Needham J referred to the powers of the liquidator in a creditors' voluntary winding up. Section 269(1)(b) of the *Companies Act 1961* provided that a liquidator in a voluntary winding up may exercise all the powers conferred on liquidators in a compulsory winding up by s 236(2), including that set out in s 236(2)(k), namely to 'do all such other things as are necessary for winding up the affairs of the company and distributing its assets.'
- 114 Needham J observed that there were no binding authorities on the issues raised. He canvassed English and Canadian decisions that were not directly on point. He said the cases supported the conclusion reached independently, 'that part of a liquidator's duty, in "winding up the affairs of the company" is to exercise the powers of the directors in the administration of trusts by the company, subject, of course to the desirability of making application to the court either for directions or for the appointment of a new trustee where that is expedient.'¹¹
- 115 Needham J held that in the absence of any statutory provision regulating the administration of trusts of which a company in liquidation is trustee, that s 261 of the *Companies Act 1961* placed upon the liquidator the duty to act in a responsible way in the administration of the trust in the name of the company. He added that in some cases it would be unsuitable for the company to continue as trustee, but nothing appeared in the case before him to indicate that that stage had yet been reached.¹²

⁹ *Re Universal*, 174.

¹⁰ [1977] 1 NSWLR 664 (*Re Crest Realty*).

¹¹ *Re Crest Realty*, 672.

116 The liquidators submitted that the case also held that the liquidators were entitled to take their remuneration out of the trust assets. I do not agree that the case went that far.

117 In *Octavo Investments Pty Ltd v Knight*,¹³ the High Court confirmed the general principles concerning the bankruptcy of a trading trustee. In the case, Coastline Distributors Pty Ltd (Coastline) carried on business solely as a corporate trustee as a distributor of frozen foods. Coastline's business was unsuccessful. Shortly before it went into liquidation it made a number of payments to a creditor, Octavo Investments Pty Ltd. The liquidators sought to recover the payments as preferences. The High Court held that the Coastline's right of indemnity over all the assets of the trust was property falling within s 122(1) of the *Bankruptcy Act 1936* and thus the payments could be rendered void as against the liquidator of Coastline.

118 The High Court said:¹⁴

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 recognised 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.

119 In *Re Byrne Australia Pty Ltd (No 1)*,¹⁵ the liquidator of a company in liquidation sought orders that he was entitled to reimburse his outgoings and seek remuneration from trust assets. The company solely acted as a trustee and its only assets were trust assets. The company had carried on business.

120 Needham J considered *Octavo* and held that accordingly 'the assets of the company should be utilized in the payment of those creditors who can properly be called trust creditors.'¹⁶ He said that if the liquidator wishes to submit that he is one of such creditors, 'then evidence

¹² *Re Crest Realty*, 672.

¹³ (1979) 144 CLR 160 ('*Octavo*').

¹⁴ *Octavo*, 371.

¹⁵ [1981] NSWLR 394 ('*Re Byrne (No 1)*').

¹⁶ *Re Byrne (No 1)*, 399.

should be filed to support such a claim and any further argument can be had.¹⁷ The matter came back on before Needham J in *Re Byrne Australia Pty Ltd (No 2)*.¹⁸ Needham J held that the ‘liquidator’s remuneration must come out of the assets of the company; this company has no assets, but it has a right of indemnity against the assets of the trust to meet its obligation to pay creditors of the trust business. It is clear that the liquidator is not such. He is a functionary, in this case appointed by the members and confirmed in office by the creditors, who has statutory powers and duties.’¹⁹ Needham J held that the liquidator was not entitled to deduct his costs and expenses out of the trust assets.²⁰

121 In *Re Enhill Pty Ltd*²¹ the Full Court of this Court held that the trustee’s right of indemnity over trust assets is a personal right of the trustee that is available to meet all liabilities of the company whether incurred on behalf of the trust or not. Accordingly, as property of the company in liquidation it was liable for the payment of the items in s 292(1)(a) of the *Companies Act 1961* (Vic) (that included the costs, expenses and remuneration of the liquidator) (the predecessor of s 556 of the Corporations Act).

122 Lush J (with whom Gray J agreed) also held that if he was wrong about the views he expressed on the trustee’s right of indemnity over the trust assets being personal property of the company, he would find that the liquidator was entitled to deduct the costs of ‘identifying and realizing the trust assets’,²² applying by analogy *Re Universal*.²³

123 In *Grime Carter & Co Pty Ltd v Whytes Furniture (Dubbo) Pty Ltd*²⁴ McLelland J, following *Re Enhill*, held that a liquidator of a company that solely carried on a business as trustee was

¹⁷ *Re Byrne (No 1)*, 399.

¹⁸ [1981] 2 NSWLR 364 (*‘Re Byrne (No 2)’*).

¹⁹ *Re Byrne (No 2)*, 367.

²⁰ *Re Byrne (No 2)*, 367.

²¹ [1983] 1 VR 561 (*‘Re Enhill’*).

²² *Re Enhill*, 572.

²³ *Re Universal*, 174-175 (Dixon J).

²⁴ [1983] 1 NSWLR 158 (*‘Grime Carter’*).

entitled to the costs and expenses of the winding up (including the remuneration of the liquidators) in priority to the claims of the trust creditors. McLelland J held that there were ‘powerful reasons’ why the decision of an ultimate State appellate court should be now followed in New South Wales.²⁵

124 In *Re Suco Gold Pty Ltd (in liq)*²⁶ the Full Court of South Australia declined to follow *Re Enhill*. Suco Gold was the trustee of two separate trading trusts. King CJ held that the trustee’s right of indemnity over the trust assets was on available to pay trust creditors.

125 King CJ said that:²⁷

The proceeds of that right of indemnity are therefore part of the estate divisible among the creditors. 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 purpose of discharging those liabilities.

126 On the question of the liquidator’s costs, expenses and remuneration, King CJ said:²⁸

It is now necessary to consider the position of the liquidator’s costs, expenses and remuneration in the light of the above principles. Although I have not found myself able to agree with certain of the reasoning in *Re Enhill Pty Ltd*, it is, as a decision of the Full Supreme Court of Victoria, a highly persuasive authority for the proposition that the liquidator’s costs, expenses and remuneration may be paid out of the trust property. There are clearly strong practical considerations in favour of such a course. Unless that course can be followed, the liquidation of a trustee company without assets of its own cannot proceed. It seems to me that that course can be justified by reference to the obligations of the trustee company arising out of the carrying on of the business authorized by the trusts. It is part of the duty of the trustee company to incur debts for the purposes of the trust businesses and, of course, to pay those debts. Upon winding up, those debts can only be paid in accordance with the provisions of the Companies Act. This requires necessarily that there be a liquidator and that he incur costs and expenses and be paid remuneration. Section 292 provides that there be paid the costs and expenses of winding up, the taxed costs of the petitioner and the remuneration of the Liquidator “in priority to *other* unsecured debts” (emphasis mine). The expression “*other* unsecured debts” appears to imply that the costs and expenses of winding up, the petitioner’s costs and the liquidator’s remuneration are regarded by the statute as debts of the company. As the company’s obligation as trustee to pay the 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

²⁵ *Grime Carter*, 161.

²⁶ (1983) 33 ACSR 99 (*‘Re Suco Gold’*).

²⁷ *Re Suco Gold*, 107-108.

²⁸ *Re Suco Gold*, 108-9.

by the trust and as covered by the trustee's right of indemnity. If that reasoning is wrong, I would, like Lush J in *Re Enhill Pty Ltd*, be prepared to rely on the principle enunciated by Dixon J in *Re Universal Distributing Co Ltd* (1933) 48 CLR 171, 174-5.

On these principles which I have discussed, the liquidator is entitled to have recourse to the property of each trust for the purpose of meeting the costs and expenses of winding up, the petitioner's costs and the liquidator's remuneration, so far as they are incurred in relation to each trust. As there are no non-trust assets or liabilities, all the expenses are attributable to one or other of the trusts and must be apportioned between them. The liquidator will be able to make an estimate of the work and expense involved in the liquidation so far as it relates to each trust. Where no apportionment is possible, the maxim that equality is equity should provide the solution to the problem of apportionment.

- 127 The decision of Jacobs J was to similar effect and Matheson J agreed with both Jacobs J and King CJ.
- 128 King CJ did say that 'the liquidator is bound by the provisions of s 292 [of the *Companies Act 1961* (SA)] with respect to the payment of the company's debts. He must therefore endeavour to pay the debts in accordance with the priority set out in the section.'²⁹ In *Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No 2)*³⁰ Brereton J said that this observation by King CJ is 'virtually universally accepted to be incorrect.'³¹ Brereton J said that s 556 (the successor of s 292) 'is concerned only with the distribution of assets beneficially owned by the company available for division between its general creditors.'³²
- 129 In *Re Indopal Pty Ltd*³³ McLelland J held that the liquidator of a company that acted solely as the trustee of a trading trust was entitled to be indemnified out of the assets of the trust for liabilities incurred by the trustee including the costs and expenses of the winding up.³⁴ His Honour cited as authority *Re Suco Gold*. McLelland J did not refer to his previous decision in *Grime Carter* where he held that the liquidator could not take the costs of the liquidation out of the trust assets.

²⁹ *Re Suco Gold*, 109.

³⁰ [2016] NSWSC 106 ('*Re Independent*').

³¹ *Re Independent* [23].

³² *Re Independent* [23].

³³ (1987) 12 ACLR 54 ('*Re Indopal*').

³⁴ *Re Indopal*, 57.

130 However, in the case of *Re ADM Franchise Pty Ltd*,³⁵ a case to which I was not referred, and which was decided after *Re Suco Gold*, McLelland J explained that in the earlier case of *Grime Carter* he had felt constrained by *Re Enhill* ‘and the ideal of consistency in approach in this area throughout the Commonwealth’ and that the subsequent decision in *Re Suco Gold* removed such a constraint. For the purposes of the case before McLelland J, the reasoning of either *Re Enhill* or *Re Suco Gold* would have reached the same result, however his Honour said ‘if I may respectfully say so, the judgments in *Re Suco Gold* appear to provide a more acceptable means of reaching this common conclusion than those in *Re Enhill*.’³⁶

131 In *Re Berkeley Applegate Ltd (No 2)*,³⁷ the company held moneys in trust on behalf of clients awaiting investment in first mortgages. The company held its own assets as well. The company was in voluntary liquidation. The liquidator applied for a determination as to whether any part of his expenses and remuneration could be paid out of the trust assets either directly or by way of payment to the company.

132 Edward Nugee QC, who was sitting as a Deputy High Court judge, identified the various categories of work the liquidator was performing in dealing with both the companies own assets and the trust assets. Deputy Judge Nugee held that the liquidator was entitled to fair compensation in carrying out his duties. His Honour said that ‘the allowance of fair compensation to the liquidator is in my judgment a proper application of the rule that he who seeks equity must do equity.’³⁸ Deputy Judge Nugee continued:³⁹

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 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 ... or by a receiver appointed by the court whose fees would have been borne

³⁵ (1983) 7 ACLR 987.

³⁶ (1983) 7 ACLR 987, 988.

³⁷ (1989) 1 Ch 32 (*‘Re Berkeley Applegate (No 2)’*).

³⁸ *Re Berkeley Applegate*, 50.

³⁹ *Re Berkeley Applegate*, 50-51 (citations omitted).

by the trust property ... and the fact that the work has been of substantial benefit to the trust property and to the persons interested in it in equity.

- 133 Deputy Judge Nugee concluded that the liquidator was entitled to be paid his proper expenses and remuneration out of the trust assets if the assets of the company were insufficient. His Honour did not decide how such expenses and remuneration should be borne between the company's own assets and the trust assets, nor whether any part of the expenses and remuneration should be borne by the trust assets if the company's own assets were sufficient to meet them.⁴⁰ Deputy Judge Nugee held that the entitlement was at the Court's discretion and not an entitlement as a right.
- 134 In *Re G B Nathan and Co Pty Ltd (in liq)*,⁴¹ McLelland J dealt with a liquidator's entitlement to trust assets to meet costs and expenses of winding up. The company held moneys on trust for clients. The company did not carry on any business as a trustee or incur debts in that capacity. Accordingly, McLelland J held that the primary rationale of *Re Suco Gold* was not present in the matter before him.⁴²
- 135 McLelland J referred to *Re Berkeley Applegate (No 2)*, and a further case involving Berkeley Applegate, *Re Berkeley Applegate (Investment Consultants) Ltd (No 3)*⁴³ where Gibson J sought to distinguish between work done by the liquidators in administering the trust property and work done winding up the company. McLelland J said that he did not consider that the distinction drawn by Gibson J could be drawn as easily as he had suggested. McLelland J said that it was the duty of the liquidator to identify the assets of the company and in particular to ascertain whether they were beneficially owned by the company. Further, in the liquidator 'fulfilling his function to "do all such ... things as are necessary for winding up the affairs of the company..."(see s 477(2)(m) of the *Corporations Law* and cf s 479(4)) the liquidator cannot disregard the fact that the company holds property in trust for others.'⁴⁴

⁴⁰ *Re Berkeley Applegate*, 53.

⁴¹ (1991) 24 NSWLR 674 (*'Re G B Nathan'*).

⁴² *Re G B Nathan*, 686.

⁴³ (1989) 5 BCC 803 (*'Re Berkeley Applegate (No 3)'*).

⁴⁴ *Re GB Nathan*, 688.

136 McLelland J also referred to *Re Crest Realty* where Needham J had held that it was the duty of the liquidator to act ‘in a responsible way in the administration of the trust in the name of the company.’

137 McLelland J said that to the extent that there is any conflict with Gibson J in *Re Berkeley Applegate (No 3)* and the view of Needham J in *Re Crest Realty*, the views of Needham J were to be preferred ‘at least where “administration” is confined to the processes of identifying the trust assets and those entitled to them and taking such steps as may be appropriate in the circumstances for the purpose of divesting from the company the trust assets and any continuing obligations in relation to them, all of which processes may fairly be comprehended in “winding up the affairs of the company.”’⁴⁵

138 McLelland J concluded:⁴⁶

Where work done by a liquidator in relation to trust assets may properly be considered as having been done for the purpose of “winding up the affairs of the company”, it is I think consistent with general principle that any remuneration and expenses attributable to that work be paid out of the (non-trust) property of the company in accordance with s 556 of the *Corporations Law*, to the extent that there is such property available. To the extent that there is not sufficient available property, bearing in mind that generally speaking “a liquidator is not liable to incur any expense in relation to the winding up of a company unless there is sufficient available property” (s 545), it would normally be appropriate to apply the principle referred to by Deputy Judge Nugee QC in the passage quoted earlier from *Re Berkeley Applegate (Investment Consultants) Ltd (In Liq)* and make an allowance to the liquidator out of trust assets. In the present case there is nothing to suggest that there is any relevant insufficiency of available property of the company to meet the liquidator’s remuneration and expenses. The evidence suggests that there are realisable assets available to the liquidator of the order of \$100,000. Accordingly there is no occasion for any allowance for the liquidator’s remuneration and expenses to be made from trust assets.

139 In *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)*,⁴⁷ Finkelstein J addressed a liquidation where the company in liquidation held moneys on trust for investors but did not carry on business as a trustee. Finkelstein J, after referring to the principles laid down by Dixon J in *Re Universal*, referred to *Re Suco Gold*. Finkelstein J acknowledged the equitable ground that Deputy Judge Nugee relied on in *Re Berkeley Applegate (No 2)*.

⁴⁵ *Re GB Nathan*, 689.

⁴⁶ *Re GB Nathan*, 689.

⁴⁷ (1999) 30 ACSR 377 (*‘13 Coromandel’*).

140 Finkelstein J referred to the difference of opinion between Gibson J in *Re Berkeley Applegate (No 3)* and that of Needham J in *Re Crest Realty* (to which McLelland J referred in *Re G B Nathan*).

141 He concluded:⁴⁸

Those cases establish, clearly enough in my opinion, that provided a liquidator is acting reasonably he is entitled to be indemnified out of trust assets for his costs and expenses in carrying out the following activities: 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 person beneficially entitled to them.

142 Finkelstein J said that if the work done by the liquidator was unrelated to the beneficiaries and their claims, the costs and expenses associated with that work would not be charged against the trust assets.⁴⁹

143 In *Bastion v Gideon Investments Pty Ltd (in liq)*⁵⁰ a liquidator applied for directions, including as to his entitlement to his costs, expenses and remuneration out of assets held on trust by the company. Austin J found that all the company's assets were held on trust. He acknowledged that there is a distinction between costs and expenses incurred by a liquidator in the course of the administration of a trust of which the company is trustee and the costs and expenses of the liquidation but it is a distinction not easily drawn.⁵¹ He ordered that the liquidator was entitled to be paid his reasonable remuneration, costs and expenses both for the work done to date as liquidator and the work done to date on behalf of the trust, out of the trust assets of the company. His Honour did so referring to *Grime Carter, Re Enhill, Re Suco Gold* and *G B Nathan*, (noting that this case contained the better articulation of the preferred reasoning than *Grime Carter*).⁵²

144 I was referred to *ASIC v Rowena Nominees Pty Ltd*.⁵³ It does not appear to add to the

⁴⁸ *13 Coromandel*, 385.

⁴⁹ *13 Coromandel*.

⁵⁰ [2000] NSWSC 939 (*'Bastion v Gideon'*).

⁵¹ *Bastion v Gideon* [69]; referring to *Re G B Nathan*, 688.

⁵² *Bastion v Gideon* [69]-[71].

⁵³ [2003] WASC 112.

jurisprudence on the issues before me.

145 In *Re Application of Sutherland*⁵⁴ Campbell J explored the nature of the Court's equitable jurisdiction to allow a trustee to be remunerated out of trust assets. Campbell J said:⁵⁵

The basis upon which the Court acts in allowing remuneration to either a liquidator in a creditor's voluntary winding up, or a company administrator who in the course of that winding up or administration administers trust funds, derives in part, it seems to me, from the Court's inherent jurisdiction in relation to trust funds.

Although generally a trustee is not entitled to remuneration for his time and trouble in execution of the trust, there is an inherent equitable jurisdiction to allow a trustee remuneration, which is usually exercised sparingly and in exceptional cases: *In Re Worthington (dec'd)*; *Leighton v MacLeod* [1954] 1 WLR 526. This inherent jurisdiction can be exercised in circumstances such as where the duties are extensive and the trustee can perform them only by seriously sacrificing his own interests (*Marshall v Holloway* (1820) 2 Swans 432, 452-3, 36 ER 681, 689; *Re Cox's Will* (1890) 11 LR (NSW) Eq 124), where the trustees are not prepared to act without being remunerated and no alternative trustees can be found (*In re Freeman's Settlement Trusts* (1887) 37 Ch D 148), or where it is otherwise advantageous to the trust estate to allow the remuneration (*Plomley v Shepherd* (1896) 17 LR (NSW) Eq 215; *Johnston v Johnston* (1903) 4 SR (NSW) 8, 11-12). In exercising that jurisdiction one factor that the Court takes into account is whether there is really any practical alternative to allowing the remuneration: even before the time when there were trustee companies who were authorised to act as trustees for a remuneration, the court recognised that if no trustee could be found who was willing to act without remuneration, the alternative was for the trust to be administered by the court, in which case it was "at best unprofitably invested and generally frittered away": *Richardson v Allen* (1870) 10 SCR (Eq) 1, 3; *Re Cox's Will* (1890) 11 LR (NSW) Eq 124, 126.

The court's inherent jurisdiction to allow remuneration to a trustee is wide. It exists whether the appointment of the trustee was made by the court or not: *In Re Masters (dec'd)* [1953] 1 WLR 81. It extends to allow the court to approve the retention of remuneration for future work done, as well as past work done: *Nissen v Grunden* (1912) 14 CLR 297, 307-8; *Re Keeler's Settlement Trusts* [1981] 1 Ch 156, 161-2; *Re White (dec'd)*; *Tweedie v Attorney-General* (2003) 7 VR 219, 233. It allows the court to authorise payment of remuneration at a higher rate than that originally allowed by the trust instrument: *Re Duke of Norfolk's Settlement Trusts*; *Perth (Earl) v Fitzalan-Howard* [1982] Ch 61. It extends to allowing remuneration to constructive trustees: *Boardman v Phipps* [1967] 2 AC 46; *Re Jarvis (dec'd)*; *Edge v Jarvis* [1958] 1 WLR 815, 820. It extends to permit the court to allow remuneration to a trustee for work he does in acting as director of a company in which the trust funds are invested: *Re Keeler's Settlement Trusts* [1981] 1 Ch 156, 162. Whether the jurisdiction is actually exercised in any particular factual circumstances is, of course, a completely separate question to whether the jurisdiction exists.

The usual situation in which that inherent jurisdiction comes to be applied is when it is the trustee who asks that the court approve remuneration. In the present case, the trustee is the company in liquidation, not the liquidator himself. The cases to which I had referred in my earlier judgment as allowing remuneration to a liquidator who

⁵⁴ (2004) 50 ACSR 297 ('*Re Sutherland*').

⁵⁵ *Re Sutherland* (2004) 50 ACSR 297 [10]-[15].

administers trusts (*Re Berkeley Applegate (Investment Consultants) Ltd (In Liquidation)*); *Harris v Conway* [1989] 1 Ch 32; *Re Eastern Capital Futures LTB* (1989) 5 BCLC 223; *Re G B Nathan & Co Pty Ltd (In Liq)* (1991) 24 NSWLR 674; *13 Coromandel Place Pty Ltd v C L Custodian Pty Ltd (in liq)* (1999) 30 ACSR 377), clearly accepted that the jurisdiction of the Court to make an allowance to the person in fact administering a trust fund permitted a payment to be made to a liquidator.

Those cases implicitly accept that the inherent jurisdiction of the Court to allow remuneration in connection with the administration of a trust fund is one which can apply so as to allow remuneration not only to a trustee, but also to someone who is for practical purposes controlling a trustee.

In permitting remuneration to a liquidator who administers trust funds, the decision in *Re Berkeley Applegate* also invoked another equitable principle, applicable outside trust law as well as inside it, that (at 50):

... 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.

146 I have quoted Campbell J at length as the exposition of the equitable principles is particularly relevant here where the remuneration sought may extend beyond that allowable under the principles of *Re Universal*.

147 In *Re Sonray Capital Markets Pty Ltd (in liq)*,⁵⁶ Finkelstein J applied the *Re Berkeley Applegate (No 2)* principle that permitted a liquidator to be paid its costs, expenses and remuneration out of trust funds held by the company in liquidation incurred in preserving and administering the trust fund where the company's own assets were not sufficient to pay the liquidator's costs and expenses. Finkelstein J observed that the principle had been applied in Australia in *Re Application of Sutherland*⁵⁷ and *Trio Capital (Admin App) v ACT*.⁵⁸ Importantly, Finkelstein J identified a problem in the liquidators chasing possible claims when the beneficiaries may have preferred not to risk spending trust funds chasing problematic or complex claims. Finkelstein J notes that in his Honour's experience 'it is, to say the least, highly unusual for A to fund B's investigation into A's conduct so that B is in a position where it can compromise any claim it may have against A.'⁵⁹

⁵⁶ [2010] FCA 1371 ('*Re Sonray*').

⁵⁷ (2004) 50 ACSR 297.

⁵⁸ (2010) 79 ACSR 425.

⁵⁹ *Re Sonray* [2010] FCA 1371 [19].

- 148 In *Caterpillar Financial Australia Limited v Ovens Nominee Pty Ltd*,⁶⁰ the liquidator of Ovens Nominee sought orders that the liquidator be permitted to sell the assets of Ovens Nominees. Ovens Nominees was the trustee of the Ovens Trust. Under the terms of the trust, Ovens Nominees ceased to hold office upon the liquidation of the company. It was thereupon a bare trustee of the trust assets. Gordon J addressed the trustee's right to indemnify itself for liabilities incurred on behalf of the trust and the nature of the lien the trustee had over the trust assets. Gordon J held that in the absence of a new trustee being appointed, the Court had power under s 63 of the *Trustee Act 1958* (Vic) to authorise the company as a bare trustee to deal with the trust assets and to apply the trust assets to meet claims under s 556 of the Corporations Act in the course of winding up of the company. I note that the view that the trust moneys realised should be applied in accordance with s 556 does not fit easily with *Re Independent*⁶¹ and my decision in *Re Amerind Pty Ltd (in liq)*.⁶² In *Re Independent*, Brereton J held that the proceeds of trust assets were not subject to s 556.
- 149 Gordon J ordered, inter alia, that pursuant to s 479(3) of the Corporations Act, the costs and expenses incurred by the company and liquidator in realising any trust assets and otherwise dealing with any trust be costs in the winding up.
- 150 In *Re North Food Catering Pty Ltd*,⁶³ Brereton J directed that a liquidator of a company that acted solely as the trustee of a trading trust, and where the company had no property of its own, was 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 had no assets other than trust assets.
- 151 His Honour referred to *Re MF Global Ltd (in liq) (No 2)*,⁶⁴ saying that Black J of the Supreme Court of New South Wales summarised the principles regarding the payment of

⁶⁰ [2011] FCA 677 ('*Re Caterpillar*').

⁶¹ *Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No 2)* [2016] NSWSC 106 ('*Re Independent*').

⁶² [2017] VSC 127 ('*Re Amerind*').

⁶³ [2014] NSWSC 77 ('*Re North Food*').

⁶⁴ [2012] NSWSC 1426 [55] ('*Re MF Global*').

liquidator's remuneration out of the assets of a trust of which the company in is in liquidation, as follows:⁶⁵

The court has an inherent equitable jurisdiction to allow a trustee remuneration, costs and expenses out of trust assets, and this extends to a person such as a liquidator who is, for practical purposes, controlling a trustee (see *Re Application of Sutherland* [2004] NSWSC 798; (2004) 50 ACSR 297; *Trio Capital Ltd (admin appointed) v ACT Superannuation Management Pty Ltd* [2010] NSWSC 941; (2010) 79 ACSR 425).

The court may decline to exercise that jurisdiction where the company does not solely act as trustee and has sufficient beneficial assets to meet the liquidators' remuneration costs and expenses and where the work done by the liquidator in relation to trust assets may properly be treated as done for the purposes of winding up the company affairs. Thus, generally where a company has assets which are not held on trust, the liquidators' costs should usually fall on its non-trust assets (see *Re GB Nathan & Co Pty Ltd (In Liquidation)* (1991) 24 NSWLR 674 at 685-689; *Re Greater West Insurance Brokers Pty Ltd* [2001] NSWSC 825; (2001) 39 ACSR 301).

Where the company has both trust assets and assets held beneficially by the company, the costs can be apportioned such that the remuneration attributable to the statutory liquidation work would fall on the assets beneficially owned by the company, whereas that which related to administering the trust property might fall on the trust assets (see *Re French Caledonia Travel Service Pty Ltd (in liq)* [2003] NSWSC 1008; (2003) 59 NSWLR 361; 48 ACSR 97 [212]).

152 His Honour said that the difficulty with the case before him was that there had unquestionably been work done which was statutory liquidation work not directly or specifically referable to the administration of the trust assets, but that there was not property beneficially owned by the company, as distinct from held on the trust of the trading trust.

153 In reaching the decision that the liquidators were entitled to be remunerated for such work out of the trust assets, Brereton J relied on *13 Coromandel*, *Re GB Nathan*, *Re Suco Gold*, *Re Grime Carter*, *Re French Caledonia Travel Services Pty Ltd (in liquidation)*,⁶⁶ *Bastion v Gideon*.

154 His Honour said that:⁶⁷

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 not assets other than trust assets.

⁶⁵ *Re North Food* [9].

⁶⁶ (2003) 59 NSWLR 361 (*'Re French Caledonia'*).

⁶⁷ *Re North Food*, [17].

155 Subsequently, in *Re AAA Financial Intelligence Ltd (in liq)*⁶⁸ Brereton J returned to the issue of the liquidator's entitlement to trust assets. In this case, the company in liquidation was not just acting as a trustee but carried on business in its own right as well. Accordingly, the statements of principles I set out below should be read in the context that his Honour was dealing with a company with assets of its own. Brereton J laid down the following relevant principles:⁶⁹

The directions sought raise three issues: (1) whether in principle the liquidators should be permitted to recover their remuneration and expenses from the trust assets; (2) whether in principle the residue of the trust assets after payment of such remuneration as might be approved should be on a *pari passu* basis; and (3) the quantum of the remuneration and expenses claimed. In addition, there is the question whether the directions and advice sought should be given without notice to those who will be affected, namely the Advisers and Stockholders.

As to the first, the applicable principles may be stated as follows:

(1) Where the company is trustee of a trading trust and has no other activities, the liquidators are entitled to be paid their costs and expenses, whether for administering the trust assets or for "general liquidation work", out of the trust assets [*Re Suco Gold Pty Limited* (1993) 33 SASR 99; 7 ACLR 873; *Grime Carter & Co Pty Limited v Whytes Furniture (Dubbo) Pty Limited* [1983] 1 NSWLR 158; *Re Sutherland*; *Re French Caledonia Travel Service Pty Ltd (in liq)* [2003] NSWSC 1008; *Bastion v Gideon Investments Pty Ltd (in liq)* (2000) 35 ACSR 466, 480 [70]; *In the matter of North Food Catering Pty Ltd* [2014] NSWSC 77].

(2) Where the company does not act solely as trustee, costs and expenses referable to work done in relation to trust assets which may nonetheless be considered as having been done for the purpose of winding up the company ought ordinarily be borne primarily by the (non-trust) property of the company, to the extent that the assets permit [*Re GB Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674, 685-689; *Re Greater West Insurance Brokers Pty Ltd* [2001] NSWSC 825; (2001) 39 ACSR 301; *French Caledonia*, [209]].

(3) At least where the non-trust assets do not permit that course, and perhaps even when they do, a liquidator is entitled to be indemnified out of trust assets for his costs and expenses, but only to the extent that they are referable to administering the trust assets [*13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)* (1999) 30 ACSR 377, 385; *French Caledonia*, [211], [213]]. This is pursuant to the court's equitable jurisdiction to allow a trustee remuneration costs and expenses out of trust assets, which extends to a person such as a liquidator who is, for practical purposes, controlling a trustee [*Berkeley Applegate (Investment Consultants) Ltd; Harris v Conway* [1989] Ch 32, 50-51; *Re Application of Sutherland* [2004] NSWSC 798; *Trio Capital Ltd (Admin App) v ACT Superannuation Management Pty Ltd* [2010] NSWSC 941; *In re MF Global Australia Ltd (in liq) (No 2)* [2012] NSWSC 1426, [55]; *Alphena Pty Ltd (in liq) v PS Securities Pty Ltd atf Joseph Family Trust* [2013] NSWSC 447].

(4) In principle, where the liquidator does work which would entitle him both to

⁶⁸ [2014] NSWSC 1004 ('*Re AAA Financial*').

⁶⁹ *Re AAA Financial* [12]-[14].

remuneration as liquidator by the company, and recovery from the trust assets, there are two funds liable and there should be contribution between them. However, where there are no assets of the company available, it is unnecessary to consider the question of contribution. If a liquidator has done work which is attributable equally to the winding up of the company and the administration of trust assets, and there are no assets of the company at all to meet his expenses in doing so, the expenses are payable solely from the trust assets [*French Caledonia*, [212]].

(5) Where the liquidator is administering, through the company of which he/she is liquidator, more than one trust, the liquidator is not entitled to charge the beneficiaries of one trust with the costs and expenses incurred in relation to the other, although where allocation is not possible a *pari passu* allocation may be permitted [*Re Suco Gold*, ACLR 882-3; *13 Coromandel*, 386].

In this case, the company did not act solely as a trustee. *Prima facie*, costs and expenses of the winding up should be borne by its non-trust assets. However, it appears that it has none (although this remains to be proven). Subject to that, the liquidators are entitled to their reasonable and proper costs and expenses from the trust assets, but only in respect of such work as is referable to administration of the trust assets. That result accords with the direction and advice the liquidators seek.

156 In *Re PrimeSpace Property Investment Ltd (in liq)*⁷⁰ Black J made directions and order pursuant to ss 479(3) and 511 of the Corporations Act, or alternatively under s 63 of the *Trustee Act 1925* (NSW) (which are similar to s 63 in the *Trustee Act 1958* (Vic), that authorised the liquidators to use moneys held on trust by the company in liquidation to investigate the circumstances of the trustee issuing convertible notes including conducting examinations and seeking the production of documents. An unusual feature of the case was that the examination was in support of a proceeding that might benefit the trustee and not the trust. Nevertheless, putting that aspect aside, the case is authority for the proposition that a liquidator may be permitted to use trust assets to conduct examinations.

157 Black J did consider the merits of the possible claims being investigated in exercising his discretion whether or not to authorise the examinations at the trust's expense.

158 In *Freelance Global Ltd (in liq) v Benstead*⁷¹ Riordan J recognised that the principles in *Berkeley Applegate (No 2)* go beyond the 'salvage' principles recognised in *Re Universal* and extend to costs and expenses for work done by liquidators in the interests of the beneficiaries and where there is no practical alternative to allowing the remuneration.⁷²

⁷⁰ [2016] NSWSC 1891 ('*Re PrimeSpace*').

⁷¹ [2016] VSC 181 ('*Freelance*').

⁷² *Freelance* [87].

159 A question remains whether or not a liquidator may, as a right, exercise the powers that courts in Australia have recognised in applications for directions under s 479(3) of the Corporations Act, or orders under s 63 of the *Trustee Act 1958* (Vic), or whether the power to access the trust assets need be sought from the court. The issue does not require determination in this case, as the liquidators are seeking directions under s 479(3) of the Corporations Act and rely also on s 63 of the *Trustee Act 1958* (Vic).

The scope of the proposed examinations

160 The liquidators wish to conduct examination on the claims made against the company by the Kurban brothers and other related entities and claims the company may have against these parties. Once the veracity of the claims has been established, the liquidators will be in a position to assess whether or not the company was insolvent and thereafter assess whether further investigations (possibly including examinations) are warranted in order to get in property of the company by way of assessing any voidable transactions (preferences payments or insolvent trading) and claims that the company may have against the related entities. Such examinations would go to ‘identifying or attempting to identify trust assets, recovering or attempting to recover trust assets, realising or attempting to realise trust assets.’⁷³

161 In any event, in my opinion, the care and preservation of trust assets by the liquidators includes identifying trust creditors, admitting and rejecting proofs of debt, paying trust creditors and then distributing the balance, if any, to the beneficiaries of the trust.

162 Trust creditors have a right to be subrogated to the right of the trustee to be indemnified out of the trust assets, and to the trustee’s lien over all the trust assets held to secure that right.⁷⁴ Accordingly, the ‘care and preservation of trust assets’ includes identifying trust creditors who have these rights over the trust assets, and those who wrongly claim to be trust creditors. Further, payment of the admitted creditors protects the trust assets from litigation and releases the assets from the lien.

⁷³ *13 Coromandel*, 385 (Finkelstein J).

⁷⁴ *Re Amerind* and the cases referred to therein.

Determination

- 163 McLelland J held in *Re GB Nathan*, that where work done by a liquidator in relation to trust assets may properly be considered as having been done for the purposes of ‘winding up the affairs of the company’ that any remuneration and expenses attributable to that work be paid out of the property of the company in accordance with s 556 of the Corporations Act. That section lays out the priority of payments, in a liquidation, out of the property of the company.
- 164 *Re G B Nathan* is the first case in those canvassed above that identifies the liquidator accessing the company’s own moneys in meeting winding up expenses that relate to work done with the trust assets. As discussed above, the decision in *Re G B Nathan* has been applied in many subsequent decisions.
- 165 The authorities, however, distinguish between circumstances where a liquidator has an entitlement as of right under the scope of *Re Universal*, to access trust assets to meet the liquidator’s costs and expenses in winding up a company that holds assets on trust, and, circumstances where the court in its equitable jurisdiction, will allow a trustee remuneration and costs out of trust assets held by the company in liquidation for general liquidation work and work that may fall outside the scope of *Re Universal*.
- 166 The rights of a liquidator under the principles identified in *Re Universal* may be exercised as of right. On the other hand, where the company has trust assets and assets of its own, the situation is not one where the liquidator has clear rights and obligations. As was held in *Re North Food* and *Re MF Global*, the court has an inherent jurisdiction to allow a trustee remuneration, costs and expenses out of trust assets, and this extends to a liquidator of the trust. Such a discretion may enable the court, in its discretion, to permit the liquidator to use the company’s own assets, or trust assets, to meet liquidation expenses that may fall outside expenses covered by the scope of *Re Universal*.
- 167 The court may decline to exercise that jurisdiction where the company does not act solely as trustee and has sufficient beneficial assets to meet the liquidator’s remuneration, costs and expenses, and where the work done by the liquidator in relation to trust assets may properly be treated as done for the purposes of the winding up of the company’s affairs. Thus, generally where a company has assets which are not held on trust, the liquidator’s costs

should usually fall on its non-trust assets.

168 It is clear from cases, including *Re AAA Financial*, *Re Primescope*, *Re North food*, and *Re MF Global*, that a liquidator is not entitled as of right, to access trust assets for any expenses incurred beyond the circumstances permitted under *Re Universal*, but may be permitted under the court's equitable jurisdiction, if the circumstances justify it.⁷⁵ It is not necessary for me to seek to identify what duties, if any, that the liquidators may have that take them outside the *Re Universal* principles. I note however in passing, that Lush J in *Re Enhill* did not refer to any reasonable expenses of a liquidator that would not be covered by the *Re Universal* principles.

169 In this case the trustee has no assets of its own. I find that the liquidators are entitled under the *Re Universal* principles to access trust assets for reasonable expenses incurred in taking reasonable steps to investigate and conduct examinations to ascertain and assess the validity of the claims by the Kurban brothers and the related parties, against the trust assets; and any claims against the Kurban brothers and the related parties. In my opinion, in the circumstances described above, the liquidators have established that such investigations and examinations would be reasonable. I also find that the liquidators were justified in bringing this application in caring for and preserving the assets of the trust.

170 Accordingly, I find that the liquidators are justified in indemnifying themselves from the assets of the Kurban Family Trust for the liquidators' reasonable remuneration and expenses (including reasonable costs of retaining solicitors and counsel) in:

- (a) conducting examination and seeking production of books under Part 5.9 of the Corporations Act in relation to matters identified in the preliminary liquidators' report dated 16 November 2016, and any further matters the liquidators determine require investigation relating to the assets of the trust and liabilities incurred on behalf of the trust;
- (b) instituting and prosecuting any preference recovery actions under section 588FA of the Corporations Act; and

⁷⁵ *Re AAA Financial*.

(c) in bringing the originating process.

171 I direct that the liquidators bring in short minutes reflecting the orders and directions I propose to make.

172 I will order that the costs of the application be costs in the winding up and otherwise recoverable from the assets held on trust.