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## Case Summary – Kite v Mooney, in the matter of Mooney’s Contractors Pty Ltd (in liq) (No 2) [2017] FCA 653

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The Federal Court of Australia has recently handed down a judgment in the case of *Kite v Mooney, in the matter of Mooney’s Contractors Pty Ltd (in liq) (No 2) [2017] FCA 653* with respect to providing judicial advice to insolvency practitioners where they are appointed to an insolvent company which is the corporate trustee of a trading trust.

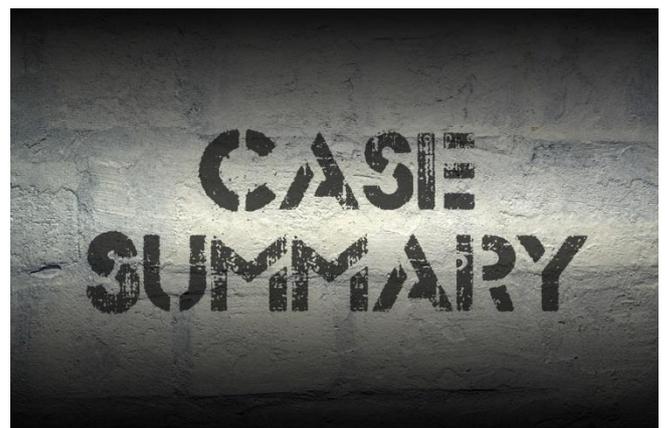
### The Case

Robert Kite and Mark Hutchins were:

1. the joint and several voluntary administrators of the Company from 27 April 2015 to 7 July 2016;
2. the receivers and managers of certain assets held by the Company as trustees for the Mooney Family Trust (**‘Trust’**) from 29 July 2016; and
3. appointed the liquidators of the Mooney’s Contractors Pty Ltd (in liquidation) (**‘the Company’**) from 7 July 2017.

The Federal Court hearing before Justice Markovic was an application made by Messers Kite and Hutchins for judicial advice in relation to various aspects of the ongoing administration of the assets of the Company as well as seeking declaration and orders over the Trust assets.

Messers Kite and Hutchins obtained most of the relief sought in the originating process but for a direction that they would be justified in paying employee entitlements in accordance with the priorities set out in s556(1) of the *Corporations Act*.



## Decision

Markovic J concluded that “it is clear that the Company, which was incorporated on the same day that the Trust was settled, operated solely as trustee of the Trust.”<sup>1</sup> Further the Company ceased to be trustee of the Trust on the appointment of Messers Kite and Hutchins as administrators, however “remains a bare trustee and may still hold the assets of the Trust, but its duties, rights and power are limited to protecting the Trust assets. As bare trustee, the Company retains its right of indemnity or exoneration and its lien over the asset of the Trust.”<sup>2</sup> Further Markovic J declared that for debts incurred prior to 27 April 2015 (when the administrators were appointed), the Company has a right of indemnity from the assets of the Trust.

The major finding by Markovic J was In relation to employee entitlements. Markovic J did not accept the submissions of Messers Kite and Hutchins and followed the decisions in *Re Independent Contractor Services (Aust) Pty Limited (in liq) (No 2)* [2016] NSWSC 106 (**‘Re Independent’**) and *Woodgate, in the matter of Bell Hire Services Pty Ltd (in liq)* [2016] FCA 1583 (**‘Woodgate’**), citing the following references:

“The statutory priority referred to in s556 does not apply in respect of trust assets, and the creditors share *pari passu* in the trust assets, after providing for the costs of administration including the Liquidator’s remuneration and expenses...”<sup>3</sup>

“s556 is concerned only with the distribution of assets beneficially owned by a company and available for division between its general creditors.”<sup>4</sup>

In relation to the other orders sought in Messers Kite and Hutchins originating process, Markovic J was satisfied with the submissions made and only made some slight amendments as deemed appropriate.

## Key points to consider

1. The main point to consider is the employees of corporate trustee will not receive the benefit of priority under s556(1) of the Corporations Act, and will be treated *pari passu* with the other creditors.
2. The case further confirms that liquidators and receivers and managers are entitled to a lien over the assets of the Trust and therefore entitled to deduct their remuneration and expenses from the Trust. The other creditors will rank *pari passu* for the balance after the liquidators and receivers and managers are paid.

Where there is a conflict of authorities and the matter involves an insolvent trustee of a trust, it is appropriate and reasonable for liquidators and receivers and managers to approach the court for

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<sup>1</sup> At [56]

<sup>2</sup> At [57], *Catpillar Financial Australia Limited v Ovens Nominates Pty Ltd* [2011] FCA 677 (Gordon J) at [26].

<sup>3</sup> At [98], *Re Independent Contractor Services (Aust) Pty Limited (in liq) (No 2)* [2016] NSWSC 106 at [25]

<sup>4</sup> At [108]

judicial advice and “the general rule is that the trust assets bear the costs of the trustee’s application for advice and directions either directly or under the trustee’s indemnity.”<sup>5</sup>

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<sup>5</sup> At [152]