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

Not Restricted

S CI 2017 01896

IN THE MATTER OF VICTORIA STATION CORPORATION PTY LTD (ADMINS APPTD)

BETWEEN:

MICHAEL CARRAFA, PETER GOUNTZOS & RICHARD CAUCHI IN THEIR CAPACITY AS JOINT AND SEVERAL ADMINISTRATORS OF VICTORIA STATION CORPORATION PTY LTD (IN ITS OWN CAPACITY AS THE PARTNERSHIP MANAGER OF THE "VICTORIA STATION CORPORATION PARTNERSHIP" (TRADING AS "VICTORIA STATION", "KATE HILL", AND "VICTORIA STATION CLEARANCE") (ADMINS APPTD) & ORS — Plaintiffs

DEPARTMENT OF EMPLOYMENT — Contradictor

JUDGE:	ROBSON J
WHERE HELD:	Melbourne
DATE OF HEARING:	15 November 2017
DATE OF JUDGMENT:	11 April 2018
CASE MAY BE CITED AS:	Re Victoria Station Corporation Pty Ltd (admins apptd)
MEDIUM NEUTRAL CITATION:	[2018] VSC 163 (Revised 19 April 2018)

CORPORATIONS – Administrators appointed to a group of companies – Companies insolvent – Two of the companies were carrying on business as a partnership – Another company acted as an agent in trading on behalf of the partnership – Administrators seeking directions in order to be able to more properly advise the second meeting of creditors of the corporations – Whether the agent company held assets on trust for the partnership – Whether agent held a possessory lien over the assets it held on behalf of the partnership by reason of its right of indemnity against the partnership for debts incurred on behalf of the partnership – Whether lien had been lost by reason of the administrators of the agent corporation selling stock held by the agent on behalf of the partnership – Whether leases partnership assets held on trust for partnership.

AGENCY – Existence of agency relationship – Agent's right of indemnity – Nature of

agent's lien - Whether lien exists over assets of agent company - Effect of sale of assets by the administrators on lien - Whether the possessory lien of the agent extends to a bank account held on trust for the partnership.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr S D Hay with Ms R Zambelli	MGA Lawyers
For the Contradictor	Mr C Moller	Clayton Utz

TABLE OF CONTENTS

HIS HONOUR:

Introduction

1 The administrators of a group of companies apply for directions under the *Corporations Act 2001* ('the Act'). The companies were used in a joint venture by two brothers, Michael and Paul Raiter. In 2003 the brothers created a complex business structure through which to run a travel-goods business. The business structure made use of corporations, trusts, a partnership, and relationships of agency. The corporations which undertook the core activities of the business went into administration in May 2017. Among the creditors are 383 employees, the landlords of 66 premises, trade creditors, and a related company which provided finance to the business.

2 The administrators seek the Court's direction in order to provide the creditors with a meaningful report and guidance at the second meeting of creditors for each of the companies in administration, under s 439A of the Act.

3 On account of the employee creditors, the Department of Employment ('Department') sought to be heard in the proceeding to advance the interests of employees to priority for their entitlements under ss 556, 560 and 561 of the Act. The Department has been appointed as the contradictor.

The material facts

4 The plaintiffs are the administrators of Victoria Station Corporation Pty Ltd (administrators appointed) ('VSCPL'), Victoria Station Services Pty Ltd (administrators appointed) ('VSSPL'), Michael Hartz Pty Ltd (administrators appointed) ('MHPL') as trustee for the Michael Raiter Family Trust ('MRF Trust'), and Paul Hartz Pty Ltd (administrators appointed) ('PHPL') as trustee for the Paul Raiter Family Trust ('PRF Trust'). I will refer to VSCPL, VSSPL, MHPL, and PHPL collectively as 'the Victoria Station group.'

5 The Victoria Station group was involved in the sale of luggage, handbags, and accessories from 64 retail outlets. The business operated under the brand, trading,

and registered business names of 'Victoria Station', 'Victoria Station Clearance', 'Kate Hill', 'Victoria Station Always Something New', and 'Victoria Station Corporation'.

6 On 27 August 2003, MHPL, PHPL, VSCPL, and VSSPL entered into The Victoria Station Corporation Partnership Agreement ('Partnership Agreement').[1] The Partnership Agreement established the 'Victoria Station Corporation Partnership' ('the partnership'). Under the Partnership Agreement, MHPL and PHPL were partners,[2] and agreed to enter into a partnership in relation to the business.[3] Although MHPL and PHPL are under administration, the partnership arrangement between them is yet to terminate.

7 VSCPL was appointed as 'Manager' of the partnership.[4] The role of VSSPL under the agreement was to enter into property leases on behalf of VSCPL.[5]

8 The Partnership Agreement defines 'the business' to mean 'the retailing of leather and travel goods (including handbags, wallets and suit cases) and associated products from factory and / or discount outlet stores.'[6] The initial capital of the partnership was nil.[7] The entitlement of the partners to capital and voting was 50 per cent each.[8]

---

1 The Victoria Station Corporation Partnership Agreement (27 August 2003) ('Partnership Agreement'), exhibited to the affidavit of Michael Carrafa, deposed 22 May 2017 ('first Carrafa affidavit').

2 The Partnership Agreement does not define the partners by reference to any particular entity; however it is not disputed that MHPL and PHPL were the partners. MHPL and PHPL are referred to in the Partnership Agreement as 'Michael' and 'Paul' respectively.

3 Partnership Agreement (27 August 2003) 1.

4 Partnership Agreement (27 August 2003) cls 1.1, 12.1.

5 See Partnership Agreement, recital F and cl 26.

6 Partnership Agreement (27 August 2003) cl 1.1.

7 Partnership Agreement (27 August 2003) cl 5.1(a).

8 Partnership Agreement (27 August 2003) cl 7.1.

9 Clause 6.1 of the Partnership Agreement, titled 'Partnership Property' provides:

> The property of the partnership shall consist of the licence, lease, goodwill, plant, furniture and stock-in-trade of the Business and all such other property whether real or personal as shall be acquired by the partnership from time to time for the purposes of the partnership business including all moneys in banks belonging to the partnership full particulars whereof shall be contained in the books of account of the partnership.

10 Clause 9.1, titled 'Outgoings', relevantly provides that 'all costs charges and expenses which shall be incurred in or about the business or in anywise relating thereto ... shall be paid out of the income or capital of the partnership ...'.

11 Under cl 12.1 of the Partnership Agreement, the manager was to conduct and carry on the business. VSCPL was the entity that employed staff, obtained finance, and entered into trade agreements for the running of the business. In its management of the business, VSCPL 'did not in any consistent way reveal to third parties that it was ... a manager of a partnership.'[9]

12 Clause 12.2(d) of the Partnership Agreement provided that VSCPL would not receive any reimbursement for its services as manager. VSCPL's duties as manager included duties to 'keep the partners currently and fully advised on all matters affecting the business and affairs of the partnership' and to 'report to and be accountable to the Partners on a regular basis.'[10] VSSPL was appointed as an agent of VSCPL, and was the entity that entered into the retail and office leases which were required to run the business.

13 On 2 May 2017, administrators were appointed over VSCPL, VSSPL, MHPL and PHPL ('the administrators') by directors' resolution pursuant to s 436A of the Act. On 12 May 2017, pursuant to s 436E, the first meeting of creditors was held for each respective company.

---

9 Transcript of Proceedings, *Re Victoria Station Pty Ltd (admins apptd)* (Supreme Court of Victoria, S CI 2017 01896, Robson J, 15 November 2017) 5 (S D Hay).

10 Partnership Agreement (27 August 2003) cls 12.2(b), (e).

14 Following their appointment, the administrators undertook a sale of the business stock and initially explored a sale of the business as a going concern.[11] The level of stock on hand rapidly diminished. The administrators did not purchase any additional stock.[12]

15 None of the expressions of interest that the administrators received progressed to a sale of a business, and it was no longer a plausible outcome after the administrators concluded the sale of all stock, vacated retail outlets, terminated all employment contracts, and ascertained that some of the relevant intellectual property was owned by Victoria Station Travel Goods and Handbags Pty Ltd ('VS Travel Goods').[13]

16 The companies did not maintain separate accounting or financial records, and the administrators chose to continue with this arrangement in the winding down of the business.[14]

17 In Michael Carrafa's affidavit of 13 September 2017 ('second Carrafa affidavit'), Mr Carrafa deposed that 'as indicated in paragraphs 22–24 (inclusive) of the Gountzos Affidavit the companies did not maintain separate accounts and financial records and the administrators chose to continue and maintain this historic arrangement, through the partnership manager, in order to continue to trade, manage employees, sell stock, manage stores and wind down the business of the partnership (those terms defined in the Gountzos Affidavit.)'[15] Paragraphs 22 to 24 of the affidavit sworn by Mr Gountzos on 31 August 2017 ('the Gountzos affidavit'), refer to financial records, which Mr Gountzos described as compilation reports. There was no reference to any bank accounts in those paragraphs.

---

11 First Carrafa affidavit, [20]–[28].

12 First Carrafa affidavit, [27].

13 Gountzos affidavit, [11].

14 Second Carrafa affidavit, [6].

15 Second Carrafa affidavit, [6].

18 In Mr Carrafa's affidavit of 20 December 2017 ('fifth Carrafa affidavit'), Mr Carrafa deposes as to the bank accounts of the partnership. He deposes that prior to the commencement of the administration the partnership operated five accounts with Westpac and one with the Commonwealth Bank of Australia. He says that these accounts were all opened in the name of VSCPL and did not distinguish between the funds of VSCPL, VSSPL, MHPL and/or PHPL. Following the appointment of the administrators, all of these accounts were closed except the Business Flexi Account with Westpac. The administrators then opened accounts with Macquarie Bank to secure the proceeds of the administration. The administrators opened three accounts with Macquarie all in the name of VSCPL 'given VSCPL was the manager of the VSP Partnership and operated all of VSC Partnership's accounts.'[16]

19 It is implicit in this evidence that the proceeds from the sale of stock and other partnership assets held by VSCPL has been deposited in an account in its name with Macquarie Bank.

20 Prior to being transferred to the partnership, the business was conducted by VS Travel Goods, to whom an unsecured liability is owed, of approximately $6,597,878.29.[17] VS Travel Goods is not presently subject to any form of external administration. Including this claim, unsecured creditor claims total in excess of $15.4 million.[18] Despite asset realisation by the administrators, there will be insufficient assets to meet the claims of all creditors.

21 There are a number of inter-company/related party loans between VSCPL, VSSPL, MHPL and PHPL. There are no significant external secured creditors, as the sole secured creditor, Westpac Banking Corporation, was discharged prior to the administrators' appointment.

---

16 Fifth Carrafa affidavit, [40].

17 Second Carrafa affidavit, [25]; Gountzos affidavit, [12].

18 This is the figure as at the date of at which the Gountzos affidavit was sworn, 31 August 2017.

22 Approximately 383 employees were employed across all retail outlets and head office. Initially, the administrators terminated the employment of 276 employees due to retail outlet closures. The administrators initially retained 107 employees at head office and selected retail outlets to maintain the existing business operations.[19] The employment of all employees has now been terminated due to the closure of the business. The investigations by the administrators have indicated that employees are owed at least $2,346,037.29 in entitlements, as at the date of appointment. The administrators currently hold approximately $5.9 million as proceeds of the sale of the business' retail stock, plant and equipment.[20]

23 As at May 2017, the directors of the companies, Michael Raiter and Paul Raiter, advised the administrators that they were considering submitting a formal proposal to the companies to enter into a deed of company arrangement (DOCA).[21] By the time Mr Gountzos swore his second affidavit on 31 August 2017, the directors had not submitted a DOCA proposal.

Procedural history

24 Shortly after their appointment, the administrators issued an originating process dated 22 May 2017, seeking to extend the convening period for the second meeting of creditors. On 24 May 2017, Gardiner AsJ made orders extending the time for convening the second meeting for each company pursuant to s 447A(1) of the Act.[22] The time for convening the second meeting has since been further extended, most recently by order of Gardiner AsJ, dated 21 March 2018, up to and including 14 May 2018.

25 On 31 August 2017, the administrators filed an interlocutory process seeking directions and/or declarations from the Court. Four of those matters fall for

---

19 First Carrafa affidavit, [29].

20 Second Carrafa affidavit, [19].

21 First Carrafa affidavit, [19].

22 See *Re Victoria Station Corp Pty Ltd* [2017] VSC 371 (23 June 2017).

determination before me:

(a) first, whether VSCPL relevantly conducted the business in its own right, or 'as appointed manager' of the partnership, or on some other basis;

(b) secondly, whether VSSPL relevantly entered into the leases of the various premises from which the business was conducted in its own right, or as appointed agent of VSCPL, or as a trustee under the Victorian Station Services Trust;

(c) thirdly, whether the assets held by the administrators are beneficially owned by VSCPL, or by the partnership; and

(d) fourthly, whether the assets of the business are to be distributed pari passu in accordance with the *Partnership Act 1958* (Vic) and the Partnership Agreement, or according to the priorities regime of the Act, or in any Deed of Company Arrangement by operation of s 444DA.

26 The administrators also sought a range of ancillary orders relating to the creditors' meetings, the dissolution of the partnership, appointment as receivers and managers and indemnification for their reasonable costs and expenses.

27 None of those additional matters presently falls for determination by the Court, and the administrators submit that they can instead sensibly be heard by Gardiner AsJ pursuant to r 60.02(2) of the *Supreme Court (General Civil Procedure) Rules 2015* once orders have been made on the balance of the application.[23]

28 The interlocutory process was originally heard by Gardiner AsJ in September 2017. The originating process and interlocutory process were subsequently referred to me. Pursuant to the orders of Gardiner AsJ of 25 September 2017, the Department was appointed as contradictor to represent the interests of VSCPL's employee creditors.

---

23 Administrators, 'Plaintiffs' Further Submissions', 22 December 2017, 21 [49].

29 The Department is the appropriate contradictor to the application. The Department administers the employee entitlements scheme under the *Fair Entitlements Guarantee Act 2012* (Cth). Many of the creditors, being unpaid employees, may look to the Fair Entitlements Guarantee ('FEG') scheme to meet their unpaid entitlements if VSCPL goes into liquidation. Once payments have been made to those employees under the FEG scheme, the Department will assume the rights and priority of those employees.

30 I heard the matter on 15 November 2017. At the conclusion of the hearing I requested that the parties provide supplementary submissions inter alia on whether VSCPL held assets as trustee of the partnership.[24]

31 Since the matter was before me, decisions have been handed down in *Commissioner of State Revenue v Danvest Pty Ltd*,[25] *Commonwealth v Byrnes (in their capacity as joint and several receivers and managers of Amerind Pty Ltd (recs and mgrs apptd) (in liq))*,[26] and *Re Jones (Liquidator) v Matrix Partners Pty Ltd, Killarnee Civil & Concrete Contractors Pty Ltd (in liq)*.[27]

32 After the decision in *Commissioner of State Revenue v Danvest Pty Ltd* was handed down, I requested the parties provide supplementary submissions addressing any relevant issues raised in that judgment.[28]

The position of the parties

33 The administrators submit that VSCPL is and was holding the partnership assets on trust for the partnership. The Department accepts this contention. The administrators also submit that VSCPL was acting as trustee in conducting the

---

24 See Administrators, 'Plaintiffs' Further Submissions', 22 December 2017; fifth Carrafa affidavit; Department, 'Contradictor's Further Submissions', 31 January 2018.

25 [2017] VSCA 382 (20 December 2017).

26 [2018] VSCA 41 (28 February 2018) ('*Commonwealth v Byrnes*').

27 [2018] FCAFC 40 (21 March 2018) ('*Killarnee*').

28 Administrators, 'Plaintiffs' Further Submissions', 29 January 2018; Department, 'Contradictor's Further Submissions', 31 January 2018.

partnership business and thus incurred liabilities as trustee for the partnership. The Department denied that VSCPL was acting as trustee in conducting the business and argued that VSCPL conducted the business under its authority as agent. The Department contends that VSCPL was, at most, a bare trustee.

34 At the time of the hearing and of the further submissions, *Re Amerind Pty Ltd* dictated that if the liabilities of VSCPL had been incurred as trustee, then the trustee's right to be indemnified out of the trust assets was not a personal asset of the trustee and that as such the asset would not be property of the trustee subject to the priority regime in the Act in the event of the liquidation of the trustee.[29]

35 Since the case was argued before me and since further submissions were filed, both the Court of Appeal in *Commonwealth v Byrnes*[30] and the Full Court of the Federal Court in *Killarnee* have held that the trustee's right of indemnity out of the trust assets is property of the trustee for the purposes of the priority regime in the Act in the winding up of the trustee,[31] contrary to the decision in *Re Amerind*. The judgments are not on all fours and differ in respect of matters that are not relevant to this decision.[32]

36 The Department argues against the proposition that VSCPL was acting as trustee when conducting the partnership business. It may have so argued because it wished to avoid the decision in *Re Amerind*, which had held that the trustee's indemnity was not subject to the priority regime in the Act. In view of the two recent decisions referred to above, the law as it now stands, and as governs me, is that if VSCPL was

---

29 (2017) 320 FLR 118 ('*Re Amerind*').

30 [2018] VSCA 41 (28 February 2018).

31 [2018] FCAFC 40 (21 March 2018).

32 *Commonwealth v Byrnes* holds that the trustee's right of indemnity is a personal asset of the trustee that is available to pay all creditors of the trustee whether incurred as trustee or otherwise. On the other hand, *Killarnee* holds that the trustee's indemnity may only be used to pay liabilities incurred by the trustee in relation to the trust (trust creditors) but, nevertheless, the entitlement is such as to engage the priority provisions in the Act as was found by King CJ in *Re Succo Gold Pty Ltd in liquidation* (1983) 33 SASR 99.

acting as trustee when it incurred its debts on behalf of the partners then its trustee's indemnity would be an asset available in the liquidation of the trustee, subject to the priority regime in favour of employees, as sought by the Department.

37 On the other hand, as discussed below, if VSCPL was not acting as trustee when it incurred debts as agent on behalf of the partnership, then VSCPL is entitled under the principles relating to agency to retain any partnership assets it held under a possessory lien until it is fully indemnified by its principal, the partnership.

Is VSCPL a trustee?

38 Both the administrators and the Department agree that it is open to me to find that VSCPL held the business assets as trustee for the partnership. I agree that VSCPL does hold the partnership assets it holds on trust for the partnership.

39 The general rule is recited by Clarke JA in *Walker v Corboy* that:[33]

> if a person delivers goods to an agent to be sold, the goods remain the property of the principal until the sale takes place and the moment the *proceeds of sale are received by the agent they become the property of the principal.*
>
> ...
>
> [that rule was] allied to a wider rule that where a principal entrusts money or property to an agent ... for a specific purpose the agent is bound to hold the money or goods on trust to deal with them as directed.

40 Dixon J also stated the relevant principle in *Palette Shoes Pty Ltd v Krohn* that:[34]

> In equity the relation of agent would carry with it a duty to account, and, as a rule, a duty if moneys are received in the course of the agency to hold them specifically for the principal ... The reason why in equity the proceeds of property may be followed by the owner and treated as a fund held upon a constructive trust in his favour is that his beneficial ownership of the thing gives him, prima facie an equitable interest in its proceeds.

---

33 (1990) 19 NSWLR 382, 388, citing *Foley v Hill* (1848) 2 HL Cas 28 (emphasis added).

34 (1937) 58 CLR 1, 30.

Did VSCPL carry on the business on behalf of the partners as trustee?

41 As mentioned, the Department contends that VSCPL carried on the business under its powers as agent and not as trustee. The administrators submit that VSCPL carried on the business as a trustee.

42 In my opinion, VSCPL carried on the business as agent for the partnership and did not carry on the business as trustee. As such, in my opinion, VSCPL held the partnership assets on behalf of the partnership as a bare trustee.

43 The partnership did not appoint VSCPL to carry on business on behalf of the partnership as trustee. There were no written terms of any trust document that would have permitted such conduct. As a bare trustee, the trustee would have had no power to use the trust assets to carry on business for the partnership.

44 The fact that there is no trust deed among the documentation, however, does not preclude the finding that an express trust arose. It is acknowledged that 'many express trusts are not express at all. They are implied, or inferred, or perhaps imputed to people on the basis of their assumed intent.'[35] In *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*, Mason CJ and Wilson J said of express trusts that:[36]

> the courts will recognize the existence of a trust when it appears from the language of the parties, construed in its context, including the matrix of circumstances, that the parties so intended. We are speaking of express trusts, the existence of which depends on intention. In divining intention from the language which the parties have employed the courts may look to the nature of the transaction and the circumstances, including commercial necessity, in order to infer or impute intention.

45 In *Korda*,[37] French CJ set out the test for determining the existence of an express trust:[38]

---

35 Patrick Parkinson, 'Chaos in the Law of Trusts' (1991) 13 *Sydney Law Review* 227, 231, cited with approval in *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62, 69 [5] (French CJ) ('*Korda*').

36 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 121 (citations omitted) ('*Trident v McNiece*').

37 (2015) 255 CLR 62.

> The question whether an express trust exists must always be answered by reference to intention. An express trust cannot be created unless the person or persons creating it can be taken to have intended to do so. Absent, as in this case, an explicit declaration of such an intention, the court must determine whether intention is to be imputed. It does so by reference to the language of the documents or oral dealings having regard to the nature of the transactions and the circumstances attending the relationship between the parties.

46 *Jacob's Law of Trusts in Australia* states:[39]

> The facts that a trust was intended may even be deduced from the conduct of the parties concerned but if there is any uncertainty as to intention, there will be no trust.

47 Although it is possible to infer or impute an intention to create a trust, one should take care not '[t]o construct intention out of straws plucked from textual and contextual breezes.'[40] In other words, the inference of intention must be based on real, discernible evidence of intention. The text and context must be able to 'elevate the propounded intention to the level of certainty.'[41] In *Korda*, Keane J observed that '[t]he language of the relevant documents is not to be strained to discover an intention to create a trust.'[42]

48 Gageler J in *Korda* explained:[43]

> ...where parties to a contract have refrained from contractual use of the terminology of trust, an intention to create a trust will be imputed to them only if, and to the extent that, a trust is the legal mechanism which is appropriate to give legal effect to the relationship, between the parties or

---

38 (2015) 255 CLR 62, 69 [3].

39 J D Heydon and M J Leeming, *Jacob's Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016).

40 *Korda* (2015) 255 CLR 62, 87 [49] (French CJ).

41 *Korda* (2015) 255 CLR 62, 70 [5] (French CJ).

42 *Korda* (2015) 255 CLR 62, 124 [208] (Keane J). Keane J pointed out that, in *Byrnes v Kendle* (2011) 243 CLR 253, 272 [49], Gummow and Hayne JJ noted the approval by Mason CJ and Dawson J in *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, 618, of the proposition stated by du Parcq LJ in *Re Schebsman* [1944] Ch 38 CA that 'unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the court ought not be astute to discover indications of such an intention': at 104.

43 *Korda* (2015) 255 CLR 62, 100 [109] (Gageler J).

between a party and a third party, as established or acknowledged by the express or implied terms of the contract.

49 The administrators contend that the Partnership Agreement supports the existence of an express trust over any partnership property in the hands of VSCPL. The administrators state that the existence of an express trust is to be construed based upon the true and actual intentions of the parties, by reference to 'all the relevant circumstances.'[44]

50 The administrators contend that an express trust is supported by: the parties' actual and inferred intentions;[45] the partnership appointing VSCPL as its manager; the manner in which VSCPL conducted the business on its behalf; and the fact that VSCPL did so via bank accounts opened in its own name for receiving proceeds of partnership property for and on behalf of the partnership.[46]

51 The administrators submit that this conclusion is apposite in circumstances where VSCPL's sole *raison d'être* was to act as manager for and on behalf of the partnership. Further, VSCPL was incorporated at the same time as the corporate members of the partnership; it received no remuneration;[47] conducted no activities and held no property on its own behalf; and it had no assets. The partnership property in its hands must have been held on trust for and on behalf of the partnership.

52 I do not agree with the administrators' contentions. First, as already mentioned, there is no trust deed, and the Partnership Agreement between MHPL and PHPL, which appointed VSCPL as 'manager', made no express provision for a trust relationship. Clause 6.2 of the Partnership Agreement provides that '[s]ubject to

---

44 Administrators, 'Plaintiffs' Further Submissions', 22 December 2017, [14]: 'as articulated by the High Court in *Kauter v Hilton* (1953) 90 CLR 86, 100, affirmed by Gummow and Hayne JJ in *Byrnes v Kendle* (2011) 243 CLR 253, 273–4 [54]' (citations added).

45 The intention may be inferred from the parties' conduct. See, eg, G E Dal Pont, *Equity and Trusts in Australia* (Thompson Lawbook Co, 6th ed, 2015) [17.45].

46 Fifth Carrafa affidavit, [35]–[37].

47 Partnership Agreement (27 August 3003) cl 12.2(d).

sub-clause 12.2(a), any property of the partnership *may be held* by the manager or by one of the partners *in trust for the partnership.*'[48] This language shows that the parties to the Partnership Agreement had turned their minds towards the idea that VSCPL might hold property on trust for the partnership. Clause 6.2 shows that the parties wished to leave open the possibility that a trust relationship might arise; but on its own, cl 6.2 is insufficient to establish that an express trust ever actually arose.

53 It is noted that the language of cl 6.2 is permissive and not imperative. The Department submits that if a trust had been intended, cl 6.2 would have been expressed in mandatory language. The majority of clauses in the Partnership Agreement use 'shall', 'must', 'will' to convey mandatory actions. The Department submits that 'may' is used in a sense that is *facilitative*. The administrators contend that its use is both facilitative and imperative. Given use of the mandating terms throughout the agreement, use of 'may' in cl 6.2 is inconsistent with an express intention of a trust.

54 The companies of the Victoria Station group were incorporated at the same time, apparently as part of the restructuring of the business. The administrators point to the timing of the incorporation of VSCPL as evidence of a trust. Conversely the Department submits that the timing actually tells against the creation of a trust. The Department submits that in comparison to the formality attending the appointment of MHPL and PHPL as trustees of family trusts — each being the subject of a formal trust deed — the absence of a trust deed governing the relationship between VSCPL and the partnership tells against a trust.

55 The terminology of neither recital E nor cl 12.1 discloses an intention to create a trust. VSCPL is to act as 'nominee'. The language used is consistent with agency, not with trusteeship.[49]

---

48 Partnership Agreement (27 August 2003) cl 6.2 (emphasis added).

49 See Partnership Agreement (27 August 2003) cl 6.2.

56 That VSCPL was not to be reimbursed for its services does not necessarily support a finding that VSCPL was to act as trustee.[50] The Department submits that where an instrument provides for a trustee not to be reimbursed, it invariably also contains a provision that the trustee be indemnified,[51] which is absent from the Partnership Agreement.

57 That an agent's powers are limited or constrained in some manner, such as not being able to mortgage property, does not necessarily indicate a relationship of trustee.

58 The requirement of VSCPL to deliver up partnership property upon determination of its appointment as manager reflects the reality that, once the appointment is terminated, there is no reason for the manager to hold the property.[52] It is not indicative of a trust relationship.

59 The Court was presented with no evidence as to the accounts of VSCPL which might have indicated whether separate trust accounts were being maintained. Board resolutions may also serve as an indicium of a trust relationship, but none was adduced as evidence before me. Similarly, invoices and receipts may indicate the existence of trust; however, none was provided to the Court as evidence in this case.

60 I find that VSCPL acted as agent in carrying on the business and was not acting as a trustee in carrying on the business on behalf of the partnership.

Agency

61 A person who is described as an 'agent' in common speech is not necessarily an agent at law.[53] The use of the word in the world of business does not correspond

---

50 See Partnership Agreement (27 August 2003) cl 12.2(d).

51 Citing Lindley LJ in *Re Beddoe* [1893] 1 Ch 547, CA: 'an indemnity is the price paid by [the beneficiaries] for the gratuitous and onerous services of trustees': at 558.

52 Partnership Agreement (27 August 2003) cl 12.5.

53 *Jones v Bouffier* (1911) 12 CLR 579, 611 (Isaacs J); *Fliway-AFA International Pty Ltd v Australian Trade Commission* (1992) 39 FCR 446, 448 (Wilcox J). See also G E Dal Pont, *Law of Agency* (LexisNexis Butterworths, 3rd ed, 2014) 7 [1.5].

exactly to its legal meaning. In the decision of the High Court of Australia in *International Harvester Company of Australia Pty Ltd v Carrigan's Hazeldene Pastoral*, the Court observed that:[54]

> Agency is a word used in the law to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties. But in the business world its significance is by no means thus restricted.

62 The cases commonly identify two essential elements of an agency relationship: the consent or assent of both principal and agent;[55] and the conferral of authority on the agent to act on the principal's behalf.[56] Some cases refer to a third essential element of agency: the principal's control over the agent's actions.[57]

63 First, agency requires that both the principal and the agent consent to their roles. In *Morgans v Launchbury*, Lord Pearson stated that:[58]

> For the creation of the agency relationship it is not necessary that there should be a legally binding contract of agency, but it is necessary that there should be an instruction or request from the [principal] and an undertaking of the duty or task by the agent.

64 In the case of VSCPL and the partnership, it is clear from the Partnership Agreement that each consented to its role. The Partnership Agreement was signed by VSCPL and both the corporate partners, MHPL and PHPL, in accordance with s 127(2) of the Act. By signing the Partnership Agreement, the parties demonstrated their acquiescence to the duties and restrictions as set out in that document.[59] I therefore

---

54 (1958) 100 CLR 644, 652–3.

55 *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1968] AC 1130, 1137 (Pearson LJ); *South Sydney DRLFC* (2000) 177 ALR 611, 645 [132] (Finn J); *Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd* (2013) 296 ALR 465, 474 [53].

56 *NMFM Property Pty Ltd v Citibank Ltd (No 10)* (2000) 107 FCR 270, 387 [522] (Lindgren J). See G E Dal Pont, *Law of Agency* (LexisNexis Butterworths, 3rd ed, 2014) 5 [1.4], 82 [4.3].

57 See, eg, *South Sydney DRLFC* (2000) 177 ALR 611, 645–7 [131]–[137] (Finn J) (decision affirmed on a different point in *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563).

58 *Morgans v Launchbury* [1973] AC 127, 140 (Pearson LJ).

59 See, eg, Partnership Agreement (27 August 2003) cls 9.1, 12.2–12.3, 15.1, 16.1.

find that the consent requirement of an agency relationship is fulfilled.

65 The second requirement for the existence of an agency relationship is the conferral of authority upon the agent. In *NMFM Property Pty Ltd v Citibank Ltd (No 10)*, Lindgren J stated that:[60]

> The notion of one person's having actual or apparent authority to act, or in fact acting, as representative of or for or on behalf of another person, is clearly central to the notion of agency ...

66 In the case of VSCPL and the partnership, I find that the requirement for conferring authority is also satisfied on the basis of the Partnership Agreement. The Partnership Agreement explicitly states that VSCPL shall 'conduct and carry on the Business to the best of its ability', 'employ all necessary qualified staff and other necessary resources', and 'perform all Administrative Functions necessary for and concerning the Partnership.'[61] These clauses, and others similar, constitute evidence of the partnership's conferral of authority upon VSCPL.

67 There is arguably a third requirement for the existence of an agency relationship, namely the principal's control over the agent's actions.

68 The relationship between VSCPL and the partnership demonstrates a significant degree of control exerted by the latter over the former. If control is in fact a requirement, then that requirement is met. For example, the Partnership Agreement provides that VSCPL must obtain the written consent of the partners before it may sell or dispose of assets (except in the ordinary course of business), mortgage assets, or change the name or function of the business.[62]

69 The level of control exercised by the partnership is consistent with VSCPL acting as agent.[63] The partners had the right to terminate the appointment of the manager at

---

60 (2000) 107 FCR 270, 387 [522] (Lindgren J).

61 Partnership Agreement (27 August 2003) cls 12.2(a), (c), (f).

62 Partnership Agreement (27 August 2003) cl 12.3.

63 See Partnership Agreement (27 August 2003) cls 4.1, 11.2, 12.2(b)–(c), 12.2(f). 12.3.

any time, without reason, and to appoint a replacement. This suggests that the relationship was one of agency.[64] The Partnership Agreement made provision for partners' liabilities and debts incurred in the business. The only reference to a relationship of trust is the holding of property on trust. VSCPL had the duty and powers to conduct the partnership business in its capacity as manager.

70 For the above reasons, I find that VSCPL is, and was, the agent of the partnership.

71 The assets were held, or registered, in VSCPL's name. These assets were property of the partnership, and fell within the definition in cl 6.1 of the Partnership Agreement. The permission for VSCPL to hold property on trust for the partnership may contemplate, but is otherwise subject to, VSCPL's obligation to conduct the business as manager or agent for the partnership.

72 VSCPL held assets on trust and performed its managerial role as agent.

73 The fact that the liabilities were incurred by VSCPL in its capacity as agent, the Department submits, means that it is entitled to the indemnity and lien that an agent enjoys.

Liability of the agent of an undisclosed principal

74 It was not contentious between the parties that VSCPL acted as agent for the partnership as the undisclosed principal;[65] however, the consequences of this agency relationship were in dispute.

75 The law is clear that if an agent contracts on behalf of an undisclosed principal, as VSCPL did on behalf of the partnership, then the agent may sue and be sued on the contract.[66] As acknowledged by the administrators in their written submissions,[67]

---

64 See Austin Wakeman Scott, William Franklin Fratcher and Mark L Ascher, *Scott and Ascher on Trusts* (Aspen Publishers, 5th ed, 2006) 63-4 § 2.3.4.

65 Department, 'Contradictor's Submissions', 31 October 2017, 8 [24]; Administrators, 'Plaintiffs' Reply Submissions', 8 November 2017, 3 [9].

66 See, eg, *Grime v Bartholomew* [1972] 2 NSWLR 827, 833 (Holland J); *Elder Smith Goldsbrough Mort Ltd v McBride* [1976] 2 NSWLR 631, 643-5 (Sheppard J). See also G E Dal Pont, *Law of Agency* (LexisNexis

and by the contradictor in oral submissions,[68] an aggrieved third party must choose between pursuing a claim against the agent, and pursuing it against the undisclosed principal. Dal Pont explains it thus:[69]

> So where A contracts with B without stating himself or herself to be an agent ('undisclosed principal'), B may, on discovering A's principal, elect between them, and once that election is made, the plaintiff cannot sue the other.

76 The effect of this in relation to the partnership and VSCPL is that creditors may sue *either* VSCPL as agent, *or* the partnership as the undisclosed principal, but not both. The creditors must elect which entity to sue, and they have the benefit of 'choice as to more than one potential pecunious defendant in enforcing the contract.'[70]

77 While acknowledging that the creditors of VSCPL would be entitled to participate in any eventual liquidation and seek distributions from the company's assets, the administrators submit that VSCPL 'has no assets'.[71] It is submitted that, as a result, 'VSCPL's creditors will instead (and practically, can only) turn to enforce their rights against the [partnership] as the undisclosed principal.'[72] It would flow from the election to sue the partnership that creditors would seek distributions from the partnership in its winding up under partnership law, which mandates a pari passu distribution amongst creditors.

Butterworths, 3rd ed, 2014) 442 [19.28].

67 Administrators, 'Plaintiffs' Reply Submissions', 8 November 2017, 4 [11].

68 Transcript of Proceedings, *Re Victoria Station Pty Ltd (admins apptd)* (Supreme Court of Victoria, S CI 2017 01896, Robson J, 15 November 2017) 83 (C Moller).

69 G E Dal Pont, *Law of Agency* (LexisNexis Butterworths, 3rd ed, 2014) 444 [19.31], citing *Calder v Dobell* (1871) LR 6 CP 486, 499 (Kelly CB); *Kendall v Hamilton* (1879) 4 App Cas 504, 514–15 (Cairns LC); *Re Lucock* (1924) 20 Tas LR 52, 55 (Nicholls CJ); *Marzo v Land and Homes (WA) Ltd* (1931) 34 WALR 62, 64 (Dwyer J).

70 G E Dal Pont, *Law of Agency* (LexisNexis Butterworths, 3rd ed, 2014) 444 [19.31].

71 Administrators, 'Plaintiffs' Reply Submissions', 8 November 2017, 4 [12].

72 Administrators, 'Plaintiffs' Reply Submissions', 8 November 2017, 4 [12].

78 The Department submits the submission by the administrators that VSCPL 'has no assets' is not correct as there is evidence that it purchased stock from suppliers.[73] It granted security to various financiers, including security interests registered on the Personal Property Securities Register[74] and fixed and floating charges.[75] VSCPL had access to financial resources, including borrowings, access to income generated from trading at retail stores, funds loaned by VS Travel Goods, and funding from Westpac under hire purchase agreements.[76] It had been party to more than 40 hire-purchase agreements which were discharged before the administrators were appointed.[77] It had access to five bank accounts with Westpac and one with the Commonwealth Bank.[78] Each of the accounts were opened in the name of VSCPL.[79] VSCPL had access to financial resources, including borrowings and bank accounts in its name, which allowed it to operate the business.

79 The Department's contention that VSCPL has no assets is not correct. As discussed below, and as acknowledged by the administrators,[80] VSCPL has an agent's right of indemnity and a possessory lien. These rights are property of VSCPL. Property has a broad definition both at common law and under the Act. In *Commissioner of Stamp Duties (Qld) v Donaldson*,[81] Isaacs ACJ quoted with approval this passage from Lord Langdale MR in *Jones v Skinner*:[82]

---

73 See Department, 'Contradictor's Submissions', 31 October 2017, [15(c)], [16(e)].

74 Fourth Carrafa affidavit, [22].

75 Fourth Carrafa affidavit, [23].

76 Fourth Carrafa affidavit, [20(c)].

77 Fourth Carrafa affidavit, [41].

78 Fourth Carrafa affidavit, [35]–[36].

79 Fourth Carrafa affidavit, [37].

80 Administrators, 'Plaintiffs' Reply Submissions', 8 November 2017, 4–6 [13]–[18].

81 (1927) 39 CLR 539.

82 (1835) 5 LJ Ch (NS) 87, 90, as quoted in *Commissioner of Stamp Duties (Qld) v Donaldson* (1927) 39 CLR 539, 550.

> It is well known, that the word 'property' is the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have.

80 VSCPL had possession and control of the stock-in-trade that was held on trust for the partnership. The partnership had the beneficial interest in the stock and accordingly the stock was property of the partnership. VSCPL was entitled to retain possession of property of the partnership in its control until the indemnity by the partnership was met.

81 The assertion that creditors would elect to sue, and practically only be able to sue, the partnership is not necessarily true. For, even if creditors elected to sue the partnership as undisclosed principal, the creditors would find the partnership's vaults empty: all the partnership assets are with VSCPL, held under the possessory lien.

Agent's right of indemnity

82 At common law, an agent has a right of indemnity against his or her principal in respect of expenses incurred in performing the role of agent.[83] The indemnity is a right that, upon the insolvency of the agent, passes to the agent's trustees in bankruptcy.[84]

83 The common law right of indemnity is also bolstered in this case by cl 9.1 of the Partnership Agreement, which provides that:

> all costs charges and expenses which shall be incurred in or about the Business or in anywise relating thereto and all losses which shall happen in respect of the Business shall be paid out of the income or capital of the Partnership and in case of deficiency thereof by the Partners ...

---

83 *John D Hope & Co v Glendinning* [1911] AC 419, 431 (Kinnear LJ). For the examination of a solicitor's possessory lien, see *Re Mamounia (in liq) (No 3)* [2018] VSC 65 (20 February 2018) [24]-[35] ('*Re Mamounia*').

84 *Rankin v Palmer* (1912) 16 CLR 285.

Agent's possessory lien

84 Dal Pont provides a concise explanation of the concept of a possessory lien.[85]

> [A] 'possessory lien' is the right of a person (A) to retain possession of goods belonging to another person (B), of which A has lawfully acquired possession, until the satisfaction of a liability due by B to A.

85 In *QNI Resources Pty Ltd v Queensland Nickel Pty Ltd (in liq)*,[86] the Queensland Court of Appeal said that it was an 'uncontroversial principle of law' that:[87]

> where the management of property has been conducted by a person authorised to do so by the owner of property, the manager will have a lien over the property in respect of expenditure incurred in managing the property.

86 An important difference between the right of indemnity of a trustee and that of an agent is that an agent's common law right of indemnity is not proprietary in character; rather, it is a personal chose in action. However, where the agent comes into possession of property that belongs to the principal, but over which the agent has power of control and disposal, the agent is entitled to retain the property by way of lien until its claim for indemnity is satisfied.[88]

87 The administrators made two submissions in relation to the operation of the right of indemnity and the possessory lien. First, the administrators submitted that VSCPL's liability as agent of the partnership 'is only triggered if and when creditors of the [partnership] elect to sue it.'[89] I do not accept this argument. The right of indemnity does not need to be 'triggered'; the right has existed from the instant the agency relationship arose, and continues to exist as property of VSCPL (or its trustees in

---

85 G E Dal Pont, *Law of Agency* (LexisNexis Butterworths, 3rd ed, 2014) 411 [18.21], citing *Tibmor Pty Ltd v Nashlyn Pty Ltd* [1989] Qd R 610, 612 (Moynihan J) ('*Tibmor*') and *Hammonds v Barclay* (1802) 2 East 277, 235; 102 ER 356, 359 (Grose J).

86 [2017] QCA 167.

87 [2017] QCA 167, [51] (Gotterson JA), Douglas and Applegarth JJ agreeing. See also *Hill v Venning* (1979) 4 ACLR 555, 557–8 (Connolly J).

88 *John D Hope & Co v Glendinning* [1911] AC 419, 431; *Foxcraft v Wood* (1828) 4 Russ 487; 38 ER 888. See also G E Dal Pont, *Law of Agency* (LexisNexis Butterworths, 3rd ed, 2014) 407–8 [18.11].

89 Administrators, 'Plaintiffs' Reply Submissions', 8 November 2017, 5 [15].

bankruptcy).

88 Secondly, the administrators submit that, since the right of indemnity is a personal chose in action, it 'is not a vehicle through which agents can secure priority to the principal's assets ahead of other creditors in the event of the principal's insolvency.'[90] This submission quotes and relies on a passage in Dal Pont, but it does not relay the passage in full. After stating that the right of indemnity cannot secure priority for the agent in the principal's insolvency, Dal Pont includes an important qualification.[91]

> [The agent's right of indemnity] is not a vehicle through which agents can secure priority to the principal's assets ... However, if in the course of the agency the agent comes into possession of property belonging to the principal over which the agent has power of control and disposal, *the agent is entitled to retain such property by way of lien until his or her claim for indemnity has been satisfied. This in effect creates a proprietary right for the purposes of insolvency.*

89 In other words, the right of indemnity alone will not bestow on the agent priority over its insolvent principal's assets; however, paired with the lien, it will give the agent an effective priority in the context of insolvency. It is for this reason that the possessory lien is relevant. Without the lien, the right of indemnity of the agent would indeed line up behind other creditors of the partnership in the distribution of the partnership's assets. The possessory lien operates, in effect, like a proprietary right.[92]

Does the lien apply to property held on trust for the principal?

90 The administrators submit that any partnership property held on trust for and on behalf of the partnership was not property against which VSCPL can exercise any lien in relation to its right of indemnity regarding claims by potential creditors

---

90 Administrators, 'Plaintiffs' Reply Submissions', 8 November 2017, 5 [15], quoting G E Dal Pont, *Law of Agency* (LexisNexis Butterworths, 3rd ed, 2014) 408 [18.11].

91 G E Dal Pont, *Law of Agency* (LexisNexis Butterworths, 3rd ed, 2014) 408–9 [18.11] (citations omitted) (emphasis added).

92 *John D Hope & Co v Glendinning* [1911] AC 419, 431 (Kinnear LJ); *Foxcraft v Wood* (1828) 4 Russ 487; 38 ER 888.

against it as agent for the partnership as undisclosed principal.

91 The administrators contend that if the partnership property was held on trust for the partnership, then the partnership property was not in VSCPL's 'power of control and disposal' in the sense as was articulated by the Privy Council in *John D Hope & Co v Glendinning*,[93] and is thus not available for the agent's indemnity to be exercised against it.

92 The stock on hand and business assets were under the power and control of VSCPL pursuant to the Partnership Agreement. I reject this contention of the administrators.

93 Accordingly, I find that the agent has a right of indemnity as against the partnership, and that the agent had a possessory lien over the property of the partnership which it had under its control and at its disposal.

Has the lien survived the sale of business assets?

94 The administrators sold the business assets, converting them into money. The money is held in a bank account with Macquarie Bank in VSCPL's name. I infer the administrators sold the business assets to preserve and protect the value of the assets held on trust by VSCPL for the partnership. It goes without saying that the stock and other assets may have depreciated in value if held, and that to maximise the proceeds of the business, as it could not continue to be conducted, the assets would need to be sold.

95 The administrators currently hold approximately $5.9 million as the net proceeds from the sale of the assets held on trust by VSCPL for the partnership.[94] The question is whether the possessory lien survives this conversion.

---

93 [1911] AC 419, 431 (Kinnear LJ).

94 First Carrafa affidavit, [20]–[28]; second Carrafa affidavit, [19].

96 In my opinion, as VSCPL held the partnership property on trust for the partnership its lien would not be compromised by the administrators preserving or protecting the fund by realising the assets, or exercising VSCPL's right to sell the assets under the Partnership Agreement.

97 Dal Pont says that it is unclear whether a possessory lien can be exercised over money.[95] There are references in the case law to liens over money,[96] but the question is not settled.

98 The Department submits, however, that the proposition that an agent's possessory lien can attach to money in bank accounts (including the relevant funds in the recent case) is recognised in several cases. The Department referred to *Tibmor Pty Ltd v Nashlyn Pty Ltd*,[97] where the Court upheld the agent's entitlement to a lien, notwithstanding that it had paid the money into court.[98]

99 In *Philippa Power & Associates v Primrose Couper Cronin Rudkim* it was held:[99]

> It seems excessively literal to assert that relevant possession can exist only over physical items and that money in a bank account gives rise to no more than a debt in favour of the depositor. The essential feature of possession is, after all, control ...

100 In view of the weight of the authorities, I am satisfied, that a lien may be held over money in a bank account. Accordingly, in my opinion, the lien is not lost by the

---

95 G E Dal Pont, *Law of Agency* (LexisNexis Butterworths, 3rd ed, 2014) 413 [18.24].

96 *Loescher v Dean* [1950] 1 Ch 491; *Skinner v Trustee of the Property of Reed* [1967] Ch 1194, 1200 (Cross J); *Johns v Law Society of New South Wales* [1982] 1 NSWLR 1, 18 (Hope JA); *Tibmor* [1989] 1 Qd R 610, 612–13 (Moynihan J); *Nickelby Pty Ltd v Holden* (Unreported, Supreme Court of NSW (Eq), Young J, 31 March 1994); *Philippa Power & Associates v Primrose Couper Cronin Rudkin* [1997] 2 Qd R 266, 272–3 (Macrossan CJ and White J), 276 (Derrington J).

97 [1989] 1 Qd R 610.

98 See also Department, 'Contradictor's Further Submissions', 31 January 2018, in which the Department also cited the following cases: *Skinner v Trustee of the Property of Reed* [1967] Ch 1194, 1200; *Active Property Marketing Services (Aust) Pty Ltd v Joelco Pty Ltd* (2007) Q ConvR, 54-673; *Loescher v Dean* [1950] 1 Ch 491; *Johns v Law Society of New South Wales* [1982] 2 NSWLR 1, 18; *Philippa Power & Associates v Primrose Couper Cronin Rudkim* [1997] 2 Qd R 266, 273.

99 [1997] 2 Qd R 266, 272.

VSCPL converting the assets into money and being held in a bank account in its name.

101 The nature of the agent's lien as possessory means that the agents did not, and do not, have the right to realise the assets. An agent's lien is similar to that of a mechanic who holds his customer's car until the customer pays for the repairs, but who is not empowered to *sell* the car in order to meet the costs of the repairs. The lien only entitles VSCPL to *possession*. The loss of possession by VSCPL that has occurred was caused not by VSCPL's own conduct but by the conduct of its administrators in selling the assets. This sale of the assets, it was submitted, amounts to conversion.[100]

Resolution of whether lien lost

102 The stock held by VSCPL on trust for the partnership was sold by VSCPL under its powers as manager of the partnership business. The administrators were exercising VSCPL's powers to sell the stock and other assets held by VSCPL as manager. The proceeds from the sale, which have been deposited in an account in VSCPL's name, is property of the partnership held on trust by VSCPL. The cases discussed above, recognise that money may constitute property over which an agent may exercise a lien. In this case, I do not consider that VSCPL has forfeited the lien by its own actions, nor lost the lien through the actions of the administrators in exercising the company's powers.

Resolution of VSCPL issues

103 As discussed above, VSCPL held the business assets on trust for the partnership. VSCPL conducted the business, however, as agent for the partnership. VSCPL is entitled to be indemnified by its principal for liabilities it incurred in carrying on the business as agent for the partnership.

---

100 Transcript of Proceedings, *Re Victoria Station Pty Ltd (admins apptd)* (Supreme Court of Victoria, S CI 2017 01896, Robson J, 15 November 2017) 52 (C Moller).

104 VSCPL has a possessory lien over the property of its principal in its possession and control. In my opinion, that lien has not been lost by reason that the administrators have realised the assets, presumably to preserve, protect and maintain the value of the trust fund constituted by the assets held by the agent or under VSCPL's powers as agent. In my opinion, the lien was not lost by the sale of the assets in the circumstances.

105 The lien is possessory only and thus the only entitlement VSCPL has is to retain possession of those moneys until it has been fully indemnified by the partnership. Thus a stalemate has been reached as the partnership has no moneys with which to indemnify VSCPL.

106 If the partnership companies are put into liquidation, the liquidators may consider obtaining a direction from the Court that they would be justified in compromising VSCPL's claims to be indemnified by transferring its interests in the moneys held by VSCPL to VSCPL. In those circumstances, the moneys would then become available to meet the priorities under the Act in the liquidation of VSCPL.

107 Because this proceeding can be resolved by the application of agency principles, the issue of whether the Partnership Act or the Corporations priority regime applies in relation to an insolvent partnership does not arise for determination.

Victoria Station Services Pty Ltd

108 As mentioned above, the administrators also apply for directions and/or declarations in respect of the following question: did VSSPL relevantly enter into leases of the various premises from which the business was conducted:

(a) in its own right, for and on its own behalf,

(b) as appointed agent of VSCPL, and if so

(i) for and on behalf of VSCPL, itself, or

(ii) for VSCPL in its capacity as manager of the partnership and therefore for and on behalf of the partnership, or

(c) as trustee under the Victoria Station Services Trust ('VSS Trust') established by deed made on 4 July 1996, for and on behalf of the trustees of the MRF Trust and the PRF Trust?

109 Mr Peter Gountzos describes, as follows, the origins of the relevant companies and the Victoria Station group business in his affidavit of 31 August 2017.[101] VS Travel Goods was incorporated on 2 August 1989. VS Travel Goods opened a luggage and travel goods store in 1990, selling well-known luggage brands. It subsequently began manufacturing its own luggage under the Victoria Station name.

110 Michael and Paul Raiter are co-directors and shareholders of VS Travel Goods, VSCPL, and VSSPL. Michael Raiter is the sole director and shareholder of MHPL and Paul Raiter is the sole director and shareholder of PHPL, of which the administrators are also appointed.

111 VSSPL was incorporated on 28 June 1996. One week later, by deed made on 4 July 1996, the VSS Trust was established to invest and hold property for its unit holders – being the individual trustees then acting for and on behalf of the MRF Trust and the PRF Trust. VSSPL was appointed the trustee of the VSS Trust.

112 In 2003, the directors of the companies and VS Travel Goods – Michael Raiter and Paul Raiter[102] – undertook a corporate restructure through which:

(a) on 14 March 2003, Michael and Paul Raiter (as individuals) registered the ABN 20 116 780 644 as a 'Family Partnership', subsequently changing the entity name owning the ABN to the MRF Trust and the PRF Trust;

(b) on 17 March 2003, the entities MHPL, PHPL, and VSCPL were incorporated;

(c) by deeds made on 5 May 2003, the individual trustees then acting for the MRF

---

101 The Gountzos affidavit, [13]–[18].

102 The Gountzos affidavit refers to the individuals as 'Michael Hartz' and 'Paul Hartz'. I assume this is a mistaken reference to Michael and Paul Raiter. Mr Gountzos deposes that MHPL was the trustee of the MRF Trust and that PHPL was the trustee of the PRF Trust.

Trust and PRF Trust were replaced by MHPL and PHPL respectively;

(d) on 27 August 2003, MHPL and PHPL (as trustees for the MRF Trust and PRF Trust) formed the partnership by the Partnership Agreement;

(e) VSCPL was appointed as manager of the partnership, for specified purposes of, inter alia, conducting the business of the partnership, employing staff, and undertaking the administrative functions of leases.

113 Relatively little was submitted in regard to VSSPL at the hearing before me, which focused mainly on the issues as between VSCPL and the partnership. Nevertheless, the administrators have found no evidence to suggest that the old model under which the Victoria Station group business was conducted prior to 2003, continued after the restructuring that took place in early 2003. I have no reason to find that thereafter the business was conducted other than under the new corporate and trust structure implemented in early 2003.

114 As mentioned above, VSSPL was a party to the Partnership Agreement entered into on 27 August 2003. The Partnership Agreement said in the recitals that 'the Partners have agreed to appoint the Manager as their nominee to operate the Business on behalf of the Partnership.' The recitals also state that '[VSSPL] enters into property leases on behalf of [VSCPL].'

115 As also mentioned above, the partnership property was defined as:

> The property of the partnership shall consist of the licence, lease, goodwill, plant, furniture and stock in trade of the Business and all such other property whether real or personal as shall be acquired by the partnership from time to time for the purposes of the partnership business including all moneys in banks belonging to the partnership full particulars whereof shall be contained in the books of account of the partnership.

116 The final clause of the partnership agreement was headed 'Victoria Station Services Pty Ltd'. It provided:

> [VSSPL] enters into property leases on behalf of [VSCPL]. The clauses within this Partnership Agreement will apply to [VSSPL] as to [VSCPL]. To further clarify this, in the event that there is a change in the entitlement to capital and property or in the shareholding of the Partners in [VSCPL], there shall be a

corresponding change in [VSSPL].

117 Mr Hay, representing the administrators, informed the Court that, as far as the administrators were aware, VSSPL did not have a bank account.[103] VSSPL took out the leases, but it was VSCPL that paid the rent.[104]

118 As discussed previously, I have found that the VSCPL, as the manager, held its assets on trust for the partnership. The Partnership Agreement makes it clear that the partnership property included the leases. Thus, I find that the leases were held on trust for the partnership. Technically, this may have been achieved by VSSPL holding the leases on trust for VSCPL, and by VSCPL itself holding the beneficial interest in the leases on trust for the partnership. Even though VSCPL paid the rent on the leased premises, VSSPL was liable for the rent.

119 It appears that VSSPL did not disclose to landlords that it acted other than in its own right and on its own behalf. Accordingly, the creditors of VSSPL, who are the landlords of the 66 premises which VSSPL leased, are entitled to make a claim against either the agent, VSSPL, or the principal, VSCPL. On the basis that VSSPL has no assets of its own, nor even has possession of any of its principal's assets, the landlords may elect to make a claim against the principal, VSCPL. If this is the case, then the landlords would be considered creditors in the distribution of VSCPL's assets, should VSCPL eventually go into liquidation.

Orders

120 The administrators apply for directions and/or declarations in respect of the questions they raise. I do not consider it appropriate to make the declarations sought, as opposed to directions, in the absence of interested parties. Accordingly, I propose to make the following directions and orders.

121 I direct that the administrators are justified in proceeding in the relevant

---

103 Transcript of Proceedings, *Re Victoria Station Pty Ltd (admins apptd)* (Supreme Court of Victoria, S CI 2017 01896, Robson J, 15 November 2017) 6 (S D Hay).

104 Transcript of Proceedings, *Re Victoria Station Pty Ltd (admins apptd)* (Supreme Court of Victoria, S CI 2017 01896, Robson J, 15 November 2017) 6 (S D Hay).

administrations on the basis that:

(a) VSCPL conducted the business as manager and agent for the partnership between MHPL and PHPL and, as such, has a right of indemnity and a lien over all assets (including any partnership assets) under its control or at its disposal in respect of debts it incurred as agent for the partnership;

(b) as regards the winding up of VSCPL, the assets of VSCPL (including any moneys it receives as a consequence of its lien) should be distributed to its creditors (including employees) in accordance with the Act, including the provisions for statutory priorities under ss 556, 560–1.

(c) VSSPL entered into leases of the various premises from which the business was conducted as appointed agent of VSCPL, and for VSCPL in its capacity as manager of the partnership and therefore for and on behalf of the partnership.

122 I note the submissions of the administrators that additional orders, for the determination of the partnership, appointment as receivers and managers, and indemnification for their reasonable costs and expenses, can sensibly be heard by Gardiner AsJ pursuant to r 60.02(2) of the *Supreme Court (General Civil Procedure) Rules 2015*.

123 I propose to order that the administrators' claims:

(a) for indemnity, remuneration and expenses; and

(b) for such amounts to be held to be secured by an equitable charge over the assets of VSCPL, the partnership and/or MHPL and PHPL (as trustees of the MRF and PRF Trusts) –

are to be referred to be heard by Gardiner AsJ, or another associate judge.

124 In relation to costs, I note the orders of Gardiner AsJ, dated 25 September 2017, ordering that the costs of the plaintiffs' interlocutory process be costs in the administration of the companies, which were confirmed by order 7 of the orders I

made on 13 October 2017.

125 Further, I note that the proposed orders attached to the administrators' further submissions provided:[105]

> The Administrators' costs incurred to date of the interlocutory process be costs of the administrations of the Companies and the partnership.
>
> The Department of Employment's costs be costs in the administrations of the Companies and the partnership and paid on an indemnity basis.

126 I propose to make orders accordingly.

127 I direct that the plaintiffs bring in short minutes of orders that address the questions raised in the interlocutory process, relevant for present purposes.

CERTIFICATE

I certify that this and the 31 preceding pages are a true copy of the reasons for Judgment of Justice Robson of the Supreme Court of Victoria delivered on 11 April 2018 as revised on 19 April 2018

DATED this nineteenth day of April 2018.

.....
Associate

105 Administrators, 'Plaintiffs' Further Submissions', 22 December 2017.