

Australian Court Directs Receivers to Pay Priority Creditors of Company in Liquidation

Receivers appointed to a company in liquidation are entitled to make payments to priority creditors, and their fees and costs are recoverable from the fund.

In *Kirman v RWE Robinson & Sons Pty Ltd (in liq)*, in the matter of *RWE Robinson and Sons Pty Ltd (in liq)* [2019] FCA 372, both the receivers and liquidators of the company sought directions from the Federal Court of Australia regarding whether they were entitled to make payments to priority creditors under section 561 of the *Corporations Act 2001* (Cth). The directions were important given that there were insufficient funds to pay the receivers' fees, the liquidators' fees, and the priority debts for superannuation and employee entitlements.

Section 561 provides that priority creditors shall be paid in priority to secured creditors if there are insufficient assets to satisfy these debts during the liquidation of a company. Section 433 imposes a similar obligation on receivers prior to liquidation. However, section 433 did not apply in this case because the receivers were appointed after the winding up commenced.

The receivers and the Commonwealth opposed the liquidators' position that the payments should be made by the liquidators. The Commonwealth (standing in the shoes of the priority employee creditors) could have expected a better return if the payments were made by the receivers because whichever party made the priority payments would have been entitled to claim its fees from the funds. The Court considered (i) whether the receivers were required to transfer the funds to the liquidators and (ii) whether the receivers' fees were claimable under an equitable lien.

Justice Katrina Banks-Smith concluded that the receivers were entitled to make the payments to the priority creditors under section 561 and that their remuneration and expenses were recoverable based upon an equitable lien. Justice Banks-Smith reasoned that section 561 did not require the receivers to pay the fund to the liquidators based on the proper construction of the provision, and nothing in the provision indicated any intention to exclude an equitable lien.

Looking ahead, receivers can be assured that their fees and costs may be recovered where there are insufficient funds to satisfy both priority creditors and secured creditors. Conversely, liquidators should consider these issues before accepting an appointment and undertaking work in reliance on future funds being handed over by receivers to ensure that their fees and costs are recoverable.



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