

DOES THE LIQUIDATOR HAVE A DUTY TO DEAL WITH TRUST PROPERTY?

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Abstract

The extent, if any, to which the liquidator of a corporate trustee is under duties in relation to trust property has received very limited attention from the English courts. The point is important since corporate trustees collectively hold property worth trillions. If such trustees cannot be placed in administration proceedings for whatever reason or if the administrator of a corporate trustee is unable fully to deal with trust property prior to the end of the administration, the absence of any duty on the liquidator to deal with such property in some appropriate way would open up a serious lacuna in the efficacy of the liquidation regime. This article sets out tentative and exploratory considerations that may assist a court asked to address this question.

KEY POINTS

- The liquidation regime plays three fundamental roles: the collection and preservation of the company's assets (**'the preservation function'**); their distribution (**'the distribution function'**); and investigation and reporting in relation to the circumstances of the company's insolvency (**'the investigation function'**).
- As to the property held on trust by the company prior to entering liquidation, the liquidator has powers in relation to each of these functions. However, the question whether there are any corresponding duties has seldom been considered and the answers are unclear and controversial.

¹ This article draws on arguments made by the author as counsel to the Financial Conduct Authority in *In re Beaufort Asset Clearing Services Limited* [2022] EWHC 636 (Ch) (where, however, the Court did not have to decide the issues). However, the views expressed in this article, particularly the mistaken ones, are the author's alone, and must not be attributed to any other person or organisation.

- This article interprets the Insolvency Act 1986 and draws on English and Australian case law tentatively to provide considerations in favour of the view that the liquidator does have duties in relation to trust property.
- In fact, it is reasonably clear though not widely understood that the liquidator has duties in relation to both the preservation and investigation functions.
- In relation to the distribution function, the better view is that the liquidator also has the duty to deal with trust property in some appropriate way.

THE FUNCTIONS OF LIQUIDATION

Liquidation performs three fundamental roles. First, the liquidator must gather in, recover, and preserve the company's property (**'the preservation function'**). Second, they must realise the company's assets and distribute them according to the statutory scheme (**'the distribution function'**). Third, they must investigate and report on the company's affairs and the circumstances of its insolvency (**'the investigation function'**).

The better view, explained below, is that the liquidator has duties (and not merely powers) in relation to each function. The liquidator's insolvency law duties in aid of both the preservation and the investigation functions appear to apply to property held on trust by the company at the point at which it enters winding-up. However, the liquidator's insolvency law duties which advance the distribution function do not apply to such trust property. Nevertheless, if it is the case that the liquidator must preserve the company's trust property, and must also investigate and report on its affairs qua trustee, then it would be odd for them not to be under any duty whatsoever to deal with trust property in some appropriate way.

THE POWER TO DEAL WITH TRUST ASSETS

It is clear that the liquidator has the power to deal with property title to which was held on trust by the company at the point at which it entered winding up. Schedule 4 to the Insolvency Act 1986 (**'IA'**) spells out the liquidator's general powers. Pursuant to paragraph 5, the liquidator may carry on the company's business "*so far as necessary for its beneficial winding up*", and pursuant to paragraph 13, the

liquidator may “do all such other things as may be necessary for winding up the company’s affairs and distributing its assets”. For the purposes of paragraph 4, what is “beneficial” is not confined to purely financial benefit but means “of advantage to the persons in whose interests the liquidation process is being undertaken”; *In re Baglan Operations Limited* [2022] EWCH 647 (Ch), [52] (Sir Alistair Norris). Further, the precise purpose of a particular winding up is sensitive to the nature of the company being wound up and may extend well beyond the direct interests of the company’s creditors; *Willis v Association of Universities of the British Commonwealth* [1965] 1 QB 140 (CA), 153F-154D (Salmon LJ); *In re Baglan Operations Limited* [2022] EWHC 647 (Ch), [54]-[60], [62], [65] (Sir Alistair Norris).

A corporate trustee’s affairs must include its affairs qua trustee, and a purpose of its winding up must be to wind up its affairs qua trustee. In these circumstances, it would be surprising if the beneficiaries of that trust were not amongst the persons in whose interests the liquidation process is undertaken. In any case, several well-known judgments of the English courts appear to proceed on the basis that the liquidator has power to administer the trust of which the company in winding up is trustee.²

The question whether the liquidator has any duty in relation to trust property is much more difficult to answer.

As a starting point, if the liquidator’s duties were limited to getting in, realising, and distributing the company’s assets, then it would appear to follow that a winding up order should not be made where the company did not have any assets. In fact, however, the court is expressly precluded from refusing to make a winding-up order “on the ground only that the company’s assets have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets” (IA s. 125(1)).

This suggests either that a liquidator may be appointed but then be under no duty at all except if they chose to exercise any of their statutory powers, or else that the liquidator’s duties are not restricted to dealing with “the company’s assets”. In fact, as shown below, the latter view must be correct.

THE PRESERVATION FUNCTION

² See e.g. *Re Berkeley Applegate (Investment Consultants) Ltd* [1989] Ch. 32; *Re William Makin & Son Ltd* [1992] Pens. L.R. 177; *Hunt v Financial Conduct Authority* [2019] EWHC 2018 (Ch).

The period in which a company sinks into insolvency can be tumultuous, and the interests of those with an economic stake in the company are at risk. In particular, the directors who manage the company are often appointed by shareholders and, in closely held companies, themselves own significant portions of the company's equity. When the company is descending into insolvency, such directors anticipate losing control of and any stake in the company. They therefore often have incentives to misapply the company's property, such as by transferring it to connected entities in a way which is harmful to the company itself and to those with an economic stake in it. Insofar as it governs liquidation, insolvency law performs its preservation function by (amongst other things):

- disabling certain transactions except in favour of those with a stronger claim to certain property than that of the company and its liquidator (such as under sections 127 and 130),
- requiring the liquidator to take custody or control of all of the company's property (under section 144(1), considered below),
- empowering the court to require any person who has possession or control of any of the property, books, papers, or records of the company to deliver them up (under section 234(2));
- providing for the reversal or adjustment of the effects of certain transactions (such as under sections 238 and 239), and
- making directors liable to contribute to the company's assets (such as under section 214).

Through these and other provisions, the preservation function operates in the company's interests and in the interests of a wide range of those with an economic stake in its property and undertaking.

A key statement of the liquidator's duty in relation to the preservation function is found in section 144(1):

*“When a winding-up order has been made, or where a provisional liquidator has been appointed, the liquidator or the provisional liquidator (as the case may be) shall take into his custody or under his control **all the property and things in action to which the company is or appears to be entitled.**”*

This preservation duty is defined by reference to “*property*”. “*Property*” is in turn defined in section 436(1) as follows:

“‘property’ includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property”.

In *Bristol Airport plc v Powdrill* [1990] Ch 744 (CA), Browne-Wilkinson V-C observed, at p 759, that “*It is hard to think of a wider definition of property*”. In *Gwinnett v George* [2019] EWCA Civ 656, [29], Newey LJ noted both that this definition is “*in the widest terms*” and that even then it is “*inclusive rather than comprehensive*”.

On this definition, the legal title to trust property of even a bare trustee constitutes “*property*”. The trustee holds property, or money, goods, things in action, or land, on trust. In each case, what the trustee holds is “*property*” for the purposes of section 436(1). Similarly, the trustee’s legal title to property falls under each of the categories of “*every description of property*” and “*every description of interest arising out of, or incidental to, property*”.

Interpreted in this natural way, the liquidator’s section 144(1) duty to take custody or control of the property to which the company is entitled extends to its trust property. Again, the trustee is entitled in law to the trust property even though bound in equity to use it for another’s benefit.

In fact, the liquidator’s duty to take custody or control of the company’s property is wider even than this definition “*in the widest terms*”. Amongst other things, the liquidator’s duty is not merely to take custody or control of all the property to which the company is entitled, but all to which it appears to be entitled. Further and as if to signal a legislative intent to give the widest practicable scope to the liquidator’s preservation duty, choses in action (including those to which the company only appears to be entitled) are expressly included in the liquidator’s section 144(1) duty even though the definition of “*property*” already includes “*things in action*”.

The liquidator’s preservation duty is buttressed by the court’s (rarely used) power on the liquidator’s application to vest in the liquidator “all or any part of the property of whatsoever description belonging to the company or held by trustees on its behalf”; see section 145(1). Again, it is difficult to envisage a broader definition of

the property, and difficult to escape the conclusion that the Court's power under this provision extends to property to which the company only ever held legal title.

“ASSETS” AS THAT SUBSET OF “PROPERTY” WHICH IS LIABLE TO BEING DISTRIBUTED TO UNSECURED CREDITORS

Section 143(1) provides a partial (see below) statement of the preservation function (with that statement underlined in the excerpt below):

*“The functions of the liquidator of a company which is being wound up by the court are to secure that **the assets of the company** are got in, realised and distributed to the company's creditors and, if there is a surplus, to the persons entitled to it.”*

It is implausible that the draftsman arbitrarily chose the concept of “assets” in section 143(1), as opposed to “property” in the following section.

“Assets” is not a term of art, is not defined in the statute, and therefore, by the standard approach to statutory interpretation, “takes its meaning from its context and from its collocation in the...Act...in which it is found and from the mischief with which that Act...is intended to deal”; *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 (HL), 1051-2 (Lord Porter).

On any view, section 143(1) refers to a narrower range of property (“assets”) than does section 144(1): at least some of the property to which the company appears to be entitled and which the liquidator is therefore obligated to take into their custody or control may turn out not to be assets of the company that the liquidator should realise (at least in the standard case). For example, the liquidator may take control of certain assets to which the company appeared entitled but which turn out to be merely bailed to it. Normally, it would be inappropriate for the liquidator to realise such assets by selling them instead of arranging for them to be collected by the bailor. Further, some of the company's property may be onerous and liable to being disclaimed under IA section 178 rather than distributed. (In such circumstances, the company's beneficial winding up “*undoubtedly requires*” the liquidator to consider avoiding any consequent liability for themselves and for the company; *In re Baglan Operations Limited* [2022] EWHC 647 (Ch), [55].)

This understanding of the company's assets as that subset of the company's property which is liable to being distributed to the company's creditors and (in the event of a surplus) shareholders is supported by section 123(2), which defines the test of balance sheet insolvency:

“A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.”

The value of only those assets which are beneficially owned by the company — and not property to which the company was or appeared to be entitled but which is beneficially owned by third parties — should be compared with its liabilities in order to determine whether it is insolvent.

That the liquidator's preservation duty extends to the company's trust property is further supported by the definition in section 283 of a natural person bankrupt's estate, which includes (at subsection 1) “all property belonging to or vested in the bankrupt at the commencement of the bankruptcy”, but which (by subsection 3) is then restricted to exclude trust property:

“Subsection (1) does not apply to...property held by the bankrupt on trust for any other person”.

On a natural reading of these provisions, property belonging to or vested in the bankrupt includes property the bankrupt holds on trust for any other person, and such property — i.e. the legal title to it — would fall in the bankruptcy estate under subsection 1 but for the exclusion in subsection 3.

In the corporate context, the statute provides no such exclusion in relation to the property to which the company is entitled and of which the liquidator is therefore duty-bound under section 144(1) to assume custody or control. Again, it would appear to follow that the liquidator should take custody or control of trust property.

THE DISTRIBUTION FUNCTION

A partial statement of the liquidator's duty in relation to the distribution function is found in section 143(1) (underlined):

“The functions of the liquidator of a company which is being wound up by the court are to secure that the assets of the company are got in, realised and distributed to the company's creditors and, if there is a surplus, to the persons entitled to it.”

The distinction between the liquidator's section 144(1) duty to take custody or control of property and his section 143(1) function of securing that assets are got in and realised has already been noted.

Even within section 143(1), however, there is a distinction between the assets which are got in and realised on the one hand, and those which are distributed to the company's creditors and (in case of a surplus) shareholders on the other. Some of the realisations made by the liquidator would go towards the costs of the liquidation process and would not be available for distribution to creditors and shareholders.

The key distributive provisions in liquidation include sections 107, 115, 174A, 175, and 176. These provide for the payment of costs and distribution to creditors and shareholders. The liquidator has duties in relation to each of these distributive provisions, as appropriate. These provisions generally, but not universally, deploy the concept of “assets” rather than “property”. In any case, however, use of the latter term in the IA's distributive provisions is not inconsistent with the position taken here, since “property” as the more general term includes “assets” as that part of the company's property which is liable to being realised and distributed pursuant to the statutory scheme.

TRUST PROPERTY IS SUBJECT TO THE PRESERVATION BUT NOT THE DISTRIBUTION FUNCTION

The foregoing discussion appears to suggest that it is part of the duty of the liquidator of a trustee company under section 144(1) to take custody or control of the property the legal title to which the company held on trust prior to being wound up. However, such legal title, which is stripped of beneficial ownership, does not constitute “assets” available for distribution amongst the company's creditors and shareholders pursuant to section 143(1).

Consistently with this conclusion though not citing authority and not advertent to the property / assets distinction highlighted above, *Sealy & Milman's Annotated Guide to the Insolvency Legislation* (24th ed, 2021), states in its commentary on section 144:

“It is also the duty of the liquidator to take control of assets held by the company on trust, although such assets are not available for distribution under the winding up.”

English authority is found in *Re Berkeley Applegate* (1988) 4 BCC 279, 283 RHS, in which Mr Edward Nugee QC was concerned with the interpretation of section 115 of the Act. Having referred to Rule 4.218 of the Insolvency Rules 1986, he stated (emphasis added):

*“It is clear...that the company’s assets do not, **for the purposes of these provisions**, include assets held by it in trust for others. **This is so notwithstanding that the duty of the liquidator under section 100^[3] to wind up the company’s affairs necessarily involves dealing to some extent with the assets which it holds as trustee.**”*

Three points are important in relation to these dicta. First, the Judge took care to limit the statement that the company’s assets do not include assets held on trust to “the purposes of these provisions”, that is, the Act’s distributive provisions. Given the considerations outlined above, this careful limitation of scope is neither excessive caution nor a mistake.

Secondly, the appearance of the qualifier “necessarily” strengthens the suggestion that the statement of the liquidator’s duty to deal with any trust assets is not restricted to the facts of the particular case. This is also supported by the fact that in the relevant passage, the Judge appears to be addressing the position in principle.

Thirdly, that the liquidator must deal with trust assets “to some extent” indicates that the liquidator is not necessarily in the position of the trustee. What extent of dealings may be called for would, on this view, be a function of the particular facts.

The same conclusion is further supported by the fact that the liquidator’s duty to preserve the company’s own assets and to distribute them to its creditors itself requires the liquidator carefully to consider whether to permit the trustee company to act in breach of trust, such as by omitting to cause

³ Section 100(1) as it then stood stated: “*The creditors and the company at their respective meetings mentioned in section 98 may nominate a person to be liquidator for the purpose of winding up the company’s affairs and distributing its assets.*”

the company to administer or transfer trust property according to the terms of the trust. Such breaches of trust may give beneficiaries personal claims against the company in a way which would be harmful to the company's existing creditors. In *In Re Pritchard Stockbrokers Ltd (in special administration)* [2019] EWHC 137 (Ch), [25] (emphasis added), Norris J stated:

“...Where an insolvent company is a trustee, how the company should discharge its duties as trustee and execute the trusts upon which it holds property, and how it should avoid the generation of claims for breach of trust which would lie against its assets, are key questions to be addressed by the administrator: and he or she can properly seek directions as to how to perform their function in that regard...”

The tenor of this dictum — made in relation to a company in special administration but by reference to the standard Schedule B1 version and by its reasoning also applicable to winding-up — suggests that it is the officeholder's duty at least to consider how the company should discharge its duties as trustee and how the officeholder should run it in order to avoid diluting the value of the claims of existing creditors as a group. This conclusion is consistent with Sir Alastair Norris's decision in the context of a compulsory winding-up in *In re Baglan Operations Limited* [2022] EWHC 647 (Ch), [55].

THE INVESTIGATION FUNCTION

Winding-up proceedings serve an important 'public' function in investigating and reporting on the circumstances of the company's insolvency, and the liquidator is subject to a number of duties in furtherance of this function including the following (amongst others):

- In compulsory liquidations, the official receiver is required to investigate the company's affairs and the reasons for its failure, and if appropriate, to report to the court winding up the company (section 132). If the report discloses the commission of a criminal offence, the court will order the report to be referred to the Secretary of State, who will consider bringing a prosecution (section 218(1)).
- Section 143(2) requires the liquidator, if they are not the official receiver, to furnish the official receiver with such information and assistance as the official receiver may reasonably require for the purposes of carrying out his functions “*in relation to the winding up*”.

- Similarly, if it appears to the liquidator who is not the official receiver that any past or present officer or member of the company has been guilty of an offence, the liquidator must make a report to the official receiver, or in case of a voluntary winding up, the Secretary of State; section 218(3) and (4).

In aid of these duties, the legislation creates other important and well-known duties and powers. In particular:

- Section 235 requires any person connected with a company in winding up to provide to (relevantly) the liquidator and the official receiver (whether or not the liquidator of the company in question) such information concerning the company and its promotion, formation, business, dealings, affairs or property as the officeholder may reasonably require.
- Section 236 empowers the court at the application of the liquidator and the official receiver (whether or not the liquidator of the company in question) to summon a person to be examined as to the company's property, or its promotion, formation, business, dealings, or affairs, and to require the production of any books, papers, or records bearing on any of these matters.

In re Pantmaenog Timber Co Ltd [2004] 1 AC concerned the question whether a section 236 order could be made to enable the official receiver to obtain information for use in disqualification proceedings pursuant to the Company Directors Disqualification Act 1986. On the official receiver's appeal, the House of Lords held that it could, on the basis that the liquidator's functions include investigation, in the public interest, of the causes of the company's failure.⁴

Now, it cannot be the case that the liquidator's duties are directed, on the one hand, to the interests of the company's creditors and (where appropriate) shareholders, and on the other, to the public interest, but leave entirely unprotected the interests of others in the intermediate category, who have a direct stake in the company's winding up but who are not its creditors (though, as noted, some may acquire claims for breach of trust) or shareholders.

⁴ *In re Pantmaenog Timber Co Ltd* [2004] 1 AC, [64] and [75] (Lord Millett) and [77], [79]-[80] (Lord Walker).

The relevant example of such a stakeholder is the beneficiary of a trust of which the company was the trustee prior to being wound up. It seems clear that the duties and investigative powers described above can be used to obtain information about property held by the company on trust.

This is shown by the Court of Appeal's judgment in the well-known case of *Bishopsgate Investment Management Ltd v Maxwell* [1993] Ch 1, a leading authority on sections 235 and 236. Bishopsgate Investment Management Ltd (**'Bishopsgate'**) was the pension investment trustee for certain Mirror Group companies. After Robert Maxwell's death, a very significant deficiency was discovered in the moneys and assets which ought to have been held on trust as part of the pension fund. Provisional liquidators were appointed to Bishopsgate, and applied (amongst other things) to examine the deceased's son pursuant to sections 235 and 236. The latter resisted on the basis of the privilege against self-incrimination. Relevantly for present purposes, there was no dispute on the basis that the information was sought in relation to the company's affairs as trustee or in relation to trust assets.

This point is not restricted to sections 235 and 236. Suppose, by way of example, that the deficiency in the Mirror Group pension fund had only been discovered when Bishopsgate went into liquidation and the liquidator uncovered the significant apparent misappropriation of trust assets. The better view must be that the liquidator would be required to report this apparent misappropriation to the official receiver pursuant to section 218, rather than doing nothing on the basis that their only duties concerned assets beneficially owned by the company. Similarly, if the official receiver had discovered such misappropriation, they would have been duty-bound to take appropriate steps. To hold otherwise would be fundamentally to weaken winding-up's investigative function and its public role in enforcing "commercial morality"; *In re Pantmaenog Timber Co Ltd* [2004] 1 AC, [53] and [80].

That the investigative function of winding up extends to all of the company's property and affairs, including in relation to trust property, goes further still. Sections 206 to 211 create summary offences in relation to malpractice affecting the company's property and affairs. This must include trust property and the company's role as trustee.

For example, section 208 makes it an offence for any officer of a company in any type of winding-up not fully to disclose to the liquidator "*all the company's property*", or not to disclose the circumstances in which any such property might have been disposed of out of the ordinary course of the company's business, or to prevent the production of any document relating to the "*company's property*", or to attempt

to account for “*any part of the company’s property*” by fictitious losses or expense. Again, to read the many references to “*the company’s property*” here as excluding property held by the company on trust would seriously undermine, both, the efficacy of liquidation as a process for unearthing and remedying impropriety, and consequently, the public interest in the investigative function.⁵

WINDING UP THE COMPANY’S AFFAIRS

Winding up is an occasion for concluding *all* of the company’s affairs to the extent that the liquidator is able to do so.⁶ In relation to a corporate trustee, as noted above, this must generally include winding up its affairs as trustee to some appropriate degree. It is unclear how it could appear to a liquidator who had not done anything whatsoever in relation to trust assets (see the possible actions set out in the next Section, below) that the winding up was “*for practical purposes complete*”, nor could the account the liquidator was required to provide “*showing how...the company’s property has been disposed of*” (section 146(2)) make no mention whatsoever of property held by the company on trust, nor is it clear how the liquidator could properly issue the requisite statutory notice to the effect “*that the company’s affairs are fully wound up*” (Insolvency Rule 7.71(2)(a)).

There is English authority that in dealing with assets held by the company on trust, the liquidator cannot improperly weight the interests of creditors over those of trust beneficiaries but must act even-handedly. In *Re Exchange Securities & Commodities Ltd* [1983] BCLC 186 (ChD), the claimants had an arguable case of being beneficiaries under a trust rather than mere creditors. They were refused leave to commence independent actions against the company in winding-up, on the basis that they could assert their claims, as claims under trusts, within the winding-up itself. The claimants argued that “*a liquidator will be principally concerned with the interests of mere creditors and will not be able to look even-handedly upon the mere creditors on the one hand and the investors [who claimed to have interests under a trust] on the other*” (at 193d). Mervyn Davies J rejected this argument, stating (at 193d-e): “*The liquidator owes no higher duty to the mere creditors than he does to other claimants on the funds in his hands*”.

⁵ For detailed consideration of the position of encumbered assets as part of the assets of the company being wound up, see Mokal, ‘What Liquidation Does for Secured Creditors, and What it Does for You’ (2008) 71(5) MLR 699.

⁶ *London and Caledonian Marine Insurance Company v The London and Edinburg Shipping Company* (1879) 9 Ch 140, 143.

This is consistent with the liquidator's *Ex p James* duty to behave in “*a fair, principled, and honourable way [by] the standards which right-thinking people...would think should govern the Court or its officers*”; *In re Baglan Operations Limited* [2022] EWCH 647 (Ch), [54] (Sir Alistair Norris).

THE LIQUIDATOR'S DEALINGS WITH TRUST PROPERTY

Beyond the considerations explained above, the English authorities do not provide much guidance. The position in Australia seems somewhat more advanced. The statutory framework governing winding up in that country is similar but of course not identical to that in England. However, English legislation appears to require the liquidator to take custody or control of the company's trust property. From this, it would appear to follow that the liquidator must cause the company to deal with such property or themselves deal with it in some appropriate way. In this context, Australian case law provides a potentially illuminating resource that an English court confronted with this question may consider in formulating guidance, to liquidators as its officers, and as a court of equity in relation to the corporate trustee.

Pursuant to section 261 of the Australian Companies Act 1961, the liquidator was appointed “*for the purpose of winding up the affairs and distributing the assets of the company*”.⁷ In *Re Crest Realty Pty Ltd*, Needham J sitting in the Supreme Court of New South Wales held as follows:⁸

“...*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 in cases where that is expedient.*

“...*In the absence of any statutory provision regulating the administration of trusts of which a company in liquidation is the trustee, it seems to me that s. 261 (1) of the Companies Act places upon the liquidator the duty to act in a responsible way in the administration of the trust in the name of the company. In respect of some cases, it would be unsuitable for the company to continue to act as trustee...*”

⁷ This formulation is materially identical to the purpose of appointment of an English voluntary liquidator (section 91). Further, pursuant to paragraph 13 of Schedule 4 to the Insolvency Act, the liquidator may “*do all such other things as may be necessary for winding up the company's affairs and distributing its assets*” (emphasis added). There are, however, other differences in the two statutory frameworks.

⁸ [1977] 1 N.S.W.L.R. 664, 672E-G.

In *Porter v Miller Street Pty Limited* [2008] FCAFC 77 at [44]-[46] [**AB/18/282**] (Sundberg, Jacobson and Gordon JJ) (references omitted, emphasis added), the Federal Court of Australia applied *Crest* and went on to hold as follows:

“In a winding up, the duty of the liquidator is to identify the assets of the company, and in that process to ascertain whether particular assets under the control of the company are beneficially owned by the company or by others... The liquidator must do all ‘other things as are necessary for the winding up of the affairs of the company and distributing its property’...

*In fulfilling those tasks, the liquidator cannot disregard the fact that the company holds property in trust for others. And to the extent that the company does hold property in trust for others, the liquidator must ‘act in a responsible way in the administration of the trust in the name of the company’... As we have said, **what the duty to ‘act in a responsible way’ will involve, and what degree of ‘administration’ of the trust will be necessary, depends upon the particular circumstances...***

... in some cases there may need to be an application to the court for the appointment of a new trustee or an application for the appointment of a receiver and manager of the trust assets. In other cases, where for example, the company holds property as bare trustee for other persons, there may be no reason why the liquidator should not cause the company to comply with any demand by the beneficial owners to transfer the assets to them, thus giving effect to, and terminating, the trusts. Each of these steps (which are by no means exhaustive) is a step taken by the liquidator in the ‘winding up the affairs of the company’ for the purpose of divesting from the company the trust assets and any continuing obligations in relation to them.”

What it is to act responsibly plainly depends on the particular circumstances of the case, including — as is clear from the *Berkeley Applegate* line of authority — the resources available to the liquidator. Responsible actions may include one, more, or none of the following (without limitation):

- deciding upon consideration to do nothing;
- notifying a known beneficiary that property was held for their benefit;

- publishing a notice, such as in the Gazette;
- seeking the appointment of a suitably experienced and resourced insolvency practitioner as liquidator;
- seeking the appointment of a special manager;
- taking proportionate steps to transfer the property to beneficiaries or to another trustee; and, of course,
- applying to the Court for directions.

CONCLUSION

For these reasons, were the Court minded to provide principled guidance to liquidators of corporate trustees, it should formulate such guidance in light of the facts that the objective of liquidation is to wind up the company's affairs, and that liquidators have preservation duties which extend to trust property and investigation duties which extend to the company's affairs as trustee and to its trust property.