

SUPREME COURT OF QUEENSLAND

CITATION: *Thorne Developments Pty Ltd v Thorne* [2015] QSC 156

PARTIES: **THORNE DEVELOPMENTS PTY LTD**
(ACN 109 570 194)
(applicant)
v
SUZANNE MAREE THORNE
(respondent)

FILE NO: BS10187 of 2014

DIVISION: Trial Division

PROCEEDING: Originating application

DELIVERED ON: 11 June 2015

DELIVERED AT: Brisbane

HEARING DATE: 23 March 2015

JUDGE: Mullins J

ORDER: **The originating application is dismissed.**

CATCHWORDS: CORPORATIONS – FORMATION – REGISTRATION OR INCORPORATION – DEREGISTRATION – where the applicant was the trustee of a family discretionary trust – where the applicant was deregistered – where the respondent was appointed a trustee of the trust during the period when the applicant was deregistered – where the applicant’s registration was reinstated – where the applicant challenged the validity of the appointment of the respondent under the terms of the trust deed on the basis the Commonwealth as the trustee of the trust property held by the applicant immediately before deregistration must consent to the appointment of a new trustee – whether the respondent was validly appointed a trustee of the trust

EQUITY – TRUSTS AND TRUSTEES – APPOINTMENT, REMOVAL AND ESTATE OF TRUSTEES – APPOINTMENT OF NEW TRUSTEES – UNDER POWER – VALIDITY OF EXERCISE OF POWER – OTHER PARTICULAR CASES – where the applicant was the trustee of a family discretionary trust – where the applicant was deregistered – where respondent was appointed a trustee by the person nominated as appointor in the trust deed – where s 12(1) *Trusts Act* 1973 (Qld) governed the appointment of trustees – where a new trustee can be appointed when a trustee which is a corporation has been dissolved – whether dissolution covers deregistration under part 5A.1 of Chapter 5A of *Corporations*

Act 2001 (Cth) – whether the respondent was validly appointed a trustee of the trust

EQUITY – TRUSTS AND TRUSTEES – APPOINTMENT, REMOVAL AND ESTATE OF TRUSTEES – RETIREMENT AND REMOVAL – REMOVAL BY THE COURT – GROUNDS FOR REMOVAL – where trust deed provided that a trustee must vacate office as a trustee if that person becomes subject to any bankruptcy law – where respondent was served with a bankruptcy notice – where respondent applied to set aside bankruptcy notice – whether respondent is subject to bankruptcy law

Corporations Act 2001 (Cth), s 601AB, s 601AD, s 601AE, s 601AH

Governance Review Implementation (Treasury Portfolio Agencies) Act 2007 (Cth), schedule 1

Trusts Act 1973 (Qld), s 10, s 12, s 80

Chalker v Barwon Coast Committee of Management Inc
[2003] VSC 286, considered

Chalker v Barwon Coast Committee of Management Inc
[2005] VSCA 101, considered

Danich Pty Ltd; Re Cenco Holdings Pty Ltd (2005) 53 ACSR 484; [2005] NSWSC 293, considered

House of Peace Pty Ltd v Bangladesh Islamic Centre of New South Wales Inc (2009) 73 ACSR 446; [2009] NSWSC 817, followed

Kleinwort Benson Australia Ltd v Cowl (1988) 165 CLR 71; [1988] HCA 34, cited

Miller v Cameron (1936) 54 CLR 572; [1936] HCA 13, considered

Montevento Holdings Pty Ltd v Scaffidi (2012) 246 CLR 325; [2012] HCA 48, considered

Schuhmacher v Emmerson [2013] QSC 205, considered

COUNSEL: P O Land for the applicant
G M Morrow (*sol*) for the respondent

SOLICITORS: Direct Brief for the applicant
Morrow Petersen for the respondent

- [1] The applicant was the trustee of a family discretionary trust known as the Thorne Family Trust No 3 (the trust) under the trust deed made on 21 June 2004 and was deregistered on 4 December 2011. At the time of deregistration, the only director of the applicant was Mr Brett John Thorne. Mr Brett Thorne became bankrupt on 26 March 2012. The applicant's registration was reinstated by ASIC on 4 September 2013 at the request of Mr Brett Thorne's trustee in bankruptcy. The applicant seeks declarations relating to the

invalidity of the appointment of the respondent as a trustee of the trust whilst the applicant was deregistered.

- [2] The application came on for hearing before a judge in the Applications jurisdiction on 4 December 2014. The parties filed written submissions for the purpose of that hearing. Because an argument was raised that suggested notices should be given under s 78B of the *Judiciary Act* 1903 (Cth), the hearing of the application was adjourned to the civil list. The respondent's solicitors obtained a transcript of the hearing on 4 December 2014 that is exhibited to the affidavit of Mr Morrow filed on 30 April 2015, so that both parties could rely on all arguments that were advanced during that first hearing. No Attorney-General proposed participating in the hearing of this application on 23 March 2015. For the purpose of that hearing, the applicant had filed a supplementary outline of argument and the respondent filed submissions in rejoinder. After the hearing on 23 March 2015, the applicant filed a supplementary outline of argument on 9 April 2015, the respondent filed supplementary rejoinder submissions on 30 April 2015 and the applicant filed a further supplementary outline of argument in response to those submissions on 12 May 2015.
- [3] I do not propose to identify in which outline or on what occasion the particular submission was made by either party, but propose in these reasons to deal with the substantive arguments of both parties made during both hearings and in all written submissions to the extent that is required to dispose of the issues between them.

The trust deed

- [4] Part 2 of the *Trusts Act* 1973 (Qld) (TA) deals with appointment of trustees. Section 10 of the TA provides:
- “Except where otherwise provided in this part, the provisions of this part shall apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust.”
- [5] The provision within part 2 that confers the power of appointing new trustees is s 12. Section 12(1) relevantly provides:
- “(1) Where a trustee, whether original or substituted, and whether appointed by the court or otherwise-
- (a) ...
- (h) being a corporation, has ceased to carry on business, is under official management, is in liquidation or has been dissolved;
- then the person nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust, or if there is no such person or no such person able and willing to act, then the surviving or continuing trustee or trustees for the time being, or the personal representative of the last surviving or continuing trustee, may by writing appoint a person or persons (whether or not being the person or persons exercising the power) to be a trustee or trustees in the place of the trustee first in this subsection mentioned.”
- [6] Clause 16 of the trust deed provides for the manner of appointment of a new trustee:

- “16.1 The Trustee may by instrument in writing appoint a new Trustee in addition to or in place of the Trustee at any time.
- 16.2 On the appointment of a new Trustee in the place of the Trustee, the Trustee replaced is discharged from all future responsibility in respect of the Trust.
- 16.3 If the Trustee is a sole trustee and has resigned or vacated its office under clauses 17 or 18 or (being a corporate trustee) has been dissolved and the Trustee has not appointed a new Trustee under clause 16.1, the Nominated Person may by instrument in writing appoint a new Trustee.”

- [7] The nominated person for the purpose of clause 16.3 is Mr Brett Thorne.
- [8] Clause 17.1 of the trust deed provides that a trustee who is an individual “must vacate that office and ceased to act as such if that person is found to be of unsound mind or becomes subject to any bankruptcy law”.
- [9] Apart from s 12 of the TA, power is conferred on the court by s 80(1) of the TA to appoint a new trustee wherever it is inexpedient, difficult or impracticable to do so without the assistance of the court.

Appointment of new trustees

- [10] Mr Brett Thorne entered into a deed of appointment with his wife Mrs Suzanne Thorne (who is the respondent) and his brother Mr Craig Thorne on 22 August 2012. Recital C of the deed refers to deregistration of the applicant. Recital D states:
- “Consequent upon the deregistration of Thorne Developments the office of Trustee of the trust has become vacant and it has been determined by the parties to these presents that it is necessary, appropriate, convenient and/or expedient that the Appointees be appointed to be a trustees of ‘Thorne Family Trust No 3’.”
- [11] Under clause 1 of the deed of appointment, Mr Brett Thorne pursuant to clause 16.3 of the trust deed appointed the respondent and Mr Craig Thorne as trustees of the trust who accepted the appointment and the deed provided for the transfer of the property of the trust to the new trustees and the vesting of all the property of the trust in the new trustees. Mr Craig Thorne relinquished his office as trustee before the applicant was reinstated to the register.

Issues

- [12] In relation to past events, there are three issues raised by the applicant on this application:
- (a) whether on the proper construction of Chapter 5A part 5A.1 (ss 601-601AH) of the *Corporations Act* 2001 (Cth) (the Act) the respondent was precluded from being

appointed a trustee of the trust unless the Commonwealth consented to such appointment and a court so ordered;

- (b) whether on the proper construction of clause 16.3 of the trust deed and the deed of appointment the respondent was not appointed a trustee of the trust;
- (c) whether the court should declare that the appointment of the respondent as a trustee of the trust is invalid and of no force and effect, because the appointment was not made bona fide and/or the respondent is a near relative of most of the beneficiaries.

The applicant also relies on a fourth issue, if it is unsuccessful on the first three issues:

- (d) whether the court should declare pursuant to clause 17.1 of the trust deed that the respondent as from 28 February 2015 was deemed to have vacated the office of trustee of the trust on the basis that she was “subject to any bankruptcy law” within the meaning of clause 17.1 of the trust deed.

Legislation

[13] The relevant parts of s 601AD of the Act are:

“(1) Company ceases to exist A company ceases to exist on deregistration.

Note: Despite the deregistration, officers of the company may still be liable for things done before the company was deregistered.

(1A) Trust property vests in the Commonwealth On deregistration, all property that the company held on trust immediately before deregistration vests in the Commonwealth. If property is vested in a liquidator on trust immediately before deregistration, that property vests in the Commonwealth. This subsection extends to property situated outside this jurisdiction.

(2) Other company property vests in ASIC On deregistration, all the company’s property (other than any property held by the company on trust) vests in ASIC. If company property is vested in a liquidator (other than any company property vested in a liquidator on trust) immediately before deregistration, that property vests in ASIC. This subsection extends to property situated outside this jurisdiction.

(3) Rights and powers in respect of property Under subsection (1A) or (2), the Commonwealth or ASIC takes only the same property rights that the company itself held. If the company held particular property subject to a security or other interest or claim, the Commonwealth or ASIC takes the property subject to that interest or claim.

Note: See also subsection 601AE(3) – which deals with liabilities that a law imposes on the property (particularly liabilities such as rates, taxes and other charges).

(3A) Commonwealth to have all powers of an owner The Commonwealth has, subject to its obligations as trustee of the trust, all the powers of an owner over property vested in it under subsection (1A).

Note: Section 601AF confers additional powers on the Commonwealth to fulfil outstanding obligations of the deregistered company.

... .”

[14] The relevant parts of s 601AE of the Act are:

“(1) Trust property vested in the Commonwealth If property vests in the Commonwealth under subsection 601AD(1A), the Commonwealth may:

- (a) continue to act as trustee; or
- (b) apply to a court for the appointment of a new trustee.

Note: Under paragraph (1)(a), the Commonwealth may be able to transfer the property to a new trustee chosen in accordance with the trust instrument.

(1A) Obligations attaching to trust property If the Commonwealth continues to act as trustee in respect of the property, subject to its obligations as trustee, the Commonwealth:

- (a) in the case of money – must credit the amount of the money to a special account (within the meaning of the Public Governance, Performance and Accountability Act 2013); or
- (b) otherwise:
 - (i) may sell or dispose of the property as it thinks fit; and
 - (ii) if the Commonwealth does so – must credit the amount of the proceeds to a special account (within the meaning of the Public Governance, Performance and Accountability Act 2013).

Note: ASIC may, for and on behalf of the Commonwealth, perform all the duties and exercise all the powers of the Commonwealth as trustee in relation to property held on trust by the Commonwealth (see subsection 8(6) of the ASIC Act).

(2) Property vested in ASIC If property vests in ASIC under subsection 601AD(2), ASIC may:

- (a) dispose of or deal with the property as it sees fit; and
- (b) apply any money it receives to:
 - (i) defray expenses incurred by ASIC in exercising its powers in relation to the company under this Chapter; and
 - (ii) make payments authorised by subsection (3).

ASIC must deal with the rest (if any) under Part 9.7.

(2A) Obligations attaching to property vested in the Commonwealth For the purposes of subsection (3), if any liability is imposed on property under a law of the Commonwealth immediately before the property vests in the Commonwealth under subsection 601AD(1A), then:

- (a) immediately after that time, the liability applies to the Commonwealth as if the Commonwealth were a body corporate; and

(b) the Commonwealth is liable to make notional payments to discharge that liability.

(3) Obligations attaching to property Any property that vests in the Commonwealth or ASIC under subsection 601AD(1A) or (2) remains subject to all liabilities imposed on the property under a law and does not have the benefit of any exemption that the property might otherwise have because it is vested in the Commonwealth or ASIC. These liabilities include a liability that:

(a) is a security interest in or claim on the property; and

(b) arises under a law that imposes rates, taxes or other charges.

(4) Extent of Commonwealth's and ASIC's obligation The Commonwealth's or ASIC's obligation under subsection (2A) or (3) is limited to satisfying the liabilities out of the company's property to the extent that the property is properly available to satisfy those liabilities.

... .”

[15] Section 601AH of the Act deals with reinstatement. Section 601AH(5) deals with the effect of reinstatement:

“(5) Effect of reinstatement If a company is reinstated, the company is taken to have continued in existence as if it had not been deregistered. A person who was a director of the company immediately before deregistration becomes a director again as from the time when ASIC or the Court reinstates the company. Any property of the company that is still vested in the Commonwealth or ASIC reverts in the company. If the company held particular property subject to a security or other interest or claim, the company takes the property subject to that interest or claim.”

Could the respondent be appointed a trustee without the consent of the Commonwealth while the applicant was deregistered?

[16] The applicant's submission is that ss 601-601AH of the Act contain an exclusive code for the removal of the Commonwealth as trustee of trust property vested in the Commonwealth by s 601AD(1A), upon deregistration of a trustee company. The respondent framed this first issue in slightly different terms: do the provisions of ss 601-601AH of the Act constitute an exclusive code in respect of all matters concerning a deregistered company and is the effect of any such exclusivity to prevent a trustee being appointed pursuant to the TA or the trust deed?

[17] I will focus on the construction and application of the relevant provisions of the Act to deal with the issue thrown up by the respondent's appointment as trustee of the trust while the applicant was deregistered and the trust property was vested in the Commonwealth pursuant to s 601AD(1A) of the Act.

[18] The current terms of ss 601AD-601AH of the Act incorporate amendments that commenced on 1 July 2007 made in schedule 1 of the *Governance Review*

Implementation (Treasury Portfolio Agencies) Act 2007 (Cth) (the 2007 amendments). Prior to the 2007 amendments, when a company was deregistered, its property vested in ASIC. The main change effected by the 2007 amendments to ss 601AD-601AH was to make a distinction between the vesting of property that was held by the deregistered company on trust and the property that was held in its own name. The effect of the 2007 amendments is that non-trust property of a deregistered company will still vest in ASIC, but the property the deregistered company held on trust will vest in the Commonwealth. In accordance with the note to s 601AE(1A) of the Act, ASIC may perform all the duties and exercise all the powers of the Commonwealth as trustee in relation to property so held on trust by the Commonwealth.

- [19] The applicant argues that the effect of s 601AD(1A) and (3A) was to vest the property held by the applicant on trust immediately before deregistration in the Commonwealth as a full trustee and the effect of s 601AE(1) was that the Commonwealth, and no other, had the right to decide whether it would remain as the full trustee or relinquish that role by application to the court.

- [20] There are only a few authorities that consider the effect of s 601AD and s 601AE of the Act. In *Danich Pty Ltd; Re Cenco Holdings Pty Ltd* (2005) 53 ACSR 484, Danich applied for an order under s 601AH of the Act directing ASIC to reinstate the registration of Cenco. Danich was the holder of units in a unit trust of which Cenco was the trustee. Cenco was deregistered in 1996. In 2005 a liquidator of a related company informed the person who was a director of Cenco at the time of deregistration and also a director of Danich that there was a distribution of over \$1m due to be paid to Cenco in the winding up of the related company. The deregistration had been effected under s 574 of the *Corporations Law*. On the basis of the operation of transitional provisions, Barrett J noted at [22] that the trust property of Cenco had vested in ASIC which had the powers then set out in s 601AE(1) of the Act (to continue to act as trustee or apply to a court for the appointment of a new trustee). Barrett J found at [11] that deregistration under that provision in the *Corporations Law* had the same significance, status or effect for the purposes of s 601AH of the Act and that was the source of jurisdiction for the court to make the reinstatement order sought by Danich.

- [21] Barrett J refused to make the reinstatement order on the basis that Danich was not aggrieved by the deregistration of the related company. Barrett J noted at [33] that the rights and interests of Danich in respect of the trust property were unaffected by the demise of Cenco, and at [36] that the liquidator of the related company, upon production of the appropriate evidence, would be bound to recognise the entitlement of ASIC to dividends in respect of the debt owed by the related company to Cenco and steps could be taken to protect the equitable interest of Danich as a beneficiary under the trust without the re-creation of the corporate existence of Cenco.

- [22] Applying as analogous the position that applied on the death of a person who was a trustee, Barrett J considered at [24] the office of trustee had remained vacant since the dissolution of Cenco, unless ASIC had positively exercised the power under s 601AE(1)(a) (as it then stood) to act as trustee. Barrett J described at [39] that there was a “gap in the tenure of a trustee”, but that it was in the hands of ASIC or Danich or anyone else with standing to seek from the court an order for the appointment of a new trustee. Barrett J also noted at [24] the trust property had devolved upon ASIC in such a

way that pre-existing charges, rights and interests were preserved, so the vesting did nothing to defeat or dismiss the rights of ARM (the secured creditor) and the unitholders under the trust in respect of the trust assets vested in ASIC.

- [23] Barrett J referred to the then terms of s 601AH(5) of the Act (which was amended in 2007 by the insertion of the words “the Commonwealth or”) and then stated at [28]-[29]:

“[28] The first part of s 601AH(5) must mean that, upon reinstatement of the registration, the company is to be viewed as if it had never ceased to exist, so that both the initial cessation of existence and the ongoing absence of existence are retrospectively obliterated. While not all consequences of the initial cessation of existence are to be disregarded (for example, the section itself makes it clear, by saying that a person ‘becomes a director again’, that it does not effect retrospective continuity of the tenure of directors), there is to be unbroken continuity of corporate existence as such.

[29] It must follow that, if the registration of Cenco were reinstated, the cessation of existence and dissolution that caused it to cease to be the trustee of the Centrelease Trust would become invisible in the eyes of the law. That, coupled with the automatic revesting of property still vested in ASIC (subject to outstanding securities and other interests and claims), would cause Cenco to hold the remaining trust property subject to the rights of ARM and the claims or interests of unitholders under the Centrelease Trust and therefore upon the trusts created by the deed of 31 December 1982, so that it was again the trustee.”

- [24] The applicant submits that the approach of Barrett J in *Danich* in treating ASIC as the holder of the legal title to the trust property of the deregistered company, but not as a trustee differs from the approach of Gillard J to the effect of s 601AD and s 601AE in *Chalker v Barwon Coast Committee of Management Inc* [2003] VSC 286 at [30] where ASIC was treated as a full trustee and not a bare trustee which should be preferred. An appeal from that decision was unsuccessful in *Chalker v Barwon Coast Committee of Management Inc* [2005] VSCA 101.
- [25] In *Chalker* a company was established as the trustee of a unit trust to conduct a restaurant in premises on Crown land that was managed and administered by the defendants. There was a dispute over rent and the restrictions imposed by the defendant management body. The company was wound up and deregistered when the liquidation was finalised. Mr Chalker and his son Mr Chalker as the plaintiffs then commenced a proceeding against the defendants purporting to act as trustees on behalf of the unit trust. Another company which claimed to be the sole unit holder and beneficiary of the unit trust sought to appoint Messrs Chalker as the trustees of the unit trust after the proceeding commenced. Messrs Chalker then purported to ratify the proceeding they had already commenced against the defendants. The defendants applied to strike out the proceeding on the basis the plaintiffs lacked capacity to bring the proceeding.
- [26] When the company that was the unit trustee was wound up, the unit holders had failed to take advantage of the provision of the unit trust deed to appoint a new trustee. Gillard J found that the plaintiffs had no authority or capacity to bring the proceeding and it was dismissed. Gillard J stated at [30]:

“It follows that the legal estate held by the Unit Trust Trustee company prior to its de-registration was held thereafter by ASIC. S601AE provides for what ASIC can do with the property. S601AE(1) is concerned with property vested in ASIC which was held by the de-registered company on trust. ASIC may continue to act as trustee or to apply to a court for appointment of a new trustee. Clearly, ASIC has the power to transfer the legal estate to a new trustee appointed pursuant to the trust instrument. In my opinion, as at 22 November 2000, ASIC held the legal estate originally held by the Unit Trust Trustee prior to its de-registration, and held the legal estate for the benefit of the Unit Trust. No application was made to the court to appoint a new trustee and no steps were taken pursuant to the Unit Trust Deed to appoint a new trustee. It follows that at the date of issue of the writ, ASIC held the legal estate of the Unit Trust for the benefit of the beneficiary under the Unit Trust Deed. The only property comprised in the legal estate was the cause of action (if any) which the Unit Trust Trustee had on behalf of the Unit Trust against the defendants. Hence, the position as at 29 January 2001 was that if there was a cause of action against the defendants or either of them, the cause of action formed part of the legal estate of the trust. The property in that cause of action was vested in ASIC who held the estate for the benefit of the beneficiary under the Unit Trust, ...”

- [27] Different arguments were advanced before the Court of Appeal in *Chalker*, and Eames JA who gave the leading judgment was at [26] able to dispose of the argument that ASIC was the trustee without deciding the point, as the outcome that the proceeding commenced by the plaintiffs was a nullity would be the same whether ASIC was the trustee or whether there was no trustee in place.

- [28] In *House of Peace Pty Ltd v Bangladesh Islamic Centre of New South Wales Inc* (2009) 73 ACSR 446, the company House of Peace was the registered proprietor of land and had been incorporated by the first defendant for that purpose, its shareholders held their shares on trust for the first defendant, and the land was purchased using funds provided by the first defendant. The second defendant (who was the president of the first defendant) on behalf of the first defendant authorised one of the members of the first defendant to take steps to transfer the subject land from the House of Peace to the first defendant. House of Peace was deregistered by ASIC on 16 December 2002 for failing to lodge documents and its annual return. A transfer of the land from House of Peace to the first defendant was signed on 8 April 2003 by the second defendant as transferor and registered on 12 May 2003. House of Peace was reinstated on 28 March 2006. House of Peace then sought a declaration that the transfer was void on the basis that the transfer had been obtained fraudulently, because the second defendant was not a director of the plaintiff and knew at the time of the transfer the plaintiff had been deregistered. The alternative ground for seeking the declaration was that the transfer and/or its registration was ineffective because of a direct inconsistency between s 42 of the *Real Property Act* 1900 (NSW) (the State Act) and s 601AD and s 601AE of the Act that invoked s 109 of the *Commonwealth of Australia Constitution Act*.

- [29] The plaintiff did not succeed on its first ground, so Nicholas J considered the alternative ground of inconsistency between the State Act and the Act.

- [30] The terms of the relevant provisions of s 601AD (without headings and notes) that were considered by Nicholas J were:

“(2) On deregistration, all the company’s property vests in ASIC. If company property is vested in a liquidator immediately before deregistration, that property vests in ASIC. This subsection extends to property situated outside this jurisdiction.

(3) Under subsection (2), ASIC takes only the same property rights that the company itself held. If the company held particular property subject to a security or other interest or claim, ASIC takes the property subject to that interest or claim.

(4) ASIC has all the powers of an owner over property vested in it under subsection (2).”

- [31] The provisions of s 601AE(2)(a) and s 601AE(3) were in substantially the same terms as they now are after the 2007 amendments. Nicholas J was dealing with the subject property on the basis that it was not held by the plaintiff on trust.

- [32] Nicholas J described the effect of deregistration at [83]-[84]:

“[83] Under s 601AD(2), on deregistration all the company’s property vests in ASIC. It includes any legal or equitable estate or interest in real or personal property of any description (s 9). ASIC takes only the same property rights that the company itself held (s 601AD(3)), and has all the powers of an owner over property vested in it under subs (2) (s 601AD(4)).

[84] As a consequence of the company’s deregistration the devolution of ownership of its property is effected by vesting by operation of law i.e. by force of s 601AD(2). The statutory vesting is, in my opinion, equivalent to the transmission of ownership from the company to ASIC in the sense defined in *Wolfson v Registrar-General (NSW)* [1934] HCA 29; (1934) 51 CLR 300 by Starke J (p 311-312) as follows:

Transmission in its strictest sense is the devolution of property upon some person by operation of law, unconnected with any direct act of the party to whom the property is transmitted – as, by death, bankruptcy, insolvency or marriage”

- [33] Nicholas J concluded at [86]-[87]:

“[86] With devolution of ownership ASIC takes only the same property rights as the company held, with all the powers of an owner over the property (s 601AD(3), s 601AD(4)). No different form of ownership or title is created, and the rights attaching to ownership and title remain the same. In my opinion, upon their proper construction, the provisions operate to change ownership of property from the company to ASIC, with the intention that ASIC is to take just the same kind of property as the company had at the time of deregistration, with the same rights and powers of ownership as the company had before deregistration. It would be incorrect to say that ASIC obtained a statutory title in the vested property which differed in any way from the nature of the title held by the company prior to deregistration.

[87] Section 601AD deals with the effect of deregistration, and s 601AE with what ASIC does with the property. Although s 601AE(2)(a) authorises ASIC to dispose of, or deal with, non-trust property as it sees fit, the Corporations Act makes no provision for the exercise of the powers of an owner which ASIC holds under s 601AD(4). As no comprehensive and exclusive code of the means by which these powers are to be exercised is to be found in the Corporations Act, in my opinion the enactment of these provisions assumed an existing legal system within which and by means of which those powers might be exercised (*Re Residential Tenancies Tribunal (NSW)* p 432). It follows, in my opinion, that these provisions “... were intended to operate within the setting of other laws so that it is supplementary to, or cumulative upon, the State law in question” (*Attorney-General (Vic)* par 54; *Re Residential Tenancies Tribunal (NSW)* p 433; *Telstra Corporation Ltd* par 27).”

- [34] Nicholas J therefore concluded at [94] there was no inconsistency between the operation of the State Act and the relevant provisions of the Act, as the operation of s 41 and/or s 42 of the State Act could not alter, impair or detract from the operation of s 601AD, s 601AE and s 601AH of the Act.

- [35] The applicant submits that the changes to s 601AD and s 601AE made by the 2007 amendments made those provisions materially different from the predecessors that were considered in *House of Peace* and the decision in that case is of no assistance in this matter.

- [36] The 2007 amendments which created the dichotomy between the vesting of the trust property and the non-trust property of the deregistered company respectively in the Commonwealth and ASIC do not have the significance suggested by the applicant. The conclusion by Nicholas J that the powers conferred as a result of s 601AD and s 601AE are intended to operate within the setting of other laws is equally applicable to the current terms of the provisions after the 2007 amendments.

- [37] I consider that Gillard J’s analysis in *Chalker* of the effect of s 601AD and s 601AE of the Act reflects the proper interpretation of those provisions rather than the observation of Barrett J in *Danich* that ASIC did not become the trustee of the trust property of the deregistered company until it positively exercised the power to do so. The idea of the scheme set up by s 601AD and s 601AE of the Act is to ensure that there is an entity to deal with the property owned by a deregistered company upon its ceasing to exist. This has particular relevance in respect of the trust property held by the deregistered company as trustee, as the statutory vesting of the trust property in the Commonwealth may facilitate dealing with the trust property for the benefit of the beneficiaries under the relevant trust. It does not resolve the first issue by determining whether the Commonwealth is a full trustee or not in respect of the trust property held by a deregistered company that vested in it under s 601AD(1A) of the Act. Even if the Commonwealth were a full trustee, the statutory scheme under part 5A.1 of Chapter 5A of the Act anticipates the rights vested in the Commonwealth as the holder of the trust property may be affected or divested by the application of the other laws within which the scheme operates. This is implicit in the note to s 601AE(1) of the Act. If the relevant trust deed or a statutory provision such as s 12(1) or s 80 of the TA regulates the

appointment of a new trustee when a corporate trustee has been deregistered, there is nothing in part 5A.1 of Chapter 5A of the Act that mandates the consent of, or notice to, the Commonwealth before such an appointment can take effect. The power the Commonwealth has pursuant to s 601AE(1) may be used to facilitate the transfer of the trust property to the new trustee or there may be practical reasons in a particular case for notifying the Commonwealth of the appointment of a new trustee, but that does not make the transfer to, or the appointment of, the new trustee conditional on the prior consent of, or notice to, the Commonwealth.

[38] The statutory vesting of the trust property held by a deregistered company in the Commonwealth is therefore defeasible, where there is a relevant exercise of powers under the trust deed or a statutory provision such as s 12(1) or s 80 of the TA for appointing new trustees when a corporate trustee has been deregistered.

[39] The applicant therefore has not succeeded on its first issue.

Whether the deed of appointment validly appointed the respondent a trustee of the trust

[40] The applicant argues that no occasion arose for the exercise by Mr Thorne of the power to nominate a new trustee, whether under s 12(1) of the TA or pursuant to clause 16.3 of the trust deed, on the basis that there was no vacancy in the office of trustee occupied by the applicant, because of the operation of s 601AD and s 601AE of the Act. The answer to this argument is the same as that which resolved the previous issue: that part 5A.1 of chapter 5A of the Act does not displace the operation of the laws that apply generally to trusts.

[41] Although the trust deed refers to the appointment of the respondent and Mr Craig Thorne being made pursuant to clause 16.3 of the deed, the application of s 10 of the TA meant that the source of the power for making a new appointment of trustees was s 12(1) of the TA.

[42] Section 12(1) of the TA provides for the process of appointment of a new trustee by the person nominated under a trust deed for the purpose of appointing new trustees. This avoids uncontentious applications to court for appointment of new trustees and enables the trust to be conducted in the manner that was anticipated by the settlor. In the case of a natural person who has been a trustee, the circumstances applying to a trustee which trigger the exercise of the power under s 12(1) of the TA are death, remaining out of the State for more than one year without having properly delegated the execution of the trust, refusal to act, unfitness to act, incapacity or being an infant. Special provision is then made in s 12(1)(h) for the exercise of the power of appointing a new trustee where specified circumstances apply to a trustee which is a corporation.

[43] When the TA was enacted, the relevant companies' legislation provided for dissolution of a corporation, rather than deregistration. The concept of deregistration was introduced by the *Company Law Review Act 1998* (Cth).

- [44] The issue of statutory interpretation that arises is whether deregistration by operation of law under s 601AB of the Act is caught by s 12(1)(h) of the TA.
- [45] The respondent submits that the concept of deregistration is the same as the concept of dissolution and the terms can be used interchangeably and that is how the word “dissolved” should be construed in s 12(1)(h) of the TA. That is what Barrett J suggested in *Danich* at [25]. The respondent also submits that if the power under clause 16.3 of the trust deed was applicable, it also applied where a corporate trustee had been dissolved and “dissolved” should be given the same meaning in that provision, as in s 12(1)(h) of the TA.
- [46] The respondent relies on the note that is found at the foot of s 601AE(1A) of the Act that contemplates that where a trustee company has been deregistered, a new trustee may be appointed in accordance with the trust instrument. The note, however, does not assist in the interpretation of s 12(1) of the TA, as the note refers to the circumstance where a trust deed may permit the appointment of a new trustee when a corporate trustee is deregistered.
- [47] The concepts of dissolution and deregistration are not different. That is made clear by s 601AD(1) of the Act that expressly states that a company ceases to exist on deregistration. The fact that there is provision for reinstatement of a deregistered company in certain circumstances does not alter the nature of deregistration when it takes effect. Section 12(1)(h) of the TA identifies the circumstances which affect the capacity of a corporate trustee to act as trustee and which warrant the exercise of the power of the appointor under the relevant trust deed to appoint new trustees. Deregistration of the corporate trustee fits within that description. The word “dissolved” in s 12(1)(h) of the TA should be construed as covering deregistration of a company under part 5A.1 of Chapter 5A of the Act.
- [48] The fact the deed of appointment incorrectly identified the source of power for making the appointment of the new trustees as clause 16.3 of the trust deed rather than s 12(1) of the TA and overlooked the statutory vesting of the trust property in the Commonwealth as the automatic consequence of the deregistration of the applicant is of no significance, as the deed of appointment correctly identified the factual circumstance of deregistration of the applicant that triggered the exercise of the power of appointment.
- [49] The applicant does not succeed on its arguments based on the exercise of the power by Mr Thorne as the nominated person to appoint new trustees and the form of the deed of appointment.

Whether the appointment of the respondent as a trustee was not bona fide

- [50] The applicant argues that the appointment by Mr Thorne of his wife as a trustee was not a bona fide exercise of the power of appointment. The applicant submits Mr Thorne could not appoint himself, because he was bankrupt, and it should be assumed that he appointed his wife who would be influenced by him, so that it was in effect an appointment of Mr Thorne.

- [51] The applicant relies on the statements of principle referred to by Daubney J in *Schuhmacher v Emmerson* [2013] QSC 205 at [94] about self appointment to the position of trustee. It should be noted that those statements of principle were quoted from a judgment that was subsequently reversed in the High Court in *Montevento Holdings Pty Ltd v Scaffidi* (2012) 246 CLR 325. The issue in *Montevento* was whether an appointor under a discretionary trust deed with power to remove a trustee and to appoint new trustees, could appoint a corporate trustee of which the appointor was the sole director and shareholder. There was an express prohibition in the deed that, so long as any individual appointor is a beneficiary, that individual shall not be eligible to be appointed as a trustee. The majority in the Court of Appeal of the Supreme Court of Western Australia had held that the prohibition was breached by the appointment of the corporate trustee on the basis that the beneficiary of the appointor would be involved in the performance of the functions of the corporate trustee which was the vice to which the prohibition was directed. The High Court held at [25] that the ordinary and natural meaning of the clause in the deed was that any natural person who holds the office of appointor may not be appointed as trustee, so that did not invalidate the appointment of the corporate trustee. In *Schuhmacher*, the appointor was the executor of the estate of the named appointor and the executor removed the existing trustee and appointed himself as the trustee of the family discretionary trust. In the factual circumstances of that matter, the appointment of the executor of himself as trustee of the trust was found at [97] to be justifiable.
- [52] The respondent submits that as the trust is a family discretionary trust where the objects are Mr Brett Thorne and the respondent and members of their family, there is no justification for reading down the broadly expressed power to appoint a new trustee that is found in the trust deed.
- [53] Apart from relying on the respondent's relationship to Mr Thorne, the applicant has not put on evidence to support its assertion that the appointment of the respondent as a trustee was not a bona fide exercise of the power of appointment.
- [54] I consider the mere fact that the respondent is the wife of Mr Thorne does not provide a sufficient factual basis to support an inference that the respondent was appointed as trustee, so that Mr Thorne would be able to influence her decisions. There is no restriction otherwise in the trust deed on the exercise by the nominated person of the power of appointment. I am not satisfied that the appointment of the respondent as a trustee was not a bona fide exercise of the power of appointment.
- [55] The applicant does not succeed on its third issue.

Whether the respondent became subject to any bankruptcy law

- [56] The applicant relies on the service of the respondent on 28 February 2015 of the bankruptcy notice issued on 27 February 2015 by Ozibar Pty Ltd as Trustee of the Ozibar Unit Trust. The respondent applied to set aside the bankruptcy notice. I have not been informed as to the outcome of that application, but the applicant's contention is that the outcome of the application is irrelevant, as upon service on the respondent of the

bankruptcy notice she became “subject to any bankruptcy law” within the meaning of clause 17.1 of the trust deed and should have vacated the office of trustee.

- [57] The applicant contends that as the issue of a bankruptcy notice is a proceeding under the *Bankruptcy Act* 1966 (Cth) (BA), as was recognised in *Kleinwort Benson Australia Ltd v Cowl* (1988) 165 CLR 71, 77, and the respondent has engaged the BA to bring the application to have the bankruptcy notice set aside, she must be subject to the BA which is the law dealing with bankruptcy. The applicant also relies on the characterisation by Deane J in *Kleinwort* at 81 of a bankruptcy notice being “the foundation of a bankruptcy”.
- [58] The respondent contends that a common sense approach should be taken to the construction of “subject to any bankruptcy law” in clause 17.1 of the trust deed and that a person becomes subject to any bankruptcy law only upon becoming a bankrupt or, possibly, upon signing an authority under s 188 of the BA. The respondent submits that it is an overly literal approach to treat proceedings under the BA anterior to a sequestration order as sufficient to disqualify a trustee from continuing in office as the trustee, when it is the sequestration order that has the effect of altering the status of the bankrupt.
- [59] Clause 17.1 of the trust deed specifies when a trustee must vacate office, because the trustee suffers from a condition or state that the settlor decided (by the terms of the trust deed) disqualifies the trustee from performing that role. Bankruptcy or an assignment for the benefit of creditors has been considered sufficient justification for removing a trustee: *Miller v Cameron* (1936) 54 CLR 572, 575, 579 and 582. The service of a bankruptcy notice on a trustee may lead nowhere. The trustee’s affairs are not subject to the regulation of the BA until the sequestration order or other assignment for the benefit of creditors is made. I therefore do not consider that clause 17.1 of the trust deed should be construed as requiring the respondent to vacate office as the trustee under the trust deed, unless the BA has effected a change in the status of the respondent. The respondent would not be subject to the BA until the BA had that effect on the respondent.
- [60] The applicant does not succeed on its fourth issue.

Orders

- [61] The applicant has failed to show that the appointment of the respondent as a trustee of the trust whilst the applicant was deregistered was invalid. It follows that the originating application should be dismissed. As the issue between the parties that has been resolved by this decision establishes the validity of the respondent’s appointment as trustee, I am prepared to make a declaration in terms to that effect, subject to hearing any submissions by the parties on whether such a declaration should be made in this proceeding brought by the applicant.
- [62] As the applicant has been unsuccessful in the issues it raised in this proceeding, costs should follow the event. I will, however, give the parties an opportunity to consider these reasons before making any costs order.