SUPREME COURT OF QUEENSLAND

CITATION:	*Fordyce v Ryan & Anor; Fordyce v Quinn & Anor* [2016] QSC 307
PARTIES:	**ANN FORDYCE AS TRUSTEE IN BANKRUPTCY OF MICHAEL MORRISON QUINN** (applicant) **v** **TMOTHY JOHN RYAN AS TRUSTEE OF THE RYAN FAMILY TRUST** (first respondent) and **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (second respondent) AND **ANN FORDYCE AS TRUSTEE IN BANKRUPTCY OF MICHAEL MORRISON QUINN** (applicant) **v** **SEAN MICHAEL MORRISON QUINN** (first respondent) and **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (second respondent)
FILE NOS:	No 8893 of 2016 No 8889 of 2016
DIVISION:	Trial
PROCEEDING:	Applications
DELIVERED ON:	20 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	20 September 2016, further submissions 22 September 2016
JUDGE:	Jackson J
ORDER:	**The applications are dismissed.**
CATCHWORDS:	BANKRUPTCY – ADMINISTRATION OF PROPERTY – PROPERTY AVAILABLE FOR PAYMENT OF DEBTS – PROPERTY DIVISIBLE AMONGST CREDITORS – PROPERTY BELONGING TO OR VESTED IN BANKRUPT AT COMMENCEMENT OF BANKRUPTCY – where the bankrupt was a general beneficiary under a purely discretionary trust, was the director of the trustee company and

had been the only beneficiary to receive distributions from the trust – where the trustee in bankruptcy applied to appoint a receiver for the relevant trusts with power to "wind up" the trusts – whether the bankrupt's right as a general beneficiary under a discretionary trust was "property" within the meaning of the *Bankruptcy Act* 1966 (Cth) that vested in the trustee in bankruptcy – whether the trustee in bankruptcy otherwise had standing to bring the application

EQUITY – TRUSTS AND TRUSTEES – GENERALLY – where each of the relevant trusts lacked a trustee – where the trustee in bankruptcy applied to appoint a receiver for the relevant trusts with power to wind up the trusts – where the applicant proposed to appoint experienced liquidators as receivers in circumstances where there were limited trust assets and it was not suggested that complex management was required – whether a receiver should be appointed with power to wind up the trusts

Bankruptcy Act 1966 (Cth), s 5, s 58
Civil Proceedings Act 2011 (Qld), s 12

Ashrafinia v Ashrafinia [2014] NSWCA 676, approved
Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199; [2001] HCA 63, cited
Australian Securities and Investments Commission v Carey (No 6) (2006) 153 FCR 509; [2006] FCA 814, considered
Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd (1998) 194 CLR 247; [1998] HCA 49, cited
Colton v Colton (1888) 127 US 300, cited
Dwyer v Ross (1992) 34 FCR 463, approved
Federal Commissioner of Taxation v Vegners (1989) 90 ALR 547, cited
Holmes v Penney (1856) 3 K&J 90; 69 ER 1035, considered
Horwath Corporate Pty Ltd v Huie (1999) 32 ACSR 413; [1999] NSWSC 583, considered
Jackson v Sterling Industries Ltd (1987) 162 CLR 612; [1987] HCA 23, cited
Kennon v Spry (2008) 238 CLR 366; [2008] HCA 56, distinguished
Lewis v Condon (2013) 85 NSWLR 99; [2013] NSWCA 204, applied
McLean v Burns Philp Trustee Co Pty Ltd (1985) 2 NSWLR 623, cited
Re Coleman; Henry v Strong (1888) 39 Ch D 443, considered
Royal v El Ali [2016] FCA 782, cited
Schmidt v Rosewood Trust Ltd [2003] 2 AC 709; [2003] UKPC 26, cited
Trustees of the Property of Cummins v Cummins (2006) 227 CLR 278; [2006] HCA 6, cited

	Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Pty Ltd (2000) 200 CLR 591; [2000] HCA 11, cited *Yunghanns v Candoora No 19 Pty Ltd (No 2)* (2000) 35 ACSR 34; [2000] VSC 300, cited
COUNSEL:	P McQuade QC and A Messina for the applicant H Mrmos (sol) for the first respondent in 8893 of 2016 No appearance for the first respondent in 8889 of 2016 No appearance for the second respondent in either application
SOLICITORS:	Bourke Legal for the applicant Quinn & Scattini Lawyers for the first respondent in 8893 of 2016

[1] **Jackson J:** The pervasive use of unit trusts and discretionary trusts as vehicles for investment in commercial property can lead to well-known difficulties in the event of insolvency of an individual trustee or beneficiary, and also in the event of winding up or deregistration of a corporate trustee or beneficiary. These unusual applications are brought by the trustee in bankruptcy of a bankrupt individual beneficiary in an attempt to bring the administration of the relevant trusts to an end by the appointment of a receiver with powers to "wind up" the trusts.

[2] In all, there are three relevant trust structures. It is inapt to speak of a trust as though it were a legal personality. However, for each of the three relevant trusts, the trustee was a company that is now deregistered. Any property of each company, including that held as trustee, is now vested in the second respondent. It is convenient, therefore, to refer to each of the trusts by the name given by its constituting instrument.

[3] The 99 George Street Unit Trust is constituted as a unit trust. The units are held as to one-third by Timothy John Ryan, the first respondent in proceeding 8893 of 2016 ("Mr Ryan") and as to two-thirds by the trustee of the Fairdinks Discretionary Trust.

[4] The trustee of the 99 George Street Unit Trust held an interest in land at 99 George Street, Beenleigh. The land was sold by a receiver appointed by a mortgagee of the land. The receiver is not a party to these proceedings but holds a balance of approximately $290,000 for the mortgagor, which is trust property of the 99 George Street Unit Trust.

[5] The Shore Street Unit Trust is also constituted as a unit trust. All of the units are held by the trustee of the Fairdinks Discretionary Trust.

[6] The trustee of the Shore Street Unit Trust held an interest in land at 15/141 Shore Street, Cleveland. The mortgagee of that land is proposing to exercise the power of sale. It is estimated that after the mortgage debt and expenses are paid the mortgagee may hold the sum of between $245,000 and $634,000 on trust for the mortgagor as trust property of the Shore Street Unit Trust.

[7] Title to the trust property in each relevant trust vested in the Commonwealth on deregistration of the relevant trustee company.[1] Property, other than any property held by the company on trust, is vested in ASIC.[2] The Commonwealth took the trust property subject to the trust.[3] The Commonwealth may continue to act as trustee or apply to the court for the appointment of a new trustee.[4] ASIC may perform the duties and exercise the powers of the Commonwealth as trustee on its behalf.[5] It does not presently propose to exercise any of those powers in relation to either the 99 George Street Unit Trust or the Shore Street Unit Trust. As yet, the Commonwealth's title to any trust property has not been followed by it going into possession of or otherwise getting in that property.

[8] The Fairdinks Discretionary Trust is a discretionary trust. There are two classes of beneficiaries under the trust deed. One is "the first principal beneficiary", an expression defined to mean Sean Michael Morrison Quinn. He is the first respondent in 8889 of 2016 ("Sean Quinn"). The second are "the general beneficiaries" an expression defined by reference to five separate subclasses of beneficiaries, but relevantly they include the mother, father, brothers and sisters of the first principal beneficiary, as well as their brothers, sisters, spouses and any other lineal relations by blood or marriage of the first principal beneficiary.

[9] The bankrupt, Michael Quinn, is the father of Sean Quinn. Accordingly, the bankrupt is in the class of general beneficiaries.

[10] The Fairdinks Discretionary Trust submitted tax returns until 2014, showing distributions to the bankrupt. The applicant's evidence is that the bankrupt, who was in control of each of the trustee companies, may have made distributions through either of the unit trusts and then to himself as beneficiary of the Fairdinks Discretionary Trust.

[11] On 2 September 2015, the applicant became the trustee in bankruptcy of Michael Quinn. Relevantly, the bankrupt's interests or involvement in the affairs of the trusts had been as:

(a) director and sole shareholder of Mercibeaucoup Pty Ltd, which was the trustee company of the 99 George Street Unit Trust;[6]

(b) director and sole shareholder of S'il Vous Plait Pty Ltd, which was the trustee company of the Shore Street Unit Trust;[7]

(c) director and sole shareholder of Fairdinks Proprietary Ltd, which was the trustee company of the Fairdinks Discretionary Trust; and

(d) one of the general beneficiaries of the Fairdinks Discretionary Trust.

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1 *Corporations Act* 2001 (Cth), s 601AD(1A).
2 *Corporations Act* 2001 (Cth), s 601AD(2).
3 *Corporations Act* 2001 (Cth), s 601AD(3) and (3A).
4 *Corporations Act* 2001 (Cth), s 601AE(1).
5 *Australian Securities and Investments Commission Act* 2001 (Cth), s 8(6).
6 He was replaced by Sean Quinn as director on 1 February 2013.
7 He was replaced by Sean Quinn as director on 1 February 2013.

[12] When each of the companies was deregistered it ceased to be trustee. As well, by clause 17.10 of each of the 99 George Street Unit Trust Deed and the Shore Unit Trust Deed, the office of trustee would be determined and vacated if the trustee entered into liquidation or had an official manager or receiver and manager appointed.

[13] The only interest that the applicant has in any of the trusts is as the trustee in bankruptcy of Michael Quinn's estate.

[14] The applicant submits that is a sufficient interest to give her standing to bring the present applications, relying on that interest as property of the bankrupt within the meaning of ss 5 and 58 of the *Bankruptcy Act* 1966 (Cth) ("BA").

Property of the bankrupt

[15] In the Fairdinks Discretionary Trust Deed, the settled and any additional property of the trust are called "the Trust Fund". By clause 2 it is held by the trustee upon the trusts and subject to the powers and provisions thereinafter expressed or implied.

[16] Clause 4 provides that the trustee may in each accounting period pay, apply or set aside the whole or any part of the net income of the Trust Fund to or for the benefit of all or such one or more exclusive of the others or other of the beneficiaries living or in existence at the time of determination as the trustee "in its absolute discretion" may by deed or written or oral declaration determine.

[17] That is subject to the proviso that any income not applied or set aside in that way may be accumulated throughout a fiscal year of receipt and at the expiration of that year converted to capital and so become part of the Trust Fund. That too is subject to the further proviso that, for any income not applied or accumulated, there are further provisions as to accumulation that it is not necessary to set out.

[18] Clause 6 provides that the trustee shall have the power from time to time to pay or apply all such part or parts of the capital of the Trust Fund as the trustee may, "in its absolute discretion", deem fit to or for the benefit of the beneficiaries or such one or more of them exclusive of the others and in such shares or proportions as the trustee in its absolute discretion determines.

[19] There are other relevant provisions as to capital but it is not necessary to set them out either.

[20] In other words, the Fairdinks Discretionary Trust is a "purely discretionary"[8] trust.

[21] Much has been written about the nature of the interest of a beneficiary or object of a power under a discretionary trust. For present purposes, the relevant concepts and principles are set out admirably in the extrajudicial writing of Justice Mark Leeming

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[8] See *Federal Commissioner of Taxation v Vegners* (1989) 90 ALR 547, 552.

entitled "Chameleon-Hued Words: A Note on Discretionary Trusts".[9] The author refers to the following passage from *Lewin on Trusts*:

> "A typical example of a discretionary trust in the wider sense (particularly in the context of offshore trusts) is one under which the trustees have various mere powers of appointment, and of distribution or application of capital and income, among a class of beneficiaries during the trust period, subject to which income is to be accumulated during the trust period, and at the end of the trust period the trust fund and its income, so far as not disposed of, is held on fixed trust … [T]he trust is described as a discretionary trust though none of the discretions are imperative and none of the default trusts themselves involves the exercise of any discretion."[10]

[22] Justice Leeming continued as follows:

> "The term 'beneficiary' may on occasion be used in contradistinction from 'discretionary object', but very often it used to include discretionary objects. Lord Scarman said that it was 'a term which everyone is agreed includes persons who are the objects of the discretionary trusts'. Lindgren J said in *Kafataris v Deputy Commissioner of Taxation* (2008) 172 FCR 242 at [44] that although discretionary objects 'do not have a beneficial interest in any property the subject of a "discretionary" trust prior to a distribution or appointment of income or capital, they are freely referred to as beneficiaries'."[11] (footnotes omitted)

[23] If this, then, is the true characterisation of the interest of a beneficiary of the Fairdinks Discretionary Trust, including the bankrupt, the next question is whether the applicant has any relevant interest in the Fairdinks Discretionary Trust which would entitle her to claim the relief sought in the applications.

[24] By s 58 of the BA, where a debtor becomes a bankrupt "the property of the bankrupt, not being after-acquired property, vests forthwith in" the bankrupt's trustee in bankruptcy. Also by s 58, "after-acquired property of the bankrupt vests, as soon as it is acquired by, or devolves on, the bankrupt" in the trustee in bankruptcy.

[25] By s 5 of the BA "property" is defined to mean "real or personal property of every description, whether situate in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property."

[26] Usual analysis accepts that the beneficiary or discretionary object under a purely discretionary trust is not someone who has a property interest in the trust property. However, the applicant submits that the law is otherwise if the relevant beneficiary is

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9 (2015) 89 *Australian Law Journal* 371.
10 Tucker L, Le Poidevin N and Brightwell J, *Lewin on Trusts*, (19th ed, Sweet & Maxwell, 2015) [29-024].
11 (2015) 89 *Australian Law Journal* 371, 373.

someone who controls the trust to the requisite degree, relying on *Australian Securities and Investments Commission v Carey (No 6)*[12] ("*Richstar*") and *Kennon v Spry.*[13]

[27] In *Holmes v Penney*[14] an assignee in insolvency of a beneficiary under a settlement of property held on discretionary trust sought to impeach the settlement as void under the Elizabethan Statute of Fraudulent Dispositions,[15] because it was entered into with the intention of defeating the insolvent's creditors. In the alternative, the assignee sought an order as to how much of the income of the trust should be left for the creditors of the insolvent beneficiary. The Vice-Chancellor held that it was not possible to do that "where an absolute discretion of applying all or any part of the income for their benefit is given to the trustees".[16]

[28] In *Re Coleman; Henry v Strong*[17] the assignee of the interest of an adult child under a will's trust claimed that the beneficiary had an interest in the income of the trust which passed by assignment. It was held that "the trustees have a discretion to apply the income for the maintenance of the children in such manner as they think fit. This excludes the notion of the children being entitled to aliquot shares."[18]

[29] In *Dwyer v Ross*[19] the applicant creditor sought interlocutory relief to prevent disposition of assets pending the hearing of a bankruptcy petition against R. The other respondent was receiver of the trustee of a discretionary trust under which the R was a beneficiary. The applicants submitted that R's interest as a beneficiary of the trust would vest in his trustee in bankruptcy. The court held that R's interest was as a beneficiary under a discretionary trust and was not an interest in any of the assets comprising the distributable fund because even after due administration he could not necessarily claim any asset or aliquot share.[20] Davies J said:

> "… [W]here the interest in the trust is a mere discretionary interest, the right to be considered for the purposes of a distribution, it is difficult to see that the right to enforce the due administration of the trust can be property which passes to the trustee in bankruptcy. The interest in the trust would seem to be a personal right which remains with the bankrupt. Of course, if a distribution of money or property is made to the bankrupt during the period of the bankruptcy, the trustee will be entitled to it as after-acquired property. See ss 58(2) and 116(1)(a) of the [BA].
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> However that may be, if [R's] estate is sequestrated, the operation of ss 58 and 116 of the [BA] will not entitle the Trustee in Bankruptcy to claim the [trust fund] or any aliquot share thereof. The distribution of the income and assets of the trust fund will continue to be a matter for the trustee of the [trust] and in the trustee's discretion."[21]

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12 (2006) 153 FCR 509.
13 (2008) 238 CLR 366.
14 (1856) 3 K&J 90; 69 ER 1035.
15 See *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278, 288 [22].
16 (1856) 3 K&J 90, 103-104; 69 ER 1035, 1040.
17 (1888) 39 Ch D 443.
18 (1888) 39 Ch D 443, 451.
19 (1992) 34 FCR 463.
20 (1992) 34 FCR 463, 465-466.
21 (1992) 34 FCR 463, 466.

[30] *Dwyer v Ross* has never been questioned, so far as I can tell. It was applied as recently as this year in *Royal v El Ali*.[22]

[31] The exception to that reasoning relied upon by the applicant stems from the discussion in *Richstar* of the concept of "property" within the meaning of s 9 of the *Corporations Act* 2001 (Cth). French J said:

> "… In my opinion, in the ordinary case the beneficiary of a discretionary trust, other than perhaps the sole beneficiary of an exhaustive trust, does not have an equitable interest in the trust income or property which would fall within even the most generous definition of 'property' in s 9 of the Act and be amenable to control by receivers under s 1323. I distinguish the 'ordinary case' from the case in which the beneficiary effectively controls the trustee's power of selection. Then there is something which is akin to a proprietary interest in the beneficiary."[23]

[32] Having discussed contingent interests in other contexts, French J returned to the case of the beneficiaries of a discretionary trust:

> "The difficulty with applying the notion of contingent interests to beneficiaries of a discretionary trust lies partly in the uncertain scope of the distribution be it income or capital, which may be made in favour of any given beneficiary. I am inclined to think that a beneficiary in such a case, at arms length from the trustee, does not have a 'contingent interest' but rather an expectancy or mere possibility of a distribution. … On the other hand, where a discretionary trust is controlled by a trustee who is in truth the alter ego of a beneficiary, then at the very least a contingent interest may be identified because, to use the words of Nourse J, 'it is as good as certain' that the beneficiary will receive the benefits of distributions either of income or capital or both.
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> As discussed earlier, the beneficiary who effectively controls the trustee's power of selection because he or she is the trustee or one of them and/or has the power to appoint a new trustee has something approaching a general power and the ownership of the trust property."[24]

[33] At the outset, it is to be noted that *Richstar* concerned the meaning of what is property for the purposes of the *Corporations Act* 2001 (Cth). That reasoning did not engage upon the reasoning of earlier cases in the bankruptcy context mentioned above.

[34] The critical question is whether effective control of a trustee's power of selection can transform the interest of a beneficiary of a discretionary trust into property of the bankrupt.

[35] In *Richstar,* French J relied on cases decided under the *Family Law Act* 1975 (Cth) ("FLA") to support that conclusion, in particular *Ascot Investments Pty Ltd v Harper*,[25]

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[22] [2016] FCA 782, [193]-[196].
[23] (2006) 153 FCR 509, 518-519 [29].
[24] (2006) 153 FCR 509, 520-521 [36]-[37].
[25] (1981) 148 CLR 337, 354-355.

In the Marriage of Ashton,[26] *In the Marriage of Goodwin*[27] and *In the Marriage of Davidson (No 2).*[28]

[36] It was held in *Kennon v Spry* that the right to due administration of the trust fund of a beneficiary of a non-exhaustive discretionary trust and the equitable entitlement of such a beneficiary to due consideration in relation to the application of income and capital can be taken into account as part of the property of the beneficiary as a party to the marriage for the purposes of s 79 of the FLA. It was also held that a trustee's power to apply assets or income of the trust to the beneficiary is able to be treated for the purposes of the FLA as a species of property held by the trustee as a party to the marriage, although subject to the fiduciary duty to consider all beneficiaries. However these conclusions do not affect what constitutes property according to the general law. Accordingly, *Kennon v Spry* does not affect the answer to the present question.

[37] It is difficult to accept as a principle of reasoning that a beneficiary's legal or de facto control of the trustee of a discretionary trust alters the character of the interest of the beneficiary so that it will constitute property of the bankrupt if the beneficiary becomes a bankrupt. To the extent that *Richstar* might be thought to support such a principle, it has not been followed or applied subsequently and it has been criticised academically. See J Glover, "A challenge to established law on discretionary trusts? – *Re Richstar Enterprises*".[29] In my view, there is no general principle of law of that kind.

[38] There are several ways in which the validity of a trust, including a discretionary trust, may be challenged. It is not necessary to discuss them here, except in one respect. That is because the applicant does not challenge the validity of the constitution of any of the three trusts in the present case. Instead, the applicant relies on the fact that distributions in the Fairdinks Discretionary Trust to date have all been made in favour of the bankrupt, in circumstances where he was in effective control of the trustee of each of the relevant trusts. For present purposes, however, the focus may be confined to Fairdinks Pty Ltd as trustee of the Fairdinks Discretionary Trust because it was the distributions of income of that trust that were made to the bankrupt.[30]

[39] In substance, the applicant's reliance on the historical fact of the distributions of income to the bankrupt amounts to an assertion that a trust validly created has become a sham at or before his bankruptcy. In my view, that contention was comprehensively dealt with in *Lewis v Condon,*[31] where Leeming JA said:

> "… [t]here are two reasons why in my opinion it is not open to conclude that a trust validly created … had become a sham prior to … bankruptcy … a notion which has been called by some an 'emerging sham'. … The second [reason] is that there can be no 'emerging sham trust' when, as here, the class

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[26] (1986) 11 Fam LR 457, [14].
[27] (1990) 101 FLR 386, 392.
[28] (1990) 101 FLR 373, 382.
[29] (2007) 30 *Australian Bar Review* 70.
[30] The applicant does not seek to invoke Division 4A of the *Bankruptcy Act* 1966 (Cth) so as to obtain an order in relation to property of an entity controlled by the bankrupt or from which the bankrupt derived a benefit, perhaps because the evidence does not reveal that the bankrupt had supplied personal services to or for or on behalf of a relevant trustee.
[31] (2013) 85 NSWLR 99.

> of beneficiaries is not closed. In the case of other transactions (such as a licence or a lease) an originally effective transaction may, by subsequent agreement of the parties, be permitted to allow its 'shadow to mask their new arrangement': *Marac Finance Ltd v Virtue* [1981] 1 NZLR 586 at 588. This was described in *Hitch v Stone* [2001] EWCA Civ 63 … at [68]:
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> > '… [T]he fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding. The proper conclusion to draw may be that they agreed to vary their agreement and that they have become bound by the agreement as varied.'
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> But there is no equivalent notion in the law of trusts, save to the extent that the rule in *Saunders v Vautier* (1841) Cr & Ph 240; 41 ER 482 is available. **A trust once validly constituted does not change in nature because the trustee and some of the beneficiaries subsequently choose no longer to abide by the obligations of the trust relationship**. Such conduct may amount to a breach of trust, and may lead to the removal of the trustee, but does not destroy the proprietary and personal rights and obligations which came into existence when the trust was created."[32] (emphasis added)

[40] In my view, that reasoning applies here. Having accepted that the trusts were validly created, it is not open to the applicant to contend that the interests of the bankrupt as a beneficiary were altered because of his actions or influence in causing the trustee to make distributions of income to himself.

[41] It follows, in my view, that the bankrupt's right as one of the general beneficiaries of the Fairdinks Discretionary Trust did not vest in the applicant as property of the bankrupt within the meaning of ss 5 or 58 of the BA. At best, the applicant's position is a statutory equivalent of an assignee of an expectancy. If the trustee of the Fairdinks Discretionary Trust makes a distribution to the bankrupt, that distribution will fall into the bankrupt's estate as after-acquired property.

[42] Even so, that conclusion may not directly answer the question whether the applicant has standing to bring the present applications. I proceed therefore to further consider the standing of and relief sought by the applicant.

Standing

[43] Representative proceedings aside, private law remedies are not often confined by a question of standing to seek the relief claimed in addition to the elements of the cause of action relied upon.[33] However, it is sometimes appropriate to refer to questions of standing to enforce a private law remedy in the law of trusts. One instance is where a beneficiary, including a beneficiary or discretionary object of a discretionary trust, is

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[32] (2013) 85 NSWLR 99, 116-117 [80]-[81].

[33] *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 264 [43]; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Pty Ltd* (2000) 200 CLR 591, 626 [92].

permitted standing to bring a derivative action against a third party when the trustee declines or is unable to do so, usually on terms that the trustee is also joined as a party.[34]

[44] Although the beneficiary or discretionary object under a discretionary trust may not have any interest in the trust property, they have standing to seek relief for due administration of the trust in the court's supervisory jurisdiction over trusts.[35]

[45] The extent of the court's supervisory jurisdiction is revealed by reference to the court's power to make a general administration order of a private trust. Such orders are almost never made today, consequent upon the procedural reforms introduced from the 1850s that permitted applications to be made for specific relief so as to avoid the delay and expense of some of the steps associated with a general administration order. The best description of the process under such an order in modern authority is in *McLean v Burns Philp Trustee Co Pty Ltd*.[36] Young J both describes the width of the court's powers under a general administration order, including the beneficiary's real right to approach the court for the appropriate order for the performance of the trust.[37] In that context, his Honour also discussed the concept of standing, including the standing of a creditor of the trust to seek administration.[38]

[46] Although when *McLean* was decided there had been no recent cases of making a general administration order, his Honour subsequently made such an order in other cases.[39] It is convenient to consider the application in the present case further on an assumption that the applicant may have standing, despite the absence of any interest in the trust property.

Receiver to wind up the trusts

[47] Originally, the applications made were to appoint receivers to all three of the 99 George Street Unit Trust, the Shore Street Unit Trust and the Fairdinks Discretionary Trust. The starting point was that the trustee of each of those trusts is a de-registered company and neither the Commonwealth nor ASIC at present is proposing to exercise any power in relation to the trust property.

[48] It follows that each of the trusts is in want of a trustee. It is axiomatic in the law of private trusts in common law systems that a trust does not fail because the office of trustee falls vacant. A succinct statement of principle may be taken from an 1888 decision of the Supreme Court of the United State of America:

> "It is a fundamental maxim that no trust shall fail for want of a trustee, and where the trustee appointed neglects, refuses or becomes incapable of executing the trust, the court itself in many cases will act as trustee."[40]

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34 *Lewis v Condon* (2013) 85 NSWLR 99, 122-123 [106]-[110].
35 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, 729 [51].
36 (1985) 2 NSWLR 623, 633-638.
37 (1985) 2 NSWLR 623, 635.
38 (1985) 2 NSWLR 623, 637-638.
39 *Stevenson v Samist Pty Ltd* (unreported, SCNSW, Young J, 2 March 1989, No 2304 of 1983, 4378 of 1988); *Metro Motor Inns Hotels & Motels Pty Ltd v Strathaven Holdings Pty Ltd* [2000] NSWSC 1004.
40 *Colton v Colton* (1888) 127 US 300, 320.

[49] But the applicant does not propose any new trustee. She proposes a receiver with power to wind up the unit trusts, relying on *Yunghanns v Candoora No 19 Pty Ltd (No 2).*[41] As filed, the applications sought the same relief for the Fairdinks Discretionary Trust. When I raised the question as to whether any of the general beneficiaries had been given notice of the application or been served, the applicant did not persist in applying for relief for the Fairdinks Discretionary Trust.

[50] It should also be observed that, with some exceptions,[42] it is unconventional in the law of private trusts to speak of winding up a trust. Winding up as a process and a legal concept is well known in a number contexts. Two in particular are in the law of partnership[43] and the law of companies.[44] However, the student of equity will not often find discussion of the laws relating to winding up a private trust in the writings about private trusts, at least not readily. The usual expression is "termination of trust".[45] Importantly, there is no general power of the court to make an order to terminate or wind up a trust as in the partnership or company law context.

[51] There are exceptions. Two that are well known lie in s 601EE[46] and Part 5C.9 of the *Corporations Act* 2001 (Cth) for the winding up of an unregistered and registered managed investment scheme respectively, which in the case of a registered scheme is constituted as a trust by statute under s 601FC(2).

[52] But as to a court order winding up a trust, in general, there are difficulties. In *Horwath Corporate Pty Ltd v Huie,*[47] Young J said:

> "The motion filed today was that the court appoint from the A List of liquidators an independent liquidator to wind up the affairs of the trust under the direction of the court.
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> There has been debate about what this really means.
>
> There has not been the opportunity to research the point completely, but it would seem to me at this stage that if the court is to wind up the trust, like it would wind up a partnership, it can only do so in proceedings in which all of the quasi partners (in other words the unitholders of the trust) are parties ... I should note the present defendant is in these proceedings as a representative contradictor, but she does not necessarily represent all unitholders.
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> Accordingly, I cannot at this stage have a winding up akin to a winding up of a partnership."[48]

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41 (2000) 35 ACSR 34.

42 For example, see YFR Grbich, *Winding Up Trusts* (CCH, 1984).

43 *Partnership Act* 1891 (Qld), s 42.

44 A process under statute started by the *Joint Stock Companies Winding Up Act* 1844 (Eng) which has continued up to the *Corporations Act* 2001 (Cth), Ch 5. The legislative history is described in M Gronow, *McPherson's Law of Company Liquidation* (Thomson Lawbook Co, 5th ed, 2006), [1.300]–[1.450].

45 Ford and Lee, *The Law of Trusts* (Law Book Co, 3rd ed, 2016), [16.000]-[16.460]; *Halsbury's Laws of Australia* (Butterworths, 2016), [430-2500]–[430-2520].

46 See, for example, *Mier v FN Management Pty Ltd* [2006] 1 Qd R 339 for a discussion of winding up under s 601EE.

47 (1999) 32 ACSR 413.

48 (1999) 32 ACSR 413, 414 [6]-[9].

[53] In the present case, the unitholders of the 99 George Street Unit Trust and the Shore Street Unit Trust are not all before the court. In the 99 George Street Unit Trust, Mr Ryan holds one third of the units, but otherwise there is no representation of the Fairdinks Discretionary Trust, either by trustee or beneficiaries.

[54] If the representation problem were remedied, there are still other problems. Again in *Horwarth*, Young J said:

> "In any event, there is a very real distinction between a corporation and a trust, in that with a corporation the property is vested in the corporation itself, but with a trust the property and the prima facie liability for the debts is vested in the trustee.
>
> There does not appear to be any reported case before the English *Joint Stock Companies Winding Up Act* 1844, when many companies adopted the structure of a deed of settlement with the property held by trustees, where there was a winding up of the enterprise by the court. However, it may be that more extensive research will find some, or it may be the answer was that because of the rule that all the 'shareholders' should be parties it was just impractical to bring such proceedings.
>
> One must also focus on what a winding up really is. … [W]inding up or liquidation is a process whereby assets are realised, claims are assessed and the assets cease to be assets of the corporation, the claims are satisfied, as much as they can be, and then the company dies.
>
> Putting that concept into the realm of trust law is rather difficult. As Grbich and others say in Grbich (et al), *Winding Up Trusts*, CCH, Sydney, 1984, at p 28 and following, it is very difficult indeed to release the equitable obligations and fiduciary duties that flow between trustees and beneficiaries, and to a more limited extent in the reverse direction. It is not feasible just to say that a trust comes to an end. One has not only got to deal with the assets and liabilities, one has also got to consider what is to happen to the equitable obligations."[49]

[55] In my view, the application in the present case highlights the difference. What is the applicant's interest in these affairs? It is that as the trustee in bankruptcy of Michael Quinn, if a discretionary distribution is made to him from the income or assets of the Fairdinks Discretionary Trust, she will acquire that property for the benefit of the unsecured creditors of his estate as after-acquired property of the bankrupt. She would wish that the person with the power to make the distribution would favour the bankrupt's creditors with a distribution to him, which would vest in her when made, rather than make any distribution to the other beneficiaries or discretionary objects of the Fairdinks Discretionary Trust.

[56] ASIC or the Commonwealth or a new trustee of either of the unit trusts would need to consider any outstanding obligations of the trustee of that trust. There may be taxation matters to attend to. But apart from that, there is no evidence that there is any ongoing business of the 99 George Street Unit Trust. As trustee, a new trustee would be required

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[49] (1999) 32 ACSR 413, 415 [14]-[17].

to pay any distribution that otherwise would be made to the trustee of the Fairdinks Discretionary Trust to ASIC (or to bring the money into court).

[57] As to the Shore Street Unit Trust, the same applies, except that as yet, the land that constitutes the property of the trust has not been sold, so there may be more to do. However, assuming that the land must be sold, there will be a surplus to be held on trust for the trustee of the Fairdinks Discretionary Trust that would again be paid to ASIC (or brought into court).

[58] The applicant's proposal is that receivers be appointed by the court of the assets of each of the unit trusts for these purposes. The applicant has nominated skilled insolvency practitioners who are registered liquidators and who have consented to be appointed for that purpose.

[59] It is trite that the court has wide reaching powers to appoint a receiver. The powers are sourced in the inherent power of the court and in statute. Section 12(1) of the *Civil Proceedings Act* 2011 (Qld) now contains the statutory power that "[t]he court may, at any stage of a proceeding, make an interlocutory order appointing a receiver if it considers it just or convenient".

[60] However, the appointment of a receiver is made for a purpose, often to protect the property in dispute in a proceeding or to facilitate the sale and realisation of property for a particular purpose or for winding up of a partnership. In particular, the statutory power is recognised as interlocutory and not final in character.[50] As is said in *Meagher Gummow and Lehane's Equity Doctrines and Remedies*, "[t]he appointment of a receiver by the court is necessarily an interim measure."[51]

[61] The particular context in the present case is that neither of the unit trusts, nor the Fairdinks Discretionary Trust has a trustee. The court's power to appoint a receiver extends to the appointment of a receiver of trust property, for example, where the trustee is unfit to carry on the trust.[52] But usually "[i]n such a case, the appointment will presumably be made pending the removal and replacement of the trustee".[53] Ford and Lee's *The Law of Trusts* says "[b]ut now that trustees can be removed and replaced relatively easily … it will rarely be necessary to appoint a receiver for these reasons."[54]

[62] In *Yunghanns*, Warren J extensively reviewed some relevant principles as to the appointment of a receiver of trust property under the interlocutory and inherent powers. However, the context in that case was different from the present case. The question was whether to appoint a receiver to displace the possession and powers of management of the appointed trustee, not whether it is appropriate to appoint a receiver when the office of trustee falls vacant for the purpose of winding up the trust. In that case, the appointed

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50 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 217 [11], 232 [60]-[62] and 239-241 [86]-[92]; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 617, 621 and 631.

51 R Meagher, JD Heydon and M Leeming, *Meagher Gummow and Lehane's Equity Doctrines and Remedies* (LexisNexis Butterworths, 2015, 5th ed), [29-015].

52 *Richards v Perkins* (1838) 3 Y & C Ex 299; 160 ER 716; *Re H's Estate* (1875) 1 Ch D 276.

53 R Meagher, D Heydon and M Leeming, *Meagher Gummow and Lehane's Equity Doctrines and Remedies*, (LexisNexis Butterworths, 2015, 5th ed), [29-085].

54 Ford and Lee, *The Law of Trusts* (Law Book Co, 3rd ed, 2016), [17.9070].

trustees refused to recognise the interest of one of the beneficiaries. A receiver was appointed pending resolution of the disputed questions as to the constitution and administration of the trust.

[63] A factor relied on by the applicant is the consent or non-opposition of Mr Ryan to the orders proposed for the appointment of a receiver to the trust property of the 99 George Street Unit Trust.

[64] The applicant also relies on the fact that four business days before the application came on for hearing Sean Quinn was served with a copy of the application and three of the affidavits in support of the application. As well, a few days before the hearing of the application, the applicant's solicitor spoke to Sean Quinn over the phone. Sean Quinn said that he had received the application and spoken to his father about it, that he was not claiming any interest in the trusts, that he was not opposing any of the orders sought, that he wanted nothing to do with any of this and that he is not a creditor and has no interest in the proceedings. He said "Dad put a couple of companies in my name and they no longer exist." The affidavit deposing to these facts was not served on Sean Quinn.

[65] A few points are absent from this material. First, it is not apparent that Sean Quinn knows of the proceeding relating to the 99 George Street Unit Trust. None of the documents filed in that proceeding were said to have been served on him. Second, there is no statement made by Sean Quinn from which I could infer that he understands his rights in relation to or interest under the Fairdinks Discretionary Trust, in particular that he is the nominated first principal beneficiary.

[66] In the present case, there are a number of matters that, in my view, make it inappropriate to appoint the receivers as sought.

[67] First, the substantial purpose of each of the proposed appointments is to "wind up" the unit trust. But it is proposed to appoint a receiver for that purpose who will not be a trustee or subject to the duties of a trustee.

[68] At the end of the day, that presents less of a problem in the 99 George Street Unit Trust. Apart from attending to any taxation matters, on the evidence there is a fixed entitlement to any surplus on distribution as between Mr Ryan and the Fairdinks Discretionary Trust in accordance with their unit holding. There is no suggestion that there is any ongoing purpose of the 99 George Street Unit Trust. It may be assumed that a trustee would consider it appropriate to distribute the surplus. That will achieve the outcome that Mr Ryan will receive his share of the distribution. But it will not achieve any more than that. Remission of the balance of the amount for distribution to the Fairdinks Unit Trust would then be made to the Commonwealth or ASIC.

[69] As to the Shore Street Unit Trust, appointment of a receiver would have the effect of requiring the receiver to attend to any taxation affairs of the trust, and to deal with the mortgagee's receiver over the sale of the trust property. If it is assumed, as appears likely, that the business of the Shore Street Unit Trust will also be brought to an end by sale of the trust property, the balance available for distribution to the Fairdinks Discretionary

Trust would again be remitted to the Commonwealth or ASIC, in the absence of another trustee.

[70] An important shortcoming in these proposals is that they only achieve a solution to part of the problems.

[71] Second, the appointment of an experienced insolvency practitioner as receiver of either of the unit trusts is not warranted, in my view. There is no suggestion of property of any complexity that requires collection or management of the sort for which an experienced liquidator might be required. There is no suggestion of an investigation of the kind for which an experienced insolvency practitioner might be required. There is no apparent need for a person with those skills to go through the books of either trust. There is no suggestion that attending to any outstanding taxation affairs of either of the unit trusts would be complex.

[72] It must not be forgotten that before any receivers' fees are incurred, the likely surpluses available for distribution will not exceed $290,000 in the case of the 99 George Street Unit Trust and may not exceed $245,000 for the Shore Street Unit Trust. These amounts are trust property.

[73] The charge out rates for the receivers proposed for the 99 George Street Unit Trust are not in evidence, but they are registered liquidators from well-known insolvency firms. In *Amir Ashrafinia v Ashrafinia*,[55] Slattery J was faced with an application to appoint insolvency practitioners who were registered liquidators as trustees to wind up a small trust estate. His Honour said:

> "The small residual capital in this trust strongly suggests that all these charge out rates are too expensive for the current circumstances of the trust. The trust balance sheet is reasonably straightforward; it will soon have net assets of only $300,000."[56]

[74] I agree with that view and think it applies to the 99 George Street Unit Trust and the Shore Street Unit Trust.

[75] Third, the applicant's ultimate goal in all this is for a distribution to be made in the Fairdinks Discretionary Trust in favour of the bankrupt. But the question of a distribution from the assets of that trust is one of the exercise of a fiduciary or trust power in the interests of the first principal beneficiary and the general beneficiaries (of whom the bankrupt is but one). If the court in its supervisory jurisdiction over trusts were to make a general administration order, it would be required to exercise that power in accordance with the established principles under the terms of the trust instrument. In my view it would be inappropriate for the court to appoint a receiver who is not subject to the same fiduciary obligations.

[76] Accordingly, in my view, the applications should be dismissed.

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[55] [2014] NSWCA 676.
[56] [2014] NSWCA 676, [29].