

Don't believe the hype - trusts do protect assets

- by *Matthew Burgess, Director, View Legal*

Arguably, the highest profile decision in relation to trusts and asset protection in recent years has been the decision in *Richstar* (that is - *Australian Securities and Investments Commission v Carey (No 6) (2006) 153 FCR 509*).

It is generally accepted that *Richstar* is the high watermark in relation to how the assets of a trust may be exposed in the context of a bankruptcy related decision.

What then is the position for trust advisers in relation to *Richstar*?

Background

The *Richstar* case stemmed from the litigation surrounding the failed WestPoint group. The Federal Court had already appointed receivers to the property of several directors and companies of the failed group.

ASIC sought to have the meaning of "property" (for the purposes of it being available for distribution amongst creditors) extended to include property held by a third party on trust for a defendant, including where the defendant was a general beneficiary of a discretionary trust.

The key issue considered by the decision was the definition of "property" in s 9 of the Corporations Act. Property is defined as meaning "any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action".

The court held that some of the defendants had "at least a contingent interest" in the trust property, which was sufficient for the property to be available to the receivers. A contingent interest was found to arise where "the trustee is effectively, the alter ego of the relevant beneficiary or otherwise subject to his or its effective control".

Although this was not the full order sought by ASIC, the decision challenged the traditional view that a beneficiary of a discretionary trust has a mere "expectancy", which is not sufficient to constitute "property" which is available to creditors.

Effect of *Richstar*

On its face, the *Richstar* decision appears to support the position that discretionary trust assets cannot be regarded as the "property" of a person merely because that person is a beneficiary, trustee, director or shareholder of a trustee company, or an appointor.

However, certain combinations of these roles may be sufficient to trigger a finding of effective control and hence an interest in "property". The distinction between the effect of each role individually and the effect of a combination of roles was not discussed in any detail in the case.

The decision in *Richstar* **represented a significant departure from the traditional view of discretionary trusts, but it was far from conclusive**. As the case involved an interlocutory application in relation to a specific provision of the Corporations Act, its application was, and arguably still is, limited to similar factual scenarios.

It is also worth remembering that this **was an interim decision to preserve the trust assets held**.

Whether the assets could in fact be distributed to creditors, was not considered.

Cases since *Richstar*

- *Tibben & Tibben* [2013] FamCAFC 145 - The only "entitlement" of the beneficiaries under the Deed of Settlement was a right to consideration and due administration of the trust: *Gartside v Inland Revenue Commissioners* [1968] AC 553.

- *DCT v Ekelmans* [2013] VSC 346 - The applicant relied on the decision in *Richstar* to contend that the cumulative effect of the role and entitlement of Leopold Ekelmans under the trust instruments amounted to a contingent interest in all of the assets of the trust, making those assets amenable to a freezing order as if the assets of Leopold Ekelmans. The Court found that the applicant could not in this matter rely on *Richstar*.
- *Hja Holdings Pty Ltd and Ors & ACT Revenue Office (Administrative Review)* [2011] ACAT 91 – Notwithstanding that beneficiaries under a discretionary trust have some rights, such as the right to have the trust duly and properly administered, generally a beneficiary of a discretionary trust, who is at arm's length from the trustee, only has an expectancy or a mere possibility of a distribution. This is not an equitable interest which constitutes "property" as defined.
- *Donovan v Sheahan as Trustee of the Bankrupt Estate of Donovan* [2013] FCA 437 - A beneficiary of a non-exhaustive discretionary trust has no assignable right to demand payment of the trust fund to them (and nor have all of the beneficiaries acting collectively) and that the essential right of the individual beneficiary of a non-exhaustive discretionary trust is to compel the due administration of the trust.
- *Simmons and Anor & Simmons* [2008] FamCA 1088 – The court and parties referred to *Richstar* on a number of occasions and confirmed that a beneficiary has nothing more than an expectancy.
- *Public Trustee v Smith* [2008] NSWSC 397 - *Richstar* did not establish that because a beneficiary of a discretionary trust controls the appointment or removal of the trustee, or controls the exercise of the trustee's power and can appoint trust property to themselves, that the holder of such a power is the beneficial owner of the trust property irrespective of the terms of the trust deed.
- *Swishette Pty Ltd v Australian Competition and Consumer Commission* [2017] FCAFC 45 ("Swishette") - As an object of a discretionary trust, a beneficiary has no legal or beneficial interest but only the right to due consideration and due administration of the trust. The fact that someone may control a trust both as appointor and as director of the trustee company, does not give them an interest in the trust property amounting to ownership (see *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510).
- *Pleash, in the matter of Equititrust Limited (In Liquidation) (Receivers and Managers Appointed) (No 3)* [2017] FCA 1074 - The reasoning in decisions such as the case of *Swishette* (mentioned immediately above) reject the arguments put forward in *Richstar* and should be followed as the correct approach, in preference to the reasoning in *Richstar*.
- *Colefax v National Australia Bank* [2018] QCA 244 - The interests of an object under a discretionary trust do not vest in a trustee in bankruptcy (see *Dwyer v Ross* (1992) 34 FCR 463 and *Fordyce v Ryan* [2017] 2 Qd R 240 and confirmed in *Edwards v Crawford* [2020] TASSC 20).

Conclusion

While there have been many decisions now that have criticised *Richstar*, it still seems to be generally the case that most trust commentators strongly recommend that the broad principles in *Richstar* be considered as part of any trust structuring exercise (whether it be the establishment of a new trust or the variation of a pre-existing trust).

Pragmatically, it may also be that part of the reason that *Richstar* has remained so topical almost 15 years since it was decided, despite the fact that it is only an interim decision of a single judge from Western Australia, is that the judge presiding did ultimately become the Chief Justice of the High Court.