THE BLUE MOUNTAINS LAW SOCIETY

SUCCESSION LAW CONFERENCE

19-21 November 2021

AN APPLICATION FOR JUDICIAL ADVICE:

Text, Context and Functional Purpose

Justice Geoff Lindsay
Protective List Judge
Equity Division
Supreme Court of NSW

INTRODUCTION

1 An application to the Supreme Court of NSW, pursuant to section 63 of the Trustee Act 1925 NSW, for "judicial advice" provides an opportunity for a plaintiff "trustee" to obtain "an opinion, advice or direction" from the Court upon a "question", or questions, stated for the Court's consideration.

2 Broadly speaking, the practical purpose of such an application is twofold. First, it provides an opportunity for a cost-effective, summary determination of questions affecting the due administration of an estate. Secondly, it provides a means by which a trustee can obtain protection against an allegation that he, she or it has acted in breach of trust. Whether a trustee has, or has not, applied to the Court for judicial advice may be a factor bearing upon the availability of an order (under section 85 of the *Trustee Act* 1925) that the trustee, having acted honestly and reasonably, ought fairly to be excused from liability for a breach of trust.

3 In terms expressed more formally, the two-fold purpose of the judicial advice jurisdiction in relation to the administration of a trust is to protect the trust and its interests and to protect the trustee: (Chief Justice) Susan Kiefel, "Judicial Advice to Trustees: Its Origins, Purposes and Nature" (2019) 42 *Melbourne University Law Review* 993 at 1001.

4 It should not be assumed from the form of an application for judicial advice that a trustee who applies for "advice" does not know the answer to any question stated for the Court's consideration. A trustee might be confident of the answer but nevertheless seek the protection of a court order to meet the challenge of a beneficiary who does not share that confidence.

5 Although a judge might mark the determination of an application for judicial advice by the publication of reasons for judgment, primary significance attaches, not to published reasons, but to the form of any order made in disposition of the application.

6 In reviewing Professor Anne Toomey's book *The Veiled Sceptre - Reserve Powers of Heads of State in Westminster's Systems* (Cambridge University Press, 2018) in the Australian Bar Review (Volume 45 at 322) Murray Gleeson incidentally commented upon the nature of judicial advice proceedings:

> … A lawyer should not need to be reminded that people often seek advice, not because they are seriously in doubt as to what they should do, but because they want reinforcement and some form of protection. People who take advice are not always looking for enlightenment. An obvious example is a trustee's application to the Supreme Court for judicial advice about a proposed exercise of a discretionary power. The application is likely to be accompanied by a legal opinion the trustee has already received as to a proposed course of action. The judicial advice may be a simple 'yes', with no further reasons. This is because the trustee is in search of protection, not education. That is an obvious example, but there are many other circumstances in public or private affairs, especially where a person or group of persons owe a responsibility to others, of advice that is sought at least partly to give legitimacy to potentially controversial action. …"

7 Any opinion, advice or direction that a judge may give should ideally be embodied in the form of a self-contained order, even if it simply incorporates a question and answer. Hence, importance attaches to the formulation of any question stated for the Court's consideration and to the formulation of any order responsive to such a question.

8 According to established practice, it is not in all (if any) cases necessary for a judge to publish reasons for judgment in aid of an order made in the provision

of “judicial advice”. That fact is important not only as a matter of form but because it permits a properly prepared application for judicial advice to be dealt with expeditiously.

9 A properly prepared application for judicial advice ordinarily exhibits four qualities. First, a precise statement of questions that are amenable to a summary determination or, as it is sometimes put, “ripe” for determination. Secondly, a precise and accurate statement of “facts”, not intermingled with statements of opinion, speculation or submissions. Thirdly, a memorandum of opinion (not “advice” or “submissions”) prepared by an independent legal practitioner (usually counsel), identifying questions for consideration, canvassing the merits of competing answers, and expressing an opinion as to the correctness or otherwise of each question stated for the Court’s consideration. Fourthly, a presentation to the Court in a form which facilitates a summary determination; ideally, a judge should be able, with or without qualifications, to adopt or disagree with counsel’s opinion.

10 The Court is not obliged to provide “judicial advice”, or to answer a question that a trustee asks, merely because a trustee makes an application for “judicial advice”.

11 Although the judicial advice procedure is flexible enough to accommodate adversarial contests, and the rights of beneficiaries might be protected by allowing them an opportunity to be heard before a trustee acts upon the Court’s advice, where an application for judicial advice is perceived by the Court to involve a substantial contest about competing “rights” rather than “management”, it can order that the proceedings be reconstructed (with the joinder of parties as defendants) as an application for a partial administration order (eg, a “construction suit”).

12 The hallmark of a question ripe for determination on an application for judicial advice is that it can be answered in the form of an order “that the plaintiff would be justified in administration of the estate of … on the basis that …”.

13 A hallmark of an application for judicial advice that may not be ripe for determination otherwise than with the joinder of defendants and treatment of the proceedings as an application for a partial administration order is a claim for relief by the trustee in the form of a "declaration" about competing "rights".

14 This is not to suggest that the form of relief claimed in a summons for judicial advice is of itself determinative of the nature of the application made by the summons. The Court has a broad discretion about how best to deal with a summons for judicial advice and generally looks to the substance of any question stated for its consideration, having regard to the nature of any controversy attaching to the question.

15 An application for "judicial advice" is generally dealt with within the legislative parameters of section 63 of the *Trustee Act* 1925 NSW and, less commonly, rules of court (currently rule 54.3 of the *Uniform Civil Procedure Rules* 2005 NSW) governing the making of an order for the partial administration of a trust.

16 A true appreciation of the nature and operation of those provisions requires an understanding of how, in the long 19th century, they emerged as procedural alternatives to an order for the general administration of a trust.

17 Learning about the nature and effect of an order for general administration of a trust is probably limited to lawyers with an antiquarian turn of mind and an interest in equity jurisprudence, the history of court procedures and the adaptability of court practice.

18 This paper does not pretend to answer all questions that might arise on, or in relation to, an application for judicial advice. The jurisdiction to provide "judicial advice" is not confined to section 63 of the *Trustee Act* 1925 NSW or UCPR rule 54.3. Although the availability of a legislative mechanism for the provision of judicial advice might limit any need to resort to the Court's inherent jurisdiction, an "inherent" jurisdiction is most likely an incident of a "trust" as a construct of the Court's equity jurisdiction.

19 The jurisdiction to provide "judicial advice" can also be found, in one guise or another, in most cases concerning the administration of an estate: for example, in the administration of a bankrupt estate, in the winding up of a corporation, in supervision of a receivership, and in the management of a protected estate. It finds an echo, also, in a legal practitioner's submission to an ethics ruling by his or her professional association; a positive, but erroneous, advice from a professional body may constitute a defence to a charge of malpractice: *Law Society of NSW v Moulton* [1981] 2 NSWLR 736 at 757.

20 As may be said of an application for judicial advice under section 63 of the *Trustee Act* 1925 NSW, some of those cases provide guidance in an uncertain world and all of them endeavour to provide a measure of protection for the person who seeks advice, makes full disclosure of facts, and acts upon such advice as may be given.

CAVEAT

21 In what follows in this paper I draw heavily upon my personal experience as junior counsel in *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623 (an unsuccessful application for an order for general administration of a trust), as senior counsel for the appellant in "*The Macedonian Church Case*" (2008) 237 CLR 66 and as an equity judge in *Re Estate of Chow Cho-Poon* [2013] NSWSC 844; 10 ASTLR 25. That experience does not guarantee the correctness of any views expressed in the paper but, perhaps, explains the provenance of those views.

TRUSTEE ACT 1925 NSW, SECTION 63

22 An application to the Supreme Court of NSW for judicial advice is commonly made under section 63 of the *Trustee Act 192*5 NSW.

23 The leading case on that section is the judgment of the High Court of Australia in "The *Macedonian Church* Case": *Macedonian Orthodox Community Church*

St Petka Inc v His Eminence Peter Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand (2008) 237 CLR 66.

24 The High Court focused attention on the text of section 63, as must any subsequent treatment of the topic of "judicial advice" in NSW. It left open "the question how far there is jurisdiction to give judicial advice by reason of the inherent jurisdiction of a court of equity, or by reason of the *Supreme Court Act* 1970 NSW, section 22 or section 23": 237 CLR 81 note 47; Kiefel, *op cit.*

25 By focussing on the text of section 63 the Court swept away an accumulation of judicial gloss on the section: J.D. Heydon and M.J. Leeming (eds), *Jacobs' Law of Trusts in Australia* (Lexis Nexis Butterworths, Australia, 8th ed, 2016), paragraph [21-34].

26 With the benefit of the High Court's judgment, I elaborated my own views about how section 63 operates in practice in *Re Estate of Chow Cho-Poon* [2013] NSWSC 844; 10 ASTLR 25.

27 Section 63 is currently in the following terms (with emphasis added):

> "**63 Advice**
>
> *(1) A trustee may apply to the Court for an* **opinion advice or direction** *on any question respecting the management or administration of the trust property,* **or** *respecting the interpretation of the trust instrument.*
>
> *(2) If the trustee acts in accordance with the opinion advice or direction, the trustee shall be deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in the* subject matter of the application*,* **provided that the trustee has not been guilty of any fraud or wilful concealment or misrepresentation in obtaining the opinion advice or direction***.*
>
> (3) Rules of court may provide for the use, on an application under this section, of a written statement signed by the trustee or the trustee's Australian legal practitioner, or for the use of other material, instead of evidence.
>
> (4) Unless the rules of court otherwise provide, or the Court otherwise directs, it shall not be necessary to serve notice of the application on any person, or to adduce evidence by affidavit or otherwise in support of the application.

(8) *Where the question is who are the beneficiaries or what are their rights as between themselves, the trustee before conveying or distributing any property in accordance with the opinion advice or direction shall, unless the Court otherwise directs, give notice to any person whose rights as beneficiary may be prejudiced by the conveyance or distribution.*

(9) The notice shall state shortly the opinion advice or direction, and the intention of the trustee to convey or distribute in accordance therewith.

(10) Any person who claims that the person's rights as beneficiary will be prejudiced by the conveyance or distribution may within such time as may be prescribed by rules of court, or as may be fixed by the Court, apply to the Court for such order or directions as the circumstances may require, and during such time and while the application is pending, the trustee shall abstain from making the conveyance or distribution.

(11) Subject to subsection (10), and subject to any appeal, any person on whom notice of any application under this section is served, or to whom notice is given in accordance with subsection (8), shall be *bound* by any opinion advice direction or order given or made under this section *as if* the opinion advice direction or order had been given or made in proceedings to which the person was a party."

28 As contemplated by section 63, rules of court have been made bearing upon the operation of the section. They are to be found in the *Uniform Civil Procedure Rules* 2005 NSW, particularly Part 55 Division 1 (with emphasis here added):

"Division 1 Judicial advice

55.1 Statement (cf SCR Part 70, rule 3)

(1) A statement under section 63 of the Trustee Act 1925 —

(a) must be divided into consecutively numbered paragraphs, and

(b) must state *the facts* concisely, and

(c) must *state the question* for opinion, advice or direction.

(2) Despite rule 6.12(2), the originating process in proceedings under section 63 of the Trustee Act 1925 need not state the question for opinion, advice or direction.

55.2 Order (cf SCR Part 70, rule 4)

An opinion, advice or direction under section 63 of the Trustee Act 1925 must be given by order.

55.3 Application by beneficiary (cf SCR Part 70, rule 5)

The time for an application under section 63(10) of the Trustee Act 1925 is, subject to that subsection, 28 days after the date of receipt by the applicant of notice under section 63(8) of that Act or the date of entry of the order containing the opinion, advice or direction, whichever date is the later.

55.4 Appeal (cf SCR Part 70, rule 6)

An appeal lies to the Court of Appeal from an opinion, advice, direction or order given or made by the Supreme Court under section 63 of the Trustee Act 1925, including an opinion, advice, direction or order given or made by an associate Judge.

Note—

Pursuant to section 104 of the Supreme Court Act 1970, this rule overrides the prohibition on an appeal from an associate Judge that would otherwise exist under that section."

29 As explained in *Re Estate of Chow Cho-Poon* at [184]-[195], I draw the following points from the High Court's judgment in the *Macedonian Church Case*:

"185 First, the jurisdiction or power conferred by s 63 is not constrained by implications or limitations not found in the express words of the section: 237 CLR 89 [55]. There is nothing express or implied in s 63 that limits its application to "non-adversarial" proceedings, or proceedings other than those in which a trustee is being sued for breach of trust, or proceedings other than those in which one remedy sought is the removal of a trustee from office: 237 CLR 89 [55]-[57].

186 Secondly, only one jurisdictional bar to s 63 exists: an applicant must point to the existence of a question respecting the management or administration of trust property or a question respecting the interpretation of a trust instrument: 237 CLR 89-90 [58].

187 Thirdly, there is nothing express or implied in the text of s 63 that makes some discretionary factors always more significant or controlling than others. There are no implied limitations on discretionary factors arising under s 63. The Court's discretion is confined only by the subject matter, scope and purpose of the legislation: 237 CLR 90 [59] and 128 [196].

188 Thus (as appears at 237 CLR 90 [60]): (a) the fact that a court may rely on a written statement of the trustee, or use other material "instead of evidence" by reason of s 63(3), gives rise to discretionary considerations of substantial weight where the question for advice is in form or substance an application which will determine or affect questions that could also be resolved in ordinary adversarial litigation; and (b) the Court may properly decline judicial advice if, for example, a contested construction suit, constituted by the disputing parties and

resolved by a judge acting on evidence, appears to be more apt to the resolution of a question concerning the interpretation of a trust instrument; but (c) the discretion of the Court to consider applications brought under s 63 is not yoked to a general first principle that, where there is a contest or where there are adversaries, it is not appropriate to give advice.

189 Fourthly, the procedure for which s 63 provides is "summary" in the sense that it permits a trustee to obtain the opinion, advice or direction of the Court without commencement of a suit for the general administration of a trust: 237 CLR 90 [61] – 91 [63].

190 Fifthly, s 63 operates as an exception to the Court's ordinary function of deciding disputes between competing litigants. It affords a facility for giving advice to a trustee that is "private" in the sense that a primary function of the section is to give personal protection to the trustee; others permitted to participate in a s 63 application, because they may be affected by advice given to a trustee, are not strictly speaking "parties" to the proceedings or in a position of parity with the trustee: 237 CLR 91 [64] – 92 [66].

191 Sixthly, the operation of s 63 will tend to vary with the type of trust involved: 237 CLR 92 [67] – 93 [68]. Every s 63 application depends on its own facts and is essentially a matter for the discretion of the judge who hears it: 237 CLR 88 [51]. The merits of any particular decision made under s 63 must depend on the particular circumstances of the case in which the decision was made: 237 CLR 95 [76].

192 Seventhly, s 63 makes provision for a trustee to obtain judicial advice [often identified with *In re Beddoe* [1893] 1 Ch 547] about the prosecution or defence of litigation in recognition of both the fact that the office of trustee is ordinarily a gratuitous office, and the fact that a trustee is entitled to an indemnity for all costs and expenses properly incurred in performance of the trustee's duties. Obtaining judicial advice resolves doubt about whether it is proper for a trustee to incur the costs and expenses of litigation: 237 CLR 93-94 [71].

193 Eighthly, certain propositions enumerated in the judgment of the Court of Appeal under review in the High Court – reported in [2007] NSWCA 150 at [63] – should not be regarded, as propositions, as expressing the governing law in Australian courts.

194 *Semble*, the propositions disclaimed by the High Court are propositions to the effect that:

(a) the proper province of judicial advice is guidance for the future;

(b) section 63 is intended to empower advice to be given to those who have the stewardship of property for the benefit of others;

(c) section 63 does not empower advice in connection with litigation that concerns merely whether the trustee has, in the past, committed breaches of trust even if the litigation (to

establish the alleged breach of trust) necessarily involves the proper construction of a trust instrument;

(d) section 63 does not empower advice in connection with litigation that involves merely allegations of past misconduct on the part of the trustee that, if established, will entail personal liability for breach of trust or statutory wrongdoing (and where the trust property will, in no way, be protected or enhanced by defence of the claim); and

(e) the provision to a trustee of an indemnity from trust assets should not be provided in advance under colour of private judicial advice.

195 Care needs to be taken in elaboration of the High Court's disclaimer of these propositions because its disclaimer was generic and not entirely unqualified. The object of the disclaimer appears, in part, to have been to caution against the imposition of a gloss, of any description, on the text of s 63. Care needs to be taken not to elevate any disclaimer of a particular proposition into a counter-proposition likewise suffering from the character of a gloss on the governing legislation."

THE NATURE OF "JUDICIAL ADVICE" PROCEEDINGS

30 In most applications for judicial advice the standing of the plaintiff as "a trustee" is not in doubt. A trust instrument is generally annexed to the Statement of Facts filed in support of the plaintiff's summons or adduced in evidence via an affidavit. Section 5 of the *Trustee Act* 1925 contains a number of definitions which, working backwards from the definition of "Trustee", include an executor or administrator of a deceased estate, a constructive trustee, a Trustee Company and the NSW Trustee.

31 Advice given to a trustee on an application for judicial advice is often described as "private" advice. This does not mean that a judicial advice application is routinely heard in a closed court. In fact, such proceedings are ordinarily held in open court, albeit with an understanding that some of the material placed by the trustee before the Court (eg an opinion of counsel) should be made the subject of a confidentiality order or, at least, be dealt with in a confidential manner.

32 A better word to describe proceedings for judicial advice than "private" might be "personal" (but that does less than full justice to the representative capacity

of a trustee). A trustee routinely applies for advice in proceedings in which it is named as the plaintiff and no party is named as a defendant. The trustee might seek directions, and the Court might in any event make orders, for service of notice of the proceedings on an interested party, but orders are routinely sought and made on an *ex parte* basis. That is because a primary purpose of judicial advice proceedings is to provide guidance and protection to a trustee in its management of an estate.

33 The fact that an application for judicial advice is made *ex parte* carries with it an obligation (as may be discussed by reference to *Thomas A. Edison Ltd v Bullock* (1912) 15 CLR 679) on the part of the trustee, and more particularly its legal advisers, to bring to the attention of the Court any fact or circumstance (including the fact or circumstance adverse to the interests of the trustee) that might reasonably be thought would be bought to attention if an adversary were in Court. By virtue of section 63(2), if a trustee is guilty of fraud or wilful concealment or misrepresentation in obtaining judicial advice, it is not entitled to the section's protection.

34 In formal terms, "judicial advice" takes the form of a Court order. It is usually an order that states a question for the Court's determination and provides an answer to the question.

35 The Court might publish reasons in support of the "judicial advice" given in those terms, but will not necessarily do so. It is a matter of judgement on the part of the judge whether publication of reasons in elaboration of an order recording the Court's advice will assist administration of the trust in the particular case.

36 Although it may be prudent for a trustee to seek judicial advice before commencing or defending proceedings, there is no legal obligation to do so: *Ludwig v Jeffrey* (No 4) [2021] NSWCA 256 at [84]. The rationale for doing so is to avoid an argument at the end of the day as to whether it was reasonable to commence and prosecute the proceedings or to defend the proceedings.

37 On an application by a trustee for advice about whether it would be justified in commencing, maintaining or defending legal proceedings, care needs to be taken not to allow the judicial advice proceedings to develop into satellite litigation in which an adversary party seeks to intervene and to contest the availability, and terms, of judicial advice.

38 Judicial advice proceedings in which a trustee seeks advice about the commencement, maintenance or defence of other proceedings are particularly at risk of developing into satellite litigation in circumstances in which an adversary of the trustee (who seeks, in due course, to have access to trust property) alleges that the trustee has been, or is on a continuing basis, guilty of a breach of trust inconsistent with an entitlement to be indemnified for costs out of trust property before the determination of the main proceedings.

39 My own practice, in most cases, is not to provide formal reasons but to make "notations and orders" which provide a documentary record of the materials placed before the Court and the determination made on those materials.

40 Although it is not necessary to do so, where it is convenient to do so, a notation might be made to the effect that the Court adopts as its reasons in support of the determination the whole, or some identified part, of a counsel's memorandum of opinion proffered by the trustee in support of its application for advice.

41 A routine form of "notations and orders" is as follows:

(1) Note the summons filed on … .

(2) Note the Statement of Facts (incorporating, where appropriate, a copy of the plaintiff's trust instrument) filed on … in support of the summons.

(3) Note the following affidavits relied upon by the plaintiff in support of the summons:

(a) Affidavit of … sworn … ;

(b) Affidavit of … affirmed … .

(4) Note the Memorandum of Counsel dated … .

(5) Note the written submissions of the plaintiff filed on … in support of the summons.

(6) Order that the plaintiff would be justified in administration of the [trust's] estate on the basis that:

(a) [A particular event has occurred] …

(b) Clause … of the trust instrument is to be construed as meaning … .

(7) Note that, for the purpose of these proceedings, the Court adopts as reasons in support of order … paragraphs … of the opinion of counsel.

(8) Order that the plaintiff's costs of these proceedings be paid out of the trust estate on the indemnity basis.

42 On the hearing of any application for judicial advice express consideration is likely to be given, at least in exchanges between Bench and Bar, to questions about the identity of any and all persons served with formal notice of the proceedings, and the question whether directions for service should be given.

43 Not uncommonly, a legal representative for a beneficiary will attend court (on notice given by the trustee) as an observer. That usually involves one of three scenarios. First, the beneficiary's legal representative may simply have a watching brief. Secondly, the legal representative might seek leave to draw particular facts to the Court's attention or to make brief submissions. Thirdly, the legal representative might record an objection to judicial advice being given because, it might be said, for example, that the application for judicial

advice represents an improper attempt to secure a forensic advantage in what should be adversarial proceedings with all affected parties formally joined.

44 Whether or not there is an appearance before the Court of any party other than the trustee, the Court has an independent role to play in case management of the proceedings. That includes a need to consider whether the proceedings should be reconstituted by the joinder of parties and by identification of relief sought for the determination of competing rights.

45 Commonly, the hearing of an application for judicial advice proceeds in an almost conversational manner because the primary documents (a summons, a statement of facts and a memorandum of opinion) have been provided in advance to the Court and there is an informed discussion between Bench and Bar designed to address matters of concern. Not uncommonly, the reasons for giving, or withholding, judicial advice will be apparent in the transcript of exchanges between Bench and Bar.

46 Although an application for judicial advice might ostensibly involve only the trustee seeking advice and the Court, the utility of judicial advice proceedings may require an engagement with all interested parties, if not before the making of the application then afterwards.

47 This involves the process of "building an estoppel". Before an application for judicial advice is made a trustee might usefully communicate with all interested persons with a view to binding them in an agreed outcome or, at least, limiting the scope of controversy in need of judicial advice. Service of notice of the Court's advice upon a beneficiary has the consequences governed by sections 63(6)-63(10). In short, a trustee may obtain a layer of protection by giving all affected parties an opportunity to complain which, if not taken up, may be lost.

48 In a controversy in which a beneficiary of a trust both insists that the trustee commence or maintain proceedings against an adversarial party and refuses to provide the trustee with an express, secured indemnity against personal

liability for the costs of the proceedings, the Court might determine, upon an application for judicial advice, that the trustee would be justified in not commencing or (as the case may be) maintaining proceedings. This could leave the beneficiaries themselves to conduct proceedings in the name of the trust, joining the trustee as a submitting party: *Ramage v Waclaw* (1988) 12 NSWLR 84; *Lamru Pty Ltd v Kation Pty Ltd* (1998) 44 NSWLR 432.

SECTION 63's TWIN: AN ORDER (UNDER UCPR rule 54.3) FOR THE PARTIAL ADMINISTRATION OF AN ESTATE

49 Section 63 of the *Trustee Act* 1925 NSW is to be read in the context of an alternative form of proceedings governed by Part 54 of the *Uniform Civil Procedure Rules* 2005 NSW.

50 Part 54 is in the following terms (with emphasis added):

> **"Part 54 Administration of estates and execution of trusts**
>
> **54.1 Definitions** (cf SCR Part 68, rule 1)
>
> In this Part—
>
> ***administration proceedings*** means proceedings for the administration of an estate, or for the execution of a trust, under the direction of the Supreme Court.
>
> ***ancillary proceedings*** means proceedings brought pursuant to rule 54.3.
>
> ***estate*** means a deceased person's estate.
>
> **54.2 Application of Part** (cf SCR Part 68, rule 3)
>
> This Part applies to both administration proceedings and ancillary proceedings.
>
> **54.3 Relief without general administration** (cf SCR Part 68, rule 2)
>
> (1) *Proceedings may be brought for any relief which could be granted in administration proceedings.*
>
> (2) *Proceedings may be brought for the determination of any question which could be determined in administration proceedings, including—*
>
> (a) *any question arising in the administration of an estate or in the execution of a trust,*
>
> (b) any question as to the composition of any class of persons—

(i) having a claim against an estate, or

(ii) having a beneficial interest in an estate, or

(iii) having a beneficial interest in property subject to a trust,

(c) any question as to the rights or interests of a person who claims—

(i) to be a creditor of an estate, or

(ii) to be entitled under the will, or on the intestacy, of a deceased person, or

(iii) to be beneficially entitled under a trust.

(3) Proceedings may be brought for an order directing any executor, administrator or trustee—

(a) to furnish accounts, or

(b) to verify accounts, or

(c) to pay funds of the estate or trust into court, or

(d) to do or abstain from doing any act.

(4) Proceedings may be brought for—

(a) an order approving any sale, purchase, compromise or other transaction by an executor, administrator or trustee, or

(b) directing any act to be done in the administration of an estate that the Supreme Court could order to be done if the estate were being administered under the direction of the Court, or

(c) directing any act to be done in the execution of a trust that the Supreme Court could order to be done if the trust were being executed under the direction of the Court.

(5) Subrules (1)–(4) do not limit the operation of each other.

(6) *In any proceedings brought pursuant to this rule, a claim need not be made for the administration of the estate, or the execution of the trust, under the direction of the Supreme Court.*

54.4 Claim under judgment (cf SCR Part 68, rule 6)

If, in the taking of an account of debts or liabilities under an order in proceedings relating to an estate or trust, a person who is not a party to the proceedings makes a claim—

(a) no party (other than an executor or administrator of the estate or a trustee under the trust) is entitled to appear in relation to the claim except by leave of the Supreme Court, and

(b) the Supreme Court may direct or allow any party to appear, either in addition to or in substitution for the executors, administrators or trustees.

54.5 Relief that may be granted (cf SCR Part 68, rule 7)

(1) The Supreme Court may make any certificate or order and grant any relief to which the plaintiff is entitled by reason of a defendant's breach of trust, wilful default or other misconduct.

(2) Subrule (1) does not affect the power of the Supreme Court under rule 6.6.

54.6 Supreme Court not required to order general administration (cf SCR Part 68, rule 8(1))

The Supreme Court need not make an order for the administration of an estate, or for the execution of a trust, under the direction of the Court unless the order is necessary for the determination of the questions arising between the parties.

54.7 Supreme Court may order general administration in certain circumstances (cf SCR Part 68, rule 8(2))

(1) This rule applies if it appears to the Supreme Court that an order for the administration of an estate or the execution of a trust under the direction of the Court is necessary—

(a) to prevent proceedings by any person who claims—

(i) to be a creditor of the estate, or

(ii) to be entitled under the will, or on the intestacy, of the deceased, or

(iii) to be beneficially entitled under the trust, or

(b) to protect the interests of any person who is, or who may be, beneficially entitled under the trust.

(2) In these circumstances, the Court—

(a) may make such an order, and

(b) may further order that no steps are to be taken under the order, or under any account or inquiry directed, without the leave of the Court.

> **54.8 Conduct of sale** (cf SCR Part 68, rule 9)
>
> If the Supreme Court makes an order—
>
> (a) for the sale of property comprised in an estate, or
>
> (b) for the sale of trust property,
>
> then, unless the Court otherwise orders, the executors, administrators or trustees, as the case requires, are to have the conduct of the sale."

51 UCPR rule 6.6 (referred to in rule 54.5) provides that proceedings that have been commenced by summons when they should have been commenced by statement of claim are nevertheless, and for all purposes, taken to have been duly commenced as from the date of the filing of the summons, and the Court may order that the proceedings continue on the pleadings.

LEGAL HISTORY: THE SEARCH FOR A SUMMARY, EFFICIENT, COST-EFFECTIVE EQUITY PROCEDURES

Introduction

52 Section 63 of the *Trustee Act* 1925 NSW (governing an application for judicial advice) and rule 54.3 of the *Uniform Civil Procedure Rules* 2005 NSW (governing an application for a partial administration order) are products of Anglo-Australian law's search, in the long 19th century, for summary, efficient and cost-effective procedures for dealing with management questions and disputes in the administration of a trust.

53 NSW law owes much to the course of events in England, but section 63 emerged as an idiosyncratic provision when, in a form since amended, it was enacted as part of the consolidation of trust law in the *Trustee Act* 1925 NSW.

54 In *The Supervisory Jurisdiction Over Trust Administration* (Oxford University Press, 2018) at paragraph [3.01], Daniel Clarry explains the context in which English equivalents of section 63 and rule 54.3 emerged:

> "The historical and jurisprudential origins of the supervisory jurisdiction over trust administration were trustee-biased in the formulation of the principles of protection and performance, which were principality motivated by a desire to attract honest persons to assume offices of trusteeship as positions of public

importance. However the resources of the Court could simply not cope with the inundation of administration suits, which were cumbersome. Judicial regulation of trusts required relinquishing control of trust property to the Court, thereby parallelising trust administration, with time-consuming processes in the Chancery Masters' office in the taking of accounts and reporting. With the growth of trusts in the 19th century, the Court's aim of achieving 'complete justice' by the making of 'perfect' orders that would authoritatively dispose of Chancery matters could not be sustained. The procedure by which trustees filed bills for the general administration of trusts in Equity was delayed and expensive, which became the catch cry that built to a crescendo in the mid-19th century and provoked a series of statutory reforms thereafter. Parliament did not cut down or diminish the supervisory jurisdiction over trust administration, which the Court had assumed was inherent in the very nature of its 'duty' to facilitate the performance of trusts but aided its efficiency by increasing Chancery staff, including additional clerks, masters, and judges, and introducing a number of important procedural reforms that enabled discrete intervention by the Court on summary petitions. A number of administrative aspects of the supervisory jurisdiction over trust administration were put on a statutory footing, thereby affirming the regulatory oversight of trusts would continue as a judicial function despite extensive reform and in spite of a number of proposals for the administrative jurisdiction to be hived-off to a specialised executive order exclusively tasked with regulating trust administration."

55 Throughout the 19th century the English legal system (with colonial NSW generally following in its wake) struggled to accommodate a range of interconnected problems relating to trusts including: (a) the cost and delay of conducting court proceedings in supervision of the administration of trusts; (b) a need to prosecute dishonest trustees; (c) the imposition upon trustees of strict liability for a breach of trust; (d) the provision of summary proceedings for judicial advice as a means of protecting trust assets and trustees in the administration of an estate; (e) the availability of relief against personal liability for a breach of trust for a trustee found to have acted honestly and reasonably; (f) the terms upon which a trustee should be entitled to an indemnity from trust property, and the terms upon which such an entitlement should be lost; (g) the terms upon which a trustee might receive, or retain, remuneration notwithstanding the gratuitous nature of the office of a trustee; and (h) the regulation of trustees conducting a business for reward.

56 The summary procedures for which section 63 of the *Trustee Act* 1925 NSW and UCPR rule 54.3 provide, and empowerment of the Court to grant a trustee (under section 85 of the *Trustee Act* 1925) relief against personal

liability for a breach of trust all have their origins in English, 19th century law reform.

What is an Order for General Administration of a Trust?

57 A full appreciation of the "summary" nature of "judicial advice" proceedings or an application for a "partial administration order" can only be had if compared with the early 19th century procedures governing the making of an order for general administration of a trust.

58 Young J treated that topic in *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623 at 633C-636D, extracts of which are here reproduced:

> "… [the] effect of an order for general administration is to bring to a halt the whole administration of the trust until the court has given its leave to proceed …
>
> I think it is necessary to consider the basis of the law of trusts when considering whether to make an order for general administration, because the order emphasises just how closely this Court controls trusts. … What then is a trust?
>
> As is well-known, at common law beneficiaries in a trust have no rights at all because the common law does not look past the owner of the relevant property. It is usually the case that laws have been made for the purposes of making it quite clear to taxation authorities and others who is the owner of valuable property and these laws govern the ownership situation at common law. However, this Court has always enforced against the legal owner of property personal obligations. When the situation occurs that the legal owner is not to have any beneficial interest in the property at all, but is to hold it on behalf of other persons, we have what we now call a 'trust'. The only way of enforcing those obligations is to take some personal actions against the trustee. Because a trust is of this nature, in any trust, no matter what the commercial circumstances, it is always open for a beneficiary to come to this Court and say: 'this trust has not been properly administered. Please make sure that the real legal owner of the property who has assumed these obligations carries them out.'
>
> Such was the control of this Court which took over trusts, that by 1850 the law was that if any beneficiary came to the court at all and asked for general administration, general administration would be decreed as of course. The court would order that the trust was to be specifically performed under its supervision, that nothing was to be done without its imprimatur, that accounts should be taken to see what the trust assets were and the court would give directions as to how the trust would be carried out.

Underhill on Trusts, 9th ed (1939) at 491, in a passage which is not reproduced in the latest edition, says of the law before 1850 in England, 1900 in New South Wales:

> '… Formerly, a decree for general administration (that is to say, a decree whereby the court actually took upon itself to supervise the execution of the trust) was granted to a trustee or beneficiary as a matter of course. The only check upon an abuse of the process of the court was the rather remote contingency that the plaintiff might possibly be deprived of his costs, or, in very flagrant cases, have to pay the costs of all parties, upon the action coming on for further consideration.'

The old law is also reflected in Cotton LJ's judgment in *Re Blake* (1885) 29 Ch D 913 at 916, where he said:

> ' … Formerly, if anyone interested in a residuary estate instituted a suit to administer the estate, he had the right to require, and as a matter of course obtained, the full decree for the administration of the estate. …'

Whilst some of these passages refer to the plaintiff having a right to relief what is really meant is that the Court would make the order as of course. In equity, no one ever has an absolute right to relief. Equity still varies as the Chancellor's foot, even after Lord Eldon's standardization. What is meant is that whilst the relief was still for the discretion of the Court, if a standard set of facts were opposed, then the Court would usually give relief in such a case or, as it is sometimes said, would give relief *ex debito justiciae*.

Originally the administration decree was a very handy remedy. How exactly it grew up, nobody quite knows and if one looks at *Spence on Chancery Procedure* (1846) it will be seen that even last century it was thought that the explanations of the previous century were modern and wrong. However, although the remedy did permit full investigation into the affairs of trusts and provided useful procedures for discovering what the assets of the trust were, its abuses were rife.

First, the procedure involved paying the whole of the estate into court for the personal use of the Masters of Chancery without interest. There would then be a slowly moving procedure of taking accounts to work out what the assets were, and only then would attention be turned to the real questions that were troubling the parties. It was a by-word last century of having an estate in Chancery because no one would ever look forward to seeing any actual cash and such proceedings were satirised by Dickens in *Jarndyce v Jarndyce …*

It is even said that the Duke of Wellington consoled himself after the weak victory of 1830 with the reflection that Lord Brougham, as Chancellor, would reform the Chancery Court, if anyone could.

During the 19th century, there was a three-pronged attack on the procedure in administration actions. It is important to note that the remedy itself was not at all debased, only its procedures were streamlined.

First, the *Court of Chancery Act* 1850 (Imp) provided for originating summonses to be filed to deal with disputed points of administration without

> the need for administration decree; secondly, the *Court of Chancery Procedure Act* 1852 (Imp) abolished the Masters in Chancery; thirdly, the English Rules of Court of 1883 which were taken up as the *Supreme Court Procedure Act* 1900 (NSW), section 11, and then the *Equity Act* 1901 (NSW), section 11, provided that it was not obligatory to make an administration order, if the questions could be dealt with without such an order …
>
> The reforms made in the 19th century mean that today there are a series of quite relatively simple procedures which a beneficiary can take to protect his rights in the trust fund. …
>
> However, it would be wrong to compartmentalize the rights of beneficiaries under the law of trusts. The beneficiary's real right is to approach the court for the appropriate order for performance of the trust, a specific order if that will meet his case, or a general degree, if that is what is called for, subject to the beneficiary paying the costs of any unnecessary application, and subject also to the restrictions which the court has over the years put on that right to approach it. …
>
> Whatever the position was before 1900, two factors now clearly govern the exercise of the Court's discretion as to whether it will make an administration decree in cases where a specific order is not appropriate. First, the Court does not make such an order if the only possible result would be that the whole trust fund would be spent in costs where there would not be likely to be any benefit to the beneficiaries. … Secondly, where the trustee has been given a discretion by the trust instrument, he should be permitted to exercise that discretion and the court will not usually exercise it for him. …"

59 An equally authoritative description of the jurisdiction to make an order for general administration of a trust is found in Sir Frederick Jordan's *Administration of the Estates of Deceased Persons* (Sydney Law School, 1948), pages 42-44.

60 At (1985) 2 NSWLR 635G of his judgment, Young J reflected on the novelty of an application for a general administration order when he wrote the following:

> "There have not been any cases in New South Wales of which I am aware after the *Supreme Court Act* 1970 came into force where a general administration order has been made or even sought. However, the only legislative change is that the *Equity Act* 1901, section 11, has been repealed and replaced by the *Supreme Court Rules* 1970, Part 68, rule 8. Whilst this change would permit the Court in the appropriate case to override the rules, in the present case it makes no difference at all."

61 In almost all cases, there is no necessity for a general administration order because problems can be dealt with by the making of a partial administration

order, if necessary accompanied by an order for the removal and replacement of a trustee.

62 Apart from anything else, the Court probably lacks the administrative support necessary to implement an order for the general administration of a trust. The focus of the work of virtually all judicial officers is upon the identification, and resolution of disputes, not on estate administration as such.

63 However, there are some cases in which an order for general administration has utility. In management of the Court's Protective List, aided by the administrative apparatus of the NSW Trustee as a statutory authority, I have made an order for the general administration of a trust estate as an intermediate step in transferring management of an incapable person's estate from a trust to a protective management regime: *Re S, an incapacitated young person* [2017] NSWSC 859 at [63]. In taking that course, I have not felt obliged to freeze management of an estate, or even to insist on a full process of accounts being taken before ongoing management decisions are made. If the course of reform in the conduct of court administration has anything to teach us, it is that the Court is master of its own rules, and rules are to be applied in service of the purpose they serve.

Legislative History: Section 63 (Judicial Advice) and UCPR rule 54.3 (Partial Administration Orders)

64 **The English Inheritance.** Section 63 of the *Trustee Act* 1925 NSW - or at least the first limb of section 63(1) - is, historically, derived from section 30 of the *Law of Property Amendment Act* 1859 (Imp), popularly known as *Lord St Leonards' Act*, 22 & 23 Vict., c 35. Section 30 was amended, shortly after its commencement, by section 9 of the *Law of Property Amendment Act*, 1860 (Imp), 23 & 24 Vict., c 38. That amendment was incorporated in the NSW legislation from the outset. The second limb of section 63(1) was introduced as a procedural innovation by its draughtsman, Professor J B Peden, in 1924-1925.

65 Section 30 of *Lord St Leonard's Act* was in the following terms:

> "[30]. Any trustee, executor, or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the High Court of Chancery, or by summons upon a written statement to any such Judge at chambers, for the opinion, advice, or direction of such Judge on any question respecting the management or administration of the trust property or the assets of any testator or intestate, such application to be served upon or the hearing thereof to be attended by all persons interested in such application, or such of them as the said Judge shall think expedient; and the trustee, executor, or administrator acting upon the opinion, advice, or direction given by the said Judge shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator in the subject-matter of the said application; provided nevertheless that this Act shall not extend to indemnify any trustee, executor, or administrator in respect of any act done in accordance with such opinion, advice, or direction as aforesaid, if such trustee, executor, or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction; and the costs of such application as aforesaid shall be in the discretion of the Judge to whom the said application shall be made."

66 The abstract of *Lord St Leonard's Act* provided a description of section 30 (grouped together with other sections relating to "Trustees and Executors") in the equivalent of what we today would describe as a marginal note. It was in the following terms: "[30] Trustee, executor, &c may apply by petition to Judge of Chancery for opinion, advice, &c in management, &c of trust property."

67 The equivalent summary of section 9 of the *Law of Property Amendment Act* 1860 (Imp) in the abstract to that Act describes section 9 in the following terms: "[9] Form of applying for advice of Judge, &c under Section 30 of 22 & 23 Vict. c 35."

68 Section 9 was in the following terms:

> "[9] Where any trustee, executor, or administrator shall apply for the opinion, advice, or direction of a Judge of the Court of Chancery under the 30th section of the Act, 22 & 23 Vict. c 35, the petition or statement shall be signed by counsel, and the Judge by whom it is to be answered may require the petitioner or applicant to attend him by counsel either in chambers or in Court where he deems it necessary to have the assistance of counsel."

69 Section 30 of *Lord St Leonards Act* may have antecedents in:

(a) section 16 of the *Charitable Trusts Act* 1853 (Imp) (16 & 17 Vict., c 137): *Lord St Leonards* participated in parliamentary debates leading to enactment of that section, and he referred to it in a popular book (*A Handy Book of Property Law*, 2nd ed, Edinburgh, 1858) that he published in the course of his campaign for law reform leading directly to enactment of section 30.

(b) section 1 of *Sir Samuel Romilly's Act* of 1812 (*the Charities Procedure Act* 1812; 52 Geo III c 101): That provision was a precursor to reform of the law relating to administration of charitable trusts leading to the *Charitable Trusts Act* 1853.

70 The long title of *Sir Samuel Romilly's Act* was "*An Act to provide a Summary Remedy in Cases of Abuses of Trusts created for Charitable Purposes*".

71 The marginal note to section 1 of the Act was in the following terms: "In cases of Breach of Trust, Petition presented to Chancellor, &c, who shall hear the same in a summary way, and make order therein".

72 The preamble to the Act and section 1 were in the following terms:

> "Whereas it is expedient to provide a more summary Remedy in cases of Breaches of Trusts created for Charitable Purposes, as well as for the just and upright Administration of the same Be it therefore enacted … That, from and after the passing of this Act, in every case of a Breach of any Trust, or supposed Breach of any Trust created for Charitable Purposes, or whenever the Direction or Order of a Court of Equity shall be deemed necessary for the Administration of any Trust for Charitable Purposes, it shall be lawful for any two or more Persons to present a Petition to the Lord Chancellor, Lord Keeper, or Lords Commissioners, for the Custody of the Great Seal, or Master of the Rolls for the time being, or to the Court of Exchequer, stating such Complaint, and praying such Relief as the Nature of the case may require; and it shall be lawful for the Lord Chancellor, Lord Keeper and Commissioners for the custody of the Great Seal, and for the Master of the Rolls, and the Court of Exchequer, and they are hereby required to hear such Petition in a summary way, and upon Affidavits or such other Evidence as shall be produced upon such hearing to determine the same, and to make such Order therein, and with respect to the Costs of such applications as to him or them shall seem just; and such order shall be final and conclusive, unless the Party or Parties who shall think himself or themselves aggrieved

> thereby shall, within Two Years from the time when such Order shall have been passed and entered by the proper Officer, have preferred on appeal from such Decision to the House of Lords, to whom it is hereby enacted and declared that an collate Appeal shall lie from such Order."

73 Section 2 of the Act (against the marginal note, "Petitions signed and certified, &c) provided:

> "Provided always, and be it further enacted, That every Petition so as to be preferred as aforesaid shall be signed by the Persons preferring the same, in the presence of and shall be attested by the Solicitor or Attorney concerned for such Petitioners, and every such Petition shall be submitted to and be allowed by His Majesty's Attorney or Solicitor General, and such allowance shall be certified by him before any such Petition shall be presented."

74 A similar proposal was discussed in the Chancery Commission's 1826 *Report on the Practice of Chancery*. In observations about Proposition 124 of the Report the Solicitor General, Sir Charles Wetherell, remarked that an "important improvement" [in Chancery practice] would be, that in cases of trusteeship a detached part of which was brought for the opinion of the Court, the trustees were not to be compelled to administer to an equitable jurisdiction; but to take the opinion of the Court only on what was wanted, and no more": Clarry, *op cit*, paragraph [3.06]. In 1826 legislative reform remained decades in the future, with charitable trusts still a matter of concern.

75 The long title of the *Charitable Trusts Act*, 1853 (Imp) was "An Act for the better Administration of Charitable Trusts". The Act established a Board of Commissioners to supervise charities.

76 In the abstract to the Act section 16 was described in these terms: "Board to entertain applications for their opinion or advice - Persons acting on advice of board to be indemnified."

77 Section 16 was in the following terms:

> "The said board shall receive and consider all applications which may be made to them by any trustee or other person having any concern in the management or administration of any charity, for their opinion, advice, or direction respecting such charity, or the management or administration thereof, of the estates, funds, property, or income thereof, or the application

> thereof, or any question or dispute relating to the same respectively, and if they so think fit, may, upon any such application, give such opinion or advice as they think expedient, subject to any judicial order or direction which may be subsequently made or given by any competent Court or Judge; and such opinion or advice shall be in writing, signed by two or more of the said Commissioners, and sealed with the seal of the said Commission; and every trustee and other person who shall act upon or in accordance with the opinion or advice given by the said board shall in respect of so acting be deemed and taken, so far as respects his own responsibility, to have acted in accordance with his trust; and no such judicial order or direction subsequently made or given by any Court or Judge shall have any such retrospective effect as to interfere with or impair the indemnity by this Act given to trustees and other persons who have acted upon or in accordance with such opinion or advice of the said Board: Provided always, that nothing herein contained shall extend to indemnify any trustee or other person for any act done in accordance with the opinion or advice of the said board, if such trustee or other person have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion or advice."

78 In England (after the *Rules of the Supreme Court,* 1883 Order 55 introduced a procedure for the grant of a "partial administration order" in proceedings commenced by an Originating Summons), section 30 of *Lord St Leonards' Act* came to be regarded, in practice, as obsolete. On that basis, it was repealed by the *Trustee Act* 1893 (Imp) (56 & 57 Vict., c 53).

79 RSC 1883 Order 55 was replaced by the *Rules of the Supreme Court* 1965, Order 85 and, in turn, by the current provisions contained in the *Civil Procedure Rules* 1998 (Eng), Part 64.

80 **NSW Legislative History**. In NSW there has been a form of section 30 of *Lord St Leonards' Act* (as supplemented by section 9 of the *Law of Property Amendment Act* 1860 (Imp) since 1862. The NSW legislation was first enacted as section 30 of the *Trust Property Act* of 1862, which was repealed and replaced by section 20 of the *Trustee Act* 1898. That section was, in turn, repealed and replaced by the first limb of section 63(1) of the *Trustee Act* 1925. The second limb of section 63 was an innovation. Associated with it were provisions relating to parties and appeals. The section was amended, upon commencement of the *Supreme Court Act* in 1972, to remove jurisdictional limits on the size of trust estates amendable to orders under the section.

81 Since 1900 NSW has also had in operation a form of legislation for partial administration orders based on the English RSC 1883 Order 55. That legislation was first enacted in sections 10-12 (and the schedule) of the *Supreme Court Procedure Act* 1900. Those provisions were, shortly thereafter, included in the consolidation effected by the *Equity Act*, 1901: sections 2, 11 and 94, and the first and fourth Schedules. Those provisions were, in turn, enacted as Part 68 of the *Supreme Court Rules*, 1970. The current provisions are found in rule 54.3 of the *Uniform Civil Procedure Rules* 2005 NSW.

82 The *Charitable Trusts Act* 1993 NSW consolidated NSW law governing the supervision of charities (and, if in so doing, repealed the NSW equivalent of *Sir Samuel Romilly's Act*, 1812; namely, section 17 of the *Imperial Acts Application Act,* 1969 NSW) but it did not supplant the general operation of section 63 of the *Trustee Act* 1925 or SCR Part 68 (UCPR Part 54).

83 The *Trustee Act* 1925, section 63 was based substantially on work undertaken by Professor Peden as Commissioner of Law Reforms. The legislation was first introduced in Parliament as the Trustee Bill of 1924. The provision that became section 63 was, in its original form, clause 61 of that Bill. When the Bill lapsed at the end of a parliamentary session, it was reintroduced in a modified form as the Trustee Bill of 1925, with clause 63 in the form in which the legislation was then enacted.

84 Clause 61 of the 1924 Bill was hotly contested at the Committee Stage, principality because it extended the operation of section 20 of the *Trustee Act* 1898 so as to enable judicial advice to be given on the interpretation of trust instruments. Some members of the practising profession were concerned about the possibility of unfairness in the exercise of that extended jurisdiction in the absence of parties interested in a trust estate. They secured an amendment of the Bill to limit its operation to "small" estates. A further amendment, which first appeared in the 1925 Bill, made provision for an appeal from an order for judicial advice.

85 Clause 61 of the 1924 Bill was the subject of observations by the Minister, FS Boyce on the second reading of the Bill; debate on the clause at the Committee Stage included a speech by Professor Peden in which he made statements to the effect that:

(a) clause 61 comprised two parts, the first relating to judicial advice on any question respecting the management or administration of trust property and the second concerning advice on the interpretation of trust instruments;

(b) the first part was "simply consolidating" section 20 of the 1898 Act;

(c) the second part of the clause was an innovation designed to facilitate the administration of estates, providing a discretionary basis upon which the Court could minimise costs, particularly in small estates; and

(d) the procedure proposed under the clause would not operate to the exclusion of the Court's jurisdiction to have a more formal hearing on an originating Summons.

86 Debate on clause 63 of the 1925 Bill was minimal. Professor Peden simply noted that the clause addressed judicial advice "not only as to administration, but as to the meaning of a will" and introduced provision for an appeal. In his earlier First Reading Speech on the bill in the legislative assembly, the Attorney General, Mr McTiernan described the Bill as "necessary in order that the law of this State may be brought up to the position in which the law of Great Britain and other States stand.

87 Extrinsic evidence about the legislative development of section 63 of the *Trustee Act* 1925 following its enactment is sparse. One is left with little more than a dry list of textual adjustments. The Court's path to adoption of a *Judicature Act* system of court administration in the decade before 1 July

1972 (when the *Supreme Court Act* 1970, as amended in 1972, commenced operation) appears to have been shielded from controversy by a process of incremental steps unattended by unnecessary publicity.

88 The *Supreme Court Act* 1970 (as amended in 1972) amended section 63 of the *Trustee Act* 1925 in a manner that affected subsections (1), (3)-(8) and (10)-(11). As originally enacted, the 1970 Act (No 52 of 1970) did not refer to section 63 in the amendments proposed to be effected by section 7 and the Second Schedule of the Act. However, before the 1970 Act commenced operation on 1 July 1972, it was amended by the *Supreme Court (Amendment) Act* 1972 (No 41 of 1972). Section 14 and the Second Schedule of the 1972 Act amended the second schedule of the 1970 Act so as to include amendments to section 63.

89 Although the Second Schedule to the 1970 Act did not refer to section 63, the Fourth Schedule (which, by virtue of sections 122 and 126, contain what, in due course became the Supreme Court Rules 1970) did refer to section 63 in Part 70 of the Rules. Those Rules substantially re-enacted Rules 310-313 of the consolidated Equity Rules of 1902 (as amended) relating to section 63. Part 68 of the Rules enacted provisions based upon Order 85 of the English Rules of the Supreme Court, 1965 relating to partial administration orders. The 1972 Act did not amend the Fourth Schedule of the 1970 Act. The substance of Parts 68 and 70, given legislative force by the 1970 Act (as amended in 1972), has remained unchanged. The only amendments have been formal, and consequential upon operation of the Uniform Civil Procedure Rules 2005.

90 On the enactment of neither the 1970 Act nor than 1972 Act did parliamentary debate descend to consideration of the *Trustee Act* 1925. Official public consideration of that Act was confined to the NSW Law Reform Commission's Report numbered "LRC 14" of 1971.

91 The Acts of 1970 and 1972 were based on three reports of the NSW Law Reform Commission

(a) Report on Supreme Court Procedure (LRC 7) of 1969;

(b) Second Report on Supreme Court Procedure (LRC 14) of 1971; and

(c) Report on Law and Equity (LRC 13) of 1971.

92 The first Report resulted in enactment of the 1970 Act. The second resulted in enactment of the 1972 Act. The third resulted in enactment of the *Law Reform (Law and Equity) Act* 1972 (No 28 of 1972) as cognate legislation.

93 None of the three Reports offered an explanation of the specific amendments of the *Trustee Act* 1925 section 63 effected by the 1970 Act as amended by the 1972 Act.

CONCLUSION

94 The success of an application under section 63 of the *Trustee Act* 1925 for judicial advice depends upon a trustee's recognition of the summary nature of proceedings under the section, and the care taken in preparation of an application (and supporting documentation) that can be determined summarily.

GCL
18 November 2021

Revised
25 November 2021