

**The Law Society of South Australia and The Adelaide Branch of the Society  
of Trust and Estate Practitioners**

**TRUSTS SYMPOSIUM**

**18 February 2011**

**Hilton Hotel**

**Adelaide**

**“The Repentant Trustee”**

**Justice P A Bergin**

- 1 In the late 19<sup>th</sup> and early 20<sup>th</sup> Century there was concern both in England and Australia that if statutory protections for breaches of trust were not made available to trustees it would be difficult to find suitable individuals who would be willing to act as trustees. In New South Wales there was the additional factor that there had been large resumptions of land and “hundreds of thousands of pounds of compensation” had “been paid into the hands of trustees”.<sup>1</sup> There was concern that notwithstanding a trustee’s honest and reasonable management of large tracts of trust property and trust funds a breach of trust may “perchance” happen and a trustee may be “absolutely ruined”.<sup>2</sup>
  
- 2 In England section 3(1) of the *Judicial Trustees Act* 1896 was the first step in providing an opportunity for protection. It was in the following terms:
  - (1) If it appears to the Court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may

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<sup>1</sup> New South Wales, Legislative Assembly, Parliamentary Debates, Vol 9, 28 November 1902, 4947.

<sup>2</sup> Ibid, 4948.

relieve the trustee either wholly or partly from personal liability for the same.

- 3 In debating the Bill, Lord Ashbourne referred to Lord Herschell's commendation of the proposed section and said that it was of "the highest value to all trustees who acted honestly and fairly, but who inadvertently committed some breach of trust, and brought themselves within the complications of the law".<sup>3</sup> Notwithstanding this rather noble purpose, the courts in England (and later in Australia) struggled with the statutory language.<sup>4</sup>
- 4 Soon after the enactment of the *Judicial Trustees Act*, Kekewich J dealt with an application for an order that a trustee (Mr Streeter) pay the costs of litigation that was necessary to recover the trust funds that had been lost by his co-trustee (Mr Pearce) who had absconded.<sup>5</sup> Messrs Streeter and Pearce were trustees of the deed of dissolution under which the affairs of a Building Society were wound up. Mr Streeter was a director of the Building Society and on its dissolution he was urged by his co-directors to join with Mr Pearce as trustee. Notwithstanding his directorship, Mr Streeter's counsel described him as a "poor tradesmen" and an "innocent victim" whose only fault was that he was not active in the trust but left things in the hands of his co-trustee.<sup>6</sup> Kekewich J used the language of repentance in stating that Mr Streeter "by his own confession" had not performed his duties "in any respect".<sup>7</sup>
- 5 Mr Streeter might have been forgiven for thinking that he was to benefit from his "confession" when Kekewich J opened his remarks by referring to the "natural and proper sympathy with a trustee who gratuitously undertakes duties in a charitable trust, which are often very irksome".<sup>8</sup>

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<sup>3</sup> 43 H.L. Deb 24 July 1896, cc 588-589.

<sup>4</sup> *Re Grindley* [1898] 2 Ch. 593 at 601 per Chitty LJ.

<sup>5</sup> *Re Second East Dulwich 745<sup>th</sup> Starr Bowkett Building Society; Miall v Pearce* (1899) 79 L. T. 726.

<sup>6</sup> *Ibid*, 726.

<sup>7</sup> *Ibid*, 727.

<sup>8</sup> *Ibid*, 726.

- 6 Although it was accepted that the *Judicial Trustees Act* did not apply to that case, Kekewich J seized the opportunity to explain some of its terms, in particular the expression "honest and reasonable". He said:

A trustee is honest if he has not done anything dishonest. Now there is nothing against Streeter - there is no suggestion that he has done anything dishonest. He has paid the 391/. 16s. 4d which was found to be due to the society from Pearce, and in so far acquitted of dishonesty in the usual sense of the word. But in another sense he is not honest. It seems to me that a man who accepts such a trusteeship, and does nothing, swallows wholesale what is said by his co-trustee, never asks for explanation, and accepts flimsy explanations, is dishonest. He poses here before me as a poor man - the victim of his co-trustee. He was imposed on by Pearce, but suffered himself to be imposed upon. He brought himself into the difficulty, and I could not allow him to have costs - that would diminish the sum recovered. But should I make him pay the costs?

- 7 That question was answered in the affirmative.<sup>9</sup> It seems to me that notwithstanding his analysis, Kekewich J was of the view that it would not be "fair" to allow Mr Streeter to resist paying the costs because the fund would be reduced. If the *Judicial Trustees Act* had applied to the case and Mr Streeter had been found to have acted honestly, may I suggest a proper analysis of the facts would have resulted in a finding that he had not acted reasonably and therefore ought not fairly to have been excused from his breach of trust.
- 8 Although the expression "confession" was used, Mr Streeter's conduct throughout his trusteeship of the winding up of the Building Society

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<sup>9</sup> In *Hall v Poolman* [2007] NSWSC 1330; (2007) 65 ACSR 123 Palmer J at 193 expressed the view that in considering whether a person had acted "honestly" in similar provisions under the *Corporations Act 2001* (Cth) the court should only be concerned with the question whether the person had acted honestly in the ordinary meaning of that term - that is, whether the person had acted without deceit or conscious impropriety, without intent to gain improper benefit or advantage for himself, herself or for another, and without carelessness or imprudence to such a degree as to demonstrate that no genuine attempt at all had been made to carry out the duties and obligations of the office imposed by the statute or the general law.

remained the same. He left everything to his co-trustee in breach of his obligations as trustee. Accordingly he did not really "repent" in the sense that he realised the error of his ways and changed his conduct, rather when faced with the application to pay the costs of litigation he did not deny that he had failed to perform his duties "in any respect". That is what was described as his "confession".

- 9 *Perrins v Bellamy* [1898] 2 Ch 521 was a case in which trustees sold trust property after receiving a surveyor's advice that it would be appropriate to do so and being advised by a solicitor that they had the power to sell the property. The sale was in breach of trust and the trustees sought to be relieved under section 3 of the *Judicial Trustee Act*. Kekewich J expanded upon his analysis of the provisions of section 3 referring to what he described as the "grit of the section" as follows<sup>10</sup>:

The Legislature has made the absence of all dishonesty a condition precedent to the relief of the trustee from liability. But that is not the grit of the section. The grit is in the words "reasonably, and ought fairly to be excused for the breach of trust." How much the latter words add to the force of the word "reasonably" I am not at present prepared to say. I suppose, however, that in the view of the Legislature there might be cases in which a trustee, though he had acted reasonably, ought not fairly to be excused for the breach of trust. ... In this section the copulative "and" is used, and it may well be argued that in order to bring a case within the section it must be shewn not merely that the trustee had acted "reasonably," but also that he ought "fairly" to be excused for the breach of trust. I venture, however, to think that, in general and in the absence of special circumstances, a trustee who has acted "reasonably" ought to be relieved, and that it is not incumbent on the Court to consider whether he ought "fairly" to be excused, unless there is evidence of the special character shewing that the provisions of the section ought not to be applied in his favour. I need not pursue that subject further,

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<sup>10</sup> [1898] 2 Ch. 521 at 527-528.

because in the present case I find no ground whatever for saying that these trustees, if they acted reasonably, ought not to be excused. The question, and the only question, is whether they acted “reasonably.” In saying that, I am not unmindful of the words of the section which follow, and which require that it should be shewn that the trustee ought “fairly” to be excused, not only “for the breach of trust” but also “for omitting to obtain the directions of the Court in a matter in which he committed such breach of trust.” I find it difficult to follow that. I do not see how the trustee can be excused for the breach of trust without being also excused for the omission referred to, and how he can be excused for the omission without also being excuse for the breach of trust. If I am at liberty to guess, I should suppose that these words were added by way of amendment, and crept into the statute without due regard being had to the meaning of the context.

- 10 Kekewich J concluded that the trustees had acted reasonably and were in the same position as if they had possessed and exercised the power of sale.<sup>11</sup> The Court of Appeal (Lindley MR, Rigby and Romer LJJ) dismissed the appeal from Kekewich J’s judgment: [1899] 1 Ch 797. Lindley MR observed that prior to the enactment of section 3 of the *Judicial Trustees Act* the trustees would have been held liable by what the Master of the Rolls described as “a very hard state of the law, and one which shocked one’s sense of humanity and of fairness”.<sup>12</sup> Although Lindley MR did not make specific reference to Kekewich J’s apparent struggle with the language of the statute, he said<sup>13</sup>:

That is to say, the Act throws upon the Court the extremely difficult and responsible task of saying, “You, a trustee, have committed a breach of trust, but at the same time, under the circumstances and having regard to your having acted honestly, reasonably, and fairly, you shall be excused: we are of opinion that it is not a case in which you ought to be held liable to make good the loss”.

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<sup>11</sup> Ibid, 532.

<sup>12</sup> [1899] 1 Ch. 797 at 800.

<sup>13</sup> Ibid, 800.

11 At this stage, let me turn to the historical development of the statutory relief available to trustees in Australia. Although there are equivalent relief provisions in the statutes of all States and Territories<sup>14</sup>, I will for ease of reference, focus on New South Wales. It was in 1902 that the New South Wales Legislature introduced a provision equivalent to section 3(1) of the *Judicial Trustees Act*.<sup>15</sup> The parliamentary debate included the observation that the object of the amending provisions was to “enable trustees to administer trust estates on safe lines and under proper safeguards, and without such penalties as may prevent a private individual from accepting a position as a trustee”.

12 The equivalent provision in the Victorian legislation was described by the Chief Justice, Sir John Madden, in *Montgomerie’s Brewery Co Ltd v Blyth* (1901) 27 VLR 175 as follows at 200-201:

The statute was never intended to relieve trustees from the consequences of breaches of trust where they had misappropriated the trust property to their own benefit, but merely where the trust property had been otherwise lost. The statute was not intended to relieve the wicked trustee, but perhaps the negligent trustee, who not to his own benefit had contributed to the loss.

13 In a later case<sup>16</sup> Madden CJ said that he did not think that the effect of the section, “wide as it is, was ever intended to give general absolution to trustees for any sort of fault they may honestly commit”.<sup>17</sup>

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<sup>14</sup> *Trustee Act Amendment Act 1902* (NSW) s 9 (*Trustee Act 1925* (NSW) s 85); *Trusts Act 1901* (VIC) s 3 (*Trustee Act 1958* (VIC) s 67); *Trustee Act 1925* (ACT) s 85 (NSW Act applied in ACT in a modified form in *Trustee Act 1957* (ACT)); *Trustee Amendment Act 1981* (NT) s 7 (*Trustee Act 1893* (SA) s 49A as in force in NT); *Trustees and Executors Acts 1897* (QLD) s 51 (*Trusts Act 1973* (QLD) s 76); *Trustee Act Further Amendment Act 1915* (SA) s 5 (*Trustee Act 1936* (SA) s 56); *Trustee Act 1898* (TAS) s 50; *Trustees Act 1962* (WA) s 75.

<sup>15</sup> Section 9(1) of the *Trustee Act Amendment Act 1902* (NSW); Section 85 of the *Trustee Act 1925* is in similar terms.

<sup>16</sup> *Equity Trustees, Etc, Co., v Fenwick and Others* [1905] VLR 154.

<sup>17</sup> *Ibid*, 163.

- 14 In *National Trustees Company of Australasia Limited v General Finance Company of Australasia Limited* [1905] AC 373, the trustees wrongfully paid out trust funds in breach of trust on the erroneous advice of their solicitors. In holding that whilst their actions may have been honest and reasonable, their failure to make any effort to restore the loss defeated their claim for relief under the provisions of the *Trusts Act* 1901 (Vic) The appeal to the Privy Council from the Full Court of the Victorian Supreme Court was dealt with on the basis that “the Courts in the Colony” had found that “the appellants acted honestly and reasonably”. Sir Ford North said:<sup>18</sup>

Unless both [honesty and reasonableness] are proved the Court cannot help the trustees; but if both are made out, there is then a case for the Court to consider whether the trustee ought fairly to be excused for the breach, looking at all the circumstances.

- 15 After describing the appellant's business as, *inter alia*, acting as trustees and executors and being paid for their services by a commission, Sir Ford North continued<sup>19</sup>:

The position of a joint stock company which undertakes to perform for reward services it can only perform through its agents, and which has been misled by those agents to misapply a fund under its charge, is widely different from that of a private person acting as gratuitous trustee. And without saying that the remedial provisions of the section should never be applied to a trustee in the position of the appellants, their Lordships think it is a circumstance to be taken into account, and they do not find here any fair excuse for the breach of trust, or any reason why the respondents, who have committed no fault, should lose their money to relieve the appellants, who have done a wrong and have denied the respondents' title. And that is not quite all.

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<sup>18</sup> [1905] AC 373 at 381.

<sup>19</sup> *Ibid*, 381-382.

If trustees do unfortunately lose part of a trust fund by a breach of trust, the least that can be expected of them is that they should use their best endeavours to recover the fund, or so much thereof, as is practicable, for their cestui que trust. In the present case...it does not appear that the trust company have taken any such steps, or made any attempt whatever to replace the fund or relieve the respondents from loss; nor have they condescended to give the Court any explanation or reason why they have abstained from doing so. ... The Courts in the Colony held that under these circumstances the appellants had not made out any case for relief under the Act; and their Lordships agree with them.

- 16 Thus post breach conduct – in that case the failure to seek to recover the trust property and the failure to explain why such steps were not taken – was taken into account in deciding whether the trustees ought fairly to have been excused. Some guidance was provided to future applicants for relief from a breach of trust under the section. First, it appeared that the bar would be higher for professional trustees in that they may be subjected to more stringent expectations.<sup>20</sup> Second, that by establishing that the trustee acted honestly and reasonably, it did not follow that relief would be automatically granted. Third, if steps were available to seek to recover lost trust property then such steps should be taken and if not taken, an explanation for not taking such steps should be given to the Court.
- 17 On 7 October 1925, the then Attorney-General for the State of New South Wales, the Honourable Edward Aloysius McTiernan<sup>21</sup>, sought the leave of the New South Wales Legislative Assembly to introduce the *Trustee Bill* describing it as very “comprehensive” and “necessary” to bring the law up to the position of the law of Great Britain and the other States.<sup>22</sup> The *Trustee Act 1925 (NSW)* commenced on 1 March 1926. Section 85 of the

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<sup>20</sup> *Re Investa Properties Ltd and Anor* [2001] NSWSC 1089; (2001) 187 ALR 462 at 471.

<sup>21</sup> Appointed to the High Court in 1930 at the age of 38. As Attorney-General he was said to be “a most effective reformer”: *The Oxford Companion to the High Court of Australia* Edited by Blackshield, Coper, and Williams, Oxford University, Press 2001

<sup>22</sup> New South Wales, Legislative Assembly, Parliamentary Debates, Vol 102, 7 October 1925, page 1333.



*Trustee Act* was not different in substance from the 1902 Act. It provides relevantly:

- (1) Where a trustee is or may be personally liable for any breach of trust, the Court may relieve the trustee either wholly or partly from personal liability for the breach.
- (2) The relief may not be given unless it appears to the Court that the trustee has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the direction of the Court in the matter in which he committed the breach.

18 The position changed from a positive statutory power to grant relief in the 1902 Act to a prohibition on the granting of relief unless the pre-requisites to relief were found to be present. The trustee bears the onus of establishing the elements of honesty and reasonableness and the circumstances upon which the trustee ought fairly to be excused.<sup>23</sup>

19 The struggle with the statutory language also occurred in New South Wales, albeit with provisions relating to trustees' indemnification rather than relief for breaches of trust. In *Gatsios Holdings Pty Limited v Mick Kritharas Holdings Pty Ltd (in liq)* [2002] NSWCA 29; (2002) ATPR 41-864 Spigelman CJ did not find helpful what he described as "conclusory terminology of whether or not conduct was "proper" or "reasonable" as if it were a test".<sup>24</sup> Mason P expressed the view that such expressions were "notoriously open-ended" and that:

Some outer limit needs to be drawn in order to recognise that certain types of grossly improper frolics by trustees will put them outside the presently uncertain boundary of the right now in question.<sup>25</sup>

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<sup>23</sup> *Re Turner* [1897] 1 Ch 536 at 541.

<sup>24</sup> *Ibid*, [17]. See *Nolan v Collie* (2003) 7 VR 287 in which it was suggested that the reasoning in *Gatsios* has caused uncertainty.

<sup>25</sup> [2002] NSWCA 29 at [42].

- 20 Although the learned President was clearly of the view that there needed to be some delineation of what he labelled the “outer limits” of conduct beyond which indemnification would not be available, the expression “grossly improper frolics” would not assist in this regard. There is the added complexity that a trustee is entitled to be indemnified in respect of a liability “improperly incurred to the extent to which, acting in good faith, he has benefited the trust estate”: *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385 at 396.
- 21 Many of the applications for relief involved circumstances in which investments had gone awry. Other applications involved carelessness by the trustees and unreasonable reliance on others.<sup>26</sup> Although, as has been referred to earlier, the introduction of these provisions was seen as a deliberate relaxation of what had been described as “a very hard state of the law” that had lacked fairness<sup>27</sup>, it was sometimes difficult for applicants for relief to establish that their conduct had been “reasonable”.<sup>28</sup>
- 22 None of these cases involved repentance – the attributes of which include: reviewing one’s actions and feeling contrition or regret for something one has done or omitted to do; and/or showing sincere remorse and undertaking to reform in the future.<sup>29</sup> Rather they have involved robust applications in which there appears to have been an expectation that because the beneficiaries’ loss was not caused by dishonesty or claimed unreasonableness the trustees should be forgiven their breaches.
- 23 That same robust approach appears to have been adopted in applications made by directors for semi-analogous relief under provisions of the

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<sup>26</sup> LA Sheridan, “Excusable Breaches of Trust” (1955) 19 *The Conveyancer and Property Lawyer* 420.

<sup>27</sup> *Maguire v Makaronis* (1997) 188 CLR 449 at 473.

<sup>28</sup> *Elder’s Trustee and Executor Company Ltd v Higgins* (1963) 113 CLR 426; *Pateman v Heyen* (1993) 33 NSWLR 188; *Turner v TR Nominees Pty Ltd and Anor* (unreported, NSWSC, 3 November 1995, Santow J); *Adams v Alemite Lubrequip Pty Ltd* (unreported, NSWCA, 30 September 1994, Gleeson CJ, Kirby P, Sheller JA); *Goodwin v Duggan and Ors* (1996) 41 NSWLR 158; *Jalmoon Pty Ltd (in liq) v Bow* [1997] 2 Qd R 62; *Larkman v Public Trustee* [1998] WASC 303, *Port of Brisbane Corporation v ANZ Securities Ltd* [2001] QSC 466; *Rayner and Ors v N J Sheaffe Pty Ltd and Ors* [2010] NSWSC 810; *Wong v Burt* [2005] 1 NZLR 91.

<sup>29</sup> Oxford English Dictionary, Macquarie Dictionary.

*Corporations Law/Corporations Act 2001* the terminology of which was derived from section 3 of the *Judicial Trustees Act* now reflected in section 85 of the *Trustee Act*.<sup>30</sup> The applications under the *Corporations Law/Corporations Act* are distinguishable from the cases in which a trustee is sued for personal liability for a breach of trust because quite often the claims are under the civil penalty provisions of the *Corporations Act* in which banning orders and the impositions of fines are sought against the directors. There are complexities to this type of litigation against directors that, for various reasons, may mean that repentance is not the best “strategy”. However some have flirted with the concept. Take for example the affidavit evidence *ASIC v Doyle*<sup>31</sup> in which the director (Doyle), said <sup>32</sup>:

I am remorseful and sorry for my actions that lead (*sic*) to the findings of (*sic*) by the learned trial Judge as I have always endeavoured in my business dealings to comply with my obligations as a director and not cause damage to those I deal with in any unfair fashion.

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Similarly I will be appealing the learned trial Judge's decision as I have been advised by my lawyers that I have a legal entitlement to appeal that decision. Again, I say this in the context that I do not, nor do I intend to waive legal professional privilege in relation to that advice ...

24 The trial judge explored these claims of remorse as follows<sup>33</sup>:

[71] While a person is in no way to be penalised for exercising their legal rights to appeal, the fact that Doyle has indicated an intention to appeal the findings in the primary judgment is somewhat inconsistent with the assertion that he accepts the findings and is remorseful and sorry for his actions which led to

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<sup>30</sup> Section 1318 of the *Corporations Act 2001* (Cth). As to the genesis of the provision see *Edwards v Attorney General* (2004) 60 NSWLR 667 at [25] per Spigelman CJ referring to Young CJ in Eq's (as his Honour then was) notation.

<sup>31</sup> [2002] WASC 223.

<sup>32</sup> *Ibid*, [45].

<sup>33</sup> *Ibid*, [71].

them. So too, the fact that his affidavit of 20 June 2002 and that of Satterthwaite of 3 July 2002 are obviously the same document, suggest their expressions of remorse and contrition are no more than formulaic and mechanical and do not reflect any real understanding of the wrongfulness of the conduct involved, nor a genuine sentiment which would give some assurance that the conduct would not be repeated because of it.

- 25 In *ASIC v Plymin & Ors*<sup>34</sup>, the civil penalty proceedings against the directors arising from the financial woes of the Water Wheel Group of companies, a director's (Elliott) affidavit included the following<sup>35</sup>:

Moreover, I will do my best to ensure that such things as befell [Water Wheel] will not befall the companies of which I am (or may become) a director. I regret the loss occasioned to the creditors of [Water Wheel] found to have been suffered when those companies became insolvent whilst I was a director.

- 26 The trial judge said:<sup>36</sup>

His course of conduct in relation to Water Wheel occurred recently and his evidence in this proceeding concerning the conduct, including his explanations of it and attitude towards it, did not engender any confidence in the Court as to his present fitness to act as a company director. Nor do the references in his affidavit to what "befell" Water Wheel or the material in his affidavit concerning his present understanding of the responsibilities of a company director redress such lack of confidence. His affidavit evidence was, to adopt language used in another case, somewhat "formulaic and mechanical".

- 27 A trustee who has conveyed trust property in breach of trust can in certain circumstances, *repent* and bring proceedings to recover the trust property.

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<sup>34</sup> [2003] VSC 230; (2003) 21 ACLC 1,237.

<sup>35</sup> *Ibid*, [72].

<sup>36</sup> *Ibid*, [109].

This so called "*locus poenitentiae* doctrine" has been described in this way:

The basic case in which the doctrine operates is clear and well-established: a claimant who transfers property under an illegal contract can recover the property if she freely abandons the contract before any part of her illegal purpose has been carried out. So, unlike repentance in the religious and moral contexts, the *locus poenitentiae* rule enables the claimant to retrieve her property only if she pulls out in time, that is, before any violation of the law has taken place. Repentance is therefore possible only in relation to the act of entering an agreement with an illegal purpose in mind, and not with regard to committing the offence itself. <sup>37</sup>

28 It has been referred to as a "highly equitable rule".<sup>38</sup> In *Wetmore v Porter*, 92 N.Y. 76 (1883) the plaintiff, Abram B Wetmore, was the executor of the estate of Alpheus Forbes. In collusion with the defendant, Mr Wetmore transferred \$12,000 worth of railway bonds belonging to the estate to an entity known as Porter & Wetmore jointly controlled by himself and the defendant, Mr Porter. Mr Wetmore subsequently tried to recover the bonds from Mr Porter in order to complete the administration of the trust, albeit unsuccessfully, and then brought a claim before the court. The court allowed Mr Wetmore to recover the railway bonds, and said "We see no reason why a trustee who has been guilty even of an intentional fault is not entitled to his *locus poenitentiae* and an opportunity to repair the wrong he may have committed".<sup>39</sup>

29 Similarly, in the case of *Atwood v Lester*, 20 R.I. 660 (1898) the court allowed the plaintiff executrix, who loaned money to the defendant in a collusive attempt to defraud the estate, to recover the money on behalf of the estate. The Court said:

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<sup>37</sup> I Samet, "*Locus Poenitentia: Repentance, Withdrawal and Luck*" in Ed. Charles Mitchell, *Constructive and Resulting Trusts* (2010) Hart Publishing at 341.

<sup>38</sup> R Pound, *Jurisprudence* (1959) West Publishing Co Vol 1 at 421-422.

<sup>39</sup> 92 N.Y. 76 (1883) at 85.

...where the plaintiff is acting in a representative capacity, and is handling the funds of an innocent beneficiary...In such a case the law permits him to undo the wrong, as far as may be, by restoring the said fund to its proper place; not, however, for his own sake, but solely out of regard to the rights of the innocent beneficiary.<sup>40</sup>

30 In *Sykes v Stratton* [1972] 1 NSWLR 145 the plaintiff and the defendant (as trustee) agreed to enter into a transaction that they were both aware was illegal to repay monies loaned in Australia into an account in Orlando Florida without authorisation from the *Exchange Control* authorities. The defendant, a solicitor, arranged for a third party to facilitate the transaction who disappeared with the money. The plaintiff sued the defendant for the recovery of the money. Helsham J, as the Chief Judge then was, referred to the cases in which parties had sought to bring themselves within the exception to the rule that courts would not countenance claims by persons implicated in illegality and said:

These cases seem to be based upon at least two requirements, namely that the money or goods have not been applied to the illegal object, or, as it is sometimes put, the illegal object has not been carried out, and a repentance in fact and in time by the person seeking to recover, giving a *locus poenitentiae*, as it is called. ...

31 Helsham J identified two prerequisites to the reliance upon this exception: (1) the action must in substance be to recover property or money that is still identifiable in the sense that it has not disappeared in the performance of the illegal transaction or otherwise; and (2) the person seeking its recovery has “repented of the transaction, has abandoned it, and seeks to recall the money or property”.

32 His Honour concluded:

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<sup>40</sup> See also the Canadian case of *Culina v Guiliani* [1972] S.C.R. 343.

The suit here is not for the recovery of trust property by a penitent, for that property is lost and the plaintiff requires the defendant out of his own resources to make good the loss.

But further I do not think the plaintiff has a locus poenitentiae. Until the money was lost he was content to let the defendant have it and apply it for the illegal purpose. True it is he cried a halt at one stage when it may have been open for him to do so, on 7<sup>th</sup> May, 1969, before plaintiff or defendant knew that the money had been stolen or removed; whether this would have been repentance in time is not necessary to decide, since almost immediately the plaintiff countermanded his instruction to stop the transaction. Whatever may have been the import of what the plaintiff then told the defendant to do - to hold everything as it was until he had time to think it over - this would not in my view amount to a repentance sufficient to attract the operation of the exception. To do that the illegal purpose must be abandoned: see *Berg v Saddler* ([1937] 2 KB 158), and that was not the case here. There is no locus poenitentiae where it is not the repentance of the party claiming recovery that causes the contract not to be carried out. ... The plaintiff cannot establish that there was a sufficient repentance or that it was in time, that is to say in time to enable him to demand recovery while the property was still in the hands of the defendant. ... Repentance was not in this case the cause of the contract being abandoned.<sup>41</sup>

- 33 The contract was abandoned, not because the plaintiff repented, but because of third-party absconded with the money. The contract must be abandoned before the illegal purpose is achieved. If there are possible competing reasons why the contract was abandoned, the Court will have to consider all of the evidence in deciding whether the exception is available to a trustee.

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<sup>41</sup> [1972] 1 NSWLR 145 at 164-166; see also *Nelson v Nelson* (1995) 184 CLR 538, per Dawson J at 577.

- 34 The world has changed quite remarkably since the enactment of the relief provisions of the *Trustee Act*. Relevantly there has been an exponential increase in the numbers of trustees in the financial and/or banking sector. This new breed of trustees is subject to statutory regulation some of which is quite intricate.<sup>42</sup> They are also trustees for the purpose of the *Trustee Act* with more stringent expectations imposed on them with the need to establish a “strong case” before the Court will grant relief.<sup>43</sup>
- 35 Another aspect to the lives of this new breed of trustees is a reward structure with bonuses that are greater than the life savings of many in the community. There is the new phenomenon of managers/trustees being paid out multi-million-dollar packages when the beneficiaries of the trust they were formerly managing have suffered extraordinary losses that continues to puzzle ordinary and reasonable members of the community.
- 36 Review of the case law leads to the irresistible conclusion that there is no growth industry in claims by trustees for the benefit of the locus poenitentiae doctrine or rule to recover trust property. Similarly there is no relevant increase in the number of applications for relief from breaches of trust under the *Trustee Act*. However experience suggests that there has been an increase in the number of applications for judicial advice. The importance of this step as a prerequisite to relief was recently emphasised by the High Court.<sup>44</sup> Irrespective of the obvious wisdom of satisfying that prerequisite, it appears that these corporate trustees are more willing to seek the courts’ guidance in difficult financial times when beneficiaries’ sensitivities are heightened.<sup>45</sup>

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<sup>42</sup> For example, *Corporations Act* 2001 (Cth) Chapter 5C; *Superannuation Industry (Supervision) Act* 1993 (Cth).

<sup>43</sup> *Re Mirvac Ltd; Re Mirvac Funds Ltd* [1999] NSWSC 457; (1999) 32 ACSR 107; *Re Investa Properties and Anor* (2001) 187 ALR 462 at 472; *Partridge v Equity Trustees Executors and Agency Co Ltd* (1947) 75 CLR 149; *Re Investa Properties and Anor* (2001) 187 ALR 462 at 472.

<sup>44</sup> *Macedonian Orthodox Community Church Saint Petka Incorporated v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand & Anor* (2008) 237 CLR 66 Gummow ACJ, Kirby, Hayne and Heydon JJ at [83].

<sup>45</sup> The increase in the applications for judicial advice has occurred since Austin J’s decision in *Re Mirvac Ltd; Re Mirvac Funds Ltd* [1999] NSWSC 457; (1999) 32 ACSR 107 in which his Honour decided, inter alia, that the Court had jurisdiction to provide judicial advice to responsible entities notwithstanding that the



- 37 In the main the trustees who have sought relief under the relevant sections have not been engaged in illegal activity or plans for illegal activity to which the locus poenitentiae doctrine may apply. Sadly, the majority of trustees who engage in illegal activity have consummated their deals and have either absconded with their millions, are being prosecuted or have been prosecuted and are serving sentences. The development of the more sophisticated investment vehicles, some of which are not vehicles at all, have enabled individuals and corporate entities (who have no desire to embrace repentance or seek forgiveness) to become trustees. Without making comment on the conduct of any particular individual who may presently be before the criminal courts, it is interesting to note the extraordinary circumstances exposed in *Trio Capital Limited (Admin App) v ACT Superannuation Management Pty Ltd* [2010] NSWSC 286. Notwithstanding the intricate statutory regime that is supposed to govern the conduct of these trustees Palmer J referred to the product disclosure statements that apparently induced financial advisors to invest in trust funds as “nothing more than gibberish”.<sup>46</sup> At the commencement of the litigation when an injunction was sought, it was not possible for senior lawyers briefed to describe what it was that Trio Capital actually did.
- 38 The financial press in Australia has recently reported that Australian managers/trustees of real estate investment trusts (REIT) have been shunned because of "shoddy management" (whatever that might mean). The following report was made only last month<sup>47</sup>:

In fact the quality, or lack of quality, of Australian REIT management has become a major issue for the international investors.

And those international investors - particularly the global property securities funds – are the market makers.

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trust instrument provided that the governing law was elsewhere than New South Wales. Austin J also gave judicial advice that the responsible entities would be justified in taking certain action: at [34]-[49].

<sup>46</sup> *Trio Capital Limited (Admin App) v ACT Superannuation Management Pty Ltd* [2010] NSWSC 286 at [26].

<sup>47</sup> Robert Harley "ING tussle gives investors hope" *The Australian Financial Review*, 24 January 2011.

Retail investors, burnt badly by the financial crisis are staying clear of the sector; the domestic property securities funds, once the market makers, are starved of new money; and the superannuation funds are looking elsewhere for their property exposure. Investors are looking for REIT managers who acknowledge the mistakes of the past - they want managers who actually look after their investors.

- 39 Looking for managers/trustees who acknowledge mistakes of the past may appear to be a search for the repentant trustee.
- 40 The concern to control the conduct of the new breed of trustees working particularly in the banking and/or financial sector became so great in the United States of America that the legislature introduced a provision known as the “honest services” requirement<sup>48</sup>, the intent of which was to prohibit schemes or artifices that would deprive another of what was referred to as the intangible right of honest services. The Supreme Court of the United States of America has now limited the application of that provision to corruption and bribery with the consequence that convictions that were not so connected have been quashed.<sup>49</sup>
- 41 The relief provisions of the trustee legislation throughout the nation have not been substantively amended, nor has it apparently been seen as necessary to amend them to accommodate the new breed of trustees. Although the courts have struggled a little with the statutory language, the concepts of honesty and reasonableness and the implied requirement to seek directions from the court have endured for a century in governing the conduct of trustees. It has not been necessary or appropriate for judges to set rules as to what acts are honest, reasonable, or fairly to be excused

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<sup>48</sup> See *Mail Fraud Statute* 18 U.S.C. §1341, *Wire Fraud Statute* 18 U.S.C. §1343 and the “Honest Services” requirement 18 U.S.C. §1346 (inserted in 1988).

<sup>49</sup> *Skilling v United States*. S.Ct. 2896 (2010); *Black v United States* 130 S.Ct. 2963 (2010).

because they are questions of fact to be determined in the light of all the circumstances of each case.<sup>50</sup>

- 42 Although the courts may be sympathetic, particularly towards the trustee who acts gratuitously, there are stringent tests for trustees to avoid liability and such avoidance seems relatively rare. Repentance does not seem to be an attribute of the modern trustee.

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<sup>50</sup> LA Sheridan, "Excusable Breaches of Trust" (1955) 19 *The Conveyancer and Property Lawyer* 420 at 437.