SUPREME COURT OF QUEENSLAND

CITATION:	*Custodial Limited v Cardinal Financial Services Limited & ors* [2004] QSC 452
PARTIES:	**Custodial Limited** (plaintiff / respondent) **v** **John Lethbridge Greig and Robert John Duff As Liquidators Of Cardinal Financial Services Limited** (First defendants / applicants) **and** **Mobandilla Land Co. Limited** (Second defendant / applicant) **and** **Mobandilla Land No.2 Limited** (Third defendant / applicant)
FILE NO/S:	BS8880/04
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	17 December 2004
DELIVERED AT:	Brisbane
HEARING DATE:	17 November 2004
JUDGE:	Atkinson J
ORDER:	**Application Dismissed**
CATCHWORDS:	EQUITY – TRUSTS AND TRUSTEES – TRUSTEES-THEIR APPOINTMENT, DISMISSAL, ESTATE, ETC – RETIREMENT AND REMOVAL – RETIREMENT – where Trustee gave notice of intention to resign – where Trustee purported to revoke notice of intention to resign – whether Trustee may unilaterally withdraw notice of intention to resign *Trusts Act* 1973 (Qld), s12, s14 *Uniform Civil Procedure Rules* 1999 (Qld), r 16 *Anderson v The Commonwealth of Australia* (1932) 47 CLR 50, cited

Barker v Peile (1865) 2 DR & SM 340; 62 ER 651, cited
Barton v The Queen (1980) 147 CLR 75, cited
Birrell v Australian National Airlines Commission (1984) 5 FCR 447, considered
Bunton v Muir (1894) 21 R (Ct of Sess) 370, cited
Burton v Shire of Bairnsdale (1908) 7 CLR 76, cited
Dey v Victorian Railways Commissioner (1948) 78 CLR 62, cited
Fitzgerald v Rogers [1910] QWN 1, cited
Fullarton Trustees v James (1895) 23 R (Sess Cas) 105, considered
General Investment Pty Ltd v Tyson [1967] Tas SR 96, cited
General Steel Industries Inc v Commissioner for Railways (1964) 112 CLR 125, cited
Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd [1899] 1 QB 86, cited
Madden v Kirkegard Ellwood and Partners [1983] 1 Qd R 649, cited
Mallott v Wilson [1903] 2 Ch 494, cited
Marks v The Commonwealth (1964) 111 CLR 549, cited
Preston v Star City Pty Ltd [1999] NSWSC 1273, cited
Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq) [2003] 1 Qd R 259, cited
State of New South Wales v Paige (2002) Aust Torts Reports 81-676; [2002] NSWCA 235, considered
Stone v ACE-IRM Insurance Broking P/L [2003] QCA 218, cited
Tara Shire Council v Garner [2002] QCA 232, cited
The Taupo Totara Timber Co Ltd v Rowe [1977] 3 All ER 123, cited
Weldon & Co v Harbinson [2000] NSWSC 272, cited

COUNSEL: G A Thompson SC with D Kelly for the applicant defendants
B D O'Donnell QC with M Stunden for the respondent plaintiff

SOLICITORS: Freehills for the applicant defendants
McCullough Robertson Lawyers for the respondent plaintiff

[1] The defendants in this action made an application to the Court to strike out the Claim and Statement of Claim by the plaintiff on the ground that the plaintiff lacked standing to bring the proceeding. If a party lacks an interest which would entitle that party to maintain an action, as it has no right capable of being vindicated in the matter, then the action should be summarily dismissed.[1]

[2] The application was made pursuant to Rule 16 of the Uniform Civil Procedure Rules (UCPR) or in the inherent jurisdiction of the Court. The relevant sub-rule of r 16 of the UCPR, r 16(e), gives the Court the discretion to set aside an originating

[1] see *Anderson v The Commonwealth of Australia* (1932) 47 CLR 50; *Fitzgerald v Rogers* [1910] QWN 1.

process. There appears to be no relevant difference in the grounds on which the Court might exercise its discretion under r 16(e) or its inherent jurisdiction in this case.

[3] This claim was commenced in response to notices by the second defendant, Mobandilla Land Co Limited ("Mobandilla Land") and the third defendant, Mobandilla Land No 2 Limited ("Mobandilla Land 2") which required the plaintiff, Custodial Ltd ("Custodial") to establish its interests under four caveats which Custodial had lodged on 23 September 2004. In the action, the plaintiff seeks declarations that the leases over the land, the subject of the caveats, are held on trust for the plaintiff, as well as orders directing the first defendant to transfer the leases to it.

[4] The proceedings were brought by the plaintiff on the basis that it is the trustee of the Mobandilla Cotton Project ("Project 1") and the Mobandilla Cotton Project No. 2 ("Project 2"). Project 1 was established by an Investment Deed dated 14 June 1995 ("Investment Deed 1"). Project 2 was created by an Investment Deed dated 4 May 1998 ("Investment Deed 2"). However the defendants contend that the plaintiff is no longer the trustee of either project as it has resigned from those positions and therefore has no standing to pursue the actions.

[5] The land which is the subject of the caveats is land owned by the second defendant and by the third defendant. The second defendant, Mobandilla Land, was the owner of the land listed below which is the subject of Project 1 (the "Project 1 land"). Mobandilla Land was also the lessor of the Project 1 land to Cardinal Financial Services Limited ("Cardinal"), who was the trustee prior to Custodial. Cardinal in turn sub-leased the Project 1 land to Mobandilla Land. The term of the sub-lease was in each instance for the same period as the lease (less one day). The Project 1 land included:

1. Lot 18 on Crown Plan CVN 809797, County of Carnavan, Parish of Winton, being all the land contained in title reference 18231196. This property is known as "Kingumbilla" and is situated near Goondiwindi. Lot 18 was subject to registered lease no 702435478 for a term commencing on 14 October 1997 and expiring on 30 June 2015.
2. Lot 17 on Crown Plan CAR 3464, County of Carnavan, Parish of Bloomfield, being all of the land contained in title reference 11975203 ("Lot 17"). Lot 17 was part of the land covered by registered lease number 702639051 for a term commencing on 30 June 1995 and expiring on 30 June 2015.
3. Lots 24 and 37 on Crown Plan CAR 3425, County of Carnavan, Parish of Bloomfield, being all the land contained in title reference 11975205 ("Lots 24 and 37"). Lots 24 and 37 were also part of the land covered by registered lease no 702639051 for a term commencing on 30 June 1995 and expiring on 30 June 2015.

4. Lot 2 on Crown Plan 853479, County of Carnarvan, Parish of Winton, being all of the land contained in title reference 50150764 ("Lot 2"). Lot 2 was covered by registered lease no 702639064 for a term commencing on 30 June 1995 and expiring on 30 June 2015.

[6] The third defendant is the owner of land subject to Project 2 (the "Project 2 land") being the registered proprietor of property known as "Morocco" more particularly described as Lot 20 on COG 80, County of Cogoon, Parish of Wycombe, being all of the land contained in title reference 50215198. It is also the lessor of "Morocco" pursuant to registered lease number 703163027 for a term commencing on 16 October 1998 and expiring on 1 July 2018. Cardinal is the lessee of "Morocco". Cardinal in turn was the sub lessor of the property known as "Morocco" to the third defendant as sub lessee for a term expiring on 30 June 2018.

[7] The Project 1 land and the Project 2 land were valuable. Although the valuations referred to in evidence do not refer to precisely the same land as that listed above, they are useful in an indicative sense. Land described as "Mobandilla" being portions 5V, 24 and 24A in the Parish of Bloomfield and Portion 2V in the Parish of Winton and "Kingumbilla" being Lot 18 in CVN 809797 in the Parish of Winton was valued on 7 June 2003 at $13,300,000 and the Project 2 land, "Morocco", was valued at $9,200,000. The lessee's interest in the remaining term of the lease over Lots 2, 17, 24, 37, "Kingumbilla" and Lots 3 and 4 on Crown Plan 853479 was valued on 9 November 2001 at $1,120,000.

[8] The Articles of Association for the second defendant and the 1995 prospectus for Project 1 show that Project 1 operated in the following manner. Mobandilla Land is the registered proprietor of the Project 1 land on which farming is carried out. Certain shareholders of Mobandilla Land referred to as "farmers" have a right to carry out the business of farming cotton and crops on the land and have the right to have their farm business managed by the manager. A farmer who is a party to a valid and current management agreement is referred to in Investment Deed 1 as an "investor". Mobandilla Land granted leases of the land to the then trustee, Cardinal, subject to the rights of farmers to occupy the land and carry on the business of farming cotton. The trustee in turn granted sub-leases of the land to Mobandilla Land to enable it to give effect to the rights of farmers to occupy portions of the land and to carry on the business of farming cotton and other crops. The manager agreed to manage the farms of certain investors holding a minimum of a particular number of shares in Mobandilla Land.

[9] Project 2 operated in a similar way in that the Mobandilla Land 2 was the registered proprietor of the Project 2 land and its Articles of Association provided that certain of its shareholders had the right to carry out the business of farming cotton and crops on the land and the right to have their farm business managed by the manager. A grower was a person who, amongst other things, had subscribed for a prescribed interest made available by the manager pursuant to a prospectus. Mobandilla Land 2 granted leases of the land to the then trustee, Cardinal, subject to the growers' right to occupy portions of the land and carry on the business of farming cotton and other crops as provided in Mobandilla's Articles of Association. The trustee

granted sub-leases of the land to Mobandilla Land 2, as agent for the growers, in order to enable Mobandilla Land 2 to give effect to the growers' right to occupy portions of the land and carry on the business of farming cotton and other crops as provided for in Mobandilla Land 2's Articles of Association. The manager agreed to manage the farm of any grower holding a certain number of shares in Mobandilla Land 2 pursuant to a management agreement.

[10] The reason for the complicated structure of this agricultural scheme for the growing of cotton was said in submissions to be "tax driven". It would be difficult to conclude, particularly given what has transpired, that the structure was economically efficient.

[11] Custodial was appointed trustee of Project 1 and Project 2 on 21 May 2002 upon the retirement of Cardinal by Deeds of Retirement and Appointment between Cardinal and Custodial ("Appointment Deeds").

[12] Pursuant to cl 6.1 of the Appointment Deeds, Custodial was entitled to exercise all the powers and enjoy all the rights and was subject to all the duties and obligations of Cardinal as if Custodial had been originally named as a party to the Investment Deeds. Pursuant to cl 7.1 of the Appointment Deeds, Cardinal and Custodial covenanted to execute all such documents and do or cause to be done all things as may be necessary or reasonably required or desirable on their respective parts and as may be within their respective powers to cause the assets of Project 1 and Project 2 to vest in Custodial in accordance with the Investment Deeds. This was necessary to effect the trustee's duty to get in the trust assets. Pursuant to cl 7.2, Cardinal was required to deliver to Custodial all books, accounts, documents and records and other property relating to the projects and pursuant to cl 7.3 Cardinal was required to transfer to Custodial the bank account for the projects. Pursuant to cl 7.4, if any assets of the projects remain vested in Cardinal, it was required to deal with those assets in accordance with the direction of Custodial in compliance with the terms of the Investment Deeds.

[13] The terms of the trusts are set out in the two Investment Deeds. The terms of the trust for Project 1 are set out in Investment Deed 1 made 14 June 1995 between Mobandilla Cotton Management Limited ("MCML"), the second defendant, Mobandilla Land, and Inteq Custodians Limited ("Inteq"), which appointed Inteq the trustee of Project 1. Inteq subsequently changed its name to Cardinal.

[14] The terms of the trust for Project 2 are set out in Investment Deed 2 dated 4 May 1998 between Mobandilla Management Corporation Limited ("MMCL"), the third defendant, Mobandilla Land 2, and Inteq (subsequently called Cardinal).

[15] As previously set out, Mobandilla Land and Mobandilla Land 2 were each the owner of certain farming lands. Each of Project 1 and Project 2 involved investors applying for allotments of shares in Mobandilla Land or Mobandilla Land 2, with each shareholder being entitled to occupy a portion of the land in order to carry on the business of primary produce, growing cotton and other crops. MCML was the manager of Project 1 and MMCL, the manager of Project 2. Curiously, the

Appointment Deeds described Cardinal as being the manager of the Projects. As a result, it was able to give notice of retirement as trustee to itself.

[16] From on or about 30 May 2002, Whittomba Limited ("Whittomba") was the manager of Project 1 and Project 2. Whittomba's directors are also directors of Mobandilla Land and Mobandilla Land 2 and Whittomba held equity in Mobandilla Land and Mobandilla Land 2.

[17] Custodial took steps to endeavour to have the leases transferred to it in accordance with the Investment Deeds and the Appointment Deeds, in particular cl 7.1. The leases were trust assets which Custodial had a duty to get in. Cardinal was obliged to effect transfer of the trust assets to Custodial. On 17 June 2003, Custodial wrote to the first defendants' accountants seeking copies of the leases. On 24 November 2003, Custodial again sought transfer of the leases and again followed it up by letters dated 22 December 2003 and 10 February 2004. On 2 July 2004, the liquidators of Cardinal signed a Statutory Declaration relating to lease documents which had been lost. These documents were required for registration of a transfer of the leases. The plaintiff's solicitors then undertook steps to have documents for the transfer of the leases prepared. However title searches by those solicitors showed that on 6 September 2004 the first defendant and on 8 September 2004 the second defendant, had signed surrenders of the leases over the Project 1 land and the Project 2 land. The plaintiff in its amended Statement of Claim claims that the surrender of the leases was in breach of Investment Deeds and Deeds of Appointment. The leases were surrendered without notice to Custodial.

[18] Both projects operated as prescribed interest schemes under the former Corporations Law. Neither project was registered as a managed investment scheme under Part 5C of the *Corporations Act*. In July 1999, the Australian Securities and Investment Commission ("ASIC") agreed to extend the period within which the projects must become registered managed investment schemes to 30 June 2004. In March 2003, ASIC announced that, in appropriate circumstances, it would grant relief to allow certain managed investment schemes until 30 June 2010 to comply with the registration requirements for managed investment schemes.

[19] On 16 December 2003, Whittomba applied to ASIC for an extension of the relief granted to the projects on the basis, inter alia, that the projects were passively managed and economically viable. However, on 22 June 2004, ASIC granted the relief only until 30 November 2004 as Whittomba was required under a Deed of Moratorium with the National Australia Bank (NAB) dated 11 April 2003 to put resolutions to a meeting of members of Project 1 and Project 2 to wind them up.

[20] On 23 June 2004, Whittomba wrote to Custodial about the future of the projects. It said that it proposed to enter into a new Deed of Moratorium with the NAB; withdraw the application to ASIC to extend the transitional relief beyond 30 June 2004 due to the uncertainty about the ongoing viability of the projects; proceed with an application to wind up the projects; and assist Mobandilla Land and Mobandilla Land 2 to refinance their existing debt to the NAB. In particular it said:

> "Whittomba has recently received notification from NAB of its agreement to enter into a new Moratorium period to expire 31 January 2005 provided the Projects are terminated and the leases surrendered on or about 31 August 2004."

[21] On 24 June 2004, Custodial told Whittomba that they did not believe that the withdrawal of the ASIC extension was in the best interests of the investors and would not effect a settlement that might prejudice property in the interests of the investors. Nevertheless, Whittomba formed the view that there was increasing uncertainty about the ongoing viability of the projects, advised ASIC of this view and asked it to revoke the relief it had granted.

[22] Custodial was of the view that Whittomba was acting in its own self interest in that it sought the termination of Project 1 and Project 2 so that it could seek refinancing for its own company and surrender of the leases was for this purpose. Custodial proposed therefore to replace Whittomba with an alternative manager, Rural Funds Management ("RFM"). On 30 June 2004, Custodial requested Whittomba to retire as managers of Project 2 in accordance with clause 15.1(f) of Investment Deed 2 whereby the manager covenanted to retire from office when requested to do so by the trustee where, inter alia, the trustee reasonably believed that it was in the best interests of the growers for the manager to retire.

[23] Whittomba asked Custodial to sign surrenders of leases as part of its refinancing arrangements with the NAB. Custodial refused to sign any surrenders of leases as it considered it would not be in the growers' interest to do so. It deposed that it formed the view that the surrender would prejudice scheme property and that Whittomba was not acting in the best interest of the growers. On 14 July 2004, Custodial sent a more detailed letter to Whittomba setting out its reasons requesting Whittomba be removed as manager of Project 1 and Project 2.

[24] In June 2004, Whittomba had asked ASIC to revoke the relief it had granted. Ian Bond, the secretary of Custodial, has deposed that Whittomba made this request of ASIC unilaterally without the support of Custodial and without the consultation of those who had been listed in the projects. On 26 July 2004, ASIC revoked the relief that had been granted. Mr Russell of Whittomba informed Custodial that Whittomba had entered into an agreement with NAB but refused to provide Custodial with a copy of that agreement.

[25] On 21 July 2004, Custodial gave written notice to Whittomba of its intention to resign as trustee of both projects ("Notice of Intention") as follows:

> " … in accordance with clauses 17.3 and 11.2 of each Projects Trust Deed the Trustee hereby serves three months notice (or earlier by mutual agreement) of its intention to resign as Trustee of both Projects."

[26] Custodial said that its position had become untenable. It gave as its reasons for serving Notice of Intention that:

> "Although ASIC have granted a further period of extension for the Projects, this relief has only been granted to 30 November 2004. This time period provides little opportunity to resolve the issues of the Projects and associated land companies along the lines the Trustee envisaged (subject to agreement by the Growers). In addition the National Australia Bank continues to maintain its position of enforcing its rights as a secured creditor to the land holding companies. This potentially threatens the water rights attached to the properties and hence the solvency of the Projects. Although the Trustee maintains these water rights form part of the Projects assets, considerable time and legal expenses will be incurred endeavouring to preserve these assets. In the meantime the viability of the Projects cannot be assured without access to sufficient water. It is not in the interest of Growers were the National Australia Bank to proceed to exercise those rights."

Custodial withdrew its notice to Whittomba requesting its resignation as manager. This Notice of Intention was served on the investors on 26 July 2004.

[27] Before the three months' notice had expired, on 1 October 2004, Custodial gave to Whittomba notice of revocation of its advice of intention to resign. Mr Bond deposed that after giving its Notice of Intention, Custodial continued to observe its obligations under Investment Deed 1 and Investment Deed 2. The withdrawal of the resignation ("Notice of Revocation") said:

> "Due to material non compliance by the Manager with the provisions of the Deed, Regulations and previous requisitions by the Trustee, and most importantly in the protection of Investors' interests, the Trustee gives notice of revocation of its intention to resign of 21 July 2004.
>
> The Trustee is in the process of preparing a notice of Meeting of Investors and will call a meeting as soon as possible.
>
> The Manager has no authority to negotiate scheme property until Resolutions are presented and passed at a properly convened meeting."

[28] Between the time when the plaintiff gave its Notice of Intention and its Notice of Revocation, Whittomba determined that it would be in breach of s 601ED(5) of the *Corporations Act* if it operated an unregistered management investment scheme which was required to be registered and that it would not therefore be able to secure the services of a replacement trustee. It also determined it would be contrary to the best interests of the investors in each project to delay the winding up of the projects.

[29] On 28 September 2004, Whittomba informed the growers that Whittomba had terminated the projects including the interests of the growers arising out of the Investment Deeds and management agreements for the projects. The letter commenced:

> "Following the resignation of Custodial Limited as the Trustee of both Projects in July 2004 the Australian Securities and Investments Commission (ASIC) revoked the relief it had previously granted in respect of the Projects. ASIC's decision was gazetted on 3 August 2004. You may recall from our earlier correspondence that we had previously made a submission to ASIC that the Projects were no longer viable and that the relief should be withdrawn."

[30] It may be open to doubt that the implication in the first sentence that ASIC's revocation of relief was as a result of the resignation of Custodial as trustee but it is again not possible on an application of this kind to determine whether ASIC withdrew the relief solely because of the earlier request by Whittomba or whether it was also the result of Custodial's Notice of Intention.

[31] Whittomba said that it believed it would be contrary to the best interests of the growers in each of the projects to delay winding up the projects, especially given the risk that the NAB would move to appoint receivers and managers to the Mobandilla Land and Mobandilla Land 2. The plaintiff has deposed that no meetings of Project 1 or Project 2 had been held to wind up the projects as is apparently required by cl 6.2(c) of Investment Deed with regard to Project 2. It should be noted however that that is not the only circumstance in which the projects can be wound up. However, the plaintiff refers to advice given to Whittomba by its solicitors, which was handed to the plaintiff, that winding up prior to the period for appointing a replacement trustee without modifying the Investment Deeds, would be in breach of the Investment Deeds.

[32] As previously referred to, on 6 September 2004, Mobandilla Land and Cardinal executed surrenders of the leases originally granted by it and Mobandilla Land 2 to Cardinal in its capacity as trustee of Project 1 and Project 2. It appears that the surrender of the leases was for no consideration despite the value of these leases. Mr Bond from Cardinal has deposed that the surrender of the leases was prejudicial to the scheme and that neither it nor the growers were consulted in relation to the surrenders. Further he deposes that the surrender of the leases was with full knowledge that the plaintiff had requested transfer documents so that the leases could be transferred to it. The liquidators of Cardinal signed the surrenders despite the fact that Cardinal had retired as trustee of the projects in May 2002. It appears that the second and third defendants wished to terminate the leases as it was easier to raise finance without them.

[33] Accordingly Mr Bond has deposed that Custodial provided the Notice of Revocation on 1 October 2004. It had on 23 September 2004 lodged four caveats with regard to the relevant leases. This litigation was commenced to vindicate the interests referred to in those caveats.

[34] On 6 October 2004, Custodial wrote to Whittomba setting out what it alleged were additional breaches by Whittomba under the covenants of the Investment Deeds and the prospectuses and again asked Whittomba to retire from the office of manager of

the projects. It is of course not possible, in an application of this kind, to determine the validity or otherwise of these allegations of wrongdoing.

[35] On 6 October 2004, Custodial applied to ASIC for relief from the transitional requirements of the law to become a registered investment scheme for another 12 months. On 27 October 2004, ASIC replied that it had received notification from Whittomba that the schemes had been wound up. It said that it was not in a position to make a determination as to whether or not the schemes had been validly wound up and would therefore not further consider the application at that time.

[36] An extraordinary general meeting of the growers and investors in Project 1 and Project 2 was called by the plaintiff and held on 3 November 2004 in Brisbane, where resolutions apparently endorsing the actions of Custodial appointing (subject to any ASIC approvals or grants of relief) RFM as manager of each project were passed.

[37] ASIC however maintained its stance that it was not in a position to make a determination as to whether or not the projects had been validly wound up and that if an agreement could not be reached with the manager about the legal status of the schemes, "it may be necessary to seek judicial guidance, or an order, from the court."

[38] These proceedings were commenced on 13 October 2004. As previously mentioned the defendants contend that the plaintiff is no longer the trustee of either project and therefore has no standing to pursue the actions.

Resignation of Trustee

[39] Once a person who has capacity to be a trustee has accepted appointment[2] as a trustee and the trust property has vested in that person, then the trustee cannot unilaterally resign or appoint a new trustee to act unless permitted to do so by statute, by the trust instrument[3] or by the court.

[40] Section 12 of the *Trusts Act* 1973 specifically confers a power to appoint new trustees when an existing trustee seeks to be discharged from all or any of the trusts or powers reposed in or conferred on the trustee. Section 14 provides for the retirement of a trustee by consent of the other trustees and s 15 deals with the vesting of trust property in new and continuing trustees.

[41] Clause 17 of Investment Deed 1 dealt with the questions of retirement of a trustee in the following terms:

"**17. <u>RETIREMENT OF TRUSTEE</u>**

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2 *Mallott v Wilson* [1903] 2 Ch 494.

3 *Bunton v Muir* (1894) 21 R (Ct of Sess) 370; *General Investment Pty Ltd v Tyson* [1967] Tas SR 96.

17.1 The Trustee covenants that it will retire as Trustee for the Investors if and when requested to do so by the Manager in the following circumstances:

(i) where it ceases to carry on business; or

(ii) on its being placed in liquidation, other than for the purpose of amalgamation, reconstruction or a purpose of a similar kind, or in official management; or

(iii) where a receiver, or a receiver and manager, is appointed in relation to the property of the Trustee and is not removed or withdrawn within 30 days of the appointment;

(iv) if the Trustee is not, or is no longer, empowered to act as a Trustee;

(v) if persons holding 50% or more in number of the Farms which are the subject of such valid and current Management Agreements resolve at a meeting that the Trustee should be removed;

(vi) if the approval of the Trustee to act under section 1067 of the Corporations Law is revoked.

17.2 On the retirement of the Trustee under any of the foregoing provisions of this clause or under clause 17.3 hereof the Manager shall within ninety (90) days from the date of such retirement or removal appoint in writing some other corporation approved by the commission to be Trustee for the Investors. Subject to any approval required by law, the Manager shall act as the Trustee in the period between the retirement of the Trustee and the appointment of a corporation to act as the Trustee provided that while the Manager is acting as the Trustee the Manager shall not make a public offering of the Interests provided for in this deed or issue any Interests provided for in this deed.

17.3 The Trustee may at any time resign on three months' written notice of intention to resign given to the Manager. The Trustee covenants that it will not accept a payment or other benefit in relation to retirement from that office that has not been approved by the votes of the holders of 50% or more of the value of the Interests.

17.4 The Trustee shall on retirement vest or cause to be vested in such new Trustee the property of the Project and any assets held by it on behalf of any Investor and shall deliver to such new Trustee all books documents records and other property whatsoever relating to the Project.

17.5 Upon the appointment of a new Trustee the retiring Trustee shall from the date thereof be absolved and released from all further obligations hereunder and such release shall be without prejudice to the liability of the Trustee under this deed to the Investors for any breach of its duties imposed by statute or rule of law and thereupon the new Trustee shall and may exercise all powers and discretions and enjoy all rights and be subject to all the duties and obligations of the Trustee hereunder as fully as though it had been originally named as a party hereto."

[42] Clause 11 of Trust Deed 2 is to similar effect. The three months' notice of intention to resign in cl 11.2 could, however, be reduced to "such lesser period of notice as

the Manager and the Trustee may agree." Cl 11.4 was also slightly different to 17.4. After the words "deliver to such new Trustee" were inserted the words "(or the Manager where the Manager is acting as Trustee)". In light of the finding below, it is not necessary to decide whether this difference in wording affects Custodial's position as trustee to bring this action.

[43] The defendants submitted that trustees are not able to withdraw a notice of intention to resign unilaterally. They argued that notice of intention to resign as a trustee is irrevocable. They rely principally on two authorities for that proposition. The first is a line of cases which provide that a resignation from employment cannot be unilaterally withdrawn. This is perhaps most clearly expressed by Spigelman CJ in *State of New South Wales v Paige*:[4]

> "Subject to any contractual or statutory provision to the contrary, the act of resignation from employment, or from membership of an organisation, is a unilateral act that takes effect in accordance with its terms and does not depend upon acceptance by the person or body to whom the resignation is directed. This common law principle is a reflection of the significance the common law has always attached to personal autonomy. Where this principle applies, unilateral withdrawal of a resignation or notice of termination is not possible."

[44] The value of this rule was explained by Gray J in *Birrell v Australian National Airlines Commission*:[5]

> "The purpose of providing in a contract for a period of notice of termination is to enable the party receiving the notice to make other arrangements. An employee given notice by his or her employer has a period of time in which to seek another job; an employer who receives notice has time to arrange for a substitute employee. It would be harsh if arrangements so made during the running of the notice could be disrupted, and parties could be held to their contracts by unilateral withdrawal of the notice at the last minute. Such withdrawal, if possible, could lead to an employee being bound by contracts of employment to employers, or an employer being bound by contracts of employment with two employees, each being required to give notice to one or the other in order to be extricated from this position, or possibly to suffer the requirement to forfeit or pay wages for a period of time. In my view, I should lean against the adoption of any principle which could lead to such unfortunate consequences, and I should follow the authorities which tend to establish that withdrawal of a notice of termination of a contract of employment can only be effected by consent of both parties."

[45] There are some problems arguing by analogy from the principles concerning the resignation of an employee to those concerning resignation of a trustee. It is, at best, an imperfect analogy. First, the significance of personal autonomy, which is a basis for the common law rule, is not so compelling when it is applied by analogy to

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4 (2002) Aust Torts Reports 81-676; [2002] NSWCA 235 at [277].

5 (1984) 5 FCR 447 at 458; referred to with approval by Spigelman CJ in *State of New South Wales v Paige* at [283].

the resignation of a trustee; a trustee may be, and often is, a company rather than an individual. Secondly, the general rule that a resignation of employment cannot be unilaterally withdrawn is not itself an invariable rule being subject to common law and statutory exceptions, as set out particularly in the judgment of Mason P in *State of New South Wales v Paige*.[6]

[46] Thirdly, the question of the capacity to withdraw a resignation as a trustee depends on the application of equitable rather than common law principles. It is a normal incident of an employment relationship at common law that it is unilaterally terminable by either party upon due notice.[7] In equity, on the other hand, a trustee may not unilaterally terminate the trust relationship unless permitted to do so by statute,[8] the trust instrument or the court.[9] As *Scott on Trusts* says, trustees cannot relieve themselves of their duties unless permitted to resign.[10] If a trustee retires in accordance with the provisions of the trust investment, as *General Investment v Tyson* shows, those provisions will be strictly construed. Even if the resignation is in accordance with the terms of the trust, the trustee is not relieved from liability for breaches of trust which have been committed.[11]

[47] For the application of the common law principle, that a resignation of employment cannot be unilaterally withdrawn, to trusts, the defendants rely on a decision of the Court of Session in Scotland from 1895, *Fullerton's Trustees v James*.[12] In that case, a trustee resigned his office as trustee in accordance with the statutory form in s 10 of the *Trusts Act* which provided, inter alia:

> "Any trustee entitled to resign his office … may do so … by signing a minute of resignation in the form of schedule A … or to the like effect, and may register the same in the Books of Council and Session".

The trustee then purported to recall his resignation relying on the fact that under the relevant Act a resignation was held to have taken effect three months after the date of intimation. In answering the question, what was the meaning of those words, the Lord President said:

> "The sound view seems to be that they merely continue the resigning trustee in the service of the trust for that period, but do not abate or make revocable the concluded act of resignation. The trustee, according to the theory of the Act, is not to throw the trust into confusion by a sudden resignation, and the remaining trustees are to have time to arrange for his successor, if need be."

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6 (supra) at [339] – [355].

7 *Marks v The Commonwealth* (1964) 111 CLR 549 at 570-571; *Birrell v Australian National Airlines Commission* (supra) at 457-458; *State of New South Wales v Paige* (supra) at [337].

8 *Trusts Act* 1973 (Qld) s14; *Trustee Act* 1925 (NSW) s8; *Trustee Act* (NT) s12; *Trustee Act* 1936 (SA) s15; *Trustee Act* 1898 (Tas) s14; *Trustee Act* 1958 (Vic) s44; *Trustee Act* 1962 (WA) s9; *Trustee Act* 1956 (NZ) s45.

9 Ford HAJ and Lee WA, *Principles of the Law of Trusts*, Thomson Law Book Co [8330].

10 Scott AW and Fratcher WF, *The Law of Trusts*, Vol 2, 4th ed, Little, Brown and Company, Boston, 106.

11 Scott, at 106.2.

12 (1895) 23 R (Sess Cas) 105.

[48] Lord Kinnear agreed, saying:

> "The minute of resignation bears that the granter does 'hereby resign, as and from the date hereof, the office of trustee', and in that respect it is in accordance with the form prescribed by the statute. So far as the resigning trustee himself is concerned, the act of resignation is complete. There is nothing more which it is necessary or possible for him to do in order to further his resignation. All that is required to relieve him of the duties and liabilities of his office is not an act within his own power, but merely the lapse of a certain period of time. If the statute, while providing that the resignation should take effect within a certain period of the intimation made by the trustee to his co-trustees, had prescribed nothing as to the form in which resignation should be made, I could understand that a more difficult question might have arisen. But the Act prescribes a form of resignation, and requires, when this mode of resignation is adopted, in order to relive the trustee of his duties and liabilities as trustee, that he must execute and deliver to his co-trustees a written instrument importing an absolute and immediate resignation from the date of the instrument.
>
> It appears to me, therefore, that no real difficulty is raised by the provision of the statute as to the period which is to elapse before the resignation shall take effect."

[49] It does not appear that *Fullerton's Trustees v James* has been referred to in any subsequent decision in the United Kingdom, the United States, New Zealand or Australia. It has been referred to once in Canada in *Dominion Square Corporation v Aluminium Company of Canada*[13] which concerned whether a notice of intention to terminate a lease took effect when given or when the period of notice had concluded. The majority held that the lease would not be determined until the expiry of the time in the notice.

[50] The determination of whether or not it is arguable that the trustee in this case had the capacity to revoke its notice of intention to resign is found firstly by an analysis of the trust deed wherein the power to resign is found; and, secondly the circumstances of the resignation and its withdrawal.

[51] The trust provides for "written notice of intention to resign"; and those were the words used by the trustee. This was unlike the words used in *Fullerton's Trustees v James*. This was not a notice of resignation on 3 months notice which would unequivocally be effective immediately; but rather a notice of "intention to resign". However there was no other action or notice required from the trustee. Giving of the notice was the effective act of resignation.[14] The position of Custodial as trustee would ordinarily end when that three month period expired.[15]

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13 (1942) SCR 73.

14 *The Taupo Totara Timber Co Ltd v Rowe* [1977] 3 All ER 123 at 126.

15 Cf *Weldon & Co v Harbinson* [2000] NSWSC 272 at [1].

[52] The plaintiff argued that a notice of intention to resign is quite different from a notice of resignation. The intention may change during the period of notice. In my view this would be a distinction without a difference in employment cases but is arguable in the case of resignation from a trust. The reason for this is found in the fiduciary duties imposed on a trustee, which are not lightly removed. The trustee after giving notice of intention to resign but before the period of notice has expired, is still a trustee. If during that period, the trustee becomes aware of facts or other parties doing things which suggest to the trustee that its resignation will not be in the interests of beneficiaries, then it seems to me that it is, at the very least, arguable that the trustee, in keeping with its duty to the beneficiaries, may withdraw its notice of intention to resign. In this case the plaintiff argued that it has acted to protect the beneficiaries of the trust by, for example, placing caveats over the project land to prevent the registration of the surrender of the leases. That argument cannot be dismissed summarily.

[53] In addition the plaintiff has an arguable case that its intention to resign is not completed until the end of the three month period when it retires, after which the manager has, pursuant to cl 17.2, 90 days after that retirement to appoint another corporation to act as trustee. The plaintiff remains the trustee during the three months' notice served pursuant to cl 17.3 prior to its retirement and the manager acts as trustee in the 90 days it has to find a new trustee pursuant to cl 17.2 after the trustee's retirement.

[54] Custodial also argued that, even if it has retired, it retained duties as a trustee pursuant to cl 17.5 which provides that the trustee is absolved and released from all further obligations under the Investment Deed upon the appointment of a new Trustee. No such appointment has taken place in this case, although the Investment Deeds provide that the Manager is to act as trustee in the period between the date of retirement of the trustee and the appointment of a corporation to act as trustee. On this argument, Custodial has not been released from its duty of trustee to get in the assets of the trust which include the leases. It does not appear to me that that is unarguable. It is consistent with the law set out in the *Restatement of the Law of Trusts*[16] that when the terms of a trust allow a trustee to resign, the resignation becomes effective only upon the acceptance of the trusteeship by a new trustee. Unless the trustee is discharged from liability, it retains standing to litigate with regard to or on behalf of the trust.[17]

[55] The court has an inherent power to stay or dismiss proceedings which are an abuse of its process.[18] But to do so here where the plaintiff has an arguable case would not appear to be an appropriate use of that power. The inherent power is to be exercised only in clear and appropriate cases.[19] This was not an application for

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16 Vol 2, St Paul, American Law Institute Publishers, 2003 at 36.

17 *Barker v Peile* (1865) 2 DR & SM 340 ; 62 ER 651.

18 *Barton v The Queen* (1980) 147 CLR 75 at 96, 107, 116.

19 *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125 at 130; *Dey v Victorian Railways Commissioner* (1948) 78 CLR 62 at 91-92; *Madden v Kirkegard Ellwood and Partners* [1983] 1 Qd R 649 at 652; *Stone v ACE-IRM Insurance Broking P/L* [2003] QCA 218 at [5]; *Tara Shire Council v Garner* [2002] QCA 232 at [6].

summary judgment pursuant to r 293(2) of the UCPR where a more robust test might be applied.[20]

[56] The circumstances in which a court may strike out a plaintiff's pleadings are limited. In *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd*,[21] Lindley MR held:

> "[the] summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks."

[57] In *Dey v Victorian Railways Commissioners*,[22] Dixon J held:

> "The application is really made to the inherent jurisdiction of the court to stop the abuse of its process when it is employed for groundless claims. The principles upon which that jurisdiction is exercisable are well settled. A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury. The fact that a transaction is intricate may not disentitle the court to examine a cause of action alleged to grow out of it for the purpose of seeing whether the proceeding amounts to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process."

His Honour quoted with approval the judgment of O'Connor J in *Burton v Shire of Bairnsdale*:[23]

> ".. the inherent jurisdiction of the Court to protect its process from abuse by depriving a litigant of these rights and summarily disposing of an action as frivolous and vexatious will never be exercised unless the plaintiff's claim is so obviously untenable that it cannot possibly succeed."

[58] These authorities were conveniently summarised by Barwick CJ in *General Steel Industries Inc v Commissioner for Railways (NSW)*:[24]

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20 See *Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq)* [2003] 1 Qd R 259 at 264-265 per Holmes J.

21 [1899] 1 QB 86 at 91.

22 (1948) 78 CLR 62 at 91.

23 (1908) 7 CLR 76 at 92.

24 (1964) 112 CLR 125 at 129.

> ".. these cases uniformly adhere to the view that the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, unless his lack of a cause of action – if that be the ground on which the court is invited, as in this case, to exercise its powers of summary dismissal – is clearly demonstrated. The test to be applied has been variously expressed; 'so obviously untenable that it cannot possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the Court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; 'be manifest that to allow them' (the pleadings) 'to stand would involve useless expense'."

[59] It could not be said that the plaintiff has no standing to bring this claim and that it could not succeed, and accordingly the claim should not be struck out.[25] The application is dismissed.

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25 *Preston v Star City Pty Ltd* [1999] NSWSC 1273.