BREACH OF TRUST BY PARTNERS

This article deals with the principles that relate to actions for breach of trust by partners against co-partners in regard to the use of partnership property, both in civil and criminal law. As the principles in regard to civil and criminal breaches of trust have not been laid down in a clear and concise manner by the courts in Singapore, an effort is made in this article to explain the principles that may enable the courts to identify breaches of trust. The scope and significance of these principles is then discussed in the context of breaches of trust by partners. In doing so, the article also focuses on the differences in the concepts of civil and criminal breach of trust.

I. INTRODUCTION

WHEN parties enter into an agreement to conduct a business jointly they often do so amidst pronouncements of mutual trust. When relationships become sour these same parties may be forced to ascertain what the term "trust" means in law. This may in turn lead to a consideration of the nature of their relationship. If their "business" has not been incorporated as a company, the law may view their relationship as a "partnership" and if a partner has acted against the interests of the partnership one may wonder whether it is possible to sue the deviant partner either in civil or criminal law for breaching the trust that the other partners had in him. In this paper an effort will be made to ascertain the principles that relate to (1) actions for breaches of trust in civil law by partners against co-partners in regard to the use of partnership property and (2) the criminal liability of partners for breach of trust. It would be imperative, therefore, to identify first a partner's rights and status in regard to partnership property. An effort will be made thereafter to explain the situations in which a partner may be viewed as holding partnership property in the capacity of a trustee and the instances in which breaches of trust occur in regard to the use of such partnership property.

Since the rules as to a partner's status in relation to partnership property are not clear, there has been considerable uncertainty as to when a partner can be viewed as a trustee of partnership property. Further, as partners are fiduciaries to one another their conduct could lead to breaches of their fiduciary obligations in the course of their dealings with partnership property. At times breaches of these fiduciary obligations could result in breaches of trust. It is, therefore, necessary to identify the situations in which partners act as trustees while they are in control of partnership property. As the principles in regard to civil breaches of trust have not been laid down in a clear and concise manner by the courts in Singapore, an effort will be made to explain the principles that may enable the courts to identify breaches of trust and apply the appropriate rules to the various situations in which breaches of trust by partners occur. Furthermore, an analysis of principles relating to civil breaches of trust may be relevant to explain the differences in the concepts of civil and criminal breach of trust, and to evaluate their significance and scope in the context of breaches of trust by partners in regard to partnership property.

II. The Status of a Partner in Relation to Partnership Property

When can one say that there is a "partnership"? What are the salient features of a "partnership" and how do partners stand in relation to one another and the "partnership"? What are their privileges in regard to the use of their own property and those of other partners which are pooled into the partnership assets?

The Partnership Act[1] defines a partnership as a relationship that "subsists between persons carrying on a business in common with a view to profit."[2] Thus two parties may be deemed partners even though they may not have agreed to act as partners. If they have acted the way partners would have the courts may view them as "partners". In other words, if they had carried on a business[3] with a view to profit they would be "partners".[4] The courts in effect would look more to the substance of the relationship than to the labels that the parties affix to their relationship in order to determine whether they are partners or not.[5]

A partnership does not constitute a separate entity. It merely represents the collective rights and duties of all the partners. The real property owned by a partnership is viewed as the property of the partnership and not that of individual partners. The interest of a partner in the real property of a partnership is considered personal property.[6] Megarry and Wade state, however, that the partners are in equity presumed to hold beneficial interests in the land that forms part of the partnership assets. They add that partners hold the land that forms part of the partnership property as joint tenants.[7] However, Lindley while accepting the view that real property included in partnership assets constitutes personalty, has added that the concept of joint ownership could apply to land and personalty:

> ... it is not always clear in relation to any particular item of partnership property whether they *[i.e.* partners] are interested therein as tenants in common, or as joint tenants without the benefit of survivorship, so far as a beneficial interest is concerned.[8]

1 The English Partnership Act c. 39, 1890 is part of the law of Singapore. See s. 5(1) of the Civil Law Act Cap. 30, Singapore Statutes, 1970 (Rev. Ed.).

2 S. 1(1) of the Partnership Act, *supra,* note 1.

3 The term "business" in the Partnership Act may be said to include every trade, occupation or profession, but does not include every activity carried on for a profit. For instance, owning property and collecting rent from tenants need not amount to carrying on a business unless "purchasing and leasing" property is a "trade". Lindley, *Law of Partnership* (Scammel and Banks eds., 15th ed., 1984) at pp. 11-12.

4 J.E. Smyth and D.A. Soberman, *The Law and Business Administration in Canada* (1983) at p. 633.

5 *Ibid*., at pp. 633-34.

6 P.H. Pettit, *Equity and the Law of Trusts* (5th ed., 1984) at p. 586, see also s. 22 of the Partnership Act, *supra,* note 1; real property will be viewed as personalty unless such conversion was inconsistent with the agreement between the parties. Lindley, *supra,* note 3 at p. 523.

7 R. Megarry and H.W.R. Wade, *The Law of Real Property* (5th ed., 1984) at pp. 428-429.

8 *Lindley supra,* note 3 at p. 516; for the view that there is neither a tenancy in common nor a joint tenancy but only a beneficial interest in favour of the partners in regard to the amount due to them after final accounts are taken on dissolution, see H. Potter, "Undivided Shares in Land" (1930) 46 L.Q.R. 71 at p. 77; see also *infra*., text to note 6 at p. 233.

A partnership, however, can sue in its own name in civil matters. A partnership can also be sued in civil matters by a third party through a reference to the name under which it operates.[9] Partners too can bring actions against one another in equity. In other words partners can bring actions against one another for specific performance, for an account, for an injunction and equitable relief in instances of fraud.[10]

A partnership is also treated as a distinct entity with assets of its own for accounting purposes.[11] Though what is "partnership property" has to be determined on a perusal of the terms of the partnership agreement, the Partnership Act itself provides a general definition of partnership property. Section 20 of the Partnership Act states that all property, rights and interests in property brought into the partnership stock should be identified in the absence of any agreement to the contrary as "partnership property". The property that is acquired by the partnership, by purchase or otherwise, on account of the firm or for the purposes of the partnership or in the course of the partnership's business is listed as "partnership property" by the Partnership Act.[12] This property has to be applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement (if any).[13]

The question of whether "property" is partnership property is a question of fact; its status has to be ascertained on the basis of whether it was treated as part of the common stock, or merely used, either on a rental basis or by gratuitous licence for the ancillary purposes of the partnership. It generally becomes difficult to establish in *a situation of doubt* that property is partnership property when one of the partners has had a sole interest in it before the partnership was established.[14]

A partner becomes entitled to partnership property only on the dissolution of the partnership and payment of the debts of the partnership.[15] A partner cannot point to specific property while the partnership is in existence and state that it is his own property. It is, however, the view of Drake (and also Lindley) that partners have a beneficial interest in the partnership assets which are held together as an undivided whole.[16] However, Drake has also added, rather inconsistently, that partnership property is owned by partners as trustees for the benefit of the firm.[17]

Partners stand in a fiduciary relationship to one another. As Finn has pointed out "the limiting obligation assumed by partners in relation to the use and enjoyment of the property itself introduces the fiduciary stamp and distinguishes partners from simple co-owners."[18] It is the undertaking that each partner gives to the other to act on his behalf that brings about the fiduciary relationship.

9 S. 23 of the Partnership Act; see also Lindley, *supra,* note 3 at pp. 584-85.
10 *Ibid*., Lindley at p. 591.
11 S. 20 of the Partnership Act.
12 Ss. 20 and 23 of the Partnership Act.
13 *Ibid*., s.20(1).
14 Underhill's *Principles of the Law of Partnership* (Ivamy and Jones, eds., 12th ed. 1986) at pp. 31-32; see also C. Drake, *Law of Partnership* (1983) at p. 136.
15 S. 39 of the Partnership Act.
16 Drake, *supra* n. 14 at pp. 156-157, see also *supra,* text to note 8.
17 *Ibid*., at p. 156.
18 P.D. Finn, *Fiduciary Obligations* (1977) at p. 96.

Who is a fiduciary? Waters has explained that the term is applied to anyone who undertakes a task on behalf of another, even though equity first conceived the term only in relation to trustees.[19] Sealy has indicated[20] that the term "fiduciary" is generally descriptive of a status that the courts wish to impart to a person when it wants to identify a relationship as a "fiduciary relationship." It is a term behind which certain rules and principles have been developed by the courts of equity. The term does not relate to a single class of relationships. It is because these rules and principles apply to a person engaged in a particular type of activity that he is termed a "fiduciary". Thus each fiduciary relationship is linked to a specific obligation. The same rules may not always govern these relationships. However, as Finn has indicated, fiduciary relationships may be broadly categorized under two heads:

> In one usage the term is employed to describe powers which are given to one person to be exercised for the benefit of another. The Judicial Committee, for example, has recently described the Board of Directors' power to issue shares as a "fiduciary power". This usage seems to be intended to imply that certain rules of Equity regulate the manner in which the donee deals with, and exercises, such a power. In a second usage the term describes in a very general way, persons who are acting for, or on behalf of, or in the interests of, or with the confidence of, another. An agent, for example, is often referred to as a fiduciary.[21]

One set of obligations of a fiduciary gives rise to what is known in modern law as the trustee-beneficiary, relationship. The obligations of a trustee may differ significantly from those of a fiduciary who is not a trustee. Sealy has pointed out that a fiduciary relationship resembles a "quasi-trust".[22] It covers relationships of confidence that do not fall within the ambit of the trust concept that the courts had developed earlier.[23] Subsequently, however, the term "fiduciary relationship" was used by the courts in relation to trust situations as well. Yet they are not the same. Not every remedy that can be sought against a trustee can be sought against a fiduciary as well. Sealy goes on to point out that no trust can exist where there is a debtor-creditor relationship.[24] However, even when a partner is not specifically entrusted with partnership property for a specific purpose, he can still be considered a fiduciary, when he deals with partnership property. As a partner he is viewed as a debtor to other partners. Even though there may not be a trust in such circumstances, he has to make good any loss to the other partners. Furthermore, the standard of care expected of a trustee in the performance of his obligations is different from that of a fiduciary. The standard of care that a fiduciary has to satisfy, depending on the nature of his obligation, is the one specified in either tort or contract.[25] As will be explained later, it would seem that the courts in Singapore have laid down varying standards of care for trustees in relation to their different obligations. In a trust relation-

19 D.W.M. Waters, *Law of Trusts in Canada* (1984) at pp. 712-13.
20 Sealy, "Fiduciary Relationships" [1962] Camb. L.J. 69; see also, [1963] Camb. L.J. 119.
21 Finn, *supra* note 18 at p. 2.
22 Sealy, [1962] Camb. L.J. 69 at p. 71.
23 *Ibid*., at pp. 71-72.
24 Sealy, [1963] Camb. L.J. 119 at pp. 119 to 120.
25 J.C. Shepherd, *Law of Fiduciaries* (1981) at p. 49.

ship both the trustee and beneficiary have proprietary interests. In other fiduciary relationships, for example, principal and agent, the agent does not acquire any proprietary interest. Nor does a director acquire a proprietary interest in the assets of the company that he controls. The principal can make a personal claim only from the agent and has to compete with other creditors of the agent, where there is a mere fiduciary relationship.[26] Trust property, on the other hand, cannot be claimed by the creditors of the trustee and where the trustee has mixed trust funds with his own funds or passed the funds on to a volunteer, as long as the trust funds are in an identifiable form, they can be "traced".[27] It is for this reason that Hanbury and Maudsley define a "trust" as a relationship recognized by equity "which arises where property is vested in (a person or) persons called trustees, which those trustees are obliged to hold for the benefit of other persons called *cestui que trust* or beneficiaries."[28] However, they add that such a "vesting" could also take place by operation of law.[29]

As areas of contract law, tort, property, wills, trusts and agency developed through rules that provided an immediate solution to a pressing problem, equity often had to intervene at various stages to facilitate the evolution of the law in these areas. As a result, it has not been easy to demarcate and classify *the rules governing fiduciaries* under various heads. As Shepherd has pointed out:

> In fact, some of the judges have chosen a rather novel way out of the rule application dilemma, by picking a handful of often unrelated fiduciary rules and showing that the facts of the case before them will fit within any of them. This practice of "hitting at all bases" makes it virtually impossible to determine the true ratio of the [a] case.[30]

The partner as a fiduciary cannot engage in any activity that would conflict with his obligations towards other partners. Each partner has also been viewed as an agent of the other partners.[31] The issue, however, has arisen when a partner, though he has a fiduciary relationship with other partners, holds partnership property in the capacity of a trustee. It has been repeatedly held in criminal cases by the Indian courts that the partner has a right over the whole of the partnership property.[32] If so, in what circumstances would a partner be holding partnership property in the capacity of a trustee? When could one say a partner has committed civil or criminal breach of trust in regard to partnership property? The Indian courts have held in criminal cases that only when the partner is "entrusted" with partnership property will he be viewed as holding partnership property in a fiduciary capacity.[33] The issue is the same in civil law as well. When does a partner become a trustee of partnership property?

26 Hanbury and Maudsley, *Modern Equity* (Martin, ed., 12th ed., 1985) at p. 48, see also, L. Scaly, [1963] Camb. L.J., *supra,* note 20 at p. 121.
27 *Ibid*., Hanbury and Maudsley, at p. 48; Sealy [1962] Camb. L.J., *supra,* n. 20 at p. 77.
28 *Ibid*., Hanbury and Maudsley at p. 46.
29 *Ibid.*
30 Shepherd, *supra,* note 25 at pp. 8-9.
31 S. 5 of the Partnership Act.
32 Ratanlal Ranchhoddas and D.K. Thakore, *The Indian Penal Code* (1984) at p. 340; the Penal Code in Singapore is very similar to the one in India.
33 See *infra,* pp. 235-236.

III. Breach of Trust in Civil Law

Though there may be a fiduciary relationship between partners, yet it has to be clearly established that the partner was in the position of an express trustee in regard to the partnership assets concerned before an action can be brought for breach of trust. Furthermore, it will also have to be established that the partner received the partnership property or alternatively, that he would have received it if not for wilful default or neglect on his part. A partner can be made trustee by the other partners. Very often the partnership agreement would make provision for the vesting of the partnership property in one or more partners as trustees of the firm. Or, alternatively, it could be said that all the partners hold the "undivided whole" as trustees for the benefit of the firm. If one partner breached the terms of the partnership agreement, he could be deemed as having breached the trust. However, this approach could lead to conceptual problems, because a firm may not satisfy the certainty of "objects" requirement in the law of trusts.

When does a breach of trust occur in civil law? If the partner as a trustee has not fulfilled his obligations under the terms of the trust there would be a breach of trust, irrespective of whether he has been fraudulent, negligent or incompetent. This is often called a "technical" breach.[34] Often clauses were included in the past in trust deeds to relieve the trustee of all liability in the event of a technical breach. The legislature then stepped in and provided the courts with statutory power to relieve the trustees of liability in the event of a technical breach, where the trustee had acted "honestly and reasonably, and ought fairly to be excused".[35]

There were other duties that a trustee had to perform in connection with a trust. These related to delegation of his responsibilities, investment and avoidance of conduct that may lead to a conflict between his interests and those of the partnership. There could be a breach of trust in these situations as well if the trustee violated an obligation that was imposed by statute or equity. These obligations coupled with the general obligation to exercise the care that is expected of a prudent man of business administering his own affairs formed what Waters called "substratum duties"; the duties associated with the particular trust were viewed as additions to these "substratum duties."[36]

In the case of *Re Haji Ali bin Haji Mohamed Noor, decd.*,[37] of the three executor-trustees who had been appointed under the will, the party who had managed the estate was declared bankrupt, and the High Court of the Straits Settlements had to decide whether the other two could be executed of all liability under section 60 of the Trustees Ordinance of 1929[38] for the breaches that had been committed by the bankrupt executor-trustee. One of the executor-trustees, who was also a beneficiary under the will, was the deceased's wife (the plaintiff).

34 Waters, *supra,* note 19 at pp. 987-88.

35 Hanbury and Maudsley, *supra,* note 26 at pp. 623-624; the power was first provided in 1896 under s. 3 of the Judicial Trustees Act c. 35, 1896; a similar provision is now found in s. 61 of the English Trustee Act of 1925 c. 19, 1925; for Singapore see s. 63 of the Trustees Act, Cap. 40, Singapore Statutes 1970 (Rev. Ed.).

36 Waters, *supra,* note 19 at pp. 690-91.

37 [1933] 2 M.L.J. 135.

38 Straits Settlements Ordinance No. 14 of 1929 (now s. 63 of the Trustees Act Cap. 40, Singapore Statutes 1970 Rev. Ed.)

The bankrupt executor-trustee was the deceased's eldest son (the first defendant). The third executor-trustee was the deceased's brother, who was a successful businessman (the second defendant). The judgment of Whitley J. does not refer to the portions of the trust deed that mentioned the powers of the trustees. It is difficult to determine from the judgment whether the court was referring to technical breaches or breaches of "substratum" duties. The tenor of the judgment, however, seems to indicate that the breaches of the bankrupt trustee and the co-trustees related to breaches of "substratum" duties. The court dealt mainly with the issue of whether the two co-trustees should be excused under section 60. However, the views expressed by Whitley J. do provide an insight into the standards that may have been contemplated by him in determining whether there were breaches of trust in the first place.

In deciding whether the wife ought to be excused for neglect of her obligations as a co-trustee under section 60, Whitley J. pointed out that the onus lay on her to establish:

i) that she acted honestly;

ii) that she acted reasonably;

iii) that she should be "fairly excused".

There was nothing to indicate that she had acted dishonestly. Had she acted reasonably? The wife was a semi-illiterate Mohammedan woman who knew very little about business matters. She left everything to be handled by her eldest son (the bankrupt trustee). It was reasonable for her to trust her eldest son — who had assisted his father in the management of his affairs. In deciding whether she ought to be fairly excused for the breach of trust Whitley J. held that it was important to consider the status of the trustee. His Lordship held that this was a material circumstance in determining whether the trustee should be excused or not. She was a "gratuitous" trustee (even though she was a beneficiary under the will) and was not performing her functions for a reward as a corporation would be, and therefore in view of her "honesty" and "reasonable conduct" she should be excused.

There was evidence to indicate that the first defendant (the son) had sought the advice of the second defendant (the brother) on several occasions, and that the latter had intermeddled in the management of the trust. The court pointed out that the word "honest" is used in many senses. In one sense a trustee is honest if he has not done anything dishonest. However, if a person assumed the responsibilities of a trustee and accepted a flimsy explanation of a co-trustee without making further inquiries, he may be deemed to have acted "dishonestly."[39] On this basis the court held that the second defendant should not be excused for the losses that were sustained as a result of the breach of trust until the court issued the administration decree to the executors. Whitley J. pointed out that the second defendant knew that his co-trustee was committing a breach of trust, he had access to all the accounts, yet he neither took any effective steps to prevent the breach of trust nor to renounce his executorship. His Lordship considered such conduct to be "dishonest".

[39] *Supra,* note 37 at p. 137.

The court also indicated that on the facts a case of *devastavit* by negligence could be established against the second defendant.[40] The personal representative is under a statutory obligation to administer the estate of a deceased person in accordance with the law and has a duty to preserve, protect and properly administer the assets of an estate with due diligence. If he does not perform any of these obligations an action for *devastavit* (a wasting of assets) can be maintained against him. There are three types of *devastavit:* 1) misappropriation of assets; 2) maladministration and 3) failure to safeguard assets. Even if the personal representative, in good faith, applied the assets of the estate for a purpose other than those provided for in the will or statute there would be "maladministration".[41] There is an overlap between breach of trust and *devastavit.* Liability for breach of trust, however, is wider than *devastavit.* A trustee, for instance, can be sued for breach of trust even in situations where he has caused no loss to the trust estate but has made a profit through the use of his office or made an unauthorized investment of the assets of the estate.[42]

There was evidence of maladministration of the estate and falsification of accounts by the first defendant in *Re Haji Ali.* The court held that this also amounted to a breach of trust. The court pointed out that an action for *devastavit* could also have been maintained against an active co-executor in these circumstances.

However, the court indicated that the second defendant was acting gratuitously and was not a beneficiary; he had not profited from the breach and did not seem to be too sure of his legal status *after the decree for administration was issued;* since the facts indicated that he had acted "honestly and reasonably" after the decree, he should be "fairly excused" from paying for the losses sustained as a result of the breaches of trust *after* the decree was issued.[43] Does this mean that it is only when the trustee is not aware of his status and obligations that he will be excused under section 60 for breaching the standard of care expected of him?

In what circumstances would *devastavit* through the negligence of an executor-trustee amount to a breach of trust? Was the higher standard of care expected of a prudent man of business applied to determine the breach of a "substratum" duty by the trustee *(i.e.,* the first defendant) or was the tort standard to determine negligence applied? Furthermore, the court did not explain clearly the standard that was used to hold the co-trustees liable for breaches of trust. The court did not indicate clearly whether it was laying down a different standard to determine liability for breaches of trust where the trustee is also a personal representative. Such a conclusion would have been more in keeping with the court's definition of "honestly" in section 60, for the court's explanation of the term "honestly" in section 60 of the Trustees Ordinance of 1929 seemed to border on the concept of negligence in tort law.

In *Ch'ng Joo Tuan Neoh* v. *Khoo Tek Keong,*[44] it was claimed by the plaintiffs, who were beneficiaries, that the trustee had committed

40 *Ibid.*, at p. 139.
41 A. R. Mellows, *The Law of Succession* (4th ed., 1983) at pp. 356-357.
42 *Ibid.*, at p. 358; for other situations in which the two concepts may overlap, see pp. 358-59.
43 *Supra,* note 37 at p. 137.
44 [1932] M.L.J. 141.

acts that amounted to breaches of trust or alternatively, "wilful default". The trustee had:

i) loaned trust funds on the security of jewellery without valuation;

ii) loaned trust funds to chetties without obtaining security; and

iii) occupied certain premises that belonged to the trust estate and not paid rental for twenty two months.

The defendant trustee had a contingent interest in one quarter of the estate. By the terms of the will the trustee was given an absolute discretion to invest as he saw fit and it seemed he was allowed to invest without security.

The trial judge (Whitley J.)[45] had held there were no breaches of trust; even if there were breaches the trustee should be excused under section 60 of the Trustees Ordinance of 1929.[46] Regarding (i) and (ii) Whitley J. held that the defendant had used the trust money in exactly the same way that his father had done. Furthermore, the court took judicial notice of the investment practice amongst wealthy Chinese during that time. They often found the modes of investment in (i) and (ii) convenient and safe in good times. It was mainly due to the adverse economic conditions that the investments had become precarious. After all, his Lordship pointed out, it is very easy to be wise after the event. Whitley J. held that the trustee had used ordinary prudence in selecting his investments.

Regarding (iii), his Lordship indicated that the plaintiffs had failed to prove that the trustee had been paying an inadequate rent. However, since the trustee admitted that his rent was inadequate, the court held, the trustee should be asked to pay the difference at 4% interest.

His Lordship went on to add that even if there were breaches of trust in the above instances the defendant should be excused under section 60. One could determine whether the trustee had acted "honestly and reasonably" by considering whether the trustee would have acted as he did with regard to the investments if he had been lending money of his own.[47] His Lordship held that in deciding whether the trustee should be "fairly excused" the status of the trustee should be considered. Relief should be given more readily if the trustee was a gratuitous trustee.[48] Whitley J. also referred to the views expressed in *Re City Insurance* (referred to below)[49] and held there was no "wilful default" in any of the situations mentioned in (i), (ii) and (iii) above.

Whitley J. clearly applied the standard of "ordinary prudence" to determine whether there was a breach of trust of a "substratum" duty. Then he went on to adopt more subjective criteria to determine whether the trustee had acted "honestly and reasonably" in order to be excused under section 60.

45 [1932] S.S.L.R. 100.
46 See supra, note 38.
47 Supra, note 45 at p. 108.
48 Ibid.
49 See infra, text to notes 55 and 56.

In the Court of Appeal of the Straits Settlements, Prichard J. pointed out that the trustee was bound to exercise the usual care expected of him by the general law. He did not explain the nature of this standard of care. Though his Lordship found that the conduct of the trustee was honest, yet he held that it was not reasonable to lend money on the security of jewellery without valuation or lend money without security.[50] Murison C.J. held that there was a breach of trust because the defendant had not "invested" the money when he loaned the money on the security of the jewellery. An investment should yield a "fair income".[51] Only then could one say there was an "investment". The loans to the Chetties were made on personal security. Giving loans upon personal security, his Lordship held, was an option that was not open to a trustee who has a discretion to invest even though such loans produce income by way of interest. Murison C.J. was referring to a breach of "substratum" duties. There were breaches of trust in both these instances. However, his Lordship added, in instances where there is an error of judgment by a trustee, there would be no liability if he has acted honestly in the exercise of an express discretionary power.[52] If so, when could one say a breach of a standard of care was due to an error of judgment? Often, erroneous judgments lead to negligent conduct.

Regarding the non-payment of rent for occupation of premises belonging to the trust estate Murison C.J. held there was a breach of trust. Murison C.J., however, held that the defendant had acted "honestly" in situations (i), (ii) and (iii) above.[53]

His Lordship indicated that a dishonest breach of trust could be viewed as "wilful default".[54] His Lordship adopted the views expressed in *In Re City Equitable Fire Insurance* Co.,[55] where it was held:

> that a person is not guilty of wilful neglect or default unless he is conscious that, in doing the act which is complained of or in omitting to do the act which it is said he ought to have done, he is committing a breach of his duty, or is recklessly careless whether it is a breach of his duty or not.[56]

There was no "dishonesty" on the part of the defendants in regard to situations (i), (ii) or (iii) in *Khoo Tek Keong*. Murison C.J., therefore, held there was no loss caused due to "wilful default". The views expressed in *Re City Equitable Fire Insurance* were adopted later in *Re Vickery*[57] in England.

His Lordship added in regard to (iii), that a trustee who has a contingent interest and has taken advances for himself by deducting the rental due from his expected share of the estate, and recorded this in the books of account does not commit "wilful default". It would simply be a situation of a debtor and creditor as between the trustee and the estate. Terrell J. and Prichard J. agreed with Murison C.J.'s

50 *Supra,* note 44 at p. 145.
51 *Ibid*., at p. 144.
52 *Ibid*., at p. 143.
53 *Ibid*., at p. 144.
54 *Ibid*., at p. 145. See also, s. 35 of the Trustees Act, Cap. 40.
55 [1925] Ch. 407.
56 *Supra,* note 44 at p. 144.
57 [1931] 1 Ch. 572.

views on "wilful default" in regard to (iii) above.[58] However, Terrell J. added, "An account will not be ordered on the footing of wilful default in respect of a single act of wilful default which has been admitted".[59] Terrell J., however, pointed out there was a breach of trust in (i) and (ii), because in (i), the money was loaned to the trustee's sister-in-law and brother-in-law respectively and in (ii) after lending the money to the Chetty, the very same day the defendant obtained a personal loan from the same Chetty. Since the transactions involved an obvious conflict between his personal interest and his duties as a trustee, his Lordship held the trustee's acts amounted to a breach of trust,[60] even though he had acted "honestly".[61] All three judges concluded that the defendant had not acted "reasonably" and should not be "fairly excused" under section 60.

The trustee in *Khoo Teck Keong* appealed to the Privy Council on the decision of the Court of Appeal in regard to (i) and (ii). Lord Russell held[62] that the loan which the trustee gave on the security of the jewellery was an "investment" because the loan carried interest. His Lordship pointed out that there was a misconception of fact on the part of Murison C.J., and since there was "income" there was in effect an "investment". Lord Russell, however, agreed with the views expressed in the Court of Appeal in regard to (ii) and expressly disapproved the views of Terrell J. in regard to the dishonest conduct of the trustee. The Privy Council held that the defendant should not be excused under section 60 for the breach in (ii) because his conduct was not reasonable as "he had never considered the question of these dealings with the trust funds in the light of his duty as a trustee, or paused to consider whether it was prudent for him as a trustee to lend on the personal security of the borrowers".[63] The Privy Council did not discuss the issue of whether there was loss caused by the trustee due to "wilful default" under section 35(1).

In *Khoo Tek Keong,* the Court of Appeal sought to draw a distinction between situations of breach of trust and loss due to "wilful default". Section 35(1) of the Trustees Act of Singapore deals with situations where "any loss" is caused to a trust due to "wilful default" by a trustee. The court held in *Re Haji Ali* that on the facts the acts of the second defendant did not constitute "wilful default", even though they could be viewed as "dishonest".[64] Did the Court of Appeal in *Khoo Tek Keong* adopt a narrower view of the term "honestly" than the High Court of the Straits Settlements in *Re Haji Ali?* Is there a significant difference between the terms "error of judgment" (in *Khoo's* case) and "error of judgment due to a failure to make an inquiry" *(Re Haji Ali's* case)? Should negligent conduct be included as a factor in determining "dishonesty"? Should a dishonest breach of trust be viewed as "wilful default"?

In *Ghows Khan* v. *Uteh Zabaidah*[65] Whitley Ag. C.J. avoided explaining "wilful default" in the context of concepts of "honesty".

58 *Supra,* note 44 pp. 146 and 148.
59 *Ibid*., at p. 148.
60 *Ibid*., at pp. 147-148.
61 *Ibid*., at p. 148.
62 [1934] A.C. 529.
63 *Ibid*., at pp. 536-537.
64 *Supra,* note 37 at p. 139.
65 [1936] 2 M.C. 131.

His Lordship held that for a trustee to be "chargeable" for a breach of trust there should be an unauthorized act causing loss to the estate. The loss should flow from an "active" act. If there is no loss the trustee cannot be "chargeable" even if there is a "flagrant breach of trust". His Lordship added that any passive as distinguished from active breaches of trust would constitute "wilful default", and that all "wilful defaults" constituted breaches of trust. He defined "wilful default" as "a wrongful neglect or omission by the executor [or trustee] to do what he ought to have done in the performance of the trust which neglect or omission results in loss to the estate".[67] Therefore, a trustee could also seek a defence under section 60 for "wilful default".[68] The defendant trustee in this case failed to enter the accounts properly and had accumulated large quantities of rubber at a time when prices were falling. The estate suffered a loss and Whitley Ag. C.J. held that there was a breach of trust through "wilful default" on the part of the trustee in both instances and since he had not acted reasonably he could not be excused under section 60 of the Trustees Act. In deciding whether there was "wilful default" in regard to stockpiling the rubber instead of selling it, Whitley Ag. C.J. added no *prudent* man would have acted the way the defendant did and that one act of wilful default was sufficient for the defendant to be "charged".[69]

In would seem that the courts in Singapore and Malaysia have not laid down clear guidelines to determine:

a) breaches of "substratum" duties;

b) "honest and reasonable" conduct on the part of a trustee that "ought to be fairly excused";

c) "wilful default" under section 35(1) of the Trustee Act.

All the judges, however, have indicated that the defence in section 60 (now section 63 of the Trustees Act) can be pleaded in situations where there is a technical breach or a breach of a "substratum" duty. This section, however, was originally drafted to protect trustees from being held liable for technical breaches.[70]

In other Commonwealth jurisdictions the courts have held that the trustee has to exercise the same degree of diligence and care that an ordinary prudent man of business would exercise in conducting a business that is his own.[71] This has become the standard of care expected of a trustee in regard to the performance of his "substratum" duties.[72] The standard of care expected of the trustee is an objective one. There is some controversy as to whether the same test should be applied to trustees who have neither business experience nor previous working experience as a trustee. The Ontario Law Reform Commission, for instance, has recommended that the standard of care should be lowered to the exercise of that degree of care, diligence and skill

66 *Ibid*., at p. 137.
67 *Ibid.*
68 *Ibid*., at p. 138.
69 *Ibid*., at p. 144.
70 Report on the Law of Trusts, Vol. I (1984) (Ministry of the Attorney General: Ontario) at p. 37.
71 Hanbury and Maudsley, *supra,* note 26 at p. 473; some judges use only the term "prudent man" — in such instances the judges are in effect referring to the prudent man of business. See Waters, *supra,* note 19 at p. 753.
72 See Waters, *supra,* note 19 at pp. 690-91.

that a person of ordinary prudence would exercise in dealing with the property of another.[73] The English courts, however, have not adopted the higher standard adopted in the United States in regard to professional trustees. Under the American law relating to trustees, if a trustee procures his appointment as trustee by representing that he has greater skill than that of a man of ordinary prudence, the courts will judge his conduct in the light of the standard of care expected of a person exercising such skill.[74]

The views that Whitley J. expressed in the High Court in the case of *Khoo Teck Keong,* as to how the terms "honest and reasonable" and "ought to be fairly excused" should be interpreted seem to be less inconsistent than those expressed by Murison C.J. in the Appeal Court. Section 63, however, does not provide any guidance as to how these phrases should be interpreted. Rather than laying down guidelines to determine what these terms mean, should the courts decide whether a trustee ought to be excused by judging each case on its own merits? In fact, the Privy Council in *Khoo Tek Keong* did not offer an explanation as to how these terms ought to be interpreted even though it approved the Court of Appeal's decision to excuse a breach of trust in one instance.

Murison C.J. in *Khoo Tek Keong* indicated that a trustee could be held liable for causing a loss to the estate if there was "wilful default" on his part. He interpreted this term to mean "dishonest breach of trust". Whitley Ag. C.J. in *Ghows Khan* restricted the term to "passive" breaches of trust that flow from "wrongful neglect or omission". The original version of section 35 was enacted in 1859 as section 31 of the Law of Property Amendment Act[75] to protect the trustee against losses caused to the trust estate through the acts and omissions of his agents. As explained earlier, section 63 was enacted for the purpose of excusing a trustee for a technical breach. Both these provisions were originally enacted to protect trustees.[76] By including "loss caused by wilful default" as a ground for determining breaches of trust, the courts in Singapore and Malaysia seem to have completely lost sight of the history behind sections 35 and 63.

In the law of trusts the emphasis is on providing compensation in the event of a breach rather than on punishing the trustee. However, the courts have come close to awarding punitive damages against trustees in instances where the breach is either grave or deliberate.[77] Shepherd even goes to the extent of stating that the imposition of a constructive trust is penal in nature.[78] A trustee is liable for his own acts and omissions and not those of a co-trustee, unless he has indirectly contributed by an act or omission to facilitate the breach of trust.[79] The measure of a trustee's liability is the loss caused by the breach to the trust estate. The burden is on the plaintiff to establish a causal

73 *Supra,* note 70 at p. 29.
74 *Ibid*., at pp. 29-31.
75 15 and 16 Geo. 5, c. 20.
76 Waters, *supra,* note 19 at p. 698; *supra,* note 35.
77 Waters, *supra,* note 19 at p. 994.
78 Shepherd, *supra,* note 25 at p. 56.
79 Hanbury and Maudsley, *supra,* note 26 at p. 610; Waters, *supra,* note 19 at p. 991.

connection between the breach of trust and the resulting loss or profit that the trustee makes.[80]

For purposes of considering the liability of trustees it is immaterial how the trust was created; it may have been created for valuable consideration or by gift, but the rules applicable to breaches remain the same.[81]

There are several advantages in suing for breach of trust rather than in tort or contract. First, if the court finds there is a fiduciary relationship none of the rules relating to remoteness of damage or other restrictive doctrines will apply.[82] Also, no limitation periods will apply where an action is brought against a trustee in respect of any fraud, fraudulent breach of trust or recovery of trust property or proceeds of trust property in the possession of the trustee.[83] The limitation periods will not apply even in regard to an action against the trustee where there has been conversion of trust property to his own use.[84] The plaintiff could also seek to trace the assets into the hands of a third party.

Thus to sue a partner for breach of trust in civil law it has to be shown that he was appointed a trustee of the partnership assets under the partnership agreement or that he was made an express trustee of the assets subsequently. A partner who is a trustee of partnership assets can be sued for a technical breach of the terms of the trust under which he controlled and used the partnership property or for the breach of his "substratum" duties. The courts in Singapore have concluded that both these types of breach may be excused under section 63 of the Trustees Act, even though the section was originally enacted as a defence to technical breaches. Further, it should be noted that section 35(1) of the Trustees Act does not refer to another form of breach of trust; the section merely provides relief to the trustee when the acts of his agents cause loss to the trust estate. These, therefore, are the rules that the courts should take cognizance of in determining the liability of partners for civil breach of trust.

There are other situations in which a partner may be viewed as a trustee. If a partner has engaged in fraudulent or unconscionable conduct the court may treat the partner as a constructive trustee. Developments in the law in this regard will be discussed in the context of the term "entrustment" under criminal breach of trust *(infra).* The

80 Pettit, *supra,* note 6 at p. 425.

81 *Ibid*., for defences of a trustee in proceedings for breach of trust, *ibid*., pp. 434-445; for the law in Singapore, see W.J.M. Ricquier and S. Yeo, *Breaches of Trust in Singapore and Malaysia* (1984) pp. 26-31.

82 Shepherd, *supra,* note 25 at p. 9.

83 S.22 of the Limitation Act, Cap. 10, Singapore Statutes 1970 (Rev. Ed.).

84 S. 22(2) of the Limitation Act states that subject to s. 22(1) no action can be brought for breach of trust or recovery of trust property after the expiry of six years from the date on which the right of action accrued; s.6(2) states clearly that no action for account can be brought six years after "the time in respect of which the matter arose"; s. 6(8) states, subject to ss. 22 and 32 (which deal with laches, acquiescence and equitable grounds for denying relief) no equitable relief can be claimed six years after the cause of action accrued. Thus, it would seem if there is a breach of a fiduciary obligation as distinguished from a breach of an obligation under a trust, an action will have to be brought within six years of the accrual of a cause of action.

same principles will be relevant to determine whether there is a constructive trust in civil law. If a partner is deemed to be a constructive trustee he will have to exercise the standard of care expected of express trustees in dealing with the partnership property.

If it is not possible to establish that the partner was a trustee, the plaintiff will have to prove that there was a breach of a fiduciary obligation. Sections 29 and 30 of the Partnership Act list the obligations that arise from the fiduciary relationship between partners. These are supplemented by the other obligations of fiduciaries in equity.[85] Thus even though a partner may not be a trustee, he may still have certain fiduciary obligations to fulfil.

IV. CRIMINAL BREACH OF TRUST

Section 405 of the Penal Code[86] defines the offence of criminal breach of trust. It states:

1) the accused should have been entrusted with property or with dominion over the property;
2) he should have:
   a) dishonestly misappropriated or converted the property to his own use, or
   b) dishonestly used or disposed of the property in violation of:
      i) any direction of law prescribing the mode of discharge of the trust; or
      ii) any legal contract concerning the discharge of the trust; or
   c) wilfully suffered another person to:
      i) misappropriate or convert the entrusted property to his own use; or
      ii) use or dispose of the property in violation of any direction of law or any legal contract concerning the discharge of such trust;....[87]

In order to prosecute a partner for criminal breach of trust it has to be clearly established that the partner acted "dishonestly". Section 24 of the Penal Code defines "dishonestly" as "causing wrongful loss" or "gaining wrongfully". "Wrongful loss" is defined in section 23 as loss caused by unlawful means of property to which the person losing is legally entitled. The same section defines "wrongful gain" as gain by unlawful means of property to which the person gaining is legally not entitled. In civil breach of trust situations the state of mind of the trustee is irrelevant. Unlike in civil law, however, it need not be shown that the partner was in the position of an express trustee for a charge to be laid against him for criminal breach of trust. All that has to be shown is that the partner was "entrusted" with partnership property. Judges in India, Singapore and Malaysia have used the term

[85] See Sealey, *supra,* note 22 at pp. 75-79 for a summary of these fiduciary obligations.
[86] Cap. 103, Singapore Statutes 1970 (Rev. Ed.).
[87] Ricquier and Yeo, *supra,* note 81 at p. 36; also see *P.P.* v. *Yeoh Teck Chye* [1981] 2 M.L.J. 176 at p. 177.

to cover all situations where property is given to a person for a purpose.[88]

In recent years criminal breach of trust has been viewed as a very serious offence in Singapore.[89] The sections that follow section 405 refer to aggravated forms of criminal breach of trust by parties in positions of confidence. Since the Penal Code views punishment by way of fine or imprisonment as the mode of redress for the wrong that may result from criminal breach of trust, it clearly limits the situations in which criminal breach of trust may be committed to forms of conduct that fall within categories 2(a), (b) and (c) above. Negligent conduct on the part of a person entrusted with property may amount to civil breach of trust.[90] Such conduct will not amount to criminal breach of trust. Even clause 2(c) refers to the accused "*wilfully* suffering another to do so" — that is, permitting another to violate the terms of the entrustment, being fully aware of the impending violation. In such a situation the accused would be acting intentionally knowing fully well that he is violating the terms of the trust by permitting another party to do one of the acts specified in 2(a), (b) or (c). Though the accused may not have a dishonest intention, yet the party who assists the accused may in fact be acting "dishonestly". It has to be proved that the third party who induced the accused to breach the terms of the trust wilfully, acted "dishonestly". If not, an unduly onerous duty will be placed on the accused. In every situation where he permits another to deal with the property in view of the exigencies of a situation not contemplated at the time of entrustment in breach of the terms of entrustment, there would be criminal breach of trust even though the other party does not receive the property dishonestly. Such an approach would result in every person who is "entrusted" with property being exposed to a charge of criminal breach of trust whenever there is a technical breach of the terms of "entrustment" as a result of property being handed over to a third party. Given the broader interpretation of the term "entrustment" by the courts (in comparison to the term "trust" in civil law), it would lead to the intolerable situation of those "entrusted" with property being subjected to criminal sanctions for certain types of technical breaches which in civil law would have been excused had there been a "trust". Therefore, for an action to be maintained under limb 2(c) "dishonesty" on the part of the receiver will have to be clearly established.[91]

Beside these major distinctions in the approaches of the Penal Code and the civil law to breaches of trust, the term "entrustment" also adds another dimension to the complex process of identifying breach of trust in criminal law.

Section 405 states that the accused should have been *entrusted with property* or *entrusted with dominion over property.* In *Sinnathamby* v. *P.P.*[92] the accused, an employee of the Public Works Department,

88 See *Velji Raghavji Patel* v. *The State* A.I.R. 1965 S.C. 1433 at p. 1435 (India); *R.* v. *Lee Siong Kiat* [1935] 4 M.L.J. 53 at p. 56 (Terrell J. stated the term "entrustment" is used in its "popular sense") (Singapore); *Sathiadas* v. *P.P.*. [1970] 2 M.L.J. 241 at p. 243 (Malaysia).

89 See Ricquier and Yeo, *supra,* note 81 at pp. 62-74.

90 See *supra,* text to note 33; Pettit, *supra,* note 6 at p. 425.

91 For a contrary view, see Ricquier and Yeo, *supra,* note 81 at pp. 49-52.

92 [1948-49] M.L.J. Supp. 75.

deposited stones from a quarry belonging to the department at a place where a third party could remove them. The accused was paid $10.00 for the stones by a third party. Thomson J. in the High Court of Malaya stated:

> I take the view that the section applies not merely in cases where the exercise of dominion over property is one of the legal incidents of the contract of service but in every case where by virtue of the existence of the contract of service the accused person is in fact in a position to exercise dominion as in this case.[93]

The accused was convicted of having committed criminal breach of trust (CBT) on the basis that he was entrusted with dominion over the stones, even though his immediate superior had overall control over the stones. Does this mean that the term "entrusted with property" refers to overall or supervisory control over property and "entrusted with dominion over property" in turn refers to actual control over the property? Gledhill disapproves of the interpretation of the term "entrustment with property" as entrustment of immovable property and "entrustment with dominion over property" as entrustment of movable property. He states that the term "property" is unqualified and cannot be restricted to either movable or immovable property.[94]

Ratanlal and Thakore indicate:

> In cases of criminal breach of trust a distinction has to be drawn between the person entrusted with property and one having control or general charge over the property. In the case of the former, if it is found that the property is missing, without further proof, the person so entrusted will be liable only when it is shown that he misappropriated it or was a party to the criminal breach of trust committed in respect of that property.[95]

In other words, Ratanlal and Thakore seem to suggest that a person "entrusted with property" is the one in physical control of the property and the party having "control or general charge over the property" is "entrusted with dominion over the property."

Mayne offers an explanation similar to that of Ratanlal and Thakore:

> A person is entrusted with property, when he is given the *[sic]* actual possession of it, as the trustee of a marriage settlement, or a banker. He is entrusted with dominion over it, when the possession remains with the owner, but he is given authority to dispose of it under certain conditions, as a shopman, or an agent with a power of attorney to sell.[96]

In a recent Malaysian case, however, the court looked to the degree of control exercised over the property by the accused to determine whether there was "entrustment" or not. In *Chang Lee Swee* v. P.P.,[97] it was held that the person who has the general power of control over

93 *Ibid*., at p. 76.
94 A. Gledhill, *The Penal Codes of Northern Nigeria and Sudan* (1963) at pp. 571-72.
95 Ratanlal and Thakore, *supra,* note 32 at p. 339.
96 J.D. Mayne, *Criminal Law of India* (1914) (4th Ed.) at p. 653.
97 [1985] 1 M.L.J. 75.

the property is the one who has been "entrusted" with the property. In *Chang Lee Swee,* the accused, who was the executive director of finance of T. Company, transferred $390,000 to another company in which he held a substantial number of shares. He did so without the approval of the managing director of T. Co. The High Court held that even though the accused was in actual control of the funds, yet he was not in a position to manage the funds without the overall control of the managing director and therefore, it could not be said that he had been entrusted with property or with dominion over the property. On this ground, the accused was acquitted. However, in an earlier case, *P.P.* v. *Yeo Teck Chye,*[98] the Federal Court convicted the accused (the second accused) who was a manager of a branch bank in Kuala Lumpur for criminal breach of trust for authorizing the withdrawal of substantial sums of money through loans and the use of overdraft facilities without the consent of his superior (the first accused), who was the Deputy Manager of the Bank. The court indicated that there was an implied term in the contract of employment of the second accused that he should not authorize certain types of loans and overdraft facilities without the permission of the first accused. Surprisingly, the counsel in the High Court and the Federal Court agreed that the bank's money had been entrusted to the accused even though he was not in a position to authorize the overdraft and loan facilities without the permission of the first accused.

If one is to assume as in *Yeo Teck Chye's* case that if the property was given to the accused for a purpose there is "entrustment", Mayne's approach would be a preferable one to determine whether the accused was entrusted with property or with dominion over property, although there is some doubt as to whether the section should apply to immovable property as well.[99] Thus if one is able to identify the type of control that has been exercised by the partner who has been charged with criminal breach of trust, it may be possible to indicate precisely whether he has been "entrusted *with property"* or "entrusted *with dominion over property"*. Prior to that, however, the prosecution will have to establish whether there was *entrustment* in the first place, that is, whether the property was "handed over" to the partner for a specific purpose. If the accused was a partner it may even be necessary to probe further and ask the question whether the accused held the partnership asset in a fiduciary capacity.

The courts in Singapore have been a step ahead of the Indian courts on the issue of whether a partner can misappropriate partnership assets. Once it is established that a partner can misappropriate partnership assets, adducing evidence to show "entrustment" in order to prove the graver offence of CBT becomes much easier.

In *Haji Sahid* v. *Shaik Peroo*,[1] the accused and two brothers entered into a partnership to manage a betel nut plantation. They borrowed $95.00 and the accused's share of the amount to be repaid was $50.00. The debt was to be repaid in the form of nuts obtained from the plantation. When the nuts were ready for plucking, the accused requested and obtained along with his share another partner's share of the nuts as well to pay off the loan. The accused then used part

98 [1981] 2 M.L.J. 176.
99 See Gledhill, *supra,* note 94 at p. 572.
1 (1875) 3 Kyshe 79.

of his partner's nuts to pay oft his own share of the debt. He sold off the balance and took the money for his own use.

On being charged for having committed the offence of criminal breach of trust, the accused contended that he was a partner and therefore he could not "misappropriate" partnership property because he jointly owned the property with others. How could he possibly misappropriate his own property?

Ford J. held that a partner's true interest is in fact restricted to his share with certain rights to separate it from the partnership assets in accordance with the terms of the partnership agreement. During the partnership he has only certain powers of dealing with the shares of his co-partners to further the aims of the partnership.

His Lordship pointed out that in English law provision has been made by legislation,[2] to hold a partner liable for embezzlement of partnership funds, as if he were not a member of the partnership. Even though this provision is not part of the law of Singapore, his Lordship added, in view of the absence of an express prohibition of actions relating to criminal misappropriation of partnership property by a partner, section 403 should not be interpreted negatively.

The court pointed out that though illustration (c) to section 403 referred to joint ownership, the rights of partners should not be equated with those of a joint tenant in real estate or joint owner of personalty. There is no right of survivorship in partners. The powers that a partner may be given of dealing with the partnership property might terminate a joint tenancy. For instance, a partner may be given the power of sale, exchange and other general powers that may in fact be inconsistent with the character of a joint tenancy.

His Lordship in fact went on to say:

> It does not seem therefore correct to say, that one partner is necessarily the legal owner or has legal property in all parts of the partnership property, however strongly the use of a mistaken analogy has imprinted such a doctrine in our text books or even in decided cases.[3]

The court held that illustration (c) to section 403 referred only to rights of possession. The illustration clearly indicates that each partner has only a right to use the horse. He does not own the horse as a whole. Therefore, if one partner sells the horse and appropriates the proceeds for his own use he is guilty of criminal misappropriation.

Furthermore, his Lordship added, section 403 referred to "misappropriation or conversion" to one's use of any movable property. There is no restriction as to the type of movable property that can be misappropriated. Therefore, even partnership property can be misappropriated by a partner.

[2] Commonly called Gurney's Act, 1867 31 and 32 Vic. C. 116, replaced by section 40(4) of the Larceny Act, c. 50, 1916.

[3] (1875) 3 Kyshe 79 at p. 82; Illustration (c) to s.403 reads:
> A and B being joint owners of a horse, A takes the horse out of B's possession intending to use it. Here, as A has a right to use the horse, he does not dishonestly misappropriate it. But if A sells the horse and appropriates the proceeds to his own use, he is guilty of an offence under this section.

However, the court was reluctant to hold the accused guilty of criminal breach of trust. Even though Ford J. felt that the term "entrustment" should be interpreted in its "simple integrity" and not in accordance with concepts of "entrustment" in trust law, yet he opted to follow an Indian decision[4] that had interpreted "entrustment" in keeping with concepts in trust law. This Indian decision has been overruled since Ford J. delivered his judgment.[5] However, his Lordship convicted the accused of having committed the offence of criminal misappropriation.

Although Ford J.'s observation that a partner can have no claims to ownership of partnership property that was originally not his own even though he could nominally retain ownership of the assets that he had included in the partnership assets may be appropriate and in keeping with the concept of "partnership property" as defined in the Partnership Act, yet his subsequent comment that a partner has a right to possess partnership property seems rather controversial. He did not specify the circumstances in which such a right could come into existence. Should the terms of the partnership agreement always support such a right to possess any of the partnership assets? Or does the right emanate from the very nature of a partnership? If so, could it mean that in a "partnership" the partners hold certain rights in the partnership property as tenants in common? Megarry and Wade point out that partnership assets could be held by the partners as tenants in common, if the asset is land.[6] If, as Ford J. pointed out, a partner has a right to possess all the assets for partnership purposes[7] can it then be said that he has an equitable interest in common with the other partners in regard to all the assets, irrespective of whether they are realty or personalty? The equitable interest associated with the partnership may well be held in tenancy in common while the legal estate in the assets of the partnership may be deemed vested in joint tenancy in all the partners. When Ford J. referred to rights to possess partnership property he should not have ignored the equitable interests associated with common ownership. The partners can be deemed as holding the legal title to the partnership assets in joint tenancy on trust for those holding equitable interests (that is, the partners themselves) as tenants in common. If so, every partner is a trustee of partnership property and would obviously be "entrusted" with the partnership assets. And should a partner so "entrusted" commit any of the acts specified in 2(a), (2Kb) or (2Xc) on the above analysis of section 405,[7a] he, would commit criminal breach of trust. Thus even if concepts in trust law had been resorted to, the accused in *Shaik Peroo* could have been convicted of CBT if Ford J. had persisted in identifying the specific characteristics of the right to possess that he touched upon in his judgment.[8]

4 *Ibid.,* at p. 84; however, Ford J. did not provide a citation for this case.

5 *Ibid.,* refer note by the editor at p. 84. The editor cites *Nrigendro Lall Chalterjee* v. *Okhoy Coomar Shaw,* 21 W.R. Cr. 59 as the overruling authority; for two recent conflicting Indian decisions on whether a partner can commit the offence of criminal misappropriation, see *Surinder Nath* v. *State* I.L.R. (1970) 2 Delhi 146; *Patel* v. *Patel* (1967) Ker. L.T. 802.

6 *Supra,* note 7 at p. 428.

7 (1875) 3 Kyshe 79 at p. 82.

7a *Supra,* at p. 228.

8 The above reasoning may even be in 'keeping with Pettit's view that the interest of a partner in the real property of a partnership is personalty. Partners can hold interests in personalty as joint tenants and tenants in common. See Vaines, *Personal Property* (*ed.* Tyler and Palmer) (1973) at p. 56.

In *R.* v. *Lee Siong Kiat*,[9] the accused, a managing partner of a firm that along with seven other firms had formed another partnership called the *Kongsi* was charged for having committed criminal breach of trust in regard to property belonging to the *Kongsi.* The *Kongsi* was formed for the purpose of purchasing and retailing passenger tickets from another firm called K.P.M. On the purchase of a certain number of tickets, K.P.M. gave the accused in view of his position as a representative of the partnership, two hundred and twenty five free tickets. The accused could not account for what had been done with one hundred and forty nine of these tickets. In addition, interest had also been paid by K.P.M. on a sum of money provided by members of the *Kongsi* jointly as security for the payment of the tickets issued from time to time. This interest money had been given to the accused. The accused could not account for the money.

The court focussed on the principal-agent relationship and pointed out that every partner is an agent of the partnership, and the accused as an agent in this case was in a position of "trust". The property had been given to him by K.P.M. because of his representative status. In other words, he was holding the property on behalf of the partnership. The court pointed out that there are two ways to show that the accused was "entrusted" with trust property:

> The fact is that in partnership cases it is more difficult to prove the offence of criminal breach of trust because *ex hypothesi* the accused has already partial dominion over the property in question, and it is essential for the prosection to prove that this limited dominion on behalf of the partnership has been converted into a personal dominion on the accused's behalf.... [Or] It may be merely a matter of account and that is in fact one of the defences submitted in the present case. The defence, however, cannot prevail in cases such as the present where the books and conduct of the parties show that the misappropriation has been complete, and that the property has passed from, or never entered into, the possession of the partnership, and has been misapplied by the accused for his own benefit.[10]

Thus since the accused had a duty to account by virtue of his status as an agent, the court held the accused was "entrusted" with partnership property. It should be noted, therefore, that the mere existence of a fiduciary relationship between the partners does not *per se* establish the fact that there was "entrustment" of property in a partner, even though he may receive the property in the capacity of a partner. It has to be shown in addition that the partner had a duty to account to the partnership as to what he had done with the property. This would establish the fact that *he held the property* in a fiduciary capacity.[11] There was no reference to what the accused should do with the complimentary tickets that he received from K.P.M. in any of the agreements signed by the partners of the various firms that formed the *Kongsi.* The court did not indicate clearly whether the accused had a duty to account for these complimentary tickets as well. However, if one could say that there was a fiduciary relationship between the partners, and that a partner is an agent of the other partners, then one

[9] [1935] 4 M.L.J. 53.
[10] *Ibid.,* at p. 56.
[11] When there is a duty to account a fiduciary relationship comes into being. See Waters, *supra,* note 19 at p. 32.

could in turn say that a partner should hold all profits resulting from the fiduciary relationship in trust for the other partners.[12] If so, there would be a constructive trust situation and the requirement of "entrustment" in regard to the complimentary tickets would be easily satisfied.

It may seem that on the facts in *Lee Siong Kiat* the court need not have considered the issue of whether a partner is an agent, because the partnerships had formed another partnership called the *Kongsi* and in turn had appointed the accused under a specific written agreement to be their representative. The accused was thus clearly an agent of the *Kongsi* and when he received the "property" from K.P.M. he had a duty to account. Terrell J., however, was correct in identifying the accused as an agent of the partnership on the basis of a rule in partnership law that every partner is an agent of the other partners.[13] Since a partnership does not have a separate existence, partners remain agents to other partners even where there is a group partnership.[14]

In *Velji Raghavel Patel* v. *The State of Maharashtra*,[15] the Supreme Court of India explained what "entrustment" means in a situation where limited dominion on behalf of the partnership is converted into personal dominion in favour of the accused. The accused and the complainant along with others had carried on a business as partners. Due to a misunderstanding between the partners it was agreed that the partnership should be dissolved. By a written agreement, the accused was given the responsibility of winding up the affairs of the partnership. He had to collect all the debts due to the partnership and deposit the amount collected with the bankers of the partnership. However, he was permitted to use the money that he collected from the debtors for carrying on the business till it was wound up. It was contended by the other partners that the accused had not properly accounted for the use of some of the money realized from the debts and he should be convicted of criminal breach of trust under section 406.

It was pointed out on behalf of the accused that:

a) in the agreement between the partners a clause indicated that the recoveries from the debtors were recoveries of the "firm". That is, that the firm could still direct him on how to use the money to wind up the partnership and the accused did not have "personal" dominion over the assets of the partnership. The dominion was still "partial";

b) there was no clause preventing the other partners from making any recoveries from the debtors. Therefore, the accused was not entrusted with personal dominion over the property that was due from the debtors.

The Supreme Court upheld the views of the defence counsel and held that there was no "entrustment" and that the accused could not be convicted of criminal breach of trust. The court also went on to hold that the accused cannot be convicted of criminal misappropriation either and indicated that the remedy lay in civil law. The court, unlike

12 Hanbury and Maudsley, *supra,* note 26 at pp. 577-78.
13 S. 5 of the Partnership Act.
14 Lindley, *Law of Partnership* (Scammel and Banks eds. 15th ed., 1984) at pp. 281-82.
15 A.I.R. 1965 S.C. 1433.

in the Singapore case of *Shaik Peroo,* pointed out that a partner is an owner of partnership property and cannot be charged with misappropriating partnership property unless the dominion he had as owner of the partnership asset is converted to a dominion that is linked to a fiduciary form through a special agreement:

> It is obvious that an owner of property, in whichever way he uses his property and with whatever intention will not be liable for misappropriation and that would be so even if he is not the exclusive owner thereof. As already stated, a partner has undefined ownership along with the other partners over all the assets of the partnership. If he chooses to use any of them for his own purposes he may be accountable in civil law to the other partners. But he does not commit any misappropriation.[16]

The court pointed out that every partner has dominion over property. However, in order to show that he was "entrusted" with dominion over the property it has to be established that he was given sole dominion over the assets by way of a special agreement between the partners. The court then went on to state that only in such a situation can one say that the partner held the property in a fiduciary capacity. Despite the fiduciary relationship between the partners the important factor that had to be established by the prosecution was that the property was held in a fiduciary capacity. Only in such a situation would there be "entrustment". This conclusion was in keeping with the views expressed in *Abdul Sattar* v. *State of Andhra Pradesh* [17] as well. Here the High Court of Andhra Pradesh pointed out that the words "property of himself or any other person" used in section 424 of the Indian Penal Code are not referred to in any of the sections on criminal breach of trust. Therefore, one cannot interpret section 405 to cover "entrustment" of one's own property.[18]

However, the court in *Velji* did not proceed to inquire whether there was an attempt to commit criminal breach of trust, even though there was no reference to such an offence in the charge. The Criminal Procedure Code of India permits the court to convict a person accused of an offence of attempt even though there is no mention of attempt in the charge.[19]

Does this mean that the "personal dominion" that Terrell J. mentioned in *Lee Siong Kiat,* referred to a partner holding property in a fiduciary capacity?[20] Is this the reason why dominion was categorized as "personal dominion" by Terrell J.? Was the reference to proof of a "special agreement" merely an evidentiary requirement to assist the court in identifying the fiduciary nature of the holding? In what other situations can a partner hold partnership property in a fiduciary capacity? If a partner is viewed as an owner of partnership property and can never be prosecuted for criminal breach of trust unless it is shown that he held the property in a fiduciary capacity, will the views expressed in *Shaik Peroo* be acceptable to the courts today?

[16] *Ibid.,* at p. 1435.
[17] 1958 Cri. L.J. 1114.
[18] *Ibid.,* at p. 1116.
[19] S. 222(3) of The Code of Criminal Procedure, Act No. 2 of 1974; for a similar provision in the Singapore Criminal Procedure Code (Cap. 113, Rep. 1980) see s. 173.
[20] See *supra,* text to note 10 at p. 234.

Should one reject the view of Ford J. that a partner has mere rights to use and possess partnership property, and no rights of ownership? No doubt, the conviction for criminal misappropriation can be supported on the basis that the accused in that case held the property in a fiduciary capacity because he obtained the nuts under a "special agreement" — that is, an agreement to repay the complainant's share of the loan as well. However, even in the absence of a special agreement the prosecution may be able to prosecute the accused for CBT on the principles in *Shaik Peroo.*

Further, as mentioned earlier, according to one view, the partner's interest in the real property that forms part of the partnership's assets may be identified during the existence of the partnership as personalty.[21] In other words, the partner has an interest in the proceeds of conversion of the real property on the dissolution of the partnership. This means that a partner can quite easily be charged for criminal breach of trust in regard to the use of real property contrary to 2(b) and (c) of section 405 because by section 22 of the Partnership Act and in equity he will be deemed owner of personalty and not real property.

Will a partner's title to his real property be affected when he includes the property in the partnership assets? A partnership has no existence apart from the partners. It is not an entity like a limited company. Therefore, a partnership will not be able to own the real property. Lindley has indicated that each partner has an equitable lien on all the partnership assets in regard to what is due to him as a partner. This lien has no practical relevance unless there is a matter concerning winding up or ascertainment of a partner's share. It is only then that the legal title of the owner of a share becomes relevant. This legal status relating to ownership remains in suspension and is replaced by the equitable lien on the formation of the partnership. Lindley has indicated that section 39 of the Partnership Act recognizes this equitable lien.[22]

In *Velji's* case, the Supreme Court's evaluation of the term "entrustment" was conceptually quite inadequate. The court pointed out that "entrustment" is a much wider term than "trust" in civil law as it encompassed any situation where property is given to another for a purpose. Yet the court went on to confine the meaning of the term "entrustment", where partners are involved, to situations where partners hold property under a special agreement. The court completely ignored the situations in which constructive trusts arise when partners deal with partnership property. In such situations where a partner is deemed to be a constructive trustee one could say that there is "entrustment". Section 405 refers to "any manner of entrustment". Thus when a partner begins to misuse partnership property in any of the ways specified in section 405, it could be said that he is a constructive trustee and that he is "entrusted" with property. Irrespective of the intention of the parties a constructive trust comes into being. It arises by operation of law. The courts will simply look into the conduct of the parties and then decide whether there is a constructive trust or not. Generally, the courts have inferred the existence of a constructive trust when the conduct of the party on whom the trust is to be imposed is

21 See *supra,* text to note 6 at p. 215.
22 Lindley, *supra* note 3 at pp. 527-528.

"fraudulent or unconscionable."[23] The American courts have gone further and imposed a constructive trust whenever the plaintiff is able to show that the defendant has been unjustly enriched at his expense.[24] There is uncertainty even in the English law as to when a constructive trust can come into being. As Oakley has pointed out:

> It might be expected that some general principle, which would be of some guidance in determining when a constructive trust should be imposed could be extracted from those situations which English law recognizes as giving rise to a constructive trust. This is, unfortunately, not the case. No clear principle can be enunciated as the basis of the doctrine of constructive trusts....
>
> It has been argued that this golden thread is the principle of unjust enrichment, that a constructive trust is imposed in order to prevent the unjust enrichment of the trustee at the expense of the beneficiary. Another view, enunciated by Davies L.J. in *Carl-Zeiss Stiftung* v. *Herbert Smith* (No. 2), is that the golden thread is a "want of probity" in the trustee.[25]

Should these complexities in the civil law be brought into the criminal law to interpret a term such as "entrustment"? It should be remembered that an offence such as criminal breach of trust exists in the Penal Code to protect the proprietary interests of individuals. To a large extent, it is for this reason that the law of property exists. Should both these systems of law impose different and at times conflicting duties on the individual? Should there not be a high degree of compatibility between the criminal law and civil law in regard to matters that concern property since the goals of both laws are the same? As J.C. Smith has indicated:

> We cannot have a criminal law protecting proprietary interests without taking full account of what those proprietary interests are. Once the civil law is involved, it must be wholly involved; it is not possible to apply it and yet ignore its "finer distinctions".[26]

Furthermore, the courts in India have assumed that a partner as an owner is entitled to the whole of the partnership property and therefore it cannot be said that he has misappropriated his own property or is "entrusted" with his own property unless there is an agreement under which he is specifically entrusted with the property by the other partners. The view is that since all partners are owners of the partnership property no one can be said to be "entrusted" with it unless all the partners agree to "entrust" it to one of the partners. When the term "ownership" is used in property law, it simply means that a partner has an interest or right in the property.[27] Several others can have interests or rights in the same property. All of them will be owners of the property. This is what "ownership" actually means. Such an

23 A.J. Oakley, "Has the Constructive Trust Become a General Equitable Remedy?" (1973) Current Legal Problems 17 at p. 22.

24 *Ibid.,* at p. 18.

25 *Ibid.,* at pp. 19-20. See also, A.T.H. Smith, "Constructive Trusts in the Law of Theft" [1977] Crim. L.R. 395.

26 J.C. Smith, "Civil Law Concepts in the Criminal Law" [1972] Camb. L.J. 197 at p. 198.

27 See, W.N. Hohfleld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale L.J. 16 at p. 22; Vaines, *Personal Property* (*ed*. Tyler and Palmer) (1973) at pp. 39-41; C.G. Weeramantry, *An Invitation to the Law* (1982) at pp. 160-64.

owner of property can misappropriate the property from other owners of the same property. This he could do by depriving others of their "ownership" interests or rights in the property. The moment he assumes exclusive control over the property and behaves "unconscionably or fraudulently" he would become a constructive trustee or be "entrusted" with the property "owned" by the others. And if his conduct falls within one of the limbs specified in section 405 *[i.e.* 2(a), (b) or (c)], it may be said he has committed criminal breach of trust.

In the English case of *R.* v. *Bonner*,[28] the Court of Appeal held that a partner could commit theft of partnership property under section 1(1) of the Theft Act of 1968,[29] even though this Act did not include provisions similar to that in section 40(4) of the Larceny Act of 1916.[30] Section 1(1) provides:

> A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

The court held that partners have merely proprietary rights in partnership property. Under section 5(1) of the Theft Act of 1968, property may be said to belong to another if he has a proprietary right or interest in the property. When one owner deprives another of his proprietary rights dishonestly[31] there could be "theft" as defined in section 1(1). This provision attempted to simplify the law relating to theft and included all the larceny offences, plus embezzlement (roughly equivalent to criminal breach of trust in our law) and fraudulent conversion (criminal misappropriation, in our law).[32]

It would seem, therefore, that it need not always be shown that there was "entrustment" under a special agreement in order to prosecute a partner for criminal breach of trust. However, if Ford J.'s observations can be adequately substantiated and explained in the context of an appropriate conceptual framework, in the manner indicated earlier (see *supra,* p. 233), it may be possible to identify the partner as a joint owner and a trustee of partnership assets for the benefit of other partners. The "special agreement" rule propounded in *Velji* can then be ignored altogether.

V. CONCLUSION

In situations where there is no "trust" that is recognized in civil law or "entrustment" as specified in the Penal Code, the remedies that the partners have against a wayward partner for breach of a fiduciary obligation would be either an action for account under the Partnership Act[33] or an equitable remedy.[34] The duty to account merely involves

28 [1970] 2 All E.R. 97.
29 C.60, 1968.
30 C. 50, 1916.
31 For some observations on the application of the concepts of "dishonesty" in the English Theft Act of 1968 and "honesty" in s. 16 of the Trustees Act of 1925, see R. Brazier, "Criminal Trustees?" (1975) 39 Conv. (N.S.) 29 at pp. 37-42.
32 See in this regard, R. Stuart, "Law Reform and The Reform of the Law of Theft" (1967) 30 Mod. L. Rev. 609 at p. 610.
33 Ss. 29 and 30 of the Partnership Act.
34 See Oakley, *supra,* note 23.

personal liability. In a trust situation, the partners could use proprietary remedies that are available in equity to reclaim the partnership assets or trace the proceeds of those assets into mixed funds if they are in an identifiable form. Is the concept of "entrustment" in criminal law broader in scope than the "express trust" concept and more in keeping with constructive trusts in civil law? "Unconscionable conduct" can give rise to a constructive trust. Only "dishonest" conduct by a person who has been given property to use for a particular purpose leads to the commission of criminal breach of trust. Does the standard of care expected of a trustee as expressed in the cases differ from the concept of dishonesty and other forms of conduct listed in 2(a), (b) and (c) of section 405 of the Penal Code? Is there a significant difference between principles for identification of breaches of trust in civil and criminal law? Should the criteria for breach of trust be significantly different in view of the nature of the remedial measures available in civil and criminal law? Even in other areas of law such as negligence, defamation, criminal force (and "battery" in tort) and assault, the civil and criminal laws identify "wrongs" through substantially the same principles. Should the approaches to breaches of trust be different?

It would seem from the above discussion of fiduciary and trust relationships that the term "entrustment" in the Penal Code is wider in scope than "trust" concepts. Sections 405 to 409 of the Penal Code seek to curtail the conduct of parties who do not have any legal estate in the property that they are "entrusted" with. Express and constructive trustees have legal title to the property that they hold. However, the term "dishonesty" in section 405 is much narrower than the objective criterion of "prudence" (which includes "honesty") specified in regard to the standard of care expected of a trustee. The accused in a criminal action will not be held guilty unless he "intended" to cause wrongful loss or gain wrongfully. In a breach of trust action in civil law the state of mind of the trustee has only a marginal bearing on the evaluation of whether he measured up to the standard of care expected of "a prudent man of business".

The term "entrustment", like "fiduciary relationship", is a descriptive term. It does not relate to any specific category of relationships. The only significant difference is that in a criminal action it will have to be proved that the accused acted "dishonestly" and violated one of the limbs specified in 2(a), (b) or (c) of section 405. In fiduciary relationships, "dishonest" conduct may contribute to a breach of a fiduciary obligation; however, conduct that is innocent could also constitute breaches of fiduciary obligations. The courts are still in the process of developing principles to determine breaches of fiduciary obligation in areas of conduct that do not have a link to "dishonest" conduct.

Thus the criteria to determine culpability for breach of trust by partners in civil and criminal law can be easily distinguished. However, as Professor Weinrib has succinctly explained, one cannot both define a relationship by a remedy and also use the relationship as a triggering device for a remedy.[35] The rules as to civil breach of trust should be developed on the first premise that Professor Weinrib has identified

35 E.J. Weinrib, "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1 at p. 5.

because of the flexibility of equity as a concept. In view of the definition of criminal breach of trust in the Penal Code the second premise is more appropriate for determining criminal liability. If the courts take heed of the observations of Professor Weinrib, it would not be too difficult to slice out the fat from the rules that have been formulated over the years in regard to civil and criminal breaches of trust in Singapore.

J. K. CANAGARAYAR *

* LL.B. (Hons.) (Ceylon); LL.M. (Dalhousie); D. Jur. (Osgoode Hall) (York). Senior Lecturer, Faculty of Law, National University of Singapore.