HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, HAYNE AND CALLINAN JJ

ROBERT JAMES MACLEOD APPELLANT

AND

THE QUEEN RESPONDENT

Macleod v The Queen [2003] HCA 24
7 May 2003
S86/2002

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation:

P L G Brereton SC with J C Papayanni for the appellant (instructed by Jeffreys & Associates)

T A Game SC with D Jordan for the respondent (instructed by Commonwealth Director of Public Prosecutions)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Macleod v The Queen

Criminal law – Property offence – Fraudulent application of company property by director or officer – Accused also sole beneficial shareholder of company – Whether consent of accused, as sole shareholder, cures what would otherwise be a breach by accused, as director or officer, of s 173, *Crimes Act* 1900 (NSW).

Criminal law – Property offence – Fraudulent application of company property by director or officer – Directions – Whether trial judge misdirected jury in failing to identify the use of dishonest means as an essential element of s 173, *Crimes Act* 1900 (NSW) – Whether trial judge erred in failing to direct that it was necessary for accused to have realised that his impugned conduct was dishonest by the current standards of ordinary, decent people.

Words and phrases – "fraudulently", "claim of right".

Crimes Act 1900 (NSW), ss 4(1), 173.

1 GLEESON CJ, GUMMOW AND HAYNE JJ. This appeal from the New South Wales Court of Criminal Appeal[1] concerns an offence created by State law which comprises the fraudulent taking or application, by a company director, officer or member, of property of the company, for the use or benefit of that person, or for any use or purpose other than the use or purpose of the company. Here, the sole beneficial shareholder of the company was the appellant.

2 At a trial in the District Court of New South Wales (Rummery DCJ, sitting with a jury), the appellant was convicted on 10 March 1999 of 18 counts on an indictment containing 25 counts. Five of the counts upon which the appellant was convicted charged contravention of s 173 of the *Crimes Act* 1900 (NSW) ("the Crimes Act"). They are the only charges which are the subject of the present appeal.

3 At the relevant time[2], s 173 of the Crimes Act provided:

> "Whosoever, being a director, officer, or member, of any body corporate, or public company,
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> > fraudulently takes, or applies, for his own use or benefit, or any use or purpose other than the use or purpose of such body corporate, or company, or
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> > fraudulently destroys any of the property of such body corporate, or company,
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> shall be liable to penal servitude for 10 years."

The term "property" was defined in s 4(1) as including:

> "every description of real and personal property; money, valuable securities, debts, and legacies; and all deeds and instruments relating to, or evidencing the title or right to any property, or giving a right to recover or receive any money or goods; and includes not only property originally in the possession or under the control of any person, but also any property into or for which the same may have been converted or exchanged, and

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1 *R v Macleod* (2001) 52 NSWLR 389.

2 Section 173 was subsequently amended to replace "penal servitude" with "imprisonment": *Crimes Legislation Amendment (Sentencing) Act* 1999 (NSW), s 5, Sched 3, Item 70.

everything acquired by such conversion or exchange, whether immediately or otherwise".

4 The Court of Criminal Appeal (Mason P, Simpson J and Newman AJ) dismissed the appellant's appeal against conviction on each of the five counts charging contravention of s 173. By special leave, the appellant appeals against that decision.

The indictment

5 Each of the 25 counts related to an enterprise carried on by the appellant between 1989 and 1994 with an apparent view to obtaining taxation concessions under Div 10BA of Pt III of the *Income Tax Assessment Act* 1936 (Cth). The indictment impugned certain conduct of the appellant between 5 May 1990 and 25 February 1994; the counts which are the subject of this appeal related to events said to have occurred between 18 February 1991 and 20 December 1991.

6 The prosecution alleged that the appellant, as director of three companies, had offered investment opportunities in a film production scheme. This had been promoted as involving the acquisition of copyright in primary works, the production and marketing of cinematograph films and the sharing amongst investors of profits derived from the joint ownership of the copyright therein. The three companies were Trainex Pty Ltd ("Trainex"), Starlight Film Studios Ltd ("Starlight") and Communications Entertainment Network Ltd ("CEN").

7 The appellant was at the relevant times a director of Trainex, save for the period to which counts 20 and 22 related, when he was secretary of the company. The appellant testified that he was the only shareholder in Trainex and there was no evidence that anyone else was beneficially interested in the company. If there were any other directors, they played no part in the company's affairs. Trainex had been incorporated (under a former name) as a proprietary company on 18 August 1977. The *Companies Act* 1961 (NSW) was then in force and s 114(1) thereof required proprietary companies to have at least two directors. At the time of the conduct the subject of the charges, Trainex, by force of ss 126 and 150 of the Corporations Law[3] ("the Law"), was taken to be a company duly

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3 As set out in s 82 of the *Corporations Act* 1989 (Cth) and applied as a law of New South Wales by s 7 of the *Corporations (New South Wales) Act* 1990 (NSW).

incorporated under that Law. Section 221(1) of the Law required a proprietary company to have at least two directors[4].

8 Several thousand investors contributed to the scheme promoted by Trainex. The Investor's Deed required Trainex to hold the invested funds on trust for the purpose of film production. The Deed obliged Trainex to deposit the invested funds into a trust account and permitted the company to invest the funds in any interest bearing or discounted securities authorised by the *Trustee Act* 1925 (NSW). Upon satisfaction of the specified "Subscription Conditions" (essentially the raising of sufficient funds to meet the budgeted film production costs), Trainex was obliged to proceed with the production of the relevant film. The money raised by Trainex was held in several accounts with Chase AMP Bank. These were described to investors as "Trust Accounts" in the Investor's Deed and related correspondence.

9 Of the funds raised, approximately $718,000 was applied to film production, but more than $2 million was applied to the appellant's own use. The appellant applied some of this money to the purchase of a home unit in Queensland; other amounts were paid to the credit of a loan account in Starlight in the appellant's name on which he subsequently drew. This application by the appellant of the funds required to be held on trust by Trainex placed Trainex in breach of the trusts created by the Investor's Deed.

10 Counts 1 to 4 on the indictment charged that the appellant had been knowingly concerned in the commission by Trainex of the offence of offering a prescribed interest to the public for subscription or purchase in contravention of ss 169 and 570(1) of the *Companies (New South Wales) Code* (NSW). Counts 5 to 8 charged similar offences in contravention of ss 1064(1) and 1311(1) of the Law. Counts 9 and 10 charged that, in contravention of ss 1018(1) and 1311(1) of the Law, the appellant had been knowingly concerned in the commission by Starlight of the offence of offering prescribed interests for subscription or purchase without having registered a prospectus with the Australian Securities Commission. Counts 11 to 13 charged that the appellant had been knowingly concerned in the commission of offences by Trainex or Starlight against s 43 of the *Securities Industry (New South Wales) Code* (NSW) or s 780 of the Law in carrying on a securities business without a relevant licence, authorisation or exemption.

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4 This was amended, with effect from 9 December 1995, to provide for a minimum of one director: *First Corporate Law Simplification Act* 1995 (Cth), s 4(2), Sched 4, Item 25.

11 The appellant was convicted on each of these counts and his appeal against each conviction was dismissed except in respect of the convictions on counts 12 and 13. These were quashed by the Court of Criminal Appeal. No appeal has been taken against the decision of the Court of Criminal Appeal in respect of any of these counts.

12 Six counts on the indictment (counts 14, 16, 18, 20, 22, 24) alleged contravention of s 173 of the Crimes Act. These charged that, as a director (counts 14, 16, 18, 24) or officer (counts 20, 22) of a body corporate, the appellant fraudulently applied for his own use (counts 14, 16, 18), or for purposes other than those of Trainex (counts 20, 22), property owned by Trainex or, in the case of count 24, property owned by CEN. The appellant was convicted on each of these counts, with the exception of count 24, on which he was acquitted. Six other counts (counts 15, 17, 19, 21, 23, 25) were charged as alternatives to these counts; no verdict was taken in respect of the first five. The jury acquitted the appellant on count 25.

13 In the result, this appeal concerns only counts 14, 16, 18, 20 and 22; the conduct of the appellant in respect of Trainex alone here is in issue. Counts 14, 16 and 18 related to the application by the appellant of three cheques drawn upon the account of Trainex with Chase AMP Bank as payment for the Gold Coast property. Counts 20 and 22 related to two further cheques drawn on the Trainex account with Chase AMP Bank; these were applied at the appellant's direction in payment of the loan account held by him with Starlight.

The Court of Criminal Appeal

14 In total, the appellant was sentenced to a minimum term of imprisonment of five and a half years, commencing on 30 January 1997, with an additional term of 18 months. The Court of Criminal Appeal granted leave to appeal against the severity of the sentences, but dismissed the appeal against sentence (except in respect of counts 12 and 13). There is no appeal against sentence in this Court.

15 In the Court of Criminal Appeal, Simpson J, with whom Mason P and Newman AJ agreed, rejected a submission for the appellant that the evidence in respect of counts 14, 16, 18, 20 and 22 could not constitute the offences charged[5]. Her Honour held that the fraudulent intent which s 173 required was equivalent to "dishonesty" and that there was ample evidence on which the jury could

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5 (2001) 52 NSWLR 389 at 391, 413, 419.

conclude that the appellant, at the relevant times, had acted dishonestly[6]. Mason P, with the concurrence of Simpson J and Newman AJ, rejected a further submission that, as the "de facto controller" or "directing mind" of Trainex, the appellant (and therefore Trainex) had "consented" to the relevant applications of company property and that the "consensual" nature of these transactions precluded conviction under s 173[7].

16 The Court of Criminal Appeal also rejected various challenges by the appellant to the adequacy of the trial judge's directions in respect of the counts charging contravention of s 173[8]. Some of these challenges were renewed in this Court.

The appellant's submissions

17 In written submissions, the appellant contended that s 173 requires the prosecution to prove an absence of consent by the "victim" of the fraud, the use of dishonest means by the accused, and the absence of a bona fide claim of right in the accused. As ultimately put in oral submissions, "consent" on the part of the company was said to be inconsistent with dishonesty, rather than operating as a separate element of the offence. The appellant submitted that (i) because the use of funds by the appellant was "contemplated" by Trainex, and the absence of consent had to be proved by the prosecution, its case had to fail; (ii) the jury had been inadequately directed as to the need for the application to be dishonest towards the company; and (iii) no adequate directions were given with respect to the claim of right made by the appellant. Acceptance of (i) was said to necessitate the quashing of the convictions on the five counts in question, whilst the other grounds were directed to a new trial.

18 The submissions for the appellant sought to isolate a series of discrete elements of the offence created by s 173. The construction propounded lacks a secure foundation in the statutory text and would be discordant with its legislative purpose. Moreover, the appellant's submissions on "absence of consent" paid insufficient regard to basic principles respecting the distinct legal personality of corporations.

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6 (2001) 52 NSWLR 389 at 410.

7 (2001) 52 NSWLR 389 at 392-394, 410, 419.

8 (2001) 52 NSWLR 389 at 391, 411-413, 419.

Section 173 of the Crimes Act and common law larceny

19 At all relevant times, Pt 4 (ss 93J-203) of the Crimes Act was headed "OFFENCES RELATING TO PROPERTY". It made provision in respect of, among other things, "LARCENY" (ss 116-154C), "EMBEZZLEMENT OR LARCENY" (ss 155-163), "FRAUDULENT MISAPPROPRIATION" (s 178A), "OBTAINING MONEY ETC BY DECEPTION" (s 178BA), "OBTAINING MONEY ETC BY FALSE OR MISLEADING STATEMENTS" (s 178BB) and "FALSE PRETENCES" (ss 179-185A). Section 173 appeared under the heading "FRAUDS BY FACTORS AND OTHER AGENTS" (ss 164-178). Other provisions under that heading proscribed misappropriation or fraudulent dealing by agents with respect to property entrusted to them (ss 165, 166, 168, 169, 170), the fraudulent disposal of property by trustees (s 172), misconduct of company directors or officers in respect of company accounts (ss 174, 175) and the publication of fraudulent statements (s 176), or cheating or defrauding (s 176A) by company directors or officers.

20 These provisions created new offences which are substantially broader in scope than the common law crime of larceny. In *R v Ward*, Jordan CJ identified the "essentials" of the crime of larceny as consisting of a "composite thing" made up of[9]:

> "the taking away of a chattel belonging to another person, coupled with a purpose on the part of the taker permanently to deprive the owner of the property in the thing taken. If such a taking for such a purpose occurs without the consent of the owner, and not under a genuine claim of right, the crime of larceny is committed."

His Honour observed that, at the time the law of larceny received its definition, the criminal law[10]:

> "protected a man from being deprived of his goods against his will; but from mere cheating he was expected to protect himself. Hence cheating, as such, was not a crime at common law. It followed that, if a man were induced to consent to part with his property in goods to a cheat by a deception, however fundamental, a consent of this kind made the taking not merely not larcenous but not criminal."

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9 (1938) 38 SR (NSW) 308 at 311. See also *Croton v The Queen* (1967) 117 CLR 326 at 330.

10 (1938) 38 SR (NSW) 308 at 312-313.

21 Perceived deficiencies in the common law attracted statutory intervention in England and in the Australian colonies throughout the course of the nineteenth century. The elaborate provisions of the *Larceny Act* 1827 (UK)[11] and the *Larceny Act* 1861 (UK)[12] are significant examples.

22 In Australia, as in England, modern statutes, including what now is s 173, have created offences freed from many of the complex distinctions and restrictions of the common law. The statutory offence of obtaining property dishonestly by deception, which was considered in *Parsons v The Queen*[13], illustrates the point. The definition of "property" in the statute there under consideration[14] was so drawn as to include instruments creating or evidencing choses in action, which were said not to have been capable of being the subject of a charge of larceny at common law. Again, in *R v Glenister*[15], the Court of Criminal Appeal held that s 173 of the Crimes Act displaced the requirement, which had existed under the common law, to prove an intention permanently to deprive the owner of the property taken.

23 In *Slattery v The King*[16], Griffith CJ observed that one result of the "many peculiar rules" of the English law of larceny was "that a person entrusted with property to hold for another, who converted that property to his own use, could not be charged with larceny, because he did not wrongfully take it away, having had it lawfully in his possession". Thus, at common law, the fraudulent breach of trust by a trustee was not a crime; being possessed of the whole legal estate in the trust property, the trustee committed no offence in misapplying that property to his own use[17]. Writing in 1883, Sir James Stephen observed that, as a general proposition, for centuries a borrower who made away with something lent to him was guilty of no crime at common law[18].

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11 7 & 8 Geo IV, c 29.

12 24 & 25 Vict, c 96.

13 (1999) 195 CLR 619 at 624 [10].

14 *Crimes Act* 1958 (Vic), s 71(1).

15 [1980] 2 NSWLR 597.

16 (1905) 2 CLR 546 at 554-555.

17 See Stephen, *A History of the Criminal Law of England*, (1883), vol 3 at 147.

18 Stephen, *A History of the Criminal Law of England*, (1883), vol 3 at 128.

24 In the United Kingdom from 1799, various statutes created offences comprising the misappropriation of property by persons (including clerks, servants, brokers and other agents, bailees and trustees, and, in time, company directors) who had been entrusted to deal with the property in specific ways and thus could not have been convicted of larceny at common law[19]. These offences were expanded and consolidated by ss 67-87 of the *Larceny Act* 1861 (UK)[20]. Section 81 thereof was in similar terms to what now is s 173 of the Crimes Act.

25 Analogous provision had been made in New South Wales by s 5 of the *Trustees and Directors Frauds Protection Act* 1858 (NSW)[21]. This in turn was repealed and re-enacted in 1883[22], in language substantially similar to s 173 of the Crimes Act. The latter provision was, at the time of the offences the subject of this appeal, in the same terms as at its enactment in 1900.

Consent

26 The notion of "consent" was central to the appellant's submissions. The reference to "fraudulently tak[ing], or appl[ying]" in s 173 was said to import a requirement that the accused took or applied the property with the intention of dealing with it in a manner not intended, contemplated or understood by the victim. The "victim" here was Trainex; it was submitted that the company, in which the appellant alone had a beneficial interest, had "consented" to the taking or application, and that that "consent" had not been obtained by deceit or dishonesty. A contravention of s 173, it was said, was impossible where the taking or application occurred with the unanimous consent of the shareholders.

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19 Stephen, *A History of the Criminal Law of England*, (1883), vol 3 at 150-159. Important enactments included: 39 Geo III, c 85; 52 Geo III, c 63; 7 & 8 Geo IV, c 29; 20 & 21 Vict, c 54.

20 24 & 25 Vict, c 96.

21 22 Vict No 16. This provided:

> "If any director public officer manager or member of any body corporate or public company shall in any manner with intent to defraud misappropriate or destroy any of the property of such body corporate or company (whether he be a member thereof or not) he shall be guilty of a misdemeanor."

22 *Criminal Law Amendment Act* 1883 (NSW), 46 Vict No 17, s 134, Sched 1. This was repealed in 1900 by the Crimes Act, s 2, Sched 1.

27 The reforms in England and New South Wales implemented a legislative intention that criminal liability should extend to fraudulent dealings by agents, trustees, directors and others in property which had been entrusted to them for a particular purpose. That expansion of criminal liability left no room for the proposition, which appeared to inform the common law, that a limited expression of consent on the part of the owner, or the possessory interest of the trustee or bailee, provided an answer to a charge of a fraudulent dealing which travelled beyond that consent or interest. The new statutory offences invariably were expressed in terms of a fraudulent dealing carried out in furtherance of some personal use or benefit, or for any purpose other than the purpose authorised by the owner. Thus, to a significant degree, liability under the provisions depended upon the pursuit, to the prejudice of the owner, of benefits personal to the accused and in derogation of the purposes of the owner, rather than upon the identification of expressions of "consent" by the owner or the possessory interests of the accused.

28 These reforms predated the emergence from the era of the joint stock company of a more fully developed understanding of the distinct legal identity of the corporation, as reflected in *Salomon v Salomon & Co*[23]. The scope and operation of the provisions necessarily move with those developments; their construction is informed by the proposition that a company has rights, interests and duties which differ from those of its directors, officers and members. The conduct or state of mind of the latter is not always to be attributed to the former; this is particularly evident upon an insolvent winding up. Indeed, the text of s 173 itself distinguishes between the director, officer or member's "own use or benefit" and the "use or purpose" of the "body corporate, or company". The Full Court of the Supreme Court of South Australia referred to like considerations in holding that a person in dominant control of a company is capable of contravening the South Australian analogue of s 173 by fraudulently applying company property for purposes other than the purposes of the company[24].

29 In *R v Gomez*, Lord Browne-Wilkinson said[25]:

> "Where a company is accused of a crime the acts and intentions of those who are the directing minds and will of the company are to be attributed to the company. That is not the law where the charge is that those who are

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23 [1897] AC 22.

24 *Attorney-General's Reference No 1 of 1985* (1985) 41 SASR 147 at 152-154.

25 [1993] AC 442 at 496.

> the directing minds and will have themselves committed a crime against the company[26]."

His Lordship referred to *Attorney-General's Reference (No 2 of 1982)*[27]. The Court of Appeal there answered in the affirmative a point of law, referred to it by the Attorney-General, whether a person in total control of a limited liability company (by reason of shareholding and directorship) is capable of stealing the property of the company within the terms of the statutory offence of theft[28].

30 The submission that the "consent" of a single shareholder company cures what otherwise would be a breach of s 173 should not be accepted. The self-interested "consent" of the shareholder, given in furtherance of a crime committed against the company, cannot be said to represent the consent of the company.

The proper construction of s 173

31 The text of s 173 indicates that the offence which it creates relevantly comprises three elements: (i) the taking or application of company property by a company director, officer or member; (ii) for his own use or benefit, or any use or purpose other than the use or purpose of the company; and (iii) that the taking or application was fraudulently made.

32 The second element, though little emphasised in the submissions for the appellant, is significant. It confirms that, as indicated by the history of the provision, s 173 identifies criminal liability by reference to the application of company property by the accused for his or her personal benefit, and in a manner inconsistent with the purposes of the company. Hence the composite expression "fraudulently takes, or applies, for his own use or benefit, or any use or purpose other than the use or purpose of such body corporate, or company". To dissect the word "fraudulently" and, through it, to import additional unexpressed elements of the offence would be insufficiently to attend to the wrongdoing which the provision itself identifies in the application of property for personal use unrelated to any use or purpose of the company.

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26 See *Attorney-General's Reference (No 2 of 1982)* [1984] QB 624, applying *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] Ch 250.

27 [1984] QB 624.

28 *Theft Act* 1968 (c 60) (UK), ss 1-6.

33 In *Glenister*[29], the New South Wales Court of Criminal Appeal correctly observed of the language of s 173 that:

> "'[f]raudulently' as a constituent of these offences bears a meaning which differs, not only from its meaning in civil contexts, but also from the significance assigned to it in certain other criminal contexts by express statutory definition."

Section 173 is to be construed by reference to its terms, scope and purpose. To apply statements in authorities respecting other statutory or common law offences[30] is to invite error. At times, the submissions for the appellant appeared to adopt such a course.

34 The Court of Criminal Appeal in *Glenister* reviewed the authorities construing s 173 and cognate provisions and concluded that the term "fraudulently" in this context has a meaning interchangeable with "dishonestly"[31]. That construction has been adopted in relation to analogous provisions in other Australian jurisdictions[32]. It is consistent with the conclusion of four members of this Court in *Spies v The Queen*[33] concerning the offence created by s 176A of the Crimes Act. It was there held that, to establish that a director had "defraud[ed]" any person in his or her dealings with the company in contravention of s 176A, it was necessary to prove that the accused had used "dishonest means" to prejudice the rights or interests of that person.

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29 [1980] 2 NSWLR 597 at 605-606.

30 Including authorities construing statutory definitions of theft: see *R v Roffel* [1985] VR 511. The correctness of the decision in *Roffel*, which turned upon the application of s 72 of the *Crimes Act* 1958 (Vic), is not a matter that falls for determination in this case.

31 [1980] 2 NSWLR 597 at 604. See also *Re Hyams and the Public Accountants Registration Act* [1979] 2 NSWLR 854 at 863-864.

32 *R v Smart* [1983] 1 VR 265 at 293-295; *Attorney-General's Reference No 1 of 1985* (1985) 41 SASR 147 at 152, 154.

33 (2000) 201 CLR 603 at 630-631 [78]-[81].

35 In *Peters v The Queen*, which concerned charges of conspiracy to defraud the Commonwealth under ss 86(1)(e) and 86A of the *Crimes Act* 1914 (Cth), Toohey and Gaudron JJ said that, ordinarily, fraud involves[34]:

> "the *intentional* creation of a situation in which one person deprives another of money or property or puts the money or property of that other person at risk or prejudicially affects that person in relation to 'some lawful right, interest, opportunity or advantage'[35], *knowing* that he or she has no right to deprive that person of that money or property or to prejudice his or her interests". (emphasis added)

36 Their Honours explained that the term "dishonestly" in a statutory offence may be employed in its ordinary meaning or in some special sense[36]. The line of authorities[37] concerning the statutory offence of dishonestly obtaining property by deception provides an illustration of the latter[38].

37 In a passage that has significance for the present appeal, Toohey and Gaudron JJ stated[39]:

> "In a case in which it is necessary for a jury to decide whether an act is dishonest, the proper course is for the trial judge to identify the knowledge, belief or intent which is said to render that act dishonest and to instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest. … If the question is whether the act was dishonest according to ordinary notions, it is sufficient that the jury be instructed that that is to be decided by the standards of ordinary, decent people."

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34 (1998) 192 CLR 493 at 508 [30]. See also *Spies v The Queen* (2000) 201 CLR 603 at 630-631 [79].

35 *R v Kastratovic* (1985) 42 SASR 59 at 62.

36 (1998) 192 CLR 493 at 510 [34].

37 See, eg, *R v Salvo* [1980] VR 401; *R v Brow* [1981] VR 783; *R v Bonollo* [1981] VR 633; *R v Love* (1989) 17 NSWLR 608.

38 *Peters v The Queen* (1998) 192 CLR 493 at 502 [11]-[13], 504 [18]-[19]; see also at 531 [86] per McHugh J.

39 (1998) 192 CLR 493 at 504 [18]; cf *R v Feely* [1973] QB 530; *R v Ghosh* [1982] QB 1053 at 1064; *Twinsectra Ltd v Yardley* [2002] 2 AC 164 at 171-175, 196-202.

Their Honours rejected any further requirement, derived from *R v Ghosh*[40], that the accused must have realised that the act was dishonest by those standards[41].

38 A question presented by s 173 of the Crimes Act is whether the taking or application was "fraudulent" or "dishonest" according to ordinary notions. The passage cited above from the joint judgment in *Peters* indicates the preferred approach to the meaning of the term "fraudulently" in s 173.

Claim of right

39 In *Peters*, the equation of "dishonesty" with absence of a belief of legal right was rejected, save where "dishonest" was used in a special statutory sense[42]. Section 173 is not such a special statutory provision. Rather, in this case, the notion of "claim of right" is a manifestation of the general principle identified by Dawson J in *Walden v Hensler*[43], namely that it is:

> "always necessary for the prosecution to prove the intent which forms an ingredient of a particular crime and any honestly held belief, whether reasonable or not, which is inconsistent with the existence of that intent will afford a defence".

Hence the statement by Glanville Williams[44]:

> "The evidential burden of a claim of right is on the accused, but the persuasive burden is on the prosecution to rebut it."

40 The submissions for the appellant in this case stopped short of relying upon a distinct and wider principle identified by Dawson J in *Walden*[45] as being that:

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40 [1982] QB 1053.

41 (1998) 192 CLR 493 at 503-504 [15]-[19].

42 (1998) 192 CLR 493 at 502 [11], 504 [19], 531 [86].

43 (1987) 163 CLR 561 at 591.

44 Williams, *Criminal Law: The General Part*, 2nd ed (1961), §117.

45 (1987) 163 CLR 561 at 591-592.

> "the existence of any state of mind, however limited, which is an element of a crime, may be negated by an honest and reasonable belief in the existence of circumstances which, if true, would make the impugned act innocent: *R v Tolson*[46]. The generality of that proposition may best be seen at common law in its application to statutory offences of strict liability which, although containing no requirement of intent, or mens rea as it is ordinarily understood, are nevertheless presumed to contain the requirement of a lesser mental element which may be expressed negatively as the absence of an honest and reasonable belief in a state of facts which if true would take the case outside the ambit of the offence. The existence of a defence based upon honest and reasonable mistake in the context of statutory offences has recently been discussed in *He Kaw Teh v The Queen*[47]".

41 Against that background, several points should be made. The first concerns what is meant when it is said that the accused raises a claim of right. As to that, Dawson J said in *Walden*[48]:

> "It is not ignorance of the criminal law which founds a claim of right, but ignorance of the civil law, because a claim of right is not a claim to freedom to act in a particular manner – to the absence of prohibition. It is a claim to an entitlement in or with respect to property which goes to establish the absence of mens rea. A claim of that sort is necessarily a claim to a private right arising under civil law: see *Cooper v Phibbs*[49]."

42 Secondly, the claim must be made honestly, leading to the proposition expressed by Callaway JA in *R v Lawrence*[50] that, although an honest claim "may be both unreasonable and unfounded", if it is of that quality then the claim "is less likely to be believed or, more correctly, to engender a reasonable doubt".

43 Thirdly, particular considerations arise where, fraud being inconsistent with a claim of right made in good faith to do the act complained of[51], that act

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46 (1889) 23 QBD 168.

47 (1985) 157 CLR 523.

48 (1987) 163 CLR 561 at 592-593.

49 (1867) LR 2 HL 149 at 170 per Lord Westbury.

50 [1997] 1 VR 459 at 467.

51 Stephen, *A History of the Criminal Law of England*, (1883), vol 3 at 124.

has, as a necessary element of criminal liability, the quality of dishonesty according to ordinary notions.

44 Section 173 of the Crimes Act is such a provision. Hence the observation by Simpson J to the effect that a finding that the appellant acted dishonestly and thus had the necessary mens rea foreclosed a finding that the appellant lacked the necessary mens rea for dishonesty because he had acted under a bona fide belief that he was entitled to do as he did[52]. Her Honour referred to the evidence of the appellant[53]:

> "that he regarded the funds as being funds belonging to Trainex, and himself as being the owner of Trainex, and therefore the owner of the money. He said that he had not, in the early years, drawn a salary but, that, when the company's financial position was more secure, he was entitled to do so. He said that he believed that the company owed him more than the amount that he borrowed from it."

The function of the claim of right put forward by the appellant was to seek to engender a reasonable doubt with respect to the overall persuasive burden on the prosecution of proving that there had been the fraudulent taking or application alleged.

45 The trial judge reminded the jury of his directions with respect to the meaning of "fraudulently" in s 173 and continued:

> "[I]n assessing the accused['s] case that he was entitled to use the company money as he did you should apply the same principles, that is whether by ordinary notions the accused was acting honestly by the standards of ordinary decent people. Finally I remind you that again the onus remains on the Crown to establish the elements of the charges beyond reasonable doubt."

The appellant complains that there was no specific reference to the "subjective" criterion attending a claim of right. But the directions to be given about a claim of right must reflect the elements of the offence charged and the nature of the mens rea required.

46 Adopting the reasoning in *Peters*, as we do, and applying it to the offences now under consideration, there is no requirement that the appellant must have

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52 *R v Macleod* (2001) 52 NSWLR 389 at 412-413.

53 *R v Macleod* (2001) 52 NSWLR 389 at 412-413.

realised that the acts in question were dishonest by current standards of ordinary, decent people. To require reference to a "subjective" criterion of that nature when dealing with a claim of right would have deleterious consequences. It would distract jurors from applying the *Peters* direction about dishonesty, and it would limit the flexibility inherent in that direction. A direction about the "subjective" element of a claim of right was neither necessary nor appropriate in this case.

47 It was open to the jury, looking at the matter by reference to the standards of ordinary, decent people, to conclude that at the time of the various takings or applications of sums by the appellant he knew of his lack of entitlement to take or apply the funds of Trainex for his own use or benefit and that, on that account, his acts were dishonest. Some of the evidence supporting that conclusion was summarised by Simpson J as follows[54]:

> "This evidence included evidence of the disposal of the investors' funds: of more than $6 million invested, approximately $2.2 million was used for the appellant's own purposes. He in fact made formal admissions, pursuant to s 184 of the *Evidence Act* 1995 [(NSW)], to that effect. A very small proportion of the funds ($718,000) was used in producing films. The income statement sent to investors falsely represented that income had been derived. The 'income' they showed was in fact funds derived from subsequent investors, and not from the marketing of completed film[s]. The so-called subsidy of 70 percent offered to investors was similarly a misrepresentation of the true position. The instruction given by the appellant to [Trainex's account and office manager] to conceal records from the [Australian Securities Commission] was evidence the jury were entitled to use as evidence of dishonesty."

48 Much of the evidence went both to dishonesty in the initial raising of the funds from investors and the application of the property of Trainex; contrary to what appears to have been an assumption in the appellant's submissions, there was no necessary dichotomy between the two. The prosecution case had been that the entire film production enterprise was "a sham". Evidence tending to indicate a deliberate and sustained course of deception by the appellant is probative of a lack of genuine belief in an entitlement to apply the property of Trainex to his own use or benefit.

49 Further, the documentation prepared by Trainex suggested that the appellant knew that Trainex owed obligations to others in respect of the

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54 *R v Macleod* (2001) 52 NSWLR 389 at 410-411.

disposition of the funds which he applied to his own use. A conclusion clearly was open that the appellant had known that the funds of investors were being held, pursuant to the Investor's Deed, for the particular purpose of film production and that he was obliged to see that those funds be kept by Trainex on trust for application for that purpose and not otherwise. The taking of those funds by the appellant for his own benefit, thereby placing Trainex in breach of trust, in the face of the documentary evidence that those funds had been raised for the purpose of film production, was indicative of the lack of any honest belief in his asserted entitlement to act as he did.

Adequacy of the trial judge's directions

50 The appellant submitted that the trial judge's directions were inadequate because they failed (i) to identify the need for dishonest means in the application of the funds, including the absence of informed consent of the "victim" of the fraud; (ii) to specify the facts from which dishonesty was to be inferred; (iii) to identify the need for prejudice to the company; (iv) to advert to the requirement for the prosecution to exclude a bona fide claim of right which involved a genuine, as opposed to reasonable, belief in the claimed right; and (v) to state that the appellant was entitled to be acquitted unless the jury were satisfied that the transactions were not loans.

51 It will be apparent from what has been said earlier in these reasons that these submissions were misconceived. Section 173 does not impose a requirement for an absence of informed consent on the part of the "victim" of the fraud and specific directions respecting a "claim of right" are not required. The trial judge adequately identified the facts from which dishonesty was to be inferred, by specifying the particular applications which were the subject of each count and by contrasting the prosecution case with what the appellant had claimed was his genuine belief in his entitlement to act as he did. The prejudice to Trainex, being the significant loss of property, did not need specifically to be identified.

52 In his written directions to the jury, the judge said:

> "Fraudulent means dishonest. To act fraudulently is to act dishonestly. In deciding whether the acts of the accused in applying the property of Trainex in the manner you find he did was or was not dishonest, you should apply the current standards of ordinary decent people."

This was repeated in the trial judge's oral directions.

53 The written directions on counts 20 and 22, under the heading "Other than for the purposes of Trainex", stated:

> "If you find that the money was applied to the Loan account of the accused in Starlight, the question for you is whether a purpose or use of Trainex has been served or promoted by such an application. Did such application advance or not advance the purposes of Trainex? The ultimate motives and intentions of the accused are irrelevant to a determination of the purpose of the application. But of course, they will be relevant to the question whether he acted fraudulently."

The substance of this direction was repeated orally to the jury.

54 In his oral directions with respect to counts 14, 16 and 18, the trial judge told the jury:

> "You know from the documentation that you have that the money came from persons, the various investors and you know from the documentation that you have what, according to both documents you may think the expectation on the Crown case of each of the investors was."

55 The judge's directions, when read as a whole, (i) identified the knowledge, belief or intent which was said to render the conduct of the appellant dishonest, and (ii) instructed the jury to decide whether the appellant had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest, by reference to the standards of ordinary, decent people. The submission that the Court of Criminal Appeal erred in holding that these directions were adequate in the circumstances should be rejected.

Conclusion

56 The appeal should be dismissed.

57 McHUGH J. Section 173 of the *Crimes Act* 1900 (NSW) made it an offence for a director or officer of any body corporate to fraudulently take or apply any of its property "for his own use or benefit, or any use or purpose other than the use or purpose of such body corporate". The principal question in this appeal is whether a person can be guilty of fraudulently applying property contrary to s 173 if that person is the controlling mind of and the only person beneficially interested in the company. If such a person can fraudulently apply property of the corporation, further questions arise in the appeal as to whether the trial judge misdirected the jury in respect of the term "fraudulently" and the appellant's "claim of right" to the property.

58 In my opinion, a person may be convicted of fraudulently applying a company's property although that person is the controlling mind of and the sole beneficial shareholder in the company. Further, the directions of the trial judge were adequate in relation to the term "fraudulently" and the appellant's "claim of right".

Statement of the case

59 In the District Court of New South Wales, a jury convicted Robert James Macleod of 18 offences arising out of his conduct as an officer of a corporation[55]. Five of the 18 offences (counts 14, 16, 18, 20 and 22) were breaches of s 173 of the *Crimes Act*. Counts 14, 16 and 18 charged that Macleod, being a director of Trainex Pty Ltd ("Trainex"), "fraudulently applied for his own use property owned by Trainex", being three substantial sums of money owed to Trainex by Chase AMP Bank. Macleod used the funds to purchase a home unit on the Gold Coast. Counts 20 and 22 charged that Macleod, being an officer of the company, "fraudulently applied for a purpose other than for the purposes of" Trainex property owned by Trainex by applying the property to pay off his loan account with another company, Starlight Film Studios Ltd ("Starlight"). He appealed to the New South Wales Court of Criminal Appeal (Mason P, Simpson J and Newman AJ) against his conviction. That Court dismissed the appeal. It rejected Macleod's submission that the evidence did not constitute the offences charged because there was a consensual transaction that precluded conviction under s 173. It also rejected his submissions that the prosecution evidence did not establish that he had acted "fraudulently" and that the trial judge had misdirected the jury in relation to the fraud and to the "defence" of a "claim of right".

60 In accordance with a grant of special leave to appeal, Macleod now appeals to this Court against his convictions on counts 14, 16, 18, 20 and 22 ("the fraud counts").

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55 Macleod was charged with 25 counts, six of which (counts 15, 17, 19, 21, 23 and 25) were alternatives to six primary charges (counts 14, 16, 18, 20, 22 and 24).

The material facts

61 The charges arose out of an enterprise conducted by Macleod over the period from 1989 to 1994[56]. The enterprise purported to take advantage of taxation concessions offered by Div 10BA of Pt III of the *Income Tax Assessment Act* 1936 (Cth). Macleod was a director of three companies, Trainex, Starlight and Communications Entertainment Network Ltd ("CEN"). Trainex was entirely under the control of Macleod. There was no evidence that any other person had any beneficial interest in Trainex.

62 Through these companies, Macleod purported to make films and videos in which he invited others to invest. Trainex was to receive the funds on the basis of standard documentation that emphasised the secure retention of the investors' funds in trust, pending expenditure on film production. Several thousand investors accepted this invitation, contributing more than $6,000,000. The money raised by Trainex was held in what the Investor's Deed referred to as "Trust Accounts" with Chase AMP Bank.

63 Macleod's investment scheme offered substantial tax advantages. An investment of $3,000 received a "subsidy" of $7,000. For an outlay of $3,000, an investor received a tax-deductible expense of $10,000. Macleod claimed that this subsidy was funded by overseas finance. There was no evidence of this finance in the company's records.

64 Investors were furnished with "income statements". They created the illusion that films were being made and were returning profits. Macleod determined the amount of income that was to be paid to investors. There was, however, no income derived from film production. The amounts remitted to investors as income came directly from investor funds.

65 Of the $6,000,000 invested, only $718,249.27 was used to make films. More than $2,000,000 was applied for Macleod's benefit, including purchasing a home unit on the Gold Coast in his own name and making payments to the credit of his loan account with Starlight.

66 The Australian Securities Commission investigated the enterprise in late 1991 or early 1992. Significantly, Macleod directed David Staume, Trainex's office and account manager, to store company records in a storage facility in the Sydney suburb of Ultimo to ensure that they would be hidden from the Commission. This was evidence of Macleod's consciousness of guilt.

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56 Because of limitation provisions, the only matters charged were those committed from 1991.

67 The Crown contended that the entire enterprise was a "sham" which Macleod practised upon investors to mislead them into believing that their funds were being used in accordance with the terms of the documents which Macleod had provided to them.

Macleod's case

68 Macleod contends that the evidence did not sustain the fraud counts because the use of the funds was "contemplated" by Trainex. He argues that "[i]t is essential to a fraudulent taking or application of property that the property be taken or applied with the intention of dealing with it in a manner not intended contemplated or understood by the victim". Macleod contends that, if the victim consents to the taking or application, no fraudulent taking or application occurs.

69 Second, Macleod contends that the trial judge misdirected or failed to direct the jury as to the element of "fraudulently" in the fraud counts. He argues that the judge did not adequately direct the jury as to the need for the application to be dishonest towards the company. Macleod contends that the trial judge did not direct the jury that the use of dishonest means is an essential element in a "defrauding offence", and that this must have taken place in relation to obtaining the property.

70 Third, Macleod contends that the trial judge erred in his directions to the jury concerning Macleod's "claim of right". According to Macleod, "[e]xclusion of a bona fide claim of right is an additional element of the offence, over and above the requirement to establish dishonest means", and the trial judge's directions did not reflect this requirement.

71 Macleod contends that, if the Court upholds his first submission, it should enter an acquittal on the fraud counts. If the Court rejects that submission but upholds any of the other submissions, it should order a new trial.

Issue 1: Whether a sole shareholder's consent to the taking of company property negates a charge of fraudulently applying that property

72 The first issue in the appeal is whether a charge of "fraudulent application" under s 173 of the *Crimes Act* can be made out where the accused is the controlling mind of and the sole person beneficially interested in the company. It raises the question whether an officer of the company can be guilty of a fraudulent application of the company's property where, being the controller of the company, the officer consents to the transfer of corporate property to himself or herself.

73 Central to Macleod's argument is the submission that the property must be taken or applied with the intention of dealing with it in a manner not intended or

contemplated by the "victim". That is, Macleod maintains that the essential element of the fraud is the absence of consent. He argues that in the present case "the victim" of the "fraud" is the company and the consent of its sole shareholder is an answer to any claim of fraud. Accordingly, he says that he committed no offence because Trainex consented to his use of the funds. In the words of his counsel, Macleod, as "the sole beneficial shareholder[,] cannot defraud himself".

Neither authority nor the proper construction of s 173 supports the contention

74 Authority does not support Macleod's argument. Nor is its major premise the consequence of the proper construction of s 173. The consent of a sole shareholder cannot cure what would otherwise be a fraudulent taking or application of the company's property.

75 A corporation is an entity separate from other persons who are its shareholders or associated with it. In *Salomon v Salomon & Co*[57], the House of Lords unequivocally ruled that, even if a company is in essence a one-person business, no question of agency or trusteeship arises between the company and its controller. The company has the legal and beneficial title to its property. While legislative restriction on fraudulent dealing by agents, trustees, and directors in property entrusted to them for a particular purpose pre-dates the emergence of the separate legal entity concept[58], the current provision must be read in the light of the dichotomy between the company and those who are its shareholders.

76 Even where the shares of a company are closely held, the purposes (or interests) of the body corporate are not synonymous with the intentions of the person or persons in control. Even if all the shareholders are officers of the company and consent to the taking of the company's property, one or all of them can be guilty of an offence or offences against s 173 of the Act. In the Court of Criminal Appeal, Mason P said, correctly in my opinion[59]:

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57 [1897] AC 22.

58 The earliest forms of the current s 173 were enacted in England in 1857 (20 & 21 Vict c 54), and adopted in the same form by the *Trustees and Directors Frauds Protection Act* 1858 (NSW). From there they have passed through consolidating Acts into the *Crimes Act* where they have remained relevantly unchanged since the Act's enactment.

59 (2001) 52 NSWLR 389 at 394.

> "In the context of provisions like s 173 there is clear authority that being in dominant control of a company provides no defence to a director proven to have fraudulently 'applied' company cheques for his or her own purposes."

77 In *Attorney-General's Reference No 1 of 1985*[60], the Supreme Court of South Australia sitting *in banc* was asked to determine:

> "2. Whether a man in dominant control of a limited liability family company ... is capable of fraudulently applying the property of the company on a proper construction of s 189 of the *Criminal Law Consolidation Act* 1935-1984; and whether two men in dominant control of a limited liability company ... are (while acting in concert), capable of fraudulently applying the property of the company on a proper construction of s 189".

78 Section 189 of the *Criminal Law Consolidation Act* 1935-1984 (SA) was not materially different from s 173 of the *Crimes Act*. King CJ, Bollen and Prior JJ unanimously answered the question in the affirmative. Prior J who gave the judgment of the Court said[61]:

> "The company was not charged with stealing from itself, or anyone else. Nor was it charged with applying property of its own for a purpose other than its own. The accused was not, and is not, the company. The fact that he is in dominant control of it, does not make the company property his property."

79 Later, his Honour said "a man in dominant control of a company can fraudulently apply the company's property"[62].

80 Not only is authority and principle against the contention submitted by Macleod but the terms of s 173 give no support to his submissions. The elements of s 173 are:

> (1) the taking or application of company property;
>
> (2) by a company director, officer or member;

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60 (1985) 41 SASR 147 at 150.

61 (1985) 41 SASR 147 at 153.

62 (1985) 41 SASR 147 at 154.

(3) for his own use or benefit, or any use or purpose other than the use or purpose of the company;

(4) that was fraudulently made.

81 Section 173 itself suggests a dichotomy between the personal use or benefit of the director or officer and the use or purpose of the company. The section proscribes use by an officer of property for any use or purpose other than the use or purpose of the body corporate. This is an objective test.

82 Under the *Crimes Act*, whether the taking or application was for the purposes of a corporation is determined objectively by reference to all the circumstances revealed in the evidence[63]. The use and benefit of the company is separate from (although not necessarily inconsistent with) the use or benefit of the accused.

83 In s 173, "fraudulently" is an adverb that characterises the taking of property for the officer's own benefit or for purposes other than that of the company. The focus of the provision must be on whether the use of the company's property was for the use or purpose of the company. If it was not, it may – is very likely to – be fraudulent or dishonest. In the present case, Macleod applied the relevant property solely for his benefit – it could not be characterised otherwise. And it was open to the jury, as I later indicate, to find that the use was fraudulent.

84 Section 173 does not require an absence of the "victim's" consent.

85 However, Macleod claims that *R v Roffel*[64] is authority for the proposition that the consent of all the shareholders is a defence to a charge of fraudulent taking or application of a company's property. In *Roffel*, a husband and wife were sole shareholders of a company whose stock and machinery were destroyed in a fire. Despite assuring creditors that they would be paid, the Roffels used most of the insurance payment for their own benefit. Mr Roffel was charged with theft of the company's funds. He defended his actions by asserting his belief that he was entitled to the monies as a company creditor on the basis that the company had originally received the entire business assets of the Roffels' partnership in exchange for shares issued. The jury convicted him. On appeal, he contended that there was no "appropriation" because the company had consented to the taking, the consent being evidenced by the acquiescence of both shareholders.

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63 *R v McEwan* unreported, Supreme Court of New South Wales, 17 March 1978; *R v Glenister* [1980] 2 NSWLR 597 at 602-603.

64 [1985] VR 511.

86 By majority, the Full Court of the Supreme Court of Victoria held that, when Roffel had taken the money, the company intended him to have it. Accordingly, there was no appropriation. The majority, applying the House of Lords decision in *R v Morris*[65], held that there is no adverse interference with or usurpation of an owner's property where the owner consents to the taking of the property. Young CJ said[66]:

> "There was no evidence to suggest that the company did not intend the applicant to have the money and to use it for his own purposes. If the company decided to give the money to the applicant in order to defeat its creditors, that would be quite irrelevant. The motive of the company in making the gift could not convert the applicant's act in receiving the money into a usurpation of the company's rights."

The majority found that, if a taking of possession of property is "consensual in the true sense" (that is to say that consent had not been obtained by duress or deception), it could not be described as an appropriation[67].

87 The decision in *Roffel* was met with "disbelief" from some commentators[68]. To some extent, the Victorian courts have sought to distance themselves from the decision[69]. In my opinion, the case was wrongly decided for the reasons given by Brooking J who dissented. His Honour held that an appropriation of property takes place where a person takes possession of another's property. His Honour thought that the consent of the owner was immaterial to whether an appropriation had taken place. He said[70]:

> "I see no sufficient warrant for holding that there is no assumption of the rights of an owner within the meaning of s 73(4) [of the *Crimes Act* 1958

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65 [1984] AC 320.

66 [1985] VR 511 at 514.

67 *R v Roffel* [1985] VR 511 at 518 per Crockett J.

68 Baxt, "Commercial Law", (1993) 67 *Australian Law Journal* 696. See also von Nessen, "Company Controllers, Company Cheques and Theft – An Australian Perspective", (1986) *Criminal Law Review* 154; von Nessen, "My Body, Myself: Problems of Identity in Corporate Crime", (1985) 3 *Company and Securities Law Journal* 235.

69 See *Feil v Commissioner of Corporate Affairs* (1991) 9 ACLC 811.

70 *R v Roffel* [1985] VR 511 at 530.

> (Vic)] if the act in question is authorized by the person to whom the property belongs. The clear words of s 73(4) are not to be cut down by reference to some notion said to be contained in the ordinary meaning of 'appropriates'. The suggestion that the word 'assumption' in s 73(4) connotes something like want of authority I find unpersuasive."

88 This Court rejected the Crown's application for special leave to appeal against the judgment of the Full Court. But that was because the prosecution had failed to establish the appropriate lack of company consent at trial[71].

89 Unsurprisingly, the House of Lords disapproved *Roffel* in *R v Gomez*[72] where the issue was whether a charge of theft could be sustained against the respondent in circumstances where the owner of the relevant goods could be deemed to have consented to the goods being transferred[73]. The House also disapproved the reasoning in its earlier decision of *Morris*[74].

90 Lord Browne-Wilkinson said of that and similar cases[75]:

> "If the accused, by reason of being the controlling shareholder or otherwise, is 'the directing mind and will of the company' he is to be treated as having validly consented on behalf of the company to his own appropriation of the company's property. This is apparently so whether or not there has been compliance with the formal requirements of company law applicable to dealings with the property of a company …
>
> *In my judgment this approach was wrong in law* … Where a company is accused of a crime the acts and intentions of those who are the directing minds and will of the company are to be attributed to the company. That is not the law where the charge is that those who are the directing minds and will have themselves committed a crime against the company …

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71 Unreported, High Court of Australia, 17 May 1985.

72 [1993] AC 442.

73 Section 1(1) of the *Theft Act* 1968 (UK) provided: "A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it".

74 [1984] AC 320.

75 *R v Gomez* [1993] AC 442 at 496-497. See also at 464-465 per Lord Keith of Kinkel, 491-492 per Lord Lowry.

> In my judgment the decision in *R v Roffel* [and statements in other cases] are not correct in law and should not be followed." (emphasis added)

91 While Lord Keith of Kinkel said that the actual decision in *Morris* was correct, he considered that it was "erroneous, in addition to being unnecessary for the decision, to indicate that an act, expressly or impliedly authorised by the owner could never amount to an appropriation"[76]. His Lordship said[77]:

> "[A] person who ... procures the company's consent dishonestly and with the intention of permanently depriving the company of the money is guilty of theft contrary to [the *Theft Act*]".

92 In any event, *Roffel* does not assist Macleod. Section 72(1) of the *Crimes Act* 1958 (Vic), on which *Roffel* turned, is significantly different from s 173[78]. It penalised dishonest appropriation "with the intention of permanently depriving" another of his or her property. In *Attorney-General's Reference No 1 of 1985*[79], the Supreme Court of South Australia, without considering whether *Roffel* was correctly decided, held that it had no relevance under the South Australian equivalent of s 173 of the *Crimes Act*.

93 I reject the submission that an officer of a company cannot be guilty of the fraudulent taking of a company's property if, as its sole shareholder, that person consents to the taking.

Issue 2: Whether the judge misdirected the jury as to the meaning of "fraudulently"

94 Macleod contends that the trial judge's directions were inadequate because they failed to identify the use of dishonest means as an essential element of s 173. He submits:

> "In a fraudulent taking or application, there must be a taking or application by dishonest means, and it is the taking or application which must be fraudulent, and this focuses attention on the taking or application – and not the accused's ultimate purpose."

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76 *R v Gomez* [1993] AC 442 at 464.

77 *R v Gomez* [1993] AC 442 at 465.

78 Section 72(1) of the *Crimes Act* 1958 (Vic) provided: "A person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it."

79 (1985) 41 SASR 147 at 153-154.

95 Macleod contends that "[t]he evidence was insufficient to establish dishonesty *towards the company in the application of the funds*", and that the jury were inadequately directed in this regard. These submissions cannot be sustained.

96 In s 173, "fraudulently" means acting dishonestly, and it was open to the jury to find that Macleod dishonestly applied the funds of Trainex for his own benefit. The trial judge's directions contained no error.

97 In *R v Scott*[80], the House of Lords held that "fraudulently" means "dishonestly". Since that decision, courts have accepted that in a criminal prosecution "fraudulently" simply means acting dishonestly and that it is not necessary, for example, to prove any "deceitful deprivation" by the person alleged to have acted fraudulently. In *Scott*, the means proposed to perpetrate the agreement to defraud were dishonest, but not deceitful. Because there was no deceit, the accused contended that his conduct was not fraudulent. But the House of Lords held that deceit was not a necessary element of "fraud" and that dishonest means were sufficient. Viscount Dilhorne, with whose speech the other Law Lords agreed, said[81]:

> "As I have said, words take colour from the context in which they are used, but the words 'fraudulently' and 'defraud' must ordinarily have a very similar meaning. If, as I think, … 'fraudulently' means 'dishonestly', then 'to defraud' ordinarily means … to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled."

98 In *R v Glenister*[82], the New South Wales Court of Criminal Appeal held – correctly in my opinion – that in s 173 "fraudulently" has "a meaning interchangeable with 'dishonestly'".

99 Where the dishonesty of the accused is an issue in a prosecution, the appropriate directions for the jury are those identified by Toohey and Gaudron JJ in *Peters v The Queen*[83]. Their Honours said[84]:

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80 [1975] AC 819.

81 [1975] AC 819 at 839.

82 [1980] 2 NSWLR 597 at 604.

83 (1998) 192 CLR 493.

84 (1998) 192 CLR 493 at 504 [18].

> "[T]he proper course is for the trial judge to identify the knowledge, belief or intent which is said to render that act dishonest and to instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest. Necessarily, the test to be applied in deciding whether the act done is properly characterised as dishonest will differ depending on whether the question is whether it was dishonest according to ordinary notions or dishonest in some special sense. If the question is whether the act was dishonest according to ordinary notions, it is sufficient that the jury be instructed that that is to be decided by the standards of ordinary, decent people. However, if 'dishonest' is used in some special sense in legislation creating an offence, it will ordinarily be necessary for the jury to be told what is or, perhaps, more usually, what is not meant by that word. Certainly, it will be necessary for the jury to be instructed as to that special meaning if there is an issue whether the act in question is properly characterised as dishonest."

100 Thus, in accordance with *Peters*, the trial judge in a case like the present must:

(a) identify the knowledge, belief or intent which is said to render the relevant conduct dishonest; and

(b) instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest; and

(c) direct the jury that, in determining whether the conduct of the accused was dishonest, the standard is that of ordinary, decent people.

The directions on "fraudulently" were not inadequate

101 The directions of the trial judge in this case accorded with the requirements set out by Toohey and Gaudron JJ in *Peters*. They identified the knowledge, belief or intent that was said to render the conduct dishonest. They also instructed the jury to decide whether the accused had that knowledge, belief or intent, according to the standards of ordinary, decent people.

102 In charging the jury, the learned trial judge gave written directions that contained the following paragraph:

> "(30) *Fraudulent* means dishonest. To act fraudulently is to act dishonestly. In deciding whether the acts of the accused in applying the property of Trainex in the manner you find he did was or was not dishonest, you should apply the current standards of ordinary decent people."

103 On the first day of the summing-up, his Honour directed the jury:

> "In paragraph 30 you are told that fraudulent means dishonest. To act fraudulently is to act dishonestly. In deciding whether the acts of the accused, such acts as you find he did on the evidence that you have, in applying the property of Trainex in the manner you find he did, and there does not seem to be any dispute about where the money went to and for what purpose it went in relation to this unit in the Gold Coast, but in deciding whether such acts of the accused as you find he did in applying the property of Trainex in the manner you find he did was or was not dishonest you as the jury apply the current standards of ordinary decent people."

104 The following day the judge returned to this topic. He said:

> "I should have said this to you yesterday that the accused's state of mind may also be relevant to the question of whether or not he acted improperly. For example if he reasonably believed that what he did was genuinely for the benefit of the company that belief may be relevant in determining whether he can be held to be criminally responsible for using his position in the way that he did.
>
> I might not have made clear to you yesterday that in the accused's case after counts one to thirteen is that he was legally entitled to use the company funds in the way that he did. Specifically he said that one, he is owed money for his services such as script writing, acting as a producer and an executive producer. Acting as the director of a company and generally managing the company and acquiring copyright. Two, that he directed Mr [Staume] to record all money advanced to him as loans and three, that Trainex owed him more money than he owed Trainex. Of course you also recall the Crown address to you and his submissions as to why you should find the accused acted dishonestly.
>
> I remind you of my directions to you especially in relation to the meaning of fraudulently which is in paragraph thirty of my aide memoire that you have that and in assessing the accused case that he was entitled to use the company money as he did you should apply the same principles, that is whether by ordinary notions the accused was *acting honestly by the standards of ordinary decent people*. Finally I remind you that again the onus remains on the Crown to establish the elements of the charges beyond reasonable doubt." (emphasis added)

105 It was open to the jury, in considering the matter through the lens of the standards of ordinary, decent people, to conclude that at the relevant time Macleod knew that he was not entitled to apply the property for his own benefit and in that regard, his actions were dishonest.

106 There was abundant evidence that Macleod acted fraudulently. Although investors invested over $6,000,000 for the purpose of the scheme, only $718,000 was used to produce films. In contrast, Macleod used over $2,000,000 of those funds for his own private purposes. The "income" statements that he sent to investors falsely represented that income had been derived from the making of films. The "income" returned to investors was taken from funds invested by later investors. His statement that investors would receive a subsidy funded by overseas finance was another lie. His instruction to Mr Staume to hide company records from the Australian Securities Commission evidenced a consciousness of guilt. If the jury had acquitted him of these charges, the acquittals would have been perverse. And, as I have pointed out, the trial judge's directions were not inadequate.

The directions on "claim of right" were not necessary or appropriate

107 For the reasons expressed in the joint judgment of Gleeson CJ, Gummow and Hayne JJ[85], I agree that it was neither necessary nor appropriate for the trial judge to direct the jury about a "subjective" test for a claim of right.

Conclusion

108 The appellant was lawfully and properly convicted on an overpowering prosecution case. The appeal must be dismissed.

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85 Reasons of Gleeson CJ, Gummow and Hayne JJ at [39]-[49].

109 CALLINAN J. This appeal raises questions as to the capacity of a director of a company to give a valid consent on its behalf to an unlawful use of its funds for his own benefit.

The facts

110 The appellant was a director of Trainex Pty Ltd ("Trainex" or "the company") and its sole shareholder. He alone controlled and managed it. Trainex solicited money from the public for investment in film making. Money invested for that purpose could attract an income tax concession for an investor pursuant to Pt III, Div 10BA of the *Income Tax Assessment Act* 1936 (Cth) ("the Income Tax Act").

111 The receipt and application of money so invested were governed by deeds executed by Trainex and each investor. The money was to be used to acquire a proprietary interest in films. An example is the deed entered into in relation to a film or series of films called "Toddler Taming", which was to be completed by 30 December 1990. Copyright in the film was to be owned, as to 50 percent by Trainex, and as to the remaining 50 percent by investors in proportion to their investments. By cl 2.2 of the deed Trainex was to deposit the invested funds into a trust account; by cl 2.3 Trainex was permitted to invest the funds in any interest bearing, or discounted securities authorised by the *Trustee Act* 1925 (NSW). On fulfilment of several conditions, including in particular the raising of sufficient money to meet the budgeted cost of making the film, Trainex was, by cl 5, to proceed to make it.

112 By cl 6.1(a) of the deed each investor was to be one of the first owners of the copyright in the film: otherwise the taxation benefits available under Pt III, Div 10BA of the Income Tax Act would not be available. There was an acknowledgment in the deed (cl 8.1) that from the completion date (as defined), the copyright in the film would be owned by the investors and Trainex in the proportions already mentioned.

113 It was a term of the deed, subject to some presently irrelevant exceptions, that Trainex or its agent would hold on behalf of the investors all rights necessary to make and market the film (cl 6.1(b)). The disbursement of the nett proceeds of the film was governed by cl 10 of the deed. Investors were entitled to a return of the amount invested, and, after repayment of any money provided by others in respect of the completion of the film, a proportionate share in any additional proceeds.

114 Each investor was sent a letter by Trainex. The letter in respect of another proposed film, "The Paradise Kids", was as follows:

"Dear Investor,

This letter is to confirm the basis on which we will hold in our Trust Account certain moneys, (the 'Moneys'), received by [sic] you.

1. The Moneys constitute an investment by you in the acquisition of the copyright of a film ...

2. The Moneys are to be invested in acquiring the copyright of the film substantially on the basis outlined in the attached pages.

3. The Moneys are to be paid to Motion Picture Management Limited, (who is the offeror named on the Prospectus for the film), when the prospectus for the film is registered, EXCEPT THAT if, for any reason whatsoever, you are not satisfied with the details of the said prospectus or if the said prospectus is not registered by 31st July 1991, you can request that the Moneys, (less FID and Bank charges), can be returned and such Moneys, (less the said FID and Bank charges), will be returned to you immediately upon your written instructions."

115 From time to time investors were sent other letters containing "investment details", also referred to as "income statements". One such letter sent in 1989, before "Toddler Taming" was made, contained this assertion:

> "There is a requirement that a concession claimed in relation to a film under 10B of *Tax Act* should be income producing in the year in which the concession (or deduction) is claimed. *The above film has met that requirement*." (emphasis added)

The recipient was advised to declare, for taxation purposes that:

> "*The film has become income producing* and the amount credited to my account is $195.65." (emphasis added)

116 Other income statements, in a similar form, referring to income from "video sales – initial order" or "video sales – second order" and later orders were sent to investors from time to time. Investors were invited to elect whether to receive the relatively small amounts of income (falsely said to be generated by exploitation of films) or to have them reinvested.

117 As Simpson J in the Court of Criminal Appeal said[86]:

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86 *R v Macleod* (2001) 52 NSWLR 389 at 409 [81].

> "These statements created the illusion that a film had been made, that marketing had begun, and that income was being generated. The truth was that ten videos constituting the *Toddler Taming* series were taped between August and December 1990, after considerable agitation by Dr Green. There was, in fact, no income from film production. The appearance of such income was created by allocating fresh investment funds to that purpose."

118 I adopt the following summary of further relevant facts made by her Honour[87]:

> "In November 1989, a cheque in the amount of $300,000 was drawn on Trainex's business account. It was paid into the trust account of a firm of solicitors representing the vendor of a property purchased in the appellant's name.
>
> Over a period substantial sums were paid from Trainex's accounts and credited to the appellant's loan accounts, from which the appellant drew from time to time. In 1991, cheques totalling $955,000 were drawn on Trainex's accounts and applied to the purchase of a home unit on the Gold Coast in the appellant's name.
>
> In late 1991 or early 1992, the Australian Securities Commission ('the ASC') was investigating the enterprise. The appellant directed David Staume, Trainex's account manager and office manager, to remove company records to a storage centre in Ultimo. His stated purpose was to ensure that they would not be found by the ASC."

119 The appellant was charged with 25 counts, six of which (counts 15, 17, 19, 21, 23 and 25) were alternatives to six primary charges (counts 14, 16, 18, 20, 22 and 24). Counts 1 to 4 were of offences under ss 169[88] and 570(1)[89] of the

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87 *R v Macleod* (2001) 52 NSWLR 389 at 409 [82]-[84].

88 Section 169 of the *Companies (New South Wales) Code* provided as follows:

> "A person, other than a company or an agent of a company authorized for that purpose under the common or official seal of the company, shall not issue to the public, offer to the public for subscription or purchase, or invite the public to subscribe for or purchase, any prescribed interest."

89 Section 570(1) of the *Companies (New South Wales) Code* provided as follows:

> "(1) A person who –

(Footnote continues on next page)

Companies (New South Wales) Code and the next nine counts were of offences under various sections of the Corporations Law and the *Securities Industry (New South Wales) Code*. This appeal is not concerned with those counts. The appellant was convicted in the District Court of New South Wales (Rummery DCJ) on five of the primary counts (14, 16, 18, 20 and 22) and it is with these that the appeal to this Court is concerned. These were laid under s 173 of the *Crimes Act* 1900 (NSW) ("the Act"). Counts 14, 16 and 18 were of fraudulently applying for his own use property owned by Trainex (being a sum standing to the credit of Trainex at the Chase AMP Bank), respectively, of (in count 14) $270,000, (in count 16) $160,000, and, (in count 18) $524,872.05. The offences charged in counts 20 and 22 were of fraudulently applying for a purpose other than that of Trainex, property (being a sum standing to the credit of Trainex at the Chase AMP Bank) by causing the Chase AMP Bank to pay to Starlight Film Studios Ltd ("Starlight") to be credited to the appellant's loan account with Starlight respectively of (in count 20) $356,646.68 and (in count 22) $5,103.

The appeal to the Court of Criminal Appeal

120 The appellant appealed against his convictions to the Court of Criminal Appeal of New South Wales. There, Mason P (with whom Simpson J and Newman AJ agreed) rejected a submission by the appellant that in the absence of evidence establishing that his use of the funds was not intended by Trainex, he could not be guilty of a contravention of s 173 of the Act. Their Honours held that fraudulently meant dishonestly, and that, for the purposes of s 173 the fact of control of a company provided no defence to a director or officer proved to have fraudulently "applied" company cheques for his or her own purposes. His Honour was of the view that if *R v Roffel*[90] were to be regarded as good law, it should be confined strictly to its particular statutory context of the use (and meaning) of the word "appropriation" in the statutory definition in Victoria

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(a) does an act or thing that he is forbidden to do by or under a provision of this Code;

(b) does not do an act or thing that he is required or directed to do by or under a provision of this Code; or

(c) otherwise contravenes or fails to comply with a provision of this Code,

is, unless that provision or another provision of this Code provides that he is guilty of an offence, guilty of an offence by virtue of this sub-section."

90 [1985] VR 511.

of theft: for the purpose of a provision such as s 173 of the Act the fact of dominant control of a company by a person provided no defence to a director or officer who has fraudulently applied company cheques for his or her own purposes. The appeal was therefore dismissed.

The appeal to this Court

121 Section 173 of the Act provided as follows:

> "**173 Directors etc fraudulently appropriating etc property**
>
> Whosoever, being a director, officer, or member, of any body corporate, or public company,
>
> > fraudulently takes, or applies, for his own use or benefit, or any use or purpose other than the use or purpose of such body corporate, or company, or
> >
> > fraudulently destroys any of the property of such body corporate, or company,
>
> shall be liable to penal servitude for 10 years."

122 The section is one of a number of sections which deal with the obligations of officers of companies and persons owing fiduciary duties in respect of property or money. Circumstances may exist in which a charge might be brought under, for example either s 173 or s 176A of the Act, the latter of which I set out.

> "**176A Directors etc cheating or defrauding**
>
> Whosoever, being a director, officer, or member, of any body corporate or public company, cheats or defrauds, or does or omits to do any act with intent to cheat or defraud, the body corporate or company or any person in his or her dealings with the body corporate or company shall be liable to imprisonment for 10 years."

The appellant's submissions

123 The principal submission that the appellant advances is that as the sole shareholder and a director of Trainex he could and did consent on its behalf to the use of the invested money for his own purposes: including for example, the purchase in his name of a home unit at the Gold Coast in Queensland for almost a million dollars. He does not shrink from that submission in the light of the further relevant facts that the money that was so used was not even beneficially owned by Trainex, but was for investment in accordance with a very explicit deed. He does not shrink from the submission even though he was bound to concede that if Trainex had any other shareholders at all, and no matter how

small their shareholdings might be, the position would be different. He went so far as to say, as he had to, if his principal submission were correct, that the sole shareholder of a company can never be guilty of an offence under s 173 of the Act in using the funds of a company, effectively how he likes.

R v Roffel overruled

124 The submission must be rejected. It must be rejected notwithstanding the decision of the Full Court of Victoria in *R v Roffel*[91] (Young CJ and Crockett J, Brooking J dissenting) or any of the decisions[92] upon which that decision purports to rest. The dissent of Brooking J in *Roffel* is, in my opinion to be preferred. It is unnecessary to add to his Honour's detailed review of the relevant texts and authorities. The force of Brooking J's reasoning is in no way diminished by his Honour's conclusion that the case could be decided on the meaning of the word "appropriation" as used in the enactment under consideration[93].

125 The decision in *Roffel* has attracted a deal of criticism. It was described as technically correct in a note in the *Australian Law Journal*[94]. In *R v Maher*[95] in the Court of Criminal Appeal of Queensland it was argued by the respondent that *Roffel* had been wrongly decided. The Court (Kelly ACJ, Derrington and Moynihan JJ) was content to distinguish it[96]. Its reasoning has been disapproved by the House of Lords in *R v Gomez*[97].

126 *Roffel* could not in any event be successfully relied on by the appellant here. Quite apart from the points made by Brooking J which are persuasive, and in my opinion correct, *Roffel* suffers from the defect that it makes no reference to

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91 [1985] VR 511.

92 eg *R v Morris* [1984] AC 320.

93 [1985] VR 511 at 526-527.

94 Baxt, "Commercial Law", (1993) 67 *Australian Law Journal* 696.

95 [1987] 1 Qd R 171.

96 [1987] 1 Qd R 171 at 195-196.

97 [1993] AC 442 at 496-497 per Lord Browne-Wilkinson, Lords Keith of Kinkel, Jauncey of Tullichettle and Slynn of Hadley agreeing, and was not followed in *Attorney-General's Reference No 1 of 1985* (1985) 41 SASR 147 at 153-155.

provisions or analogues[98] of them that have appeared in legislation for many years with respect to directors and officers of companies which not only create offences, but also impose affirmative duties of honesty, care and diligence on directors and officers, as well as prescribe the conditions for the making of loans by companies to them, matters of inescapable relevance to the propriety and possible criminality of any transactions between a company and a director or officer even when charges under those provisions are not directly under consideration.

The appellant was guilty of fraudulent taking or application of property of Trainex

127 The appellant submits that he could not be guilty of any fraud upon the company because it, or he, on its behalf consented to the use of, and the application of the money on his behalf. The use of the money was however in no fewer than three respects "unlawful". It was done in breach of the appellant's duties as a director. This was so whether or not the appellant was convicted on a charge under s 229 of the *Companies (New South Wales) Code* or its subsequent analogue in the Corporations Law because on any view the way in which the funds were applied by the appellant could not be regarded as an honest or reasonably careful and diligent discharge of the appellant's duties. The use of the money constituted a breach of trust, and although the memorandum and articles of association of Trainex were not before the Court, it is plain that the money used by the appellant was not used in pursuance of the objects of the company. Whether unlawfulness is or is not necessarily to be equated with fraud or dishonesty, it is relevant to the question whether fraud or dishonesty is present. Taken to their logical conclusion the appellant's submissions would, if correct, mean that no matter how the appellant chose to use Trainex's money, the company (by him) could always validate that use by consenting to it. I cannot accept this submission. It ignores the vital distinction which the law draws between separate legal personalities. It is a distinction which s 173 itself makes. The funds or property of a company can only be used or applied as the result of some act or conduct on the part of a natural person. The fact that the natural person so acting is in effective control of the company does not mean that he *is* the company, or that no distinction may be drawn between what he does and what the company may and should lawfully do.

128 A director or officer acting in breach of his obligations under statute law relating to companies, or in breach of its memorandum and articles of association, by using the money of the company for his own purpose is no more the voice or the amanuensis of the company, as between himself and the

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98 *Companies (New South Wales) Code*, s 229; *Corporations Act* 1989 (Cth), s 232; Corporations Law, s 232 and *Corporations Act* 2001 (Cth), ss 180-185.

company, than a thief who gains access to its treasury and steals money from it, or a forger who forges a company cheque in his own favour. Nor can it be overlooked that s 173 in terms also renders criminal a fraudulent taking or application of property for other than a use or purpose of the company. In acting as he did in applying the money to which Trainex had legal title, but in respect of which it owed express fiduciary duties, he was not acting for or on behalf of the company, or indeed as the company, but in his own interests.

129 The appellant submitted that "fraudulently" as used in the Act meant more than merely "dishonestly", that it required an added ingredient of trickery or deceptiveness of conduct as well as of intent.

130 No matter how the word "fraudulently" in s 173 of the Act is to be understood the appellant was shown to have acted fraudulently here. An explanation of what dishonesty involves will rarely require elaboration to a jury by a trial judge. In this respect what was said by Toohey and Gaudron JJ in *Peters v The Queen* is apposite[99]:

> "In a case in which it is necessary for a jury to decide whether an act is dishonest, the proper course is for the trial judge to identify the knowledge, belief or intent which is said to render that act dishonest and to instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest. Necessarily, the test to be applied in deciding whether the act done is properly characterised as dishonest will differ depending on whether the question is whether it was dishonest according to ordinary notions or dishonest in some special sense. If the question is whether the act was dishonest according to ordinary notions, it is sufficient that the jury be instructed that that is to be decided by the standards of ordinary, decent people. However, if 'dishonest' is used in some special sense in legislation creating an offence, it will ordinarily be necessary for the jury to be told what is or, perhaps, more usually, what is not meant by that word. Certainly, it will be necessary for the jury to be instructed as to that special meaning if there is an issue whether the act in question is properly characterised as dishonest[100]."

That the appellant was not charged under s 172 of the Act[101] does not mean that the fact that he caused the company to act in breach of its obligations as a trustee

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99 (1998) 192 CLR 493 at 504 [18].

100 As in *R v Salvo* [1980] VR 401.

101 Section 172 provided as follows:

(Footnote continues on next page)

does not make his conduct in that regard irrelevant. "Fraudulently" taken at its lowest as requiring merely "dishonesty"[102] was abundantly made out here. The appellant well knew of the obligations that the deed imposed upon Trainex. He also well knew that the money in its possession had not been used for the only purposes for which it could be used, to make the films, acquire the copyright, and otherwise to hold it for the investors, and he knew that his representation with respect to the generation of income by the films was false. Singly or together these matters were well capable of establishing beyond doubt that he was dishonest. They could also establish, in my opinion, fraud if there be required for it some additional ingredient to dishonesty. The appellant's conduct in several respects involved trickery or deception. The false "income statements" alone provided ample evidence of these. The trial judge's directions as to "fraudulently" were sufficient for the circumstances of this case.

131 The appellant sought to emphasize in his submissions that there was no absence of consent by Trainex to the use of the funds by the appellant. The submissions ignore the realities that, first: any "consent" by Trainex for a use of the monies contrary to its lawful objects could not be a real and effective consent; secondly, that a consent to an illegality could not be a valid and effective consent; thirdly, that Trainex had no beneficial interest in the funds at any material time; fourthly, that they were to be held strictly upon the trusts contained in the deed; and fifthly, that in those circumstances the "consent" could not be the consent of Trainex: at most it could only be a purported consent by a different legal personality on its behalf, the appellant. Each of these is a reason why the appellant's attempt to characterize, as the appellant appears to have accepted he had to do, the consent of Trainex as a "true consent" failed.

"Whosoever, being a trustee of property for the use or benefit, wholly or partially, of some other person or for any public or charitable purpose,

> converts, or appropriates, the same, or any part thereof, for the use or benefit of himself, or some other person, or for any other than such public or charitable purpose, or,
>
> otherwise disposes of, or destroys such property, or any part thereof,

in violation in any such case of good faith, and with intent to defraud, shall be liable to penal servitude for ten years:

Provided that no prosecution shall be instituted under this section without the leave of the Supreme Court or of the Attorney-General."

102 *Peters v The Queen* (1998) 192 CLR 493 at 542 [114] per Kirby J.

132 The appellant repeatedly protested in cross-examination that the promises made by the deed did not reflect his real intentions. He sought to justify his use of the investors' money for his own benefit by contending that Trainex owed him money, and that the payments were to purchase, or to reimburse the appellant for the purchase of the copyright of a script or scripts. The jury was entitled, indeed almost bound, to reject these claims having regard to the limited and particular uses to which the investors' funds were to be put, how they were to be held until they could lawfully be put to those uses, and further, to the use of the funds well before there was even a film in existence in respect of which the copyright could be acquired.

The appellant's claim of right and of misdirections in respect of it fails

133 The appellant complains that the trial judge failed to direct the jury adequately with respect to the appellant's defence of claim of right. The claim of right was made on several bases. I have already referred to the ones upon which the appellant placed weight, the alleged loans, purchases and reimbursements.

The appellant's submissions as to misdirection by the trial judge

134 On the second day of his Honour's summing-up, the trial judge gave some additional directions to the effect that the accused's state of mind could be relevant to whether or not he acted improperly (language analogous to the terminology used in the Corporations Law, s 232(6)[103]): that if he *reasonably* believed that what he did was for the benefit of the company that might be relevant in determining whether he could be held criminally responsible for using his position as he did. His Honour then said that "the accused case after counts one to thirteen" is that he was entitled to use the company funds in the way in which he did. His Honour did not give any further directions as to the claim of right except to remind the members of the jury of what appeared in the written directions that they had already been given, that "in assessing the accused's case that he was entitled to use the company money as he did you should apply the ... standards of ordinary decent people."

135 The appellant submitted that these directions could not have brought home to the jury that, in respect of the fraud charges, the Crown had to show that the claim of right was not only not reasonably held, but also not genuinely held. It

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103 Section 232(6) provided as follows:

> "An officer or employee of a corporation must not, in relevant circumstances, make improper use of his or her position as such an officer or employee, to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the corporation."

was submitted that such an omission was particularly damaging to the appellant because none of the evidence showed, or tended to show fraud on the company, or any intention to deprive it of the means of discharging its obligations to the shareholders and creditors. The submission can immediately be seen to be wrong because it ignores that the investors were not only beneficially entitled under the deed, but also were creditors of the company.

136 The appellant submitted that the Court of Criminal Appeal erred in holding that there was ample evidence on which the jury could conclude that the appellant, at the relevant time, acted dishonestly, and overlooked the misdirections and omissions of the trial judge in his summing-up to which the appellant referred and which I have summarized. The appellant added that none of the matters listed by Simpson J[104] pertained to the relevant applications of the company funds: that none showed, or tended to show, that the application of the company's funds – as distinct from their solicitation from the investors – was fraudulent. It might be that there were various misrepresentations to investors, but the appellant was not charged with defrauding *them*. Her Honour's conclusion involved a failure to focus on the need to establish that the *relevant application of funds* was dishonest – not that their original procuration from investors was. This was an error which the summing-up left open to the jury.

137 These submissions should be rejected. The emphasis that the trial judge placed in his summing-up, on the need by the respondent to prove the appellant's dishonesty made it abundantly clear that the genesis of his belief was in issue. Just as absence of proof of dishonesty would mean that the prosecution had not made out its case, absence of proof that an accused's claim of right was not an honest one, would entitle the accused to an acquittal. Both as to the proof of the offences, and any other defence offered in respect of them, the accused's honesty or dishonesty of mind and purpose was crucial. As Gibbs J said in *R v Pollard*[105]:

> "An accused person acts in the exercise of an honest claim of right, if he honestly believes himself to be entitled to do what he is doing. A belief that he may acquire a right in the future is not in itself enough."

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104 The evidence to which her Honour referred as conclusive of the appellant's dishonesty included: ample evidence of the appellant's use of investors' funds for his own purposes; formal admissions to that effect; only a small proportion of the funds were actually used in producing the films; the misrepresentations contained in the income statements; the misrepresentation as to the subsidy available to investors; and the instructions given to conceal records from the ASC.

105 [1962] QWN 13 at 29.

138 Although the appellant was not charged with defrauding the investors, the way in which the money was raised from, and was to be held and applied for their benefit by the company, necessarily meant that the effect of the appellant's dealings with Trainex could not be divorced from an assessment of the appellant's state of mind, and the nature of his conduct in dealing as he did with the money to which Trainex had legal title but which it held for the benefit of the investors. In this matter, as will often be the case, a dishonest state of mind in respect of one aspect of an offence, for example an accused's use of the property of a corporation for other than a purpose of the corporation, will inevitably colour another element, the taking by the accused of the property. It does happen from time to time that the conduct of an accused might constitute more than one offence, or that it might render him criminally liable for a different offence from, or in addition to the one with which he has been charged. In these circumstances the prosecution may in general choose which charge or charges should be laid. The possibility of the formulation of a charge different from the one with which the accused is charged, does not mean that facts and circumstances of greater, or more direct relevance to the uncharged offence, are irrelevant to the charged offence.

A case for the application of the proviso

139 The cases against the appellant were very strong ones. Factors such as the way in which the funds were applied, their magnitude, the appellant's misrepresentations as to the earnings from the film, the shortage of funds otherwise, the absence of book entries for the alleged loans, the numerous breaches of the deed, and the other matters to which Simpson J referred in the Court of Criminal Appeal would in my opinion warrant the application of the proviso in s 6(1) of the *Criminal Appeal Act* 1912 (NSW) if otherwise there had been error on the part of the trial judge or the Court of Criminal Appeal.

140 I would dismiss the appeal.