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**1984–2014
THE LIFE OF THE (NON-CONSTRUCTIVE)
TRUST IN THE HIGH COURT**

ABSTRACT

The High Court of Australia has handed down at least 30 judgments on the law of trusts in the period 1984–2014. This presents as an opportune time to consider what the timeframe of a generation has contributed to trusts law at the highest judicial level in Australia. Leaving aside the constructive trust, which is jurisprudentially distinct and well served by academic literature, this paper focuses on the High Court developments in the law of trusts within this era. It concludes that, while not revolutionary, the case law has revealed incursions into what may previously have been assumed to be accepted principle and a consequent fluidity in the concept of the trust and its incidents.

I INTRODUCTION

This paper pursues a broad overview of Australian High Court case authority on the general law of trusts, with the exception of constructive trusts, in the 30 year period between 1984 and 2014. There is an obvious reason for targeting High Court decisions. After all, as the Court sits at the apex of the Australian court hierarchy, its statements on (trusts) law are the only truly authoritative (non-statutory) statements of what is Australian (trusts) law. And while it may be accepted that state and territory appellate courts, and decisions of the Full Court of the Federal Court of Australia, merit considerable weight in approaching the general law of trusts, they must yield to the ratio decidendi of the High Court. Indeed, there is an indication that courts lower in the hierarchy should follow even the ‘considered dicta’ of the High Court rather than pursue a new avenue of judicial analysis. Arguably the sternest rebuke, at least in recent times, by the High Court in this regard derived from a trusts case.¹ In that instance, it chastised the New South Wales Court of Appeal for propounding an unjust enrichment analysis of recipient liability in place of the traditional approach grounded in inquiry into knowledge.² In so doing, the High Court

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¹ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 148–58 [130]–[158].

² *Ibid.*

made clear that it expected other than incremental steps in the development of the general law to remain its sole domain.

There is more than mere expediency driving the focus on the last 30 years of High Court decisions. It aligns with the introduction in 1984 of s 35A of the *Judiciary Act 1903* (Cth), which prescribed criteria for the grant of special leave to appeal to the High Court. Since this time, the only (trusts) cases heard by the High Court are those that, in the language of s 35A, involve a question of law that is either of ‘public importance’ or in respect of which there is a need to resolve differences of opinion between lower courts or the judges therein and the ‘interests of the administration of justice’ require consideration by the High Court. In other words, the appeal must warrant the leadership of the highest court of the land to give direction so far as the law is concerned. In turn, the trusts case law in the last 30 years should, at least in theory, represent areas calling most for this leadership.

A second reason for the selection of the 30 year time frame is that it largely aligns with the time span of a single generation. To this end, one may expect it to reflect a sufficient breadth of generational thinking. When speaking of generations, it also equates to approximately twice the average tenure of a High Court judge since the Court was constituted,³ and three times the average tenure of its Chief Justice.⁴ A sufficient breadth of judicial opinion can thus be anticipated, in a time frame within which on average the Court has twice altered its constitution and been under the leadership or stewardship of three Chief Justices.

Aside from the temporal restriction, a further qualification in this excursus is its focus on cases directed to matters of broad trusts principle as opposed to those where trusts law has had either a peripheral application or otherwise an application against a backdrop of a specific (non-trusts) statute. Accordingly, for instance, even though the concept of ‘charity’ at law translates to the law of charitable trusts, the High Court ‘charity’ authorities in the last 30 years have chiefly targeted the meaning of ‘charity’ for the purposes of taxing statutes.⁵ They have not been cases directed to the charitable trust as such. There have also been various High Court decisions involving the taxation of trust income,⁶ and while no doubt informed by general trusts principle to the extent that it aligns with the terms of the statute, their focus is one that rests on

³ Calculated in 2014 on the basis of non-currently sitting High Court judges (including those subsequently appointed Chief Justice) since the institution of the Court, namely 38 judges, equating to approximately 15.2 years average tenure.

⁴ Calculated in 2014 on the basis of non-currently sitting High Court Chief Justices since the institution of the Court, namely 11 judges, equating to approximately 10.5 years average tenure.

⁵ See, eg, *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168; *Federal Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204; *Aid/Watch Incorporated v Federal Commissioner of Taxation* (2010) 241 CLR 539.

⁶ See, eg, *Harmer v Federal Commissioner of Taxation* (1991) 173 CLR 264; *Bamford v Federal Commissioner of Taxation* (2010) 240 CLR 481.

the meaning of the statutory wording. Similar remarks may be made vis-a-vis case law on managed investment schemes.⁷

But as foreshadowed at the outset, the most substantial qualification to the coverage of this paper is that it omits analysis of the cases targeting constructive trusts. Aside from making it more manageable in size, and not seeking to add to the already substantial academic literature on the Australian law of constructive trusts (which mostly developed in the last 30 years),⁸ there are reasons in principle for this omission. The most substantive is that the constructive trust is largely jurisprudentially distinct from other trusts. Express trusts and resulting trusts, aside from being grounded in intention (whether actual, inferred or presumed), ordinarily target the holding of property for another person. The constructive trust – with one arguably anomalous exception that has in any case not been the subject of clear High Court endorsement –⁹ does not rest upon any inquiry into intention, but against the main backdrop of either a breach of an existing (usually fiduciary) duty (often termed an ‘institutional constructive trust’) or an unconscionable denial of a beneficial interest in property (a ‘remedial constructive trust’). In each case, the Court’s imposition of the trust remains discretionary, and in the case of the institutional constructive trust may involve no interest in property whatsoever. In the fiduciary context, the ‘trust’ language here may be utilised as a means of expressing personal accountability rather than any interest in property. Indeed, this has led some, including within the judiciary, to suggest that the language of ‘trust’ is inappropriate and misleading in this context.¹⁰

⁷ See, eg, *Westfield Management Ltd v AMP Capital Property Nominees Ltd* (2012) 247 CLR 129.

⁸ See, eg, Pamela O’Connor, ‘Happy Partners or Strange Bedfellows: The Blending of Remedial and Institutional Features in the Evolving Constructive Trust’ (1996) 20(3) *Melbourne University Law Review* 735; Gino E Dal Pont, ‘Equity’s Chameleon – Unmasking the Constructive Trust’ (1997) 16 *Australian Bar Review* 46; David Wright, *The Remedial Constructive Trust* (Butterworths, Sydney, 1998); Tom Besanko, ‘Refining the Constructive Trust’ (2011) 5 *Journal of Equity* 108; Elise Bant and Michael Bryan, ‘Constructive Trusts and Equitable Proprietary Relief: Rethinking the Essentials’ (2011) 5 *Journal of Equity* 171; William M C Gummow, ‘Knowing Assistance’ (2013) 87 *Australian Law Journal* 311.

⁹ Namely what is termed the ‘common intention constructive trust’, in Australian law largely emanating from the New South Wales Court of Appeal’s decision in *Allen v Snyder* (1977) 2 NSWLR 685, a prototypical case of adjusting property interests in a failed de facto relationship. Cf Darryn Jensen, ‘Rehabilitating the Common Intention Trust’ (2004) 23(1) *University of Queensland Law Journal* 54; Mark Pawlowski and Nicola Grout, ‘Common Intention and Unconscionability: A Comparative Study of English and Australian Constructive Trusts’ (2012) 2 *Family Law Review* 164.

¹⁰ See, eg, *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, 404 [142] (Lord Millett) (who suggested that the words ‘accountable as constructive trustee’ in the case of accessory liability should be discarded in favour of ‘accountable in equity’); Malcolm Cope, ‘A Comparative Evaluation of Developments in Equitable Relief for Breach of

In the past 30 years there can be numbered at least 30 cases indexed in the Commonwealth Law Reports under the ‘Trusts’ title, or that otherwise exhibited sufficient trusts content as to merit this indexation. This, it should be noted, approximates to one decision for each year in that period. Some 20 of those decisions targeted, respectively, what goes to constituting express trusts (five decisions),¹¹ resulting trusts (five decisions, one overlapping with constructive trusts)¹² and constructive trusts (10 decisions, one overlapping with express trusts).¹³ Of the remaining cases, most focused on either the nature of interests under a particular form of express trust (namely the unit trust and the discretionary trust)¹⁴ or aspects relating to the management of trusts.¹⁵ In this paper it is these remaining cases that are first addressed, followed by a review of the case law on express trusts and resulting trusts.

Fiduciary Duty and Breach of Trust’ (2006) 6(1) *Queensland University of Technology Law and Justice Journal* 118, 157; Darryn Jensen, ‘Reining in the Constructive Trust’ (2010) 32 *Sydney Law Review* 87, 112.

- ¹¹ Namely, in chronological order, *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 (Mason CJ and Dawson J); *Corin v Patton* (1990) 169 CLR 540; *Registrar of the Accident Compensation Tribunal v Commissioner of Taxation* (1993) 178 CLR 145 (‘*Accident Compensation Tribunal*’); *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588 (‘*Associated Alloys*’); *Byrnes v Kendle* (2011) 243 CLR 253.
- ¹² Namely, in chronological order, *Calverley v Green* (1984) 155 CLR 242; *Muschinski v Dodds* (1985) 160 CLR 583; *Delehunt v Carmody* (1986) 161 CLR 464; *Nelson v Nelson* (1995) 184 CLR 538; *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278 (‘*Cummins*’).
- ¹³ Namely, in chronological order, *Chan v Zacharia* (1984) 154 CLR 178; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 (Mason J); *Muschinski v Dodds* (1985) 160 CLR 583; *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371; *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 (Wilson, Toohey and Brennan JJ); *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566; *Giumelli v Giumelli* (1999) 196 CLR 101; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; *John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1.
- ¹⁴ Namely, in chronological order, *Read v Commonwealth of Australia* (1988) 167 CLR 57; *Commissioner of Stamp Duties (NSW) v Pental Nominees Pty Ltd* (1989) 167 CLR 1; *MSP Nominees Pty Ltd v Commissioner of Stamps (SA)* (1999) 198 CLR 494; *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98 (‘*CPT*’); *Kennon v Spry* (2008) 238 CLR 366.
- ¹⁵ Namely, in chronological order, *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 (‘*Youyang*’); *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 (‘*Macedonian*’); *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254 (‘*Finch*’); *Byrnes v Kendle* (2011) 243 CLR 253.

Four cases are omitted from discussion, as three of these involve trusts law peripheral to the main subject matter of the case¹⁶ and the fourth raises no more than a question of construction of the relevant trust deed.¹⁷

II COMPARING FIXED AND DISCRETIONARY TRUSTS

The ‘interest’ of a beneficiary under a trust has arisen in at least five High Court cases in the last 30 years. These highlight, more so than its High Court precursors, that the traditional division between a fixed (unit) trust and a discretionary trust – whereby beneficiaries of the former necessarily have a fixed equitable (ownership) interest in the trust property, whereas beneficiaries of the latter do not – cannot be applied categorically, at least where the language of ‘trust’, ‘interest’ and ‘ownership’ under statute is concerned.

Four out of those five cases involved a unit trust.¹⁸ The Court’s 1989 decision in *Commissioner of Stamp Duties (NSW) v Pental Nominees Pty Ltd*¹⁹ can be put to one side at the outset. Against a backdrop of a purchase of shares by a trustee of a unit trust, under an agreement containing a covenant by a nominee to hold on trust for the purchaser, the case raised a question of whether the shares were, under the agreement, to be held in trust for the trustee or instead for the unit holders. The decision turned on the terms of the agreement as against those of the relevant stamp duties legislation, and discussed few matters of principle. Similarly, the Court’s decision of *Read v Commonwealth of Australia*²⁰ in the year prior – involving an issue concerning the ‘income’, for the purposes of social security legislation, of a pensioner who received

¹⁶ Namely *Orr v Ford* (1989) 167 CLR 316 (a case involving alleged statutory illegality of a trust, and broader judicial remarks as to the equitable defences of laches and acquiescence, mostly in the dissenting judgment of Deane J; it should be noted that the Court’s subsequent decision in *Byrnes v Kendle* (2011) 243 CLR 253, discussed later in this paper by reference to trustees’ duties and intention to create a trust, also contains multiple judicial remarks directed to acquiescence (albeit adding little to the existing legal landscape); *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 (involving the incidence of stamp duty on a supplemental deed to a discretionary trust altering the destination of the trust property in default of appointment; although the case does contain useful statements directed to the nature of the trustee’s right to indemnity, these largely reflect existing High Court authority); *Clay v Clay* (2001) 202 CLR 410 (a case involving limitation of actions, which stands chiefly for the proposition that, for the purposes of limitations legislation, the relationship between guardian and ward was not one between trustee and beneficiary).

¹⁷ Namely *Montevento Holdings Pty Ltd v Scaffidi* (2012) 246 CLR 325 (dealing with the interpretation of a clause providing for the appointment of a trustee).

¹⁸ Namely, in chronological order: *Read v Commonwealth of Australia* (1988) 167 CLR 57; *Commissioner of Stamp Duties (NSW) v Pental Nominees Pty Ltd* (1989) 167 CLR 1; *MSP Nominees Pty Ltd v Commissioner of Stamps (SA)* (1999) 198 CLR 494; *CPT* (2005) 224 CLR 98.

¹⁹ (1989) 167 CLR 1.

²⁰ (1988) 167 CLR 57.

additional units under a commercial unit trust scheme – added little to matters of principle except to describe a unit holder’s position in the following terms:

A unit holder thus has a beneficial interest in the assets of the Trust, a right to have the trusts executed in accordance with the Deed, and a right to proportionate distribution of the proceeds representing the assets of the trust fund upon termination of the Trust. The extent of a unit holder’s beneficial interest at any given time is that proportion which his or her units bear to the total number of units issued.²¹

But the apparent breadth of these remarks must be seen in the context of the terms of the unit trust before the Court. The point was made explicit in 2005 in *CPT Custodian Pty Ltd v Commissioner of State Revenue*,²² where the Full Court remarked that the descriptor ‘unit trust’, in the absence of an applicable statutory definition, has no constant, fixed normative meaning. It prefaced these remarks with the observation that ‘a priori assumptions as to the nature of unit trusts under the general law and principles of equity would not assist and would be apt to mislead’.²³ On the facts, what this meant was that it could not be assumed that unit holders were the ‘owners’²⁴ of an equitable estate or interest in land, or persons entitled to ‘any estate of freehold in possession’,²⁵ for the purposes of the relevant land tax statute.

Their Honours further stressed that the belief, commonly held, that unit holders have a proprietary interest in all of the property that is for the time being subject to the trust deed – often seen as the upshot of the remarks of Dixon CJ, Kitto and Taylor JJ in *Charles v Federal Commissioner of Taxation*²⁶ – should be placed in the context of the terms of the deed in *Charles*. Indeed, the judges in *Charles* had prefaced their remarks with the words ‘under the trust deed before us’. What the reasons in *CPT* moreover suggest is that there is no standard form unit trust that per se generates standard outcomes for the purposes of varying statutory expressions.

In any case, decisions of this kind in effect target the meaning of words used in a statute (usually a taxing statute), against the backdrop of words chosen by parties to a trust deed. The focus on statutory language, in tandem with recognition that beneficiaries’ ‘interests’ under a trust must be conceived by reference to the entitlements and restrictions imposed by the trust deed, indicate that each case must rest on its own facts rather than being amenable to rules other than at a high level of generality. For instance, the Court in *CPT* did not accept the proposition that unit

²¹ Ibid, 61–2 (Mason CJ, Deane and Gaudron JJ).

²² (2005) 224 CLR 98, 109 [15].

²³ Ibid.

²⁴ *Land Tax Act 1958* (Vic) s 13AA.

²⁵ Ibid.

²⁶ (1954) 90 CLR 598, 609 (*‘Charles’*).

holders necessarily have a sufficient (equitable) interest in the trust property to lodge a caveat on it.²⁷

And, as their Honours remarked in *CPT*,²⁸ nor does the term ‘discretionary trust’, in the absence of an applicable statutory definition, have a constant, fixed normative meaning.²⁹ While, in its earlier decision in *MSP Nominees Pty Ltd v Commissioner of Stamps (SA)*³⁰ (another case involving revenue law consequences of dealings with interests under a unit trust), the Court had noted that the use of terms such as ‘beneficial interest’ is ‘apt to mislead when applied to beneficiaries’ interests in a discretionary trust’, and it cannot be assumed that discretionary trusts, like unit trusts, fit standard moulds. In line with the above prescient remarks in *CPT*, in 2008 in *Kennon v Spry*³¹ the Court ruled that the wife’s right, as a discretionary beneficiary of a family trust, to secure its due administration, when coupled with her husband’s discretionary power (as trustee) to appoint the entirety of the trust assets to the wife, constituted ‘property of the parties to the marriage’ for the purposes of allocating property interests under s 79 of the *Family Law Act 1975* (Cth). In so concluding, French CJ reasoned as follows:

The word ‘property’ in s 79 is to be read as part of the collocation ‘property of the parties to the marriage’. It is to be read widely and conformably with the purposes of the *Family Law Act*. In the case of a non-exhaustive discretionary trust with an open class of beneficiaries, there is no obligation to apply the assets or income of the trust to anyone. Their application may serve a wide range of purposes ... Where property is held under such a trust by a party to a marriage and the property has been acquired by or through the efforts of that party or his or her spouse, whether before or during the marriage, it does not, in my opinion, necessarily lose its character as ‘property of the parties to the marriage’ because the party has declared a trust of which he or she is trustee and can, under the terms of that trust, give the property away to other family or extended family members at his or her discretion.³²

In the circumstances, his Honour added that the characterisation of the assets of the trust as ‘property’ of the parties to the marriage was supported by the husband’s legal title to the assets, the origins of their greater part as property acquired during the marriage, the absence of an equitable interest in them in any other party, the absence of any obligation on the husband’s part to apply all or any of the assets to any beneficiary and the contingent character of the interests of those who might be

²⁷ *CPT* (2005) 224 CLR 98, 113–4 [29]–[32], querying the general applicability of *Costa & Duppe Properties Pty Ltd v Duppe* [1986] VR 90 to this effect.

²⁸ *Ibid* 110 [15].

²⁹ *Ibid*.

³⁰ (1999) 198 CLR 494, 509 [34].

³¹ (2008) 238 CLR 366.

³² *Ibid*, 390–1 [64]–[65]. *Contra* 425 [175] (Heydon J).

entitled to take upon a default distribution at the distribution date.³³ In reaching the same conclusion, Gummow and Hayne JJ emphasised that the term ‘property’ is not a term with a specific and precise meaning, it being necessary to pay regard to any statutory context in which the term is used, specifically its subject matter, scope and purpose.³⁴ What the decision indicates, it has been suggested, is that:

where the trust, as established or as operated, constitutes a vehicle for the accumulation of assets of the marriage which, in other circumstances, might simply be held in joint names, then, upon the breakdown of the marriage the ample powers of the Family Court under the Act allow it effectively to deal with those assets in the altered circumstances which have eventuated.³⁵

The focus of the majority in *Kennon v Spry* on the statutory context, against the backdrop of a lengthy marriage, is arguably an indicator against the unthinking application of the same approach outside the familial environment.³⁶ But while the majority was careful to confine its remarks to the statutory context underscoring the *Family Law Act*, the case does reveal that the long held notions that place discretionary beneficiaries’ interests invariably outside the proprietary sphere are no longer gospel.³⁷

In this context, therefore, the elapsing of 30 years has witnessed a breaking down of the assumption that the unit trust and the discretionary trust are polar opposites so far as beneficiaries’ ‘interests’ are concerned. The historical dichotomy has, at least in its application in the statutory environment, yielded to a more contextual inquiry, where fixed rules have less to play than the language adopted by legislators and trust deed drafters.

III INQUIRING INTO TRUSTEE DUTIES OF MANAGEMENT

Four trusts cases decided by the High Court of Australia within the last three decades can, in particular, be grouped by reference to trustees’ management of a trust. In *Finch v Telstra Super Pty Ltd*³⁸ the Court was requested to address the duties of a trustee

³³ Ibid 392 [70].

³⁴ Ibid 396–7 [89].

³⁵ Justin Gleeson, ‘Spry’s Case: Exploring the Limits of Discretionary Trusts’ (2010) 84 *Australian Law Journal* 177, 184.

³⁶ One commentator has suggested that the decision ‘could be read down as an eccentric view on the width of “property” as a term under the *Family Law Act*’: Lee Aitken, ‘Muddying the Waters Further – *Kennon v Spry*: ‘Ownership’, ‘Control’ and the Discretionary Trust’ (2009) 32 *Australian Bar Review* 173, 181.

³⁷ It should be noted, as an aside, that the majority did not seek to address the (traditional) distinction adopted in Heydon J’s dissent (*Kennon v Spry* (2008) 238 CLR 366 425–6 [175]), namely that between the wife’s ‘interest’ in being considered as a beneficiary of the discretionary trust and the actual trust property itself.

³⁸ (2010) 242 CLR 254.

of a superannuation fund. In particular, at issue was the trustee's compliance, or otherwise, with its obligations under the trust deed to determine 'total and permanent invalidity' in the appellant. The trust deed defined that phrase to mean, inter alia, a disablement as a result of which:

in the opinion of the Trustee after consideration of any information, evidence and advice provided to the Trustee by the Employer and any other information, evidence and advice the Trustee may consider relevant, the Member has ceased to be an Employee and is unlikely ever to engage in any gainful Work for which the Member is for the time being reasonably qualified by education, training or experience.³⁹

The appellant's claim for a 'total and permanent invalidity' benefit rested on the trustee forming an opinion about the likelihood that the appellant would ever again engage in 'gainful Work'. Under the above clause, the Court noted, 'that was not a mere discretionary decision'.⁴⁰ Rather, it imposed upon the trustee a duty to seek relevant information, and make sufficient inquiries, in order to make an informed decision as to the appellant's claim. Their Honours made the following remarks in this regard:

In the Deed there was a power to take into account 'information, evidence and advice the Trustee may consider relevant', and that power was coupled with a duty to do so. It would be bizarre if knowingly to exclude relevant information from consideration were not a breach of duty. And failure to seek relevant information in order to resolve conflicting bodies of material, as here, is also a breach of duty.⁴¹

As a matter of construction of the trust deed, there is little to dispute in the Court's remarks. In this sense, the decision is one on its own facts and thus of little greater moment. But their Honours stepped beyond the process of construction of a particular trust deed to make an observation with a broader principle-based resonance. They noted that what have been described as the '*Karger v Paul*'⁴² principles – wherein the court may review the exercise of a trustee's discretion upon proof of, inter alia, a want of 'properly informed consideration' – applied in the superannuation environment *but with greater accentuation*. In particular, 'the duty of trustees properly to inform themselves is more intense in superannuation trusts', as it is 'extremely important to the beneficiaries of superannuation trusts that where they are entitled to benefits, those benefits be paid'.⁴³

³⁹ Ibid 262–3 [66].

⁴⁰ *Finch* (2010) 242 CLR 254, 280–1 [66].

⁴¹ Ibid.

⁴² Named after the principles identified in *Karger v Paul* [1984] VR 161.

⁴³ *Finch* (2010) 242 CLR 254, 280 [66].

In drawing this conclusion the underlying context and factual matrix proved especially persuasive. In that employees' superannuation is a valuable asset (and, moreover, is the subject of management by a professional trustee, to whom higher standards of trusteeship can be expected), different criteria may be seen to apply to the operation of a superannuation trust from those that apply in respect of discretionary decisions made by a trustee holding a power of appointment under a non-superannuation trust. As superannuation is earned and in the nature of deferred pay, the legitimate expectation that decisions over benefits will be sound is high. As the Court said, the attendant public significance of superannuation and close regulatory attention given to it supported the conclusion that decisions of superannuation trustees are unlikely to be immunised from judicial control without clearly contrary language.⁴⁴

Finch is instructive because it highlights that the same principles, even at general law, do not necessarily apply vis-a-vis all trusts. There are considerations, it seems, that may be unique to one or more types of express trust. Indeed, the very breadth of uses of the trust, in a variety of distinct contexts, may well justify some rethinking of what should remain as general trusts law 'principle' – a core, as it were – and what may instead be malleable in the circumstances.

Ultimately, *Finch* may suggest that there is no 'one size fits all' approach to characterising trustee duties. The law, it seems, must be more nuanced in its statements of principle. If so, it reveals some confluence, at a higher level of generality, with the case law on unit and discretionary trusts mentioned earlier. Although the subject matter of the respective cases, aside from coming under the broad umbrella of trusts law, is quite discrete, the trend away from 'one size fits all' approaches is extant. To brand a trust a 'discretionary trust', or a 'unit trust', may not be determinative of respective rights and obligations thereunder. Similarly, to speak in terms of a trustee's obligation to give real and genuine consideration to the exercise of discretion as to appointment may, as a result of *Finch*, be a more fluid and contextual exercise than may previously have been imagined.

Neither *Finch*, nor the High Court case law on unit and discretionary trusts should be seen however, as suggesting that other aspects of trust principle, especially directed at attempts to dilute the strictness of trustee duties, justify a corresponding fluidity. In *Byrnes v Kendle*⁴⁵ – a case more significant in the context of the creation of an express trust, and thus accordingly chiefly addressed below under that heading – the respondent signed an Acknowledgment of Trust declaring that he held one undivided half-interest in the matrimonial home as tenant in common upon trust for his wife. Upon the breakdown of the matrimonial relationship, the respondent leased the property to his son from a previous marriage but took few steps to collect rent, which remained largely unpaid. In an attempt to withstand claims by the wife's family to recover, inter alia, the unpaid rent, the respondent argued that, in the circumstances, he was not obliged to collect rent from the property. The High Court rejected this argument, and with it any claim that the respondent was no more than a bare trustee.

⁴⁴ Ibid 270–2 [32]–[37].

⁴⁵ (2011) 243 CLR 253.

It instead trod the orthodox path in espousing that a trustee is obliged to render the trust property productive.⁴⁶

Implicit in the reasons of French CJ was that even if the respondent could have been characterised as a bare trustee (which on the facts was not so), this was not conclusive against a duty to generate income, for the benefit of the beneficiary, from the trust property.⁴⁷ Accordingly, any suggestion that a trustee's duty to render the trust property productive should be diluted, qualified or even ousted by the trust being characterised as a bare trust, or otherwise arising in a familial or matrimonial context, was not an outcome their Honours appeared willing to countenance. Justices Heydon and Crennan addressed the point as follows:

Even if there is no direction in the trust instrument that the trust property be invested, it is the duty of the trustee to invest the trust property subject to the limits permitted by the legislation in force under the proper law of the trust and subject to any limits stated in the trust document. If there are no limits of that kind, a trustee who receives a trust asset, like an executor of a deceased estate, must 'lay it out for the benefit of the estate'. That is, it is the duty of a trustee to obtain income from the trust property if it is capable of yielding an income. If the property is money, it should be invested at interest or used to purchase income-yielding assets like shares. If the property consists of business assets, it should be employed in a business. If the property is lettable land, it should be let for rent. And if the intended means of gaining an income turn out to be unsatisfactory, those means must be abandoned and others found.⁴⁸

Aside from alternative provision in the trust instrument, the upshot of *Byrnes v Kendle* in this regard is essentially an overarching approach when it comes to a duty to invest trust property. That the above remarks of Heydon and Crennan JJ were categorical, and expressed without qualification, is suggestive of a principle capable of application across the breadth of trusts and trusteeship. It highlights the core function of a trustee to pursue the financial interests of the beneficiary and is therefore not variable by reference to the type of trust involved or the nature of the relevant trustee.

A number of the Court's obiter remarks in *Youyang Pty Ltd v Minter Ellison Morris Fletcher*⁴⁹ reflect a corresponding disinclination to compartmentalise the law of trusts, albeit here by reference to the common law. Their Honours cautioned that the nature of a monetary remedy for breach of trust 'may vary to reflect the terms of the trust, and the breach of which complaint is made', such that '[g]eneralisations may mislead'.⁵⁰ But this did not preclude the Court from querying the trend in England and New Zealand courts to distinguish trustees' breaches of duties of skill

⁴⁶ Ibid 264–5 [19]–[23] (French CJ), 277–8 [67]–[73] (Gummow and Hayne JJ), 291–2 [119]–[124] (Heydon and Crennan JJ).

⁴⁷ Ibid 264–5 [19]–[22].

⁴⁸ Ibid 291–2 [119] (citations omitted).

⁴⁹ (2003) 212 CLR 484.

⁵⁰ Ibid 499 [36].

and care from fiduciary breaches for the purposes of quantifying monetary relief for breaches of trust. In those jurisdictions the courts have revealed a willingness to assimilate trustees' breaches of duties of skill and care to tortious (or contractual) breaches. They accordingly have voiced a justification to approach monetary relief for these breaches by trustees in a manner equivalent to that applicable to common law damages, with its particular constraints of causation, foreseeability and remoteness. In response, the High Court in *Youyang* made the following remarks:

there must be a real question whether the unique foundation and goals of equity, which has the institution of the trust at its heart, warrant any assimilation even in this limited way with the measure of compensatory damages in tort and contract. It may be thought strange to decide that the precept that trustees are to be kept by courts of equity up to their duty has an application limited to the observance by trustees of some only of their duties to beneficiaries in dealing with trust funds.⁵¹

The upshot of the foregoing is an indication, perhaps not conclusive but at least weighty, that core principles of trusts law are not to be diluted by concepts traditionally seen as foreign to the trust or fiduciary concept. This aligns, in a broad sense, with the Court's strict conception of the trustee's duty to benefit the beneficiaries evident in *Byrnes v Kendle*. After all, the above obiter remarks in *Youyang* are, in the context of the law's remedial response, evidently directed at fostering a higher standard of conduct on trustees than would be expected by the common law.

There is necessarily a flipside to the strictness with which the Court has conceived of trustee obligations and, with this, the strict liability that stems from a breach of trust. It is evident, at least from one perspective, in the Court's 2008 judgment in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand*.⁵² Its essence is to dismantle the impediments that lower courts had, over time, imposed on the curial jurisdiction to give a trustee advice and directions. That the advice sought could determine substantive rights, or could otherwise involve proceedings that evinced an adversarial tinge, had been proffered as effectively jurisdictional limitations on the court's power to give the said opinion, advice or directions.

What the High Court made clear in its reasons is that these matters present no bar to jurisdiction, although they may assume relevance to the discretion as to whether and what advice is given. In one sense, the Court's reasons do no more than reflect the statutory language in which the jurisdiction is framed, and dissuade the introduction of non-statutory fetters. But its remarks must also be viewed within a broader framework. If Australian trusts law is to maintain its strictness vis-a-vis trustee duties and liability, there is sense in encouraging trustees who are legitimately unsure about the appropriateness of a certain course of action to approach the court for advice and directions. After all, a trustee who acts in accordance with the advice or directions, where all relevant evidence was placed before the court and the facts are substantially

⁵¹ Ibid 500 [39].

⁵² (2008) 237 CLR 66.

as submitted in the application, is deemed to have discharged his or her duty as trustee in the subject matter of the application.

Indeed, in the context of trustees defending proceedings the plurality went so far as to declare that ‘a trustee who is sued should take no step in defence of the suit without first obtaining judicial advice about whether it is proper to defend the proceedings’.⁵³ A failure to seek this advice may, in addition, adversely impact upon the trustees’ ability to seek an indemnity for costs in the litigation, which may have particular impact upon corporate trustees as a result of s 197 of the *Corporations Act 2001* (Cth).⁵⁴

IV TARGETING INTENTION UNDERSCORING EXPRESS TRUSTS

It is accepted that the creation of an express trust requires, inter alia, the satisfaction of ‘three certainties’: certainty of intention, certainty of subject matter and certainty of object. Should High Court endorsement of this classic catalogue of requirements, emanating from the remarks of Lord Langdale MR in *Knight v Knight*,⁵⁵ be needed, it can be found in its 2001 decision in *Clay v Clay*.⁵⁶

In the last 30 years, any substantive analysis of the second and third of these certainties has, with one exception,⁵⁷ been largely absent from High Court pronouncements. The assumption, it seems, is that the law pertaining to these certainties is sufficiently clear not to justify High Court exposition. This is no foregone conclusion, however, as case law from lower courts and other jurisdictions reveals that both certainty of subject matter and certainty of object are not without their challenges. For instance, the extent to which Australian law should countenance a valid trust over part of the

⁵³ *Macedonian* (2008) 237 CLR 66, 94 [74] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

⁵⁴ The section dictates that where a company incurs a liability as a trustee, a director is liable to discharge all or part of the liability if the company has not discharged, and cannot discharge, the liability or that part of it, and the company is not entitled to be fully indemnified against the liability out of trust assets solely because of: (a) a breach of trust by the company; (b) the company acted outside the scope of its powers as trustee; and/or (c) a term of the trust denies, or limits, the company’s right to be so indemnified.

⁵⁵ (1840) 3 Beav 148, 172–3; 49 ER 58, 68.

⁵⁶ (2001) 202 CLR 410, 431 [42]. See also *Kauter v Hilton* (1953) 90 CLR 86, 97 (Dixon CJ, Williams and Fullagar JJ) (‘the established rule that in order to constitute a trust the intention to do so must be clear and that it must also be clear what property is subject to the trust and reasonably certain who are the beneficiaries’).

⁵⁷ Namely the remarks by Gaudron, McHugh, Gummow and Hayne JJ in *Associated Alloys* (2000) 202 CLR 588, 604 [30] (finding no objection to the effective creation of a trust that the trust property is identified as a proportion of the proceeds received by a purchaser referable to moneys from time to time due and owing but unpaid by the buyer to the seller).



bulk of identical or similar items awaits High Court authority.⁵⁸ Similarly, the binary approach to certainty of object – applying the list certainty test to fixed trusts and the criterion certainty test to discretionary trusts – has produced difficulties for judges in lower courts.⁵⁹ This binary approach, moreover, may now face challenge from the High Court’s tendency, noted earlier, to adopt a more individualised approach to the incidents of fixed (unit) trusts and discretionary trusts. In any case, although it may seem a given, the High Court has yet to explicitly pronounce on the legitimacy of the criterion certainty test.⁶⁰

By contrast, five High Court trusts cases in the 1984–2014 time span have trodden a path pertaining to certainty of intention. In four of those – chronologically, *Bahr v Nicolay [No 2]*,⁶¹ *Registrar of the Accident Compensation Tribunal v Commissioner of Taxation*,⁶² *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)*⁶³ and *Byrnes v Kendle*⁶⁴ – intention formed a core issue before the Court. In the remaining case, *Corin v Patton*,⁶⁵ which was essentially about the requirements for effecting a transfer or assignment of property, intention can be seen to form part of the calculus surrounding complete constitution.

Though first and second chronologically, a discussion of *Bahr v Nicolay [No 2]* and *Accident Compensation Tribunal* is reserved for later because the cases involve inferring an intention to create a trust. The other three cases, conversely, involve the use of explicit trust language and the issue before the Court (except perhaps in *Corin v Patton*) was whether the language sufficed to evince an intention to create a trust.

A Express Intention

In *Associated Alloys* the trust language was located in a contractual retention of title clause, which read as follows:

In the event that the purchaser uses the goods/product in some manufacturing or construction process of its own or some third party, then the purchaser shall hold such part of the proceeds of such manufacturing or construction process as relates to the goods/product in trust for the vendor. Such part shall be deemed to

⁵⁸ See the extensive analysis at first instance by Campbell J in *White v Shortall* (2006) 68 NSWLR 650 (affirmed albeit not on this specific point: *Shortall v White* [2007] NSWCA 372 (19 December 2007)).

⁵⁹ See, eg, *West v Weston* (1998) 44 NSWLR 657 (in the context of an ostensibly fixed trust); *Lempens v Reid* (2009) 2 ASTLR 373 (in the context of a discretionary trust).

⁶⁰ Cf *Accident Compensation Tribunal* (1993) 178 CLR 145, 183 (Brennan, Dawson and McHugh JJ, dissenting).

⁶¹ (1988) 164 CLR 604.

⁶² (1993) 178 CLR 145.

⁶³ (2000) 202 CLR 588.

⁶⁴ (2011) 243 CLR 253.

⁶⁵ (1990) 169 CLR 540.



equal in dollar terms the amount owing by the purchaser to the vendor at the time of the receipt of such proceeds.

The relevant wording aimed to overcome one of the main difficulties surrounding retention of title clauses at general law. Namely, that the mixing of the property which forms the subject of the clause with other property may deny the product any independent identity to which the clause may apply. The wording of the clause in *Associated Alloys* sought to address this difficulty by declaring a property interest over a proportion of the proceeds of the mixed goods. It therefore purported to translate a contractual proprietary interest, preceding any mixing, to an equitable proprietary interest thereafter.

Justices Gaudron, McHugh, Gummow and Hayne found that the words chosen by the parties, via their agreement, were consistent with an intention to create a trust. The facts revealed nothing to suggest that the parties did not mean what they said in their written instrument, or did not say what they meant.⁶⁶ That an incident of trusteeship would normally be that the trust property is retained separately rather than mixed with other property – and the Court accepted that an express obligation upon the purchaser to keep the ‘proceeds’ separate would have pointed to the existence of a trust even if none had been explicit⁶⁷ – did not alter this view. The fact that the parties had used the language of trust meant that mixing did not threaten the existence of a trust or any intention supporting it.⁶⁸ As a result, their Honours construed the above clause as an agreement to constitute a trust of future-acquired property, not as a registrable charge, meaning that it was not void as against the administrators or liquidator of the purchaser.

The decision in *Associated Alloys* therefore reveals the pre-eminence the court will accord to the explicit use of ‘trust’ language, to which effect will be given unless there is compelling evidence of an intention to the contrary. It stands to reason, therefore, that where parties who are commercially experienced, and/or document their dealings pursuant to legal advice, choose the language of trust to express those dealings (or a part thereof), there is likely to be little scope to contend that no trust was intended. That the High Court in *Associated Alloys* was willing to so conclude, whilst conceding the ‘practical difficulties’ it may cause to third parties seeking to assess a purchaser’s credit-worthiness,⁶⁹ highlights the primacy given to explicit expressions of intention.

⁶⁶ *Associated Alloys* (2000) 202 CLR 588, 606 [35] (Gaudron, McHugh, Gummow and Hayne JJ).

⁶⁷ *Ibid* 606 [34], citing *Cohen v Cohen* (1929) 42 CLR 91, 100–1.

⁶⁸ Although only mentioned in passing in the judgment, by way of footnote, this holding was entirely consistent with that of the New South Wales Court of Appeal in *Stephens Travel Service International Pty Ltd v Qantas Airways Ltd* (1988) 13 NSWLR 331, 348–9 (Hope JA), 334 (Kirby P), 367 (Priestley JA).

⁶⁹ *Associated Alloys* (2000) 202 CLR 588, 61 [49] (Gaudron, McHugh, Gummow and Hayne JJ). Their Honours considered that these difficulties could be remedied by legislation. Yet when the opportunity to address these difficulties presented itself with

This primacy, even outside of the commercial arena, was reiterated a decade or so later in *Byrnes v Kendle*. As mentioned earlier, the respondent in that case signed an Acknowledgment of Trust declaring that he held one undivided half-interest in the matrimonial home as tenant in common upon trust for his wife. Upon the breakdown of the relationship, the home was sold. The respondent sought to withstand claims by the wife's family to recover one-half of the proceeds of sale by arguing that he had not intended to create a trust.

The Court unanimously rejected the respondent's argument. Importantly, this was largely independent of whether or not the respondent actually had a subjective ('real') intention to create a trust. Rather, the case concerned the admissibility of evidence of that intention. The Court found that where there is executed a document that explicitly countenances the creation of a trust, aside from evidence of vitiating factors, evidence cannot be admitted to contradict the intention manifested by that document. Accordingly, extrinsic evidence of the respondent's intentions underscoring the negotiations leading to the trust was inadmissible to prove that he did not intend to create a trust.

The assumption is that persons who use the unambiguous language of trust intend to create a trust. Language of this kind is decisive, and serves to preclude the admission of evidence inconsistent with it. The relevant intention is, in the words of Heydon and Crennan JJ, 'an intention to be extracted from the words used, not a subjective intention which may have existed but which cannot be extracted from those words'.⁷⁰ The focus on the intention as evinced on the face of the document – an 'objective' intention – aligns with the prevailing approach to contractual interpretation, and with the policy underscoring the parole evidence rule.⁷¹ In so ruling, the Court overruled its decision some 90 years earlier in *Commissioner of Stamp Duties (Qld) v Jolliffe*,⁷²

the advent of personal property securities legislation, it was not taken. The *Personal Property Securities Act 2009* (Cth) treats a retention of title agreement essentially as a secured loan, and prescribes its own procedures for the seller to enforce its security – thereby rewriting the principles that underpin retention of title clauses – but is expressed not to apply to 'a transfer of the beneficial interest in a monetary obligation where, after the transfer, the transferee holds the monetary obligation on trust for the transferor' (s 8(1)(f)(x)). Accordingly, it dictates that the trust retains its utility as a vehicle to secure priority in this context, given that property held on trust is not available to satisfy the claims of creditors of an insolvent trustee, coupled with the fact that trust interests require no form of registration and take effect at the time the settlor specifies. See further Jamie Glister, 'The Role of Trusts in the PPSA' (2011) 34(2) *University of New South Wales Law Journal* 628.

⁷⁰ *Byrnes v Kendle* (2011) 243 CLR 253, 290 [114]. See also 277 [17] (French CJ), 290 [65] (Gummow and Hayne JJ).

⁷¹ A point, however, queried by some commentators: see, eg, Corey Karaka, 'Secret Intentions and Slippery Words: *Byrnes v Kendle*' (2012) 34(3) *Sydney Law Review* 599; Jessica Palmer, 'Equity and Trusts' [2012] *New Zealand Law Review* 141, 142–7.

⁷² (1920) 28 CLR 178, 181 (Knox CJ and Gavan Duffy J); *contra* 190–3 (Isaacs J) whose reasoning the Court in *Byrnes v Kendle* unanimously endorsed.

where a majority of the Court was willing to admit evidence to determine the ‘real intention’ of the purported settlor, in opening a bank account as ‘trustee’.

By rendering inadmissible extrinsic evidence to deny an intention to create a trust, the Court in *Byrnes v Kendle* (and implicitly also in *Associated Alloys*) made its task (and that of later courts) easier – essentially avoiding the responsibility of balancing and deciding as between competing evidential presentations – and attendant to this reduced the scope for litigation. Inquiry into subjective (or ‘real’) intention is, moreover, prone to difficulties. It relies solely on the evidence adduced by the person whose state of mind is in issue, and is accordingly likely to be inherently biased, even assuming it is accurate in view of, inter alia, the elapsing of time.

By denying the admissibility of evidence of subjective intention – ‘both to the question of whether a trust exists and to the question of what its terms are’⁷³ – the Court was not, however, suggesting that subjective intention has no relevance vis-a-vis the law of trusts. As Heydon and Crennan JJ made explicit:

As with contracts, subjective intention is only relevant in relation to trusts when the transaction is open to some challenge or some application for modification – an equitable challenge for mistake or misrepresentation or undue influence or unconscionable dealing or other fraud in equity, a challenge based on the non est factum or duress defences, an application for modification by reason of some estoppel, an allegation of illegality, an allegation of ‘sham’, a claim that some condition has not been satisfied, or a claim for rectification.⁷⁴

It follows, it may be reasoned, that there is unlikely to be any injustice done to a settlor by denying the opportunity to adduce evidence of his or her actual (subjective) intention. Scenarios where the settlor could be the victim of some injustice are, it seems, adequately addressed by existing vitiating doctrines.

Although not reasoned explicitly by reference to objective intention of a settlor, but rather by reference to whether or not a trust had been completely constituted, the High Court’s decision over 20 years earlier in *Corin v Patton*⁷⁵ is amenable to being viewed through the prism of objective intention. In addressing the complete constitution point, the Court needed to resolve a point punctuated by conflicting authority simmering in Australian law since its early decision in *Anning v Anning*.⁷⁶ The latter produced three divergent interpretations of Turner LJ’s classic remarks in *Milroy v Lord*⁷⁷ that ‘in order to render a [trust] valid and effectual, the settlor must have done everything which ... was necessary to be done in order to transfer the property and render the settlement binding upon him’. The Court in *Corin* favoured the view that

⁷³ *Byrnes v Kendle* (2011) 243 CLR 253, 290 [115] (Heydon and Crennan JJ).

⁷⁴ *Ibid* (citations omitted). See also 262–3 [15]–[17] (French CJ).

⁷⁵ (1990) 169 CLR 540.

⁷⁶ (1907) 4 CLR 1049.

⁷⁷ (1862) 4 De GF & J 264, 274; 45 ER 1185, 1189.



a settlor (or donor or transferor) must do *only* those acts that are *obligatory for him or her to do and no-one else*.⁷⁸ As explained by Mason CJ and McHugh J:

if an intending donor of property has done everything which it is necessary for him to have done to effect a transfer of legal title, then equity will recognise the gift. So long as the donee has been equipped to achieve the transfer of legal ownership, the gift is complete in equity. ‘Necessary’ used in this sense means necessary to effect a transfer. From the view point of the intending donor, the question is whether what he has done is sufficient to enable the legal transfer to be effected without further action on his part ... [so] the donee acquires an equitable estate or interest in the subject matter of the gift once the transaction is complete so far as the donor is concerned.⁷⁹

This approach has the merit of giving effect to the settlor’s intention, objectively determined. After all, if the settlor has done everything necessary to be done by him or her to effect the transfer, to refuse to enforce a trust would be to frustrate what is objectively the settlor’s intention. But where some act remains to be done that is the sole province of the settlor, the trust will be incompletely constituted until that act is done; here it cannot be inferred as a matter of course that the settlor intended to create a trust because he or she has failed to fulfil the acts required of him or her. Importantly, whether or not the putative settlor *subjectively* intended to create a trust is practically irrelevant in this context, because he or she has not manifested this intention objectively by doing what was necessary for him or her to do so as to render the trust completely constituted. It stands to reason that the decision in *Byrnes v Kendle* could hardly be seen as unheralded, but as representing somewhat of a culmination of a flow of High Court jurisprudence directed to this end.

B *Inferred Intention*

In each of the above cases the putative settlor used the language of trust. It was no great step, therefore, for the Court to attribute to the settlor an intention to create a trust. But, as noted by the High Court in *Accident Compensation Tribunal*:

A trust may be created without use of the word ‘trust’. And, unless there is something in the circumstances of the case to indicate otherwise, a person who has ‘the custody and administration of property on behalf of others’ or who ‘has received, as and for the beneficial property of another, something which he is to hold, apply or account for specifically for his benefit’ is a trustee in the ordinary sense.⁸⁰

⁷⁸ Namely the view espoused by Griffith CJ in *Anning v Anning* (1907) 4 CLR 1049, 1057. Higgins J (at 1081–2) had taken the view that the transferor must do those acts it is *possible* for him or her to do. Isaacs J (at 1069) had held that the transferor must ensure that *all* necessary acts are done, irrespective of who can do them.

⁷⁹ *Corin v Patton* (1990) 169 CLR 540, 559. See also 582 (Deane J).

⁸⁰ (1993) 178 CLR 145, 165–6 (Mason CJ, Deane, Toohey and Gaudron JJ) (citations omitted).



Accident Compensation Tribunal was unusual because the alleged intention to create a trust derived from statute rather than a private settlor, and the arguments circled around whether public officers or entities should come within the private law trusts mantle.⁸¹ A majority of the Court held that a statutory provision under which ‘any amount of money administered by the Registrar under this Act may be invested, applied or otherwise dealt with in any manner that the Registrar thinks fit for the benefit of the person entitled to that money’ sufficed to constitute the Registrar a trustee, in the ordinary sense, of compensation moneys paid to the Registrar pursuant to the relevant workers compensation legislation. These words sufficed, reasoned their Honours, ‘because they indicate that he has or holds that money for the benefit of the person or persons entitled to the compensation involved’.⁸²

The case reveals that, by requiring a public official to hold funds on behalf of persons entitled, there may be grounds to conclude that the funds are to be held on trust. But much no doubt depends on the terms of the relevant statute, and the context within which the collection and dispersal of the funds operates.⁸³ Accordingly, beyond an acceptance that a trust may be inferred in circumstances where no explicit trust language is used, the decision may be seen as one on its own facts. Nonetheless, what appears is that the focus on objective intention redolent in *Byrnes v Kendle* is not confined to scenarios where the language of trust appears on the face of the relevant instrument. It has force, and arguably even greater value, where a court is asked to *infer* an intention to create a trust, often from what is ostensibly no more than a contractual relationship. Gummow and Hayne JJ in *Byrnes v Kendle*⁸⁴ endorsed the following comment of Lord Millett in *Twinsectra Ltd v Yardley*:

A settlor must, of course, possess the necessary intention to create a trust, but his subjective intentions are irrelevant. If he enters into arrangements which have the effect of creating a trust, it is not necessary that he should appreciate that they do so; it is sufficient that he intends to enter into them.⁸⁵

The reason why objectively discerned intention assumes especial significance where there has been no use of trust language in the relevant dealings is that matters of inference are most unlikely to be grounded in subjective intention. Had a person subjectively intended to create a trust, a court could legitimately reason that he or she would have used language sufficiently explicit to this effect. The absence of this kind

⁸¹ On this latter point the majority found ‘no rule of law or equity to prevent the imposition of ordinary trust obligations on a person who is, in other respects, a servant or agent of the Crown’, adding that ‘[t]he mere fact that the person on whom the obligation is cast is a statutory office holder cannot, of itself, require the question whether he or she is a trustee in the ordinary sense to be approached on the basis of a presumption to the contrary’: *Accident Compensation Tribunal* (1993) 178 CLR 145, 163, 164 (Mason CJ, Deane, Toohey and Gaudron JJ).

⁸² *Ibid* 166 (Mason CJ, Deane, Toohey and Gaudron JJ).

⁸³ *Cf Victoria v Sutton* (1998) 195 CLR 291.

⁸⁴ 243 CLR 253, 274 [55].

⁸⁵ [2002] 2 AC 164, 185 [71] (*‘Twinsectra’*).

of language dictates a need to pursue what the person, objectively speaking, is likely to have intended via the dealing.

A typical scenario triggering attempts to infer a trust relationship is, as in *Twinsectra*, where moneys advanced, ostensibly as a loan, may prove (partially) irrecoverable in the event of the borrower's insolvency. If the lender can establish that the moneys were advanced on trust, whether or not also as a loan, and that the object of the advance remains to be fulfilled, the lender may prove able to reclaim those moneys in the capacity as a beneficiary of a trust. Moneys held on trust, after all, are not available to satisfy the claims of the trustee's (here the borrower's) own creditors. The core determinants of whether moneys so advanced are brought within the (proprietary) umbrella of trust, as opposed to (or in addition to) the (contractual) umbrella of debt, were elicited in a 1913 statement by Channell J in *Henry v Hammond*,⁸⁶ that the High Court cited with approval, albeit in 1929,⁸⁷ which reads as follows:

It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If, on the other hand, he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then ... he is not a trustee ... but a mere debtor.⁸⁸

Logic of this kind has given force, in English law, to what is known as the 'Quistclose trust' – named after the House of Lords' decision in *Barclays Bank Ltd v Quistclose Investments Ltd*⁸⁹ – which the High Court has recently described as 'helpful as a reminder that legal and equitable remedies may co-exist'.⁹⁰ Importantly, in line with the remarks in the above quote, what animates an inference of an intention to create a trust is the conduct of the lender, or that of lender and borrower together, in crafting the advance of moneys for a specific object, to be treated discretely rather than to form part of the borrower's general funds. In other words, that conduct evinces an intention, objectively, to retain (beneficial) ownership of the moneys in question, at least until they are applied for the object of the advance.

Implicit in the Court's decision in *Associated Alloys*, discussed earlier, that explicit trust language can overcome a failure to prescribe the discrete treatment of money or property advanced is that, absent such language, a failure to prescribe for that discrete treatment will in all probability be fatal to any claim of trusteeship. In this

⁸⁶ [1913] 2 KB 515.

⁸⁷ *Cohen v Cohen* (1929) 42 CLR 91, 101 (Dixon J).

⁸⁸ *Henry v Hammond* [1913] 2 KB 515, 521.

⁸⁹ [1970] AC 567 ('Quistclose').

⁹⁰ *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493, 523 [112] (Bell, Gageler and Keane JJ).

latter scenario, there is likely to be very little from which to make the inference, objectively, of an intention to create a trust.

At least in the last 30 years, though, there is little in the way of High Court authority directed to a *Quistclose*-type scenario. To find the most significant (and essentially the only dedicated) High Court statement directed to this end, it is necessary to go back to 1978, where Gibbs ACJ, with whom Jacobs and Murphy JJ agreed, cited *Quistclose* as authority for the proposition that:

where money is advanced by A to B, with the mutual intention that it should not become part of the assets of B, but should be used exclusively for a specific purpose, there will be implied (at least in the absence of an indication of a contrary intention) a stipulation that if the purpose fails the money will be repaid, and the arrangement will give rise to a relationship of a fiduciary character, or trust.⁹¹

In any case, Gibbs ACJ found no trust on the facts. Beyond an indication from the above quote that the trust in question is one grounded in intention (though misleadingly termed ‘implied’ rather than ‘inferred’),⁹² the High Court’s only other remark in this context is one unrelated to intention, namely that the terminology of a ‘*Quistclose* trust’ is ‘not helpful if taken to suggest the possibility apart from statute of a non-express trust for non-charitable purposes’.⁹³

Even without compelling recent High Court authority in this regard, what can be said is that the application of the express trust in the (ostensible) debtor-creditor scenario is grounded in an inquiry into intention, objectively determined by reference to the language and conduct of the relevant person. Although the trust is usually raised ex post facto in an attempt to secure an outcome not available in contract, its existence, in line with Channell J’s observations in *Henry v Hammond*, is premised upon evidence upon which an inference of intention to create a trust can be made.

Yet in another context, which has witnessed greater exposition in High Court authority within the last 30 years, the evidence of intention proffered as sufficient to create a trust has appeared less compelling. Again, the scenario is one whereby the (express) trust is utilised ex post facto to circumvent what would otherwise be an insurmountable hurdle imposed by contract law. Commonly termed the ‘trust of a contractual promise’, directed chiefly at overcoming a potential injustice emanating

⁹¹ *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (in liq)* (1978) 141 CLR 335, 353.

⁹² Which Lord Millett later incidentally explained by a reference to an ‘orthodox’ resulting trust in *Twinsectra* [2002] 2 AC 164, 192–3 [100].

⁹³ *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493, 523 [112] (Bell, Gageler and Keane JJ).

from the doctrine of privity of contract, it is a decidedly abstract use of the trust vehicle,⁹⁴ albeit one seemingly well established in English case law.

The joint judgment of Mason CJ and Dawson J, in the High Court's 1988 decision in *Bahr v Nicolay [No 2]*,⁹⁵ appears to countenance a 'weak' concept of objectively derived intention in this context. The appellants had sold land to the first respondent with a lease back for three years. The contract of sale gave the appellants a right of re-purchase at a specified price once those three years had expired. During that time, the land was sold to the second respondents, who in the sale agreement acknowledged the buyback provision. At the expiration of the lease, the second respondents refused to sell the land back to the appellants. As the appellants had no contractual relationship with the second respondents, they lacked standing in contract to enforce any claim against the second respondents.

Chief Justice Mason and Justice Dawson reasoned that '[c]ontract scarcely seems to give sufficient effect to what the parties had in mind'; instead '[a] trust relationship is a more accurate and appropriate reflection of the parties' intention'.⁹⁶ Their Honours expressed their concurrence with the remarks of Fullagar J some 30 years earlier in *Wilson v Darling Island Stevedoring & Lighterage Co Ltd*,⁹⁷ who had found it 'difficult to understand the reluctance which courts have sometimes shown to infer a trust in such cases'. This prompted their Honours to frame the relevant principle in the following terms:

If the inference to be drawn is that the parties intended to create or protect an interest in a third party and the trust relationship is the appropriate means of creating or protecting that interest or of giving effect to the intention, then there is no reason why in a given case an intention to create a trust should not be inferred.⁹⁸

The present was, according to Mason CJ and Dawson J, 'just such a case'.⁹⁹ The effect of the trust, accordingly, obliged the second respondents hold the land subject to such rights as were created in favour of the appellants by the original contract between the appellants and the first respondent. The outcome is abstract because it did not make the second respondents the trustees of the land itself, but rather the trustees of the promise contained in the original agreement.

⁹⁴ Some have, to this end, suggested that a supposed intention to create a trust in this context 'appears to be a particularly artificial construct' (Joseph Jaconelli, 'Privity: The Trust Exception Examined' [1998] *Conveyancer and Property Lawyer* 88, 93) and represents a 'fictional process' (Ian B Stewart, 'Why Place Trust in a Promise? Privity of Contract and Enforcement of Contracts by Third Party Beneficiaries' (1999) *73 Australian Law Journal* 354, 361).

⁹⁵ (1988) 164 CLR 604.

⁹⁶ *Ibid* 618.

⁹⁷ (1956) 95 CLR 43, 67.

⁹⁸ *Bahr v Nicolay [No 2]* (1988) 164 CLR 604, 618–19.

⁹⁹ *Ibid* 619.

Importantly, their Honours emphasised that the trust in question was an express, not a constructive, trust.¹⁰⁰ Yet there seemed scant evidence before the Court of the parties' intentions, whether objective or subjective, that could have supported the inference of an intention to create a trust. In a sense, Mason CJ and Dawson J implicitly accepted this in their formulation of principle above, which is suggestive of an inquiry grounded in what the parties might have thought, *after the event*, as reflective of the structure of the dealing in question. It seems difficult to conclude that, had the parties been asked, at the time of the relevant transaction, whether they intended to create a trust, they would have answered unswervingly in the affirmative.

Their Honours' approach, underscoring their insistence on the trust being express in nature, nonetheless (indirectly) feeds into the Court's later focus on objective intention as the core determinant of an express trust. Indeed, over 20 years before *Byrnes v Kendle*, it ostensibly took objectivity to a new level, in the sense that their Honours inferred an intention that the parties *may have shared, had they turned their minds to the question, with the benefit of hindsight*. On this reasoning, there may be little distinction between inferring and imputing intention, even though courts have traditionally eschewed the latter in trusts law.¹⁰¹

Yet, no less than three months later, Deane J in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*¹⁰² was likewise willing, in very similar language, to countenance the relevant inference of intention in the trust of a contractual promise scenario. It is accordingly curious in that case that Mason CJ, on this occasion joined by Wilson J, saw it as 'incongruous that we should be compelled to import the mechanism of a trust to ensure that a third party can enforce the contract if the intention of the contracting parties is that he should benefit from performance of the contract'.¹⁰³ Their Honours accordingly proposed an exception to the doctrine of privity on the facts before them,¹⁰⁴ though it is arguable that the language in which the aforesaid remarks is couched could have been transmissible to the *Bahr v Nicolay [No 2]* scenario.

The approach of Mason CJ and Dawson J in *Bahr v Nicolay [No 2]* has prompted one commentator to suggest that there is now no necessity to intend to create a

¹⁰⁰ *Bahr v Nicolay [No 2]* (1988) 164 CLR 604, 619.

¹⁰¹ For instance, in the case law on the so-called 'common intention constructive trust', judges have explicitly refused to countenance imputing an intention: see, eg, *Allen v Snyder* [1977] 2 NSWLR 685, 690–4 (Glass JA), 704 (Mahoney JA).

¹⁰² *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 147 ('the requisite intention should be inferred if it clearly appears that...the third party should himself be entitled to insist upon performance of the promise and receipt of the benefit and if trust is, in the circumstances, the appropriate legal mechanism for giving effect to that intention').

¹⁰³ *Ibid* 121.

¹⁰⁴ Which involved a claim by the respondent sub-contractor to secure the benefit of insurance under an insurance contract between the appellant insurer and the owner of the relevant facility, which was expressed to cover sub-contractors.



trust, but merely an intention simply to benefit another pursuant to which the court decides whether the trust is the appropriate legal mechanism to execute this intention to benefit.¹⁰⁵ Not only does this approach strain the notion of an express trust, it runs contrary to the usual intentions of contracting parties that the promisor will, in exchange for the consideration furnished by the promisee, do the act or thing intended in favour of the third party.¹⁰⁶ This may, inter alia, explain why the other judges in *Bahr v Nicolay [No 2]* were unwilling to infer an intention to create a trust, but reached the same ultimate outcome on the facts through the vehicle of the (imposed) constructive trust.¹⁰⁷

Be that as it may, a general dearth of High Court remarks on inferring an intention to create a trust in the subsequent 25 years or so has hardly served to deny the potential applicability of the approach to ‘inference’ espoused by Mason CJ, Dawson and Deane JJ. Notwithstanding potential misgivings, it remains within Australian law’s arsenal under the guise of an express trust.

V THE DIRECTION OF THE PRESUMED RESULTING TRUST

Resulting trusts are traditionally subdivided, especially by English judges, between ‘presumed resulting trusts’ and ‘automatic resulting trusts’.¹⁰⁸ The latter operate, by implication of law, to fill a gap in beneficial ownership where the settlor fails to dispose of the entire beneficial interest in the relevant property. For instance, where an express trust that fails for lack of certainty of subject matter or object, the intended property of the trust is held by the intended trustee on automatic resulting trust for the settlor.

The following discussion, however, targets the so-called ‘presumed resulting trust’. There are several reasons for this. First, of the five decisions of the High Court of Australia within the last 30 years that have directly addressed the resulting trust,¹⁰⁹ the focus has been squarely on the presumed resulting trust. Second, there is no High Court authority, even going back to the inception of the Court, that adopts the ‘automatic resulting trust’ terminology (although the broader concept is hardly

¹⁰⁵ David Wright, ‘Trusts Involving Enforceable Promises’ (1996) 70 *Australian Law Journal* 911, 917 and 919.

¹⁰⁶ Ian B Stewart, ‘Why Place Trust in a Promise? Privity of Contract and Enforcement of Contracts by Third Party Beneficiaries’ (1999) 73 *Australian Law Journal* 354, 361.

¹⁰⁷ *Bahr v Nicolay [No 2]* (1988) 164 CLR 604, 638 (Wilson and Toohey JJ), 654 (Brennan J).

¹⁰⁸ See, eg, *White v Vandervell Trustees Ltd (No 2)* [1974] 1 Ch 269, 289 (Megarry J).

¹⁰⁹ Namely, in chronological order, *Calverley v Green* (1984) 155 CLR 242; *Muschinski v Dodds* (1985) 160 CLR 583 (which is mentioned only in passing because its main focus was on the remedial constructive trust); *Delehunt v Carmody* (1986) 161 CLR 464 (which contains relatively little by way of principle beyond the judgments in *Calverley v Green*, and so does not require further analysis for this purpose); *Nelson v Nelson* (1995) 184 CLR 538; *Cummins* (2006) 227 CLR 278.



foreign to (older) High Court authority).¹¹⁰ Third, the assumption that an ostensible gap in beneficial ownership must necessarily be filled, whether or not through the vehicle of the resulting trust, was challenged by the High Court in *CPT*, noted earlier, in its rejection of the ‘dogma’ that, where ownership is vested in a trustee, equitable ownership must necessarily be vested in someone else.¹¹¹ Fourth, it is the presumed resulting trust – in particular, the presumption of resulting trust underscoring it – more so than the scenarios that have traditionally triggered the automatic resulting trust, that have been challenged in the case law, including by some Australian High Court judges, as noted below.¹¹²

Within the 30 year time frame targeted in this paper, the core principles pertaining to the presumed resulting trust, which ostensibly remain extant in Australian law, were catalogued by the High Court in the leading case of *Calverley v Green*.¹¹³ The following remarks of Gibbs CJ encapsulate these principles:

Where a person purchases property in the name of another, or in the name of himself and another jointly, the question whether the other person, who provided none of the purchase money, acquires a beneficial interest in the property depends on the intention of the purchaser. However, in such a case, unless there is such a relationship between the purchaser and the other person as gives rise to a presumption of advancement, ie, a presumption that the purchaser intended to give the other a beneficial interest, it is presumed that the purchaser did not intend the other person to take beneficially. In the absence of evidence to rebut that presumption, there arises a resulting trust in favour of the purchaser. Similarly, if the purchase money is provided by two or more persons jointly, and the property is put into the name of one only, there is, in the absence of any such relationship, presumed to be a resulting trust in favour of the other or others. For the presumption to apply the money must have been provided by the purchaser in his character as such – not, eg, as a loan. Consistently with these principles it has been held that if two persons have contributed the purchase money in unequal shares, and the property is purchased in their joint names, there is, again in the absence of a relationship that gives rise to a presumption of advancement, a presumption that the property is held by the purchasers in trust for themselves as tenants in common in the proportions in which they contributed the purchase money.¹¹⁴

¹¹⁰ See, eg, *Black v S Freedman & Co* (1910) 12 CLR 105; *Duncan v Cathels* (1956) 98 CLR 625.

¹¹¹ *CPT* (2005) 224 CLR 98, 112 [25].

¹¹² This is not to say that the automatic resulting trust is, by its nature, entirely devoid of any aspect of presumption: see Charles E F Rickett, ‘The Classification of Trusts’ (1999) 18 *New Zealand Universities Law Review* 305 at 316 (who suggests that it may be more accurate to simply replace the phrase ‘resulting trust’ with the phrase ‘presumed trust’).

¹¹³ (1984) 155 CLR 242.

¹¹⁴ *Ibid*, 246–7. See also 255–6, 258 (Mason and Brennan JJ), 266–7 (Deane J) (citations omitted); *Delehunt v Carmody* (1986) 161 CLR 464, 472–3 (Gibbs CJ). See also 473 (Wilson J), 473 (Brennan), 473 (Deane J), 473 (Dawson J).

Several observations necessarily stem from his Honour's remarks. First, it is evident that the (presumed) resulting trust – whether stemming from property voluntarily transferred to another (the 'voluntary transfer scenario') or purchase money supplied for the purchase in the (joint) name of another (the 'purchase money scenario') – is grounded in a presumed intention that the law attributes to the 'settlor'.

Second, presumed intention must give way to evidence of actual intention and so it is said that the presumption of resulting trust can be rebutted by evidence of intention inconsistent with it. For example, this may be evidence of an intention that legal ownership is to align with equitable ownership, as was found in *Muschinski v Dodds*.¹¹⁵ This necessarily raises the question of what evidence should be admissible for this purpose. Justices Mason and Brennan in *Calverley v Green*, citing from earlier High Court authority,¹¹⁶ addressed the point as follows:

The evidentiary material from which the court might have drawn an inference as to the intention of the parties included their acts and declarations before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction. Evidence of those acts and declarations were admissible either for or against the party who did the act or made the declaration, but any subsequent declarations would have been admissible only as admissions against interest¹¹⁷

Third, stemming from the foregoing is the need to draw a temporal line when it comes to admissible evidence, although the High Court has not been explicit as to the specific reason for adopting this restriction. It may be that, as the resulting trust is presumed to arise as a result of a particular type of transaction, to allow post-transaction conduct to impact upon the beneficial interests under that trust would undermine the certainty of beneficial interest at the time of its creation. If so, the resulting trust sets in stone the relevant beneficial interests as at (or around) the date of the transaction.

Fourth, and flowing from the above, the ostensible need to draw a temporal line may inter alia dictate that financial contributions post-purchase are not probative of the relevant beneficial interests under the resulting trust. Indeed, in *Calverley v Green* Mason and Brennan JJ explicitly rejected the proposition that contributions to the repayment of a mortgage over the relevant property could be taken into account in determining beneficial interests under the trust. Their Honours reasoned, to this end, that '[t]he purchase price is what is paid in order to acquire the property; the mortgage instalments are paid to the lender from whom the money to pay some or all of the purchase price is borrowed'.¹¹⁸ This required Mason and Brennan JJ to distinguish the Court's decision, only three years earlier (and barely outside the 30 year time

¹¹⁵ (1985) 160 CLR 583.

¹¹⁶ Namely *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353, 365.

¹¹⁷ *Calverley v Green* (1984) 155 CLR 242, 262 (citations omitted). See also 269 (Deane J).

¹¹⁸ *Ibid* 257.

frame), in *Bloch v Bloch*,¹¹⁹ where every member of the Court was willing to count mortgage contributions for the purposes of determining beneficial interests under a (presumed) resulting trust, reasoning that the parties' objective was to purchase what would be ultimately unencumbered title.¹²⁰ Yet this begs the question, in any case, of how many contributors to property funded by a mortgage do *not* intend to ultimately own the property outright.

Fifth, Gibbs CJ in the seminal quote extracted above noted that the presumption of resulting trust does not operate in scenarios where the 'counter-presumption'¹²¹ of 'advancement' arises on the facts. Hence, the recognition of one presumption (that of resulting trust) must be counterbalanced by another presumption (of advancement) in circumstances where the law would naturally presume an intention to gift. This in turn requires the law to distinguish relationships in which advancement is presumed from those where it is not, and a resulting trust is instead presumed. This has not always proven straightforward, and certainly there seems no entirely definitive legal foundation upon which such a distinction can confidently be made.¹²² For instance, against a backdrop whereby the law had long accepted that a transfer from husband to wife operated by way of advancement,¹²³ in *Calverley v Green* Gibbs CJ envisaged a presumption of advancement as between a man and his de facto spouse,¹²⁴ whereas Mason, Brennan and Deane JJ did not.¹²⁵ And it was not until 1995, in *Nelson v Nelson*,¹²⁶ that the High Court extended the presumption of advancement as between parent (of either gender) and child; previously it was confined, in this regard, to relationships between father and child. Moreover, by recognising another presumption in this context the law must necessarily supply rules as to admissibility of evidence directed to its rebuttal. Parallel challenges accordingly arise in this context as per the admissibility of evidence to rebut the presumption of the resulting trust.

Each of these issues stems, at least partly, from the law's adoption of a presumption. The law could undoubtedly be simplified were it to eschew presumptions here and instead proceed on the basis of legal title-holding to property. In any case, the notion that either of the aforesaid presumptions necessarily reflects the likely intention of parties to property dealings may well be queried. Most in society would hardly appreciate, for instance, that placing title in the name of another may reserve an equitable interest that essentially prevails over legal title. Informed by considerations

¹¹⁹ (1981) 180 CLR 390, 397–8 (Wilson J). See also 392 (Gibbs CJ), 392 (Murphy J), 392 (Aickin J), 402 (Brennan J).

¹²⁰ See *Calverley v Green* (1984) 155 CLR 242, 262–3.

¹²¹ In the words of Mason and Brennan JJ in *ibid* 258.

¹²² See, eg, *ibid* 247–50 (Gibbs CJ).

¹²³ *Wirth v Wirth* (1956) 98 CLR 228, 232 (Dixon CJ); *Hepworth v Hepworth* (1963) 110 CLR 309, 318 (Windeyer J).

¹²⁴ *Calverley v Green* (1984) 155 CLR 242, 250–1.

¹²⁵ *Ibid* 259–60 (Mason and Brennan JJ), 268–9 (Deane J).

¹²⁶ (1995) 184 CLR 538, 548 (Deane and Gummow JJ), 575–6 (Dawson J), 583–6 (Toohey J), 601–2 (McHugh J).

of this kind, Murphy J in *Calverley v Green*,¹²⁷ in a typically liberal judgment, advocated the discarding of both presumptions as ‘inappropriate to our times’ and ‘opposed to a rational evaluation of property cases arising out of personal relationships’. In the absence of those presumptions, said his Honour, the legal title should reflect the interests of the parties ‘unless there are circumstances (not those false presumptions) which displace it in equity’.¹²⁸

Even Deane J, a judge less liberal than Murphy J, in briefly cataloguing the historical background to the presumptions, saw their worth even in earlier times as ‘at best debatable’, before adding that in present times ‘their propriety is open to serious doubt’.¹²⁹ His Honour was, however, unwilling to take the step for which Murphy J contended, seeing the presumptions as ‘too well entrenched ... to be simply discarded by judicial decision’.¹³⁰ His Honour’s preference for the issue to be addressed by statute has, at least in the de facto relationship scenarios presented in cases such as *Calverley v Green* and *Muschinski v Dodds*, come to fruition via a statutory jurisdiction to alter property interests upon the breakdown of those relationships,¹³¹ mirroring an existing jurisdiction as between spouses under the *Family Law Act 1975* (Cth).¹³²

While statute has largely obviated the need to rely on the presumption of resulting trust or the presumption of advancement in allocating property interests upon the breakdown of spousal and de facto relationships, there remain scenarios outside this statutory domain where the presumptions retain operation. For instance, the presumptions may be probative in allocating property interests in relationships outside the legislation, or in dealing with events not governed by the legislation, such as in the context of succession, concerning matters of illegality, to confer priority (whether or not for the purposes of insolvency), or for standing to sue or to lodge a caveat. Yet it should not be assumed that Australian law has been uniformly welcoming to the full implications of the presumptions in these contexts, at least if the High Court’s two subsequent decisions in *Nelson v Nelson*¹³³ and *Trustees of the Property of Cummins v Cummins*¹³⁴ provide any guide.

¹²⁷ (1984) 155 CLR 242, 264.

¹²⁸ Ibid 265.

¹²⁹ Ibid 266.

¹³⁰ Ibid.

¹³¹ *Domestic Relationship Act 1994* (ACT) s 15; *Property (Relationships) Act 1984* (NSW) s 20; *De Facto Relationships Act 1991* (NT) s 18; *Property Law Act 1974* (Qld) s 286; *Domestic Partners Property Act 1996* (SA) s 9; *Relationships Act 2003* (Tas) s 40; *Relationships Act 2008* (Vic) s 45; *Family Court Act 1997* (WA) s 205ZG. Since 1 March 2009 this power has largely been brought within the Commonwealth Act as a result of a referral of powers (other than by Western Australia) vis-a-vis property allocation in de facto relationships: *Family Law Act 1975* (Cth) s 90SM (pursuant to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth)).

¹³² *Family Law Act 1975* (Cth) s 79.

¹³³ (1995) 184 CLR 538.

¹³⁴ (2006) 227 CLR 278.

In the former of these cases, decided in 1995, the opportunity to consider the interaction of the presumptions with the principles of (statutory) illegality presented itself. Reflecting the classic statement of principle that '[n]o court will lend its aid to a man who founds his cause of action upon an immoral or illegal act',¹³⁵ the Court accepted the general rule that a court may assist a party to a transfer of property for an illegal purpose to recover that property only if he or she can establish legal or equitable title without the need to adduce evidence as to his or her own illegality. So far as the presumptions were concerned, this 'rule' suggests that a party cannot rely upon evidence of his or her own illegality to rebut either presumption. If money or property has been transferred for an illegal purpose in circumstances giving rise to a presumption of advancement, it follows that the transferor cannot rebut the presumption as this would involve leading evidence of the illegality. A claim grounded in the presumption of resulting trust, on the other hand, need not disclose an illegality as the law presumes that a retention of an (equitable) interest in the relevant property.

In this context the question of admissibility is not merely one subject to temporal constraints. It is one that, unless mollified, may deny the admissibility of relevant evidence of (contrary) intention entirely. In *Nelson v Nelson* a mother provided funds for the purchase of a house, the title to which was put into the names of her son and daughter. This transaction was designed to enable the mother to access subsidised finance under a statutory scheme on the purchase of a residence for herself. The mother, (falsely) declaring that she had no interest in a house other than the one for which the subsidy was sought, obtained that finance. On the later sale of the first house, the mother claimed the proceeds, which the son conceded, but the daughter withstood on the basis that the original purchase moneys were provided by way of advancement. As the Court accepted that the mother-child relationship gave rise to the presumption of advancement, the issue was whether the mother should be precluded from adducing evidence rebutting that presumption on the basis that this evidence disclosed an illegality.

That each member of the Court allowed the mother to adduce evidence surrounding the original transaction, even though it was tainted by illegality and in the face of the presumption of advancement, suggests an approach that is hardly inflexible when it comes to that presumption (or to the presumptions generally). It is true that their Honours specifically targeted statutory illegality in this context and that there was no unanimity as to the appropriate approach to ultimately addressing the mother's illegality. But a unanimous desire to ensure that the mother was not deprived of an equitable interest in property, which the evidence supported, led their Honours to downplay the strictness with which the presumptions, interacting with the principles of illegality, should be applied.

In turn this can be interpreted as a potential dissatisfaction with the presumptions, or at least with their mechanical application independent of the justice of the instant case. Only McHugh J, however, was willing to voice that concern explicitly. After noting that the presumption of advancement derives its force from the existence of

¹³⁵ *Holman v Johnson* (1775) 1 Cowp 341, 343; 98 ER 1120, 1121 (Lord Mansfield).

the presumption of resulting trust, his Honour opined that ‘it seems much more likely that, in the absence of an express declaration or special circumstances, the transfer of property without consideration was intended as a gift to the transferee’.¹³⁶ In line with remarks of Murphy J in *Calverley v Green*, noted earlier, he then warned that ‘[i]f the presumptions do not reflect common experience today, they may defeat the expectations of those who are unaware of them’.¹³⁷

Though it may be accepted that *Nelson v Nelson* cannot stand as authority denying the applicability of the presumptions in Australian law – indeed, the Court proceeded on the assumption that the presumption of advancement applied as between mother and daughter – nor can it stand as an uncritical and unwavering endorsement of their application in every instance. If this is a trend to be discerned, it is one that derives support from the Court’s decision, some eleven years later, in *Cummins*.¹³⁸

The case involved, inter alia, a 1987 transfer, by a husband to wife, of his legal and beneficial interest as joint tenant in the matrimonial home. The evidence revealed that the husband had, when the home was originally purchased many years earlier, contributed approximately one-quarter of the purchase price and the wife the remainder. The husband became bankrupt in 2000. Before the High Court (and also at first instance) his trustees in bankruptcy succeeded in establishing that the 1987 transfer was void because, in the language of s 121(1)(b) of the *Bankruptcy Act 1966* (Cth), ‘the [husband’s] main purpose in making the transfer was ... to prevent the transferred property from becoming divisible among the [husband’s] creditors’. The question then centred on whether the trustees in bankruptcy could recover the husband’s (former) one-half share in law, or were confined to his alleged share in equity, under a resulting trust, commensurate with his (lesser) original contribution to the purchase price.

At first instance Sackville J accepted, as a starting point, ‘the equitable presumption which arises where unequal contributions are made to the acquisition of an asset by parties to a marriage (or other relationship)’,¹³⁹ namely the presumption of resulting trust. However, according to his Honour the presumption was rebutted in the circumstances by evidence that the parties’ common intention, at the time of purchasing the home, was that they should hold as joint beneficial owners. In this sense, the reasoning in question follows nothing beyond an orthodox approach.

Though reversed on appeal,¹⁴⁰ the High Court reinstated Sackville J’s orders.¹⁴¹ But their Honours’ approach in reaching this outcome, at least so far as the operation of the presumption of resulting trust is concerned, was more veiled. Rather than

¹³⁶ *Nelson v Nelson* (1995) 184 CLR 538, 602.

¹³⁷ *Ibid.*

¹³⁸ (2006) 227 CLR 278.

¹³⁹ *Prentice v Cummins* (2003) 134 FCR 449, 463 [53].

¹⁴⁰ *Cummins v Trustees of the Property of Cummins* [2004] FCAFC 191 (30 July 2004).

¹⁴¹ *Cummins* (2006) 227 CLR 278, 304 [76].

approach the question by reference to an original presumption, and then evidence of intention capable of ousting that presumption, the Court appeared to go directly to evidence of inferred intention. What drove this ostensible short-circuiting of principle, it appears, was that, unlike a case such as *Calverley v Green*, the facts in *Cummins* involved a longstanding ‘traditional matrimonial relationship’.¹⁴² In such a relationship, their Honours accepted the reasoning espoused by the leading American trusts work, which in two discrete extracts adopted by the Court reads as follows:

Where a husband and wife purchase a matrimonial home, each contributing to the purchase price and title is taken in the name of one of them, it may be inferred that it was intended that each of the spouses should have a one-half interest in the property, regardless of the amounts contributed by them.

It is often a purely accidental circumstance whether money of the husband or of the wife is actually used to pay the purchase price to the vendor, where both are contributing by money or labor to the various expenses of the household. It is often a matter of chance whether the family expenses are incurred and discharged or services are rendered in the maintenance of the home before or after the purchase.¹⁴³

The above, said the Court, ‘applies with added force in the present case where the title was taken in the joint names of the spouses’.¹⁴⁴ If so, it appears that, notwithstanding manifold broad statements of legal principle in the case law (including in the High Court) directed to circumstances in which the presumption of resulting trust is triggered, there may be less room for the resulting trust to operate vis-a-vis property in a marriage relationship. It almost seems, at least in the insolvency context of *Cummins*, that any supposed resulting trust could not survive against a counter-presumption of intention arising as a result of the purchase of property as a matrimonial home. The ambit of the resulting trust is thus correspondingly reduced. Taken together with High Court judicial remarks, catalogued earlier, which can be interpreted as challenging the presumption’s validity or at least scope for operation, subtle moves appear afoot against the presumption of resulting trust (and with this, the presumption of advancement).

VI CONCLUSION

Even without engaging in a review of the most frequent contributor to High Court trusts jurisprudence in the last 30 years – the constructive trust – there stems from the trusts case law sufficient indication that trusts law is capable of evolution within the space of a generation.

¹⁴² Ibid 302 [71].

¹⁴³ Austin W Scott and William F Fratcher, *The Law of Trusts* (4th ed, Aspen Law & Business, New York, 1989), vol 5, §§443 (citations omitted), 454.

¹⁴⁴ *Cummins* (2006) 227 CLR 278, 303 [72].



The categories of fixed and discretionary trusts can no longer be accurately understood as watertight. The law of trusts, in this regard, is more nuanced, especially when measured against concepts found in revenue law statutes. There is also evident a more nuanced, and contextual, approach to trustee duties, albeit concurrent with a reinforcement of certain core trustee obligations that transcend context.

So far as the express trust is concerned, the last 30 years has witnessed, and culminated, in a focus on intention that is objectively determined. Trusts law has in this vein followed contract law, but has in other instances, chiefly where intention is sought to be inferred, been utilised as a vehicle to overcome contractual constraints. Yet in this latter scenario too, questions of subjective intention have not infrequently been put to one side, mainly to justify a finding of trusteeship rather than to deny it.

And in the context of resulting trusts, while the High Court has revealed no explicit inclination (with the exception of *Murphy J*) to judicially discard the presumption of resulting trust (and the attendant presumption of advancement), nor has it revealed a willingness to uncritically endorse and apply the presumptions in every instance.

Overall, what the foregoing review suggests is that trust principles should not be perceived as being set in stone. With the exception of its development of the remedial constructive trust,¹⁴⁵ which fell outside the scope of this paper, while the High Court in the past 30 years has on the whole not shown itself willing to pursue revolutionary change in trusts law, it has shown itself willing, by way of incremental steps, to reshape certain of its parameters. So far as the evolution of trusts law is concerned, this willingness may be welcomed, especially in view of the High Court's inclination, noted at the outset of the paper, to reserve the reshaping of legal doctrine to itself. The inherent historical fluidity of equity would, it may be surmised, expect no less.

¹⁴⁵ Through the seminal case of *Baumgartner v Baumgartner* (1987) 164 CLR 137.

