HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND CRENNAN JJ

MARTIN FRANCIS BYRNES & ANOR — APPELLANTS

AND

CLIFFORD FRANK KENDLE — RESPONDENT

Byrnes v Kendle [2011] HCA 26
3 August 2011
A23/2010

ORDER

1. *Appeal allowed with costs.*

2. *Orders 1 and 3 of the orders of the Full Court of the Supreme Court of South Australia sealed 20 January 2010 be set aside and in place thereof it be ordered that:*

    (a) the appeal to the Full Court be allowed with costs; and

    (b) the orders of the District Court made on 31 March 2009 and order 1 of the orders made on 22 June 2009 be set aside and in place thereof:

        (i) declare that the solicitors for the respondent, Clifford Frank Kendle, be at liberty to account for the moneys held by them in trust pursuant to order 4 of the orders of the District Court made on 11 September 2008 by paying thereout to the first appellant, Martin Francis Byrnes, or as he may direct in writing, the sum of $73,534.70 and by paying the balance to Mr Kendle, or as he may direct in writing;

        (ii) order that:

            (A) Mr Kendle pay the costs of the appellants on a party and party basis of the trial and all applications filed in the District Court action; and

(B) the action otherwise be dismissed.

On appeal from the Supreme Court of South Australia

Representation

D M J Bennett QC with A L Tokley for the appellants (instructed by Haarsma Lawyers)

M A Frayne SC with N J Floreani for the respondent (instructed by Corsers Lawyers)

CATCHWORDS

Byrnes v Kendle

Equity – Trusts and trustees – Express trusts constituted inter vivos – Where respondent by deed declared one half of property held "upon trust" for second appellant – Whether respondent a trustee – Whether evidence extrinsic to deed relevant to intention to create trust.

Equity – Trusts and trustees – Powers, duties, rights and liabilities of trustees – Liability for breach of trust – Where trustee leased trust property – Whether duty to collect rent – Whether breach of duty to fail to collect unpaid rent – Where beneficiary knew trustee failed to collect rent and was told trustee had duty to collect rent – Whether beneficiary consented to or acquiesced in breach – Whether trustee entitled to set-off outgoings and improvements to property in taking of accounts.

Words and phrases – "acquiescence", "bare trust", "consent", "estoppel", "express trust", "intention", "upon trust".

Law of Property Act 1936 (SA), ss 29(1)(b), 41.
Trustee Act 1936 (SA), ss 6, 7, 8, 25A, 25C.

FRENCH CJ.

Introduction

1 In proceedings commenced in the District Court of South Australia in September 2008, Martin Byrnes and his mother, Joan Byrnes, alleged that, between 2002 and 2007, Mrs Byrnes' estranged husband, Clifford Kendle, had committed breaches of trust in relation to a house and land at 10 Rachel Street, Murray Bridge ("Rachel Street"). The legal title to the property was held by Mr Kendle. However, he had signed an Acknowledgment of Trust in 1997 declaring that he held one undivided half interest in the property as tenant in common upon trust for Mrs Byrnes.

2 The principal breach of trust alleged against Mr Kendle was that he let the house to his son in 2002 for a weekly rental of $125, collected only $250 rent from him and took no steps to collect any further rent over the ensuing years of his son's occupancy, which was terminated in 2007. Martin Byrnes' involvement in the proceedings stems from his mother's assignment to him of her interest in Rachel Street and her rights arising out of the Acknowledgement of Trust. That assignment was effected by deed in March 2007.

3 The property was sold three days after the commencement of the proceedings. On 31 March 2009, Boylan DCJ, following a trial of the action, made a declaration that Mr Kendle held one half of the net proceeds of sale of Rachel Street on trust for Mr Byrnes[1]. The claims based on breaches of trust, including the alleged failure to collect rent, were dismissed. In a separate judgment given on 22 June 2009, the primary judge ordered that Mr Byrnes and his mother pay Mr Kendle's costs of the trial and all applications filed in the action. His Honour refused an application by Mr Kendle for indemnity costs.

4 On 18 December 2009, the Full Court of the Supreme Court of South Australia (Doyle CJ, Nyland and Vanstone JJ)[2] dismissed the appeal and a cross-appeal on the costs decision and ordered that Mr Byrnes and his mother pay Mr Kendle's costs of the appeal. An application to the Full Court to reopen the hearing of the appeal to permit further submissions, in relation to a loan made by Mr Kendle to his son on the security of the property, was refused. On 3 September 2010, Mr Byrnes and his mother were granted special leave to appeal (French CJ, Crennan and Bell JJ) against the first decision of the Full Court. The second decision of the Full Court, refusing the application to reopen the hearing of the appeal, was not the subject of a grant of special leave.

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1 *Byrnes v Kendle* [2009] SADC 36.

2 *Byrnes v Kendle* (2009) 3 ASTLR 459.

5 This case concerns a husband and wife in their 80s, now separated, who have been engaged in litigation with each other for more than two and a half years over relatively small sums of money. That they should be involved in such litigation at this time of their lives is a great misfortune for them and their families. For the reasons that follow, the appeal must be allowed. The facts of the case[3] and relevant aspects of the reasoning of the primary judge and the Full Court are set out in joint judgment of Gummow and Hayne JJ.

The appeal to this Court

6 Mr Byrnes and his mother appeal to this Court on the grounds that the Full Court erred in law in finding that Mr Kendle did not have a duty with respect to the recovery of rent in relation to the property of which he was trustee. They also challenge the finding of the Full Court that Mr Kendle was not subject to the duties that would normally be imposed on a trustee who rents out trust property. They contend that the Full Court erred in law and in fact in finding that Mrs Byrnes had consented to or acquiesced in Mr Kendle's actions as trustee.

7 By notice of contention Mr Kendle challenges the finding of the Full Court that the Acknowledgment of Trust created an express trust of which Mrs Byrnes was a beneficiary. He asserts that, even if he were a trustee, he did not have a duty to collect rent and that, if he did have such a duty, it had been waived. He also asserts that, in any event, the set off for outgoings and improvement to the premises paid solely by him, results in there being no balance due to Mrs Byrnes.

Statutory framework

8 This appeal is concerned with the application of established equitable principles. There is, however, a statutory context in which it arises.

9 The trust said to have been established by Mr Kendle related to an undivided half share in Rachel Street. It attracted the application of s 29(1)(b) of the *Law of Property Act* 1936 (SA) ("the Law of Property Act"). That provision requires that a declaration of trust with respect to an interest in land be manifested or proved by some writing signed by some person able to declare such trust. The definition of "land" under the Law of Property Act, includes "an undivided share in land"[4]. Section 29(1)(b) does not require that the trust be created by the writing which manifests or proves it, albeit the distinction is not

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3 Reasons of Gummow and Hayne JJ at [32]-[39].

4 Law of Property Act, s 7.

material in this case[5]. In his defence, filed in the District Court, Mr Kendle contended that the Acknowledgment of Trust did not comply with the Law of Property Act, although his pleading did not specify how it was non-compliant. Non-compliance with the Law of Property Act was not asserted in this appeal. Nevertheless, the Byrnes submitted, and it may be accepted, that the Acknowledgment of Trust complied with the requirements of s 41 of the Law of Property Act and that it was a deed[6]. That formality serves to emphasise the status of the Acknowledgement of Trust as an exhaustive manifestation of Mr Kendle's intention to create a trust. The question whether it was appropriate for the primary judge to go behind that Acknowledgement of Trust to inquire into Mr Kendle's "real intention" is discussed later in these reasons.

10 The legal title to Rachel Street was held by Mr Kendle as registered proprietor of the land pursuant to the provisions of the *Real Property Act* 1886 (SA). As senior counsel for the Byrnes accepted in oral argument, in so far as the asserted trust was in force on the face of the register, it was a personal obligation within the exceptions to the indefeasibility of registered title[7]. A caveat on the title, lodged by Mr Byrnes, protected his interest as assignee of his mother's beneficial interest under the Acknowledgment of Trust.

11 The *Trustee Act* 1936 (SA) ("the Trustee Act") is also relevant. As was pointed out in the submissions for the Byrnes, s 6 of the Trustee Act confers power on a trustee to invest trust funds in any form of investment. When the trustee, who exercises that power, is not a person engaged in the profession, business or employment of being a trustee or investing on behalf of others, he or she has a duty, imposed by s 7 of the Trustee Act, to "exercise the care, diligence

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5 *Kauter v Hilton* (1953) 90 CLR 86 at 98; [1953] HCA 95.

6 The relevant requirements imposed by the Law of Property Act for a deed executed by a natural person are the application of the person's signature or mark on the deed (s 41(1)(a)) and attestation by a non-party witness (s 41(2)(a)). The Acknowledgment of Trust was also expressed to be a deed: Law of Property Act, s 41(5)(a).

7 *Barry v Heider* (1914) 19 CLR 197 at 213 per Isaacs CJ; [1914] HCA 79; *Frazer v Walker* [1967] 1 AC 569 at 585; *Breskvar v Wall* (1971) 126 CLR 376 at 384-385 per Barwick CJ; [1971] HCA 70; *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 at 613, 618 per Mason CJ and Dawson J, 638 per Wilson and Toohey JJ; [1988] HCA 16; *Bank of South Australia v Ferguson* (1998) 192 CLR 248 at 255 per Brennan CJ, Gaudron, McHugh, Gummow and Kirby JJ; [1998] HCA 12. The *Real Property Act* 1886 (SA), s 71(e) expressly preserves the rights of a cestui que trust against the operation of the indefeasibility provisions in ss 69 and 70 where the registered proprietor is a trustee.

and skill that a prudent person of business would exercise in managing the affairs of other persons"[8]. It was submitted for the Byrnes, that while the statutory duty relates to investment, its existence as a presumptive duty under the statute requires a conclusion that analogous principles at general law continue to apply. That submission gained support from the express preservation under s 8 of the Trustee Act of rules and principles of law or equity that impose a duty on a trustee exercising a power of investment except so far as those rules are inconsistent with any statute or the trust instrument[9]. None of ss 6, 7 or 8 however, is directed to the power of a trustee to lease a house held on trust nor to the duties of the trustee in relation to such leasing. Under the general law, a trustee with power to manage trust property has power to lease it for a short term[10]. Section 25C of the Trustee Act supplements the general law by conferring a power on a trustee of land in possession to make a lease of the land for five to ten years depending upon whether the trustee does or does not have power to manage the land. The section does not apply to a bare trustee where the beneficiary is entitled in possession and free of any incapacity[11]. Section 25C was not referred to in argument. The Byrnes relied upon the general law. It is at least arguable, however, that Mr Kendle also had a statutory power as trustee to lease the property.

12 In the context of the defence of set off, s 25A of the Trustee Act authorises a trustee in his or her discretion to pay and satisfy all rates, taxes, charges, assessments or impositions assessed or imposed on or in respect of the trust property or any part thereof and to debit the moneys so paid to capital or income or adjust the same between capital and income in such manner as to the trustee shall seem equitable[12]. The section was not referred to in argument.

The existence of a trust

13 Mr Kendle sought, by notice of contention, to resurrect the trial judge's finding that he was not a trustee because he lacked intention to create a trust. He relied upon *Commissioner of Stamp Duties (Q) v Jolliffe*[13]. The Full Court found,

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8 Trustee Act, s 7(1)(b).

9 Trustee Act, s 8(1).

10 *Jacobs' Law of Trusts in Australia*, 7th ed (2006) at [2020]; *Attorney-General v Owen* (1805) 10 Ves Jun 555 [32 ER 960]; *Earl of Egmont v Smith* (1877) 6 Ch D 469; *Re Shaw's Trusts* (1871) LR 12 Eq 124; *Re Byrne* (1902) 19 WN (NSW) 141.

11 Trustee Act, s 25C(5).

12 Trustee Act, s 25A(1)(b) and (d).

13 (1920) 28 CLR 178; [1920] HCA 45.

adversely to that contention, that the terms of the Acknowledgment of Trust were clear. They constituted Mr Kendle a trustee, for Mrs Byrnes, of an interest as tenant in common with a life interest in his interest if he predeceased her[14]. The Full Court was correct in that conclusion.

14 *Jolliffe* turned upon findings of fact by a trial judge made in a particular statutory context. In that case, the *Queensland Government Savings Bank Act* 1916 (Q) ("the Queensland statute") provided that no person should have more than one account in the Queensland Savings Bank, but that the section would not prevent any person from having additional accounts in his own name in trust for other persons[15]. Mr Jolliffe deposited funds into a savings account in his wife's name and his own name with the designation "Trustee". He also signed a statutory declaration in a form required by regulations made under the Queensland statute, that he was "desirous of becoming a depositor in the Queensland Government Savings Bank as the bona fide trustee of Mrs Hanna Jolliffe"[16]. Lukin J found, despite the documentary material, that Mr Jolliffe did not intend to make a gift to his wife. On the basis of that finding he allowed an appeal against an assessment of the Commissioner of Stamp Duties against Mr Jolliffe as administrator of his wife's estate for duty including in the assessment the money which had been deposited by Mr Jolliffe in the account. A grant of special leave to appeal to this Court, against that decision, was made subject to the condition that the appeal be limited to the question whether the effect of the Queensland statute and the documents in evidence prevented Mr Jolliffe from averring that he was not the trustee of the funds deposited. As acknowledged in each of the judgments in that case, the Court was bound to assume, for the purposes of the appeal, that it was not Mr Jolliffe's real intention to make a gift to his wife and that the money was placed in the account solely to procure interest which would not be available to him if the money had been placed there in his own name[17]. The findings of fact by the primary judge as to Mr Jolliffe's real intention, the correctness of which could not be challenged, were held by Knox CJ and Gavan Duffy J to be an "insuperable obstacle" to the proposition that he had created a trust. Their Honours[18] relied upon a passage from the 11th edition of *Lewin on Trusts*:

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14 (2009) 3 ASTLR 459 at 464 [28].

15 Queensland statute, s 12 of the Schedule.

16 (1920) 28 CLR 178 at 184-185 per Isaacs J.

17 (1920) 28 CLR 178 at 181 per Knox CJ and Gavan Duffy J, 182 per Isaacs J.

18 (1920) 28 CLR 178 at 181.

> "It is obviously essential to the creation of a trust, that there should be the *intention* of creating a trust, and therefore if upon a consideration of all the circumstances the Court is of opinion that the settlor did not mean to create a trust, the Court will not impute a trust when none in fact was contemplated." (emphasis in original)

Jolliffe was a case which concerned what the authors of the 18th edition of *Lewin on Trusts* describe as a "shamming intent"[19]. Neither the passage quoted from the 11th edition of *Lewin* nor the judgment of the majority in *Jolliffe* was directed to the effect of an unambiguous and explicit written declaration of a trust, in proceedings in which there is no concession or assumption about the settlor's "real intention".

15 The passage from *Lewin* quoted in *Jolliffe* included a reference in the text, which was not quoted, to the decision of *Field v Lonsdale*[20]. That decision concerned a depositor who, without telling his sister, placed money in a bank account as trustee for her in order to evade the rules of the bank[21]. Given its statutory and factual setting, *Jolliffe* should not be taken as authority for the general proposition that where there has been an explicit written declaration of trust, unaffected by vitiating factors[22], evidence is admissible to contradict the intention to create a trust manifested by the declaration. Isaacs J, who dissented in the result in *Jolliffe*, observed[23]:

> "An open declaration of trust is … an expression of intention that is final and beyond recall."

He added[24]:

> "I cannot believe that, for instance, a solemn deed of trust or a will can be open to the reception of parol evidence, not of mistake as to its nature, or

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19 *Lewin on Trusts*, 18th ed (2008) at 95 [4-23].

20 (1850) 13 Beav 78; [51 ER 30].

21 Similar facts existed in *Gaskell v Gaskell* (1828) 2 Y & J 502 [148 ER 1017], footnoted in the passage from *Lewin*. The settlor's purpose was to avoid estate duty and the creation of the trust was not communicated to the appointed trustee.

22 Such as fraud, undue influence, duress, the non est factum principle or an intention to create a sham trust.

23 (1920) 28 CLR 178 at 187.

24 (1920) 28 CLR 178 at 191.

> as to any condition of execution, or as to undue influence or other well understood causes of ineffectiveness, but merely of personal secret intention not to do what the document purports to effect."

16 What Isaacs J said in *Jolliffe* was entirely consistent with the principle that a trust cannot be created unless the person creating it intends to do so[25]. That principle was reiterated in *Kauter v Hilton*[26], which was concerned with provisions of the *Commonwealth Bank Act* 1945 (Cth) relating to the creation of trust accounts in the Savings Bank. The Court said of *Jolliffe* that its effect was[27]:

> "that the mere opening of an account under the section by one person in trust for another is not necessarily sufficient to make that person a trustee for the other person. All the relevant circumstances must be examined in order to determine whether the depositor really intended to create a trust."

In *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)*[28] the plurality, after referring to the treatment of *Jolliffe* in *Kauter v Hilton*, appeared to place *Jolliffe* in the category of cases in which the language employed by the parties for the transaction is inexplicit leaving the court to infer the relevant intention from other language used by them, from the nature of the transaction and from the circumstances attending their relationship[29].

17 The passage quoted in *Jolliffe* from the 11th edition of *Lewin on Trusts* was reproduced in the 12th to 16th editions of that work, but not in the 17th or 18th editions. In the 18th edition of *Lewin on Trusts*, published in 2008, *Jolliffe* is treated as a case about a sham trust in which the settlor was allowed to assert his own shamming intent to defeat the effect of his declaration of trust as against the revenue authority. The authors refer to the "powerful dissent" of Isaacs J and observe that[30]:

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25 *Garrett v L'Estrange* (1911) 13 CLR 430 at 434 per Griffith CJ, Barton and O'Connor JJ agreeing at 435; [1911] HCA 67.

26 (1953) 90 CLR 86 at 98.

27 (1953) 90 CLR 86 at 100.

28 (2000) 202 CLR 588; [2000] HCA 25.

29 (2000) 202 CLR 588 at 605 [34] per Gaudron, McHugh, Gummow and Hayne JJ.

30 *Lewin on Trusts*, 18th ed (2008) at 95-96 [4-23].

> "A settlor who has executed a declaration of trust is subject to the usual rule that prevents a party to a legal document from relying on mere mental reservations to resist its enforcement."

A short statement of the position in a case such as the present, written in the context of the trust of the family home, appears in *The Law of Trusts* by Thomas and Hudson[31]:

> "In circumstances in which there has been an express trust declared over land, the terms of that trust will be decisive of the parties' equitable interests in land, in the absence of any fraud, undue influence, or duress." (footnote omitted)

The relevant intention in such a case is that manifested by the declaration of trust. Such a case does not require any further inquiry into the subjective or "real" intention of the settlor. I also respectfully agree with and adopt the reasons of Gummow and Hayne JJ on this question[32].

18 The primary judge in the present proceedings appears to have taken the view that Mr Kendle's intention could be determined by reference to evidence contradicting the Acknowledgement of Trust. He said[33]:

> "In determining whether or not an express trust has been created the court may look at evidence outside the Trust Deed to determine the intention of the alleged settlor."

His Honour relied upon the decision of Perry J in *B & M Property Enterprises Pty Ltd (in liq) v Pettingill*[34], which in turn relied upon the decision of Napier J in *Starr v Starr*[35] applying *Jolliffe* as though it were authority for the proposition that "notwithstanding the terms of the written instrument said to constitute a trust, evidence was admissible to show that the document was never intended to operate as a binding declaration of trust."[36] That proposition, to the extent that it

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31 2nd ed (2010) at 1495 [58.04].

32 Reasons of Gummow and Hayne JJ at [46]-[66].

33 [2009] SADC 36 at [33].

34 [2001] SASC 75.

35 [1935] SASR 263.

36 *B & M Property Enterprises Pty Ltd (in liq) v Pettingill* [2001] SASC 75 at [125]; see also *Starr v Starr* [1935] SASR 263 at 266-267.

encompassed the case of an unambiguous written declaration of trust, was expressed too broadly. In the Full Court, Doyle CJ said[37]:

> "The terms of the Acknowledgement are clear. So are the terms of the earlier Acknowledgement. Mr Kendle might not have fully understood what he was doing, but that is neither here nor there."

His Honour was correct in so holding. Mr Kendle's challenge to the finding that he had created a trust cannot succeed.

Mr Kendle's duties as trustee

19 In the Full Court, the Chief Justice proceeded upon the factual premise that Mr Kendle and the Byrnes had agreed that he would let Rachel Street to his son. His Honour held that there was "no affirmative duty on Mr Kendle to let out the property"[38].

20 In also holding that Mr Kendle had no duty to collect the rent on Rachel Street from his son, the Chief Justice took as his guide "the legal relationship as between co-owners and tenants in common"[39]. In so doing, with respect, he erred. His Honour said that if Mr Kendle had let the property to a tenant on an ordinary commercial basis he would have had no liability to make up unpaid rent. That may be so, as far as it goes, but that says nothing about whether he had a duty in such a case to endeavour to enforce payment or evict the non-complying tenant.

21 Mr Kendle submitted that, as trustee under the Acknowledgement of Trust, he had "no active duties to perform". He characterised himself as a "bare trustee", described in *Jacobs' Law of Trusts*, which he cited, as[40]:

> "a trustee who has no interest in the trust assets other than that existing by reason of the office of trustee and the holding of the legal title, and who never has had active duties to perform or who has ceased to have those duties with the result that in either case the property awaits transfer to the beneficiaries or at their direction."

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37 (2009) 3 ASTLR 459 at 464 [28].

38 (2009) 3 ASTLR 459 at 466 [38].

39 (2009) 3 ASTLR 459 at 466 [37].

40 *Jacobs' Law of Trusts in Australia*, 7th ed (2006) at 48 [315].

Mr Kendle's characterisation begged the question whether he had a duty to collect rent from his son. The designation "bare trustee" has attracted slightly varying definitions and sometimes, as pointed out in *Jacobs' Law of Trusts*, takes its meaning from a statutory setting[41]. In the 18th edition of *Lewin on Trusts* the learned authors observe[42]:

> "A bare trustee, holding property for a single beneficiary who is absolutely and indefeasibly entitled, has traditionally been said to be a mere passive repository, owing a duty only to transfer the property to the beneficiary or at his direction. But it is clear that certain trustees holding property in that way owe active duties to manage the trust property, with corresponding powers, notably a trustee of land, a trustee for a minor solely entitled and a trustee with an unsatisfied right of indemnity; and other such trustees also may have powers of management with an associated duty of care." (footnotes omitted)

It is also said in *Lewin* that when the property in question is land, "[a] trustee holding land on trust for an absolute beneficiary is not a mere cypher and has the powers of a beneficial owner in relation to the land"[43].

22 In any event, the nature of the trust in this case does not lend itself easily to characterisation as a bare trust. The co-existence of beneficial interests, one held by the trustee in his own right and the other by Mrs Byrnes as beneficiary under the trust, are consistent with the necessity for, and existence of, a power on Mr Kendle's part to manage the property and to let it when he and Mrs Byrnes vacated it. That power was associated with a duty, existing at general law, to manage the property in spite of the absence of any specific direction to that effect in the Acknowledgement of Trust[44]. Absent such a duty, Mrs Byrnes would have derived no benefit from the interest conferred upon her under the trust. Only Mr Kendle, with legal title to the house and land, had the power to grant a lease of the property to another and thus derive income for Mrs Byrnes' benefit as beneficial owner of an undivided half share, as well as for his own benefit as

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41 *Jacobs' Law of Trusts in Australia*, 7th ed (2006) at 48 [315] and fn 42.

42 *Lewin on Trusts*, 18th ed (2008) at 1215 [34-03].

43 *Lewin on Trusts*, 18th ed (2008) at 18 [1-25]; *Ingram v Internal Revenue Commissioners* [2000] 1 AC 293 at 305 per Lord Hoffmann, approving Millett LJ in *Ingram v Internal Revenue Commissioners* [1997] 4 All ER 395 at 424. See also *CGU Insurance Ltd v One Tel (in liq)* (2010) 84 ALJR 576 at 581 [36]; (2010) 268 ALR 439 at 446; [2010] HCA 26.

44 *Adamson v Reid* (1880) 6 VLR (E) 164 at 167 per Molesworth J – a case concerning the general law obligation on a trustee to invest.

beneficial owner of the other undivided half share. Unlike the lands the subject of the trust considered in *Earl of Egmont v Smith*[45], Rachel Street was not a farm "situate, perhaps in one of the finest counties in England, and readily lettable"[46]. Nevertheless, there was nothing to suggest that it was not lettable. Mr Kendle exercised his power and, for present purposes, may be assumed to have discharged his duty to let the property, by letting it to his son. He had, however, as trustee a continuing duty to ensure, so far as he reasonably could, that the rent was paid and if it were not paid that a new tenant was found to replace his son.

23 Mr Kendle's duty was not to be assessed by reference to notions of a putative co-ownership. It was a fiduciary duty which he assumed when he declared the trust and retained the legal title to the land. The Full Court erred in holding that his failure to ensure that the rent was paid by his son did not give rise to a breach of duty making him liable to compensate Mrs Byrnes in respect of her interest in the unpaid rent[47].

Consent and acquiescence

24 For the sake of matrimonial harmony, Mrs Byrnes did not press Mr Kendle to insist upon payment of the rent owed by his son. In his defence in the District Court proceedings, Mr Kendle raised pleas of waiver, consent and acquiescence. He also asserted an estoppel. The primary judge found that, "although unwillingly", Mrs Byrnes "consented to her husband's decisions not to press for rent"[48]. The Chief Justice characterised the primary judge's finding as one of co-operation by Mrs Byrnes in the breach of duty[49] or concurrence or acquiescence by her in letting the matter of the rent drift. The Chief Justice held that the words "acquiescence" and "concurred" better described Mrs Byrnes' conduct than "cooperate". His Honour held that "on the judge's finding, although there was some reluctance on her part she was well aware of the issue and acquiesced in the decision not to press for rent"[50]. His Honour agreed with the primary judge's conclusion.

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45 (1877) 6 Ch D 469.

46 (1877) 6 Ch D 469 at 476 per Jessel MR.

47 (2009) 3 ASTLR 459 at 467 [45].

48 [2009] SADC 36 at [42].

49 (2009) 3 ASTLR 459 at 467 [46].

50 (2009) 3 ASTLR 459 at 467 [49].

25 As counsel for the Byrnes submitted, it was not clear that the Chief Justice drew any distinction between concurrence and acquiescence. The two concepts are not congruent. Consent, of course, may be expressed in a number of ways some of which may overlap with conduct constituting acquiescence. As Handley JA said in *Spellson v George*[51]:

> "Consent may take various forms. These include active encouragement or inducement, participation with or without direct financial benefit, and express consent. Consent may also be inferred from silence and lack of activity with knowledge. However consent means something more than a state of mind. The trustee must know of the consent prior to the breach."

Handley JA quoted a number of authorities for the proposition that consent to a breach of trust operates as an estoppel and observed[52]:

> "If this defence does operate by way of estoppel it would require proof of inducement and reliance thereon by the trustee."

Young AJA, in the same case, distinguished between concurrence in a breach and acquiescence after breach. His Honour also referred to the distinctions to be drawn between consent and other concepts, including the distinction between consent and "a situation where a person knows of the facts, hopes that the proposed course will take place but does nothing to assist it"[53]. Hope AJA, who agreed with Young AJA, said it was necessary, in determining whether a defence of consent to a breach of trust was made out, to consider all the circumstances with a view to determining whether it was fair and equitable to allow the plaintiff to sue the defendants for the breaches of trust[54].

26 In this case, neither the findings of fact by the primary judge nor the evidence supported a defence of consent. Mrs Byrnes' unwillingness to insist upon collection of the rent did not amount to a consent to Mr Kendle's inaction. Nor was there any finding that Mr Kendle, in failing to enforce collection of the rent, was induced by, or relied upon, Mrs Byrnes' position. That leaves for consideration the matter of acquiescence.

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51 (1992) 26 NSWLR 666 at 669-670.

52 (1992) 26 NSWLR 666 at 670.

53 (1992) 26 NSWLR 666 at 682.

54 (1992) 26 NSWLR 666 at 674-675.

27 Acquiescence as a defence to a claim for equitable relief is used in at least two different senses[55]:

- A person who is aware that an act is about to be done to his or her prejudice takes no step to object to it.

- A person being aware of a violation his or her rights which has occurred fails to take timely proceedings to obtain equitable relief. This is acquiescence after the event which founds the defence of laches.

There was no plea of laches in this case. The species of acquiescence relied upon to defeat Mrs Byrnes' claim, while extended over time, was analogous to the first category.

28 Counsel for the Byrnes pointed to a number of aspects of the evidence of Mr Kendle and Mrs Byrnes which were inconsistent with these defences:

- Mr Kendle's evidence in examination-in-chief and in cross-examination that he and Mrs Byrnes discussed the non-payment of rent from time to time and that both hoped that his son would pay the rent.

- The absence in Mr Kendle's evidence of any suggestion that his inaction was attributable to or induced by anything Mrs Byrnes did or failed to do.

- Mr Kendle's evidence that he decided matters concerning his family and that Mrs Byrnes decided matters concerning her family.

- Mrs Byrnes' evidence that, for the sake of matrimonial harmony, she did not take action to insist upon Mr Kendle pursuing his son for rent.

29 The primary judge found[56]:

> "Mrs Byrnes and Mr Kendle were both upset at Kym's failure to pay rent. So was Martin Byrnes. On occasions the three of them discussed the problem but Mr Kendle took no action. To use his own words, he 'just let the problem drift'. Nor did Mrs Byrnes take action. She chose not to do so for the sake of matrimonial harmony."

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55 Meagher, Heydon and Leeming, *Equity, Doctrines and Remedies*, 4th ed (2002) at 1043-1045 [36-090], [36-095].

56 [2009] SADC 36 at [20].

Neither that finding nor the evidence is consistent with the concept of acquiescence on Mrs Byrnes' part in Mr Kendle's failure to discharge his duty as trustee of her interest in the house and land. She could not take action herself to recover the rent[57].

30 Mrs Byrnes' inaction, if it can be called that, is to be understood by reference to the matrimonial relationship and the fact that a member of Mr Kendle's family was at the centre of his ongoing failure to insist on the rental payment. There was no acquiescence in the relevant sense, there was no evidence of reliance by Mr Kendle upon Mrs Byrnes' inaction. In any event, given the circumstances, it could not be said that it was not fair and equitable for Mrs Byrnes to be permitted to complain of a breach of trust by Mr Kendle.

Conclusion

31 The appeal should be allowed. I agree with the reasons of Gummow and Hayne JJ in relation to the allowable set offs which Mr Kendle can claim and with the orders that their Honours propose.

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57 *Schalit v Joseph Nadler Ltd* [1933] 2 KB 79 at 83-84.

32 GUMMOW AND HAYNE JJ. The second appellant (Mrs Byrnes) and the respondent (Mr Kendle) married in 1980. She was then aged 60 and he about 57. Each had adult children by previous marriages. The first appellant (Mr Martin Byrnes) is the son of Mrs Byrnes and Mr Kym Kendle is the son of Mr Kendle. Mr Martin Byrnes is a solicitor and his mother took advice from him.

33 Mrs Byrnes and Mr Kendle separated early in 2007 after some 26 years of marriage. They have not divorced and there has been no settlement of property under the *Family Law Act* 1975 (Cth).

34 In 1984 Mr Kendle purchased a home unit at Brighton in South Australia being the property comprised and described in Certificate of Title Register Book Vol 4063 Folio 848, with finance provided under the scheme established by the *Defence Service Homes Act* 1918 (Cth)[58]. Mr Kendle became the sole registered proprietor. In 1989, at the instigation of Mr Martin Byrnes, Mrs Byrnes and Mr Kendle executed an instrument with respect to the Brighton property ("the 1989 Deed"). The operative provisions were as follows:

> "1. Subject to clause 2, [Mr Kendle] stands possessed of and holds one undivided half interest in the Property as tenant in common upon trust for [Mrs Byrnes] absolutely ('the [Byrnes] Interest').
>
> 2. If [Mrs Byrnes] shall predecease [Mr Kendle], then during his lifetime and while he continues to own the remaining undivided half share in the Property as tenant in common ('the [Kendle] Interest') [Mr Kendle] shall be entitled to the use and enjoyment of the [Byrnes] Interest. This clause shall entitle [Mr Kendle] to a life interest in the [Byrnes] Interest subject to early termination upon disposal of the [Kendle] Interest.
>
> 3. If [Mr Kendle] shall predecease [Mrs Byrnes], then during her lifetime and while she continues to own the [Byrnes] Interest [Mrs Byrnes] shall be entitled to the use and enjoyment of the [Kendle] Interest. This clause shall entitle [Mrs Byrnes] to a life interest in the [Kendle] Interest subject to early termination upon disposal of the [Byrnes] Interest."

This instrument was so framed and executed as to be a deed pursuant to s 41 of the *Law of Property Act* 1936 (SA) ("the Law of Property Act"). Section 41(2) required attestation by at least one witness who was not a party, sub-s (3) provided that delivery was not necessary, and sub-s (5)(b) provided that an

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58 See *Nelson v Nelson* (1995) 184 CLR 538 at 568-570; [1995] HCA 25.

instrument so signed by an individual and attested was a deed if, as was the case here, the instrument was expressed to be sealed.

35 The Brighton property was sold and the proceeds applied in the purchase in 1994 of a house in Rachel Street, Murray Bridge in South Australia. The purchase price was $47,500. Again, Mr Kendle became the sole registered proprietor. The Defence Service Homes mortgage scheme was "transferred" to Rachel Street and Westpac Banking Corporation ("Westpac") appeared on the title as mortgagee.

36 In 1997, again at the instigation of Mr Martin Byrnes, Mrs Byrnes and Mr Kendle executed a deed ("the 1997 Deed"). They were identified therein as residing at Rachel Street and the recitals were as follows:

> "A. By [the 1989 Deed], the parties acknowledged that each of them was entitled to a half interest as tenant in common of the property known as Unit 19, Strata Plan 2527, 120 The Esplanade, Brighton, South Australia ('the Original Property'), and that [Mr Kendle], who was the registered proprietor of the Original Property, stood possessed of an undivided half interest in the Original Property upon trust for [Mrs Byrnes] absolutely.
>
> B. The Original Property was sold in 1994 and the proceeds applied to the purchase or further development of the property situated at 10 Rachel Street, Murray Bridge, South Australia ('the New Property'), of which [Mr Kendle] is now the sole registered proprietor.
>
> C. In addition to the proceeds from the Original Property, the Parties have both contributed other monies to the purchase or further refurbishment of the New Property.
>
> D. The Parties by this deed acknowledge that their respective entitlements to interests in the Original Property are transposed into interests in the New Property."

Clause 1 stated that Mr Kendle "stands possessed of and holds one undivided half interest in the New Property as tenant in common upon trust for [Mrs Byrnes] absolutely". Clauses 2 and 3 of the 1997 Deed adopted clauses 2 and 3 of the 1989 Deed.

37 However, in about December 2001, Mrs Byrnes and Mr Kendle moved out of Rachel Street and into a property in Graetz Street, Murray Bridge which had been purchased by Mr Martin Byrnes.

38 Thereafter, the Rachel Street property, the subject of the 1997 Deed, was let by Mr Kendle to his son Kym. He lived there until early 2007, and paid rent only for the first two weeks, whereas it is now accepted that in total he should have paid $36,150. Mr Kendle's daughter Cathy persuaded her father in January 2007 to remove Kym from Rachel Street. Since about March 2007 Mrs Byrnes and Mr Kendle have lived apart. Mr Kendle moved in with his daughter. His grandson Mr Reece Smith moved into Rachel Street in July 2007 and paid $100 per week. This was applied by Mr Kendle's daughter to off-set her expenses in caring for her father.

39 On or about 23 March 2007 Mrs Byrnes assigned by deed to Mr Martin Byrnes her interest in Rachel Street, including her rights in connection with the 1997 Deed, in consideration of $40,000. Upon removal of a caveat, the sale of Rachel Street was completed on 12 September 2008. By consent, the District Court of South Australia ordered that the net proceeds of $124,681.99 be held in the trust account of Mr Kendle's solicitor, pending the outcome of the litigation instituted by Mrs Byrnes and her son in that Court. The net proceeds were computed after deduction from the sale price of $145,000 of various costs and disbursements, including $13,107.53 to pay out the Westpac mortgage.

The litigation

40 The relief sought against Mr Kendle in the District Court litigation was variously described in the pleadings. It included an order for payment to the plaintiffs of one half of the net proceeds, an order that Mr Kendle provide a full accounting in connection with Rachel Street and an order that moneys found to be due as a result of the account be deducted from his share of the net proceeds.

41 There were many issues in the litigation, but as it has reached this Court on appeal from the Full Court of the Supreme Court of South Australia (Doyle CJ, Nyland and Vanstone JJ)[59] the live issues centre upon the liability of Mr Kendle as trustee in respect of the failure to recover from his son rent in respect of Rachel Street.

42 The references to accounting by Mr Kendle as trustee indicate the several senses in which the term "duty to account" may be used, namely, (i) a duty to keep records, (ii) a duty to report to the beneficiaries or to the court concerning the administration of the trust, and (iii) a duty to pay amounts the trustee is obliged to pay to the beneficiaries[60].

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59 *Byrnes v Kendle* (2009) 267 LSJS 43.

60 *Scott and Ascher on Trusts*, 5th ed (2007), vol 3, §17.4, fn 1.

43 With respect to (i) and (ii), and as a matter of first principle, a trustee should gain no advantage by failure to keep proper records and the court will resolve doubts against a trustee who fails to do so[61]. The nature of the principal complaint against Mr Kendle, of failure to obtain any rent in respect of Rachel Street over a long period, is such as to posit the taking of accounts on the basis of wilful neglect and default, in the sense described in *Meehan v Glazier Holdings Pty Ltd*[62].

44 For his part, Mr Kendle claims to "set-off", in any taking of accounts for the period from January 2002 to the completion of the sale of Rachel Street on 12 September 2008, the amounts he paid for rates, and mortgage and other payments in respect of that property. (The claim from 1994 and the period while Rachel Street was the matrimonial home appears no longer to be pressed by Mr Kendle.) This aspect of the dispute was not considered by the trial judge and he made a declaration that Mr Kendle held one half of the net proceeds of sale in trust for Mr Martin Byrnes. In the Full Court, Doyle CJ (with whom Nyland and Vanstone JJ agreed) did not enter upon the question of "set-off", the matter not having been raised by Mr Kendle either in his Notice of Cross-Appeal to the Full Court or in his Notice of Contention. In this Court, by his Notice of Contention Mr Kendle seeks to agitate the question and it will be necessary to return to it when considering the question of remedies.

45 On the appeal to this Court there are five principal issues: (i) was there a trust created by the 1997 Deed; (ii) if so, what were the duties of Mr Kendle with respect to the renting out of the Rachel Street property after he and his wife moved out in December 2001; (iii) was there a breach of those duties; (iv) if so, did Mrs Byrnes (and thus her son, who takes as her assignee) consent to or acquiesce in the breach; (v) if she did not, what is the appropriate form of relief to the appellants for the breach of trust by the respondent?

Was there a trust?

46 The first issue should be decided in favour of Mrs Byrnes. The 1997 Deed was effective in its terms to vest in Mrs Byrnes as beneficiary a one undivided half interest as tenant in common in Rachel Street.

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61 *Kemp v Burn* (1863) 4 Giff 348 at 349-350 [66 ER 740 at 740-741]; *Scott and Ascher on Trusts*, 5th ed (2007), vol 3, §17.4. cf *Trustee Act* 1936 (SA), s 84B.

62 (2002) 54 NSWLR 146 at 149-150 [14]-[15], 163 [65]-[66].

47 Rachel Street is land under the provisions of the Torrens system provided by the *Real Property Act* 1886 (SA) and s 162 thereof requires that no particulars of a trust shall be entered upon the Register Book. However, as Higgins J indicated in the early years of the Court[63], and Griffith CJ explained in *Barry v Heider*[64], and as has been long accepted, the title by registration under the Torrens system, such as that of Mr Kendle, is subjected to the enforcement by a court of equity of a trust, such as that created by the 1997 Deed.

48 Section 29(1)(b) of the Law of Property Act required that a declaration of trust respecting "any land or any interest therein", such as that in Rachel Street, "be manifested and proved by some writing signed by some person who is able to declare such trust". The words quoted have a legislative history beginning with s 7 of the *Statute of Frauds* 1677[65]. As explained in *Kauter v Hilton*[66], s 7 did not require that a trust of land be created by writing, but that, however created, the trust "be manifested and proved by writing".

49 In *Bahr v Nicolay [No 2]*[67] Mason CJ and Dawson J approved of the expression of the "traditional attitude" by du Parcq LJ[68] that "unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the court ought not to be astute to discover indications of such an intention". In the present case there was no degree of informality, the trust being manifested and proved by deed using the technical term "upon trust". Accordingly, to adopt what was said in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq)*[69]:

> "This is not one of those cases where the language employed by the parties for the transaction is inexplicit so that the court is left to infer the relevant intention from other language used by them, from the nature of

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63 *Fink v Robertson* (1907) 4 CLR 864 at 891; [1907] HCA 7.

64 (1914) 19 CLR 197 at 206; [1914] HCA 79.

65 29 Car II c 3.

66 (1953) 90 CLR 86 at 98; [1953] HCA 95.

67 (1988) 164 CLR 604 at 618; [1988] HCA 16.

68 *In re Schebsman; Official Receiver v Cargo Superintendents (London) Ltd* [1944] Ch 83 at 104.

69 (2000) 202 CLR 588 at 605 [34]; [2000] HCA 25.

> the transaction and from the circumstances attending the relationship between the parties." (footnote omitted)

50 However, by his Notice of Contention in this Court, Mr Kendle relies upon the statement by the trial judge (Judge Boylan)[70]:

> "In my view, this case turns upon Mr Kendle's intention. In determining whether or not an express trust has been created the court may look at evidence outside the Trust Deed to determine the intention of the alleged settlor. The Acknowledgement of Trust signed in 1997 did not create an express trust of which Mrs Byrnes was a beneficiary. When Mr Kendle signed that document he intended only to acknowledge that, upon eventual sale of the property, half of the net proceeds would belong to his wife. That view is consistent with the way he viewed the arrangement and with the way in which he dealt with the property." (footnote omitted)

51 The Notice of Contention is necessary because Doyle CJ, who gave the leading judgment in the Full Court, disagreed with the trial judge, and indicated that an inquiry into the subjective state of mind and understanding of Mr Kendle could not displace the effect of the 1997 Deed[71].

52 Counsel for the appellants emphasised the exiguous and equivocal oral evidence given by Mr Kendle as to his intention upon which the trial judge relied. In addition, and more fundamentally, evidence of this nature was inadmissible. In that regard, it is important to observe that the trust asserted against Mr Kendle was not said to further or be associated with an illegal purpose[72]. Nor was the 1997 Deed said to be a "sham" in the sense explained in *Raftland Pty Ltd v Federal Commissioner of Taxation*[73], and there was no plea of non est factum as described in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*[74]. Nor was there any claim to rescission of the 1997 Deed upon any of the grounds upon which that remedy is available in equity. Finally, the maxim that "equity looks to

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70 *Byrnes v Kendle* [2009] SADC 36 at [33].

71 (2009) 267 LSJS 43 at 47 [30].

72 cf *Nelson v Nelson* (1995) 184 CLR 538.

73 (2008) 238 CLR 516 at 531-532 [35], 567 [173]-[174]; [2008] HCA 21.

74 (2004) 219 CLR 165 at 181-182 [46]-[47]; [2004] HCA 52. See also the discussion by White J in *Forrest v Cosmetic Co Pty Ltd* (2008) 218 FLR 109 at 116-117 [32].

the substance rather than the form" would be misapplied and misunderstood if used to warrant "the substitution of a different transaction for the one into which the parties [to the 1997 Deed] have entered"[75].

53 The fundamental rule of interpretation of the 1997 Deed is that the expressed intention of the parties is to be found in the answer to the question, "What is the meaning of what the parties have said?", not to the question, "What did the parties mean to say?" The point is made as follows, with reference to several decisions of Lord Wensleydale[76], in *Norton on Deeds*[77]:

> "The word 'intention' may be understood in two senses, as descriptive either (1) of that which the parties intended to do, or (2) of the meaning of the words that they have employed; here it is used in the latter sense."

Dixon J[78] and Starke J[79] spoke to similar effect when construing the terms of wills creating testamentary trusts.

54 Where an express inter vivos trust respecting land or any interest in land is manifested and proved by some informal writing, or an express inter vivos trust of personalty is said to have been created by informal writing or orally, then a dispute as to the presence of the necessary intention, despite inexplicit language, is resolved by evidence of what the Court in *Kauter v Hilton*[80] identified as "[a]ll the relevant circumstances".

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75 *K D Morris & Sons Pty Ltd (In liq) v Bank of Queensland Ltd* (1980) 146 CLR 165 at 199 per Aickin J; [1980] HCA 20.

76 *Grey v Pearson* (1857) 6 HLC 61 at 106 [10 ER 1216 at 1234]; *Abbott v Middleton* (1858) 7 HLC 68 at 114 [11 ER 28 at 46].

77 Norton, *A Treatise on Deeds*, 2nd ed (1928) at 50.

78 *Currie v Glen* (1936) 54 CLR 445 at 458; [1936] HCA 1.

79 *Brennan v Permanent Trustee Co of New South Wales Ltd* (1945) 73 CLR 404 at 412; [1945] HCA 17.

80 (1953) 90 CLR 86 at 100.

55 But the object of this evidentiary odyssey does not change, and the nature of the intention of the alleged settlor does not differ. The question, as Megarry J put it[81], "is whether in substance a sufficient intention to create a trust has been manifested". The point was made by Lord Millett in *Twinsectra Ltd v Yardley*[82]:

> "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."

56 There is good sense in such a rule. Issues of the construction to be placed upon the words or actions of alleged settlors are apt to arise long after the event. For example, the dispute in *Kauter v Hilton*[83] arose between the executors of the will of Mr Hickey (who had died in 1950) and his niece, and concerned the construction to be placed upon his words and acts respecting certain bank accounts in the last five years of his life. Further, trusts give rise to proprietary interests, dealings which may engage third parties who are strangers to the original actors.

57 In the first edition of his treatise, published in 1939, Professor Austin Wakeman Scott wrote under the heading "Requirement of manifestation of intention" in these terms[84]:

> "An express trust, unlike a constructive trust, is created only if the settlor properly manifests an intention to create a trust. It is not enough that he secretly intends to create a trust; there must be an outward expression of his intention. There are situations where the legal effect is dependent upon a person's actual intention; thus, for example, if he is charged with the crime of larceny, his actual intention is of importance. Ordinarily, however, the legal effect of a transaction does not depend upon the secret intention of a party to the transaction but upon the outward manifestation of intention. For practical reasons his undisclosed state of mind is regarded as immaterial. In the interest of accuracy, therefore, it is necessary in dealing with the creation of a trust and the terms of the trust

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81 *In re Kayford Ltd (In liq)* [1975] 1 WLR 279 at 282; [1975] 1 All ER 604 at 607.

82 [2002] 2 AC 164 at 185 [71]. See also *Mills v Sportsdirect.com Retail Ltd* [2010] 2 BCLC 143 at 158 [52]-[54].

83 (1953) 90 CLR 86.

84 Scott, *The Law of Trusts*, (1939), vol 1, §23.

> to speak not of the settlor's intention but of his manifestation of intention. Although the latter phrase may ring harshly in the ears of lawyers, one who wishes to write accurately can hardly avoid the use of it." (footnote omitted)

58 The substance of this passage is now expressed in the current edition of *Scott and Ascher on Trusts* as follows[85]:

> "In some situations, legal consequences do turn on actual intentions, as in the case of those charged with certain crimes. Ordinarily, however, the legal effect of a transaction does not depend on the parties' secret intentions, but on the outward manifestations of their intentions. For practical reasons, we disregard the parties' undisclosed states of mind. To be accurate, therefore, it is necessary, when dealing with the creation of a trust and its terms, to speak not of the settlor's intention but of the settlor's manifestation of intention."

59 Likewise, the "objective theory" of contract formation, which, as Mason ACJ, Murphy and Deane JJ put it in *Taylor v Johnson*[86], stands "in command of the field", is concerned not with "the real intentions of the parties, but with the outward manifestations of those intentions"[87]. While the origins and nature of contract and trust are quite different, there is, as Mason and Deane JJ observed in *Gosper v Sawyer*[88], no dichotomy between the two. For example, a common form of express trust is that created by covenant between settlor and trustee. Hence the significance of consistency between trust and contract with respect to matters of intention in contract formation and trust declaration.

60 In the 11th edition of *Lewin on Trusts*, published in 1904, it was said[89]:

> "It is obviously essential to the creation of a trust, that there should be the *intention* of creating a trust, and therefore if upon a consideration of all the circumstances the Court is of opinion that the settlor did not mean

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85 5th ed (2006), vol 1, §4.1.

86 (1983) 151 CLR 422 at 429; [1983] HCA 5.

87 (1983) 151 CLR 422 at 428.

88 (1985) 160 CLR 548 at 568-569; [1985] HCA 19. See also *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq)* (2000) 202 CLR 588 at 603 [26]-[28] per Gaudron, McHugh, Gummow and Hayne JJ.

89 Lewin, *A Practical Treatise on the Law of Trusts*, 11th ed (1904) at 85.

> to create a trust, the Court will not impute a trust where none in fact was contemplated." (emphasis in original; footnote omitted)

The difficulty with this passage lies in the cryptic phrase "the settlor did not mean …". The authorities cited for that passage, *Gaskell v Gaskell*[90], *Hughes v Stubbs*[91], *Smith v Warde*[92], and *In re Pitt Rivers*[93], all shared a particular characteristic. This was that the alleged trust was created informally by a deceased settlor, and upon consideration of his correspondence and other relevant circumstances the court held that no trust had been created.

61 In *Commissioner of Stamp Duties (Q) v Jolliffe*[94], the primary judge (Lukin J) had admitted evidence given by Mr Jolliffe that he had opened a savings bank account as trustee for his wife (now deceased) not to make a gift to her but for the sole purpose of procuring interest not payable by the bank if the account stood in his name alone. The issue identified on the grant of special leave to appeal had been whether the effect of the *Queensland Government Savings Bank Act* 1916 (Q) ("the 1916 Act") and the written evidence precluded Mr Jolliffe from averring that he was not trustee of the money in the account at the death of his wife.

62 In *Jolliffe* the passage from *Lewin on Trusts* which has been set out above was relied upon by the majority (Knox CJ and Gavan Duffy J)[95], in the absence of citation of any other authority, as denying the proposition that "by using any form of words a trust can be created contrary to the real intention of the person alleged to have created it". This statement was applied by Napier J in *Starr v Starr*[96], and in further decisions concerning bank accounts which were collected by Williams J in *Teasdale v Webb*[97] and by Bray CJ in *In re Lamshed*[98]. In

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90 (1828) 2 Y & J 502 [148 ER 1017].

91 (1842) 1 Hare 476 [66 ER 1119].

92 (1845) 15 Sim 56 [60 ER 537].

93 [1902] 1 Ch 403.

94 (1920) 28 CLR 178; [1920] HCA 45.

95 (1920) 28 CLR 178 at 181.

96 [1935] SASR 263 at 267.

97 (1940) 57 WN (NSW) 151 at 153.

98 [1970] SASR 224 at 239.

Hyhonie Holdings Pty Ltd v Leroy[99], Young CJ in Eq referred to the 17th edition of *Lewin on Trusts*[100], where it was said that today the dissenting reasons of Isaacs J in *Jolliffe* would be preferred in England to those of the majority.

63 There were some indications in 19th century cases that the effect of legislation might be to deny, for evasion of a statutory regime, what otherwise might have been an effective declaration of trust[101]. The issue presented in *Jolliffe* was rather different. The terms of the 1916 Act at stake provided that, save as trustee for another, no person was to have more than one account with the bank, and also imposed a limit on the amount on which interest might be paid. Was the effect of the 1916 Act to impose a "statutory trust" upon an account holder depositing money ostensibly as trustee for another person, and to preclude any averment by the account holder that there was no trust[102]? This appears to have been the submission by the appellant[103], and was rejected by Knox CJ and Gavan Duffy J[104].

64 What the Court did not have before it in *Jolliffe* was a submission which was distinct from reliance upon any "statutory trust" or upon any express or implied statutory prohibitions upon denial of a trust. In particular, there was no application of the reasoning seen in *Nelson v Nelson*[105] and most recently applied in *Miller v Miller*[106]. Anticipating those decisions, the inquiry in *Jolliffe* would have been whether the legislative purpose of the 1916 Act would not be fulfilled unless there were disregarded any further circumstances which tended to deny the terms on which the trust account was opened and conducted. The answer "yes" would mean that even if evidence of the "real intention" of Mr Jolliffe had

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99 [2003] NSWSC 624 at [38]. An appeal was dismissed by the Court of Appeal: [2004] NSWCA 72.

100 *Lewin on Trusts*, 17th ed (2000) at 81 [4-23], fn 6.

101 *Field v Lonsdale* (1850) 13 Beav 78 at 81 [51 ER 30 at 31]. See also *Gaskell v Gaskell* (1828) 2 Y & J 502 at 509 [148 ER 1017 at 1020], where it was said to be "evident that these transfers were made with an intent to evade the legacy duty".

102 cf *Williams v McIntosh* (1909) 9 SR (NSW) 391.

103 *Commissioner of Stamp Duties (Q) v Jolliffe* (1920) 28 CLR 178 at 180.

104 *Commissioner of Stamp Duties (Q) v Jolliffe* (1920) 28 CLR 178 at 181-182.

105 (1995) 184 CLR 538.

106 (2011) 85 ALJR 480; 275 ALR 611; [2011] HCA 9.

been admissible, that intention would have had to yield to the policy of the statute, and the appeal by the Commissioner should have been allowed.

65 There are indications in the dissenting reasons of Isaacs J in *Jolliffe*[107] that his Honour foresaw such an argument, but it is unnecessary here to pursue the matter. What is important for the present case is that *Jolliffe* should not be regarded as retaining any authority it otherwise may have had for the proposition that where the creation of an express trust is in issue, regard may be had to all the relevant circumstances not merely to show the intention manifested by the words and actions comprising those circumstances, but to show what the relevant actor meant to convey as a matter of "real intention".

66 It follows that Doyle CJ correctly disagreed with the primary judge on the first issue. The second and third issues may be taken together.

What were the duties of Mr Kendle to rent out Rachel Street? Did he breach those duties?

67 As a general proposition, where the trust estate includes land, it is the duty of the trustee to render the land productive by leasing it, and this is so even if the trust instrument does not expressly so provide[108]. The benefit of the obligation of the tenant to pay the rent reserved, the performance of which is the means by which the trust property is rendered productive, will be held by the trustee for the trust.

68 In the present case, the 1997 Deed identified the parties, Mr Kendle and Mrs Byrnes, as residing at Rachel Street, and made no express provision for the renting out of the property if, as occurred in 2001, they moved elsewhere. However, upon ordinary principles, Mr Kendle then was obliged to render Rachel Street productive by leasing it during the remainder of their joint lives. Thereafter, clauses 2 and 3, respectively, of the 1997 Deed (which adopted those clauses in the 1989 Deed) made special provision for the survivor to enjoy a life interest in the tenancy in common of the deceased, terminable upon the disposal of the survivor's interest. It is unnecessary here further to consider the operation of clauses 2 and 3.

69 The trial judge found that the parties agreed not to use a real estate agent to find a tenant for Rachel Street, and that they had agreed that Mr Kendle would

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107 (1920) 28 CLR 178 at 191-192.

108 *Scott and Ascher on Trusts*, 5th ed (2007), vol 3, §18.1.3.

find a tenant and collect the rent; with Mrs Byrnes's knowledge Mr Kendle then rented the property to his son Kym.

70 In the Full Court, Doyle CJ disposed of the trust case presented by Mrs Byrnes and her son on the footing that (a) if the parties had simply been co-owners, there would have been no fiduciary relationship between them and no obligations on either of them to ensure that the property was tenanted, and (b) this putative state of affairs was a guide to the answer to the question of duties owed by Mr Kendle as a trustee, the trust having been a "device" used by the parties[109]. No other reason was given for the conclusion of the Chief Justice that there had been "no affirmative duty on Mr Kendle to let out the property" when the move was made to Graetz Street[110].

71 In the 1997 Deed, as previously in the 1989 Deed, the co-owners chose in a formal fashion to create a particular trust relationship. This operated upon what would have otherwise been the legal incidents of their co-ownership. It is to reverse the relationship between law and equity, and is without logic, to base considerations as to the obligations assumed by Mr Kendle as trustee from the position which would have obtained at common law had there been no trust.

72 Doyle CJ did go on[111] to posit the letting of Rachel Street to a tenant "on an ordinary commercial basis" and asked whether Mr Kendle would have been liable to make up unpaid rent. The answer must be that he would be obliged to take steps to protect and preserve the trust property, including, if necessary, to protect against the defaulting tenant.

73 The question then becomes whether there was a breach of duty by Mr Kendle in failing to take steps to recover rent due but unpaid by the tenant of Rachel Street. This must be answered in the affirmative.

Was there consent or acquiescence in the breach?

74 Paragraph 19 of the defence pleaded in the District Court relied without distinction on consent, acquiescence, waiver and estoppel. The ambiguities in the term "waiver" in various areas of legal discourse were considered by Gummow, Hayne and Kiefel JJ, with the agreement of Heydon J, in *Agricultural*

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109 (2009) 267 LSJS 43 at 48 [36]-[37].

110 (2009) 267 LSJS 43 at 48 [38].

111 (2009) 267 LSJS 43 at 49 [43].

and Rural Finance Pty Ltd v Gardiner[112]. In the present case "waiver" is best understood as a genus comprising consent, estoppel and acquiescence.

75 The primary judge held that Mrs Byrnes had "co-operated" in the breach of trust, stating[113]:

> "*She was well aware of her need to protect what she saw as her proprietary rights*. Kym lived in the house for a little over six years. For all of that time, or nearly all of it, she was fully aware that he was not paying rent. Further, during those [six] years, she was present at numerous discussions with her son and her husband *at which Martin Byrnes spelled out his view that Mr Kendle owed a duty to Mrs Byrnes to collect rent from Kym*. She was well aware of the rights her son claimed for her but, for the sake of matrimonial harmony, *she took no action*. I find that, *although unwillingly*, she consented to her husband's decision not to press for rent. Equity should not hear her complaints now, only after the marriage has broken down." (emphasis added)

In the Full Court, Doyle CJ stated his agreement with these findings[114], although he preferred the terms "acquiescence" and "consent" to "co-operation".

76 In this Court, counsel for the appellants made several criticisms of the above passage in the reasons of the primary judge. While she may have been able to seek an accounting by the trustee, Mrs Byrnes, as beneficiary, had no standing to sue to recover the rent[115]. If she was, through her son, protesting the situation, how was she consenting or acquiescing in it?

77 The term "consent", when used with respect to breach of trust, expresses the principle that "[t]here is no reason for a court of Equity to enforce an equitable obligation in favour of a party who consented to its breach against a party who acted with knowledge of that consent". The words are those of Handley JA in *Spellson v George*[116]. His Honour added that while consent may take various forms, and while consent may operate as an estoppel, it means

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112 (2008) 238 CLR 570 at 586-588 [49]-[55], 625 [162]; [2008] HCA 57.

113 [2009] SADC 36 at [42].

114 (2009) 267 LSJS 43 at 50 [49]-[50].

115 *Schalit v Joseph Nadler Ltd* [1933] 2 KB 79 at 83-84.

116 (1992) 26 NSWLR 666 at 669.

"something more than a state of mind", and that "[t]he trustee must know of the consent prior to the breach"[117].

78 The findings by the primary judge in the above passage fell short of providing sufficient basis for defences of consent and estoppel.

79 There remains the defence of acquiescence by Mrs Byrnes in the breach of trust. This, as explained by Deane J in *Orr v Ford*[118], is best understood as requiring calculated (that is, deliberate and informed) inaction by her or standing by, which encouraged Mr Kendle reasonably to believe that his omissions were accepted or not opposed by her. Counsel for the appellants correctly emphasised the absence of evidence by Mr Kendle that there was no need for him to take steps to recover arrears of rent or to evict Kym because Mrs Byrnes accepted the actions and did not oppose their continuation.

80 There was no pleading of a defence of laches. In any event, where presented in answer to a claim of breach of an express trust such as that manifested in the 1997 Deed, the defence would require aggravating circumstances such that the granting of the relief sought by the beneficiary would "give rise to serious and unfair prejudice to the defendant or a third party"[119]. No such case was presented by the defendant in this litigation.

Remedies

81 To what remedies are the appellants entitled in this Court?

82 Counsel submitted to the Full Court a joint memorandum which contains a detailed summary of payments by Mr Kendle on account of council rates, insurance premiums, mortgage payments to Westpac and payments to SA Water.

83 Mr Kendle had several relevant capacities. As the mortgagor and registered proprietor he was liable to Westpac and the other relevant third parties to meet these outgoings. Before the determination of any accrual in favour of the interests of himself and Mrs Byrnes, and the fixing of sums payable from the net proceeds in the trust account of his solicitors, as trustee Mr Kendle is entitled to deduct (or, on a loose use of the term, to "set-off") the amount of these outgoings.

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117 (1992) 26 NSWLR 666 at 669-670.

118 (1989) 167 CLR 316 at 337-338, 340; [1989] HCA 4.

119 *Orr v Ford* (1989) 167 CLR 316 at 341 per Deane J.

The balance then is to be accounted for equally between the two sides to the litigation.

84 For the period January 2002 to January 2007, $36,150 should have been received as rent, but Mr Kendle as trustee should be allowed the outgoings in total of $17,707.69.

85 With respect to the occupancy of Mr Kendle's grandson between July 2007 and September 2008 the respondent accepts attribution of a rent of $140 per week for 60 weeks, giving a total of $8,400. Kym left Rachel Street early in 2007 and there was an interval before the grandson moved in. In all the circumstances there should be no accounting on the basis of a failure to let Rachel Street in that period. The outgoings for the period of the grandson's occupation total $4,454.91.

86 If the appropriate additions of these amounts be made, from the total rental sum of $44,550 there should be allowed $22,162.60. This leaves $22,387.40 as the rent for which an allowance of one half ($11,193.70) should be made in favour of the appellants. This should be added to the half share ($62,341.00) otherwise payable to the appellants from the net proceeds of sale of Rachel Street, a total of $73,534.70. By reason of the assignment between the appellants, payment should be made to and a sufficient discharge received from Mr Martin Byrnes alone.

87 The appellants should have the costs in the District Court and of the appeal and cross-appeal to the Full Court. No costs order appears to have been made by the Full Court on the re-opening application by the appellants which was dismissed on 25 March 2010 and this situation should not be disturbed.

88 The respondent refers to provisions in the District Court statute and Rules which are said to have the effect that no costs order in the present case should be made in favour of the appellants unless it is just to do so in the circumstances. However, the salient feature of the litigation has been the refusal of the respondent to acknowledge his position as trustee under the 1997 Deed. There should be costs orders against the respondent with respect to the whole of the litigation.

Orders

89 The following orders should be made:

(1) Appeal allowed with costs.

(2) Orders 1 and 3 of the orders of the Full Court sealed 20 January 2010 be set aside and in place thereof it be ordered that:

(a) the appeal to the Full Court be allowed with costs; and

(b) the orders of the District Court made on 31 March 2009 and order 1 of the orders made on 22 June 2009 be set aside and in place thereof:

(i) declare that the solicitors for the respondent, Clifford Frank Kendle, be at liberty to account for the moneys held by them in trust pursuant to order 4 of the orders of the District Court made on 11 September 2008 by paying thereout to the first appellant, Martin Francis Byrnes, or as he may direct in writing, the sum of $73,534.70 and by paying the balance to Mr Kendle, or as he may direct in writing;

(ii) order that:

(A) Mr Kendle pay the costs of the appellants on a party and party basis of the trial and all applications filed in the District Court action; and

(B) the action otherwise be dismissed.

90 HEYDON AND CRENNAN JJ. The questions which this lamentable and ill-starred litigation throws up are as follows.

Was there a trust?

91 *Background.* Did the "Acknowledgment of Trust" executed in 1997 create a trust? The trial judge held that it did not, because in his opinion evidence extrinsic to that Acknowledgment of Trust revealed that the alleged settlor did not intend to create a trust. For the legitimacy of taking that evidence into account he cited *B & M Property Enterprises Pty Ltd (in liq) v Pettingill*[120]. That case relied on *Starr v Starr*[121], which in turn treated *Commissioner of Stamp Duties (Qd) v Jolliffe*[122] as authority for the proposition that evidence was admissible to show that a written instrument alleged to constitute a trust was not intended so to operate.

92 The Full Court of the Supreme Court of South Australia disagreed. It declined to read *Jolliffe's* case as requiring an examination of the alleged settlor's subjective intentions not recorded in the Acknowledgment of Trust.

93 In this Court the respondent submitted that it was necessary for the appellants to establish a subjective intention by the respondent to create a trust, that the trial judge was best placed to assess the respondent's subjective intention in the light of his testimony, and that the Full Court should not have overturned the trial judge's finding of fact.

94 This submission is incorrect. The trial judge's estimate of the respondent's evidence about subjective intention, and the evidence itself, was irrelevant. The submission rests on a fundamental but very common misconception.

95 *Constitutional construction.* It is material, in exposing that misconception, to consider some words of Charles Fried. He is a former Solicitor-General of the United States. He is a distinguished scholar. He is the conservative at the Harvard Law School. He expressed scorn for the notion that "in interpreting poetry or the Constitution we should seek to discern authorial intent as a mental fact of some sort." He said: "we would not consider an account of Shakespeare's mental state at the time he wrote a sonnet to be a more complete or better account of the sonnet than the sonnet itself." He disagreed

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120 [2001] SASC 75 at [124]-[126].

121 [1935] SASR 263 at 266-267.

122 (1920) 28 CLR 178 at 181; [1920] HCA 45.

"with the notion that when we consider the Constitution we are really interested in the mental state of each of the persons who drew it up and ratified it." On that false notion, he said, the "texts of a sonnet or of the Constitution would be a kind of second-best; we would prefer to take the top off the heads of authors and framers – like soft-boiled eggs – to look inside for the truest account of their brain states at the moment that the texts were created." He continued[123]:

> "The argument placing paramount importance upon an author's mental state ignores the fact that authors writing a sonnet or a constitution seek to take their intention and embody it in specific words. I insist that words and text are chosen to embody intentions and thus replace inquiries into subjective mental states. In short, the text *is* the intention of the authors or of the framers."

96 That approach to constitutional construction is consonant with s 109 of our Constitution. It provides in part: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail …". There is an inveterate linguistic usage in many of the cases on s 109 purporting to direct attention to what the *intention* of the Federal Parliament was in enacting a federal law said to be inconsistent with a law of a State. But the cases mean only the intention as revealed in the words of the law. That is because s 109 does not provide: "When what a law of a State was intended to say is inconsistent with what a law of the Commonwealth was intended to say, the latter shall prevail …".

97 *Statutory construction.* These approaches to constitutional construction are matched by approaches to statutory construction. That is not surprising, given that the Constitution is contained in an Imperial statute. Soon after the Constitution came into force, O'Connor J correctly propounded a theory of statutory construction which stressed the irrelevance of the subjective intention of legislators. The construction of the statute depended on its intention, but only in the sense of the intention to be gathered from the statutory words in the light of surrounding circumstances[124]. Even if it were possible to establish the actual mental states of those drafting and voting for a Bill, the inquiry would be

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123 "Sonnet LXV and the 'Black Ink' of the Framers' Intention", (1987) 100 *Harvard Law Review* 751 at 758-759 (emphasis in original, footnotes omitted). Fried attributes the reasoning to passages in Dworkin, *Law's Empire*, (1986) at 54-57 and 359-365.

124 *Tasmania v The Commonwealth and Victoria* (1904) 1 CLR 329 at 358-359; [1904] HCA 11. For modern discussions, see *Wilson v Anderson* (2002) 213 CLR 401 at 417-419 [7]-[9]; [2002] HCA 29; *Singh v The Commonwealth* (2004) 222 CLR 322 at 335-336 [19]; [2004] HCA 43.

irrelevant. The correct approach is also seen in an extra-curial pronouncement by Mr Justice Holmes, only five years before O'Connor J: "we do not deal differently with a statute from our way of dealing with a contract. We do not inquire what the legislature meant; we ask only what the statute means."[125] In the words of the Seventh Circuit of the United States Court of Appeals: "Congress did not enact its members' *beliefs*; it enacted a text."[126] Similarly, Lord Hoffmann described statutory construction as "the ascertainment of what … Parliament would reasonably be understood to have meant by using the actual language of the statute."[127] However, in recent times in England[128] and in New Zealand[129], through similar common law developments, and in Australia by statute[130], extrinsic materials have been routinely examined to ascertain what the legislature meant. It is but one of several objections to that usually unprofitable course that it does not comply with Fried's approach.

98 *Contractual construction.* The approach taken to statutory construction is matched by that which is taken to contractual construction. Contractual construction depends on finding the meaning of the language of the contract – the intention which the parties expressed, not the subjective intentions which they may have had, but did not express[131]. A contract means what a reasonable person having all the background knowledge of the "surrounding circumstances" available to the parties would have understood them to be using the language in

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125 Holmes, "The Theory of Legal Interpretation", (1899) 12 *Harvard Law Review* 417 at 419.

126 *Jones v Harris Associates LP* 527 F 3d 627 at 633 (7th Cir 2008) (emphasis in original).

127 *R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718 at 1723 [17]; [2006] 1 All ER 529 at 535. See also *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956 at 2958-2959 [5]; [2002] 4 All ER 654 at 656-657.

128 *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 at 630-640.

129 See Burrows, *Statute Law in New Zealand*, 3rd ed (2003) at 181-184.

130 *Acts Interpretation Act* 1901 (Cth), s 15AB, and equivalents in some other jurisdictions.

131 *Deutsche Genossenschaftsbank v Burnhope* [1995] 1 WLR 1580 at 1587; [1995] 4 All ER 717 at 724. See also *Rabin v Gerson Berger Association Ltd* [1986] 1 WLR 526 at 533; [1986] 1 All ER 374 at 379-380.

the contract to mean[132]. But evidence of pre-contractual negotiations between the parties is inadmissible for the purpose of drawing inferences about what the contract meant unless it demonstrates knowledge of "surrounding circumstances"[133]. And in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* this Court said[134]*:*

> "It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe."

99 One reason why the examination of surrounding circumstances in order to decide what the words mean[135] does not permit examination of pre-contractual

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132 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 at 1112 [14]. A fact known to one party but not reasonably available to the other cannot be taken into account: *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 at 272 [49]. Gleeson CJ, Gummow and Hayne JJ agreed with this in *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at 188 [11]; [2001] HCA 70. See also *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40]; [2004] HCA 52. There is or may be considerable controversy in relation to whether the test turns on what background knowledge was reasonably available to the parties or on what knowledge they actually had; if the former, to whether the knowledge is what each party might reasonably have expected the other to know; and to whether the knowledge of third parties into whose hands the contract may fall is relevant. Similar problems can arise with trusts. The issues in the present case do not call for their resolution.

133 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 at 1117-1121 [33]-[42].

134 (2004) 219 CLR 165 at 179 [40] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ. Thus the question is: "what would the first party have led a reasonable party in the position of the other party to believe the first party intended, whatever the first party actually intended?" See Hoffmann, "The Intolerable Wrestle With Words and Meanings", (1997) 114 *South African Law Journal* 656 at 661; *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 at 272-273 [51]. See also *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441 at 502; *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 at 736; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 462 [22]; [2004] HCA 35.

135 That course is permissible, but how far is controversial. This Court said in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 at 62-63 [39]; [2002] HCA 5 that until this Court had decided on whether there were differences between *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; [1998] 1 All ER 98 and *Codelfa Construction*

(Footnote continues on next page)

negotiations is that the latter material is often appealed to purely to show what the words were *intended* to mean, which is impermissible. The rejected argument in *Chartbrook v Persimmon Homes Ltd* was that all pre-contractual negotiations should be examined, not just those pointing to surrounding circumstances in the mutual contemplation of the parties. The argument purported to accept that contractual construction was an objective process, and that evidence of what one party intended should not be admissible. But other parts of the argument undercut that approach. Mr Christopher Nugee QC submitted: "The question is not what the words meant but what *these parties meant*. … Letting in the negotiations gives the court the best chance of ascertaining what *the parties meant*."[136] It would have been revolutionary to have accepted that argument.

100 These conclusions flow from the objective theory of contractual obligation. Contractual obligation does not depend on actual mental agreement. Mr Justice Holmes said[137]:

> "[P]arties may be bound by a contract to things which neither of them intended, and when one does not know of the other's assent. …
>
> [T]he making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs, – not on the parties' having *meant* the same thing but on their having *said* the same thing."

101 In consequence the actual state of mind of either party is only relevant in limited circumstances, for example, where one party relies on the common law defences of non est factum or duress; where misrepresentation is alleged; where one party is under a mistake and the other knows it[138]; where the contract is liable

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Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337; [1982] HCA 24, and if so which should be preferred, the latter case should be followed in Australia. The question has not been argued or decided in this Court. The opinions stated in *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* (2009) 261 ALR 382 at 384-385 [1]-[4] and 406-407 [112]-[113] and *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 at 616-618 [14]-[18], 621-622 [42], 626 [63] and 663-678 [239]-[305] must be read in this light.

136 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 at 1108 (emphasis added).

137 Holmes, "The Path of the Law", (1897) 10 *Harvard Law Review* 457 at 463-464 (emphasis in original).

138 *Taylor v Johnson* (1983) 151 CLR 422 at 432; [1983] HCA 5.

to be set aside by reason of equitable doctrines of undue influence, unconscionable dealing or other fraud in equity; where the equitable remedy of rectification is available; where a question of estoppel arises; or where there is a question whether the "contract" is a sham[139].

102 *The construction of trusts.* The rules for the construction of contracts apply also to trusts. Although the two institutions are distinct, that is not surprising.

103 For one thing, as Mason and Deane JJ said[140]: "The contractual relationship provides one of the most common bases for the *establishment* or implication and for the *definition* of a trust." By "establishment" their Honours referred to deciding whether a trust existed. By "definition" they referred to ascertaining its terms. The two inquiries are closely related: for the terms of a document or oral dealing determine whether it creates a trust.

104 For another thing, the same considerations which limit recourse to surrounding circumstances and oral testimony in relation to contracts applies in relation to trusts. In 1877 Lord Gifford said: "The very purpose of the written contract was to exclude disputes inevitably arising from the lubricity, vagueness, and want of recollection, or want of accurate recollection, of mere oral conversations occurring in the course of negotiations more or less protracted."[141] And three centuries earlier Popham CJ said[142]:

> "it would be inconvenient, that matters in writing made by advice and on consideration and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory."

The goal of excluding disputes of this kind from litigation is thwarted by recourse to the same material in order to discover the background, and that is so whether the disputes are about whether a particular contract was created or a particular trust.

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139 Conaglen, "Sham Trusts", (2008) 67 *Cambridge Law Journal* 176 at 178, 182 and 193.

140 *Gosper v Sawyer* (1985) 160 CLR 548 at 568-569; [1985] HCA 19 (emphasis added).

141 *Buttery & Co v Inglis* (1877) 5 R 58 at 70.

142 *Countess of Rutland's Case* (1604) 5 Co Rep 25b at 26a-26b [77 ER 89 at 90].

105 The authorities establish that in relation to trusts, as in relation to contracts, the search for "intention" is only a search for the intention as revealed in the words the parties used, amplified by facts known to both parties. Thus in 1881 Sir George Jessel MR said[143]:

> "The settlement is one which I cannot help thinking was never intended by the framer of it to have the effect I am going to attribute to it; but, of course, as I very often say, one must consider the meaning of the words used, not what one may guess to be the intention of the parties."

106 In 1934 Lord Wright said, speaking of a failed attempt to settle property on trust[144]:

> "the Court, while it seeks to give effect to the intention of the parties, must give effect to that intention as expressed, that is, it must ascertain the meaning of the words actually used. There is often an ambiguity in the use of the word 'intention' in cases of this character. The word is constantly used as meaning motive, purpose, desire, as a state of mind, and not as meaning intention as expressed. The words actually used must no doubt be construed with reference to the facts known to the parties and in contemplation of which the parties must be deemed to have used them: such facts may be proved by extrinsic evidence or appear in recitals: again the meaning of the words used must be ascertained by considering the whole context of the document and so as to harmonize as far as possible all the parts: particular words may appear to have been used in a special sense, which may be a technical or trade sense, or in a special meaning adopted by the parties themselves as shown by the whole document. Terms may be implied by custom and on similar grounds. But allowing for these and other rules of the same kind, the principle of the common law has been to adopt an objective standard of construction and to exclude general evidence of actual intention of the parties; the reason for this has been that otherwise all certainty would be taken from the words in which the parties have recorded their agreement or their dispositions of property."

107 In 1970, in *Gissing v Gissing* Lord Diplock made it plain that a trust between spouses could be inferred from the conduct of the parties. He said[145]:

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143 *Smith v Lucas* (1881) 18 Ch D 531 at 542.

144 *Inland Revenue Commissioners v Raphael* [1935] AC 96 at 142-143.

145 [1971] AC 886 at 906.

> "the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party. On the other hand, he is not bound by any inference which the other party draws as to his intention unless that inference is one which can reasonably be drawn from his words or conduct."

Among the conduct relevant to inferring the trust was "what spouses said and did which led up to the acquisition of a matrimonial home". He took into account, as relevant to the inquiry, financial aspects of the transaction by which the matrimonial home was purchased, and the financial contributions of the parties. These are instances of "background circumstances".

108 In 1986, in *Eslea Holdings Ltd v Butts*, another background circumstance, "commercial necessity", was held relevant to the inferring of a trust. It was a case where guarantees were held on trust, and the relevant "commercial necessity" turned on the scope of the business which the party guaranteed was engaging in[146]. In 1988 Mason CJ and Wilson J followed that approach when they said in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*[147]*:*

> "the courts will recognize the existence of a trust when it appears from the language of the parties, construed in its context, including the *matrix of circumstances*, that the parties so intended. We are speaking of express trusts, the existence of which depends on intention. In divining intention from the language which the parties have employed the courts may look to the *nature of the transaction* and the *circumstances, including commercial necessity*, in order to infer or impute intention: see *Eslea Holdings Ltd v Butts*."

The reference to "matrix of circumstances" is plainly a reference to well-known decisions of Lord Wilberforce on contractual interpretation[148]. Similarly,

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146 (1986) 6 NSWLR 175 at 189-190.

147 (1988) 165 CLR 107 at 121; [1988] HCA 44 (emphasis added).

148 *Prenn v Simmonds* [1971] 1 WLR 1381 at 1384; [1971] 3 All ER 237 at 239; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 997; [1976] 3 All ER 570 at 575.

Deane J said that where it was said that a contract had created a trust of a promise, the contractual terms had to be construed "in context"[149].

109 In 1990, Priestley JA said in *Walker v Corboy* that, in deciding whether an agent for the sale of farm produce was a trustee of the proceeds or whether he and the principal stood only in the relationship of debtor and creditor, it was necessary to evaluate the "circumstances" and "background"[150]. He cited a decision of Sir George Jessel MR in which, in deciding against the existence of a trust or equitable duties, he took into account the nature of one party's business which was necessarily known to the others[151]. And Meagher JA said that in deciding whether there was a trust, it was necessary to look not only at "the particular provisions of the agreement of the parties", but also "the whole of the circumstances attending the relationships between the parties."[152]

110 In 1991, Gummow J said that the relevant intention to create a trust "is to be inferred from the language employed by the parties in question and to that end the court may look also to the nature of the transaction and the relevant circumstances attending the relationship between them"[153].

111 In England these principles have been applied to the construction of trust deeds controlling pension funds – first in the language of Lord Wilberforce's "matrix of fact"[154], later without that reference. In that area one relevant aspect of the background is the fiscal background[155], and the practice and requirements

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149 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 148.

150 (1990) 19 NSWLR 382 at 385-386.

151 *Kirkham v Peel* (1880) 43 LT 171 at 172.

152 *Walker v Corboy* (1990) 19 NSWLR 382 at 397.

153 *Re Australian Elizabethan Theatre Trust; Lord v Commonwealth Bank of Australia* (1991) 30 FCR 491 at 503. See also *Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1991) 101 ALR 363 at 370. *Walker v Corboy* and *Re Australian Elizabethan Theatre Trust* were followed in *Di Pietro v Official Trustee in Bankruptcy* (1995) 59 FCR 470 at 484.

154 *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 at 1610; [1991] 2 All ER 513 at 537.

155 *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 at 1610-1611; [1991] 2 All ER 513 at 537; *National Grid Co plc v Mayes* [2001] 1 WLR 864 at 870 [18]-[20]; [2001] 2 All ER 417 at 423-424.

of the tax authorities at the relevant time[156]. Another relevant aspect is that the beneficiaries under a pension scheme are usually not volunteers, but have rights with contractual and commercial origins in their contracts of employment which they pay for by their service and contributions[157]. Another relevant aspect is common practice in the field of pension schemes generally, as evinced in the evidence of actuaries and textbooks by practitioners in the field[158].

112 In 2000 Gaudron, McHugh, Gummow and Hayne JJ said that even if "the language employed by the parties … is inexplicit", the court can infer an intention to create a trust "from other language used by them, from the nature of the transaction and from the circumstances attending the relationship between the parties."[159]

113 Neither in England nor in Australia has the application of the principles for establishing and defining a trust been analysed with the sophistication devoted in England to their application in contract. However, in both English and Australian law the surrounding circumstances are material to the questions whether the words used created a trust and what its terms are. Accordingly, Conaglen was correct to say[160]:

> "The court's focus when construing the terms of [a] bilateral arrangement [creating a trust] is on the objective meaning that those terms would convey to a reasonable person, just as it is when construing contractual arrangements."

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156 *Stevens v Bell* [2002] EWCA Civ 672, quoted in *Ansett Australia Ground Staff Superannuation Plan Pty Ltd v Ansett Australia Ltd* (2002) 174 FLR 1 at 56-57 [216].

157 *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 at 1610; [1991] 2 All ER 513 at 537; *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589 at 597; [1991] 2 All ER 597 at 605-606.

158 *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 at 1611; [1991] 2 All ER 513 at 537-538; *Stevens v Bell* [2002] EWCA Civ 672.

159 *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588 at 605 [34]; [2000] HCA 25 (footnote omitted). In *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35 at 77 [281] the principles of contractual construction discussed above were applied to an inquiry into whether a fiduciary relationship founded on a contract existed.

160 Conaglen, "Sham Trusts", (2008) 67 *Cambridge Law Journal* 176 at 181.

The question is what the settlor or settlors did, not what they intended to do.

114 That truth tends to be obscured by constant repetition of the need to search for an "intention to create a trust". That search can be seen as concerning the first of the three "certainties" – what Dixon CJ, Williams and Fullagar JJ called in *Kauter v Hilton*[161]*:*

> "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."

But the "intention" referred to is 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. This is as true of unilateral declarations of alleged trust as it is of bilateral covenants to create an alleged trust. It is as true of alleged trusts which are not wholly in writing as it is of alleged trusts which are wholly in writing. In relation to alleged trusts which are not wholly in writing, the need to draw inferences from circumstances in construing the terms of conversations may in practice widen the extent of the inquiry, but it does not alter its nature.

115 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[162] 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[163], an allegation of "sham"[164], a claim that some condition has not been satisfied[165], or a claim for rectification. But subjective intention is irrelevant both to the question of whether a trust exists and to the question of what its terms are.

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161 (1953) 90 CLR 86 at 97; [1953] HCA 95.

162 *Commissioner of Stamp Duties (Qd) v Jolliffe* (1920) 28 CLR 178 at 191 per Isaacs J.

163 *Nelson v Nelson* (1995) 184 CLR 538; [1995] HCA 25.

164 Conaglen, "Sham Trusts", (2008) 67 *Cambridge Law Journal* 176. Although this was not the way the decision was reasoned, *Starr v Starr* [1935] SASR 263 may be an example, for the three trusts appear to have been created by unilateral declarations of trust which the defendant treated as "mere formalities" (at 265).

165 *Commissioner of Stamp Duties (Qd) v Jolliffe* (1920) 28 CLR 178 at 191 per Isaacs J.

116 *Jolliffe's case.* The majority in *Jolliffe's* case relied on a passage in the eleventh edition of *Lewin on Trusts*[166] stating that the court will not impute a trust where the settlor did not mean to create one. In the light of the authorities discussed above, that statement is wrong. The majority denied that "by using any form of words a trust can be created contrary to the real intention of the person alleged to have created it"[167]. Denials to that effect are incorrect as statements of the law generally. They can only be correct in particular statutory contexts which might justify them. In 2000 *Lewin on Trusts*[168] stated that Isaacs J's "powerful dissent" would be preferred in England, and in 2008 that work again described Isaacs J's dissent as "powerful"[169]. His dissent is indeed powerful, and as a statement of trusts law generally it is to be preferred in Australia as well as England to the majority's statement in *Jolliffe's* case and the cases which have followed it.

117 *The 1997 Acknowledgment of Trust.* Did the 1997 Acknowledgment of Trust create a trust? The opening language twice described it as a trust. Clause 1, a key operative provision, used the language of trust. These indications, not countered by any other aspect of the document, are more than sufficient to support the conclusion that it was a trust. But there are surrounding circumstances known to the parties pointing to that conclusion as well. By Recital D the parties acknowledged that their respective entitlements to interests in the Original Property which was the subject of the 1989 Acknowledgment of Trust were transferred into interests in the New Property at Rachel Street, which had been purchased with the proceeds of sale of the Old Property. The 1989 Acknowledgment of Trust had the same references to trust as the 1997 Acknowledgment of Trust, and cll 1-3 of the two Acknowledgments of Trust were close to identical. Nothing in either the 1997 Acknowledgment of Trust or the 1989 Acknowledgment of Trust to which it refers and which it replaces points against the existence of a trust. The oral evidence of the respondent was inadmissible on this question, and in any event was extremely obscure.

118 Thus the 1997 Acknowledgment of Trust created a trust.

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166 Lewin, *A Practical Treatise on the Law of Trusts*, 11th ed (1904) at 85.

167 *Commissioner of Stamp Duties (Qd) v Jolliffe* (1920) 28 CLR 178 at 181.

168 *Lewin on Trusts*, 17th ed (2000) at 81 [4-23] n 6.

169 *Lewin on Trusts*, 18th ed (2008) at 95 [4-23] n 12.

Was it the duty of the respondent as trustee to let the property?

119 Both the trial judge and the Full Court denied that the respondent was under a duty to let the property. That was correct while the respondent and the second appellant lived in the property. But it ceased to be correct in 2001, when they moved elsewhere. The respondent submitted that the 1997 Acknowledgment of Trust imposed no other duties on himself as trustee, and, in particular, no duty to recover rent. The submission fails, because the duty existed independently of the terms of the 1997 Acknowledgment of Trust. 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[170]. 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."[171] 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[172]. And if the intended means of gaining an income turn out to be unsatisfactory, those means must be abandoned and others found.

120 Were any limits on the duty of the respondent as trustee created by the legislation in force under the proper law of the trust (ie the law of South Australia)? Section 6 of the *Trustee Act* 1936 (SA) relevantly provides:

> "A trustee may, unless expressly forbidden by the instrument creating the trust –
>
> (a) invest trust funds in any form of investment …"

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170 *Stafford v Fiddon* (1857) 23 Beav 386 [53 ER 151]; *Adamson v Reid* (1880) 6 VLR (E) 164 at 167; *Gilroy v Stephens* (1882) 51 LJ Ch 834; *Re Jones; Jones v Searle* (1883) 49 LT 91; *Wharton v Masterman* [1895] AC 186 at 197.

171 *Rocke v Hart* (1805) 11 Ves Jun 58 at 60 [32 ER 1009 at 1010] per Sir William Grant MR.

172 *Earl of Egmont v Smith* (1877) 6 Ch D 469 at 476 (a strong holding, since the case concerned not an express trust, as in this appeal, but the special kind of trust which exists between vendor and purchaser of land after exchange of contracts but before completion); *In re Byrne; Byrne v Byrne* (1902) 19 WN (NSW) 141.

The letting of land is an "investment" within the meaning of s 6(a). Sections 7-9 and 25C create or preserve other rules relating to investment, but it was not submitted that any of them prevented the trustee from having a duty to let the property. Thus the letting of land was not restricted. And there were no limits stated in the trust instrument which cut down the respondent's duty to invest the trust property (the land) by letting it.

121 The Full Court held that if the "device" of a trust had not been used, Mrs Byrnes and Mr Kendle would have been co-owners, and this would have excluded any duty to let the property. The Full Court then appeared to hold that, even though Mr Kendle was a trustee, the co-ownership displaced the trust duties. That is not so. Whatever the position at law if there had been no trust, the position in equity once the trust was created was that Mr Kendle's duty as trustee prevailed.

122 Counsel for the respondent also submitted that the respondent was a fiduciary, and that the law did not impose positive legal duties on fiduciaries. In the first place, that is a very over-simplified proposition in relation to fiduciaries. And, in the second place, the respondent was not just a fiduciary: he was a trustee.

123 The respondent then submitted that if the respondent was a trustee, he was only a bare trustee, and a bare trustee had no active duties to perform and no duty to recover rent. But this is a circular and question-begging argument.

124 Thus it was the duty of the respondent to let the property.

Did the respondent as trustee breach his duty to let the property?

125 The respondent attempted to carry out his duty to let the property by letting it to his son on a promise to pay rent. Subject to questions about the legitimacy of letting it to a close family member, particularly one as financially embarrassed as the son, this, at least initially, fulfilled the duty. However, the son paid hardly any rent. The respondent thereafter fell into breach of duty as trustee by failing either to ensure that the rent was paid, or, in default, to procure that the son be evicted much more speedily than he was and replaced by a more satisfactory tenant.

Did the conduct of the second appellant disentitle her from complaint about the respondent's breach of trust?

126 Neither the pleading of this issue nor what the courts below said about it is clear. This is not surprising in view of the unclarity of the applicable law.

127 The trial judge found, after analysing the problem in terms of an inquiry about "cooperation", that "although unwillingly, [the second appellant] consented to her husband's decision not to press for rent." The Full Court found that she "concurred or acquiesced" in it. It also described her as having given "consent". The Full Court also said that the trial judge's "clear finding of fact" was "not really challenged on appeal". In fact it was, by ground 6 of both the original and the supplementary notice of appeal, and by argument.

128 The respondent supported the reasoning of the Full Court. That reasoning accepted that the second appellant would not be disentitled from relief unless she knew the legal effect of what she was doing. It was not established that she did know the legal effect of what she was doing.

129 In his evidence the respondent said:

> "[The second appellant] and I hoped that [the son] would pay rent arrears to us eventually, but he did not. [The second appellant] and I did not take any action until 2007 when we with help of my family … caused [the son] to leave the property."

In cross-examination the respondent confirmed that evidence. He also accepted that at no stage did he say to the son that the son did not have to pay the rent. These answers establish that there was no abandonment of the trust's claim against the son and no consent, concurrence or acquiescence in any abandonment of it by the second appellant. The evidence of the second appellant does not contradict that position. Nor was she ever asked whether she consented to the respondent's inactivity.

130 But it is desirable to examine the position more fully.

131 The respondent was in breach of trust on every occasion the respondent declined to sue the son for failure to pay rent. The respondent, on whom the burden of proof lay, took the court to no evidence that the second appellant consented to or "concurred" in any of those breaches of trust in advance.

132 Was there contemporaneous or subsequent conduct by the second appellant disentitling the appellants from relief?

133 In *Orr v Ford* Deane J set out various meanings of "acquiescence". It is convenient to consider the circumstances of this case in the light of his analysis.

134 Deane J said[173]:

> "Strictly used, acquiescence indicates the contemporaneous and informed ('knowing') acceptance or standing by which is treated by equity as 'assent' (i.e. consent) to what would otherwise be an infringement of rights …."

There was no evidence to support contemporaneous consent by the second appellant.

135 Deane J then said that the word "acquiescence" is commonly used also to refer "to a representation by silence of a type which may found an estoppel by conduct"[174]. The respondent did not attempt to establish the ingredients of an estoppel by silence.

136 Deane J further said that "acquiescence" is commonly used to refer to "acceptance of a past wrongful act in circumstances which give rise to an active waiver of rights or a release of liability"[175]. The conditions for "active waiver" were not established. Nor were the conditions for a "release of liability". Lord Westbury LC described those conditions thus in *Farrant v Blanchford*[176]:

> "Where a breach of trust has been committed, from which a trustee alleges that he has been released, it is incumbent on him to shew that such release was given by the *cestui que trust* deliberately and advisedly, with full knowledge of all the circumstances, and of his own rights and claims against the trustee; for it is impossible to allow a trustee who has incurred personal liability to deal with his *cestui que trust* for his own discharge upon any other ground than the obligation of giving the fullest information, and of shewing that the *cestui que trust* was well acquainted with his own legal rights and claims, and gave the release freely and without pressure or undue influence of any description."

The evidence does not establish that the second appellant was acting deliberately and advisedly or with knowledge of her own rights and claims against the respondent.

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173 (1989) 167 CLR 316 at 337; [1989] HCA 4.

174 (1989) 167 CLR 316 at 337.

175 *Orr v Ford* (1989) 167 CLR 316 at 337.

176 (1863) 1 De G J & S 107 at 119-120 [46 ER 42 at 46-47].

137 Deane J then said that "acquiescence" is commonly used to refer to "an election to abandon or not enforce rights"[177]. The evidence does not support election.

138 Deane J then referred to two usages of the word "acquiescence" which he found unhelpful[178]:

> "First, it is sometimes used as an indefinite overlapping component of a catchall phrase also incorporating 'laches' or 'gross laches' and/or 'delay'. … Secondly, acquiescence is used as a true alternative to 'laches' to divide the field between inaction in the face of 'the assertion of adverse rights' ('acquiescence') and inaction 'in prosecuting rights' ('laches')".

He then gave a third meaning[179]:

> "Thirdly, and more commonly, acquiescence is used, in a context where laches is used to indicate either mere delay or delay with knowledge, to refer to conduct by a person, with knowledge of the acts of another person, which encourages that other person reasonably to believe that his acts are accepted (if past) or not opposed (if contemporaneous)".

There is no evidence of that encouragement, and the respondent did not give evidence that he had that belief.

139 Finally, Deane J said that the expression "gross laches" referred to[180]:

> "circumstances where inaction or standing by (with knowledge) by a plaintiff over a substantial period of time assumes an aggravated character in that it will, if the plaintiff is granted the relief which he seeks, give rise to serious and unfair prejudice to the defendant or a third party."

The grant of relief to the plaintiff appellants here will cause no prejudice to third parties and no prejudice (beyond the justice of the case) to the respondent.

140 The respondent also contended, but did not plead, that the first appellant, who was assignee of the second appellant's rights, had waived his entitlement.

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177 *Orr v Ford* (1989) 167 CLR 316 at 338.

178 *Orr v Ford* (1989) 167 CLR 316 at 338.

179 *Orr v Ford* (1989) 167 CLR 316 at 338.

180 *Orr v Ford* (1989) 167 CLR 316 at 341.

That contention must be rejected. The supposed waiver was the first appellant's offer to "let go of" the relevant claims if the Rachel Street property was sold and he received a fair price for his half share. In short, he was seeking to settle a dispute. The offer was not accepted by the respondent and the dispute was not settled.

Relief

141 What relief should be granted in the light of the outgoings paid by the respondent as trustee which he was entitled to have taken into account? The appellants wavered between submitting that that question should be referred to the Full Court, and submitting that this Court should deal with it. In view of the small sums in dispute, the heavy costs already incurred and the litigious mishaps which have taken place, the parties should not be exposed to the expense and trouble of a further trip to the Full Court.

142 The parties differ on whether the respondent ought to have obtained rent for the property in the 29 weeks between when the son left the premises in January 2007 and the grandson came in in July 2007. That difference is to be resolved in favour of the respondent. Taking into account the probable difficulties of tenanting the property, there was no breach of duty by the respondent in relation to that 29 week delay.

143 The total figure for rent which ought to have been, but which was not, received is $44,550. The total figure for rates, insurance, mortgage payments and water charges for which the respondent, as trustee holding the legal title, was liable was $22,162.60.

144 The appellants submitted that the correct approach was to take the figure which should have been received for rent; deduct the figure for outgoings, halve the difference, and give one half to the appellants.

145 The respondent submitted that it is not correct to take that course because, although the rent was never paid, the outgoings were actually paid, and paid only by the respondent. It was said to be wrong that the appellants should get "half of the net rent without contributing anything by way of the outgoings".

146 The flaw in the respondent's contention is that, while he paid the whole of the outgoings, he also failed to ensure receipt of any of the relevant rent. It is necessary to take the net figure derived by comparing what the respondent ought to have received ($44,550) with what he actually paid ($22,162.60), and giving the appellants half that net figure ($11,193.70). If that is done, full allowance is given for what, on the one hand, the respondent paid, and, on the other hand, the respondent failed to ensure the receipt of. The appellants obtain half the rent which the respondent should have got (less half the outgoings) because they are

entitled to be compensated for the respondent's breach of trust; the respondent does not obtain the other half of the rent because he breached his trust in failing to get it in.

147 There was a controversy whether, by reason of s 42(2) of the *District Court Act* 1991 (SA), no order as to costs should be made in favour of the appellants. Whether or not the other conditions stipulated in that provision are satisfied, it is clear that it is just in the circumstances to make the costs order proposed by Gummow and Hayne JJ. Among those circumstances are the complete failure of the respondent on all substantive points agitated on appeal, and the erroneous denial at all stages by the respondent of his trusteeship.

148 The other orders proposed by Gummow and Hayne JJ should be made. The appellants submitted in effect that in order (2)(b)(i) line 2 there should not be inserted after "liberty" the words ", and to be obliged,". That submission may be accepted on the ground that the solicitors may be expected to pay in accordance with the reasoning of this Court.