

BETWEEN:

**MARK KORDA & ORS**  
Appellants

and

10



**AUSTRALIAN EXECUTOR TRUSTEES (SA) LIMITED**  
(ACN 007 870 644)  
Respondent

**RESPONDENT'S SUBMISSIONS**

**PART I: FORM OF SUBMISSIONS**

1. These submissions are in a form suitable for publication on the internet.

20

**PART II: ISSUES**

2. Did the parties intend the proceeds from the sale of timber to which the Covenants related (**timber sale proceeds**) and some of the proceeds of the sale of land to which the Covenants related (**land sale proceeds**) to be held on trust for Covenantholders upon receipt by the Third Appellant (**Forest Company**) and/or the Fourth Appellant (**Milling Company**) or, instead, only upon the proceeds being paid by the Forest Company to the Respondent?

**PART III: JUDICIARY ACT 1903 (Cth), s 78B**

- 30 3. The Respondent considers that no notice is required under s 78B of the *Judiciary Act 1903* (Cth).

**PART IV: FACTS**

4. The summary of facts set out in the Appellants' Submissions (AS) at [5] to [18] is accepted, with the following qualifications and additions:
  - a. The administration of the Forest Company and the Milling Company referred to in AS[2] followed an effective takeover of those companies by Gunns Limited in 2008 and each of them shortly thereafter encumbering its assets (by way of a fixed and floating charge) to lenders to the Gunns Limited group of companies.<sup>1</sup>

40

<sup>1</sup> Agreed Summary for Court of Appeal dated 7 May 2013 at [16].

- b. The reasons of the majority of the Court of Appeal included an extract from the summary by the primary Judge of his Honour's reasons for concluding that there was an intention to create a trust over the timber sale proceeds and land sale proceeds.<sup>2</sup> The majority agreed with the analysis of the primary judge and characterized the other matters dealt with in their judgment as reinforcing the correctness of that analysis.<sup>3</sup>

## PART V: LEGISLATIVE PROVISIONS

- 10 5. In addition to the legislative provisions on which the Appellants rely, the Respondent relies on ss 39 and 191 of the *Real Property Act 1886* (SA).

## PART VI: ARGUMENT

6. This Court has recognised that there should be no reluctance in inferring the existence of a trust.<sup>4</sup> Rather, if the circumstances of a case reveal an intention to create, or protect, an interest in a third party, and a trust relationship is the appropriate means for protecting the interest or giving effect to the intention, then an intention to create a trust should be inferred.<sup>5</sup> Such an approach recognises the innate flexibility of the law of trusts.<sup>6</sup>
- 20 7. In cases where there is an express and unequivocal declaration of trust, it is not open to attempt to avoid the implication of a trust by contending that the true intention was contrary to the express declaration.<sup>7</sup> In such circumstances, it will be unnecessary to look beyond the express declaration of trust. However, that is not this case. In the present case, it is necessary to look to all the relevant circumstances in order to divine the necessary intention to create a trust.<sup>8</sup> In determining whether there is an intention to create a trust, it is appropriate to have regard to the outward manifestations of intention within the totality of the circumstances.<sup>9</sup>

---

<sup>2</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [8] extracting *Australian Executor Trustees (SA) Limited v Korda & Ors* [2013] VSC 7 at [88]. References to paragraphs of the Court of Appeal's decision are hereinafter referred to as "CA[X]" and references to paragraphs of the primary Judge's decision are hereinafter referred to as "J[X]".

<sup>3</sup> CA[9]

<sup>4</sup> *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 618-619 (Mason CJ and Dawson J) citing with approval *Wilson v Darling Island Stevedoring & Lighterage Co Ltd* (1956) 95 CLR 43 at 67 (Fullagar J). See also *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 120-121 (Mason CJ and Wilson J), 140 (Brennan J), 146-147 (Deane J), 166 (Toohey J) and *Legal Services Board v Gillespie Jones* (2013) 249 CLR 493 at [118] (Bell, Gageler and Keane JJ). These statements have been applied by both intermediate appellate courts and courts at first instance: see for example *News Ltd v Australian Rugby League Football League Ltd* (1996) 139 ALR 193 at 326 (Lockhart, von Doussa and Sackville JJ) and *Walker v Corboy* (1990) 19 NSWLR 382 at 396 (Priestley JA). Applied by the primary Judge at J[60].

<sup>5</sup> *Bahr v Nicolay (No 2)* (1988) 164 CLR 618-619 (Mason CJ and Dawson J). Applied by the primary Judge at J[60].

<sup>6</sup> *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 147 (Deane J) citing *Adams v Champion* (1935) 294 US 231 at 237 (Cardozo J)

<sup>7</sup> See *Byrnes v Kendle* (2011) 243 CLR 253 at [14]-[18] (French CJ); *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588 at [34] (Gaudron, McHugh, Gummow and Hayne JJ)

<sup>8</sup> *Byrnes v Kendle* (2011) 243 CLR 253 at [54] (Gummow and Hayne JJ); *Kauter v Hilton* (1953) 90 CLR 86 at 100 (Dixon CJ, Williams and Fullagar JJ). Applied by the primary Judge at J[59].

<sup>9</sup> *Legal Services Board v Gillespie Jones* (2013) 249 CLR 493 at [119] (Bell, Gageler and Keane JJ); *Byrnes v Kendle* (2011) 243 CLR 253 at [59] (Gummow and Hayne JJ); *Walker v Corboy* (1990) 19 NSWLR 382 at

8. The circumstances that will be centrally relevant to divining the relevant intention will include the nature of the relationship between the parties and the rights or obligations pertaining to that relationship.<sup>10</sup> An intention to create a trust may also be discerned from the full range of circumstances attending the relationship between the parties, the nature of the transaction, and the language the parties used, construed in its context.<sup>11</sup>
9. This appeal concerns the application of orthodox principles as to the identification of an intention to create a trust. Those principles were correctly identified by the primary Judge (with which reasoning the majority in the Court of Appeal agreed<sup>12</sup>).  
10 Indeed, even the dissentient cited the same principles, noting the absence of any dispute that, in discerning intention, the Court was to look at the full range of circumstances including all the relevant documents and the commercial context in which the investment by the Covenantholders was made.<sup>13</sup>
10. Having regard to all of the relevant circumstances, it is apparent that a trust over the timber and land sale proceeds was intended. Those circumstances included the language used in the relevant documents and the statutory and commercial context. Each of these is addressed below.

#### *The language in the relevant documents*

- 20 11. The documents from which an intention to create a trust was to be discerned were: the Trust Deed;<sup>14</sup> the Tripartite Agreement;<sup>15</sup> the Prospectuses;<sup>16</sup> and the Covenants.<sup>17</sup> Each of these documents was considered carefully below<sup>18</sup> and each contains evidence of an intention to create a trust over the timber and land sale proceeds. That intention is manifested in five ways.
12. *First*, the documents underlying the relationship between Covenantholders, the Forest Company and the Milling Company evince an intention that Covenantholders would have an interest in the actual proceeds received by the Forest Company and the Milling Company, rather than a mere contractual entitlement to an amount equivalent to a proportion of those proceeds.
- 30 13. This matter is significant because it reveals an essential element of a trust; the receipt of property to be dealt with for the benefit of another. This Court has held that where

---

386 (Priestley JA); *Re Australian Elizabethan Theatre Trust*; *Lord v Commonwealth Bank of Australia* (1991) 30 FCR 491 at 503 (Gummow J)

<sup>10</sup> *Legal Services Board v Gillespie Jones* (2013) 249 CLR 493 at [119] (Bell, Gageler and Keane JJ)

<sup>11</sup> *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 121 (Mason CJ and Wilson J) (“language of the parties, construed in its context, including the matrix of circumstances”)

<sup>12</sup> See CA[8]-[9]

<sup>13</sup> CA [243]. The dissent was only as to the result of the application of the accepted principles to the facts of the present case (which Robson AJA acknowledged was “not free from difficulty”: CA[248], [302]).

<sup>14</sup> Exhibited to the affidavit of Stuart Howard sworn 29 October 2012, Exhibit SH1, pgs 208 (**Trust Deed**)

<sup>15</sup> Exhibited to the affidavit of Stuart Howard sworn 29 October 2012, Exhibit SH1, pgs 286 (**Tripartite Agreement**)

<sup>16</sup> Prospectuses were issued in respect of a number of years. The relevant prospectuses are exhibited to the affidavit of Stuart Howard sworn 29 October 2012, Exhibit SH1, pg 298 (**1980 Prospectus**) and pg 322 (**1984 Prospectus**). For the sake of simplicity and consistently with the approach adopted in the Court of Appeal (see CA[11] fn6), the 1984 Prospectus is referred to in the balance of this outline unless there is a relevant distinction.

<sup>17</sup> Covenants were issued in respect of a number of years. They are exhibited to the affidavit of Stuart Howard sworn 29 October 2012, Exhibit SH1, pg 305 (**1980 Covenant**) pg 329 (**1977, 1978 and 1981 Covenant**) and pg 332 (**1982 and 1983 Covenant**).

<sup>18</sup> See CA[10]-[29] (Maxwell P and Osborn JA)

a person “has received as and for the beneficial property of another, something which he is to hold, apply or account for specifically for his benefit”, then, unless there is something in the circumstances of the case to indicate otherwise, the person will be a trustee in the ordinary sense.<sup>19</sup> By providing that Covenantholders were to receive not merely a particular amount of money, but rather a proportion of a particular fund, it was made clear that the amounts held by the Forest Company and the Milling Company were to be dealt with for the benefit of the Covenantholders.

- 10 14. The Prospectuses provided to Covenantholders and the terms of the Covenants referred to an “entitl[ment] to the net timber proceeds apportionable to your interest”<sup>20</sup>, “the net timber proceeds...are divided amongst the Covenantholders”<sup>21</sup>, “Timber proceeds paid to Covenantholders from 1942 to 1984 total \$15,826,967”<sup>22</sup>, “Each Covenant entitles the holder thereof to 95%...of the net proceeds from the timber apportionable...”<sup>23</sup>, “[t]he Covenantholder will receive his due proportion of the benefits obtained from the sale of the timber harvested”<sup>24</sup>, “the [Forest Company]...will pay the balance [of the timber proceeds] to the Trustee for the Covenantholders for distribution by the Trustee amongst the Covenantholders entitled thereto in accordance with their respective holdings”<sup>25</sup>, “[t]he Covenantholder shall accept his due proportion of the benefits from the sale of timber...”<sup>26</sup>, “The Covenantholder will receive his due proportion of the benefits obtained from the sale of the timber harvested”<sup>27</sup>, “[t]he above benefits are all paid from the Timber Proceeds”<sup>28</sup>. These statements reflected the concepts contained in the Trust Deed and Tripartite Agreement.<sup>29</sup>
- 20 15. The adoption of such phraseology was no accident. Where the parties intended to refer to an amount calculated in a particular way (as opposed to a portion of the fund itself) the documents made that matter clear.<sup>30</sup>
16. Each of these matters underscored that Covenantholders were not merely contractually entitled to an amount calculated by reference to the timber proceeds,

---

<sup>19</sup> *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 165-166 (Mason CJ, Deane, Toohey and Gaudron JJ) citing *Cohen v Cohen* (1929) 42 CLR 91 at 100. Cited with apparent approval in *Legal Services Board v Gillespie Jones* (2013) 249 CLR 493 at [113] (Bell, Gageler and Keane JJ).

<sup>20</sup> 1984 Prospectus at pg 3

<sup>21</sup> 1984 Prospectus at pg 3

<sup>22</sup> 1984 Prospectus at pg 4

<sup>23</sup> 1977, 1978 and 1981 Covenant, cl 1 (contained at pg 7 of the 1984 Prospectus). See also 1982 and 1983 Covenant, cl 1 (contained at pg 10 of the 1984 Prospectus)

<sup>24</sup> 1977, 1978 and 1981 Covenant, cl 4 (contained at pg 7 of the 1984 Prospectus) and 1982 and 1983 Covenant, cl 4 (contained at pg 10 of the 1984 Prospectus)

<sup>25</sup> 1977, 1978 and 1981 Covenant, cl 4 (contained at pg 8 of the 1984 Prospectus) and 1982 and 1983 Covenant, cl 4 (contained at pg 11 of the 1984 Prospectus); 1984 Prospectus at pg 16 (cl 13(e))

<sup>26</sup> 1977, 1978 and 1981 Covenant, cl 14 (contained at pg 9 of the 1984 Prospectus) and 1982 and 1983 Covenant, cl 16 (contained at pg 12 of the 1984 Prospectus)

<sup>27</sup> 1984 Prospectus at pg 16 (cl 13)

<sup>28</sup> 1984 Prospectus at pg 19.

<sup>29</sup> **Trust Deed:** pg 18-19 (cl 12(b)), pg 19-20 (cl 12(d)), pg 20 (cl 12(e)), pg 23 (cl 13(b)), pg 23-24 (cl 13(f)(iv)), pg 27 (cl 20A(b)), pg 44 (cl 27). **Tripartite Agreement:** pg 5-6 (cl 9), pg 7 (cl 10A). See also J[35] and [78]-[79] and CA[295] and [298].

<sup>30</sup> See **Trust Deed**, pg 15, cl 4(b) (“the Trustee will...repay to the Forest Company...sums equal to two per centum...of the total sums credited to each Maintenance Fund”), **Tripartite Agreement**, pg 6, cl 9(c) (“In paying to the Milling Company a sum equal to Twelve Dollars (\$12.00) per centum per annum upon the issued and fully paid capital”), pg 6, cl 9(d) (“In payment...to the Forest Company of an amount equal to five per centum”).

but were instead entitled to a portion of the actual timber and land sale proceeds. In those circumstances, the documents evince a clear intention to create a trust.

17. The Appellants rely on the reference in cl 27 of the Trust Deed and cl 6 of the 1982 and 1983 Covenant to the entitlement of holders of that Covenant to the “value” of certain land. The Appellants contend that these clauses indicate that those Covenantholders were entitled only to the value of the land, rather than the proceeds of any sale of the land.<sup>31</sup> This argument was expressly considered, and rejected by the majority, who noted the conceptual distinction between the value of land and an interest in the land, but noted that the document used the terms “beneficial interest in the land value” and “interest in the land” interchangeably.<sup>32</sup> The majority noted that use of terms such as “beneficial interest” and “interest in the land” reinforced the expectation that an investor would acquire an interest connected with, and hence as secure as, the land itself.<sup>33</sup>
18. At the outset, it is to be noted that the Appellants’ contention referred to in paragraph 17 above is relevant only insofar as it concerns the land sale proceeds, and does not apply to the timber sale proceeds. In any event, the Appellants’ contention should be rejected. The reference in cl 27 to “value” does not detract from the force of the other provisions set out above as it is explicable by reference to a peculiarity in the methodology for determining the amount payable to a Covenantholder. In particular, clause 29 provided that the amount payable to a Covenantholder was to be determined by reference to a valuation of the land performed by an independent valuer. There is no indication in the Trust Deed that the amounts payable pursuant to clause 27 were to be characterized differently to the other amounts payable to Covenantholders. . To the extent that there is any inconsistency in the terminology, it is to be treated in the same manner as was addressed by the majority, as an infelicity in drafting that does not contradict the overriding purpose of the documents.
19. *Secondly*, the obligations of the Forest Company and Milling Company in dealing with the funds the subject of the investment scheme further support the existence of an intention to create a trust in respect of the timber sale proceeds and land sale proceeds.
20. An express obligation to keep a sum of money separate will point to the existence of a trust if no intention to create a trust is made explicit.<sup>34</sup> Such an obligation is a duty of a trustee.<sup>35</sup>
21. The Tripartite Agreement regulated the manner in which the Forest Company and the Milling Company were to deal with funds while in their hands. Clause 8 of that agreement provided:

*The Milling Company and the Forest Company and each of them shall keep such books accounts vouchers and records as shall enable them at all times to ascertain and specify to which class of Covenantholders and in respect of which*

---

<sup>31</sup> See AS[53]-[55]

<sup>32</sup> See CA[25]-[26]

<sup>33</sup> CA[26]

<sup>34</sup> *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588 at [34] (Gaudron, McHugh, Gummow and Hayne JJ)

<sup>35</sup> *Puma Australia Pty Ltd v Sportsman’s Australia Ltd (No 2)* [1994] 2 Qd R 159 at 162 cited with approval in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588 at [34] (Gaudron, McHugh, Gummow and Hayne JJ)

*series of Covenants and in what proportions the balance of moneys referred to in Clause 10A shall be allocated and apportioned.*<sup>36</sup> [emphasis added]

22. Moreover, clauses 9 to 10A of the Tripartite Agreement set out a scheme whereby the funds received by the Forest Company and Milling Company were to be kept as an intact whole, subject to the deduction of certain amounts payable to those companies.<sup>37</sup>
23. What emerges from these obligations is that at no time was the Forest Company or the Milling Company entitled to deal with the funds received by them as if they were their own.<sup>38</sup> Instead, and especially by operation of clause 8 of the Tripartite Agreement, the companies were obliged to treat those funds separately to other funds held by the companies. This of itself indicates an intention to create a trust over those funds.
24. The Appellants contend that the fact that neither the Forest Company nor the Milling Company were required to deposit the timber or land sale proceeds into an account specifically designated as a “trust account” is indicative of the absence of an intention to create a trust. This is said to be contrasted with the obligations of the Respondent under the Trust Deed.<sup>39</sup>
25. The Appellants’ contention is an elevation of form over substance. As demonstrated above, the substantive obligation imposed on the Forest Company and Milling Company was to deal with the timber and land sale proceeds in a manner that recognised that they were separate to other funds held by those companies. The fact that those companies were not obliged to deposit the funds into a separate account is not dispositive of any intention in relation to the creation of the trust. In particular, the analogy of a solicitor’s trust account identified by the primary Judge is apposite.<sup>40</sup> A solicitor maintains one fund into which trust funds are deposited. Those funds are no less held on trust because the solicitor does not establish a different account in respect of each client. Instead, similarly to the present case, it is sufficient that the solicitor maintains records indicating the persons entitled to those funds. This point is emphasized when viewed in light of the matters referred to in paragraphs 86 to 88 below, which disclose that the proceeds were, as a matter of fact, separately accounted for.
26. *Thirdly*, the documents underlying the relationship between Covenantholders, the Forest Company and the Milling Company establish that Covenantholders had a proprietary interest in the subject matter of the scheme.
27. The language deployed by the parties in this regard is significant because the conferral of a proprietary interest on a person who does not hold legal title is one of the essential hallmarks of a trust.<sup>41</sup> The language used by the parties reveals that the Covenantholders held not simply a personal right against the Forest Company or the Milling Company, but rather a proprietary right in respect of the trust property.

<sup>36</sup> Tripartite Agreement, pg 5 (cl 8)

<sup>37</sup> Tripartite Agreement, pgs 5-7 (cl 9 and 10A)

<sup>38</sup> Cf. AS[35] in respect of the Milling Company. Contrary to the Appellants’ assertion, there is nothing in the Trust Deed or Tripartite Agreement which provides that the Milling Company was entitled to use the sale proceeds as it saw fit. Rather, as cl 9 of the Tripartite Agreement demonstrates, the manner in which the Milling Company was to deal with any proceeds was strictly prescribed.

<sup>39</sup> See AS[36]-[37]

<sup>40</sup> See J[38] fn 8

<sup>41</sup> This proposition excludes charitable and purpose trusts. See *Hardoon v Belilios* [1901] AC 118 at 123 (PC); J Mowbray, L Tucker, N Le Poidevin, E Simpson, *Lewin on Trusts* (17<sup>th</sup> ed, 2000) at [1-06]

28. In this regard, the documents provided to Covenantholders used language indicating an entitlement on the part of Covenantholders not merely to an amount in respect of the timber and land, but, instead, an interest in the timber and land itself. Relevantly, the Prospectuses and Covenants used language including “[a] covenant provides for you *an interest in a Radiata Pine plantation*”<sup>42</sup>, “the covenant provides a *beneficial interest in the land value*”<sup>43</sup>, “Each acre Covenant and each one half hectare or one quarter hectare Covenant ... will entitle the holder thereof to *95%...of the timber apportionable* to one acre, one half hectare or one quarter hectare (as the case may be) planted by the Company”<sup>44</sup>, and “*INCLUDES LAND INTEREST*”.<sup>45</sup>
- 10 29. Similar concepts are found in the Trust Deed and the Tripartite Agreement.<sup>46</sup> Indeed, the Trust Deed went so far as to require the Forest Company to indemnify Covenantholders against claims in respect of the tending and supervision of the land and trees and any claims for rent, rates, taxes or outgoings.<sup>47</sup> Contrary to AS[39(e)], the existence of such an indemnity is recognition that Covenantholders had an underlying proprietary interest in the land, and therefore might be made liable in respect of it.
- 20 30. The notion of a proprietary interest held by Covenantholders in the trust property was further underscored by the right under the Trust Deed for the Trustee to lodge a caveat to protect Covenantholders’ interests in the lands the subject of the Covenants.<sup>48</sup> That right was also referred to in the Covenants.<sup>49</sup> A caveat may only be lodged to protect a proprietary interest in land. So much is made clear from the terms of the South Australian legislation<sup>50</sup> and the authorities.<sup>51</sup> The existence of such a right indicates that Covenantholders’ interests went beyond mere contractual rights and were, instead, proprietary in nature.
31. In circumstances where there was a clear intention to confer on Covenantholders a proprietary interest, there was an intention to create a trust over that property.
32. *Fourthly*, the terms of the Trust Deed setting out the obligations of the Forest Company provide further support for the existence of a trust over the timber and land

---

<sup>42</sup> 1984 Prospectus at pg 3. The 1984 Prospectus also went so far as to identify the relevant land: see pg 13-14.

<sup>43</sup> 1984 Prospectus at pg 4 (in respect of the period from 1982). An identical statement was not found in the 1980 Prospectus.

<sup>44</sup> 1984 Prospectus at pg 16 (cl 13). Specific reference was also made in cl 13 to the 1982 planting year and an entitlement to a value in respect of the land. See also 1984 Prospectus, pg 15 (cl 15(a)).

<sup>45</sup> 1984 Prospectus at pg 24. An identical statement was not found in the 1980 Prospectus.

<sup>46</sup> **Trust Deed:** pg 27, cl 20A(c) (“The Trustee will cause to be registered a caveat or caveats in respect of such lands prohibiting any dealings therewith except in the *interests of the Covenantholders in such lands*”). **Tripartite Agreement:** pg 1, preamble (“the Milling Company was duly incorporated having for its objects (inter alia) the felling, milling, manufacturing and marketing of grown timber and thinnings of the *property of Covenantholders of the Forest Company*”), pg 9, cl 15 (“trees and timber planted or acquired by the Forest Company for the benefit of Covenantholders”)

<sup>47</sup> Trust Deed, pg 9, cl 3(c).

<sup>48</sup> See Trust Deed, pg 6, cl 2(d)(v)

<sup>49</sup> See 1977, 1978 and 1981 Covenant, cl 6 (contained at pg 9 of the 1984 Prospectus) and 1982 and 1983 Covenant, cl 8 (contained at pg 12 of the 1984 Prospectus)

<sup>50</sup> Section 191 of the *Real Property Act 1886* (SA) authorizes, and at all relevant times, authorized the lodgment of a caveat by a “settlor of land or beneficiary claiming under a will or settlement, or any person claiming to be interested at law or in equity, whether under an agreement, or under an unregistered instrument, or otherwise howsoever in any land”. See also s 39 of the *Real Property Act 1886* (SA).

<sup>51</sup> *Simons v David Bengel Motors Pty Ltd* [1974] VR 585 at 588 (Norris J); *McMahon v McMahon* [1979] VR 239 at 243 (Marks J); *Valerica Pty Ltd v Global Minerals Australia Pty Ltd* (2001) NSW Conv R 55-963 at [11] (Windeyer J)

sale proceeds while those amounts were held by the Forest Company and the Milling Company.

33. In this regard, cl 20B(a) of the Trust Deed refers to the Forest Company not being liable to be removed from the “management of the trust”. This reference can only be explicable on the basis that the intention was for a trust to exist throughout the flow of funds provided for in the documents (including when the funds were in the hands of the Forest Company and the Milling Company). If the intention had been for a trust only to exist when the funds came into the hands of the Respondent, then there would have been no trust for the Forest Company to manage.
- 10 34. *Fifthly*, the documents reflect a painstaking attempt to ensure that the Forest Company’s and Milling Company’s dealings with the subject matter of the investment scheme were in the interests of Covenantholders. The apparent intention was for the Forest Company and the Milling Company to deal with the land on terms that would ensure that no prejudice was occasioned to the interests of the Covenantholders.<sup>52</sup> In other words, the Forest Company and Milling Company were obliged to act in the interests of the Covenantholders, including when dealing with the proceeds of the investment scheme. This is revelatory of an intention to create a trust, as the essence of a trust is a requirement for a person to deal with property for the benefit of another person.<sup>53</sup>

20 The Appellants’ contentions

35. The Appellants contend that there are a number of indications in the documents between the parties that establish the absence of an intention to create a trust over the timber and land sale proceeds. On analysis, each of those matters may be rejected for the following reasons.
36. *First*, the Appellants point to the fact that the parties partly regulated their affairs by way of a contract.<sup>54</sup> In respect of the Milling Company, the Appellants further contend that if a trust existed, there would be no need to enter into a contractual arrangement through the Tripartite Agreement.<sup>55</sup> They contend that in such circumstances, there is no warrant to overlay that contractual relationship with an additional trust. The effect of the Appellants’ contention is to seek to draw a distinction between the existence of a contract and the existence of a trust. However,
- 30

---

<sup>52</sup> See the Covenants and Prospectuses provided to Covenantholders: 1977, 1978 and 1981 Covenant, cl 6(i) and (ii) (contained at pgs 8-9 of the 1984 Prospectus); 1982 and 1983 Covenant, cl 8(i) and (ii) (contained at pg 12 of the 1984 Prospectus) (“the Company will not sell the land of which it is the proprietor nor without the consent of the Trustee encumber such land”, “the Company will not surrender, assign or encumber its interest in leased land as aforesaid or otherwise deal with such land in a manner prejudicial or detrimental to the interests of Covenantholders without the consent of the Trustee” and “the Trustee shall register a Caveat in respect of such lands prohibiting any dealing therewith except in the interests of the Covenantholders in such lands”). See also 1984 Prospectus, pg 17, cl 18(c). See also the Trust Deed, pg 6, cl 2(d)(i), (ii) and (iv) (“the Forest Company will not sell land of which it is the proprietor nor without the consent of the Trustee encumber such land”, “The Forest Company will not surrender assign or encumber its interest in Leased Land or otherwise deal with such land in a manner prejudicial to or detrimental to the interests of Covenantholders without the consent of the Trustee”, “[t]he Forest Company will not without the consent of the Trustee encumber the timber planted thereon”)

<sup>53</sup> *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 165-166 citing *Taylor v Davies* [1920] AC 636 at 651 and *Cohen v Cohen* (1929) 42 CLR 91 at 100. Cited with apparent approval in *Legal Services Board v Gillespie Jones* (2013) 249 CLR 493 at [113] (Bell, Gageler and Keane JJ). D Hayton, P Matthews, C Mitchell *Underhill and Hayton: Law of Trust and Trustees* (17<sup>th</sup> ed, 2006) at 2; PH Pettit, *Equity and the Law of Trusts* (2006) p 24.

<sup>54</sup> See AS[33], [34], [39(b)]

<sup>55</sup> AS[34]



as this Court has recognized, a contract may readily provide the basis for the establishment or implication of a trust.<sup>56</sup> In such circumstances, the fact that the parties chose to partly regulate their affairs through a contract does not detract from the fact that a trust also existed.

10 37. *Secondly*, the Appellants point to the fact that a portion of the moneys that might become subject to the trust could be paid to the Forest Company or Milling Company for the purposes of their affairs.<sup>57</sup> However, there is nothing in that circumstance that tells against the existence of a trust. The fact that the moneys from which the subject of the trust will be drawn will partly become subject to the trust and will be partly used for another purpose has been recognised as a factor not defeating the existence of a trust.<sup>58</sup>

38. *Thirdly*, the Appellants rely on the fact that it was open to the parties to expressly declare the existence of a trust in respect of the timber and land sale proceeds. The Appellants contend that the fact that the parties did not expressly declare a trust indicates an intention that no such trust should exist.<sup>59</sup> This contention should not be accepted.

20 39. It is not necessary for the parties to use any formula of words, such as “on trust for” or “as trustee”, in order to constitute a trust.<sup>60</sup> While such words may indicate the existence of a trust, the fact that they have not been used does not tell against the existence of a trust. Rather, it is necessary to have regard to the full circumstances of the case, which, in the present case, support the existence of an intention to create a trust.

40. Moreover, to treat the fact that a particular formula of words was not used as counting against the existence of a trust is contrary to the maxim “Equity regards the intention rather than the form”. Focusing on the existence, or non-existence, of a particular form of words diverts attention from the real inquiry: was there an intention to create a trust.

***The context within which the Covenants were issued***

30 41. In addition to considering the terms of the documents that the parties entered into, in determining whether there was an intention to create a trust over the timber and land sale proceeds, it is also relevant to consider the context for the parties’ relationship. As set out below, that context supports the existence of an intention to create a trust.

**Statutory context**

42. Similarly to the position in *Byrnes v Kendle* (2011) 243 CLR 253 at [8]-[12], this case arises within a particular statutory context.

---

<sup>56</sup> *Gosper v Sawyer* (1985) 160 CLR 548 at 568-569 (Mason and Deane JJ) cited with approval in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588 at [27] (Gaudron, McHugh, Gummow and Hayne JJ) and *Legal Services Board v Gillespie Jones* (2013) 249 CLR 493 at [113] (Bell, Gageler and Keane JJ)

<sup>57</sup> See AS[39(a)] and [39(g)]

<sup>58</sup> See *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588 at [30] (Gaudron, McHugh, Gummow and Hayne JJ)

<sup>59</sup> See AS[32]-[33]

<sup>60</sup> *Brisbane City Council v Attorney-General (Qld)* [1979] AC 411 at 421 (PC); *Registrar of Accident Compensation Tribunal v Commissioner of Taxation (Cth)* (1993) 178 CLR 145 at 165 (Mason CJ, Deane, Toohey and Gaudron JJ); *Re Kayford Ltd* [1975] 1 WLR 279 at 282 (Megarry J)

43. The regulatory framework within which the Covenants were issued supports the existence of an intention to create a trust and, as set out in AS[20], included the following statutory provisions::
- a. The *Companies Act 1962 (SA) (Companies Act)* and the regulations made under that Act (**Companies Regulations**), which were effective as at the point in time at which the Trust Deed and Tripartite Agreement were entered into.
  - b. The *Companies Act 1962-1974 (SA)* (as amended by the *Companies Act Amendment Act 1979 (SA)* and the *Companies Act Amendment Act 1980 (SA)*) (**1980 Act**) and the regulations made under that Act (**1980 Regulations**), which were effective as at the point in time at which the 1980 Prospectus was issued.
  - c. The *Companies (South Australia) Code (Companies Code)* and the regulations made under that Act (**1984 Regulations**), as at the point in time at which the 1984 Prospectus was issued.
44. The regulatory framework within which the Covenants were issued contemplated a sharp distinction between investment in a management company (which would be subject to the financial fortunes of the management company) and investment in a particular scheme to be managed by a management company (which would not). The investment moneys or assets purchased with those monies that the management company held were not to form part of the general assets of the management company, but were instead to be held on behalf of investors in the relevant scheme.
45. The regulatory framework governing the issue of the Covenants was premised on the existence of a scheme, undertaking or common enterprise in which people would invest. That scheme, undertaking or enterprise was to be distinct from the management company, which promoted and managed the scheme, undertaking or enterprise. This distinction was manifested in the following ways:
- a. The genesis for the regulatory framework was the use of unit trusts to encourage investment otherwise than through a corporation, so as to avoid the protections provided to investors under the corporations legislation.<sup>61</sup> The regulatory framework was intended to ensure that those protections were extended to these alternative investments. Accordingly, the regulatory framework was premised on an investment being made otherwise than in a corporation, which necessarily excluded an investment in a management company.
  - b. The term “interest” was defined in the regulatory framework by reference to a right or interest in respect of the underlying scheme, undertaking or enterprise and expressly excluded an investment through acquisition of a share in a corporation.<sup>62</sup> This necessarily excluded an investment in the management company.

<sup>61</sup> Second Reading Speech for the *Companies Bill 1955 (Vic)*: Victorian Parliamentary Debates, Legislative Assembly, 19 October 1955, pg 1101

<sup>62</sup> See s 76 of the Companies Act, s 76 of the 1980 Act and s 5 (“prescribed interests”) of the Companies Code. This would necessarily exclude an investment in the management company, which was required to be a company: see s 81 of the Companies Act; s 81 of the 1980 Act; and s 169 of the Companies Code. The definition of “interest” also included reference to an interest in an “investment contract” which was, in turn, defined by reference to a contract, scheme or undertaking under which an investor invested money and acquired a right or interest in property that would or might be used in common with any other interest in or right in respect of property acquired in like circumstances.

- c. The statutory provisions required any deed in relation to the interests to include a covenant prohibiting use of investment moneys for investment in, or lending to, the management company or a related company. By way of example, s 80(1)(d) of the Companies Act provided:

*80(1) A deed shall, for the purposes of paragraph (a) of subsection (2) of section 78, contain covenants to the following effect, namely –...*

*(d) a covenant binding the management company and the trustee or representative, respectively, that **no monies available for investment under the deed will be invested in or lent to the management company, or to the trustee or representative, or to any company (other than a banking corporation or corporation declared pursuant to paragraph (b) of subsection (5) of section 38 to be an authorised dealer in the short-term money market) which is by virtue of subsection (5) of section 6 deemed to be related to the management company or to the trustee or representative.***<sup>63</sup> [emphasis added]

- d. The use of the term “management company” in the regulatory framework carries with it the notion of “management” of the scheme by that entity, rather than an investment in that entity. This is also consistent with statements in the authorities as to the role performed by a management company.<sup>64</sup>

46. It follows that it would be contrary to the regulatory framework for a scheme, undertaking or enterprise to involve an investment in the management company or a related entity. The regulatory framework precluded not only the acquisition of shares in the management company, but also the provision of funds to the management company that would form part of the assets of that company.

47. In the context of the present case, the Forest Company functioned as the management company and the Milling Company was a company related to, or associated with, it. The effect of the matters set out above was that it could not have been contemplated that the investment scheme in relation to the Covenants would involve an investment by Covenantholders in either the Forest Company or the Milling Company.

48. However, in the absence of a trust over the timber and land sale proceeds, that is precisely what would have eventuated. The investment moneys contributed by Covenantholders would be used to purchase assets that became part of the assets of the Forest Company or the Milling Company. Further, any amounts realized on the sale of the assets would also form part of the assets of those companies.

49. This would make Covenantholders direct stakeholders in the Forest Company and Milling Company, exposing them to those companies’ financial fortunes. Consequently, Covenantholders would not merely be investing in the underlying scheme, undertaking or enterprise, but, also, in the Forest Company and Milling Company.

50. By contrast, the existence of a trust over the timber and land sale proceeds would respect the integrity of the statutory framework. Covenantholders would have invested only in the underlying scheme, undertaking or enterprise and would not

<sup>63</sup> Relevantly identical provisions were found in s 80(1)(d) of the 1980 Act and s 168(1)(d) of the Companies Code.

<sup>64</sup> See *Elders Trustee and Executor Co Ltd v EG Reeves Pty Ltd* (1987) 78 ALR 193 at 228 (Gummow J); *Re Investa Properties Ltd* (2002) 187 ALR 462 at [1] (Barrett J).

have been exposed directly to the financial fortunes of the Forest Company or Milling Company. For this reason, the statutory framework supports the existence of an intention to create a trust in respect of the timber and land sale proceeds.

51. There is no inconsistency between the existence of a trust over the timber and land proceeds and the statutory framework under which the Covenants were issued. That framework does not prohibit either the management company or any related or associated company from holding assets on trust for persons investing in the scheme, undertaking or enterprise.
- 10 52. The prohibition of a state of affairs that would plainly be to the benefit of investors would be surprising in the context of a regulatory framework that was expressly designed for the protection of investors.<sup>65</sup> As noted in *Equiscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at [22] per French CJ, Crennan and Kiefel JJ, the genesis for provisions of this kind in Australia was s 10 of the *Companies Act 1955* (Vic). The second reading speech for that Act noted that its purpose was to protect the public.<sup>66</sup> Moreover, the report that led to that Act similarly referred to notions of protecting the public.<sup>67</sup>
- 20 53. The Appellants contend that the existence of a trust over the timber and land sale proceeds would place the Forest Company and Milling Company in breach of the regulatory framework.<sup>68</sup> However, that submission elides the specific trust relationship required by the regulatory framework through the existence of a separate trustee or representative to act on behalf of investors with the broader or additional trust intended to exist over funds held by the management company or its related companies.
54. In this regard, the Appellants point to the provisions of the regulatory framework that require the relevant deed to disclose “full particulars of the trust”.<sup>69</sup> However, “the trust” that is referred to in those provisions is the trust under which the statutorily required trustee or representative holds assets on trust for investors.<sup>70</sup> That provision does not speak to the presently relevant additional trust over assets in the hands of the management company or a related company.

---

<sup>65</sup> See J[88(b)]. See also Second Reading Speech for the *Companies Act Amendment Bill 1960*: SA Parliamentary Debates, House of Assembly, 20 October 1960, pg 1485 noting the Bill was designed to ensure “that the rights acquired [by investors] through such investment are safeguarded as far as is practicable”.

<sup>66</sup> Victorian Parliamentary Debates, Legislative Assembly, 19 October 1955, pg 1101.

<sup>67</sup> The *Companies Act 1955* (Vic) was enacted following recommendations made in a report by the Statute Law Revision Committee in 1954 titled “Report from the Statute Law Revision Committee on Amendments of the Statute Law to Deal with Fraudulent Practices by Persons Interested in the Promotion and/or Direction of Companies and by Firms” (**SLRC Report**). The purpose of the report was expressed to be “reporting upon the measures deemed necessary to afford adequate protection to shareholders, creditors, and members of the public”: SLRC Report at pg 3. The report further identified one of the deficiencies in the law as being the lack of protection for purchasers of unit certificates under any of the legislative safeguards provided for shareholders: SLRC Report at pg 10. The notion of protection of investors’ assets continues to find expression in the current managed investment scheme provisions of Ch 5C of the *Corporations Act 2001* (Cth): see Second Reading Speech for the *Managed Investments Bill 1987* (Cth), Senate, 5 March 1998, pg 446.

<sup>68</sup> See AS[25]

<sup>69</sup> See AS[27] referring to reg 12(1)(c) of the Companies Regulations and the 1980 Regulations and Sch 5, 3(3) of the 1984 Regulations.

<sup>70</sup> As to the statutory requirement for there to be a trustee or representative of the holders of interest see s 78(1) and 83(1) of the Companies Act; s 78(1) and 83(1) of the 1980 Act; s 166(1) and 171(1) of the Companies Code

55. This distinction is made clear by the reference to “the” trust, which is a reference to the trust relationship required by the regulatory framework, rather than the additional trust.<sup>71</sup> Further, the opening words of the provisions on which the Appellants rely make clear that those provisions are concerned only with the trust required by the regulatory framework, rather than the additional trust.<sup>72</sup> Moreover, the intention of the provisions to deal only with the trust required by the statute is further evinced by the express reference to disclosure in respect of property that may be vested in the “representative towards the holder of those interests”, a concept created by the regulatory framework.<sup>73</sup> In this way, the provisions again focus attention on the statutorily required trustee or representative, rather than the additional trust that may arise in the circumstances of a particular case such as the present.
- 10
56. In any event, even if those provisions were relevant to the additional trust over assets held by the management company or a related company, they were discharged in the present case. The Trust Deed contained detailed and comprehensive provisions governing the way in which property was to be dealt with by the Forest Company. That Deed (together with the Tripartite Agreement) set out the respective obligations of the Forest Company and the Milling Company. The gravamen of the Appellants’ contention appears to be that there was no express declaration of trust over the timber sale proceeds or land sale proceeds.<sup>74</sup> However, the lack of any such express declaration is a matter of form rather than substance. As set out in paragraph 39 above, the fact that the words “on trust for” or “as trustee for” have not been used is not dispositive of the existence of a trust where the circumstances otherwise reveal such a trust.
- 20
57. For this reason, nothing in the regulatory framework tells against an intention to create a trust over the timber sale proceeds and land sale proceeds.
58. In addition, the fact that the Trust Deed exhibits an adherence to the regulatory framework does not establish the absence of an intention to create a trust in respect of the timber and land sale proceeds. In this connection, the Appellants contend that the fact that the Trust Deed and the Tripartite Agreement adhere to the legislative scheme of identifying a management company and a trustee indicates the lack of an intention to create the additional trust.<sup>75</sup> That contention should be rejected.
- 30
59. The fact that in ordering their affairs the parties, unsurprisingly, met the minimum requirements prescribed by the regulatory framework does not indicate that there was no intention to supplement those requirements with an additional trust not required by the statute. Accordingly, the parties’ compliance with the regulatory framework

---

<sup>71</sup> See reg 12(1)(c) of the Companies Regulations and the 1980 Regulations and Sch 5, 3(1) and (2) of the 1984 Regulations

<sup>72</sup> The extract from reg 12(1)(c) of the Companies Regulations and the 1980 Regulations set out at AS[27] fn 44 is incomplete. The full extract deals with matters required to be included in an approved trust deed and reads: “*except where no property is to be vested in the trustee or representative, a provision creating a trust, or containing a declaration of trust, and setting out full particulars of the trust, including precise information as to the circumstances in which the money, marketable securities, investments and other property subject to the trust are or will be vested in the trustee or the representative towards the holders of those interests in regard to that property.*” [omitted material in bold]. The analogous provision in the 1984 Regulations was found in Sch 5, 3(1) and (2).

<sup>73</sup> See reg 12(1)(c) of the Companies Regulations and the 1980 Regulations and Sch 5, 3(2) of the 1984 Regulations

<sup>74</sup> See AS[29]

<sup>75</sup> See AS[26]

does not indicate the absence of an intention to create a trust over the timber and land sale proceeds.

60. The Appellants further contend that no intention to create a trust existed in this case because the regulatory framework describes a management company's obligations as being in "covenant", rather than in trust.<sup>76</sup> Again, this contention should be rejected.

61. As noted above, nothing in the regulatory framework excludes the possibility of a management company holding assets on trust. Moreover, the fact that the regulatory framework describes *some* of a management company's obligations as arising by reason of covenant does not weigh against the existence of a trust. As observed in paragraph 36 above, this Court has recognised that a contract and a trust are not mutually exclusive concepts and that a contract may readily form the basis for the implication of a trust.<sup>77</sup>

62. For the reasons set out above, the regulatory framework within which the Covenants were issued supports the existence of an intention to create a trust over the timber and land sale proceeds.

#### Commercial context and objectives of the parties

63. One of the contextual matters that is relevant to determining whether there is an intention to create a trust is the commercial objective that the parties seek to achieve through their dealings. In this regard, this Court has emphasized that in identifying an intention to create a trust, it is necessary to have regard to "all the circumstances" of a case.<sup>78</sup> In the context of a commercial relationship, those circumstances will include the commercial (objective) purpose of a transaction.

64. Consideration of the commercial objective of the parties in determining whether there is an intention to create a trust is consistent with the approach recently reaffirmed by this Court in relation to contractual construction.<sup>79</sup> It is also consistent with the approach adopted in other jurisdictions where a trust has been inferred by reference to the commercial objectives or purposes of the parties.<sup>80</sup>

65. The commercial objective is but one of the factors that may be taken into account in determining whether an intention to create a trust exists.<sup>81</sup> It is neither determinative on its own of an intention to create a trust, nor is its absence conclusive evidence that no such intention existed.

66. While reference has sometimes been made to "commercial necessity" in determining whether there is an intention to create a trust,<sup>82</sup> there is no reason in authority or

---

<sup>76</sup> AS[24]

<sup>77</sup> *Gosper v Sawyer* (1985) 160 CLR 548 at 568-569 (Mason and Deane JJ) cited with approval in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588 at [27] (Gaudron, McHugh, Gummow and Hayne JJ) and *Legal Services Board v Gillespie Jones* (2013) 249 CLR 493 at [113] (Bell, Gageler and Keane JJ)

<sup>78</sup> *Byrnes v Kendle* (2011) 243 CLR 253 at [54] (Gummow and Hayne JJ); *Kauter v Hilton* (1953) 90 CLR 86 at 100 (Dixon CJ, Williams and Fullagar JJ)

<sup>79</sup> *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 306 ALR 25 at [35] (French CJ, Hayne, Crennan and Kiefel JJ)

<sup>80</sup> See *Don King Productions Inc v Warren* [2000] Ch 291 at 322 (Lightman J) aff'd on appeal at 339 (Morritt LJ, Aldous and Hutchison LJ agreeing). See also PW Young, C Croft, MS Smith, *On Equity* at [6.270]

<sup>81</sup> Cf. *Eslea Holdings v Butts* (1986) 6 NSWLR 175 at 189 (Samuels JA) cited with approval in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 121 (Mason CJ and Wilson J) in the context of considering "commercial necessity"

<sup>82</sup> *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 121 (Mason CJ and Wilson J).

principle why such considerations must be limited only to those circumstances where a trust is essential to give effect to the objectives of the parties. A narrow approach that limits consideration to only those circumstances where a trust is required as a matter of "necessity" is inconsistent with the orthodox approach of considering all of the circumstances of the case and of inferring an intention to create a trust where that is the appropriate means of creating or protecting an interest.<sup>83</sup> Of course, where a trust is strictly necessary, that matter may count more strongly in favour of an intention to create a trust, but any absence of such necessity does not make irrelevant the commercial context and objectives sought to be achieved by the parties.

10 67. In the present case, consideration of the commercial objective in Covenantholders purchasing Covenants supports the existence of an intention to create a trust over the timber sale proceeds and land sale proceeds.

68. The nature of the transaction into which the parties entered supports the existence of an intention to create a trust. In this regard, the purpose of the Covenants was to allow an investment in a scheme in relation to forestry plantations. Covenantholders were not, and, indeed, having regard to the statutory context set out in paragraphs 42 to 46 above, could not, have been investing in the Forestry Company or the Milling Company.

20 69. So much is made clear by the terms of the Prospectuses provided to Covenantholders, which dealt exclusively with an investment in forestry plantations. No disclosure was made of detailed financial information in relation to the Forestry Company or the Milling Company. Similarly, no disclosure was made of the risks that would attend an investment in the fortunes of those companies. If Covenantholders were investing in the Forestry Company or the Milling Company, such disclosure would have been mandatory.<sup>84</sup>

30 70. As set out in paragraphs 47 to 50 above, a trust over the timber and land sale proceeds ensured that Covenantholders were exposed only to an investment in the underlying forestry scheme, and not to the financial fortunes of the Forest Company and Milling Company (and certainly not to the fortunes of a potential acquirer of those companies decades hence).

71. In this way, the existence of a trust over the timber and land sale proceeds furthered the commercial objectives of the parties.

40 72. It is clear from the terms of the relevant documents that the Covenants were a long-term investment and that protection of the financial investment of Covenantholders was of essential importance.<sup>85</sup> The documents provided to Covenantholders referred to the "safeguard" of their investment.<sup>86</sup> This is coupled with the conservative purposes for which the investment was expressly marketed, which included "a provision for later life, or as an endowment for children".<sup>87</sup> The investment was expressly disavowed as being speculative in nature.<sup>88</sup> Moreover, the tenor of the information provided to investors was that each investor "will" receive a share of the timber proceeds. No mention was made in those documents of any potential risk to investors of insolvency of the Forest Company or the Milling Company. That lack of

<sup>83</sup> *Bahr v Nicolay (No 2)* (1988) 164 CLR 618-619 (Mason CJ and Dawson J).

<sup>84</sup> Cf. s 46 of the Companies Act, s 107 of the Companies Code

<sup>85</sup> See CA[34]-[35]

<sup>86</sup> 1984 Prospectus, pg 6

<sup>87</sup> 1984 Prospectus, pg 23

<sup>88</sup> 1984 Prospectus, pg 23

disclosure is in circumstances where, had such a risk existed, it was required to be disclosed to potential Covenantholders.<sup>89</sup>

73. If no trust was intended to have existed over the timber and land sale proceeds, Covenantholders would have been exposed to increased investment risk because they would have borne the risk of the Forest Company's or the Milling Company's insolvency. By contrast, the existence of a trust as intended lessened Covenantholders' exposure to any investment risk by giving them a direct interest in the timber and land sale proceeds.
- 10 74. The Appellants contend that "commercial necessity" requires that "a trust is indispensable in resolving an unworkable relationship" between the parties before it may be used as an aid in construing the intention of the parties.<sup>90</sup> Essentially, the Appellants contend that the relationship between the parties must be impossible in the absence of the operation of a trust.
75. Consideration of the commercial objectives of the parties only through the lens of impossibility imposes a test that is too stringent and is an inappropriately high standard for determining the intention of the parties. In particular, a test that focuses on identifying an otherwise "unworkable" relationship would elevate consideration of the parties' commercial objectives to a factor that would rarely be applicable, rather than a flexible tool to be used as part of the overall consideration of the
- 20 circumstances of a case.
76. For the reasons set out above, consideration of the commercial objectives of the parties supports the existence of an intention to create a trust in respect of the timber and land sale proceeds.

The tax position in relation to the Covenants

77. The Appellants contend that the operation of various taxation laws indicate that there was a deliberate decision by the parties not to impose trust obligations on the Forest Company or the Milling Company. The majority in the Court of Appeal considered and rejected a similar submission.<sup>91</sup>
- 30 78. At the outset, it is important to note that the effect of taxation laws on the parties can be used only as a tool for ascertaining whether there was an intention to create a trust. It is therefore only one of the factors that may be used to discern the relevant intention. The Appellants' contention that the taxation laws reveal an intention to exclude the operation of a trust should not be accepted for three reasons.
79. *First*, the Appellants' contention rests on the assumption that gaining a favourable tax treatment for Covenantholders was the primary consideration for the parties, so that they would have suffered other adverse outcomes in order to achieve that favourable treatment. The imposition of a trust necessarily reduced Covenantholders' investment risk by reducing their insolvency risk in relation to the Forest Company and Milling Company. There is no sound basis in the surrounding
- 40 factual circumstances to support an assumption that the parties intended to obtain a favourable tax treatment at the expense of increased investment risk. Rather, as noted in paragraph 72 above, to the extent that the parties' desires are reflected in the documents, they reflect a concern to avoid any investment risk to the extent possible.

<sup>89</sup> Cf. s 46 of the Companies Act, s 107 of the Companies Code

<sup>90</sup> AS[56]

<sup>91</sup> See CA[54]-[68]



80. *Secondly*, and relatedly, the Appellants do not identify any tax benefit that they say would have been lost to Covenantholders by the imposition of a trust.<sup>92</sup> Instead, the Appellants contend only that such a trust might have increased the *risk* of a benefit being lost. How the existence of any such *risk* might have been weighed against the certainty of increased investment risk is not revealed by the surrounding circumstances.
81. *Thirdly*, and in any event, the decisions on which the Appellants rely indicate that the imposition of a trust would have had no relevant taxation implications for Covenantholders.<sup>93</sup>
- 10 82. *Clowes v Commissioner of Taxation* (1954) 91 CLR 209 turned on whether investment in a plantation scheme amounted to the carrying on or carrying out a profit-making scheme or undertaking by the taxpayer or on his or her behalf.<sup>94</sup> The features of that scheme were relevantly indistinguishable from the features of the scheme in the present case.<sup>95</sup> Significantly, the Forest Company carried out (on its own behalf) the operation of the scheme by planting pine trees, cultivating the land, and logging and disposing of timber. The imposition of a trust over part of the proceeds generated by those activities did not affect the proper characterization of the scheme because it did not convert Forest Company's activities on its own behalf into activities on behalf of Covenantholders. This analysis was confirmed in *Milne v Commissioner of Taxation* (1976) 133 CLR 526, where the scheme under  
20 consideration provided for the conferral of a proprietary interest in land on investors, in circumstances where title to the land remained with the company. Barwick CJ (with whom Gibbs and Stephen JJ agreed) nevertheless confirmed that there was no involvement by investors in the profit-making scheme or undertaking of the company.<sup>96</sup>

## PART VII: NOTICE OF CONTENTION

83. Conduct by the Appellants subsequent to the issue of the relevant documents and Covenants confirms the existence of a trust over the timber sale proceeds and land sale proceeds.  
30
84. When the express creation of a trust is in issue, evidence of the subsequent conduct and statements of a person involved is admissible where proof of the existence of the trust is against the interest of that person. In *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271 at 276-277, Gummow J noted:
- In some factual situations where the existence of an express trust is in issue, it will be against the interest of the alleged trustee to admit the trust. Thus evidence of acts by him subsequent to the date of the alleged declaration of trust which tend to show the existence of the trust will be admitted as admissions against (but not for) his interest: Shepherd v Cartwright [1955] AC 431 at 445; Calverly v Green (1984) 155 CLR 242 at 262.*<sup>97</sup>
- 40

<sup>92</sup> A submission to this effect was expressly eschewed by the Appellants in the Court of Appeal: CA[57]. In this Court, the Appellants refer only to the "potential" or "considerable" risk of such exposure: AS[40].

<sup>93</sup> See CA[58]-[66]

<sup>94</sup> See *Clowes v Commissioner of Taxation* (1954) 91 CLR 209 at 217-218 (Dixon CJ). See CA[63]-[64]

<sup>95</sup> See CA[63]

<sup>96</sup> *Milne v Commissioner of Taxation* (1976) 133 CLR 526 at 535. See CA[66]

<sup>97</sup> See also HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters) at [2040].

85. Similarly, in *Kauter v Hilton* (1953) 90 CLR 86 at 99, Dixon CJ, Williams and Fullagar JJ used evidence of the subsequent conduct of a settlor in dealing with trust funds to identify an intention to create a trust in respect of those funds.
86. In August 2012, the Company Secretary for the Forest Company and the Milling Company and the General Counsel for the Gunns Group made statements referring to the holding of funds by the Milling Company in relation to Covenantholders' interests, the segregation of those funds from any other funds, and the holding of those funds as an accrual for Covenantholders:

10           *We confirm that the amount of the sale proceeds that are held by the Milling Company in relation to CH interests is approximately \$27.6M... This amount will be held separately. That is, it will be quarantined. As the proceeds are CH proceeds (the Trust documentations [sic] makes this very clear), we see no basis for any party to access this sum other than the Trustee for distribution to CHs in accordance with the Trust documentations.*<sup>98</sup>

and

20           *I confirm that the amount of the sale proceeds that are held by the Milling Company in relation to CH interests is approximately \$27.6M... As the proceeds are CH proceeds (the Trust documentations [sic] makes this very clear), we see no basis for any party to access this sum other than the Trustee for distribution to CHs in accordance with the Trust documentations... As has been the practice, all CH proceeds (from harvesting or otherwise) are held by the Milling Company as an accrual – Covenant holder distribution (either Current or Noncurrent, depending on when the distribution is due).*<sup>99</sup>

- 30           87. Other communications from the Company Secretary for the Forestry Company and Milling Company similarly recorded that the proceeds of the sale of timber and land were held by the Milling Company on trust for Covenantholders pending final calculation, auditing and payment to the Forest Company and then to the trustee for distribution to Covenantholders, that the trustee had enquired about the safeguards put in place to ensure that Covenantholders' monies were quarantined and protected for the benefit of Covenantholders, and that it was vital to ensure that obligations under the Trust Documents were met by immediately segregating the Covenantholders' portion from the proceeds of the redemption.<sup>100</sup>
88. These statements, and the conduct to which they refer, are plainly against the Appellants' interest in contending that there was no intention to create a trust over the timber and land sale proceeds.
- 40           89. It was considered unnecessary below to determine the issue of whether, and if so how, this evidence should have been taken into account.<sup>101</sup> The Respondent contends, in accordance with the principles set out above, that the evidence was admissible and relevant to the full range and totality of circumstances to be taken into account (although it was not necessary to support their Honours' conclusions).

<sup>98</sup> See affidavit of Stuart Howard sworn 29 October 2012, Exhibit SH1, pg 657. See J[89].

<sup>99</sup> Affidavit of Stuart Howard sworn 29 October 2012, Exhibit SH1, pg 661. See J[90].

<sup>100</sup> See affidavit of Tri Duc Nguyen sworn 6 December 2012 at Exhibit TN-2. See also affidavit of Richard Anicich sworn 12 December 2012 at Exhibit RHA1 and affidavit of Tri Duc Nguyen sworn 6 December 2012 at Exhibit TN-3.

<sup>101</sup> J[95], CA[68].

**PART VIII: ESTIMATE OF TIME**

91. The Respondent expects that it will require 3.5 hours to present its oral argument.

Dated: 10 October 2014

10



J R J LOCKHART SC  
T: (02) 9235 3875  
F: (02) 9221 3724  
E: lockhart@tenthfloor.org

M I BORSKY  
T: (03) 9225 8737  
F: (03) 9225 8395  
E: mborsky@vicbar.com.au

I J M AHMED  
T: (02) 8067 6911  
F: (02) 9232 1069  
E: iahmed@sixthfloor.com.au

## SCHEDULE OF ADDITIONAL LEGISLATIVE PROVISIONS

### *Real Property Act 1886 (SA)*

(as at March 1964)

- s 39 Any person having or claiming an estate or interest in any land sought to be brought under the provisions of this Act, or the attorney or agent of any such person, may, within the time by the Registrar-General or under any order of the Court for that the purpose limited, lodge a caveat with the Registrar-General, in the form of the third schedule hereto, forbidding the bringing of such land under the provisions of this Act. Every such caveat shall state the nature of the estate or interest claimed by the person lodging the same and the grounds on which such claim is founded, and no caveat shall be received unless some address within the city of Adelaide shall be given therein at which notices and proceedings relating to the caveat may be served.
- s 191 Any settlor of land or beneficiary claiming under a will or settlement, or any person claiming to be interested at law or in equity, whether under an agreement, or under an unregistered instrument, or otherwise howsoever in any land, may lodge a caveat with the Registrar-General forbidding the registration of any dealing with such land, either absolutely or unless such dealing shall be expressed to be subject to the claim of the caveator, or to any conditions conformable to law expressed therein:
- I. A caveat may be in the form or to the effect of the twelfth schedule hereto, and shall be under the hand and verified by the declaration of the caveator or his agent, and shall contain an address within the city of Adelaide to which notices may be sent or at which proceedings may be served;
  - II. Upon receipt of a caveat the Registrar General shall make a memorandum thereon of the date and hour of the receipt thereof, and shall enter a memorandum thereof in the Register Book, and shall forthwith send a notice of such caveat through the post office to the person against whose title such caveat shall have been lodged, directed to his address appearing in the Register Book;
  - III. So long as any caveat shall remain in force the Registrar-General shall not, contrary to the requirements thereof, register any dealing with the land in respect of which such caveat shall have been lodged: Provided that notwithstanding the receipt of a caveat the Registrar-General shall, subject to the other provisions of this Act, proceed with and complete the registration of any instrument affecting the said land, which instrument is produced for registration before the receipt of the caveat by the said Registrar-General
  - IV. The registered proprietor or any other person claiming estate or interest in the land may, by summons, call upon any caveator, including the Registrar-General, to attend before the Court to show cause why the caveat should not be removed; and the Court may, upon proof that the caveator has been summoned, and upon such evidence as the Court may require, make such order in the premises, either ex parte or otherwise, as shall seem just;

- V. The caveatee may, except when the caveat is lodged by a settlor, or by a beneficiary under a will or settlement, or by the Registrar-General under Part XIX of this Act, make application in writing to the Registrar-General to remove the caveat and shall in such application give an address in Adelaide to which notices or proceedings relating to the caveat may be sent, and the Registrar-General shall thereupon give twenty-one days' notice in writing to the caveator, requiring that the caveat be withdrawn;
- VI. The Registrar-General shall, after the lapse of twenty-one days from the posting of such notice to the address mentioned in the caveat, or of such extended time as may be ordered by the Court, remove the caveat from the Register Book by entering therein a memorandum that the same is discharged;
- VII. The caveator may apply to the Court, by motion or summons, for an order to extend the time beyond the twenty-one days mentioned in such notice, and notice of such motion or such summons may be served at the address given in the application of the caveatee; and the Court may, upon proof of the service of such notice of motion or summons, and upon such evidence as the Court may require, make such order in the premises, either ex parte or otherwise, as shall seem just;
- VIII. Any caveator may, by notice in writing to the Registrar-General, withdraw his caveat at any time; but the Court may, notwithstanding such withdrawal, order payment by the caveator to the caveatee or other person interested of any costs incurred by the caveatee prior to the receipt by him of notice in writing of the withdrawal of the caveat;
- IX. An entry shall be made by the Registrar General in the Register Book of any order made by the Court relating to any caveat, or of the withdrawal, lapse, or removal of any caveat;
- X. Any caveator other than the Registrar-General who shall have lodged or refused or neglected to withdraw any caveat wrongfully and without reasonable cause, shall be liable to make compensation to any person who may have sustained damage thereby, and such compensation may be recovered by action: Provided that, if proceedings shall have been taken in the Court by the caveatee or other person interested, the amount of such compensation may be assessed by the Court acting in the same proceedings; or the Court may direct an action to be brought to ascertain and recover such amount;
- XI. It shall not be lawful for any caveator other than the Registrar-General, or for anyone acting on behalf of such caveator, to lodge a further caveat relating to the same matter without the leave of the Court;
- XII. Where any caveat lodged by the Registrar-General shall be removed by the Court, such Court may order the cost sustained by the person at whose instance

such caveat was removed to be paid out of the estate on behalf of which such caveat was entered.

***Real Property Amendment Act 1969 (SA)***

- s 7 Section 39 of the principal Act is amended by striking out the passage “the city of Adelaide” and inserting in lieu thereof the passage “South Australia”.
- s 11 Section 191 of the principal Act is amended –
- (a) by striking out from paragraph I the passage “the city of Adelaide” and inserting in lieu thereof the passage “South Australia”;
  - (b) by striking out from paragraph V the word “Adelaide” and inserting in lieu thereof the passage “South Australia”.

***Real Property Amendment Act 1979 (SA)***

- s 29 Section 191 of the principal Act is amended by striking out from paragraph I the passage “A caveat may be in the form or to the effect of the twelfth schedule hereto” and inserting in lieu thereof the passage “A caveat shall be in the appropriate form”.