Double Bay Newspapers Pty Ltd v A W Holdings Pty Ltd cont.

[423] ... In the presence of these authorities McLelland J in *Person-to-Person Financial Pty Ltd v Sharari* [1984] 1 NSWLR 745 made observations which show the significance which in my opinion ought to be attributed to a failure to lodge a caveat. I respectfully share his Honour's view that the decision in *Butler v Fairclough* continues to be of authority. Priority which would otherwise exist according to time may be lost where some act or omission by the holder of the earlier interest has led the holder of a later interest to acquire his interest on the supposition that the earlier did not exist. Examples of those circumstances occur where the holder of a later interest searched the register, found no such information as lodgement of a caveat would have put there and acted in reliance on the apparent absence of any such interest. As is shown by *J & H Just (Holdings)*, where these circumstances exist they may not be the only significant circumstances, and they may be outweighed by other circumstances.

Competing equities: equitable interests and mere equities:

A distinction of great importance for competing priorities must be drawn between equitable interests and mere equities. This terminology which does not have a clear and well-settled meaning. The distinction which I make between an equity (or a mere equity) and an equitable estate (which could also be called an equitable interest) was stated with clarity by Upjohn J (as his Lordship then was) in *Westminster Bank Limited v Lee* [1956] 1 Ch 7 at 18–20. The passage which I will cite illustrates the way in which I will use terminology and distinguish an equitable estate from a mere equity. Upjohn J cited a passage from the judgment of Fry J in *Cave v Cave* (1880) 15 Ch D 637 which in turn included a citation from Lord Westbury's judgment in *Phillips v Phillips* (1861) 4 De GF & J 208; 45 ER 1164 including the passage which had close attention in judgments in *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265. Upjohn J said (at 18–20):

> Now the bank's charge is equitable, and therefore it takes subject to all equities affecting the land whether it has notice of them or not, subject only to the following qualification. The Court of Equity has been careful to distinguish between two kinds of equities, first, an equity which creates an estate or interest in the land and, secondly, an equity which falls short of that. An equitable mortgagee takes subject to all prior equitable estates or interests in the land whether he has notice of them or not, but in relation **[424]** to a mere equity it is otherwise; the defence of purchaser for value without notice may be available by the owner of an equitable estate against the owner of a prior equity. The principle was laid down by Lord Westbury LC sitting at first instance in *Phillips v Phillips*; as the relevant passages in his judgment are set out and followed in a subsequent judgment of a great master of equity, Fry J in *Cave v Cave* (1880) 15 Ch D 639, I propose to go straight to that case. He said this (at 646):
>
> > The case of *Phillips v Phillips* is the one which has been principally urged before me, and that, as being the decision of a Lord Chancellor, is binding upon me, notwithstanding the subsequent comments upon it of Lord St Leonards in his writings. That case seems to me to have laid down this principle, that, as between equitable interests, the defence will not prevail where the circumstances are such as to require that this court should determine the priorities between them. The classes of cases to which that defence will apply are other than that. Lord Westbury in the course of his judgment in that case said this (at 215): "I take it to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to and no more. If, therefore, a person seised of an equitable interest (the legal estate being outstanding), makes an assurance by way of mortgage, or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, namely, the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers claiming in equity take and are ranked according to the date of their securities, and the maxim applies, 'Qui prior est tempore potior est jure.' The first grantee is potior – that is, potentior. He has a better and superior

Double Bay Newspapers Pty Ltd v A W Holdings Pty Ltd cont.

> – because a prior – equity." His Lordship then proceeded to explain the different classes of cases in which that defence is available, and the one which has been relied upon as bringing the case of the defendants within the decision of Lord Westbury is the third class, which is this, that (1) "where there are circumstances that give rise to an equity as distinguished from an equitable estate – as, for example, an equity to set aside a deed for fraud, or to correct it for mistake – and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the court will not interfere."
>
> Now the question I have to determine is this, is the right of the parties to follow this money into the land an equitable estate or interest, or is it an equity as distinguished from an equitable estate. That is the question I have to determine.

Upjohn J recognised by saying (at 19): "... the defence of purchaser for value without notice may be available by the owner of an equitable estate against the owner of a prior equity" that equities (or mere equities) do not participate in competitions of priorities on the same basis as equitable interests; they may be defeated by equitable interests acquired for value without notice of them; yet they may prevail against equitable interests which are acquired with **[425]** notice of them. The way in which they may prevail is illustrated by the judgment of Fry J in *Bainbrigge v Browne* (1881) 18 Ch D 188 in the passage commencing (at 197) "I must therefore inquire whether the defendants Browne, Rogers, and Rock had notice or knowledge of the circumstances upon which the equity which is alleged against them arose?" to the end of the judgment. Although on the facts it was found that they did not have knowledge of the circumstances in which there was an equity to set aside a transaction for undue influence exercised over the plaintiffs by another defendant, it is evident that if Browne, Rogers and Rock had had such notice Fry J would have treated them as bound by the plaintiffs' equity.

In my respectful view the law now relevant appears more clearly in the passage which I have cited from *Westminster Bank v Lee* than from observations in *Latec Finance v Hotel Terrigal*, where the decision was complicated by factors not present here. Kitto, Taylor and Menzies JJ gave judgments in *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)*. They were each of high personal authority in this field and they did not speak with one voice; an indication of its difficulties. The distinction between equitable interests and mere equities was not the matter under decision. Their Honours' statements on the distinction were made on the path to decision and appear to express opinions which each of their Honours regarded as not open to debate. The conclusion which I base on their observations is that a mere equity, meaning a claim to have an equitable interest which can only be enforced by succeeding in some claim to a court for equitable relief (such as a claim for rectification, a claim to set aside a conveyance obtained by fraud or (as I think) a claim the enforcement of which depends on the doctrine of part performance) does not participate in competitions of priorities with equitable interests which have been acquired in good faith, for valuable consideration and in a manner which can be clearly shown without obtaining any decision of the court upholding them.

In the *Latec* case, the mere equity was the claim of a mortgagor whose land had been sold and transferred in purported exercise of a mortgagee's power of sale to recover the land from the purported purchaser on the basis that there had been a fraudulent exercise of the power of sale. The significance of the difference between the views of Kitto J and Taylor J about the standing of an equitable estate which is subject to an impediment which there is a claim in equity to remove need not be established now and may not be great. Equitable estates which have difficulties of that kind can be left out of consideration for my present purposes. In my opinion each of their Honours' views shows clearly that an equity which requires the assistance of a court if it is to be established at all does not enter into a competition of priorities with an equitable interest which was obtained for value and without notice of it. A claim which depends on success under the doctrine of part performance is in my view a mere equity of the same kind as the illustration given of a claim which depends on success in a suit for rectification.

Chan v Zacharia cont.

[205] ... Whatever way one looks at the case, it is one in which Dr Chan abused his fiduciary position as trustee and former partner to seek an advantage for himself and in which he subjected the performance of his fiduciary obligations to the pursuit of his personal interest. He holds and will hold any fruits of that abuse of fiduciary position and pursuit of personal interest upon constructive trust for those entitled to the property of the dissolved partnership.

———— ∞ ————

[4.160] **Notes & Questions**

1. Deane J (at 195) found that Drs Chan and Zacharia each occupied "two related and overlapping roles as regards the legal rights ... under the lease": as trustees of those legal rights, and as members of the partnership. This led his Honour to conclude that the rule in *Keech v Sandford* (1726) Sel Cas t King 61; 25 ER 223 (see [4.40]) had a dual operation on the facts of the case (at 203): "there is an irrebuttable presumption that any rights in respect of a new lease ... were obtained by Dr Chan by the use of his position as a trustee of the previous tenancy and there is a rebuttable presumption of fact that any such rights were obtained by use of his position as a partner in the dissolved partnership".
2. According to *Chan v Zacharia*, when do a partner's fiduciary obligations come to an end? Where is the line to be drawn if indeed fiduciary obligations can survive the termination of the partnership? Compare *Paton v Reck* [2000] 2 Qd R 619 with *Sew Hoy v Sew Hoy* [2001] 1 NZLR 391.
3. In *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 539–540 the Full Federal Court, having distinguished between "vertical" relationships (such as principal and agent) and "horizontal" relationships (such as a partnership), opined that trust and confidence is applicable more readily to "horizontal" relationships, whereas it is easier to apply the notion of a party undertaking to act solely in the interests of another where the relationship between them is "vertical"? Why is this so?
4. In *Brunninghausen v Glavanics* (1999) 46 NSWLR 538 at 555 Handley JA noted that some of the traditional fiduciary relationships (such as that between partners) "are created by the more or less free choice of the parties", in which case, and subject to contractual restraints, "the person to whom fiduciary duties are owed in these relationships is free to terminate them at any time". Other fiduciary relationships (such as that between trustee and beneficiary) "arise by operation of law or from the acts of others", in which case "[t]he parties in these relationships to whom fiduciary duties are owed did not enter into those relationships voluntarily and are not free to terminate them". Should this difference impact on the strictness of the fiduciary duty in each case? Why or why not?

Agent and principal

Duty–interest conflict

[4.165] The relationship between principal and agent has been traditionally recognised as giving rise to fiduciary duties: see Dal Pont, *Law of Agency* (3rd ed, LexisNexis Butterworths, 2014), Ch 12. An agent must therefore eschew a conflict between her or his personal interests

and the duty as fiduciary. As the word "agent" is in common usage, it is important to note that only persons meeting the legal definition of an agent are presumed to be subject to fiduciary duties. Other relationships presumed to give rise to fiduciary duties can be viewed as a subset of the agent–principal relationship (such as the relationship between lawyer and client, and that between director and company).

The relationship of real estate agent and client is fiduciary in character – the agent must not profit at the expense of her or his principal except with the informed consent of the latter. A leading case is *McKenzie v McDonald*, extracted below, although Dixon AJ did not presume the relationship in question gave rise to fiduciary duties because the agent in that case had not specifically been retained by the vendor (principal) to effect the sale of the vendor's property.

McKenzie v McDonald

[4.170] *McKenzie v McDonald* [1927] VLR 134 (Supreme Court of Victoria)

[The plaintiff, a widow, owned a small farm, but desired to live in Melbourne. She was introduced to the defendant, an estate agent, whom she informed of her desire to sell the farm at a price of £4.10.0 per acre. The defendant inspected the farm and was informed by a local property agent that the plaintiff could reasonably expect to sell the farm at that asking price. He then wrote to the plaintiff informing her that she should reduce her asking price to £4 per acre because she would be unlikely to realise a greater amount. The defendant then suggested that he buy the farm at £4 per acre (£2,300) and for the plaintiff to buy a shop and dwelling he owned in Melbourne for £2,000 (found to be worth only £1,550). The proposal was agreed and the defendant subsequently sold the farm at a profit.]

DIXON AJ ... **[145]** ... Did the defendant occupy such a position of confidence towards the plaintiff as to bring him within the equitable requirements of full disclosure and fair and open dealing? In my opinion he did. He assumed the function of advising and assisting a woman in a difficult situation in the acquisition of a residence by means of the disposal or pledging of her property. He was necessarily furnished with an intimate knowledge of her financial position, her obligations, and family needs. He proceeded to advise her upon the wisdom and practicability of raising money by mortgage, and acted for her in an effort to do so. He undertook the sale of her farm, and acquired such information as he could in relation to it, and offered his counsel as to its condition and the price she had asked and in effect should ask. In this circumstance he was, in my opinion, an agent who came within "the rule of the court; which, however, does not prevent an agent from purchasing from his principal, but only requires that he shall deal with him at arm's length, and after a full disclosure of all that he knows with respect to the property": per Sir E Sugden LC, *Murphy v O'Shea* (1845) 2 Jones & Lat 422 at 425; 69 ER 337 at 339–340 ...

No attempt has been made by the defendant to show that he made a reasonable use of the confidence placed in him, or that he furnished the plaintiff with all the knowledge which he himself possessed. On the contrary, the evidence affirmatively proves, I think, that he set out to make a bargain with her as advantageous to himself as possible, and to that end suppressed the opinion he had obtained from Lockhart, whom he knew to be well informed, that the land could be sold at £4 10s per acre, and that the tenant **[146]** might be expected to buy at that price, took no steps to find a purchaser, and wrote a misleading and untruthful report which he intended to dishearten his client and make her eager to accept the means of meeting her obligation to Mrs Nairn, which he had it in mind to propose. When he came to make that proposal I think he misstated his motives and intentions, under-estimated somewhat the value of the farm, grossly over-estimated the value of the shop, and adopted a form of expression, in dealing with the income she would receive, likely to

remedial constructive trust of this kind is that it is premised on proof of direct or indirect contributions to property, and it is unclear as to whether or not information constitutes property. Courts also speak of constructive trusteeship to mean mere personal accountability in cases in which there is no property over which to declare the trust (such as in the case of accessory liability: see [38.65]–[38.80]), but such cases are premised on, or at least require a link with, a breach of fiduciary duty. No such breach stemmed from the facts of *Franklin v Giddins*. But note the observations of Callinan J in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 315:

> The making, use and custody of the film place the parties in a relationship with each other. Once the appellant came into possession of the illegally obtained film, it necessarily did come into a relationship with the respondent. It came to hold, without giving value for it, an item of property that neither it nor anyone else could have legitimately made or acquired without the respondent's permission. There was no need for the respondent to post a sign saying it occupied and controlled its own premises. The film is an item of property that came into existence in infringement of one of the most important aspects of the respondent's proprietary rights, its right to exclusive possession of its abattoir and to control what might be done inside it. It is an item of significant value to the appellant for the reasons I have stated. It is a tangible item of property. It has a value, like any reproduction, over and above the value of a mere spoken or written description of the respondent's activities. If it were otherwise, the appellant would surely have been content to describe, as it is still free to do, without telecasting images of, what took place at the respondent's abattoir. It is an item of property that has parallels with stolen property and the appellant is in a position that can be compared with that of a receiver of stolen property. It is, in that sense, complicit.
>
> Equity should, and in my opinion is right to, indeed it has no choice but to, regard the relationship created by the possession of the appellant of a tangible item of property obtained in violation of the respondent's right of possession, and the exploitation of which would be to its detriment, and to the financial advantage of the appellant, as a relationship of a fiduciary kind and of confidence. Ir is a relationship that the appellant could immediately terminate by delivering up the film to the respondent. The circumsrances are ones to which equity should attach a constructive trust.

Is it correct to say that fiduciary duties arose in these circumstances? Could Callinan J's approach be seeu as manufacturing a fiduciary duty in order to generate the desired remedy? The latter is a course Australian judges have ordinarily eschewed: see [4.05]–[4.15]. In that constructive trusteeship in cases of, say, accessory liability, ordinarily secures personal rather than proprietary accountability, is there any need, if a fiduciary duty has been breached, to characterise information as property to generate such a remedy?

PUBLIC INTEREST DEFENCE

[6.185] English courts have recognised, as a general defence against breach of confidence, a claim that a public interest justifies the disclosure of information in a specified fashion even though iu so doing a breach of confidence is committed. This essentially involves a balancing exercise: to balance the private iuterest (that reflects a broader public interest) that confiders have their confidences protected against the public interest in those confidences being known. Although some Australiau authorities recognise such a general defence, most countenance a limited role for the public interest only in the context of disclosure of "crimes, frauds and

misdeeds" ("iniquity") and in respect of governmental information. Each is addressed in turn below, followed by an illustration of the broader English approach.

Disclosure of crimes, frauds and misdeeds

[6.190] The public interest in disclosure of crimes, fraud and misdeeds is grounded in the notion that "no private obligations can dispense with the universal one which lies on every member of society to discover every design which may be formed, contrary to the laws of society, to destroy the public welfare": *Initial Services Ltd v Putterill* [1968] 1 QB 396 at 405 per Lord Denning MR. It would be odd if equity protected the confidentiality of information recognised to be contrary to the public interest. The principle is commonly stated: "[t]here is no confidence as to the disclosure of an iniquity": *Gartside v Outram* (1856) 26 LJ Ch 113 at 114 per Wood VC. The courts have wrestled with the concept of "iniquity" in the search for a criterion that serves to distinguish between information that should, and should not, be disclosed in the public interest. *A v Hayden* typifies this struggle.

A v Hayden

[6.195] *A v Hayden* (1984) 156 CLR 532 (High Court of Australia)

[The plaintiffs, whilst in the employ of the Australian Secret Intelligence Service (ASIS), and at the direction of the Commonwealth, participated in a training exercise to free a "hostage" from a hotel room. During the exercise, criminal offences were allegedly committed. The State government requested the Commonwealth to disclose the names of the plaintiffs so that it could conduct a criminal investigation. The plaintiffs sought to restrain the Commonwealth from making this disclosure on the basis that their employment contract provided that their identity and any actions conducted in the course of training or work were to remain confidential. Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ held that the confidentiality clause was unenforceable as contrary to public policy. It was Gibbs CJ who developed the concept of iniquity.]

GIBBS CJ ... **[544]** ... The court will refuse to exercise its discretion in favour of granting equitable relief, such as an **[545]** injunction, to enforce an obligation of confidentiality when the consequence would be to prevent the disclosure of criminality which in all the circumstances it would be in the public interest to reveal ...

The concept of "iniquity" ... has been expanded to include misconduct generally ... In *Allied Mills Industries Pty Ltd v Trade Practices Commission* (1981) 34 ALR 105, Sheppard J, after a careful review of the authorities, concluded, at 141, that "the public interest in the disclosure ... of iniquity will always outweigh the public interest in the preservation of private and confidential information". That is too broad a statement, unless "iniquity" is confined to mean serious crime. The public interest does not, in every case, require the **[546]** disclosure of the fact that a criminal offence, however trivial, has been committed. And the administration of justice, although a fundamental public interest, is not an exclusive public interest ... Take an example from the present case. Suppose that the participant who entered the lift with the manager did nothing that could possibly amount to the commission of a crime unless an offence was constituted by the fact that he and the manager jostled one another in the lift. Suppose also that it was agreed that the public disclosure of the identity of that participant would be prejudicial to the security of the nation, and might have serious consequences for the participant himself and other persons. On those assumptions I should find it very hard to conclude that the hands of the participant were so sullied that he should be denied equitable relief or that because of what on the present material would appear to be, at worst, a minor and harmless assault, the national security should be put at risk and innocent persons, not themselves involved, should be made possibly to suffer.

David Securities Pty Ltd v Commonwealth Bank of Australia cont.

ordering recovery is that the defendant has been unjustly enriched, there is no justification for drawing distinctions on the basis of how the enrichment was gained, except in so far as the manner of gaining the enrichment bears upon the justice of the case ...

[376] ... For the reasons stated above, the rule precluding recovery of moneys paid under a mistake of law should be held not to form part of the law in Australia. In referring to moneys paid under a mistake of law, we intend to refer to circumstances where the plaintiff pays moneys to a recipient who is not legally entitled to receive them. It would not, for example, extend to a case where the moneys were paid under a mistaken belief that they were legally due and owing under a particular clause of a particular contract when in fact they were legally due and owing to the recipient under another clause or contract.

Having rejected the so-called traditional rule denying recovery in cases of payments made under a mistake of law, it is necessary to consider what principle should be put in its place. It would be logical to treat mistakes of law in the same way as mistakes of fact, so that there would be a prima facie entitlement to recover moneys paid when a mistake of law or fact has caused the payment. Jurisdictions which have abolished the traditional rule by legislation have done so by stating that recovery should be allowed in cases of mistake of law in the same circumstances as it would be were the mistake one of fact (Western Australia and New Zealand).

The proposition that there should be a prima facie entitlement to recover moneys paid when a mistake of fact or law has caused the payment has not been universally accepted. Two alternative formulations of the basis of recovery have been proposed: first, that the person making the mistaken payment must have supposed that he or she was legally liable to make the payment; and, secondly, that the mistake of the person making the payment must have been a fundamental one. The first of these formulations can be subjected to the same criticism levelled at the traditional rule denying recovery in cases of mistake of law, namely, that it is illogical to concentrate upon the type of mistake made when the crucial factor is that the recipient has been enriched ...

[377] ... The second alternative formulation asserts that, in addition to being causative, the mistake must also be fundamental ... The requirement that the mistake be fundamental as well as causative is not as restrictive as the liability approach considered above, but it has been suggested that the requirement is still a worthwhile precaution against a potential flood of claims and consequent insecurity of receipts. The notion of fundamentality **[378]** is, however, extremely vague and would seem to add little, if anything, to the requirement that the mistake cause the payment. If the payer has made the payment because of a mistake, his or her intention to transfer the money is vitiated and the recipient has been enriched. There is therefore no place for a further requirement that the causative mistake be fundamental; insistence upon that factor would only serve to focus attention in a non-specific way on the nature of the mistake, rather than the fact of enrichment. If a strict approach is taken towards the issue of mistake so that a plaintiff bears the burden of establishing on the balance of probabilities that a causative mistake has been made, there would also be no need to appeal to the element of fundamentality as a limiting factor. So, the payer will be entitled prima facie to recover moneys paid under a mistake if it appears that the moneys were paid by the payer in the mistaken belief that he or she was under a legal obligation to pay the moneys or that the payee was legally entitled to payment of the moneys. Such a mistake would be causative of the payment.

However, the respondent argues that a plaintiff should be required to prove that retention of the moneys by the recipient would be unjust in all the circumstances before recovery should be granted; if the circumstances of the case showed that it would not be unjust for the recipient to retain the money, the fact that the plaintiff could point to a causative mistake, whether of fact or law, would not assist the plaintiff. According to the respondent's submissions, moneys paid under a mistake of law could only be recoverable in so far as the recipient has been unjustly enriched at the expense of the payer, such that it would be unconscionable for the recipient not to give restitution to the payer. In support of this

David Securities Pty Ltd v Commonwealth Bank of Australia cont.

approach, the respondent relies, inter alia, on the recent decisions of this court in *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 and *Pavey and Matthews* (1987) 162 CLR 221.

Although this alternative approach is not greatly different from that stated above, it does have important consequences in relation to the elements of the action which the plaintiff must plead and prove. It also appears to proceed from the view that in Australian law unjust enrichment is a definitive legal principle according to its own terms and not just a concept. The two decisions of this Court just mentioned reject that approach. In *Pavey and Matthews* Deane J stated ((1987) 162 CLR at 256–257):

> To identify the basis of such actions as restitution and not genuine agreement is not to assert a judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate ... That is not to deny the importance of the concept of unjust enrichment in the law of this country. It constitutes a **[379]** unifying legal concept which explains why the law recognizes, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case.

Accordingly, it is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair or unconscionable. Instead, recovery depends upon the existence of a qualifying or vitiating factor such as mistake, duress or illegality. As this Court stated in *Westpac Banking Corporation* ((1988) 164 CLR 662 at 673):

> In other words, receipt of a payment which has been made under a fundamental mistake is one of the categories of case in which the facts give rise to a prima facie obligation to make restitution, in the sense of compensation for the benefit of unjust enrichment, to the person who has sustained the countervailing detriment.

As La Forest J stated in *Air Canada v British Columbia* (1989) 59 DLR (4th) at 192, the two species of mistake (ie fact and law) should be "considered as factors which can make an enrichment at the plaintiff's expense 'unjust' or 'unjustified'".

The respondent's submission that the appellants must independently prove "unjustness" over and above the mistake cannot therefore be sustained. The fact that the payment has been caused by a mistake is sufficient to give rise to a prima facie obligation on the part of the respondent to make restitution. Before that prima facie liability is displaced, the respondent must point to circumstances which the law recognises would make an order for restitution unjust. There can be no restitution in such circumstances because the law will not provide for recovery except when the enrichment is unjust. It follows that the recipient of a payment, which is sought to be recovered on the ground of unjust enrichment, is entitled to raise by way of answer any matter or circumstance which shows that his or her receipt (or retention) of the payment is not unjust ...

[384] ... The respondent next submits that an order for restitution would be unjust because it has changed its position. The defence of change of position has not been expressly accepted in this country ... **[385]** ... If we accept the principle that payments made under a mistake of law should be prima facie recoverable, in the same way as payments made under a mistake of fact, a defence of change of position is necessary to ensure that enrichment of the recipient of the payment is prevented only in circumstances where it would be *unjust*. This does not mean that the concept of unjust enrichment needs to shift the primary focus of its attention from the moment of enrichment. From the point of view of the person making the payment, what happens after he or she has mistakenly paid over the money is irrelevant, for it is at that moment that the defendant is unjustly enriched. However, the defence of change of position is relevant to the enrichment of the defendant precisely because its central element is that the defendant has acted to his or her detriment *on the faith of the receipt*. In the jurisdictions in which it has been accepted (Canada and the United States), the defence operates in

Commonwealth v Clark cont.

increased stress and anxiety ... would tend in favour the making good" of Mr Verwayen's assumption in that case. With respect, it would seem that her Honour's method of approach to detriment correctly envisaged that detriment is essentially a matter for prediction.

I would conclude therefore, consistently with the principles stated by the High Court in *Verwayen's* case and earlier cases, that what must be demonstrated are acts, facts or circumstances from which it can be inferred: (1) that detriment to the party claiming estoppel is more likely than not to occur if the other party is permitted to depart from the assumption relied upon; and (2) that detriment of that kind will derive from the first party's proven acts or inaction in reliance on the assumption. In my opinion those are the elements of "detriment" which must be affirmatively established by a party seeking to rely upon equitable estoppel.

In the present case that is what has been proved. I am satisfied upon the evidence which I have summarised earlier in this judgment that there would be detriment to Mr Clark of a kind which would be substantial and, for reasons which I will turn to, of a kind which would make it unconscionable not to hold the Commonwealth to those assumptions. Not only is it highly likely that, if the Commonwealth were permitted to depart from the assumptions, the respondent will have thrown away money on legal fees, medical fees and the costs of travel from Queensland to Victoria on numerous occasions for the purposes of the litigation, together with related expenses, but he has also incurred liability to the National Australia Bank for principal and interest under the loan which he took out to pay for certain of those expenses and which, though originally limited to $5,000, appears to have blown to almost twice that sum. In addition, by embarking on the litigation in reliance on the Commonwealth's implied representations, when formerly he thought it would be a waste of money to do so, he has suffered and would suffer additional stress and strain arising from the necessity to recount what clearly were unpleasant experiences in the past but for which he would be unable to recover damages for the consequential exacerbation of his psychological condition caused by the litigation process.

There is sufficient evidence that the chopping and changing resulting from the Commonwealth's alterations of attitude to the litigation which Mr Clark has been induced to undertake has already caused him severe psychological harm. As he said, and his psychiatrists confirmed, he was "devastated" on first hearing of the Commonwealth's change of heart. I have summarised in the first part of this judgment the evidence given by the psychiatrists as to his condition over the period from 1985 onwards. As I have endeavoured to explain the fact that that evidence has been given merely shows the greater likelihood that detriment will occur if in the end the Commonwealth is not held to the assumptions. His present unhappy position, the exacerbation of his condition and the confusion created in the past is of the kind which already points to the conclusion that it would be unconscionable not to hold the Commonwealth to those assumptions. But that evidence is only part of the matters which must be taken into account in determining relevant detriment. So far, by reason of the ruling of the trial judge, the Commonwealth has been held to its **[381]** representations and so the ultimate conclusion as to what would occur if the opposite conclusion were reached by this court or by the High Court is not presently known. I do not think it is necessary to examine that evidence further for I would conclude that it is abundantly clear that there is a real likelihood of far greater detriment to this plaintiff if the Commonwealth were not held to the assumptions and that additional detriment is not presently capable of measurement in monetary terms.

It may be said that the conclusion I have reached is predicated upon the failure to satisfy the promise and not the detriment which would flow from the plaintiff's reliance on the Commonwealth's implied representations. The long passage from Mason CJ's judgment, at 415, set out above, clearly makes this distinction: see also per Brennan J, at 429. It is perhaps difficult to separate these elements, especially at this stage, but the evidence here shows a plaintiff who was not otherwise likely to commence proceedings, who has been induced to commence those proceedings because of

Commonwealth v Clark cont.

assumptions which the Commonwealth induced and which have led him to take steps in the hope of gaining compensation and which indeed has led to a verdict so far in his favour. It may be difficult to distinguish between the potential detriment flowing from the failure to carry out the promise and the detriment which would flow from those acts which have been carried out in reliance upon the assumptions but in this case I am satisfied that sufficient harm would flow from the acts done in reliance on the assumptions for the test of detriment, as I have explained it, to have been clearly satisfied. It is not merely a case of denying an apparent promise; it is a case where the promise or implied representation has led to the adoption of a course of action which itself caused stress and anxiety and which, if those processes which he has been induced to put in train are denied to him, would potentially lead to even greater harm to the plaintiff by way of exacerbation of his psychological condition. The evidence accepted by the trial judge showed that already "the legal processes were ... almost always followed by a worsening of his anxiety and depressive symptoms". That merely shows what has happened so far and what would form part of the detriment which would be suffered by Mr Clark in acting in reliance on the assumptions by commencing and continuing his action.

I have no doubt therefore that detriment of the relevant kind would be suffered by Mr Clark, if the assumptions were not adhered to, and that the trial judge's conclusion in this respect was correct.

———— ⁂ ————

Notes & Questions

[10.105]

1. In light of the foregoing, what is the object of estoppel? Does it make a difference to the result whether a court adopts a broad as opposed to a narrow characterisation of detriment? What are the advantages of adopting a narrow characterisation of detriment? What are its drawbacks? See Dal Pont, *Equity and Trusts in Australia* (6th ed, Lawbook Co., 2015), [10.230], [10.235]; Robertson, "Reliance and Expectation in Estoppel Remedies" (1998) 18 LS 360; Jensen, "In Defence of the Reliance Theory of Equitable Estoppel" (2001) 22 Adel L Rev 157.

2. In any event, is the court constrained to select either the narrow or the broad view of detriment to apply in a given case? In this context, consider the words of Marks J in *Commonwealth v Clark* (at 342–343):

> It is not fruitful, in my opinion, to attempt to define "minimum equity". The relief, it seems, which may be granted is that which is "necessary to prevent unconscionable conduct and to do justice between the parties": *Verwayen's* case, per Mason CJ, at 411. It is more helpful to assume that this is its meaning which was intended by the Chief Justice, as it was the expression he adopted immediately prior to his reference to "minimum equity".

If Marks J is correct, how should a court calculate detriment? On the facts before him, his Honour found (at 343) that "the public renunciation by the Commonwealth of any reliance by it on a limitations defence not only encouraged the issue of proceedings by the respondent but also an expectation that his financial and other anxieties would be at least alleviated by unhindered access to the common law and the full compensation which it provides".

3. Should a court aim for precision in quantifying the relevant detriment? Is precision possible where the inquiry is directed chiefly to whether resiling from a representation is unconscionable? Consider the following remarks of Allsop P in *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483 at [3]:

Lake v Quinton cont.

no presumption that the testator intended an ademption pro tanto of the legacy by the settlement. I have come to the conclusion that it does not. The terms of the settlement are more favourable to the children. Moreover, the nature of the settlement is such that it can fairly be described as an anticipation of the provision which the testator father intended to make for those children. It is true that the anticipation may not have been a voluntary one in every sense of the term. I do not think that that matters. What was sought in the matrimonial causes proceedings was to be sure that the children would not be cut off by their father from provision for their advancement in life after his death. The intention was to give them security to some extent pro tanto for what they would receive under the will and codicil if it were not altered. This in my view has all the characteristics of a portion unless it can truly be said that the property given is of such a different kind from the residuary estate that the principles of ademption are not applicable.

There can be no doubt, in my opinion, that both the bequest of the shares in residue and the settlement of the shares were portions. The only question is whether the presumption that double portions were not intended has been rebutted. Equity leans strongly against double portions ... The supplying the wants of one child by an advancement is not allowed to lessen or destroy the provisions for **[123]** others. The court does not impute to a testator an intention of twice discharging his obligation to provide for a particular child ... The presumption against double portions may be rebutted by evidence of the testator's intention either from the language of the will itself or from any other circumstances directly or indirectly indicating his intention. The effect of the presumption is to put the onus of proof on the person claiming both portions ...

The question then arises as to the date at which the shares are to be valued for the purpose of applying the rule. I am of the opinion that the proper date is the date when the subject matter of the gift is taken in possession by the children, namely, the date of the testator's death. I know of no authority exactly in point but it seems to me to be in accord with principle. Usually the portion is immediate so that the date of gift or settlement is the appropriate **[124]** date ... but the reason in such a case is that the valuation takes place at the time of beneficial enjoyment. The reason is clear. When beneficial enjoyment of the gift is assumed the gift is wholly or partly within the donee's disposition, so that the only fair course is to give to the donee the benefit or the burden of changes of value from that time onward. Thus is true equality achieved among the children of a testator. On the other hand, if beneficial enjoyment is postponed until the testator's death in favour of a life interest in the testator, the whole purpose of achieving equality among the children would be lost sight of if the donee had to be satisfied with property which by the date of the testator's death might have become worthless. By a doctrine of equity designed to prevent a child sharing twice over rigidly applied according to a formula such a child might not share in his father's bounty at all. Equity can do better than that in designing its rules.

[15.65] **Notes&Questions**

1. In *Lake v Quinton*, what accounted for the different conclusion regarding ademption in the context of, on the one hand, the house and, on the other, the shares?
2. Why does the principle of ejusdem generis not apply so strictly in cases of subsequent advances by persons in loco parentis? In *Lake v Quinton* [1973] 1 NSWLR 111 at 141 Hutley JA made the following observation in this context:

> As the doctrine is founded on the presumption that parents intend equality amongst children, one would not have thought that differences in the kind of property would only be significant where one part of the property was not really capahle of being a portion. In a society where primogeniture prevailed, as it did in England in the eighteenth and nineteenth centuries, there could be no presumption of intention to achieve equality amongst children in respect of realty.

3. Though historically limited to gifts or advances made by fathers or other male persons, given that in current society mothers (and other female persons) also assume the position of a parent, the presumption has been held to apply to gifts or advances from mothers: *Re Cameron (decd)* [1999] Ch 386 at 404–405 per Lindsay J. This is almost certainly the case in Australia, given that in *Nelson v Nelson* (1995) 184 CLR 538 the High Court held that the presumption of advancement (as to which see [26.105]–[26.135]), based as it (ostensibly) is on an obligation to provide, applies between mother and child.
4. At what date should the value of the subsequent advance be brought into account for the purposes of ademption? Will this vary according to the circumstances? If so, what may influence that determination?
5. Are there any circumstances in which the rule against double portions can apply where the two gifts are in favour of different donees? Why or why not? See *Re Cameron (decd)* [1999] Ch 386 at 412–416 per Lindsay J. Note that in *Re Cameron* his Lordship opined (at 416) that "the rule against double portions is entirely judge-made and is thus, within familiar limits, capable of being reformed in the course of decided cases", and added (at 416, 417):

> [I]t is a rule which is "founded on good sense, and adapted to the ordinary transactions of mankind" (see *Pym v Lockyer* (1841) 5 My & Cr 29 at 46; 41 ER 283 at 289). But such transactions change over time. The ways in which parents in the 1990s might find it convenient to make substantial provision for their children are not necessarily those or only those which were used in earlier years. It might, for example, have once been thought to be a trivial and unnecessary benefit for a child to have his or her children's private education paid for by the grandparents. However, the relative costs of things may change and I would expect that nowadays many a parent wishing to have a child privately educated would see it as a very considerable benefit to have that education provided by a grandparent. So also the grandparent would be likely to see that as making a substantial provision for the benefit for his child as well as being of benefit to his grandchild. Indeed, a whole sector of the insurance industry has grown up to assist in the making of such provisions ... The rule is amenable to reshaping by the courts and should be reshaped to coincide with "good sense" and the "ordinary transactions of mankind" as they are from time to time seen to be.

Subsequent advance for a specific purpose

[15.70] Little J in *Re Sparrow* expressed the relevant principles governing ademption by virtue of a subsequent advance for a specific purpose.

Re Sparrow (decd)

[15.75] *Re Sparrow (decd)* [1967] VR 739 (Supreme Court of Victoria)

[The testator, by a will dated 1963, bequeathed to his wife during her widowhood one-half of the net income of his residuary estate, directing his trustees to "supplement the said one half share of nett income by drawing upon the corpus of my residuary estate to whatever extent may be necessary that my said wife during the period of her entitlement shall receive at least £5 per week hereunder" (cl 4(a)). The will also contained the testator's reasons for making no further provision for his wife (cl 7). In 1965, the wife brought divorce proceedings against the testator, which proceedings were

Trustees of Church Property of the Diocese of Newcastle v Ebbeck cont.

concerned may disregard it entirely if they wish.

[19.40]

Notes & Questions

1. In *Ebbeck* the majority (per Dixon CJ and Windeyer J) decided that the condition should be struck down in toto. Why did the court not strike down the offending part of the condition (the part relating to the religion of the son's wives) and uphold the remainder? Windeyer J justified not doing so on the basis that it was not what the testator directed. Is this a valid justification? Was the court's striking down of the condition in toto closer to what the testator intended than simply striking down the offending part?

2. According to the principles discussed in the judgment of Windeyer J in *Ebbeck*, would the following conditions be upheld: "to X provided she never marries" or "to Y provided he never marries a New Zealander"? See *Jenner v Turner* (1880) 16 Ch D 188.

3. Kitto J in *Ebbeck* dissented, reasoning as follows (at 409–410):

> The general principle that the institution of marriage is sacrosanct, and in particular that neither husband nor wife should be given an inducemenr to divorce or separation, no court, I imagine, would hesitate to maintain. But there is not, I think, any principle of law which is offended by the creation of a potential cause of dissension between spouses, unless the dissension would he likely to result in divorce or separation. Once go beyond that, and it becomes difficult to see where or on what principle a line is to be drawn ... Granted that some conditions may have in them the seeds of domestic discord ... the question must always be ... whether there is, generally speaking, a likelihood that the discord not only will arise but will lead one of the spouses to seek an end to their marriage or to their living together.

On the facts, his Honour concluded (at 410) that "[b]y this condition, a husband, even though impatient and exasperated by what he might consider his wife's stubbornness, is given no inducement to separation". What is the fundamental difference between the approach of Kitto J and that of Windeyer J?

In light of the law's increasing focus on protecting individual rights, are modern courts more or less likely to uphold conditions of the *Ebbeck* kind than in the past? What are the competing policies that the court must balance in determining whether to uphold a condition? Can the invalidity of trusts that disturb the sanctity of marriage or the family be justified in modern society? Consider in this context the remarks of Douglas J in *Ellaway v Lawson* [2006] QSC 170 at [16]:

> [C]hanging attitudes to divorce ... reflected in the far greater proportion of marriages that end in divorce and the diminished difficulty of establishing the grounds for divorce brought about by statutory changes ... may suggest that the public policy issues no longer loom so large in allowing provisions such as these to be attacked. Generally speaking, those changes may support an argument that it is no longer forbidden to provide for the possible dissolution of a marriage contract ... [Yet] there is still significant support for marriage as an institution and little to support the view that any increase in the number of divorces is socially desirable. Again, it is still necessary to establish the statutory grounds for a divorce to be granted by the courts having jurisdiction under the *Family Law Act 1975* (Cth).

In New Zealand the issue is addressed by statute. The *Human Rights Act 1993* (NZ), s 136 reads:

> A condition, whether oral or contained in a deed, will or other instrument, which restrains, or has the effect of restraining, marriage shall be void if the person or class of person whom the person subject to the condition may or may not marry is identified or defined, expressly or by implication, by reference to the colour, race, or ethnic or national origins of the person or class of person.

5. Beyond the changed legal landscape underscoring the availability and prevalence of divorce, do matters of public policy in this context also need to be considered from the perspective of the court's statutory jurisdiction to grant a spouse (and others) provision from a deceased's estate beyond any entitlement under the deceased's will? Consider the following observations by White J in *Jones v Krawczyk* (2011) 7 ASTLR 104 at [44] (in the context of the relevant New South Wales legislation):

> The likely effect of [a] condition as an inducement to divorce and separation should he assessed having regard to rhe provisions of Ch 3 of the *Succession Act 2006* (NSW) (substantially re-enacting the *Family Provision Act 1982*). If the effect of the impugned provisions is that the plaintiff has not been left with adequate provision for her proper maintenance, education and advancement in life, the plaintiff, as a child of the deceased, would be entitled to apply for an order for provision out of the estate so as to make such adequate provision (*Succession Act*, s 59). If the plaintiff receives adequate provision out of the estate for her proper maintenance, education and advancement in life, even if that provision is less than that which she would have received had she exercised a power of appointment of income or capital to herself as beneficiary, it is not likely that she would divorce and separate herself from her husband in order to obtain that power of appointment.

6. The appellant in *Ebbeck* also contended that the condition was void for uncertainty on the basis that the word "Protestant" had no precise and determinate meaning. Windeyer J rejected this contention, reasoning that (at 411) "[w]e would ... be shutting our eyes to the world around us and ignoring the ordinary use of words in Australia if we were to hold that ... the words of this will do not clearly express a definite requirement that the testator had in mind". In today's secular society, where the correlation between claiming and practising a religion is receding, how can a condition relating to religion be applied with certainty?

7. Is a condition that an annuity should cease if the beneficiary should "have social or other relationship" sufficiently certain? See *Re Jones* [1953] 1 All ER 357. How about a condition attached to a gift of income "for so long as [the beneficiary] shall not enter into a de facto relationship"? See *Re Lichtenstein* [1986] 2 NZLR 392. Is a bequest conditional upon the beneficiary "not ceasing to engage in a prayer life" uncertain?

Trusts in restraint of alienation

[19.45] It is the policy of the law not to tie up property but to promote its free alienability. For this reason, certain restraints on the power of a transferee to alienate property are void. "[I]f a testator conveys an absolute interest in property he cannot then purport to restrict alienation. To do so is repugnant to the estate": *Faucher v Tucker Estate* (1994) 109 DLR (4th) 699 at 710 per Kroft JA. In modern times an application of this principle has arisen in the context of

excludes the statutory power, in which case, the trustee can be said to be exercising only the power conferred by the trust instrument: see *Re Havill (decd)* [1968] NZLR 1116.

2. Do these provisions effectively give the court the power in proper cases to order a trustee to give reasons for what he or she has done or failed to do? See *Re Koczorowski* [1974] Qd R 177 at 183 per Dunn J.

3. In approaching applications under these provisions, it has been said that the court will not concern itself with minor or ordinary decisions that the trustee may have made – it must be shown that there is a decision of real significance in the affairs of the trust, and as to which there are real and substantial grounds for questioning its correctness before the court will embark upon an investigation of what, if any, directions ought to be given. See *Re Koczorowski* [1974] Qd R 177 at 184–185 per Dunn J; *Tierney v King* [1983] 2 Qd R 580 at 583 per Matthews J.

RIGHTS OF TRUSTEES

Right to indemnity and recoupment

[23.70] As the legal owner of the trust property, a trustee is personally liable for any debts incurred in the course of carrying out the trust. However, both at general law and under the trustee legislation, a trustee has a right of indemnity or a right of exoneration out of the trust property in respect of expenses properly incurred or expended in or about execution of the trustee's trusts or powers. The relevant provision of the trustee legislation generally reads as follows: "A trustee may reimburse himself or herself, or pay or discharge out of the trust property all expenses incurred in or about execution of the trustee's trusts or powers". See *Trustee Act 1925* (ACT), s 59(4); *Trustee Act 1925* (NSW), s 59(4); *Trustee Act 1893* (NT), s 26; *Trusts Act 1973* (Qld), s 72; *Trustee Act 1936* (SA), s 35(2); *Trustee Act 1898* (Tas), s 27(2); *Trustee Act 1958* (Vic), s 36(2); *Trustees Act 1962* (WA), s 71.

The nature of the right of indemnity was explained by the High Court in *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367:

> [A trustee] is entitled to be indemnified against those liabilities from the trust assets held by him and for the purpose of enforcing the indemnity the trustee possesses a charge or right of lien over those assets ... The charge is not capable of differential application to certain only of such assets. It applies to the whole range of trust assets in the trustee's possession except for those assets, if any, which under the terms of the trust deed the trustee is not authorised to use for the purposes of carrying on the business ... In such a case there are then two classes of persons having a beneficial interest in the trust assets: first, the [beneficiaries], those for whose benefit the business was being carried on; and secondly, the trustee in respect of his right to be indemnified out of the trust assets against personal liabilities incurred in the performance of the trust. The latter interest will be preferred to the former, so that the [beneficiaries] are not entitled to call for a distribution of trust assers which are subject to a charge in favour of the trustee until the charge has heen satisfied ... The creditors of the trustee have limited rights with respect to the trust assets. The assets may not be taken in execution ... but in the event of the trustee's bankruptcy the creditors will be subrogated to the beneficial interest enjoyed by the trustee ...

An authoritative statement in this respect is found in the High Court's decision in *Chief Commissioner of Stamp Duties v Buckle*.

Chief Commissioner of Stamp Duties (NSW) v Buckle

[23.75] *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 (High Court of Australia)

[Under the *Stamp Duties Act 1920* (NSW), s 66 (now repealed) a conveyance of property made without consideration in money or money's worth was to be charged with ad valorem stamp duty on the greater of "the unencumbered value of the property" or the amount or value of all encumbrances subject to which the property was conveyed. The issue was whether a trustee's right of indemnity or exoneration encumbered the beneficiaries' interests so as to be taken into account in valuing the property conveyed for the purposes of s 66.]

FULL COURT ... **[245]** ... In *Worrall v Harford* (1802) 8 Ves Jun 4 at 8 [32 ER 250 at 252] , 252 (ER)], Lord Eldon LC said: "It is in the nature of the office of a trustee, whether expressed in the instrument, or not, that the trust property shall reimburse him all the charges and expences [sic] incurred in the execution of the trust." The entitlement of a trustee who has borrowed money for application to trust purposes has been described as follows (*Scott on Trusts*, 4th ed (1988), vol 3A, §246):

> Where the trustee acting within his powers makes a contract with a third person in the course of the administration of the trust, although the trustee is ordinarily personally liable to the third person on the contract, he is entitled to indemnity out of the trust estate. If he has discharged the liability out of his individual property, he is entitled to reimbursement; if he has not discharged it, he is entitled to apply the trust property in discharging it, that is, he is entitled to exoneration.

[246] In aid of that right to reimbursement or exoneration for liabilities properly incurred in the administration of the trust, the trustee cannot be compelled to surrender the trust property to the beneficiaries until the claim has been satisfied. In that sense, the entitlement to reimbursement or exoneration confers a priority in the further administration of the trust. Accordingly, in an administration action, if it appears probable that the trust fund will be insufficient for the full recoupment of the trustee, the trustee is entitled to the insertion in the order for administration of a direction that there be payment in the appropriate order of priority.

Until the right to reimbursement or exoneration has been satisfied, "it is impossible to say what the trust fund is" (*Dodds v Tuke* (1884) 25 Ch D 617 at 619). The entitlement of the beneficiaries in respect of the assets held by the trustee which constitutes the "property" to which the beneficiaries are entitled in equity is to be distinguished from the assets themselves. The entitlement of the beneficiaries is confined to so much of those assets as is available after the liabilities in question have been discharged or provision has been made for them. To the extent that the assets held by the trustee are subject to their application to reimburse or exonerate the trustee, they are not "trust assets" or "trust property" in the sense that they are held solely upon trusts imposing fiduciary duties which bind the trustee in favour of the beneficiaries (*Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 370).

The entitlement to reimbursement and exoneration was identified by Lindley LJ as "the price paid by cestuis que trust for the gratuitous and onerous services of trustees" (*Re Beddoe* [1893] 1 Ch 547 at 558). The right of the trustee has been described as a first charge upon the assets vested in the trustee (*Staniar v Evans* (1886) 34 Ch D 470 at 477), as one upon the "trust assets" (*Octavo Investments* at 367), and as conferring upon the trustee an "interest in the trust property [which] amounts to a proprietary interest" (*Octavo Investments* at 370).

However, the starting point in the class of case under consideration is that the assets held by the trustee are "no longer property held solely in the interests of the beneficiaries of the trust" (*Octavo Investments* at 370). The term "trust assets" may be used to identify those held by the trustee upon **[247]** the terms of the trust, but, in respect of such assets, there exist the respective proprietary rights, in order of priority, of the trustee and the beneficiaries. The interests of the beneficiaries are not "encumbered" by the trustee's right of exoneration or reimbursement. Rather, the trustee's right to

[27.60] **Notes & Questions**

1. What is the purpose of s 197? What mechanism does it use to achieve this purpose? Cf the recommendation of the New Zealand Law Commission (*Some Problems in the Law of Trusts*, No 79, April 2002) that the *Trustee Act 1956* (NZ) be amended to provide that "[t]he directors of a trading trust will have the same obligation to the beneficiaries of the trust as they would have had if they and not the corporation had been the trustees of such trust" (p 14). In what way does this suggested approach differ from s 197 of the *Corporations Act 2001*?

2. Prior to 18 November 2005 (being the date of commencement of the *Corporations Amendment Act (No 1) 2005* (Cth), s 197 read as follows:

   (1) A person who is a director of a corporation when it incurs a liability while acting, or purporting to act, as trustee, is liable to discharge the whole or a part of the liability if the corporation:

   (a) has not, and cannot, discharge the liability or that part of it; and

   (b) is not entitled to be fully indemnified against the liability out of the trust assets.

   This is so even if the trust does not have enough assets to indemnify the trustee. The person is liable both individually and jointly with the corporation and anyone else who is liable under this subsection.

   (2) The person is not liable under subsection (1) if the person would be entitled to have been fully indemnified by 1 of the other directors against the liability had all the directors of the corporation been trustees when the liability was incurred.

In *Hanel v O'Neill* (2003) 180 FLR 360 Mullighan J interpreted the section as follows (at [11], [12]):

> It would be a strange result if s 197(1)(b) was to be interpreted so that a director could escape personal liability by reason of that provision merely by ensuring that a provision, such as Clause 21, was contained in the trust deed and could thereby operate as a shield against personal liahility, even though the director causes the trust to he without funds to avoid paying the debt. The clear intention of the section is that a director of a corporate trustee is liable to discharge the liability where it is not entitled to be fully indemnified out of the assets of the trust ...

Clause 21 read as follows: "The Trustee is entitled to be indemnified out of the assets for the time being comprising the Trust Fund against liabilities incurred by the Trustee in the execution or attempted execution of or as a consequence of the failure to exercise any of the trusts, authorities, powers and discretions hereof or by virtue of being the Trustee". Gray J remarked that (at [74]) the construction contended for by counsel for the creditor "would ensure that the director of a corporate trustee had a personal liability in circumstances where a debt was incurred and there were insufficient trust assets to meet the debt", which result his Honour considered was "not unfair nor unreasonable" because s 197 "represents an extension to the liability of the director of a trustee company". The approach of the majority in *Hanel* essentially interpreted s 197 to mean that directors of corporate trustees could be personally liable in any case where there were insufficient assets to discharge the trust liabilities and, *for that reason*, could not be indemnified out of the trust assets. Such an interpretation, in treating directors of corporate trustees essentially as guarantors of any liability entered into on

behalf of the trust, had the potential to unduly impinge upon the separate corporate personality principle. After two New South Wales judges expressed the view that *Hanel* was "plainly wrong" (see *Edwards v Attorney-General (NSW)* (2004) 60 NSWLR 667 at [142]–[152] per Young CJ in Eq; *Saffron Sun Pty Ltd v Perma-Fit Finance Pty Ltd (in liq)* (2005) 65 NSWLR 603 at [31] per Windeyer J), the position was rectified by the replacement of s 197 with the section extracted at [27.55].

3. The more general insolvent trading provision should also be noted. It may make directors personally liable to compensate creditors for debts not met by the company where, at the time the debts were incurred, the directors were aware, or a reasonable person in their circumstances would have been aware, of grounds for suspecting the company to be insolvent or likely to become insolvent by incurring the debts: *Corporations Act 2001* (Cth), ss 588G(2), 588J(1). See Mescher, "Personal Liability of Company Directors for Company Debts" (1996) 70 ALJ 837; Hii, "Directors' Duties to Prevent Insolvent Trading" (1999) 27 ABLR 224; *Elliott v Australian Securities and Investments Commission* (2004) 48 ACSR 621.

Liability of beneficiaries to indemnify trustee

[27.65] Where the trust property is insufficient to satisfy the trustee's right to indemnity, it may be possible for the trustee to proceed against the beneficiaries personally to satisfy the shortfall. McGarvie J discussed the circumstances in which beneficiaries may be so liable in *Broomhead's* case

JW Broomhead (Vic) Pty Ltd (in liq) v JW Broomhead Pty Ltd

[27.70] *JW Broomhead (Vic) Pty Ltd (in liq) v JW Broomhead Pty Ltd* [1985] VR 891 (Supreme Court of Victoria)

[A company was incorporated to conduct a construction business as trustee of a unit trust. The units in the trust were held as follows: 42% by JW Broomhead Pty Ltd (JWB); 10% by Baroy Industries Pty Ltd; 24% by Accordo Industries Pty Ltd; and 24% as joint tenants by Graham Wood and his wife Lynette Wood. The corporate trustee was subsequently wound up. The liquidator brought proceedings claiming that as the corporate trustee carried on the business for the beneficiaries they were liable to personally indemnify the liquidator to the extent that the trust assets were insufficient to satisfy the creditors of the business.]

McGARVIE J ... **[936]**... I now consider whether the plaintiff is entitled under the principle applied in *Hardoon v Belilios* [1901] AC 118 to the indemnities claimed. That general principle is that a trustee is entitled to an indemnity for liabilities properly incurred in carrying out the trust and that right extends beyond the trust property and is enforceable in equity against a beneficiary who is *sui juris* [legally competent]. The basis of the principle is that the beneficiary who gets the benefit of the trust should bear its burdens unless he can show some good reason why his trustee should bear the burdens himself. The general principle was not in issue before me. There are exceptions to the general principle and the defendants argued that their situation fell within a number of the exceptions.

Several beneficiaries

It was argued that the general principle applies only where there is a sole beneficiary. In *Hardoon v Belilios* [1901] AC 118 at 124 the Privy Council stated the law as it applies where the only beneficiary is a person *sui juris*. It was dealing with a case where there was only one beneficiary. Its statement was in accordance with the sound judicial practice of not stating a principle wider than necessary for the decision of the case. Such a statement should not be construed as though the Privy Council was

Superannuation Industry (Supervision) Act 1993 (Cth), ss 19, 29TC, 29VN, 29VO, 31, 52, 52A, 58A, 58B, 62, 101, 106, 109, 113, 133, 134, 263 cont.

(ii) prevent the corporate trustee from, or hinder the corporate trustee in, properly performing or exercising the corporate trustee's functions and powers as trustee of the entity;

(f) to exercise a reasonable degree of care and diligence for the purposes of ensuring that the corporate trustee carries out the covenants referred to in section 52.

...

(4) A covenant referred to in paragraph (2)(e) does not prevent the director from engaging or authorising persons to do acts or things on behalf of the trustee.

(5) The reference in paragraph (2)(f) to a reasonable degree of care and diligence is a reference to the degree of care and diligence that a superannuation entity director would exercise in the circumstances of the corporate trustee.

(6) A covenant referred to in subsection (2) operates as if the director were a party to the governing rules.

Service providers and investments cannot be limited to particular persons or associates

58A(1) This section does not apply to a regulated superannuation fund that is a self managed superannuation fund.

(2) A provision in the governing rules of a regulated superannuation fund is void to the extent that it specifies a person or persons (whether by name or in any other way, directly or indirectly) from whom the trustee, or one or more of the trustees, of the fund may or must acquire a service.

(3) A provision in the governing rules of a regulated superannuation fund is void to the extent that it specifies an entity or entities (whether by name or in any other way, directly or indirectly) in or through which one or more of the assets of the fund may or must be invested.

(4) A provision in the governing rules of a regulated superannuation fund is void to the extent that it specifies (whether by name or by reference to an entity) a financial product or financial products:

(a) in or through which one or more of the assets of the fund may or must be invested; or

(b) that may or must be purchased using assets of the fund; or

(c) in relation to which one or more assets of the fund may or must be used to make payments.

(5) Subsections (2), (3) and (4) do not apply if the relevant person, entity or financial product is specified in a law of the Commonwealth or of a State or Territory, or is required to be specified under such a law.

Service providers and investments

58B(1) This section applies if a trustee, or the trustees, of a regulated superannuation fund does one or more of the following:

(a) acquires a service from an entity;

(b) invests assets of the fund in or through an entity;

(c) invests assets of the fund in or through a financial product;

(d) purchases a financial product using assets of the fund;

(e) uses assets of the fund to make payments in relation to a financial product.

Superannuation Industry (Supervision) Act 1993 (Cth), ss 19, 29TC, 29VN, 29VO, 31, 52, 52A, 58A, 58B, 62, 101, 106, 109, 113, 133, 134, 263 cont.

if the trustee, or the trustees, would not breach:

(a) a provision of any of the following:

(i) this or any other Act;

(ii) a legislative instrument made under this or any other Act;

(iii) the prudential standards;

(iv) the operating standards;

(v) the governing rules of the fund; or

(b) any covenant referred to in this Part or prescribed under this Part;

in doing one or more of the things mentioned in subsection (1), the general law relating to conflict of interest does not apply to the extent that it would prohibit the trustee, or the trustees, from doing the thing.

Sole purpose test

(1) The trustee of a regulated superannuation fund must ensure that the fund is maintained solely:

(a) for one or more of the following purposes (the ***core purposes***):

(i) the provision of benefits for each member of the fund on or after the member's retirement from any business, trade, profession, vocation, calling, occupation or employment in which the member was engaged (whether the member's retirement occurred before, or occurred after, the member joined the fund);

(ii) the provision of benefits for each member of the fund on or after the member's attainment of an age not less than the age specified in the regulations;

(iii) the provision of benefits for each member of the fund on or after whichever is the earlier of:

(A) the member's retirement from any business, trade, profession, vocation, calling, occupation or employment in which the member was engaged; or

(B) the member's attainment of an age not less than the age prescribed for the purposes of subparagraph (ii);

(iv) the provision of benefits in respect of each member of the fund on or after the member's death, if:

(A) the death occurred before the member's retirement from any business, trade, profession, vocation, calling, occupation or employment in which the member was engaged; and

(B) the benefits are provided to the member's legal personal representative, to any or all of the member's dependants, or to both;

(v) the provision of benefits in respect of each member of the fund on or after the member's death, if:

(A) the death occurred before the member attained the age prescribed for the purposes of subparagraph (ii); and

(B) the benefits are provided to the member's legal personal representative, to any or all of the member's dependants, or to both; or

(b) for one or more of the core purposes and for one or more of the following purposes (the "ancillary purposes"):

Oppenheim v Tobacco Securities Trust Co Ltd cont.

of educational trusts for, as already indicated, I think the educational value and scope of the work actually to be done must have a bearing on the question of public benefit.

Finally, it seems to me that, far from settling the state of the law on this particular subject, the *Compton* test is more likely to create confusion and doubt in the case of many trusts and institutions of a character whose legal standing as charities has never been in question. I have particularly in mind gifts for the education of certain special classes such, for example, as the daughters of missionaries, the children of those professing a particular faith or accepted as ministers of a particular denomination, or those whose parents have sent them to a particular school for the earlier stages of their training. I cannot but think that in cases of this sort an analysis of the common quality binding the class to be benefited may reveal a relationship no less personal **[319]** than that existing between an employer and those in his service. Take, for instance, a trust for the provision of university education for boys coming from a particular school. The common quality binding the members of that class seems to reside in the fact that their parents or guardians all contracted for their schooling with the same establishment or body. That the school in such a case may itself be a charitable foundation seems altogether beside the point and quite insufficient to hold the *Compton* test at bay if it is well founded in law.

My Lords, counsel for the appellant and for the Attorney-General adumbrated several other tests for establishing the presence or absence of the necessary public element. I have given these my careful consideration and I do not find them any more sound or satisfactory than the *Compton* test. I therefore return to what I think was the process followed before the decision in *Compton's* case, and, for the reasons already given, I would hold the present trust charitable and allow the appeal. I have only to add that I recognise the imperfections and uncertainties of that process. They are as evident as the difficulties of finding something better. But I venture to doubt if it is in the power of the courts to resolve those difficulties satisfactorily as matters stand. It is a long cry to the age of Elizabeth and I think what is needed is a fresh start from a new statute.

[29.55]

Notes & Questions

1. Why is there a need for charitable trusts to exhibit public benefit? What is the rationale or policy underscoring the public benefit requirement? What type of restriction on the class of potential beneficiaries serves to deny public benefit? Is the *Oppenheim* approach logical? How could the trust in *Oppenheim*, which had some 110,000 ultimate beneficiaries, *not* be for the public benefit? Do you find the approach of Lord Simonds or that of Lord MacDermott more convincing? Why? What are the advantages and drawbacks of each approach? See further Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010), [3.11]–[3.13].

2. How does a court determine whether or not a purpose is for the public benefit? Is the following a useful test for making the relevant distinction?

> Courts have tended not to recognise public benefit where benefits were conferred upon a group related to or employed by one or a group of persons, perhaps as representing a privileged and closed group to which one is admitted either by birth, employment or some other privilege. On the other hand, there is an acknowledged public benefit where the beneficiaries consist of a relatively small group suffering a disability of some kind over which they have no control and which might equally be brought about by an accident of birth. (*Strathalbyn Show Jumping Club Inc v Mayes* (2001) 79 SASR 54 at 74 per Bleby J)

3. In *Latimer v Commissioner of Inland Revenue* [2004] 1 WLR 1466 at [37] Lord Millett noted that "[a]ll charitable purposes (with well known exceptions) are public purposes; but not all public purposes are charitable purposes". Why is this so?

4. What evidence can be adduced to substantiate the requisite public benefit? How much of the question of public benefit is simply the whim of a judge? Is the public benefit requirement simply a variable that assists the court in justifying its decision to uphold or upset the validity of a trust for purposes? In this context, consider the following observation of Lord Cross in *Dingle v Turner* [1972] AC 601 at 624:

> In truth the question whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question whether the trust is a charity. Much must depend on the purpose of the trust. It may well be that, on the one hand, a trust to promote some purpose, *prima facie* charitable, will constitute a charity even though the class of potential beneficiaries might fairly be called a private class and that, on the other hand, a trust to promote another purpose, also *prima facie* charitable, will not constitute a charity even though the class of potential beneficiaries might seem to some people fairly describable as a section of the public.

5. Is the difficulty raised by the *Oppenheim* test overcome by *McPhail v Doulton* [1971] AC 424 (extracted at [17.110]), in which a trust for, inter alia, employees of a company was held to be a valid non-charitable non-purpose trust fulfilling certainty of object?

6. In New Zealand, ostensibly to take into account the "unique cultural situation that exists in New Zealand" (*Report by the Working Party on Registration, Reporting and Monitoring of Charities*, 28 February 2002 (S Ashton, Chairperson), p 25), statute now provides that a purpose is charitable if it would satisfy the public benefit requirement "apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood": *Charities Act 2005* (NZ), s 5(2)(a). Although this seems to be directed to formally legitimising the status of Maori charities (cf *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195), does the statutory language oust the "public" aspect of the public benefit test as it is understood at general law?

7. In Ireland the *Charities Act 2009*, s 3(7) states that in determining whether a gift is of public benefit or not, account shall be taken of, inter alia, "any limitation imposed by the donor of the gift on the class of persons who may benefit from the gift and whether or not such limitation is justified and reasonable, having regard to the nature of the purpose of the gift", and that any such limitation "shall not be justified and reasonable if all of the intended beneficiaries of the gift or a significant number of them have a personal connection with the donor of the gift". How does this approach compare to Australian law? Is it the same, or are there differences?

8. It may not always be fatal to a charitable trust that there is a nexus between the beneficiaries based on blood, contract, family association membership or employment. It is possible to establish a charitable trust by qualifying the section of beneficiaries by means of the exercise of a preference. The effect of a preference amongst a class, providing the preference is not linked to a duty, is not fatal to the requirement of public benefit. For example, in *Re Koettgen's Will Trusts* [1954] Ch 252 the testator left money on trust for commercial education with the request that up to 75% of the fund be expended on the education of employees of a particular company. Upjohn J upheld the trust on the basis that the gift to the primary class from whom the trustees could

Re Tyrie (No 1) cont.

where it is stated that "there is no lapse where an institution which has ceased to exist was named merely as the channel for carrying out a charitable intention, or for carrying on a particular charitable work which is still being carried on although by different persons or a different institution" ...

(B) If upon the true interpretation of the will the testator intended that the gift should operate simply as an accretion to the assets of the named institution so as to become subject to whatever charitable trusts were from time to time applicable to those assets, and if after the named institution itself ceased to exist its assets remained subject to charitable trusts which were still on foot at the testator's death, then the gift will be treated as taking effect as an accretion to any property which was at his death subject to those trusts: see, for example, *Re Withall* [1932] 2 Ch 236; *Re Lucas* [1948] Ch 424; *Re Hutchinson's Will Trusts* [1953] 1 All ER 996; *Re Roberts* [1963] 1 All ER 674 ...

(C) If in cases not falling within exceptions (A) or (B), the testator is nevertheless found upon the proper interpretation of the will to have had a dominant intention to benefit work or purposes of the kind which the named institution carried out, notwithstanding that the named institution itself might no longer exist at his death, and if it is practicable as at the death of the testator to apply the gift for the benefit of work or purposes of that kind, and in a way which is in all respects consistent with any other elements of the dominant intention of the testator (or to put it in another way, consistent with any indispensable or essential elements of his charitable intention), then the gift will be so applied by means of a cy-près scheme ... But although the existence of this third exception is well recognised I have myself found no reported case where it has been applied in the case of a gift to a named charitable institution *simpliciter*: cf *Marsh v Attorney General* (1860) 2 J & H 61; 70 ER 971, where the gift was expressly directed to be applied by the named institution for a special purpose.

[29.360] **Notes & Questions**

1. How does the court determine whether a gift to an institution is charitable if the institution itself does not exist? If a specific institution is identified, will the court find difficulty construing the gift as importing any general charitable intention? Why or why not?
2. How does a court determine when a gift will lapse instead of being applied cy-près? What happens to the money or property the subject of the gift if the gift lapses?
3. Where a valid charitable trust has been in existence and carried on but subsequently becomes impossible or impracticable, the court applies the property cy-près: *Re Slevin* [1891] 2 Ch 236. Applying this principle, where the institution exists at the testator's death but ceases to exist during administration of the will and at the time of payment, what will the court do with the fund? See *Williams v Attorney-General (NSW)* (1948) 48 SR (NSW) 505.

Cy-près and statute

[29.365] Most Australian jurisdictions have introduced legislation to clarify and extend the circumstances in which charitable trusts may be varied. It follows three basic approaches. The first is found in the Queensland, South Australian, Tasmanian and Victorian statutes. The Queensland provision is extracted below by way of example. The second approach is found in the New South Wales legislation (extracted below at [29.380]). The most radical third approach is that which prevails in Western Australia (and New Zealand), where the court may effect a variation in the absence of a general charitable intention (see [29.390]), and its interpretation is discussed in *Re Twigger* (extracted at [29.395]).

Trusts Act 1973 (Qld), s 105

[29.370] *Trusts Act 1973* (Qld), s 105

105(1) Subject to subsection (2), the circumstances in which the original purposes of a charitable trust can be altered to allow the property given or part of it to be applied cy-près shall be as follows:

(a) where the original purposes, in whole or in part:

(i) have been as far as may be fulfilled; or

(ii) cannot be carried out; or

(iii) cannot be carried out according to the directions given and to the spirit of the trust;

(b) where the original purposes provide a use for part only of the property available by virtue of the trust;

(c) where the property available by virtue of the trust and other property applicable for similar purposes can be more effectively used in conjunction, and to that end can suitably, regard being had to the spirit of the trust, be made applicable to common purposes;

(d) where the original purposes were laid down by reference to an area which then was but has since ceased to be a unit for some other purpose, or by reference to a class of persons or to an area which has for any reason since ceased to be suitable, regard being had to the spirit of the trust, or to be practical in administering the trust;

(e) where the original purposes, in whole or in part, have, since they were laid down:

(i) been adequately provided for by other means; or

(ii) ceased, as being useless or harmful to the community or for other reasons, to be in law charitable; or

(iii) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the trust, regard being had to the spirit of the trust.

(2) Subsection (1) shall not affect the conditions which must be satisfied in order that property given for charitable purposes may be applied cy-près, except in so far as those conditions require a failure of the original purposes.

(3) References in subsections (1) and (2) to the original purposes of a trust shall be construed, where the application of the property given has been altered or regulated by a scheme or otherwise, as referring to the purposes for which the property is for the time being applicable.

(4) It is hereby declared that a trust for charitable purposes places a trustee under a duty, where the case permits and requires the property or some part of it to be applied cy-près, to secure its effective use for charity by taking steps to enable it to be so applied.

Active Leisure (Sports) Pty Ltd v Sportsman's Australia Ltd cont.

this court in *Queensland Industrial Steel Pty Ltd v Jensen* [1987] 2 Qd R 572. There Andrews CJ dealt specifically with the question of risk of irreparable damage. At 575–576 his Honour said:

> Some reliance was had upon a statement in *NWL Ltd v Woods* [1979] 1 WLR 1294, 1306 by Lord Diplock, where he highlighted the relevance in considering the balance of convenience of the fact that grant or refusal of an interlocutory injunction would in effect dispose of the action finally in favour of whichever party was successful in the application because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial. Of course, the facts in that case were quite different from those here but the statement is nonetheless apposite. Further at 1306 the learned Law Lord said that in assessing whether what is compendiously called the balance of convenience lies in granting or refusing interlocutory injunctions in actions between parties of undoubted solvency, the judge is engaged in weighing the respective risks that injustice may result from his deciding one way rather than the other at a stage when the evidence is incomplete. He referred to the risk that if an interlocutory injunction is refused but the plaintiff succeeds at the trial he may, in the meantime, have suffered harm and inconvenience for which an award of money can provide no adequate recompense and on the other hand the risk that if the application is granted and the plaintiff ultimately fails at the trial the defendant may suffer harm and inconvenience similarly irrecompensable; that, in effect, the question is to see whether the nature and degree of harm and inconvenience likely to be sustained in these two events by the defendant and the plaintiff respectively from the grant or refusal of an injunction are sufficiently **[313]** disproportionate to bring down by themselves the balance on one side or the other.

Importantly, Andrews CJ did not dissent from the statement of Lord Diplock in *NWL* at 1306 that the risk of irreparable harm is considered as part of the balance of convenience in cases where "the grant or refusal of an interlocutory injunction would in effect dispose of the action finally in favour of whichever party was successful in the application", which is more often than not the case of an interlocutory mandatory injunction. Moreover, Andrews CJ applied those observations to the case before the court which was an application for an interlocutory prohibitory injunction to restrain a breach of covenant. In his Honour's view the approach of the court to the question of irreparable injury, which his Honour outlined, was of general application for interlocutory injunctions of whatever nature.

> In my view the risk of irreparable injury to a party in the event of the court exercising a discretion to grant or refuse an application for an interlocutory injunction is part of the determination of the balance of convenience, and it may in some cases be an important part of it, but it is not a matter either determinative of balance of convenience or a matter to be determined outside the balancing process, as an independent consideration determinative of the exercise of the discretion.

[31.105]

Notes & Questions

1. Cooper J in *Active Leisure* indicated differences of judicial opinion on the question whether the risk of irreparable damage is part of the balance of convenience test or a separate element to be established. Do these differences of opinion have any practical effect on the outcome of cases? See *AB Hassle v Pharmacia (Aust) Pty Ltd* (1995) 33 IPR 63 at 76–77 per Ashley J; *Instyle Contract Textiles Pty Ltd v Good Environmental Choice Services Pty Ltd (No 2)* [2010] FCA 38 at [55]–[64] per Yates J. Do the following remarks by the Full Federal Court in *Samsung Electronics Co Ltd v Apple Inc* (2011) 217 FCR 238 at [62], [63] elucidate?

> The assessment of harm to the plaintiff, if there is no injunction, and the assessment of prejudice or harm to the defendant, if an injunction is granted, is at the heart of the basket of discretionary considerations which must be addressed and weighed as part of the court's consideration of the balance of convenience and justice. The question of whether damages will be an adequate remedy for the alleged infringement of the plaintiff's rights will always need to be considered when the court has an application for interlocutory injunctive relief before it. It may or may not be determinative in any given case. That question involves an assessment by the court as to whether the plaintiff would, in all material respects, be in as good a position if he were confined to his damages remedy, as he would be in if an injunction were granted ...
>
> The interaction between the court's assessment of the likely harm to the plaintiff, if no injunction is granted, and its assessment of the adequacy of damages as a remedy, will always be an important factor in the court's determination of where the balance of convenience and justice lies. To elevate these matters into a separate and antecedent inquiry as part of a requirement in every case that the plaintiff establish "irreparable injury" is, in our judgment, to adopt too rigid an approach. These matters are best left to be considered as part of the court's assessment of the balance of convenience and justice even though they will inevitably fall to be considered in most cases and will almost always be important considerations to be taken into account.

2. Does the term "irreparable", when referring to harm or injury, refer to the nature of that harm or injury, or its magnitude? See *RJR-Macdonald Inc v Canada (Attorney-General)* (1994) 111 DLR (4th) 385 at 405–406 per Sopinka and Cory JJ.

3. In *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670 at 680–682 Hoffmann J distinguished "fundamental principles" from what are sometimes described as "guidelines", that is, useful generalisations about the way to deal with the normal run of cases falling within a particular category. His Lordship considered it a fundamental principle that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense of granting an injunction to a party who fails to establish her or his right at the trial (or would fail if there was a trial) or, alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. On the other hand, Hoffmann J categorised Megarry J's reference in *Shepherd Homes Ltd v Sandham* [1971] Ch 340 at 351 to a "high degree of assurance" before granting a mandatory injunction as a guideline, rather than an independent principle. Should mandatory and prohibitory injunctions be subject to different fundamental principles, as opposed to guidelines? See Leubsdorf, "The Standard for Preliminary Injunctions" (1978) 91 Harv L Rev 519. Do the following characteristics of mandatory injunctions justify a weightier onus?

> [M]andatory injunctions carry a greater risk of injustice when granted at the interlocutory stage if the court makes the wrong decision, in the sense of granting an injunction to a party who fails to establish a right at the trial (or would fail if there was a trial). Some of the reasons for mandatory injunctions carrying a greater risk of injustice are: a mandatory order usually goes further than the preservation of the status quo by requiring a party to take some new positive step or undo what the party has done in the past; a mandatory order usually causes more waste of time and money if it turns out to have been wrongly granted than an order which merely causes delay by restraining the party from doing something which it appears at the trial the party was entitled to do; a mandatory order usually gives a party the whole of the relief which the party claims in the originating process and makes it unlikely there will be a trial; a mandatory injunction is often difficult to formulate with sufficient precision to be enforceable; and a mandatory order is usually perceived as a more intrusive exercise of

Maguire v Makaronis cont.

for" test resonates with observations in this court both before and after *Re Dawson*. The approach taken in *Re Dawson* has been cited with approval in Canada. It appears lately to have attracted the **[492]** approbation of the House of Lords (*Target Holdings Ltd v Redferns* [1996] 1 AC 421 at 438–439) ...

Fiduciaries' liability and the causation issue – the rule

Although there are some distinctions between this case and the facts in *Brickenden* I am not persuaded that the essential holding is inapplicable. I do not believe that this is the way *Brickenden* has been understood and applied, including in this country.

I acknowledge the force of the criticisms of *Brickenden*. On the other hand, a purely causative approach, which relieved a defaulting fiduciary of liability unless it were positively shown that such liability was caused by the breach of fiduciary duty would have several disadvantages. It would involve courts in the embarrassing and difficult task of untangling the multiple causes of losses which have followed an undoubted breach. Such a task would be specially difficult where further transactions and new interests had intervened. It would present the risk, although such breaches were proved, of effectively sanctioning or at least ignoring the breach by affording no relief to the beneficiary. It would undermine the *Brickenden* rule which has the advantage of simplicity and the prophylactic consequence of discouraging fiduciary default. Such default is inherent in the temptations to which people in the position of fiduciaries are commonly exposed. It is a rule which helps to fulfil the purposes of equity, which are somewhat different from those of the common law. These include, relevantly, ensuring the strict loyalty and good faith to beneficiaries, the dutiful enforcement of obligations; the deterrence of breaches by fiduciaries of their powers, and, where such occurs, the ready restitution and reinstatement of the beneficiary to the fullest extent possible.

The rule in *Brickenden* has survived a long time. It has been frequently applied, especially in recent years. It contains within its formulation words which adequately meet the need for there to be some connection to the breach so as to exclude events which are too remote. Thus it must be shown that any facts not disclosed by the **[493]** fiduciary were "material". What is forbidden is "speculation". In my view, the rule in *Brickenden* can quite comfortably co-exist with the exposition of principle by Street J in *Dawson*. Facts will not be "material" if the relevant loss would have happened if there had been no breach. Both Lord Thankerton in *Brickenden* and Street J in *Dawson* were simply saying that, once a breach of fiduciary duty is shown, the inquiry is not a simple one as to what caused subsequent losses. Equity must strive to repair the breach of fiduciary duty lest the fiduciary in default could be exonerated too easily, the beneficiary suffer a double disadvantage: the courts being seen to wink at wrong-doing.

A further, practical, reason for adhering to the rule of "strictness" in *Brickenden* (breach of fiduciary duty being shown) is that it remains open to a court, in fashioning the remedies which it is apt for equity to provide, to consider most, if not all, of the matters which would otherwise be urged as a reason for excluding relief altogether on the ground of the alleged absence of a causal connection between the breach and the loss ... The wide variety of remedies available to a court of equity following proof of a breach of fiduciary duty permit the court to exercise very large powers to fashion orders apt to a full consideration of all the facts, as they are found. These include an order of rescission, the finding of a constructive trust; the application of tracing **[494]** principles; the imposition of an account for profits; the award of equitable compensation, particularly where rescission is impossible; injunctive relief and so on. Controversially, it has been suggested that a way to avoid burdening the fiduciary in default with the consequences of the beneficiary's own unreasonable conduct is the application of an equitable principle of apportionment. The importation of notions resting on the statutory principles of contributory negligence has been criticised strongly and repeatedly. I shall say no more of it for it was not argued in this case.

Maguire v Makaronis cont.

The foregoing arguments suffice to show that adhering to *Brickenden* does not present the spectre, suggested for the appellants, that fiduciaries will be unfairly burdened with consequences that have no logical connection with their breach and which should properly be ascribed to other causes. If a breach occurs which has no real consequences, the pre-condition of the *Brickenden* formulation, in the case of a breach constituted by non-disclosure of material facts, will not be made out. The facts in question will not be classified as "material". Other remedies may lie against the fiduciary. But they will not include relief from the transaction. Where, however, the facts are "material", in the sense that, but for their existence the events which followed would not have occurred, a court exercising equitable jurisdiction is not concerned at the first stage of its inquiry to sort out issues of causation. But clearly, it will be relevant to the exercise of the discretion to provide relief at all, and if so, to determine the form of that relief, to take into account the actual impact of the fiduciary's default. Only in that way will the objects of the relief, principally restitution, be secured.

The primary judge and the Appeal Division were therefore right, in my opinion, to apply the rule in *Brickenden*. On the facts found, the non-disclosed interest of the solicitors in the mortgage was certainly material. The disastrous events which occurred would not have happened but for the breach. It resulted in the execution of a mortgage instrument which was flawed. The considerations urged to exempt the appellants from any liability are clearly relevant to the determination of the relief that is then appropriate. But they are not sufficient to take the case out of the provision of any relief at all. This is so fundamentally because, as the judges in the Supreme Court recognised, the rule in *Brickenden* upholds equitable purposes other than the mere **[495]** adjustment of the position as between the fiduciary and the beneficiary.

[34.25] Notes & Questions

1. What is the rationale for the *Brickenden* principle? Is it compelling? Why should such a principle apply as regards equitable compensation but not common law damages? See Heydon, "Causal Relationships Between a Fiduciary's Default and the Principal's Loss" (1994) 110 LQR 328.

2. How does the *Brickenden* principle relate to the concept of causation? In view of the comments of the High Court in *Maguire v Makaronis*, what is the status of the *Brickenden* principle in Australia? In *Thomas v SMP International Pty Ltd (No 4)* [2010] NSWSC 984 at [74] Pembroke J noted that "[w]here a defendant behaves dishonestly by taking positive steps to conceal his interest, it is a short step to infer – on the balance of probabilities – that the plaintiff would have acted differently if disclosure had been made. Proof of sufficient causation in such a case is unlikely to be difficult". *Brickenden* was one of those cases, as Mr Brickenden had taken positive steps to conceal his interest. It was against this backdrop, Pembroke J noted, that Lord Thankerton made his "controversial statement". Accordingly, should the *Brickenden* approach have broad application?

3. In *Swindle v Harrison* [1997] 4 All ER 705 the plaintiff, a lawyer, provided a client (the defendant) with a bridging loan of £75,000 for the purchase by the client of a hotel, the loan being secured by way of first charge on the hotel. The plaintiff failed to disclose that his firm was making a hidden profit on the loan. The main creditor, who had lent £80,000 on the security of the defendant's house, took possession of the defendant's house when she defaulted on the loan. The plaintiff claimed possession of the hotel,

Joscelyne v Nissen cont.

reside at and occupy the ground floor of the premises "or such other property as may be agreed upon in writing free of all rent and outgoings of every kind in any event". The defendant paid several of the household expenses but, following a dispute with the plaintiff, stopped doing so, contending that the agreement did not require the payment of the household expenses. The plaintiff sought rectification of the agreement to include a provision requiring payment of household expenses. The trial judge found that there was no prior concluded contract between the parties, but nonetheless acceded to the plaintiff's claim. On appeal, the defendant argued that the plaintiff could not get rectification of the written instrument save to accord with a complete antecedent concluded oral contract between the parties, which the trial judge had found did not exist. Russell LJ addressed this contention in the following extract.]

RUSSELL LJ (delivering the judgment of the court) ... **[91]** ... It is convenient to start with the case of *Mackenzie v Coulson* (1869) LR 8 Eq 368, a decision of James V-C. There a policy of insurance was in terms in accordance with the wishes of the assured and the insurers sought rectification based on an insurance slip which is not a contract; the facts are a little complicated but it would seem that the insurers sought to impute to the assured an intention (and mistake) based on knowledge of a junior clerk of an agent of the assured of the contents of the slip. We should have thought this a difficult proposition to sustain. In deciding against rectification James V-C used this language, at 375:

> Courts of Equity do not rectify contracts: they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts. But it is always necessary for a Plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified; and that such contract is inaccurately represented in the instrument. In this instance there never was any contract other than this policy which the Plaintiffs have so signed ... It is impossible for this Court to rescind or alter a contract with reference to the terms of the negotiation which preceded it.

This statement of the law supports the daughter's contention.

We turn next to the lost cause of *Lovell and Christmas Ltd v Wall* (1911) 104 LT 85 in this court. A covenant not to be concerned in the business of a provision merchant was held not broken by manufacturing and selling margarine, and it was further held that there was no case for rectification so as to provide that the covenantor should not compete with the business of the covenantee, company or its subsidiaries. We do not think that it is necessary to examine closely the facts of the case, save to say that we do not think that the facts demonstrated that such a firm accord on the relevant term had been reached in the course of negotiation as even on the father's argument is required. There is no doubt however that general statements of the law as contended for by the daughter were firmly made, albeit obiter, and made in the face of the argument that is now put forward by the father. Sir Herbert Cozens-Hardy MR said, at 88:

> The essence of rectification is to bring the document which was expressed and intended to be in pursuance of a prior agreement into harmony with that prior agreement. Indeed, it may be regarded as a branch of the doctrine of specific performance. It presupposes a prior contract, and it requires proof that, by common mistake, the final completed instrument as executed fails to give proper effect to the prior contract.

He had in the course of argument said, at 88: "Surely rectification ought to be looked upon as a branch of specific **[92]** performance subject to an exception in the case of voluntary settlements." Fletcher Moulton LJ said, at 91:

> Rectification can only come where there is a case of contract. And, as James V-C put it so well in the case which has been cited of *Mackenzie v Coulson* (1869) LR 8 Eq 368, the law does not make new contracts for parties. All it does is to rectify an incorrect expression in writing of the contract that was made. And, to my mind, it is not only clear law, but it is absolutely necessary logic, that there cannot be a rectification unless there has been a pre-existing contract which has been inaptly expressed. The consequence is that if you have to ascertain

Joscelyne v Nissen cont.

> whether there was or was not a pre-existing contract, for that purpose you must look at what happened before the contract was entered into. It is a very great mistake to think that that can lightly be done unless you can prove the existing contract. If the completed contract is badly expressed, all the communings beforehand, whether you have gone into them or not, have to be rejected by the court in deciding the nature of the instrument.

Buckley LJ expressed himself somewhat differently at 93:

> In ordering rectification the court does not rectify contracts, but what it rectifies is the erroneous expression of contracts in documents. For rectification it is not enough to set about to find out what one or even both of the parties to the contract intended. What you have got to find out is what intention was communicated by one side to the other, and with what common intention and common agreement they made their bargain.

[His Lordship then quoted from several other cases, in each case the relevant extract being *obiter*, and continued:] **[95]** ... Next we have *Crane v Hegeman-Harris Co Inc* [1939] 1 All ER 662 decided by Simonds J. The facts need not be set out. Simonds J said, at 664:

> Before I consider the facts and come to a conclusion whether the defendants are right in their contention, it is necessary to say a few words upon the principles which must guide me in this matter. I am clear that I must follow the decision of Clauson J, as he then was, in *Shipley Urban District Council v Bradford Corpn* [1936] Ch 375, the point of which is that, in order that this court may exercise its jurisdiction to rectify a written instrument, it is not necessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify. The judge held, and I respectfully concur with his reasoning and his conclusion, that it is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. If one finds that, in regard to a particular point, the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then this court has jurisdiction to rectify, although it may be that there was, until the formal instrument was executed, no concluded and binding contract between the parties. That is what the judge decided, and, as I say, with his reasoning I wholly concur, and I can add nothing to his authority in the matter, except that I would say that, if it were not so, it would be a strange thing, for the result would be that two parties binding themselves by a mistake to which each had equally contributed, by an instrument which did not express their real intention, would yet be bound by it. That is a state of affairs which I hold is not the law, and, until a higher court tells me it is the law, I shall continue to exercise the jurisdiction which Clauson J, as I think rightly, held might be entertained by this court.
>
> Secondly, I want to say this upon the principle of the jurisdiction. It is a jurisdiction which is to be exercised only upon convincing proof that the concluded instrument does not represent the common intention of the parties. That is particularly the case where one finds prolonged negotiations between the parties eventually assuming the shape of a formal instrument in which they have been advised by their respective skilled legal advisers. The assumption is very strong in such a case that the instrument does represent their real intention, **[96]** and it must be only upon proof which Lord Eldon, I think, in a somewhat picturesque phrase described as "irrefragable" that the court can act. I would rather, I think, say that the court can only act if it is satisfied beyond all reasonable doubt that the instrument does not represent their common intention, and is further satisfied as to what their common intention was. For let it be clear that it is not sufficient to show that the written instrument does not represent their common intention unless positively also one can show what their common intention was. It is the light of those principles that I must examine the facts of this somewhat complicated case.

It is we think probable that the eminent counsel concerned in the case did not really dispute that Clauson J's opinion represented the law on the relevant point; it does not appear from the judgment