HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, KIEFEL, GAGELER AND KEANE JJ

MARK KORDA & ORS ..... APPELLANTS

AND

AUSTRALIAN EXECUTOR TRUSTEES (SA)
LIMITED ..... RESPONDENT

Korda v Australian Executor Trustees (SA) Limited
[2015] HCA 6
4 March 2015
M82/2014

ORDER

1. *Appeal allowed with costs.*

2. *Set aside paragraphs 1 and 2 of the orders of the Court of Appeal of the Supreme Court of Victoria made on 10 April 2014 and, in their place, order that:*

   (a) *the appeal to that Court is allowed;*

   (b) *paragraphs 1, 2 and 3 of the orders of the Supreme Court of Victoria made on 1 March 2013 be set aside and, in their place, declare that:*

      (i) *the respondent is not entitled to any of $33,999,998 payable to the fourth appellant pursuant to the Tree Sale Agreement, being the agreement dated 15 March 2012 to which the third appellant, the fourth appellant, the fifth appellant, and the respondent, amongst others, were parties; and*

      (ii) *the respondent is not entitled to any of $53,356,000 payable to the third appellant under the Land Sale*

      Contracts, being two contracts dated 15 March 2012 to which the third appellant, amongst others, was a party; and

   (c) *the respondent pay the appellants' costs of the proceedings before the primary judge and the Court of Appeal.*

On appeal from the Supreme Court of Victoria

Representation

P D Crutchfield QC with R G Craig for the appellants (instructed by Ashurst Australia)

J R J Lockhart SC with M I Borsky and I J M Ahmed for the respondent (instructed by Sparke Helmore)

CATCHWORDS

Korda v Australian Executor Trustees (SA) Limited

Trusts - Express trust - Two companies, "the Forest Company" and "the Milling Company", operated timber plantation investment scheme - Forest Company sought investment in scheme - Forest Company entered into Trust Deed with Trustee Company as trustee for holders of interests Forest Company issued - Whether proceeds of the sale of standing timber and scheme land payable to Forest Company and Milling Company subject to express trust in favour of scheme investors.

Words and phrases - "express trust".

Companies Act 1962 (SA), s 80.
Companies (South Australia) Code, s 168.

Index of Headings

FRENCH CJ.

Introduction

1 The first and second appellants are the receivers and managers appointed pursuant to securities over two companies which had operated a timber plantation investment scheme for many decades. Australian Executor Trustees (SA) Ltd ("**AET**"), the corporate trustee of the scheme, claimed on behalf of the investors that the proceeds of a sale of standing timber and scheme land which were payable to the companies were subject to an express trust in their hands in favour of the investors, and thus not available to the receivers and managers. It succeeded in the Supreme Court of Victoria and declarations were made that it was beneficially entitled to the tree sale proceeds and a proportion of the land sale proceeds.[1] An appeal to the Court of Appeal of the Supreme Court of Victoria was dismissed by majority (Maxwell P and Osborn JA, Robson AJA dissenting).[2] The appeal to this Court is by special leave granted on 15 August 2014.

2 The transactions said to have given rise to the trust were reflected in scheme documents comprising individual "Covenants" between the plantation management company and investors, a Trust Deed establishing AET as corporate trustee, and a Tripartite Agreement between the management company, which owned or leased the land, a milling company, which was a company associated with the management company, and AET. The transactions were contractual. Nevertheless, contract provides "one of the most common bases for the establishment or implication and for the definition of a trust".[3]

3 The question whether an express trust exists must always be answered by reference to intention.[4] An express trust cannot be created unless the person or persons creating it can be taken to have intended to do so.[5] Absent, as in this case, an explicit declaration of such an intention, the court must determine whether intention is to be imputed. It does so by reference to the language of the documents or oral dealings[6] having regard to the nature of the transactions and the circumstances attending the relationship between the parties.[7]

4 For the reasons that follow, the necessary intention cannot be imputed. The scheme documentation, having regard to the commercial and regulatory context, does not support the existence of a trust or trusts of the tree and land sales proceeds in the hands of the two companies. The appeal to this Court should be allowed and orders made accordingly.

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1 *Australian Executor Trustees (SA) Ltd v Korda* (2013) 8 ASTLR 454.
2 *Korda v Australian Executor Trustees (SA) Ltd* [2014] VSCA 65.
3 *Gosper v Sawyer* (1985) 160 CLR 548 at 568-569 per Mason and Deane JJ; [1985] HCA 19 quoted with approval in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq)* (2000) 202 CLR 588 at 603 [27] per Gaudron, McHugh, Gummow and Hayne JJ; [2000] HCA 25.
4 *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491 at 502 per Gummow J.
5 *Garrett v L'Estrange* (1911) 13 CLR 430 at 434 per Griffith CJ, Barton and O'Connor JJ agreeing at 435; [1911] HCA 67.
6 *Byrnes v Kendle* (2011) 243 CLR 253 at 286 [103] per Heydon and Crennan JJ; [2011] HCA 26.
7 *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq)* (2000) 202 CLR 588 at 605 [34] per Gaudron, McHugh, Gummow and Hayne JJ citing *Walker v Corboy* (1990) 19 NSWLR 382.

Finding an express trust

5 It has rightly been observed that "many express trusts are not express at all. They are implied, or inferred, or perhaps imputed to people on the basis of their assumed intent."[8] The American Law Institute's Restatement Third, Trusts uses the term "trust" to refer to an express trust as distinct from a resulting or constructive trust and defines it as:[9]

> "a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee".

The seventh edition of *Jacobs' Law of Trusts in Australia* offers the usefully succinct observation that the creator of an express or declared trust will have used language which expresses an intention to create a trust:[10]

> "The author of the trust has meant to create a trust, and has used language which explicitly or impliedly expresses that intention, either orally or in writing. The fact that a trust was intended may even be deduced from the conduct of the parties concerned but if there is any uncertainty as to intention, there will be no trust." (footnote omitted)

In the present case, neither text nor context could elevate the propounded intention to the level of certainty.

6 The express trust found by the primary judge and the Court of Appeal was imputed by reference to the contractual arrangements comprising the investment scheme. It was not a trust created by statute of the kind recently discussed in *Wellington Capital Ltd v Australian Securities and Investments Commission*.[11] Neither party argued otherwise. And although this Court has held that a trust may arise from legislation which does not expressly so provide,[12] AET did not contend so in relation to the provisions of the *Companies Act* 1962 (SA) ("**the Companies Act**") and the *Companies (South Australia) Code* ("**the Companies Code**"), which regulated the offering of interests and prescribed interests in 1964 and 1984 respectively, and which thereby regulated the transactions comprising the scheme. Nor did this appeal require a consideration of the evolution of the use of trust relationships by statute and contract[13] and its effect on the "classic duality of legal and equitable interests in property, overlain by equity's regime of prudential management".[14]

7 The appellants did not dispute that the trust in contention, if it existed, would be an express trust. Given the need for AET to show an intention to create such a trust, it

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8 Parkinson, "Chaos in the Law of Trusts", (1991) 13 *Sydney Law Review* 227 at 231; see also Costigan, "The Classification of Trusts as Express, Resulting, and Constructive", (1914) 27 *Harvard Law Review* 437 at 438-439; Cope, *Constructive Trusts*, (1992) at 5-6.

9 Restatement Third, Trusts, §2.

10 *Jacobs' Law of Trusts in Australia*, 7th ed (2006) at 44 [306].

11 (2014) 89 ALJR 24; 314 ALR 211; [2014] HCA 43.

12 *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 165-166 per Mason CJ, Deane, Toohey and Gaudron JJ; [1993] HCA 1; *Clay v Clay* (2001) 202 CLR 410 at 427 [35]; [2001] HCA 9.

13 For an account of that evolution see D'Angelo, *Commercial Trusts*, (2014) at 38-108.

14 Bryan, "Reflections on Some Commercial Applications of the Trust", in Ramsay (ed), *Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford*, (2002) 205 at 208. See also the discussion of the "classic duality" in Edelman, "Two Fundamental Questions for the Law of Trusts", (2013) 129 *Law Quarterly Review* 66.

was not in the appellants' interests to dispute its classification. Certainty of intention is one of the three certainties necessary to an express trust — the others being certainty of subject matter[15] and certainty of object.[16] The necessary intention is imputed when made manifest by an explicit declaration as in *Byrnes v Kendle*.[17] In the case of a written text an "express trust" depends upon the construction of the written instrument. It does not arise from any inference of the law imposing a trust upon the conscience.[18]

8 The implication of intention precedes the ascertainment of an express trust. Failure to appreciate that sequence may lead to the imputation of a trust without proper consideration of intention. The ascertainment of an express trust may come to resemble the imposition of a constructive trust, which has been described by this Court as "a remedy which equity imposes regardless of actual or presumed intention".[19] Although it has been suggested that "unconscious express trusts", like constructive trusts, are "imposed by the court, in truth, in recognition of a factor affecting the conscience of the common law owner of the property",[20] ascertainment is not a vehicle for imposition.

9 The boundaries between express and constructive trusts have not always been clear[21] and have sometimes varied according to their significance for particular statutory provisions.[22] But while there may be overlap in their application, the requirement of an imputed intention marks a conceptual distinction between them.[23] Imputed intention is the focus of this appeal. AET submitted that the intention of the parties to create a trust over the timber and land sale proceeds was "manifested" in several ways, one of which was that the documents conferred upon the investors a beneficial proprietary interest in the timber and land itself. The management company held those assets on trust for the investors. In those circumstances, there was an intention to create a trust over the sale proceeds as well. The objects were the investors from time to time.

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15 *Federal Commissioner of Taxation v Clarke* (1927) 40 CLR 246 at 283-284, 286 per Higgins J; [1927] HCA 49; *Kauter v Hilton* (1953) 90 CLR 86 at 97 per Dixon CJ, Williams and Fullagar JJ; [1953] HCA 95; *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq)* (2000) 202 CLR 588 at 604 [29] per Gaudron, McHugh, Gummow and Hayne JJ; *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at 524 [116] per Bell, Gageler and Keane JJ; [2013] HCA 35.

16 *Morice v Bishop of Durham* (1804) 9 Ves Jun 399 at 404-405 [32 ER 656 at 658]; *Kinsela v Caldwell* (1975) 132 CLR 458 at 461; [1975] HCA 10; *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at 524-525 [117] per Bell, Gageler and Keane JJ. Charitable trusts are not held void for uncertainty of objects if there is a clear indication of a general purpose of charity: see *Jacobs' Law of Trusts in Australia*, 7th ed (2006) at 190 [1061].

17 (2011) 243 CLR 253.

18 *Cunningham v Foot* (1878) 3 App Cas 974 at 984 per Lord Cairns LC.

19 *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 584 [40]; [1998] HCA 59 referring to *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 148 per Mason CJ, Wilson and Deane JJ, 152 per Toohey J, 157 per Gaudron J; [1987] HCA 59.

20 Hudson, *Equity & Trusts*, 3rd ed (2003) at 961 [36.3.2].

21 Once described as a "fundamental mystery": Heydon, "Recent Developments in Constructive Trusts", (1977) 51 *Australian Law Journal* 635 at 635.

22 Matthews, "The Words Which Are Not There: A Partial History of the Constructive Trust", in Mitchell (ed), *Constructive and Resulting Trusts*, (2010) 3 especially at 6; Swadling, "The Nature of the Trust in *Rochefoucauld v Boustead*", in Mitchell (ed), *Constructive and Resulting Trusts*, (2010) 95 at 95 and 100; *Jacobs' Law of Trusts in Australia*, 7th ed (2006) at 42 [301] and 44 [306]. See also the observations of Bowen LJ in *Soar v Ashwell* [1893] 2 QB 390 at 396-397.

23 Intention may nevertheless be relevant to the imposition of a constructive trust where, for example, the expectations of one party are affected by the conduct of another, or where a trust is imposed by operation of law as an element of a wider property transaction which the parties intended to enter: Bryan, "Constructive Trusts", in Ford and Lee (eds), *Principles of the Law of Trusts*, (looseleaf service), vol 2 at [22.600].

10 In *Bahr v Nicolay [No 2]*,[24] which concerned a contract for the benefit of a third party, Mason CJ and Dawson J found that an express trust had been created.[25] Their Honours held that if the parties to a contract intended to create or protect an interest of a third party and the trust relationship is the appropriate means of creating or protecting that interest, there is no reason why in a given case an intention to create a trust should not be inferred. They referred to the observation of Fullagar J in *Wilson v Darling Island Stevedoring and Lighterage Co Ltd*[26] that it was difficult to understand the reluctance which courts had sometimes shown to infer a trust in cases involving a promise made for the benefit of a third party.[27] Again, in the context of a contract for the benefit of a third party, in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*,[28] Mason CJ and Wilson J, speaking of express trusts, stated that:

> "the courts will recognize the existence of a trust when it appears from the language of the parties, construed in its context, including the matrix of circumstances, that the parties so intended".

The courts would look to "the nature of the transaction and the circumstances, including commercial necessity, in order to infer or impute intention".[29] That approach is not limited to contracts for the benefit of a third party. In each case it is a question of fact for the courts to determine whether an intention to create a trust is sufficiently evinced.[30] The finding made by the primary judge that the arguments for the implied intention were "finely balanced"[31] should have raised a cautionary concern about the certainty of that intention.

11 The process of ascertaining whether the necessary intention to create a trust should be imputed is one of construction of the relevant text or oral dealings in their context. What was said in *Bahr v Nicolay [No 2]* should not be misconstrued. A trust is not to be inferred simply because a court thinks it is an appropriate means of protecting or creating an interest.

Factual and procedural overview

12 AET is the corporate trustee for investors in a number of timber plantations acquired, developed and managed by the third appellant, SEAS Sapfor Forests Pty Ltd ("**the Forest Company**"), over many years. The trees were felled, milled, marketed and sold by the related company SEAS Sapfor Harvesting Pty Ltd ("**the Milling Company**"), the fourth appellant. Prospectuses were issued from time to time seeking investment in the scheme. Investors, referred to as "Covenantholders", entered into agreements called "Covenants" with the Forest Company. The principal scheme documentation comprised the Prospectus, the Covenants, a Trust Deed between AET and the Forest Company made on 6 March 1964, and a Tripartite Agreement between AET, the Forest Company and the Milling Company made on the same date. The Covenantholders agreed to be bound by the provisions of those agreements.

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24 (1988) 164 CLR 604 at 619; [1988] HCA 16.
25 Wilson and Toohey JJ and Brennan J found a constructive trust: (1988) 164 CLR 604 at 638 per Wilson and Toohey JJ, 654-656 per Brennan J.
26 (1956) 95 CLR 43 at 67; [1956] HCA 8.
27 (1988) 164 CLR 604 at 618-619.
28 (1988) 165 CLR 107 at 121; [1988] HCA 44. See also at 147-148 per Deane J, 156-157 per Dawson J.
29 (1988) 165 CLR 107 at 121.
30 *Bloch v Bloch* (1981) 180 CLR 390 at 396 per Wilson J, Gibbs CJ, Murphy and Aickin JJ agreeing at 392; [1981] HCA 56.
31 (2013) 8 ASTLR 454 at 472 [75].

13 The Covenants relevant to this appeal were offered under a Prospectus issued in 1984 ("**the 1984 Prospectus**") which set out their terms. Classes of Covenants offered interests in relation to various areas covered by trees planted in 1977, 1978 and 1981. Other classes offered interests in relation to 1982 and 1983 plantings. Each of the Covenants entitled the Covenantholder to the net proceeds from the sale of the timber, after various deductions and payments to the Forest Company and the Milling Company were made. The 1982 and 1983 Covenants also entitled each Covenantholder to a payment calculated by reference to the increase in the value of the planted land between the time it was planted and the time when the timber on it was clear-felled or the Covenant ceased.

14 In 2008, Gunns Ltd, the fifth appellant, effected a takeover of the Forest Company and the Milling Company. Each company granted a fixed and floating charge over its assets to financiers of the Gunns Group.[32]

15 In March 2012, the Forest Company and the Milling Company sold trees on their plantations under a Tree Sale Agreement for approximately $34 million payable to the Milling Company. That sum was paid into a Gunns Ltd overdraft account. At about the same time, the Forest Company and other entities sold scheme land situated in South Australia and Victoria for $53.356 million payable to the Forest Company. In September 2012, the financiers appointed the first and second appellants as the joint receivers and managers of each of the companies.

16 On 30 October 2012, AET filed an originating motion in the Supreme Court of Victoria naming the appellants and others as defendants, and claiming declarations as to what, if any, right it had to the proceeds of the sale agreements. The primary judge, whose decision was upheld in the Court of Appeal, found AET to be beneficially entitled to the Tree Sale Agreement proceeds less certain expenses, and to a proportion of the land sale proceeds.

17 The Trust Deed created an express trust, in the hands of AET, of the net proceeds of the sale of milled timber and "land value" payments made by the Forest Company to AET. The principal issue for determination in the Supreme Court and in this Court was whether an intention to create a trust in favour of the Covenantholders was to be imputed in relation to the timber and land sale proceeds in the hands of the Forest Company and the Milling Company. AET sought to support the decision of the Court of Appeal in this Court on the basis of a trust of both sets of proceeds, evidently underpinned by a trust or trusts of the planted trees and the scheme land. Ambiguities in the identification of the propounded trust (or trusts) and subject matter are discussed in the joint reasons of Hayne and Kiefel JJ[33] and the reasons of Keane J.[34] The disposition of this appeal on the basis of the trust of the proceeds propounded by AET is sufficient to dispose of the variants.

18 The relevant documentation is described in detail in the reasons for judgment of Keane J.

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32 ANZ Capel Court Ltd, as security trustee for the Gunns Financing Security Trust, held registered security interests over all, or substantially all, of the assets and undertakings of each of the Gunns companies, including the Forest Company and the Milling Company: (2013) 8 ASTLR 454 at 457 [5] fn 1.

33 Reasons for Judgment at [78].

34 Reasons for Judgment at [135].

The statutory framework

19 Regulatory legislation in force in 1964 and 1984 concerning the offering and issue of "interests" (other than shares or debentures) and "prescribed interests" were to be found in the Companies Act and the Companies Code respectively. Those statutes required that a scheme such as that in issue in this appeal provide for a management company[35] and a trustee approved by the Minister.[36] There was a prohibition upon the issue or offer of a widely defined "interest"[37] or "prescribed interest"[38] absent an approved deed in force[39] which contained specified covenants.[40] The dual structure contemplated by the statutory scheme was reflected in the function of the Forest Company as the management company and AET as the trustee. It did not require that the management company be a trustee in any respect. Nor did it require that of any other company carrying out functions under the scheme. The obligations of the management company as contemplated by the legislation were in covenant and not in trust. The functions of the management company and the trustee under the legislation could not be performed by the same entity.[41]

20 The Trust Deed, the Tripartite Agreement and the Covenants defined the scheme into which the Covenantholders entered. The regulatory framework was capable of accommodating a variety of interests and arrangements, but did not mandate any trusteeship on the part of the Forest Company or the Milling Company. The absence of any such mandate was acknowledged in a discussion paper published in 1987 by the Companies and Securities Law Review Committee under the chairmanship of the late Professor Ford, which observed:[42]

> "At present the Companies Act Part IV Division 6 shows no explicit intention to treat the management company as a fiduciary."

21 Section 80(1)(d) of the Companies Act required the inclusion in the approved deed of a covenant, binding the management company and the trustee, that no monies available for investment under the deed would be invested in or lent to the management company or to the trustee. AET submitted that in the absence of a trust over the timber and land sale proceeds, the investment monies contributed by the Covenantholders would have been used to purchase assets that became part of the assets of the Forest Company or the Milling Company. Any amounts realised on their sale would also form part of the assets of those companies. That would make the Covenantholders direct stakeholders in the Forest Company and the Milling Company, and expose them to those companies' financial fortunes. On that basis it was submitted that the statutory framework supported the existence of an intention to create a trust in respect of the timber and land sale proceeds. However, as the appellants pointed out in their reply, the effect of that submission was that any investment scheme which did not ensure that investment monies were the subject

35 Companies Act, s 76(1), definition of "management company"; Companies Code, s 164(1), definition of "management company".
36 Companies Act, s 77(b); Companies Code, s 165(1)(b).
37 Companies Act, s 76(1), definition of "interest".
38 Companies Code, s 5(1), definition of "prescribed interest".
39 Companies Act, s 83(1); Companies Code, s 171(1).
40 Companies Act, ss 78(2), 80(1); Companies Regulations (SA) (as at 6 March 1964, "1964 Regulations"), reg 12(1); Companies Code, ss 166(2), 168(1); Companies (South Australia) Regulations (as at 1984, "1984 Regulations"), reg 50, Sched 5.
41 See, for example, Companies Act, ss 80, 87; Companies Code, ss 168, 175.
42 Companies and Securities Law Review Committee, *Prescribed Interests*, Discussion Paper No 6, (1987) at 104.

of additional or broader trust protection during the life of the scheme would be in breach of the statutory regime.

22 To the extent that the statutory framework applicable in 1964 and 1984 required a dual structure involving a management company and either a trustee or an investors' representative acting as trustee, that structure did not impress upon the assets of the scheme or their proceeds in the hands of the Forest Company or the Milling Company any trust in favour of the Covenantholders. Nor was it otherwise supportive of the implication, from the scheme documentation, of the intention necessary to the existence of an express trust. The question for determination remains whether the arrangements between the Forest Company and the Milling Company on the one hand, and the Covenantholders on the other, can be characterised on the application of general principles as having given rise to a trustee and beneficiary relationship between them in connection with the planted trees and land and the proceeds of their sale.

The 1984 Prospectus

23 The 1984 Prospectus, as a marketing and informational document, did not define the rights and obligations of the parties. It was not a transactional document incorporating substantive provisions to which a relevant intention might be attached. It nevertheless formed part of the context in which the question of the intention underlying the transactional documents fell to be ascertained.

24 The Prospectus offered each prospective investor a Covenant providing him or her with "an interest in a Radiata Pine plantation entitling you to the net timber proceeds apportionable to your interest in the particular planting year for which you apply".[43] AET relied upon that language, and similar phraseology in the Covenants, for the proposition that each of the Covenantholders was entitled to a proportion of the actual timber and land sale proceeds. That characterisation of the interest was said to support the implication of a clear intention to create a trust of the proceeds. That submission should not be accepted. There is no reason to suppose that the concept of "interest" as used in the Prospectus, which was a marketing document, was to be understood as referring to a proprietary interest in land or trees. The term "interest" was defined far more widely in the Companies Act,[44] which was in force when the Trust Deed and the Tripartite Agreement were made in 1964. So too was the term "prescribed interest" in the Companies Code as it stood when the 1984 Prospectus was published.[45] The nature of the "interests" acquired by the Covenantholders was determined by the substantive provisions of the Covenants read in the light of the Tripartite Agreement and the Trust Deed. As appears from those provisions, and as Robson AJA observed, the Covenantholders had a contractual right to a numerical proportion of the output from a much larger area of land than was referable to the individual Covenants.[46] That contractual right did not translate into a proprietary interest in the land or the trees.

25 The 1984 Prospectus also stated that the 1982 and subsequent Covenants provided for the Covenantholder "an interest in the value of land".[47] That was not an interest

43 1984 Prospectus at 3.
44 Companies Act, s 76(1), definition of "interest".
45 Companies Code, s 5(1), definition of "prescribed interest".
46 [2014] VSCA 65 at [257].
47 1984 Prospectus at 3.

in the land. The offer provided for payment to Covenantholders of a sum assessed by independent valuation as the increase per Covenant area in the value of the land upon which the relevant Covenant was issued between the year of planting and the year in which the land was clear-felled.[48] That provision was relied upon by AET but, as appears later in these reasons dealing with the Covenants, did not indicate an intention to create a trust of interests in the land in the hands of the Forest Company.

26 The taxation benefit of investment in the scheme was highlighted under the headline "Tax Free Timber Proceeds".[49] The Prospectus referred to a decision of this Court to support the proposition that distributions from the Forest Company to Covenantholders were not assessable income of the Covenantholders under the *Income Tax Assessment Act* 1936 (Cth). That decision, *Milne v Federal Commissioner of Taxation*,[50] followed the decision of *Clowes v Federal Commissioner of Taxation*,[51] which antedated the Trust Deed and the Tripartite Agreement.

27 In *Clowes*, this Court held[52] that the proceeds of forestry "bonds" were not income in the sense of "profit arising ... from the carrying on or carrying out of any profit-making undertaking or scheme" within the meaning of s 26(a) of the *Income Tax Assessment Act*. As Dixon CJ characterised the scheme:[53]

> "the taxpayer did nothing but lay out his money on the faith of the contract and await the result. The company was in no sense his agent. The money which he paid in pursuance of the contracts became part of the general funds of the company. Its obligations to him were simply contractual."

The facts in *Milne* were relevantly indistinguishable.[54] Barwick CJ, with whom Gibbs and Stephen JJ agreed, also rejected a submission that the power of the trustee in *Milne* to direct realisation of the plantation lands involved the bondholders in any participation in the management company's business.[55] The business was for the sale of the company's covenants under the bonds. However, that conclusion was said by Barwick CJ to be unaffected by whether or not the bonds effected the acquisition of an interest in land.[56] As appears below, AET relied upon that observation.

28 The appellants submitted that the propounded trust was inconsistent with the purpose of securing a taxation benefit, which was an obvious selling point for the scheme. They argued, as Robson AJA found in the Court of Appeal,[57] that the trust would have exposed the Covenantholders to a risk of characterisation as participants in a common profit-making undertaking or scheme with the Forest Company and the Milling Company. That risk was said to arise from the dissenting judgment of Webb J in *Clowes*. Webb J held that the taxpayer/investor had acquired "not choses in action but interests in particular timber in respect of which he was paid, on the

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48 1984 Prospectus at 4.
49 1984 Prospectus at 23.
50 (1976) 133 CLR 526; [1976] HCA 2.
51 (1954) 91 CLR 209; [1954] HCA 10.
52 The Court of four was equally divided so that the opinion of Dixon CJ pursuant to s 23(2)(b) of the *Judiciary Act* 1903 (Cth) prevailed. Kitto J agreed with Dixon CJ. Webb and Taylor JJ dissented.
53 (1954) 91 CLR 209 at 217.
54 *Milne v Federal Commissioner of Taxation* (1976) 133 CLR 526 at 532 per Barwick CJ.
55 (1976) 133 CLR 526 at 534.
56 (1976) 133 CLR 526 at 535.
57 [2014] VSCA 65 at [260].

basis of his lot-holding".[58] From that premise, his Honour concluded that the taxpayer's interest established a relationship between the proceeds and their source which negated their treatment as a capital receipt.[59] The risk was that a similar characterisation of the Covenantholders' interest might have been available if they had a beneficial interest in the timber and land.

29 The existence of a significant taxation risk arising from the propounded trust would have been at least plausible in 1964, when the Trust Deed and the Tripartite Agreement were made.[60] To the extent that the imputed intention necessary to the existence of the propounded trust depended upon those documents, it was not supported by and was to some degree at odds with the promise of a taxation benefit in the 1984 Prospectus. That consideration cannot be discounted on the basis that the propounded trust would serve the purpose of protecting the Covenantholders against investment risk in the event of the insolvency of the Forest Company and/or the Milling Company. As appears later in these reasons, that purpose cannot be attributed to the parties. The taxation benefit offered by the Prospectus was not determinative but tended against the imputation of an intention to create the propounded trust.

The Covenants

30 Each Covenant stated that it was issued subject to the provisions of the Trust Deed and the Tripartite Agreement and that the Covenantholder agreed to be bound by those provisions.[61]

31 The Covenantholder would receive "his due proportion of the benefits obtained from the sale of the timber harvested by the Milling Company from the planting in respect whereof his Covenant is issued in accordance with the terms and conditions set out in the Covenant".[62] Each Covenant set out the way in which money received by the Milling Company from the sale of standing timber or timber felled, cut, milled, manufactured and sold pursuant to the Tripartite Agreement was to be applied.[63] After recoupment of its expenses and a fee,[64] the balance of the proceeds was to be paid to the Forest Company, which, after further deductions including a commission,[65] was required to:[66]

> "pay the balance to the Trustee for the Covenantholders for distribution by the Trustee amongst the Covenantholders entitled thereto in accordance with their respective holdings".

32 The 1982 and 1983 Covenants contained the "land interest" provisions promised in the Prospectus. The obligation on the Forest Company to pay to the Covenantholders the appreciation in the value of the land covered by their Covenants was conditional upon one or other of the events that the timber on the land was clear-felled

58 (1954) 91 CLR 209 at 219.
59 (1954) 91 CLR 209 at 219.
60 That risk was unaffected by the later observation by Barwick CJ in *Milne* that the characterisation of the management company's business was unaffected by whether the bondholders acquired an interest in land.
61 1977, 1978 and 1981 Covenants, cl 4; 1982 and 1983 Covenants, cl 4.
62 1977, 1978 and 1981 Covenants, cl 4; 1982 and 1983 Covenants, cl 4.
63 1977, 1978 and 1981 Covenants, cl 4; 1982 and 1983 Covenants, cl 4.
64 12 per cent per annum on the issued and fully paid capital of the Milling Company.
65 5 per cent of the sum paid to it by the Milling Company.
66 1977, 1978 and 1981 Covenants, cl 4(e); 1982 and 1983 Covenants, cl 4(e).

or that the land ceased to be subject to the Covenant because of fire damage to the timber or otherwise.[67] The obligation to make those payments was not referable to the sale of the land. It was not defined in such a way as to support the inference that the Covenantholder had a beneficial interest in the land. As Robson AJA put it in his dissenting judgment in the Court of Appeal:[68]

> "[t]he invitation [to invest] made it clear that the interest was in the value of the land, and not in the land itself".

Moreover, the trust found to exist by the Supreme Court was applicable to Covenantholders in respect of the 1977, 1978 and 1981 planting years,[69] for which no land interest provisions were made. It was not dependent upon the "land interest" provisions for the 1982 and 1983 planting years. Those provisions do not support the existence of the trust.

33 The Forest Company undertook, "[i]n order to adequately secure its due compliance with the terms" of the Covenant, that, until the timber was cut and disposed of, it would not sell the land of which it was the proprietor nor, without the consent of AET, encumber such land.[70] It made a similar covenant with respect to its interest in leased land and promised that it would not, without the consent of AET, encumber the timber planted on the land.[71] It also undertook to deposit the Certificates of Title and leases of the relevant land in a safe deposit jointly held by itself and AET. AET was to register a caveat in respect of such land prohibiting any dealing with it except in the interests of the Covenantholders in relation to such lands.[72] That provision was reflected in the Trust Deed. Its significance is discussed in the next section of these reasons.

The Trust Deed

34 The Trust Deed created an express trust in the hands of AET of the proceeds of timber sales paid to AET in accordance with the scheme. It also imposed contractual obligations as between the Forest Company and AET. Under cl 1 of the Trust Deed, the Forest Company appointed AET and AET covenanted and agreed:

> "to be and act as Trustee for the Covenantholders for the time being upon and subject to the trusts terms covenants and conditions hereinafter contained".

The Forest Company undertook to perform its obligations under the Covenants, which included planting trees on allocated areas of land, and to prepare plans of the planted and allocated areas.[73] It also agreed to plant a reserve area[74] as a provision against timber losses[75] and to issue Covenants to be held by AET on behalf of the Forest Company in relation to those reserve areas.[76]

35 The undertakings by the Forest Company, made in the Covenants, in relation to the encumbrance or disposition of the land or timber and the deposit of Certificates of

67 1982 and 1983 Covenants, cl 1.
68 [2014] VSCA 65 at [272].
69 1977, 1978 and 1981 Covenants, cl 1.
70 1977, 1978 and 1981 Covenants, cl 6(i); 1982 and 1983 Covenants, cl 8(i).
71 1977, 1978 and 1981 Covenants, cl 6(ii)-(iii); 1982 and 1983 Covenants, cl 8(ii)-(iii).
72 1977, 1978 and 1981 Covenants, cl 6; 1982 and 1983 Covenants, cl 8.
73 Trust Deed, cl 2(a)-(b).
74 5 per cent in excess of the area covered by the Covenants.
75 Trust Deed, cl 2(c)(i).
76 Trust Deed, cl 2(c)(ii).

Title and leases in a joint safe deposit with AET, were replicated in the Trust Deed.[77] So too was the provision for AET to register a caveat over the titles to the relevant land.[78] AET submitted that those provisions reflected a clear intention[79] to confer on Covenantholders a proprietary interest and thereby an intention to create a trust over the land. As the appellants pointed out, however, the prefatory words of the provisions in the Covenants and the Trust Deed indicated that their purpose was to secure the Forest Company's compliance with its contractual obligations. AET, they argued, held a "security interest" in the land and trees which was consistent with the Forest Company's continuing beneficial ownership. The precise nature of the "security interest" was not explained in argument. It seems to have been used in the sense of anything that entitles an obligee to resort to a fund or property to ensure performance of an obligation.[80]

36 The creation of a security interest does not import the creation of a trust. An apposite distinction was made between the grant of a charge and the creation of a trust in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq)*.[81] The caveat provision rested upon the premise that the transactional arrangements gave rise to a caveatable interest. Whether they did is debatable. In any event, the provision does not establish its premise. The question of estoppel aside, a common assumption about the legal effect of a transaction does not necessarily support an inference that it had that legal effect.[82] Having regard to their context, the caveat provisions and the prohibitions on alienation and encumbrance which appeared in the Covenants and the Trust Deed were not indicative of an intention to create a trust over the land or trees or their proceeds in the hands of the Forest Company or the Milling Company.

37 The Forest Company was required, by the Trust Deed, to make payments to a Maintenance Fund controlled by AET[83] in accounts established in respect of each plantation. Subject to compliance with its obligations, the Forest Company was entitled to be repaid annually a percentage of each Maintenance Fund account until it had received one hundred per cent thereof.[84] The net aggregate income derived from the investment of the Maintenance Fund by AET was payable to the Forest Company.[85] The appellants submitted that that provision was not consistent with the imposition of fiduciary obligations upon the Forest Company. That submission should not be accepted. The fact that a proportion of a sum of money from which the subject of a trust is to be drawn is used for another purpose does not negate the existence of a trust.[86]

38 The Forest Company was also required to indemnify AET and the Covenantholders

77 Trust Deed, cl 2(d).
78 Trust Deed, cl 2(d)(v).
79 Referring to s 191 of the *Real Property Act* 1886 (SA), which provides for lodgement of a caveat by a "settlor of land or beneficiary claiming under a will or settlement, or any person claiming to be interested at law or in equity, whether under an agreement, or under an unregistered instrument, or otherwise howsoever in any land".
80 See the discussion in *General Motors Acceptance Corporation Australia v Southbank Traders Pty Ltd* (2007) 227 CLR 305 at 312-313 [20]-[21]; [2007] HCA 19.
81 (2000) 202 CLR 588 at 595-596 [5]-[6] per Gaudron, McHugh, Gummow and Hayne JJ.
82 *Southern Cross Assurance Co Ltd v Australian Provincial Assurance Association Ltd* (1935) 53 CLR 618 at 636 per Rich, Dixon, Evatt and McTiernan JJ; [1935] HCA 56; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352 per Mason J; [1982] HCA 24.
83 Trust Deed, cl 2(e).
84 Trust Deed, cl 4(b).
85 Trust Deed, cl 7.
86 See, for example, *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq)* (2000) 202 CLR 588 at 604 [30]-[31].

against claims in respect of the tending, supervision, protection and preservation of the land and trees and in respect of outgoings in relation to the land.[87] That indemnity was said by the appellants to be at odds with the existence of a trust. If the Forest Company and the Milling Company were trustees as contended, they would be entitled to an indemnity over the trust estate by way of reimbursement for expenses incurred by them as trustees and exoneration in respect of undischarged liabilities incurred in their capacity as trustees.[88] The capital contributed by the Covenantholders would be exposed to the risk created by that indemnity. To that extent the suggested commercial imperative for the propounded trust as a protection against investment risk is of diminished significance. The appellants' submission should be accepted. The indemnity provision was inconsistent with the asserted status of the Forest Company as a trustee.

39 AET pointed to cl 20B(a) of the Trust Deed, which provided for the non-removal of the Forest Company from "the management of the Trust". The latter reference was said to be explicable only on the basis of an intention to create a trust to exist throughout the flow of funds provided for in the documents (particularly the Tripartite Agreement). The short answer to that submission on the part of the appellants was that the provision in question was mandated by regulation.[89]

40 The explicit trust provision in relation to AET appeared in cl 4(a) of the Trust Deed. AET covenanted that it would hold all monies paid into the Maintenance Fund or received by AET and Covenants and other securities:

> "upon and subject to the trusts and for the purpose and upon and subject to the terms and conditions stated declared or contained therein".

The explicit provision for the creation of that trust highlights the significance of the absence of any such provision for the trust asserted by AET against the Forest Company and the Milling Company.

The Tripartite Agreement

41 Under the Tripartite Agreement, the Milling Company was subject to directions by the Forest Company in relation to the thinning of the plantations[90] and cutting and removing fully grown trees.[91] AET, when it thought proper, was to authorise the Forest Company to make thinnings and fully grown trees available to the Milling Company, which was to market and sell them.[92]

42 Money received by the Milling Company from the sale of the timber was to be retained and applied as set out in the Covenants, the Trust Deed and the Tripartite Agreement. After the five per cent commission payable to the Forest Company, the balance of the net proceeds was to be paid by instalments to the Forest Company, which in turn was to pay it:[93]

87 Trust Deed, cl 3(c).
88 *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367 per Stephen, Mason, Aickin and Wilson JJ; [1979] HCA 61; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 245-246 [47]; [1998] HCA 4; *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98 at 120-121 [50]; [2005] HCA 53; *Trustee Act* 1936 (SA), s 35(2).
89 1964 Regulations, reg 12(1)(d)(ii); 1984 Regulations, Sched 5, cl 4(b).
90 Tripartite Agreement, cl 2.
91 Tripartite Agreement, cl 3.
92 Tripartite Agreement, cll 6, 7.
93 Tripartite Agreement, cl 10A.

> "to the Trustee for distribution amongst the Covenantholders entitled thereto in manner provided by the Trust Deed".

The two companies were required to keep accounts and records to enable them, at all times, to specify the class of Covenantholders and the series of Covenants to which the net proceeds were to be allocated and apportioned, and in what proportions.[94] The Milling Company had to submit its books and annual accounts for audit by the Forest Company's auditors.[95]

43 AET submitted that the Tripartite Agreement required the Forest Company and the Milling Company to treat the proceeds as a fund, indicating an intention to create a trust of the fund. At no time were the Forest Company and the Milling Company to deal with the funds as their own. They were obliged to treat them separately from other funds which they held. That submission should not be accepted. As the appellants pointed out, the provisions of the Tripartite Agreement facilitated the performance of AET's obligations under the Trust Deed and the Forest Company's obligations under the statutory regime. Under the Trust Deed, AET was required to open a bank account for the Covenantholders of each planting year for the purpose of holding the net proceeds.[96] The Forest Company was required by the relevant legislation to keep a register of the holders of interests under the Trust Deed and to enter into it the extent of the holding of each Covenantholder.[97] The Milling Company was not required to keep the sale proceeds intact as a fund. The accounting arrangements are explicable by reference to the statutory and contractual obligations of AET and the companies and do not import an intention to create a trust.

Admissions against interest

44 AET sought to support the decision of the Court of Appeal by reference, in a Notice of Contention, to statements made in 2012 by the company secretary of the Forest Company and the Milling Company. The statements, contained in emails, referred to the holding of funds by the Milling Company in relation to Covenantholders' interests and their segregation from other funds. They were made more than a month before the appointment of administrators and of the receivers and managers.[98] The primary judge found it unnecessary to determine whether they could be taken into account, although he thought it "unlikely that an admission [could] create an express trust with retrospective operation ... where none was intended or found to exist".[99] The majority in the Court of Appeal, like the primary judge, found it unnecessary to evaluate the evidence. Robson AJA, assuming (without deciding) the admissibility of the evidence, concluded that it was "of little value in deciding the question to be addressed where there are indicators for and against the imputation of an express trust contained in an array of documents".[100] Robson AJA was correct so to conclude and that conclusion is sufficient to dispose of the Notice of Contention.

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94 Tripartite Agreement, cl 8.
95 Tripartite Agreement, cl 8.
96 Trust Deed, cl 20A(b).
97 Companies Act, s 84(1); Companies Code, s 172(1).
98 (2013) 8 ASTLR 454 at 476-477 [92].
99 (2013) 8 ASTLR 454 at 477 [95].
100 [2014] VSCA 65 at [241].

The reasoning in the Supreme Court and the Court of Appeal

45 The primary judge focussed upon what he described as the interrelated and integrated steps in the handling of the proceeds of timber sales as required by the scheme documentation.[101] The relevant documents in context evidenced "an intention to create and preserve a fund for the benefit of Covenantholders at all relevant stages".[102] That proposition was central to the submissions put on behalf of AET in support of the decisions of the primary judge and the Court of Appeal. His Honour acknowledged that there was no specific obligation on the Forest Company or the Milling Company to set aside funds in a separate account. He also acknowledged that a contractual obligation to deal with funds in a particular way does not necessarily determine "their proprietary character".[103] On the other hand, the obligation to pay net proceeds to AET was not expressed as merely a contractual obligation to pay a certain amount.[104]

46 His Honour's reasons for concluding that a trust existed, as summarised in his judgment,[105] may be condensed further:

- The nature of the transaction and relationship between the parties was highly suggestive of a relationship of trustee and beneficiary. A relationship of trustee and beneficiary was consistent with the detailed obligations contained in the relevant documents.
- The relevant documents were required pursuant to the relevant legislation under the division dealing with interests other than shares and debentures. That division was directed towards the protection of investors.
- The detailed provisions of the documents were directed to managing other people's funds. The obligations imposed on the Forest Company and the Milling Company were covenants and undertakings to act in the interests of identified others at all stages.

47 In the Court of Appeal, Maxwell P and Osborn JA agreed with the primary judge's conclusions. Their Honours found support for those conclusions in the language of the scheme documents and in the "commercial necessity that the investments made by covenantholders not be at risk by reason of extraneous activities of the operating companies".[106] The provision in the Trust Deed of an express trust only of the sale proceeds in the hands of AET did not deflect their Honours from that finding:[107]

> "So strong were the assurances (express and implied) in the prospectus — that the investors would have a secure interest in, and entitlement to, the sale proceeds — that the parties to the investment contract must have intended those assurances to override any inconsistent provisions in the formal documents."

There was nothing in the Trust Deed or the Tripartite Agreement to stand in the way of the primary judge's findings.[108]

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101 (2013) 8 ASTLR 454 at 473 [76].
102 (2013) 8 ASTLR 454 at 462 [26].
103 (2013) 8 ASTLR 454 at 472 [74].
104 (2013) 8 ASTLR 454 at 472 [72].
105 (2013) 8 ASTLR 454 at 475 [88].
106 [2014] VSCA 65 at [33].
107 [2014] VSCA 65 at [40].
108 [2014] VSCA 65 at [44].

48 Robson AJA, dissenting, considered that the taxation planning aspect of the scheme was consistent with an intention that the Covenantholders' rights as against the Forest Company and the Milling Company with respect to the timber sale proceeds were contractual only prior to their payment to AET.[109] Moreover, there was no relevant distinction drawn in the scheme documentation between the treatment of money paid under the Covenants taken out in respect of pre-planted areas and money paid under the Covenants relating to land and/or trees yet to be acquired and planted. His Honour accepted that there were some aspects of the scheme that might support recognition of a trust on the basis that the produce of the timber harvest was the property of the Covenantholders.[110] In any event, his Honour's preferred characterisation of the obligations of the Forest Company and the Milling Company was that they were contractual, and did not give rise to a trust of the scheme funds.

Whether an express trust existed

49 AET submitted that this Court has recognised that there should be no reluctance in inferring the existence of an express trust. The "reluctance" thus eschewed was that said by Fullagar J, in *Wilson*,[111] to have been applied by English courts in connection with finding trusts based on a promise for the benefit of a third party. To eschew an historical reluctance is one thing. To construct intention out of straws plucked from textual and contextual breezes, some blowing in different directions, is quite another.

50 AET invoked the "innate flexibility of the law of trusts", a term used by Deane J in *Trident*[112] referring to the judgment of Cardozo J in *Adams v Champion*.[113] What Cardozo J said, in apparently rejecting the imposition of a constructive trust in that case, was:

> "Equity fashions a trust with flexible adaptation to the call of the occasion."

Deane J said that an intention to create an express trust of a promise for the benefit of a third party should be inferred if the intention of the promisee to entitle the third party to insist upon the performance of a promise "clearly appears".[114] Relevantly to the present case, his Honour added:[115]

> "A fortiori, equity's requirement of an intention to create a trust will be at least prima facie satisfied if the terms of the contract expressly or impliedly manifest that intention as the joint intention of both promisor and promisee."

51 While the Trust Deed and the Tripartite Agreement might be seen as embodying promises made to AET by the Forest Company and the Milling Company for the benefit of the Covenantholders, the provisions of the Covenants themselves included promises by the Forest Company to perform its obligations under the Trust Deed and the Tripartite Agreement. The Milling Company was a company associated

109 [2014] VSCA 65 at [261].
110 [2014] VSCA 65 at [293].
111 (1956) 95 CLR 43 at 67.
112 (1988) 165 CLR 107 at 147.
113 294 US 231 at 237 (1935).
114 (1988) 165 CLR 107 at 147.
115 (1988) 165 CLR 107 at 147.

with the Forest Company. In the circumstances, the scheme documents are best treated as at least analogous to a multilateral agreement between all parties, with the Forest Company and the Milling Company on one side as promisors and AET and the Covenantholders on the other as promisees. It is an imputed joint intention of promisors and promisees which has to be ascertained in relation to the creation of the propounded trust.

52 AET's submissions in relation to the language of the transaction documents, as indicative of an intention to create the propounded trust, have been dealt with in the preceding consideration of those documents and have not been accepted. Nor have its submissions in reliance upon the statutory framework.

53 AET further submitted that the intention to create the trust was supported by the commercial objectives of the parties. It did not contend that the trust was a commercial necessity. A commercial purpose, not amounting to a "necessity", might be relevant to the existence of the requisite intention to create a trust. But that which is commercially desirable for one party is not, on that account, a commercial purpose of both. AET argued that the purpose of the Covenants was to allow an investment in a scheme in relation to forest plantations. That is indisputable. It further argued that the investment was marketed as long-term, conservative and non-speculative. That too is indisputable. Then it was said that the propounded trust would ensure that the investors were exposed only to an investment in the underlying forestry scheme, and not the financial fortunes of the Forest Company and the Milling Company or their subsequent acquirer. To say that is to say nothing about the intention of the parties. No doubt the creation of a trust would have been favoured by the Covenantholders if they had been asked about it. So too would the creation of a trust in favour of many investors in commercial undertakings. The advantages of a trust, which might have enhanced the desirability of the investment from the point of view of the Covenantholders, do not support an inference that the creation of the trust would have reflected the joint intention of promisors and promisees. AET's argument in that respect almost amounted to an invitation to the Court to imply a trust in order to reinforce marketing promises found in the Prospectus. That approach would conflate the ascertainment of an express trust with the imposition of a constructive trust. The invitation should not be accepted.

Conclusion

54 For the preceding reasons the primary judge and the Court of Appeal erred in finding that the express trust propounded by AET existed. The appeal must be allowed and orders made as proposed by Keane J.

HAYNE AND KIEFEL JJ.

55 The critical facts giving rise to this appeal may be stated shortly. A company ("**Forest Co**") planted pine trees on land it owned or leased. When the trees were mature, they were felled and the logs were sold. To finance its operations, Forest Co issued what the relevant companies legislation first called "interests other than shares",[116] and at the times most immediately relevant to these proceedings called "prescribed interests".[117] As the companies legislation required,[118] Forest Co made a deed with a company (the respondent to this appeal, "the Trustee Co") as trustee for the holders of the interests Forest Co was to issue. The holders of those interests were called "Covenantholders".

56 The parties agree that the provisions of Ch 5C of the *Corporations Act* 2001 (Cth) are not engaged and that the interests which were issued are not affected by those provisions.

The Trust Deed

57 By the Trust Deed, Forest Co covenanted with the Trustee Co to perform all of the terms and conditions of the covenants it was to issue. Each covenant recorded that it entitled the holder to "the net proceeds from the timber apportionable" to one acre or hectare, or one half of an acre or hectare or one quarter of a hectare (as the case required) of the area planted by Forest Co in the year stated in the Covenantholder's application.

58 The Trust Deed recorded that the Trustee Co agreed to hold certain moneys on trust. In particular, the Trust Deed required the Trustee Co to establish a separate bank account "for the Covenantholders of each planting year into which proceeds from the sale of timber and any other moneys to which the Covenantholders may be entitled shall be paid by [Forest Co]". The Trust Deed also obliged Forest Co to pay part of the amounts it received from Covenantholders into a maintenance fund and, again, the Trust Deed recorded that the Trustee Co would hold the maintenance fund upon the trusts stated in the Trust Deed.

59 The Trust Deed contained no provision expressly declaring or providing that Forest Co was, or was to act as, a trustee.

60 The Trust Deed imposed numerous other obligations on Forest Co, including obligations to maintain and supervise the forests it planted. But the detail of only two of these further obligations need be noticed. The Trust Deed expressly provided that Forest Co would indemnify and keep indemnified the Trustee Co and the Covenantholders from and against "all and all manner of claims demands actions proceedings in respect of the tending supervision protection and preservation" of the land and the trees, as well as all outgoings and impositions payable in respect of the land. And the Trust Deed also provided that "no Covenantholder shall by reason of holding a [c]ovenant or by reason of the relationship thereby created with the [Trustee Co] or [Forest Co] be under any obligation personally to indemnify the [Trustee Co] or [Forest Co] or the creditor of either of them for any debt incurred

116 *Companies Act* 1962 (SA), Pt IV Div V (ss 76-89).
117 *Companies (South Australia) Code*, Pt IV Div 6 (ss 164-177).
118 *Companies Act* 1962, s 78; *Companies (South Australia) Code*, s 166.

by them or either of them in connection with the powers and obligations" vested in them or created by the Trust Deed. These provisions are consistent with Forest Co carrying on its own business for its own profit. They are not consistent with Forest Co being no more than the promoter or manager of some common enterprise between the Covenantholders.

The Tripartite Agreement

61 Forest Co and the Trustee Co made a further written agreement ("**the Tripartite Agreement**") with a company associated with (if not controlled by) Forest Co ("**Milling Co**"). By the Tripartite Agreement, Milling Co was bound, as and when directed by Forest Co, to fell trees grown on Forest Co's plantations, mill the timber and sell it. The Tripartite Agreement regulated what was to be done with the proceeds of selling felled and milled timber. It provided that all moneys received by Milling Co from the sale of logs it felled "shall be retained by [Milling Co] and applied" in the manner provided by the succeeding six sub-paragraphs of the agreement.

62 The first three sub-paragraphs provided for allowances to Milling Co. Those allowances were (a) the amount necessary to recoup Milling Co for all expenses incurred in connection with felling, milling and selling the timber, including rates, taxes, insurance, overheads and bad debts; (b) an annual amount for depreciation of Milling Co's buildings, plant and machinery and other specified deductions; and (c) an annual amount equal to 12 per cent of the issued and fully paid capital of Milling Co.

63 After the allowances described had been made in favour of Milling Co, five per cent of the balance was to be paid to Forest Co and retained by it as commission and remuneration for its services. Only then was Milling Co bound to pay the residue in respect of any year ending 30 September to Forest Co by five instalments due at the end of April, May, June, July and August of the following year.

64 Upon Forest Co receiving from Milling Co sums payable in accordance with the provisions that have been described, Forest Co was to reimburse itself and retain all expenses it was entitled to retain under the Trust Deed. Within 30 days of Forest Co receiving money from Milling Co, Forest Co was to "pay the balance to [the Trustee Co] for distribution amongst the Covenantholders entitled thereto in manner provided by the Trust Deed".

65 The Tripartite Agreement provided that Milling Co must submit its books and accounts to audit by Forest Co's auditors. And it further provided that the auditors were to be authorised to disclose to Forest Co such information as Forest Co reasonably required "to accurately and adequately comprehend, appreciate and understand the financial position" of Milling Co.

Covenantholders

66 Covenantholders subscribed money in response to prospectuses issued by Forest Co. Argument proceeded in this Court, as it had in the Court of Appeal, on the basis that the covenants offered in the 1984 Prospectus were typical of the two types of

covenants that had been offered. All covenants entitled the Covenantholder to receive a rateable share of the net proceeds of the sale of timber referable to a particular planting year. Some covenants offered an additional right to receive an amount calculated by reference to the value of the land on which the trees were grown.

67 The Trust Deed provided that, in respect of the 1982 and 1983 years of planting, a covenant would entitle the holder, when the timber was clear felled or the land ceased to be subject to the covenant, to a rateable share of the then assessed value of the land. To obtain this right, the Covenantholder had to pay, as part of the subscription price, a rateable share of the value of the land assessed at the time of planting. Hence, the amount which the Covenantholder stood to gain from taking such a covenant was a rateable share in the change in value of the land as assessed at planting and its value as assessed after harvesting. Prospectuses issued by Forest Co described this arrangement as enabling "[C]ovenantholders to participate in the capital appreciation of the land on which the trees are planted" by providing "a beneficial interest in the land value".

The issue

68 Forest Co and Milling Co gave security over their assets to lenders to other companies in the corporate group of which they are now part. The lenders have appointed receivers and managers to Forest Co and Milling Co. Are the proceeds of a sale of timber made in March 2012 (and other proceeds of sale of timber) and the proceeds of a sale of land on which timber was grown assets which are subject to the receivership? Or are those proceeds held by Forest Co or Milling Co on trust for Covenantholders?

The proceedings

69 The Trustee Co applied to the Supreme Court of Victoria for declarations that it was entitled to those proceeds as trustee for Covenantholders. At first instance, Sifris J held[119] that the relevant parties intended the proceeds from the harvesting of the timber (or, where relevant, from the sale of plantation lands) to be held on trust for the Covenantholders upon receipt.

70 The receivers and managers appealed. By majority, the Court of Appeal of the Supreme Court of Victoria (Maxwell P and Osborn JA, Robson AJA dissenting) dismissed the appeal, holding[120] that the primary judge was right and that "it was a matter of commercial necessity that the investments made by [C]ovenantholders not be at risk by reason of extraneous activities of the operating companies".[121]

71 By special leave the receivers and managers appeal to this Court. The appeal should be allowed and consequential orders made in the form proposed by Keane J.

72 Whether a trust should be found to exist depends upon the particular documents in issue. It is those documents which record the parties' transactions.

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119 *Australian Executor Trustees (SA) Ltd v Korda* (2013) 8 ASTLR 454; [2013] VSC 7.
120 *Korda v Australian Executor Trustees (SA) Ltd* [2014] VSCA 65 at [2].
121 [2014] VSCA 65 at [33].

73 The central debate in the appeal to this Court was whether a trust was to be spelled out from the terms of the Trust Deed, the Tripartite Agreement, the Prospectuses issued by Forest Co or the form of covenants it issued to Covenantholders. No party submitted in this Court that any of those documents explicitly provided that Forest Co or Milling Co was trustee for all or any part of the proceeds from harvesting timber or all or any part of the proceeds of sale of land on which timber had been grown or harvested. Rather, in its written submissions, the Trustee Co submitted that "[h]aving regard to all of the relevant circumstances, it is apparent that a trust over the timber and land sale proceeds was intended". The circumstances to which it referred were said to include "the language used in the relevant documents and the statutory and commercial context".

74 The majority in the Court of Appeal decided, and the Trustee Co submitted in this Court, that the subject-matter of the trust was sufficiently identified as "the timber sale proceeds" and "the land sale proceeds". And much of the reasoning of the majority in the Court of Appeal, and the Trustee Co's argument in this Court, proceeded from the premise that the documents were to be read as evincing an "intention" to create a trust in respect of those proceeds. But who was trustee? And what was the subject-matter of the trust?

75 These reasons will show that, considered separately or together, none of the relevant documents (the Trust Deed, the Tripartite Agreement, the Prospectuses or the covenants) contained or constituted any agreement or declaration by Forest Co or Milling Co that it (or they) held or would hold identified property on trust for Covenantholders.

Some preliminary observations

76 It will be convenient to deal first with "the timber sale proceeds". Before doing so, some preliminary observations must be made.

77 What was described in the proceedings as "the timber sale proceeds" had been reduced to an identified fund at the time the proceedings were commenced in the Supreme Court of Victoria. Argument in this Court, and in the courts below, proceeded on the basis that rights in respect of the fund are those that would arise from the harvesting, milling and sale of timber in the ordinary course of events. Accordingly, no distinction was drawn in argument between the rights in respect of the fund and the rights that are claimed to exist in respect of the proceeds of sale of timber planted in the 1981 and 1982 planting years. It is, therefore, not necessary to describe the transactions which gave rise to the fund now constituting "the timber sale proceeds".

78 When identifying what rights would arise from the harvesting, milling and sale of timber, it remains important, however, to determine whether the trust which it is said that the documents recorded or established would attach to the gross proceeds of sale of timber or some lesser sum. As will later be shown, the Trustee Co's arguments in this Court might be understood as not always making plain whether the trust for which it contended was a trust in respect of gross or net proceeds.

A trust in respect of timber sale proceeds?

79 The description which has been given of the provisions of the Tripartite Agreement is sufficient to indicate the variety of questions which arise when it is said that there was a trust in respect of the (gross or net) proceeds of sale of timber.

80 Did Milling Co receive the gross proceeds of its sale of timber on trust? If Milling Co was a trustee of the *gross* proceeds, why was it entitled to retain or deduct from those proceeds amounts attributable to its cost of doing business including an amount providing it with a 12 per cent annual return on its fully paid capital? If Milling Co was a trustee, why was it not obliged to keep the proceeds of sale (whether the gross receipts or those receipts net of allowed deductions and retentions) separate from its own moneys? Why was Milling Co bound to pay the net amounts to Forest Co only by instalments well in arrears of receipt? And if Milling Co was a trustee of the moneys for Covenantholders, why did the Tripartite Agreement make elaborate provision for *Forest Co* (not the Trustee Co, which was appointed as trustee for the interests of the Covenantholders) to have access to Milling Co's books of account?

81 Who owned the timber that Milling Co felled, milled and sold? Forest Co had planted the trees on land which Forest Co owned or leased. It was not, and could not be, suggested that any Covenantholder had any proprietary interest in any identified part of the plantation or any identified trees. If Milling Co sold Forest Co's timber, why was Milling Co a trustee of the proceeds for Covenantholders?

82 Did Forest Co receive the amount which remained after Milling Co had made the several deductions and retentions allowed by the Tripartite Agreement on trust? If it did, why was Forest Co not bound to keep the whole of the net amount it received (or that amount less the further deductions contemplated by the Tripartite Agreement) separate from its own moneys?

83 None of these questions can be answered satisfactorily except on the footing that the obligations undertaken by both Forest Co and Milling Co under the Tripartite Agreement were contractual obligations, not obligations as trustee.

84 Contrary to the central submission made on behalf of the Trustee Co, the Trust Deed, the Tripartite Agreement, the Prospectuses and the covenants did not provide that the Covenantholders "were to receive not merely a particular amount of money, but rather a proportion of a particular fund". (It may be noted that the reference to a "proportion" of a particular fund suggests a trust with respect to net, not gross, proceeds of sale, but the consequences of that observation need not be pursued to their conclusion.) The documents (separately or together) do not indicate[122] that either Forest Co or Milling Co was to hold the money it received (or any part of that money) for the benefit of Covenantholders. On the contrary, the documents demonstrate that the amounts which Forest Co and Milling Co received could, and would, be mixed with the company's own moneys and that payments due from Milling Co to Forest Co and from Forest Co to the Trustee Co would be made out of the relevant company's own moneys.

85 The Trustee Co rightly submitted that the documents were to be construed in their commercial context. But that was not a context in which it could be assumed that

[122] cf *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 165-166 per Mason CJ, Deane, Toohey and Gaudron JJ; [1993] HCA 1.

the interests of Covenantholders were to be preferred or protected to any particular degree or in any particular way. The documents took the form they did according to choices made by parties other than the Covenantholders. Covenantholders acquired the interests they did in accordance with the arrangements and agreements recorded in those documents. They became parties to agreements which took a form prepared by the companies, not by investors. And, as has been observed, the Trust Deed was drawn in a way that was consistent with Forest Co carrying on its own business for its own profit rather than with it being the promoter or manager of some common enterprise between the Covenantholders.

86 Hence, to ask, as the majority in the Court of Appeal did,[123] what a "representative of the commercial interests of investors [participating] in the drawing-up of the scheme documents in 1964" would have done to protect the interests of investors was to ask an irrelevant question. It was a question which looked to circumstances that not only did not occur but, more importantly, could never have occurred. Contrary to the conclusion reached[124] by the majority in the Court of Appeal, it was not "a matter of commercial necessity that the investments made by Covenantholders not be at risk by reason of extraneous activities of the operating companies". This was not a case where commercial necessity required imputing a trust, and the Trustee Co did not submit to the contrary.

87 The Trustee Co pointed to various statements to be found in the documents which emphasised that the parties undertook obligations which, if performed, would serve the commercial purposes of all concerned. Unsurprisingly, the prospectuses that were prepared for persons contemplating investment were cast in reassuring terms designed to emphasise the desirability of making an investment in the hope of eventual profit. The prospectuses (and all of the other documents) were prepared on the assumption that the scheme would be successful. But it by no means follows that the documents must be understood as providing protection to Covenantholders against the consequences of commercial adversity. And, in particular, nothing in the documents supports the conclusion[125] that "the only risks to which the parties intended that the investors [would] be exposed were risks *intrinsic* to the enterprise being funded by their investment moneys" (emphasis added).

88 It may be accepted that this Court's decision in *Clowes v Federal Commissioner of Taxation*[126] formed part of the commercial background against which the Trust Deed and the Tripartite Agreement were drafted. *Clowes* concerned the taxation consequences for investors in a pine plantation investment scheme generally similar to the arrangements now in issue. In *Clowes*, the Court held that sums distributed to investors from the proceeds of the marketing of the timber were not to be included in the taxpayer's assessable income as "profit arising from the sale by the taxpayer of any property ... or from the carrying on or carrying out of any profit-making undertaking or scheme".[127] The Court held that the operations which produced the profit were not carried on by or on behalf of the taxpayer, but by the company on its own behalf.

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123 [2014] VSCA 65 at [37] per Maxwell P and Osborn JA.
124 [2014] VSCA 65 at [33] per Maxwell P and Osborn JA.
125 [2014] VSCA 65 at [34] per Maxwell P and Osborn JA.
126 (1954) 91 CLR 209; [1954] HCA 10.
127 *Income Tax Assessment Act* 1936 (Cth), s 26(a).

89 Prospectuses which Forest Co issued emphasised that this Court had held that distributions which Forest Co made to Covenantholders in respect of timber proceeds are not assessable income of the Covenantholders and referred, indirectly, not only to *Clowes* but also to the later decision of this Court in *Milne v Federal Commissioner of Taxation*.[128] (In *Milne*, the Court held that amounts received by investors in a generally similar pine plantation investment scheme were not income according to ordinary conceptions and were not profits arising from the carrying on or carrying out of a profit-making undertaking or scheme.)

90 It may be accepted, then, that taxation considerations were seen as important for investors. It may also be accepted that the decisions in both *Clowes* and *Milne* point towards the conclusion that the documents in issue in this case gave Covenantholders only contractual and not proprietary rights. But neither *Clowes* nor *Milne* can be treated as determining the present appeal. The documents in this case are generally similar to those that were in issue in those cases. But they are not identical. And because they are not identical, they are to be construed according to their own terms. What was said in *Clowes* (or in *Milne*) cannot be treated as if it provides some exposition (contemporaneous or otherwise) of the construction of the relevant documents. The most that can be said is that those decisions provide an important element of the commercial context in which those documents were prepared and are not inconsistent with the conclusions reached in these reasons.

91 Two other aspects of the argument in this Court may be noticed but dealt with shortly. They are the regulatory framework and some alleged admissions made by Forest Co.

Regulatory framework

92 Both parties rightly emphasised that the interests acquired by Covenantholders are to be understood in the light provided by the applicable regulatory framework. The Trust Deed and the Tripartite Agreement were prepared at a time when the interests which Forest Co wished to issue were regulated by Div V of Pt IV of the *Companies Act* 1962 (SA) ("**the 1962 Act**"). The covenants issued in respect of the planting years which yielded both the timber sale proceeds and the land sale proceeds were regulated by Div 6 of Pt IV of the *Companies (South Australia) Code* ("**the Code**").

93 The Trustee Co submitted that the regulatory framework "contemplated a sharp distinction between investment in a management company (which would be subject to the financial fortunes of the management company) and investment in a particular scheme to be managed by a management company (which would not)". The Trustee Co submitted that this scheme was of the latter and not the former kind.

94 It may greatly be doubted that either the 1962 Act or the Code drew a distinction of the kind asserted. Both kinds of scheme fell within the very general definitions of an "interest" in the 1962 Act and a "prescribed interest" in the Code. But even if a distinction of the kind drawn by the Trustee Co was consistent with the applicable regulatory framework, the Trustee Co's assignment of this scheme to one rather than the other category assumed, rather than demonstrated, the answer to the central issue in the case.

[128] (1976) 133 CLR 526; [1976] HCA 2.

Admissions?

95 The Trustee Co filed a Notice of Contention alleging that, during 2012, an employee of Forest Co, Milling Co and their holding company had admitted that both the timber sale proceeds and the land sale proceeds were held by Milling Co on behalf of Covenantholders. But the critical question in this case is not what employees of Forest Co or Milling Co (let alone its holding company) thought or assumed the documents mean. The issues in the case are to be decided by the proper construction of the documents. If the statements relied on by the Trustee Co as admissions bear the construction for which it contends, and if the statements are admissible against Forest Co and Milling Co, their making neither requires nor permits any different conclusion about the construction of the documents. It is therefore not necessary to examine any issue about what the statements meant or whether any of the statements was admissible.

96 Neither Forest Co nor Milling Co was a trustee of the timber sale proceeds. The obligations which Forest Co and Milling Co owed to Covenantholders were contractual, not obligations as trustee.

97 There remains for consideration the land sale proceeds.

A trust in respect of land sale proceeds?

98 In addition to the matters relied on in support of its argument that Forest Co or Milling Co held the timber sale proceeds on trust for Covenantholders, the Trustee Co pointed to two further matters as supporting its argument that the land sale proceeds were held on trust for Covenantholders. It referred first to a provision of the Trust Deed permitting the Trustee Co to lodge a caveat over land, and second to some particular statements made in prospectuses.

99 The Trust Deed obliged Forest Co, "until the timber growing thereon is so cut and milled and disposed of and the proper proceeds thereof paid to the Trustee [Co]", to take certain steps with respect to land that it owned or leased "in order to secure due compliance by [it] with the terms and conditions [of the Trust Deed]". Those obligations included depositing certificates of title to the land planted in any preceding planting year (in respect of which 75 per cent of the amount intended to be raised by the issue of covenants for that year had been raised). The certificates of title were to be deposited with a nominated bank in the joint names (and to the joint order) of Forest Co and the Trustee Co. The Trust Deed provided that:

> "The Trustee [Co] shall cause a Caveat or Caveats to be registered in respect of such land prohibiting any dealings therewith except in the interests of the Covenantholders in such lands."

The Trust Deed did not identify what interest the Trustee Co would claim in such a caveat.

100 As already noted, some prospectuses Forest Co issued offered Covenantholders "a beneficial interest in the land value" (described elsewhere in the same documents as an "interest in the value of land"). Investigating accountants' reports included in the prospectuses also referred to covenants providing "for a beneficial interest in the land value" "[t]o enable [C]ovenantholders to participate in the capital appreciation of the land on which the trees are planted".

101 Neither the provision permitting the lodging of a caveat nor any of the several statements made in the prospectuses about the land altered or added to the rights and obligations created by the Trust Deed in respect of covenants giving the holder a right to receive an amount referable to the assessed value of land after harvesting of the trees. The Covenantholder's right was to an amount of money. The statements made in the prospectuses about a "beneficial interest" concerned the "value" of the land, not the land itself. The Covenantholder did not acquire any interest in the land. Neither Forest Co nor the Trustee Co agreed or declared that it would hold the land on trust for Covenantholders.

Conclusion and orders

102 For these reasons, the appeal to this Court should be allowed. Neither Forest Co nor Milling Co is a trustee of the timber sale proceeds or the land sale proceeds.

103 Orders should be made in the form proposed by Keane J.

104 **GAGELER J.** The factual and procedural background of this proceeding is exhaustively set out in the reasons for judgment of other members of the Court. The ultimate issue is whether Forest Co and Milling Co hold the proceeds of the sale of timber harvested in 2012 (and of the land on which it was grown) on trust for the Covenantholders, having regard to the circumstances in which Forest Co issued covenants in 1984.

105 I am unable to accept the conclusion of the majority of the Court of Appeal that a trust over the proceeds arose as a matter of "commercial necessity" to ensure that Covenantholders' investments would "not be at risk by reason of extraneous activities".[129] I am equally unable to accept the argument of the respondent that such a trust over the proceeds arose "by reference to the outward manifestation of the intentions of the parties within the totality of the relevant circumstances".

106 In *Hospital Products Ltd v United States Surgical Corporation*,[130] after identifying the relationship of trustee and beneficiary as one of the accepted categories of fiduciary relationship,[131] and before stating that "it is altogether too simplistic, if not superficial, to suggest that commercial transactions stand outside the fiduciary regime" and that "every ... transaction must be examined on its merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship",[132] Mason J said:[133]

> "That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic

[129] *Korda v Australian Executor Trustees (SA) Ltd* [2014] VSCA 65 at [33].
[130] (1984) 156 CLR 41; [1984] HCA 64.
[131] (1984) 156 CLR 41 at 96.
[132] (1984) 156 CLR 41 at 100.
[133] (1984) 156 CLR 41 at 97.

> contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction."

107 Jacobson J has explained the consequence to be that "where a fiduciary relationship is said to be founded upon a contract, the ordinary rules of construction of contracts apply":[134]

> "Thus, whether a party is subject to fiduciary obligations, and the scope of any fiduciary duties, is to be determined by construing the contract as a whole in the light of the surrounding circumstances known to the parties and the purpose and object of the transaction".

108 Mason CJ and Wilson J should not be taken to have been suggesting a wider or different inquiry when, in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*,[135] they referred to a court inferring or imputing an intention to create a trust from "the language which the parties [to a contract] have employed" by looking to the "nature" and "circumstances" of a transaction, including "commercial necessity". That statement followed by way of explanation from their Honours' immediately preceding statement that "courts will recognize the existence of a trust when it appears from the language of the parties, construed in its context, including the matrix of circumstances, that the parties so intended". As Heydon and Crennan JJ pointed out in *Byrnes v Kendle*,[136] that reference to the "matrix of circumstances" was plainly an adoption of the standard terminology used to describe the overall context within which contractual intention is objectively discerned.

109 Where there is no reason to consider that parties entering into a contract have not said what they meant or meant what they said, an express term in the contract that one party is to hold property on "trust" for another party, or for a third party, will be recognised and enforced in equity as a trust.[137] Conversely, where parties to a contract have refrained from contractual use of the terminology of trust, an intention to create a trust will be imputed to them only if, and to the extent that, a trust is the legal mechanism which is appropriate to give legal effect to the relationship, between the parties or between a party and a third party, as established or acknowledged by the express or implied terms of the contract.[138] The question is whether recognition and enforcement of a trust is appropriate to give effect in law to entitlements and obligations which the parties, according to ordinary principles of contractual interpretation, can be taken together to have intended to exist in fact. Those cases

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134 *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35 at 77 [281].

135 (1988) 165 CLR 107 at 121; [1988] HCA 44.

136 (2011) 243 CLR 253 at 288 [108]; [2011] HCA 26.

137 *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588 at 605-606 [34]; [2000] HCA 25.

138 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 147-149; *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 at 618-619; [1988] HCA 16; *Pettitt v Pettitt* [1970] AC 777 at 823. Cf *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 at 646 [135]-[136]; *Garnac Grain Co Inc v H M F Faure & Fairclough Ltd* [1968] AC 1130 at 1137.

in which one party takes action beyond the terms of a contract sufficient to manifest a unilateral intention to constitute a trust can for present purposes be put to one side.[139]

110 Amongst the numerous and otherwise largely equivocal indications of contractual intention to which the parties to the present appeal have drawn attention in argument, one contractual omission is, in my view, decisive. It is the acknowledged absence of any contractual indication that Forest Co and Milling Co should hold the proceeds separately from other moneys of their own. As Robson AJA pointed out in dissent in the Court of Appeal, not only were those companies not contractually obliged to hold the proceeds in separate accounts, but the delay of between seven and eleven months permitted by cl 9(f) of the Tripartite Agreement in payment by Milling Co to Forest Co carried with it the implication that Milling Co "was able to use those moneys as it saw fit in the interim".[140]

111 A duty to hold trust money separate from one's own is the "automatic consequence of the imposition of a trust"[141] and "is a hallmark duty of a trustee".[142] An intention that money be held in a separate fund is for that reason indicative, although not conclusive, of an intention to create a trust over that money.[143] For the same reason, although failure in fact to hold money in a separate fund need not negate the existence of an express trust otherwise conclusively established,[144] absence of a contractual intention that money be held in a separate fund must surely be fatal to the imputation of a contractual intention to create a trust over that money.[145]

112 I agree with Keane J as to the disposition of the notice of contention and as to the orders to be made in the appeal.

113 **KEANE J.** For many years Southern Australia Perpetual Forests Limited ("**the Forest Company**") carried on business developing plantations of pine trees. To finance these operations, the Forest Company raised funds from investors ("**Covenantholders**") through the issue of interests ("**Covenants**") offered by prospectus.

114 Sapfor Timber Mills Limited ("**the Milling Company**"), a company related to the Forest Company, provided tree felling and milling services to the Forest Company, and sold the timber products from the Forest Company's plantations.

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139 Eg *In re Kayford Ltd* [1975] 1 WLR 279; [1975] 1 All ER 604.

140 *Korda v Australian Executor Trustees (SA) Ltd* [2014] VSCA 65 at [251].

141 Finn, *Fiduciary Obligations*, (1977) at 103.

142 *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588 at 605 [34], quoting *Puma Australia Pty Ltd v Sportsman's Australia Ltd (No 2)* [1994] 2 Qd R 159 at 162.

143 *Cohen v Cohen* (1929) 42 CLR 91 at 101; [1929] HCA 15, referring to *Henry v Hammond* [1913] 2 KB 515 at 521; *Puma Australia Pty Ltd v Sportsman's Australia Ltd (No 2)* [1994] 2 Qd R 159 at 162. See also *Jessup v Queensland Housing Commission* [2002] 2 Qd R 270 at 273-274 [8]-[9].

144 *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588 at 605-606 [34]; *Stephens Travel Service International Pty Ltd (Receivers and Managers Appointed) v Qantas Airways Ltd* (1988) 13 NSWLR 331 at 341.

145 *Walker v Corboy* (1990) 19 NSWLR 382 at 398. See also *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491 at 498; *Salvo v New Tel Ltd* [2005] NSWCA 281 at [65]; *In re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 100.

115 Australian Executor Trustees (SA) Limited ("**AET**") is the trustee of the Southern Australia Perpetual Forests Trust ("**the SAPF Trust**"), which was established by a trust deed made between the Forest Company and what is now AET on 6 March 1964 ("**the Trust Deed**"). AET represents the Covenantholders in the proceedings in this Court.

116 On the same day as the SAPF Trust was established, an agreement was made between the Forest Company, the Milling Company and AET ("**the Tripartite Agreement**") pursuant to which it was agreed that the Milling Company would pay the proceeds of its sale of timber products, net of specified deductions, to the Forest Company. The Forest Company agreed to pay those proceeds, net of further deductions, to AET, which would then account to the Covenantholders.

117 Each Covenantholder was entitled to an aliquot share in the net proceeds of the sale of the products of timber grown from trees planted in a specified year on an identified area of land. For some, but not all, planting years, a Covenantholder also became entitled to a payment in respect of an aliquot share in any appreciation in the value of the land on which the trees were planted during the term of the Covenant. The amount of the appreciation in value was calculated at the date of the clear felling of the trees, or termination of the Covenant.

118 In 2008, the Forest Company and the Milling Company were taken over by the fifth appellant, Gunns Limited. Subsequently, each of the Forest Company and the Milling Company encumbered its assets (by way of fixed and floating charge) to lenders to the companies of the Gunns Group[146] to secure the repayment of moneys lent to the Gunns Group. No question has been raised in these proceedings as to the propriety of these loans or the granting of security to the lenders.

119 On 15 March 2012, the Forest Company, the Milling Company, AET and others entered into a Tree Sale Agreement for the sale of trees owned by the Forest Company ("**the Tree Sale Agreement**"). Some of these trees were from planting years in the early 1980s in respect of which Covenants had been issued by the Forest Company. The price payable under the Tree Sale Agreement to the Milling Company amounted to $33,999,998 ("**the Tree Sale Proceeds**"). On the same day, the Forest Company entered into contracts for the sale of identified land to The Trust Company (Australia) Limited ("**the Land Sale Contracts**") for a total consideration payable to the Forest Company of $53,356,000 ("**the Land Sale Proceeds**"). Thereafter, competing claims arose to the Tree Sale Proceeds and the Land Sale Proceeds (together, "the Relevant Proceeds").

120 On 25 September 2012, the lenders to the Gunns Group appointed the first and second appellants as the receivers and managers of the Forest Company and the Milling Company.

121 These proceedings concern competing claims to the Relevant Proceeds. AET instituted proceedings in the Supreme Court of Victoria claiming that the Forest Company and the Milling Company hold the Relevant Proceeds on trust for Covenantholders. The first and second appellants claimed the Relevant Proceeds on behalf of the Forest Company and the Milling Company.

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146 *Australian Executor Trustees (SA) Ltd v Korda* (2013) 8 ASTLR 454 at 457 [5].

122 The proceedings did not involve any suggestion that the making and completion of the Tree Sale Agreement and the Land Sale Contracts involved a breach by the Forest Company or the Milling Company of any provision of the Trust Deed or the Tripartite Agreement. It should also be noted that the litigation did not involve any contest of priority between the interests asserted by AET and the rights of secured creditors under their securities. It may also be noted that it was common ground between the parties that at the times the Covenantholders' moneys were subscribed, the trees to which the subscription related had been planted on land already acquired by the Forest Company.[147]

123 AET's claim was upheld in the Supreme Court of Victoria. The primary judge declared that AET is beneficially entitled to the Tree Sale Proceeds, less the expenses payable to the Forest Company and the Milling Company in accordance with the Trust Deed and the Tripartite Agreement. The primary judge also declared that AET is beneficially entitled to the Land Sale Proceeds referable to the value of the land subject to the 1982 planting year, the 1983 planting year and the Supplementary Covenants (as defined in cl 30 of the Trust Deed) calculated in accordance with the Trust Deed.

The decision of the primary judge

124 The primary judge (Sifris J) held that the language used in the Trust Deed, the Tripartite Agreement and the Covenant:

> "when assessed in the context and circumstances of the transaction, sufficiently indicates an intention to provide, at all stages, protection to the interests of the Covenantholders beyond a mere contractual obligation to account, despite the fact that the funds were not required to be placed in a separate account. The presumed intention of the parties was that the funds would not form part of the assets of either the Forest Company or the Milling Company. Rather, those companies were entrusted with looking after the funds of Covenantholders."[148]

125 His Honour's conclusion was that, from the moment a Covenantholder's subscription money was received by the Forest Company, it was held beneficially for the Covenantholder, both by the Forest Company and by the Milling Company: "the entire process was to be individually and specifically recorded and accounted for" and so the absence of a separate fund was not material.[149]

The decision of the Court of Appeal

126 The Court of Appeal, by majority (Maxwell P and Osborn JA), granted leave to appeal, but dismissed the appeal.[150] While it is not entirely clear, it would seem that the majority in the Court of Appeal accepted the primary judge's all-encompassing view of the subject matter of the trust.[151]

147 This common ground between the parties is not consistent with the suggestion by the primary judge as to the use of Covenantholders' contributions at *Australian Executor Trustees (SA) Ltd v Korda* (2013) 8 ASTLR 454 at 460-461 [17].

148 *Australian Executor Trustees (SA) Ltd v Korda* (2013) 8 ASTLR 454 at 472-473 [75].

149 *Australian Executor Trustees (SA) Ltd v Korda* (2013) 8 ASTLR 454 at 473 [79].

150 *Korda v Australian Executor Trustees (SA) Ltd* [2014] VSCA 65.

151 *Korda v Australian Executor Trustees (SA) Ltd* [2014] VSCA 65 at [8]-[9].

127 Robson AJA, in dissent, held that the Forest Company and the Milling Company did not hold the Relevant Proceeds as trustees for the Covenantholders.[152]

128 The majority in the Court of Appeal considered that, in the circumstances of the present case, considerations of "commercial necessity" warranted the inference that the objective intention of the parties was that the Covenantholders' investments "would be safe".[153] Their Honours said that:

> "it was a matter of commercial necessity that the investments made by covenantholders not be at risk by reason of extraneous activities of the operating companies. Had there been any suggestion that such a risk existed, prospective investors would have been much less likely to invest."[154]

129 The majority in the Court of Appeal attributed particular significance to the language of the prospectus, which emphasised that the investment in the scheme was a secure one.[155] Their Honours noted that a prospective investor was "invited to acquire 'an interest ... in a pine plantation'."[156] Their Honours also noted that "the language was simple and unambiguous, representing that an investor who purchased a covenant would acquire a beneficial interest in land."[157]

130 No party suggested that there was any significant inconsistency between the terms of the prospectus and the operative provisions which established the Covenantholders' interests. It is to the latter that one must look in order to ascertain the objective expression of the parties' intentions, and, in particular, whether the security of the Covenantholders' investments was assured by contractual promises or the creation of proprietary rights. While the prospectus may indicate "the relevant circumstances attending the relationship between" the parties,[158] the provisions which gave effect to the intentions of the parties as the "outward manifestation"[159] of their promises and expectations in respect of the scheme are to be found in the Trust Deed, the Covenant, which expressly adopted the terms of the Trust Deed, and the Tripartite Agreement.

131 Referring to the provisions of the Trust Deed and the Tripartite Agreement, the majority in the Court of Appeal held that these instruments created "trust protection" for Covenantholders in respect of their interest in the timber "until the investment returns were paid out in full."[160]

132 In relation to the land on which the trees were grown, the majority said:[161]

> "In substance, if not in form, these provisions imposed trust obligations on the Forest Company with respect to its freehold and leasehold interests in the land, obligations expressly imposed for the benefit of covenantholders."

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152 *Korda v Australian Executor Trustees (SA) Ltd* [2014] VSCA 65 at [89], [248], [303].
153 *Korda v Australian Executor Trustees (SA) Ltd* [2014] VSCA 65 at [30].
154 *Korda v Australian Executor Trustees (SA) Ltd* [2014] VSCA 65 at [33].
155 *Korda v Australian Executor Trustees (SA) Ltd* [2014] VSCA 65 at [6].
156 *Korda v Australian Executor Trustees (SA) Ltd* [2014] VSCA 65 at [13].
157 *Korda v Australian Executor Trustees (SA) Ltd* [2014] VSCA 65 at [29].
158 *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491 at 503.
159 *Korda v Australian Executor Trustees (SA) Ltd* [2014] VSCA 65 at [7], [242].
160 *Korda v Australian Executor Trustees (SA) Ltd* [2014] VSCA 65 at [49]-[52].
161 *Korda v Australian Executor Trustees (SA) Ltd* [2014] VSCA 65 at [48].

The appeal to this Court

133 The appellants were granted special leave to appeal to this Court by Hayne and Crennan JJ on 15 August 2014.[162]

134 In this Court, AET did not seek to support the conclusion that the trusts for which it contended were required as a matter of "commercial necessity". Nevertheless, AET did seek to support the conclusion of the Court of Appeal on the basis that the operative provisions of the relevant documents made manifest an intention to protect the Covenantholders' investments by keeping them separate from the general business of the Forest Company and the Milling Company. This protective intention was said to warrant the conclusion that the Covenantholders' entitlements under the relevant documents[163] took effect, not merely as rights enforceable in contract, but as proprietary entitlements held for their benefit in trust by the Forest Company and the Milling Company.

135 The primary judge and, it would seem, the majority in the Court of Appeal discerned in the relevant documents an intention that Covenantholders' subscriptions would give rise "at all stages" to proprietary entitlements to be held by the Forest Company and the Milling Company on trust for the Covenantholders. In this Court, AET supported a more modest view to the effect that it was only from the moment when the net proceeds of timber sales for the relevant year of planting were held by the Milling Company that a trust fixed upon those proceeds, and then it operated subject to the deductions authorised by the relevant documents. It is difficult to see how that more modest claim could support AET's claim to the Land Sale Proceeds. With that difficulty in mind, perhaps, AET did not abandon the more ambitious claim that beneficial interests in the trees and land were held on trust at all times after the Covenantholders paid their subscriptions.

136 For the reasons which follow, the appeal should be allowed. Close consideration of the text of the relevant documents demonstrates that the conclusions of the primary judge and the majority in the Court of Appeal cannot be sustained. It is significant that the relevant documents, pursuant to which the Covenantholders made their investments, made no express provision for the trust relationships for which AET contends. The absence of such provision gains added significance from the circumstance that the Trust Deed did make express provision for certain funds to be held on trust. In addition, the relevant documents contained provisions predicated on an understanding that the contributions of the Covenantholders would not be segregated from the general funds of the Forest Company and the Milling Company but would be used in their businesses. The operation of the relevant documents may be summarised by reference to the conclusion of Kitto J in *Clowes v Federal Commissioner of Taxation*[164] in relation to similar arrangements:

> "Upon payment to the company, the lot-holders' money was gone, and it was not repayable in any circumstances. … The essence of the matter simply was that the company bound itself to follow, over an indefinite period of years, a course of action which it expected would yield substantial net proceeds, and, in consideration of an immediate payment by the

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162 [2014] HCATrans 175.

163 For the purposes of this judgment, the "relevant documents" include the Trust Deed, the Tripartite Agreement and the applicable Covenant.

164 (1954) 91 CLR 209 at 223; [1954] HCA 10.

> [lot-holder], it promised to pay him a proportion of those net proceeds if and when they should come in."

137 This understanding of the operation of the relevant documents is consistent with the statutory framework which regulated the investment. To the extent that Covenantholders were exposed to the risk of the failure of the Forest Company and the Milling Company, that was a risk which the regulatory framework sought to address by measures which did not require that moneys invested by members of the public should be held and preserved separately from the business of the Forest Company.

138 The conclusion of the majority in the Court of Appeal was based on the commercial consideration that Covenantholders' interests would be better protected if the obligations of the Forest Company and the Milling Company were held to give rise to obligations in trust rather than contract. Considerations of commercial necessity may afford assistance in discerning the objective intentions of the parties where the language of their written agreements is not explicit.[165] Such considerations afford little assistance in cases where the language of the parties is explicit. The present is such a case.

139 But even if regard were to be had to considerations of "commercial necessity",[166] those considerations would not support the conclusion of the primary judge and the majority in the Court of Appeal. While the creation of an all-embracing trust relationship might have been better calculated to preserve the Covenantholders' investments, it might also have exposed them to personal liability to external creditors for the debts incurred by the Forest Company and the Milling Company as trustees of what, on the Court of Appeal's view, is a trading trust. Even if it were legitimate to construe the relevant documents to give effect to the supposed commercial preferences of Covenantholders, that speculation would not support the view of the majority in the Court of Appeal as to the "substance"[167] of the provisions of the relevant documents.

The terms of the Covenantholders' investment

140 The parties' arguments in this Court focused closely upon the terms of the Trust Deed, the Tripartite Agreement, and the Covenant issued pursuant to the 1984 Prospectus. In order to appreciate the strength of those arguments, it is necessary to consider the terms of the relevant documents at length and in detail. This course is also necessary to avoid the misunderstandings which can occur when a word or a phrase is isolated from its context.

141 In order to put the provisions made by the relevant documents in context, it is desirable to refer first to the statutory framework within which they had their genesis.

The statutory framework

142 Schemes for the management of collective investments such as those undertaken by the Covenantholders have, since the *Managed Investments Act* 1998 (Cth), been

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165 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 121; [1988] HCA 44; *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq)* (2000) 202 CLR 588 at 605 [34]; [2000] HCA 25; *Byrnes v Kendle* (2011) 243 CLR 253 at 272 [49], 287-288 [108]-[110]; [2011] HCA 26.

166 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 121; *Byrnes v Kendle* (2011) 243 CLR 253 at 287-288 [108].

167 *Korda v Australian Executor Trustees (SA) Ltd* [2014] VSCA 65 at [48].

operated by a single licensed "responsible entity".[168] Prior to that time, the States regulated such schemes by legislation which operated through the mechanism of an "approved deed",[169] which was required to contain a number of statutory covenants. These statutory covenants were intended to provide minimum standards of accountability to investors. The legislation also required the management company, as the entity issuing the interests to the public, to make disclosure of information pertaining to the scheme by a prospectus.

143 The covenants required by the legislation established, and distinguished between, the roles of the manager of the investment scheme (an entrepreneurial company which issued interests to investors) and a trustee (whose role was to protect investors). Consistently with the entrepreneurial role of the manager of an investment scheme, the management company was not required by the legislation to assume the self-denying obligations of a trustee in that the legislation contemplated that it would carry on business in pursuit of its own profit.[170]

144 At the date of the Trust Deed and the Tripartite Agreement in 1964, the governing legislation was the *Companies Act* 1962 (SA) ("**the Companies Act**"). Although the Relevant Proceeds related to trees and land relevant to Covenants for a number of planting years, the parties were content to treat the 1984 Prospectus and Covenant as containing the provisions relevant to the case.[171] The *Companies (South Australia) Code* ("**the Companies Code**") provided the relevant statutory framework as at the date of the 1984 Prospectus and Covenant.

145 Consistently with the distinction drawn by the legislation between the functions and obligations of the "trustee for or representative of the holders of interests"[172] and the functions and obligations of the "management company",[173] the roles of the management company and trustee were not performed by the same entity. The Trust Deed conformed to these requirements.

146 The Forest Company was the management company "by or on behalf of which the interests have been or are proposed to be issued".[174] The Companies Act and the Companies Code applied to the issue of "interests" and "prescribed interests", respectively, to members of the public.[175] Under the legislation, an "interest" and a "prescribed interest" were defined to include a right to participate in any interest, whether enforceable or not, and whether actual, prospective or contingent, in profits or assets of an undertaking, or in a common enterprise. The statutory definition of "interest" and "prescribed interest" also included a right to participate in a contract, scheme or arrangement whereby the investor acquired an interest in property which would or might be used in common with rights of others acquired in like circumstances.[176] The legislation thus contemplated that the issue of an "interest" or a "prescribed interest" might, or might not, involve the acquisition of an interest of a proprietary nature, as opposed to an interest in the nature of a contractual right.

168 The current provision is *Corporations Act* 2001 (Cth), s 601FB.
169 See *Companies Act* 1962 (SA), ss 77 and 83; *Companies (South Australia) Code*, ss 165 and 171.
170 *Parkes Management Ltd v Perpetual Trustee Co Ltd* (1977) 3 ACLR 303 at 310-311.
171 *Korda v Australian Executor Trustees (SA) Ltd* [2014] VSCA 65 at [11] and fn 6.
172 Companies Act, ss 78 and 80; see also Companies Code, ss 166 and 168.
173 Companies Act, s 80; Companies Code, s 168.
174 Companies Act, s 76(1); see also Companies Code, s 164(1).
175 Companies Act, s 76(1); Companies Code, s 5(1).
176 Companies Act, s 76(1), definition of "investment contract"; Companies Code, s 5(1), definition of "investment contract".

The nature of the "interest" or "prescribed interest" was left to be determined by the terms of the arrangements effected by the parties in any given case.

147 To the extent that investors in managed investment schemes were at risk of the failure of the management company, the Companies Act and the Companies Code sought to moderate those risks by the requirement of the interposition of a trustee to protect the interests of holders of interests or prescribed interests, and by the requirement of covenants from the trustee and the management company; but they did not require the segregation of investment moneys from the general funds of the management company.

148 Section 80(1)(a) of the Companies Act and s 168(1)(a) of the Companies Code proceeded on the assumption that such segregation would not occur, in that each required a covenant:

> "binding the management company that it will use its best endeavours to carry on and conduct its business in a proper and efficient manner and to ensure that any undertaking, scheme or enterprise to which the deed relates is carried on and conducted in a proper and efficient manner".

149 The Companies Act, by s 80, and the Companies Code, by s 168, also required that an approved deed contain certain covenants. These provisions included a covenant by the management company that it would, within a specified time, pay to the trustee money which was payable to it. The trustee was required to covenant that it would exercise all due diligence and vigilance in carrying out its functions and in watching the rights and interests of holders of interests, and that it would keep proper books of account and cause those accounts to be audited annually.[177]

150 Section 80(1)(d) of the Companies Act was relevantly re-enacted by s 168(1)(d), which provided that an approved deed should contain a covenant:

> "binding the management company and the trustee ... respectively, that no moneys available for investment under the deed will be invested in or lent to the management company [or] the trustee ... or any person ... who is associated with the management company or with the trustee".

151 AET argued that these sections required a covenant obliging the Forest Company to segregate the investments of Covenantholders from the general conduct of its business. That argument mistakes the effect of the sections.

152 These provisions did not require a covenant from the management company that the moneys subscribed by investors not be mixed with the general funds of the management company. They did not seek to prevent the investment being mixed with the funds of the management company, or to quarantine the investment against the risk that the management company might fail because of risks of business not peculiar to the particular investment scheme. Rather, they were concerned to prevent the trustee or the management company from using subscriptions raised from the public in order to enhance its equity or loan capital.

153 Finally in relation to the statutory framework, it should be said that it was well known that the kind of investment presently in issue was risky.[178] It is ironic that a consequence of the conclusion of the courts below is that the investments by the

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177 Companies Act, s 80(1)(b) and (c)(i), (ii) and (iii); Companies Code, s 168(1)(b) and (c)(i), (ii) and (iii).

178 *Clowes v Federal Commissioner of Taxation* (1954) 91 CLR 209 at 221-222.

Covenantholders would now be afforded trust protection against risks which, at the time the investments were made, were sufficiently a matter of public knowledge that this kind of investment was not one which trustees were authorised to make under the *Trustee Act* 1936 (SA).[179]

The Trust Deed

154 The Trust Deed recited that the Tripartite Agreement was made to ensure the performance by the Forest Company of its obligations to Covenantholders. It was readily apparent that the Milling Company was not a party to the Trust Deed, and that this was deliberate, given the Milling Company's role under the Tripartite Agreement. That there was no trust relationship between the Milling Company and Covenantholders under the Trust Deed was the conclusion which one would expect to be drawn.

155 Clause 1 of the Trust Deed provided that the Forest Company appointed AET as trustee, and AET agreed "to be and act as Trustee for the Covenantholders for the time being upon and subject to the trusts terms covenants and conditions hereinafter contained." Once again, given the express provision that AET is the trustee for the Covenantholders, the conclusion which one would ordinarily expect to be drawn is that the Forest Company is not. The question then becomes whether the detailed provisions of the Trust Deed and the associated instruments manifest a different intention.

156 Clause 2 of the Trust Deed contained covenants by the Forest Company to perform faithfully its obligations in relation to the maintenance of the plantations. On the face of things, the Forest Company's obligations to Covenantholders in this regard are matters of contract. An exception to that general observation is cl 2(d)(v) of the Trust Deed, which provided that, "in order to secure due compliance by the Forest Company with the terms and conditions" of the Trust Deed, the Forest Company would "cause to be deposited in [a bank] ... in the joint names" of the Forest Company and AET "all Certificates of Title and Lessee's copies of all leases free from encumbrances" used in plantings and that the:

> "Trustee shall cause a Caveat or Caveats to be registered in respect of such land prohibiting any dealings therewith except in the interests of the Covenantholders in such lands."

157 AET argued that because a caveat could only be lodged to protect a proprietary interest in land,[180] cl 2(d)(v) must be taken to manifest an intention to create a proprietary interest in the land on which the trees were planted. That argument should not be accepted.

158 Clause 2(d)(v) was directed to preventing the Forest Company engaging in dealings with the land which might adversely affect the interests of Covenantholders. Contrary to AET's argument, however, it is apparent that cl 2(d)(v) did not confer upon Covenantholders an absolute beneficial interest in the land and trees growing thereon as distinct from a security interest the extent of which is commensurate with the Covenantholders' contractual entitlements.

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179 Section 5, which was repealed by the *Trustee (Investment Powers) Amendment Act* 1995 (SA).
180 *Real Property Act* 1886 (SA), s 191.

159 It may be[181] that the basis for the caveat[182] was AET's interest by way of equitable charge created by the deposit of instruments of title,[183] which, in turn, was expressly "to secure due compliance by the Forest Company with the terms and conditions" of the Trust Deed. Be that as it may, the express provision for security for the performance of the Forest Company's contractual obligations falls far short of the creation of a beneficial interest in the assets of the business of the Forest Company asserted by AET.

160 It was not suggested by AET that any contravention of the security provided by cl 2(d)(v) occurred in the making and completion of the Tree Sale Agreement and the Land Sale Contracts. It was not explained how the Tree Sale Agreement and the Land Sale Contracts were made and completed consistently with this security interest; but it would not be fair to assume that any such contravention occurred, especially given that AET was itself a party to the Tree Sale Agreement.

161 By cl 2(e) of the Trust Deed, the Forest Company covenanted to pay into:

> "a fund to be called 'the Maintenance Fund' such amount ... as agreed from time to time ... and the Trustee shall credit such amount to the appropriate Maintenance Fund account in respect of each planting."

162 This provision, and cl 20A, expressly contemplated the keeping of the Maintenance Fund separately from the assets of the Forest Company. The significance of cl 2(e) is that this express provision sits ill with the broad contention that the Forest Company was generally obliged to keep Covenantholders' contributions separate from its own funds in trust for the benefit of Covenantholders.

163 By cl 3(a) of the Trust Deed, the Forest Company agreed to:

> "[t]end maintain and supervise the said land and the trees planted thereon in accordance with the principles of afforestation approved by the officer of the Company for the time being responsible to the Board for forestry operations".

164 By cl 3(b) of the Trust Deed, the Forest Company covenanted to:

> "[p]ay and discharge all rent rates taxes charges outgoings and impositions assessed imposed upon and payable in respect of the said land and in the case of Leased Land pay all or any further amounts as may be payable by the lessee pursuant to the terms of the lease".

165 By cl 3(c) of the Trust Deed, the Forest Company covenanted to:

> "[i]ndemnify and keep indemnified the Trustee and the Covenantholders from and against all and all manner of claims demands actions proceedings in respect of the tending supervision protection and preservation of the said land and trees and in respect of all such rent rates taxes charges outgoings and impositions and further amounts aforesaid."

166 AET drew attention specifically to provisions of the Trust Deed which were said to oblige the Forest Company to account to AET and the Covenantholders. By cl 3(ca) of the Trust Deed, the Forest Company was obliged to:

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181 It was common ground that the evidence did not disclose whether a caveat was, in fact, lodged, and, if it was, the nature of the interest which it claimed.

182 *Avco Financial Services Ltd v White* [1977] VR 561; *Re Universal Management Ltd* [1983] NZLR 462.

183 *Russel v Russel* (1783) 1 Bro CC 269 [28 ER 1121]; *Bank of New South Wales v O'Connor* (1889) 14 App Cas 273 at 282; *UTC Ltd (In liq) v NZI Securities Australia Ltd* (1991) 4 WAR 349 at 351.

> "[f]urnish quarterly to the Trustee not later than the last days of April July October and January in every year a report in writing in respect of the period of three calendar months ended on the last day of the preceding month signed on behalf of the Board of Directors of the Forest Company by two Directors thereof:-
>
> ...
>
> (ii) whether the Forest Company has observed and performed all the covenants and conditions binding on it pursuant to the terms of the said Covenants and the Trust Deed as amended from time to time;
>
> (iii) whether any event which is or should be known to the Forest Company has happened which has caused or could cause the said Covenants or any of them or any provision of the Trust Deed as amended from time to time to become enforceable by reason of any breach or default by the Forest Company;
>
> ...
>
> (iix) whether the Forest Company and, to the best of the knowledge, information and belief of its Directors, [the Milling Company] have each kept and performed all their covenants and agreements respectively to be kept and performed by them pursuant to the terms of the Tripartite Agreement."

167 Further, in this regard, by cl 3(d)(i) of the Trust Deed, the Forest Company was obliged to furnish to AET:

> "upon request such information relative to the financial position and affairs generally of the Forest Company ... as shall reasonably be required by the Trustee to enable the Trustee to accurately and adequately comprehend appreciate and ascertain the financial position of the Forest Company."

168 By cl 3(f) and (g) of the Trust Deed, the Forest Company covenanted to:

> "(f) [b]etween the first day of October and the last day of November in each and every year cause to be made by its Forestry Superintendent ... having charge of the lands allocated to cover the obligations of the Forest Company to the Covenantholders, a report setting forth:-
>
> (i) The extent to which the operations of the Forest Company in respect of the area so allocated have advanced.
>
> (ii) Whether or not the Forest Company is discharging efficiently its obligations in respect of such area and in respect of the planting thereof and of the plantings thereupon.
>
> (g) Prior to the thirty-first day of December following the receipt of the report referred to in the preceding sub-paragraph hereof (herein referred to as 'the said report') the Forest Company will at its own cost and expense deliver a copy thereof to the Trustee and will within six (6) weeks of receiving from the Trustee a copy of any report which the Trustee may wish to make to the holders of Covenants

> relating to the period covered by the said report ... at its own cost and expense cause the said report and the report of the Trustee (if any) to be printed and a copy thereof forwarded to each holder of Covenants."

169 The terms of cll 3(ca), 3(d)(i), 3(f) and 3(g) did not oblige the Forest Company to keep Covenantholders' contributions in accounts separate from its general accounts. Indeed, these provisions reflect an appreciation that the "financial position and affairs generally of the Forest Company" were matters of importance to AET and the Covenantholders because those matters affected the safety of the Covenantholders' investments, and that these undertakings were required precisely because the Covenantholders' contributions were not to be kept separately from the general funds of the Forest Company.

170 Clause 3(h) required that the Forest Company was to:

> "[e]xecute and perform all such acts deeds matters and things as may be reasonably required by the Trustee for the purpose of giving full due and proper effect to these presents according to the true spirit intent and meaning thereof."

171 Clause 10 of the Trust Deed provided that the Forest Company "will do all in its power ... to secure reasonable financial returns to the Covenantholders" and that:

> "the Forest Company shall not be liable for any loss which may be sustained by the Covenantholder provided the Forest Company has used its best endeavours to obtain reasonable returns for the Covenantholders from such measures in accordance with the contract with the Covenantholder."

172 This provision is a significant indication, both that the Forest Company's obligations to the Covenantholders are a matter of contract, and that they do not extend to the stewardship of the timber and lands as assets held for the benefit of the Covenantholders.

173 That indication is confirmed by cl 12 of the Trust Deed, which contained the following undertakings on the part of the Forest Company:

> "(a) The Forest Company undertakes to plant with pine trees ... the number of acres or hectares (as the case may require) of land cleared and fenced (where necessary) equal in each case to the total area comprised in the ... Covenants issued ... and to tend and supervise the trees in accordance with the principles of afforestation".

174 Clause 12 of the Trust Deed also provided:

> "(b) Each Covenant in respect of which a Fully Paid Certificate has been issued will entitle the holder thereof to the net proceeds from the timber appropriate to [the] ... Covenant planted by the Forest Company with trees as stated in the application signed by the applicant. The Covenantholder will receive his due proportion of the benefits obtained from the sale of timber harvested from the planting in respect whereof his Covenant is issued in accordance with the terms and conditions set out in the Covenant and within recited Tripartite Agreement.

...

(d) The Forest Company shall be entitled to retain the amount of five per centum of the balance of the proceeds from the sale of timber as provided by Clause 9(d) of the Tripartite Agreement as amended for its commission and remuneration for its services."

175 These provisions cannot sensibly be read as declaring a trust "entitlement" to the "net proceeds from the timber". Rather, they state the content of the Forest Company's contractual obligations (and also its entitlements) in respect of the proceeds of the realisation of timber.

176 In contrast, cl 12 of the Trust Deed did make express provision for the creation of a second trust fund, providing relevantly:

"(e) The Trustee will, upon receipt of such net proceeds above described, hold the same in the interest of the respective Covenantholders and shall open accounts in the Trustee's ledger which shall be called 'Timber Proceeds Accounts', such accounts being kept separate to each planting. Details of such Timber Proceeds Accounts shall be shown on an audited statement which shall be attached to the Trustee's Balance Sheet at the end of the financial year.

(f) When the sum standing to the credit of any one of such Timber Proceeds Accounts becomes sufficiently large to render it, in the opinion of the Directors of the Forest Company, economically capable of distribution amongst the Covenantholders in whose interest such Account shall have been opened, the Forest Company shall recommend to the Trustee that a specified sum per covenant out of the moneys to the credit of such Timber Proceeds Account shall be distributed amongst the said Covenantholders. The Trustee shall thereupon notify the Forest Company the sum (not greater than the sum so recommended by the Forest Company) which the Trustee requires to be so distributed."

177 It is clear from cl 12(e) and (f) that AET's obligation to create and keep separate a fund for the benefit of Covenantholders arose only upon receipt of the net proceeds from the Forest Company and not otherwise. Once again, the limited scope of this obligation is inconsistent with a more expansive trust relationship attaching to the Forest Company's assets for the benefit of the Covenantholders at earlier points in the generation of the proceeds of the enterprise.

178 Clause 13 of the Trust Deed provided that, in the event of default on the part of the Forest Company in the observance of its obligations, AET could "take charge of and manage the business conducted by the Forest Company on the ... land allocated to the ... Covenants".

179 Clause 14 of the Trust Deed provided that, in the event of default by the Forest Company, the Maintenance Fund "shall ... be applied by the Trustee ... in the same manner as the Forest Company could have applied the same." By cl 20A, the Trust Deed made express provision declaring trusts in respect of the Maintenance Fund, the Covenantholders' Distribution Accounts and the security deposits:

"The Trustee declares that it will hold the following assets in trust for the Covenantholders that is to say -

> (a) **Maintenance Fund**
>
> From the purchase money received by the Forest Company from the Covenantholders a sum fixed by the Trustee as agreed from time to time shall in manner provided in Clause 2(e) hereof be deposited with the Trustee by the Forest Company as and when Covenants are paid in full as a form of guarantee or insurance that the Forest Company will carry out its maintenance commitment under the contract. ...
>
> (b) **Covenantholders' Distribution Accounts**
>
> A separate banking account shall be maintained by the Trustee at ANZ Banking Group Ltd ... for the Covenantholders of each planting year into which proceeds from the sale of timber and any other moneys to which the Covenantholders may be entitled shall be paid by the Forest Company. These funds shall be distributed by the Trustee to the Covenantholders from time to time pursuant to the terms of the relevant Covenants.
>
> (c) **Titles to Planted Land**
>
> All such Certificates of Title and Lessee's copies of leases for any land the subject of such plantings as shall pursuant to Clause 2(d) hereof have been deposited in the Savings Bank of South Australia Head Office Safe Deposit ... and the Trustee will cause to be registered a Caveat or Caveats in respect of such lands prohibiting any dealings therewith except in the interests of the covenantholders in such lands."

180 It may be noted here that cl 16 of the Trust Deed provided that if a Covenantholder should default in his or her purchase obligations, he or she would "cease to be cestui que trust hereunder." It should be borne in mind that Covenantholders were "cestuis que trust" both of AET and of the trusts expressly declared by cl 20A. Clause 16 does not suggest that the rights of a Covenantholder as "cestui que trust", vis à vis the Forest Company, went beyond the trusts expressly declared by the Trust Deed.

181 Clause 27 of the Trust Deed stated the Covenantholders' rights with respect to the land on which trees were planted. It relevantly provided that:

> "each Covenant in respect of which a Fully Paid Certificate has been issued will entitle the holder thereof to the value ... of the freehold land or land held under perpetual lease ... planted in respect of the Covenant and to the net proceeds from the timber in each case ... planted by the Forest Company with trees as stated in the application signed by the applicant."

182 This provision related to the value of the appreciation in the valuation of the land between the date of the planting to which the Covenant related and the clearing of timber from the land. The entitlement of the Covenantholder was to the payment of an amount being an increase in value of land to be determined by valuation; it was distinctly not an aliquot share in the land itself.

183 Clause 30 of the Trust Deed authorised the issue of Supplementary Covenants in respect of:

> "any planting year prior to the 1982 planting year ... which will entitle the holder thereof to an interest in the value of the land subject to the Covenant for such year."

184 The Trust Deed was amended by the addition on 26 August 1986 of cl 34, which purported to relieve a Covenantholder from personal liability to indemnify AET or the Forest Company for any debt incurred by either of them "in connection with [their] powers and obligations" under the Trust Deed. This provision was not operative in respect of Covenantholders under the 1984 Covenant or earlier Covenants. Accordingly, if the amendment were otherwise effective to exclude the liability of Covenantholders to indemnify the Forest Company for debts incurred in the course of the enterprise, it would not protect Covenantholders who acquired their interests before 26 August 1986 from any obligation which might arise under the general law to indemnify the Forest Company in respect of liabilities to third parties for such debts.

The Tripartite Agreement

185 The Tripartite Agreement provided for the proceeds of the milling of trees and manufacturing of timber products by the Milling Company, net of identified deductions, to be paid to the Forest Company to be dealt with in accordance with the Forest Company's covenants in the Trust Deed.

186 The lengthy preamble to the Tripartite Agreement contained the following recitals:

> "WHEREAS the Forest Company was formed for the purpose (inter alia) of acquiring lands and planting the same with forest trees and preserving the forests so planted and tending and cultivating the same until such time as the same should become marketable AND WHEREAS for the purpose of acquiring the funds necessary for the carrying out of its purposes the Forest Company intends from time to time to issue prospectuses inviting the public to subscribe for and purchase the covenants referred to in such prospectuses on the terms and conditions in any such prospectus and in the printed form of Covenant more particularly set forth AND WHEREAS by ... 'the Trust Deed' ... the Forest Company appointed the Trustee and the Trustee undertook ... to be and act as Trustee for the holders for the time being of the said Covenants subject to the trusts terms and covenants and conditions in the Trust Deed contained and the Forest Company covenanted and agreed with the Trustee as in the Trust Deed is more particularly mentioned AND WHEREAS the Milling Company was duly incorporated having for its objects (inter alia) the felling, milling, manufacturing and marketing of grown timber and thinnings the property of Covenantholders of the Forest Company".

187 AET focused upon the last of these recitals as an indication of the proprietary nature of the interests of the Covenantholders. This recital relates, in terms, to the objects for which the Milling Company had been incorporated; whether or not its objects had been altered since its incorporation,[184] the reference to the original objects of the Milling Company sheds little light on the terms of the relationship actually established between the Covenantholders and the Forest Company by the Trust

[184] There was no evidence in this regard.

Deed and the Covenant. It was to overstate the effect of the preamble to say, as the primary judge said:[185] "The preamble records that the object [scil of the Tripartite Agreement] is to fell the trees 'the property of the Covenantholder'."

188 By cl 7 of the Tripartite Agreement, it was provided that:

> "The Milling Company shall market and sell and at all time [sic] use its best endeavours to market and sell all logs or timber standing or milled and manufactured by the Milling Company ... as soon as possible after the same shall have been cut or milled and manufactured and shall use its best endeavours to obtain the best market price from time to time obtainable for the said timber."

189 By cl 8, the Tripartite Agreement provided for the keeping of accounts by the Forest Company and the Milling Company but not for the keeping of separate accounts for the benefit of Covenantholders:

> "The Milling Company and the Forest Company and each of them shall keep such books accounts vouchers and records as shall enable them at all times to ascertain and specify to which class of Covenantholders and in respect of which series of Covenants and in what proportions the balance of moneys referred to in Clause 10A shall be allocated and apportioned. The Milling Company shall also submit their books and annual accounts for audit or check audit by the Forest Company's Auditors."

190 The terms of cl 8 are inconsistent with the contention that Covenantholders' payments were not intended to be mixed with the funds of either the Forest Company or the Milling Company. Further, it is to be noted that the Milling Company's obligation to submit its accounts for audit was owed, not to AET on behalf of the Covenantholders, but to the Forest Company.

191 The Tripartite Agreement imposed obligations on the Milling Company in favour of the Forest Company, not in favour of AET, in respect of the payment of the net proceeds of the Milling Company's operations:

> "9. All moneys received by the Milling Company from the sale of such logs or milled and manufactured timber shall be retained by the Milling Company and applied in manner following:-
>
> (a) In recouping to the Milling Company all expenses of whatsoever nature necessarily incurred in connection with the felling cutting milling manufacturing and selling of the said thinnings and fully grown trees and the logs or timber milled and manufactured therefrom ...
>
> ...
>
> (d) In payment immediately to the Forest Company of an amount equal to five per centum of the balance of such moneys, to be retained by the Forest Company for its commission and remuneration for its services herein specified.
>
> (e) In payment to the Forest Company of the balance then remaining of such moneys.

[185] *Australian Executor Trustees (SA) Ltd v Korda* (2013) 8 ASTLR 454 at 459 [15(a)].

> (f) All moneys payable by the Milling Company to the Forest Company pursuant to Sub-clause (e) of this Clause ... shall be payable by the Milling Company to the Forest Company by five instalments on the last days of the months of April, May, June, July and August then next following."

192 As an assurance of the performance by the Milling Company of its payment obligations, the Tripartite Agreement provided:

> "10. The Milling Company shall not ... declare or pay any dividend to its shareholders unless all moneys which shall have become due and payable by the Milling Company to the Forest Company pursuant to sub-clauses (d), (e) and (f) of Clause 9 ... have been fully paid."

193 Clause 10A provided for payment by the Forest Company to AET:

> "The Forest Company upon receipt from the Milling [C]ompany of any moneys payable to it pursuant to sub-clauses (e) and (f) of Clause 9 of this Agreement shall re-imburse itself and retain all such expenses as it may be entitled to deduct in terms of the Trust Deed and shall within thirty days after the receipt of such moneys pay the balance to the Trustee for distribution amongst the Covenantholders entitled thereto in manner provided by the Trust Deed."

194 This provision speaks of an obligation to pay money generated by the activities of the Forest Company and the Milling Company, not of the realisation of assets held for the benefit of Covenantholders. This understanding is confirmed by cl 14 of the Tripartite Agreement.

195 Clause 14 provided relevantly that, during the currency of the Tripartite Agreement:

> "The Milling Company shall ... have the sole and exclusive right to ... in conjunction with others ... mill and process the thinnings and fully grown trees planted by the Forest Company ... and sell the products therefrom".

196 This provision is noteworthy for the absence of any qualification upon the Milling Company's "sole and exclusive right" which might support the contention that it was operating for the exclusive benefit of the Covenantholders.

197 The provisions of cl 15 should also be noted:

> "The Milling Company shall not during the currency of this agreement fell cut mill manufacture or sell any trees other than trees and timber planted or acquired by the Forest Company for the benefit of Covenantholders without the joint written consent of the Trustee and the Forest Company first had and obtained. Such consent may be refused without assigning any reason for such refusal."

198 It was not suggested that the Tree Sale Agreement was made or completed in breach of this provision. AET fastened upon the reference to the "benefit of Covenantholders", but that reference is consistent with benefits that are contractual in nature.

The Covenant

199 The 1984 Covenant by the Forest Company described, by cl 1, the "entitlement" of each Covenantholder in terms which reflected the obligations undertaken by the Forest Company under the Trust Deed.

200 Clause 4 of the Covenant was expressed in terms which identified the "entitlement" of a Covenantholder to the payment of money as a return upon the investment. Its provisions are concerned with the quantification of the amount of the payment to Covenantholders by way of return upon their investment rather than the realisation of their assets. That can be seen when it is set out at length.

> "The Covenantholder will receive his due proportion of the benefits obtained from the sale of the timber harvested by the Milling Company from the planting in respect whereof his Covenant is issued in accordance with the terms and conditions set out in the Covenant and determined in manner following that is to say: All moneys received by the Milling Company from the sale of standing timber or timber felled, cut, milled and manufactured and sold pursuant to the Tripartite Agreement will be applied as follows:
>
> (a) in recouping to the Milling Company all expenses of whatsoever nature necessarily incurred in connection with the felling, cutting, milling, manufacturing and selling of the thinnings and fully grown trees and the timber milled and manufactured therefrom, including rents, rates, taxes ... and insurance, overhead charges and bad debts actually written off;
>
> (b) in providing an annual amount for the depreciation of the Milling Company's buildings, plant and machinery and other deductions as specified in the Schedule to the Tripartite Agreement;
>
> (c) in paying to the Milling Company a sum equal to $12 per centum per annum upon the issued and fully paid capital of the Milling Company;
>
> (d) in paying immediately to the Company 5% of the net balance of such moneys, to be retained by it as its commission for its services, and in paying the balance then remaining of such moneys to the Company in accordance with the terms of the said Tripartite Agreement.
>
> (e) The Company, after deducting from the said remaining balance of such moneys so received by it from the Milling Company
>
> (i) the cost to the Company of labour and material involved in the spreading of further fertilizer ...;
>
> (ii) the cost of any other treatment carried out on the advice of the Company's Technical Superintendent with the approval of the Trustee ...; and
>
> (iii) the excess amount (if any) by which the total estimated expense to the Forest Company during the ... period of twenty (20) years of maintaining and tending the trees in the plantation or plantations of the planting year

> to which the relevant covenants relate ... shall exceed the total sum estimated by the Forest Company ... for the purposes of sub-paragraph (iii) of sub-clause (a) of Clause 20D of the Trust Deed as amended;
>
> will pay the balance to the Trustee for the Covenantholders for distribution by the Trustee amongst the Covenantholders entitled thereto in accordance with their respective holdings."

201 This provision does not speak of the realisation of assets held for the benefit of Covenantholders, but of a payment by way of return from the activities of the Forest Company and the Milling Company.

202 The 1984 Covenant provided, by cl 6, for the payment of a sum in respect of "the value" of land, calculated as the increase in the valuation of the land appropriated to a given year's planting and its valuation when the timber on the land is clear felled.

203 The Covenant also made provision, by cl 8, for the security of Covenantholders which adopted the substance of the provisions of cll 2(d) and 20A of the Trust Deed.

Textual considerations

Principles of construction

204 In *Kauter v Hilton*,[186] Dixon CJ, Williams and Fullagar JJ referred to:

> "the established rule that in order to constitute a trust the intention to do so must be clear and that it must also be clear what property is subject to the trust and reasonably certain who are the beneficiaries."

205 The need for clarity as to the intention to create a trust and its subject matter is of particular importance in a commercial context where acceptance of an assertion that assets are held in trust is apt to defeat the interests of creditors of the putative trustee. The traditional inclination of the courts is to protect creditors against the use of a straw company as a trading trustee.[187]

206 AET placed considerable reliance upon the following observations of Bell, Gageler and Keane JJ in *Legal Services Board v Gillespie-Jones*:[188]

> " '[U]nless there is something in the circumstances of the case to indicate otherwise, a person who has "the custody and administration of property on behalf of others" or who "has received, as and for the beneficial property of another, something which he is to hold, apply or account for specifically for his benefit" is a trustee in the ordinary sense'[189] (footnotes omitted). A legal practitioner who receives money from a client to be held for and on behalf of the client or another person archetypally answers that description."

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186 (1953) 90 CLR 86 at 97; [1953] HCA 95. See also *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq)* (2000) 202 CLR 588 at 604 [29].

187 *Re The Exhall Coal Co Ltd* (1866) 35 Beav 449 [55 ER 970]; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367, 372; [1979] HCA 61.

188 (2013) 249 CLR 493 at 523-524 [113]; [2013] HCA 35.

189 *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 165-166; [1993] HCA 1, quoting *Taylor v Davies* [1920] AC 636 at 651 and *Cohen v Cohen* (1929) 42 CLR 91 at 100; [1929] HCA 15. See also *Mann v Hulme* (1961) 106 CLR 136 at 141; [1961] HCA 45.

207 This passage identifies the nature of the inquiry which must occur in order to determine whether a person is a trustee; it does not suggest an affirmative answer to the critical questions in this case, namely whether the Forest Company or the Milling Company had "the custody and administration of property on behalf of" the Covenantholders, or had "received, as and for the beneficial property of [the Covenantholders], something which [they were] to hold, apply or account for specifically for [their] benefit". Indeed, the contrast between the receipt of moneys by a legal practitioner to be held specifically for the benefit of a client or a third party and the receipt of investment funds by the Forest Company tells against an affirmative answer.

208 The language of the relevant documents is not to be strained to discover an intention to create a trust of the broad scope for which AET contends. In *Byrnes v Kendle*,[190] Gummow and Hayne JJ noted the approval by Mason CJ and Dawson J in *Bahr v Nicolay [No 2]*[191] of the proposition stated earlier by du Parcq LJ[192] that:

> "unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the court ought not to be astute to discover indications of such an intention."

"Interests" and "entitlements"

209 AET's argument fastened upon words and phrases in the relevant documents such as "interests" and "entitlements to proceeds", which were said to indicate an intention to vest in the Covenantholders a proprietary interest in the timber and land.[193] AET argued that the relevant documents reveal a "painstaking attempt" to ensure that the Covenantholders' investments were at all times dealt with by the Forest Company and the Milling Company in the interests of the Covenantholders by creating a trust of assets held for the benefit of the Covenantholders.[194]

210 As has been seen, the terms of the Trust Deed lend little support to the argument that it created any trusts of which the Forest Company was trustee for the Covenantholders. The Trust Deed, which does create express trusts of limited scope, nowhere expresses a trust of the broad scope for which AET contends.

211 In the relevant documents, references to the "interests" and "entitlements" of the Covenantholders are not to proprietary interests as opposed to contractual entitlements, any more than references in the Companies Act and the Companies Code to "interests" and "prescribed interests" were to proprietary interests rather than matters of contract. It is the context in which these terms are used which controls their meaning. It has long been recognised that, in the context of managed investment schemes similar to the present, these terms do not indicate an interest of a proprietary nature held on trust by the manager for the investor.

212 In *Clowes*, this Court was concerned with whether an investor, described as a "lotholder", who had entered into two agreements with a timber growing company, had

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190 (2011) 243 CLR 253 at 272 [49].
191 (1988) 164 CLR 604 at 618; [1988] HCA 16.
192 *In re Schebsman* [1944] Ch 83 at 104.
193 1984 Prospectus at 3, 4, 16, 24. See also Trust Deed, cl 20A(c); Tripartite Agreement, preamble and cl 15.
194 *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 165-166.

a beneficial interest in the timber getting enterprise. The first of those agreements recited[195] that:

> "the lot-holder is desirous of becoming possessed of a beneficial interest in the produce of one acre of timber lands (hereinafter referred to as a lot or lots) forming portion of four hundred and fifty acres of land ... in South Australia".

213 The agreement provided[196] that the lot-holder pay to the company £25 per lot, and, in return, the timber growing company agreed to transfer the land into the name of a trustee company, which was to hold the land upon trust to "compel the company to fairly and faithfully carry out all the obligations entered into by it with respect to planting and maintaining the said land with pine trees". The trustee company was also obliged to:

> "hold the whole of the said land as security for the performance ... [of] the trust deed ... and to hold the produce of the said land and net proceeds thereof in trust for the company and the lot-holders as to nine-tenths thereof for the lot-holders ... and as to one-tenth thereof in trust for the company."

214 The timber growing company also agreed[197] that it would:

> "as soon as the forest or growing timber on the said land or any part of it has reached maturity or otherwise become marketable make such arrangements as it considers necessary or advisable for marketing the produce thereof either standing or cut and after deducting all costs and expenses and the company's one-tenth share of the net proceeds ... will distribute the remaining nine-tenths amongst the lot-holders in the proportion of one-four hundred and fiftieth part for every fully paid up lot in full and final settlement of the claims of such lot-holders under this contract."

215 Dixon CJ explained the effect of the agreement in the following terms:[198]

> "[A lot-holder] laid out a sum of money entitling him at the end of a protracted period of time to an uncertain return in a lump sum which he hoped might prove larger than his outlay though it might well prove smaller. In the event, when a period of fifteen to eighteen years had elapsed, he received back a sum equal to his outlay and an additional forty per cent. But [he] did nothing but lay out his money on the faith of the contract and await the result. The company was in no sense his agent. The money which he paid in pursuance of the contracts became part of the general funds of the company. Its obligations to him were simply contractual. It made the contract for its own advantage and in performing it acted independently of the direction or control of any lot-holders, whose relationship to the company was simply that of persons providing it with money on special terms."

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195 (1954) 91 CLR 209 at 210. The second agreement was in materially the same terms but related to different land.
196 (1954) 91 CLR 209 at 211.
197 (1954) 91 CLR 209 at 212.
198 (1954) 91 CLR 209 at 216-217.

216 Dixon CJ went on to make the point that the agreement did not have the effect that the business of planting and harvesting pine trees was carried on by the lot-holder or on his or her behalf. His Honour said:[199]

> "[T]he operation giving rise to the profit ... was the planting of pine trees, the cultivation of the plantation and the logging and disposal of timber. These appear to me to have been both in fact and in law the operations of the company conducted on its own behalf and not on behalf of the lot-holders. True it is that the company had contracted with the lot-holders to plant the trees, market the timber and pay over the stipulated portion of the proceeds. But these were contractual terms on which the money was raised by the company. From the [lot-holder's] standpoint the only profit in contemplation was an increase in the amount he invested with the company when the money became repayable as a result of the operations of the company, operations which as part of the terms of the investment the company became bound to carry out. To enter into a contract to provide a specified sum on such terms, to pay it and then to await results cannot in my opinion be properly described as 'carrying on or carrying out a scheme or undertaking'."

217 The point of this passage was that, notwithstanding the terms of the recital, which spoke of the lot-holder "becoming possessed of a beneficial interest in the produce of one acre of timber lands", the lot-holder acquired only contractual rights. Kitto J made the same point:[200]

> "The active duties to be performed by the company were laid down in cll 5 and 8. Without troubling to set out the detail of these provisions it may be said that, first, cl 5 bound the company to plant the land with pine trees in a proper and husband-like manner; and cl 8 obliged it, as soon as the forest or growing timber on the land or any part of it should have reached maturity or otherwise become marketable, to make arrangements for marketing the produce thereof, either standing or cut, and, after deducting all costs and expenses and its own one-tenth of the net proceeds, to distribute the remaining nine-tenths amongst the lot-holders in proportion to their lot-holdings, in full and final settlement of their claims under the agreement. It will be observed that what each lot-holder was to become entitled to ultimately was an aliquot share in nine-tenths of the net proceeds of marketing; and it is in this sense that the recital must be understood when it refers to a beneficial interest in 'the produce' of an acre, or two acres, forming portion, but an undivided portion, of the specified parcel of land."

218 These observations have particular relevance to cl 12(b) and (d) of the Trust Deed, cll 9 and 10A of the Tripartite Agreement and cl 4 of the Covenant.

219 Counsel for the appellants put these passages from *Clowes*, the force of which is evident, in the forefront of their argument in this Court. It is noteworthy that counsel for AET did not attempt any response directed to this important aspect of the appellants' argument.

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[199] (1954) 91 CLR 209 at 218.
[200] (1954) 91 CLR 209 at 221.

220 The contemporaneous exposition in *Clowes* of the effect of an agreement cast in language with evident similarities to the arrangements effected by the relevant documents is significant. The reasons of Dixon CJ and Kitto J afford powerful guidance as to the correct interpretation of the relevant documents. Their Honours' exposition of the effect of similar language in a similar commercial context affords a compelling indication as to the contemporary understanding of the relevant documents.[201]

221 In the Court of Appeal, the appellants argued that the investment scheme was promoted to investors on the basis that any return was not assessable for income tax. It was said that, having regard to the reasoning in *Clowes*, there was a significant risk that the relevant proceeds would in fact become assessable to income tax if a trust relationship were inferred because it might be said that the business was being conducted by the Covenantholders or on their behalf, so that the profits of the business were assessable in their hands. For that reason, so it was said, the Court of Appeal should be slow to accept the trust argument propounded by AET.

222 The majority in the Court of Appeal rejected the appellants' argument that the decision in *Clowes* supported an inference that it was the parties' "deliberate decision" not to impose trust obligations on the Forest Company or the Milling Company.[202] Their Honours considered that "[t]he scheme ... had all of the characteristics identified in *Clowes* as leading to the conclusion that the investment return in that case was non-assessable."[203] It may be observed that among those characteristics was that the holder of an interest in the enterprise was not the principal on whose behalf the enterprise was conducted by the management company.[204] The majority in the Court of Appeal, in focusing upon the likely tax consequences for Covenantholders, did not fully acknowledge the significance for the interpretation of the relevant documents of the meaning assigned by Dixon CJ and Kitto J to similar language used in a context analogous to the present.

223 The majority in the Court of Appeal also referred[205] to the observation of Barwick CJ, with whom Gibbs and Stephen JJ agreed, in *Milne v Federal Commissioner of Taxation*:[206]

> "Whether or not an acquisition of an interest in land be regarded as involved in the purchase of a bond, it seems to me that the [investors] had no scheme or plan other than to participate in the result of the company's covenanted activities on the land by way of capital increment to the amount invested in the bond."

That observation is consistent with the view that the "company's covenanted activities" were not conducted as agent or trustee for bondholders.

224 It is also noteworthy that Barwick CJ adverted to, and expressly rejected, an argument which sought to characterise the bondholders in that case as principals in relation to the timber growing company's profit-making scheme rather than merely

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201 "Contemporanea expositio est optima et fortissima in lege" (a contemporary interpretation is the best and strongest statement of legal meaning): 2 Co Inst 11.
202 *Korda v Australian Executor Trustees (SA) Ltd* [2014] VSCA 65 at [54].
203 *Korda v Australian Executor Trustees (SA) Ltd* [2014] VSCA 65 at [63].
204 (1954) 91 CLR 209 at 216-217, 221; for a contrary view see at 219.
205 *Korda v Australian Executor Trustees (SA) Ltd* [2014] VSCA 65 at [182]-[185].
206 (1976) 133 CLR 526 at 535; [1976] HCA 2.

persons who provided the company with money albeit on "special terms".[207] Barwick CJ said:[208]

> "I am unable to accept that the trustees' power to direct realization of the lands of the plantations involved the bondholders in any participation in the company's business."

Separate accounts

225 A significant textual consideration is that no provision in any of the relevant documents required either the Forest Company or the Milling Company to create and maintain an account separate from its general funds to safeguard the timber proceeds from the vicissitudes of their business.

226 AET argued that the protective intent of the relevant documents was manifested by cll 3(ca), 3(d)(i), 3(f) and 3(g) of the Trust Deed and cl 8 of the Tripartite Agreement. But these provisions fell far short of requiring that the moneys invested by Covenantholders not be used as part of the assets of the Forest Company.

227 In *Jessup v Queensland Housing Commission*,[209] the Queensland Court of Appeal rejected a submission that a provision of an agreement which required that a recipient of funds keep an accounting system capable of identifying income emanating from the funds was indicative of a trust. Such a provision, said McPherson JA, with whom Davies JA and Philippides J agreed:

> "ill accords with the notion that [the provider] was, from the beginning and throughout, the beneficial owner of the funds it supplied and that [the recipient] was simply the legal title holder of those funds for [the provider]."

228 The Tripartite Agreement provided, by cl 8, for the keeping of records by the Forest Company and the Milling Company to enable Covenantholders' entitlements to be identified. *Jessup v Queensland Housing Commission*[210] is again of assistance. In that case, McPherson JA considered provisions, at least as rigorous as cl 8, for the keeping of records of moneys received by a putative trustee, and said:

> "All of these are or resemble obligations like those imposed by equity on a trustee in similar circumstances. In the end, however, they tell against rather than in favour of the existence of a trust. If [the provider] as settler had intended to create a trust, it would have been simple to have said so, instead of descending to the detail it did in the Agreement; or, if the reason for including the detail was to point up the specific obligations of [the recipient] as trustee, it would have been cautionary to have done both. It is true, said du Parcq LJ in *Re Schebsman*,[211] that:
>
> > 'by the use possibly of unguarded language, a person may create a trust, as Monsieur Jourdain talked prose, without knowing it, but unless an intention to create a trust is clearly to be collected from the language used and the circumstances

[207] (1976) 133 CLR 526 at 534.
[208] (1976) 133 CLR 526 at 534.
[209] [2002] 2 Qd R 270 at 274-275 [12]-[13].
[210] [2002] 2 Qd R 270 at 273-274 [8]-[9].
[211] [1944] Ch 83 at 104.

> of the case, I think that the court ought not to be astute to discover indications of such an intention.'
>
> If the purpose of [the provider] was to inspire the poetry of trusts, it is odd that it chose to express itself in common law prose."

229 Those observations apply with even greater force to the present case. In particular, cll 3(ca), 3(d)(i), 3(f) and 3(g) of the Trust Deed and cl 8 of the Tripartite Agreement all tell against, rather than in favour of, the existence of the trust for which AET contends. They provide necessary aid to the identification and enforcement of the contractual entitlements of the Covenantholders precisely because their investments were to be mixed with the general funds of the Forest Company when they were received by it.

Commercial considerations

230 The reasons of the majority in the Court of Appeal do not come to grips with two important commercial consequences of the conclusion that the Forest Company and the Milling Company are trustees for the Covenantholders. First, to declare the beneficial entitlement of AET as trustee for the Covenantholders in respect of the Relevant Proceeds may be of limited utility given the consequent entitlement of the Forest Company and the Milling Company, as newly declared trustees, to indemnity from the Relevant Proceeds in respect of liabilities properly incurred by them in carrying on the enterprise for the benefit of the Covenantholders.[212]

231 In *Octavo Investments Pty Ltd v Knight*,[213] Stephen, Mason, Aickin and Wilson JJ said:

> "If the trustee has incurred liabilities in the performance of the trust then he is entitled to be indemnified against those liabilities out of the trust property and for that purpose he is entitled to retain possession of the property as against the beneficiaries. The trustee's interest in the trust property amounts to a proprietary interest, and is sufficient to render the bald description of the property as 'trust property' inadequate."

232 The second difficulty bears upon the perceived need for commercial protection of the Covenantholders as the basis for discerning a trust relationship. In this regard, the primary judge, and, it would seem, the majority in the Court of Appeal, came to a conclusion that the investments of the Covenantholders were trust property used in the conduct of the business of the plantation. Their Honours did not advert to the possibility that their conclusion as to what the parties intended might expose Covenantholders, as beneficiaries of a trading trust, to personal liability, beyond the amount of their investments, to the creditors of the Forest Company and the Milling Company for debts incurred by the Forest Company and the Milling Company in the course of their management of the enterprise for the benefit of the Covenantholders.[214] Neither the primary judge nor the majority in the Court of Appeal took into account the personal right of a trustee to indemnity from the beneficiaries of a

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[212] *Re Enhill Pty Ltd* [1983] 1 VR 561 at 564-565, 570-571; *Young v Murphy* [1996] 1 VR 279 at 303.
[213] (1979) 144 CLR 360 at 369-370.
[214] *J W Broomhead (Vic) Pty Ltd (In liq) v J W Broomhead Pty Ltd* [1985] VR 891 at 936-940.

trading trust recognised in *Hardoon v Belilios.*[215] As Lord Lindley said:[216]

> "The plainest principles of justice require that the cestui que trust who gets all the benefit of the property should bear its burden unless he can shew some good reason why his trustee should bear them himself."

233 In this regard, it is instructive that, in *Clowes*, Webb J, who dissented, holding that the receipt was assessable to income tax, took the view that the agreements there in question did create a trading trust. His Honour said that:

> "there is enough on the face of the agreements to indicate that the [lot-holder] acquired not choses in action but interests in particular timber in respect of which he was paid, on the basis of his lot-holding, his due proportion of the profits from the timber grown on his lots and other lots, and thus to establish the necessary relationship between the [lot-holder] and the source of the income and to prevent the latter from being held to be a capital receipt. ...
>
> Here the source of the income in question is in the cultivation of the lots ...
>
> So regarded the [lot-holder] was as much a party to this profit-making undertaking or scheme as was the company which operated on his lots. ... As to nine-tenths, the profits from his lots were made for him and not for the company. The company received the remaining one-tenth as its share of the proceeds of the joint venture."[217]

234 That passage echoes the view of the relevant documents taken by the majority in the Court of Appeal. On that view, the Forest Company and the Milling Company were trustees of a trading trust, and so would be entitled to be indemnified from the Covenantholders against their respective indebtedness to external creditors insofar as those liabilities were properly[218] incurred in the course of the trust.[219] Accordingly, to hold that the Forest Company and the Milling Company were acting as trustees for the Covenantholders because necessary protection of their commercial interests required that conclusion would be to expose them to a risk of personal liability to external creditors. It is far from self-evident that Covenantholders would have welcomed such a risk.

235 In this Court, AET argued that cll 34 and 3(c) of the Trust Deed were sufficient to defeat any personal right of indemnity which the Forest Company might have asserted against the Covenantholders. That argument is not compelling. As noted above, cl 34 of the Trust Deed did not operate before 26 August 1986. Further, cl 3(c) of the Trust Deed, which was in operation earlier, was not cast in terms which were apt to exclude an equitable obligation which rests upon the "plainest principles of justice". And, in any event, these provisions could not affect the rights of the Milling Company because it was not a party to the Trust Deed.

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215 [1901] AC 118 at 123-125. See also *Trautwein v Richardson* [1946] ALR 129 at 134-135; *Marginson v Ian Potter & Co* (1976) 136 CLR 161 at 175-176; [1976] HCA 35; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 244 [42]; [1998] HCA 4; *Jessup v Queensland Housing Commission* [2002] 2 Qd R 270 at 275 [14].

216 [1901] AC 118 at 123.

217 (1954) 91 CLR 209 at 219.

218 *Ron Kingham Real Estate Pty Ltd v Edgar* [1999] 2 Qd R 439 at 441-442.

219 *Hardoon v Belilios* [1901] AC 118 at 123-125; *Jessup v Queensland Housing Commission* [2002] 2 Qd R 270 at 275 [14]. See also McPherson, "The Insolvent Trading Trust", in Finn (ed), *Essays in Equity*, (1985) 142 at 144-150.

236 In the end, speculation about the adequacy of the protection afforded to the Covenantholders by the relevant documents against the various commercial risks to which their investment exposed them cannot alter the substance of the terms of the investment upon which the parties agreed.

237 For the foregoing reasons, the provisions of the relevant documents did not warrant the conclusion that the Forest Company or the Milling Company owed obligations to Covenantholders beyond the contractual obligations undertaken by the Forest Company.

The notice of contention

238 In a notice of contention, AET argued that aspects of the recent conduct of the appellants should be regarded as admissions capable of establishing the trusts for which AET contends. AET relied upon correspondence involving the Company Secretary of the Forest Company and the Milling Company to suggest that those companies followed a practice of segregating and protecting the investment funds or their proceeds for the benefit of the Covenantholders. It was argued that this practice amounted to an admission of the existence of a trust relationship.

239 This contention was not accepted by either of the courts below. It should be noted that the appellants adduced evidence denying the existence of any such practice. That evidence was not contradicted or indeed challenged. It is simply not open to this Court to conclude that either the Forest Company or the Milling Company declared itself trustee by the adoption of a practice of keeping investment funds separately from its other assets.

240 In these circumstances, there is no reason to doubt that the primary judge was correct when he said that: "If I am wrong and there is no trust it is unlikely that the admissions, such as they are, would be capable of creating an express trust."[220]

Conclusion

241 The appeal should be allowed with costs.

242 It should be ordered that paragraphs 1 and 2 of the orders of the Court of Appeal made on 10 April 2014 should be set aside. In their place, it should be ordered:

(a) the appeal to that Court is allowed;

(b) paragraphs 1, 2 and 3 of the orders of the Supreme Court of Victoria made on 1 March 2013 be set aside and, in their place, declare that:

(i) the respondent is not entitled to any of $33,999,998 payable to the fourth appellant pursuant to the Tree Sale Agreement, being the agreement dated 15 March 2012 to which the third appellant, the fourth appellant, the fifth appellant, and the respondent, amongst others, were parties; and

(ii) the respondent is not entitled to any of $53,356,000 payable to the third appellant under the Land Sale Contracts, being two contracts

[220] *Australian Executor Trustees (SA) Ltd v Korda* (2013) 8 ASTLR 454 at 477 [95].

dated 15 March 2012 to which the third appellant, amongst others, was a party; and

(c) the respondent pay the appellants' costs of the proceedings before the primary judge and the Court of Appeal.

Index of cases and authorities

This keyword index is experimental, was automatically generated and will be refined
referenced by paragraph