

Journal of Equity (JOE)
Volume 15 Part 3
(articles included in this part are linked to the LexisNexis platform)

CONTENTS

Articles

[Solving the riddle of ratification of misappropriation of company property: A new analogy](#)

— *Rosemary Teele Langford*

233

The ability of shareholders to authorise or ratify breach of directors' duty is a complex topic, particularly in Australia due to an established line of cases that has restricted authorisation and ratification of breach of statutory duty. One category of cases where ratification has been denied at general law is where the breach involves misappropriation of company property. Cases in this category appear difficult to reconcile. However, an analogy with statutory proscriptions on improper use of position and of information from position has the potential to bring clarity to this category of cases and also helps explain when ratification by shareholders who are also directors will be ineffective, including in cases in which courts have denied ratification or authorisation of breach of statutory duty.

[Restructuring business trusts as unregistered companies](#)

— *Hans Tjio*

259

The use of alternative business forms harks back to the unincorporated joint stock company that was often a partnership with trust characteristics. Real Estate Investment Trusts (REITs) and business trusts form a large component of the Singapore Exchange but there are issues with their liquidation and restructuring. They have been analogised with the company which has clear asset partitioning conferring creditor claim priority to a segregated fund. Such partitioning also existed with partnerships and trusts and this was recognised by Victorian legislatures which crafted early company legislation. While Australian courts have focused on winding up trustees as there is no 'trust' as such, restructuring poses more problems, especially for REITs with separate custodian-trustees and managers. It is argued here that they could be seen as 'unregistered companies' under Commonwealth Companies Acts and restructured in a way that mirrors an incorporated company.

[Trusts over cremated ashes](#)

— *Kate Falconer*

283

Every year in Australia over 110,000 people are cremated. Each of these cremations leaves behind physical material — what is commonly referred to as 'cremated ashes', or, more succinctly (and no less respectfully), 'cremains'. In recent decades, Australian courts have begun to impose trusts over this physical material prior to its ultimate disposal. This 'cremated ashes trust' provides courts with much-needed flexibility in resolving bitter disputes between those close to the deceased, but, so this article argues, is built on flawed foundations. In particular, this article rejects the explanation given in the case law to date, which sees the trust over cremated ashes as an express trust for a purpose.

Instead, it argues that the classification of the cremated ashes trust as a constructive trust best reflects both doctrinal reality and the normative forces that have underpinned its development.

Salvaging security: The normative basis of equity's relief against forfeiture

— *Andrew Berriman*

306

This article examines the jurisdiction to relieve against forfeiture, specifically the enforcement of securities. The article argues that the normative impulse to grant relief is found in two places: the characterisation of a clause as a security for the performance of a stipulation, and the ability of the court to order the performance of that stipulation, albeit late. That impulse to grant relief is the vindication of the parties' intentions, provided that the innocent defendant can still obtain the performance bargained for. The article goes on to critique the 'property requirement' developed by Lord Diplock in *The Scaptrade* and developed further by the House of Lords, the Supreme Court and the Court of Appeal. The argument for abandoning the property requirement is that it does not assist to accomplish the normative impulse and it does not foster commercial certainty as asserted elsewhere.