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Articles

Recovering misdirected trust assets in the face of Torrens indefeasibility

— *Alvin W-L See*

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Where misdirected trust asset consists of, or becomes invested in, registered land, whether the beneficiary could recover it from the recipient is doubtful given that the Torrens system, through the principle of indefeasibility, effects a substantial reversal of the priority rules under the general law. The key to unravelling the seemingly inconsistent cases on this topic is to be sensitive to the diversity in drafting and interpretation of the different Torrens legislations, with particular focus on whether the principle of indefeasibility also protects registered volunteers. Through a comparative study of the Torrens jurisdictions in Australia and Singapore, this article highlights how the position differs from jurisdiction to jurisdiction and makes suggestions on how the interests of the competing parties may be best balanced.

Conceptions of the fiduciary in trust law

— *Tobias Barkley*

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Statutory reform of trust law in New Zealand is taking the groundbreaking step of defining the express trust relationship. Part of the definition is that trusts are fiduciary relationships. As interpretation of the statute will take into account common law principles, this reform provides an opportunity to reflect on what fiduciary means in trust law. The article identifies five distinct conceptions of the fiduciary in trust cases. While all five are concerned with restraint on the trustees' discretion, different trustees can be restrained by different standards of behaviour. The identified fiduciary conceptions range from the classical fiduciary, who must solely and exclusively act for the benefit of others, to the honest fiduciary, who is free to honestly benefit him- or herself. The range of meaning in the common law will complicate interpretation of 'fiduciary' in the New Zealand legislation.

Rethinking equitable damages

— *Daniel Reynolds*

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The remedy we now know as 'equitable damages' was called into existence by a statute that had a single, limited purpose: to save litigants the trouble of having to go to two separate courts to get all the relief to which they were entitled. That statute was later construed by English courts as having a considerably broader effect, that is, allowing courts to award damages in circumstances where they would not have been available at common law. This article argues that that reading should not have been adopted as a matter of statutory construction, and that Australia's continued adherence to it has a hidden potential to undermine longstanding principles of the law of damages. The solution proposed is to depart from the English authorities and adopt an alternative construction of the statute which conforms with its terms, context and purpose.

Comment and Analysis

Accounting for gains from knowing participation in breach of fiduciary duty

— *Pauline Ridge*

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This comment discusses the High Court's decision in *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* concerning the remedy of account of profits for knowing participation in a dishonest and fraudulent breach of fiduciary duty. It endorses the Court's confirmation that equitable, rather than common law, causation principles apply in determining an account of profits against the knowing participant, but prefers Gageler J's minority view that the requisite causal link is between the participant's gain and the fiduciary's wrongdoing, rather than between the participant's gain and their own wrongdoing. The equitable methodology for quantifying the knowing participant's gain is discussed and it is argued that the Court failed to provide a convincing explanation for why its quantification of the profits was preferable as a matter of principle to that of the Full Federal Court. This failure creates uncertainty and undermines the credibility of equity's judicial method. The reluctance of the Court to engage with the conceptualisation of some equitable participatory liability as accessorial in nature is also noted.

Doctrine, policy, culture and choice in assessing unconscionable conduct under statute: *ASIC v Kobelt*

— *Jeannie Marie Paterson, Elise Bant and Matthew Clare*

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In *Australian Securities and Investments Commission v Kobelt* the High Court of Australia held by a narrow majority that an informal and largely undocumented credit scheme known as 'book-up' provided by Mr Kobelt to the indigenous residents of the remote South Australian APY Lands, the Anangu people, was not unconscionable under the Australian Securities and Investments Commission Act 2001 (Cth). This article analyses the use of legal principle, concepts of voluntariness and benefit, and evidence about culture by the High Court in this decision. It argues that in terms of both legal doctrine and policy outcomes, the approach of the minority judges is to be preferred.