BACK TO THE FUTURE: RETROGRESSION AND THE HIGH COURT'S DECISION IN *BYRNES V KENDLE*

LUDMILLA ROBINSON*

Case citation; *Byrnes v Kendle* (2011) 243 CLR 253; [2011] HCA 26 (3 August 2011)

I. INTRODUCTION

Byrnes v Kendle[1] ('*Byrnes*') is an interesting and arguably contentious decision regarding the law of trusts in Australia. On the one hand, the case clarifies the duties of a trustee when no duties have been provided in the trust instrument. This in itself is useful but unremarkable. On the other hand, the noteworthy aspect is the Court's approach to the interpretation of a trust instrument, the issue of intention to create a trust and the unanimous overruling of *Commissioner of Stamp Duties (Qld) v Jolliffe* (1920) 28 CLR 178 ('*Jolliffe*'). Certainty of intention to create a trust is one of the three 'certainties' necessary for the establishment of a valid trust. For just over ninety years, *Jolliffe* has provided authority for the proposition that the subjective as well as the objective[2] intention of a settlor at the time a trust was created should be considered by the court, and, if necessary, should outweigh the objective intention expressed in the trust instrument. Thus, prior to *Byrnes*, if a settlor created a trust for a purpose other than holding legal title to property for the benefit of a beneficiary,[3] the court could take this ulterior motive, together with other relevant facts and circumstances, into consideration when determining whether a valid trust had been created. Now, it would appear, such a broad and traditionally equitable approach to the construction of a trust instrument has been overruled, to be replaced by the requirement of a narrow and purely textual, rather than contextual, interpretation.

* BA (Hons), Dip Ed, Dip Law, PhD, SJD, Barrister and Lecturer in Equity and Trusts, School of Law, University of Western Sydney.

[1] (2011) 243 CLR 253.

[2] The objective intention is evidenced by the actual words used in the document.

[3] For example, as a means of circumventing statute, as in *Jolliffe*, income redistribution or as a business strategy.

In addition to the consideration of the interpretation and validity of trust instruments, all three judgments in *Byrnes* present comprehensive, helpful discussions of the defences of acquiescence, consent and waiver.

There were three judgments handed down in the case. An individual judgment by French CJ, and two joint judgments by Gummow and Hayne JJ and Hayden and Crennan JJ. Although the reasoning and approaches taken in each of the decisions differ, they are all in agreement as to the conclusions drawn in relation to the major issues. As may be gathered from the following discussion, another common feature exhibited by all three is an implicit, and in some instances explicit, conservatism, manifested by a preference for restatement and explication.

II. BACKGROUND

Joan Byrnes and Clifford Kendle were married in 1980. They separated in 2007, but at the time of the High Court proceedings, had not divorced. Both parties had adult children at the time of their marriage. In 1984 Mr Kendle purchased a unit in Brighton, South Australia, which was financed with a loan under the *Defence Service Homes Act* 1918 (Cth). The unit was registered in Mr Kendle's name.

In 1989, Martin Byrnes, Mrs Byrnes' son and a solicitor, advised the parties to execute a document in regard to the property which was described as an 'Acknowledgement of Trust.' The instrument provided (inter alia):

> 1. Subject to clause 2 [Mr Kendle] stands possessed of and holds one undivided half interest in the Property as tenant in common upon trust for [Mrs Byrnes] absolutely ('the Byrnes Interest').

It went on to provide that, should one of the parties predecease the other, the survivor would hold a life interest in the share of the deceased party.

The instrument constituted a deed pursuant to s 41 of the *Law of Property Act* 1936 (SA), because it was executed by both parties, their signatures duly witnessed and the document was expressed as being sealed.

In 1994, the Brighton property was sold and with the proceeds, the parties purchased a house in Rachel Street, Murray Bridge, South Australia. The Defence Services loan was transferred to the new

property and a mortgage was also taken out with Westpac. As with the first property, Mr Kendle was the sole registered proprietor. In 1997 the parties executed a deed in relation to the Rachel Street property, which created Mr Kendle trustee of a half share in the Rachel Street properties on similar terms as the 1989 instrument.
In 2001, the parties moved into a property which had been purchased by Martin Byrne. In early 2002, Mr Kendle rented the property to his son for a weekly rental of $125.00. The son, however, paid only the first two weeks rent. In January 2007, Mr Kendle, on the advice of his daughter, terminated the son's tenancy in the Rachel Street house and it was subsequently let to his grandson. The parties separated in March 2007.

At about this time, Mrs Byrnes assigned her interest in the Rachel Street property to her son, Martin, including her rights under the 1997 deed, for $40,000.00. The Rachel Street property was sold in 2008.

III. THE SLIPPERY PATH OF LITIGATION

In September 2008, Martin Byrnes commenced proceedings in the District Court of South Australia against Mr Kendle alleging, inter alia, that he had committed breaches of trust in failing to collect the rent for the Rachel Street house from his son and in breaching the duty to account. The plaintiff claimed one half of the proceeds of sale of the property, an order that Mr Kendle provide a full accounting of the income from and costs of the property and that any moneys found to be due as a result of the account be deducted from Mr Kendle's share of the proceeds of sale. In his defence, Mr Kendle alleged that Mrs Byrnes had consented or acquiesced to his conduct regarding the collection of the rent, thereby waiving her rights. Mr Kendle also raised estoppel as a defence.

The primary judge, Boylan DCJ, found that Mr Kendle held half of the net proceeds of the sale of the property on trust for Mr Martin Byrnes, but dismissed the allegations of breaches of trust on the basis that Mrs Byrnes had "co-operated" in the breaches by failing to take action to require Mr Kendle to collect the rent. A costs order was made against Mr Byrnes and his mother.

Mr Byrnes appealed the decision and on 18 December 2009, the Full Court of the Supreme Court of South Australia (Doyle CJ, Nyland and Vanstone JJ) dismissed the appeal and ordered costs against the Byrnes.

IV. ISSUES

There were three significant issues considered by the High Court in this case. These are as follows:

1. whether a valid trust had been created by the Acknowledgement of Trust of 1997.
2. if so, whether Mr Kendle had breached his duties as trustee by failing to collect the rental owed on the property.
3. if there had been breaches of trust, whether Mrs Byrnes had acquiesced or in some way consented to these breaches, thereby waiving any rights she might have had to seek redress against the trustee.

V. CREATION OF A VALID TRUST

The starting point for the deliberations of the Court was the issue of the validity of the trust created by the Acknowledgement of Trust of 1997. In their judgments, French CJ and Gummow and Hayne JJ found that the Acknowledgement of trust conformed to the requirement of s 29 (1)(b) of the *Law of Property Act* 1936 (SA), which provides that all declarations of trust in regard to an interest in land be evidenced in some form of writing. Thus, the validity of the trust instrument pursuant to statute was not in question. What was at issue was, the intention of the respondent when the trust was created, since he alleged (inter alia) that at the time of executing the deed, he had no intention to create a trust.[4] Naturally, if there was no valid trust, the respondent owed no fiduciary duties to the appellant and, therefore, no breaches of trust could have occurred.

Consideration of the questions of validity and intention centred upon two interrelated but nevertheless separate and arguable conflicting issues raised by the facts and circumstances of the case. These are:

1. validity as determined solely by the words of the trust instrument and whether extrinsic factors could or should be used to determine meaning;
2. the effect upon validity of the subjective intention of the settlor, Mr Kendle, at the time the trust instrument was executed, and the use of extrinsic circumstances to determine this ulterior, subjective purpose.

[4] *Byrnes*, above n 2, 256.

As noted above, these issues are related but, arguably, also at variance. If the sole criterion upon which the validity of a trust is to be determined is to be the face of the document itself, then one of the three certainties necessary for the creation of a valid trust, intention, could be rendered otiose if some form of writing has been used to create the trust.

A. *Validity as determined on the face of the instrument*

French CJ does not engage in any lengthy discussion of this particular issue, preferring to concentrate instead upon the examination of the concept of the subjective intention of the settlor as a means of determining validity. He quotes with approval, however, a passage from Thomas and Hudson, *The Law of Trusts* in regard to the importance of inferring trust from the instrument alone:

> In circumstances in which there has been an express trust declared over land, the terms of that trust will be decisive of the parties' equitable interests in land, in the absence of any fraud, undue influence or duress.[5]

His Honour goes on to add:

> The relevant intention in such a case is that manifested by the declaration of trust. Such a case does not require any further inquiry into the subjective 'real' intention of the settlor.[6]

Similarly, Gummow and Hayne JJ are brief and to the point in expressing their opinion that the intention to create a trust should be construed from the trust instrument alone and not through the examination of external factors.[7]

In contrast to the brief, if not precisely terse, statements of principle of French CJ and Gummow and Hayne JJ, the joint judgment of Heydon and Crennan JJ deals at length with the question of the determination of validity of a trust solely from the face of the instrument.

In their efforts to discredit the "common misconception" that it is necessary "to establish a subjective intention by the respondent to create a trust,"[8] their Honours draw upon the principles of

[5] Ibid 263, quoting G Thomas *The Law of Trusts* (Oxford University Press, 2nd ed, 2010) 95-96.
[6] Ibid.
[7] Ibid 273.
[8] Ibid 282.

constitutional and statutory construction. While not stating explicitly that the approach to the interpretation of the trust instrument should be the same as the approach taken to statutory interpretation, this implication is self-evident.

An interesting, and arguably controvertible, prelude to their discussion is their approval of the approach taken to statutory and literary interpretation of Charles Fried, whom they describe as 'the conservative at the Harvard Law School,'[9] no doubt intending to suggest that he is the only conservative in that venerable institution.[10] Fried rejects the notion that:

> in interpreting poetry or the [United States] Constitution we should seek to discern authorial intent as a mental fact of some sort . . . we would not consider an account of Shakespeare's mental state at the time he wrote the sonnet to be a more complete or better account of the sonnet itself.[11]

Apart from the fact that Fried appears to accept without question the validity of the approach to textual interpretation of the movement in literary criticism known as the New Critics,[12] he is arguably mistaken in attempting to compare the approach taken to a work of art and imagination to that which must be taken to statute. Such an analogy fails to consider the fact that, unlike statutory interpretation, there are no rules which prescribe a particular approach to literary criticism. Indeed, the New Critics, whose views Fried embraces with such enthusiasm, was just one of many schools of criticism theory, and by no means the most important. Thus, whilst it may be accurate to state that, in regard to statutes, 'the text is the intention,'[13] a similar 'black ink' method applied to literary analysis, especially poetry, devalues not only the efforts of the author to communicate, but also the ability of the reader to construct multiple and parallel levels of meaning.

After their brief, but misguided, excursion into literary theory and criticism, Heydon and Crennan JJ proceed to discuss the more traditional approaches to statutory interpretation, stressing 'the

[9] Ibid.
[10] It is arguable that their Honours hold the view that the appellation "conservative" gives credence and authority to Fried's pronouncements.
[11] Charles Fried, 'Sonnet LXV and the 'Black Ink' of the Framers' Intention' (1987) 100 *Harvard Law Review* 751, 758-759.
[12] Thereby, potentially stirring a hornets' nest of controversy from the stalwart and vocal opponents of this highly questionable school of literary criticism.
[13] Fried, above n 10, 759.

irrelevance of the subjective intention of legislators.'[14] It is the meaning of the statute which is paramount, not what the legislators meant.[15] This is a reasonable view, after all, a statute is a regulatory instrument, not a work of art and imagination.

Moving from statutory interpretation, their Honours turn their attention to examining approaches to contractual construction:

> Contractual construction depends on finding the meaning of the language of the contract – the intention which the parties expressed, not the subjective intentions which they may have had, but did not express.[16]

Thus, evidence of any pre-contractual dealings or negotiations between the parties is inadmissible 'unless it demonstrates knowledge of "surrounding circumstances."'[17] Their Honours go on to state that 'the actual state of mind of either party is only relevant in limited circumstances, for example, where one party relies on the common law defences of non est factum or duress.'[18]

After having emphasised the necessity for a purely textual interpretation of the meaning of the terms in a contract, their Honours proceed to discuss the correspondences between the construction of contracts and the interpretation of trust instruments, stating unequivocally that the rules of construction are the same for both.[19] Heydon and Crennan JJ quote with approval from the judgment of Mason and Dean JJ in *Gosper v Sawyer*,[20] in which their Honours state that: 'the contractual relationship provides one of the most common bases for the establishment or implication and for the definition of a trust.'[21] Thus, Heydon and Crennan JJ conclude that:

---

[14] *Byrnes*, above n 2, 283.
[15] Ibid.
[16] Ibid 284.
[17] Ibid.
[18] Ibid 285. It is interesting to note that this strict textual approach to contractual interpretation was re-stated in the recent High Court decision in *Western Export Services v Jireh International Pty Ltd* [2011] HCA 45 (28 October 2011), in which Gummow, Heydon and Bell JJ emphatically reaffirmed the principles laid down in *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337. Thus, evidence of circumstances surrounding the formation of a contract are only admissible if there is a patent ambiguity on the face of the document. The significance attached by the Court to its rejection of the use of extrinsic factors to aid contractual interpretation is highlighted by the fact that the Court took the unusual step of publishing its reasons for the denial of an application for special leave to appeal.
[19] Ibid 286.
[20] (1985) 160 CLR 548.
[21] Ibid 568-569.

> The authorities establish that in relation to trusts, as in relation to contracts, the search for the 'intention' is only a search for the intention as revealed in the words the parties used, amplified by facts known to both parties.[22]

Although the alignment of the construction of trust instruments and contracts may provided a collection of neat and tidy rules, the comparison tends to discount the differences in both purpose and content between the two types of instrument. Contracts are, by nature and definition, bilateral arrangements. The interests of both parties must be considered and, as far as possible, protected. Thus, a strict approach to the construction of terms is necessary to ensure contractual certainty. However, although there may be some trusts which are created pursuant to a bilateral agreement, there are many, such as testamentary trusts, which are created by the testator/settlor, unilaterally.

Further, all three judgments affirm the necessity of interpreting a trust document solely on the basis of the language used in the instrument, with no reference to surrounding circumstances, unless there is some vitiating factor which renders the language obscure. This is a purely objective rather than quasi-subjective exercise. However, whilst this approach may produce a literal construction, it may not always produce an equitable outcome. Although in *Byrnes* the language of the trust instrument was unambiguous, this may not always be the case. The judgment does nothing to address the situation in which the language of a document fails to convey the precise intentions of the settlor. In any proceedings for rectification or construction, it is arguable that the court would need to take some cognisance of the facts and surrounding circumstances of the creation of the document in order to arrive at an interpretation which to some extent approximates to the intention which gave rise to its creation. The judgment does little to assist in situations where a beneficiary is seeking the enforcement of an imprecisely drafted trust instrument and thereby fails to mirror the intention of the settlor and which was created unilaterally.

B. *Relevance of the intention of the settlor*

In their joint judgment, Heydon and Crennan JJ, note that 'the truth tends to be obscured by constant repetition of the need to search for an "intention to create a trust." That search can be seen as concerning the

[22] *Byrnes*, above n 2, 286.

first of the three "certainties."'[23] Even in context, it is difficult to ascertain what their Honours meant by 'the truth.' It is probable that it is an epithet for 'literal and accurate construction of a trust instrument.' What is clear, however, throughout all three judgments, is the intense suspicion, even antipathy that the five justices appear to have formed for the proposition that the settlor's intention should be considered when construing a trust instrument.

Traditionally, in both Australia and England, a valid express trust must display all three 'certainties:' certainty of intention of the settlor to create the trust; certainty of subject matter or property subject to the trust and, certainty of object or beneficiaries.[24] It is the first and most important of these, certainty of intention, which exercises the learned justices in this case.

Heydon and Crennan JJ state that:

> the intention referred to is an intention to be extracted from the words used, not a subjective intention which may have existed but which cannot be extracted from those words.[25]

This appears to reflect a concerted attempt to quarantine the concept of the subjective intention of the settlor in relation to the purpose or provisions of the trust, from any considerations of meaning. Further, their Honours go on to state that:

> As with contracts, subjective intention is only relevant in relation to trusts when the transaction is open to some challenge or some application for modification – an equitable challenge for mistake or misrepresentation or undue influence or unconscionable dealing or other fraud in equity.[26]

Thus, the logical outcome of the above statement would appear to be, that if a settlor alleges that a trust instrument does not accurately reflect his intentions, perhaps as a defence to a suit by a beneficiary or third party, his subjective intention is irrelevant. On the other hand, if the trust is challenged in some way by a beneficiary or third party, the settlor's intention may be examined.

---

[23] Ibid 290.
[24] See JD Heydon and MJ Leeming, *Jacob's Law of Trusts in Australia* (LexisNexis, 7th ed, 2006) 55-71 for an authorative discussion of the three certainties.
[25] *Byrnes*, above n 2, 290.
[26] Ibid.

Further, and surprisingly in view of their subsequent rejection of the use of intention as an indicia of validity, Gummow and Hayne JJ raise the spectre of the equitable maxim: 'equity looks to the substance rather than the form.'[27] Although this maxim is often regarded as the basis for the remedy of rescission,[28] it is also invoked in regard to 'the so-called "illusory" trust where equity will regard no trust as existing although words of trust are used.'[29]

Their Honours go on to state that:

> The fundamental rule of interpretation of the 1997 deed is that the expressed intention of the parties is to be found in the answer to the question, 'What is the meaning of what the parties have said?' not 'What did the parties mean to say?'[30]

At the risk of appearing to quibble, it is suggested that this statement, if taken in a broad sense, is inconsistent with the maxim of equity discussed above. However, they then quote *Norton on Deeds* in an attempt to provide a definition of intention, viz:

> The word 'intention' may be understood in two senses, as descriptive of either (1) of that which the parties intended to do, or (2) of the meaning of the words that they have employed.[31]

It would appear that their Honours have chosen to ignore the first meaning in favour of the second, despite their subsequent acknowledgement that when a dispute arises as to the intention to create an express *inter vivos* disposition of an interest in property by way of trust, the dispute may be resolved by examining 'evidence of all of the surrounding circumstances.'[32]

Thus, the emphasis throughout their Honours' discussions of intention is upon the need to ascertain the settlor's manifest or obvious intention,[33] in preference to acknowledging the influence upon the settlor's actions of some concealed or ulterior purpose. Whilst this approach is preferable when the trust is bilateral in nature, as in *Byrnes*,

---

[27] Sometimes expressed as: "equity looks to the *intent* rather than the form." On this point, see R Meagher, JD Heydon and ML Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis, 4th ed, 2002) 106.
[28] Michael Evans, *Equity and Trusts* (LexisNexis, 3rd ed, 2011) 29.
[29] Heydon and Leeming, above n 26, 106.
[30] *Byrnes*, above n 2, 273.
[31] Ibid (Gummow and Hayne JJ), quoting RF Norton *A Treatise on Deeds* (Sweet and Maxwell, 2nd ed, 1928) 50.
[32] Ibid 274-275.
[33] Ibid 275.

it presents a limited and limiting option for those situations in which either the trust has been used as a device or where the language of the trust document is at variance with the alleged intentions of the settlor.

C. *Jolliffe*

A feature of the discussion in all three judgments in relation to the intention to create a trust is the unanimous overruling of *Jolliffe*.[34] Traditionally, *Jolliffe* has provided authority for the principle that there is no form of words which can create a trust 'contrary to the real intention of the person alleged to have created it.'[35] This pronouncement is consonant with the equitable maxim 'equity looks to the substance rather than the form.' In *Jolliffe*, the settlor alleged that he had not intended to hold a bank account on trust for his wife, and that the creation of the trust had, in fact, been a device to circumvent the provisions of the *Queensland Government Savings Bank Act* 1916 (Qld). The Act prohibited a person from holding more than one interest bearing bank account. Mrs Jolliffe died and the Commissioner claimed that duty was owing to the State on the administration by Mr Jolliffe of his deceased wife's estate. Mrs Jolliffe had been unaware of the existence of the bank account. Knox CJ and Gavan Duffy J found for Mr Jolliffe, with Isaacs J dissenting. In arriving at their majority decision, Knox CJ and Gavan Duffy J had examined and accepted the Mr Jolliffe's subjective intention of circumventing the provisions of the Act.

Gummow and Hayne JJ state quite categorically, if somewhat cryptically that:

> What is important for the present case is that *Jolliffe* should not be regarded as retaining any authority it otherwise may have had for the proposition that where the creation of an express trust is in issue, regard may be had to all the relevant circumstances not merely to show the intention manifested by the words and actions comprising those circumstances, but to show what the relevant actor meant to convey as a matter of 'real intention.'[36]

French CJ, on the other hand, approves Issacs J's dissenting judgment, in which His Honour unequivocally prefigures the attitude of the current High Court to the relevance of subjective intention and the primacy of the trust instrument.

---

[34] (1920) 28 CLR 178.
[35] Ibid 181 (Knox CJ and Gavan Duffy J).
[36] Byrnes, above n 2, 277.

Heydon and Crennan JJ are even more forthright in condemning the decision in *Jolliffe*:

> The majority in *Jolliffe*'s case relied on a passage in the eleventh edition of *Lewin on Trusts* stating that the court will not impute a trust where the settlor did not mean to create one. In the light of the authorities discussed above, that statement is wrong. The majority denied that 'by using any form of words a trust can be created contrary to the real intention of the person alleged to have created it.' Denials to that effect are incorrect as statements of the law generally.[37]

Throughout the three judgments, however, no distinction was made between the facts of *Jolliffe* and those of *Byrnes*. In *Jolliffe*, Mr Jolliffe had not told his wife, the putative beneficiary, of the existence of the trust of the account. Therefore, Mrs Jolliffe was not only ignorant of her 'beneficial interest,' but she had no corresponding expectations in regard to her rights and entitlements, nor had she contributed any funds to the account. Had she been told that she was a beneficiary of the account and perhaps even contributed to the funds, it is arguable that the Court's decision would have been different, and a valid trust might have been found. In *Byrnes*, however, Mrs Byrnes was well aware of the trust and, indeed, relied upon the beneficial interest it conferred. It is also probable that she had contributed time, effort and money to the maintenance of the property while living there between 1994 and 2001. The trust was, therefore, what could be described as a bilateral trust.

Therefore, the unequivocal overruling of *Jolliffe* in *Byrnes* leaves a 'gap' in trust law. If a trust can only be construed according to the words of the instrument which creates it, it is arguable that unilateral and putative or illusory trusts, similar to the one in *Jolliffe*, which are created to circumvent, but not defeat legislation, must stand.

VI. DUTIES OF THE TRUSTEE

Once the Court had decided that the Acknowledgement of Trust of 1997 had created a valid trust, the learned justices turned their attentions to the duties of Mr Kendle as trustee. Although they arrived at this conclusion along slightly different paths, all were in agreement that the respondent was in breach of duty by failing to collect the rent due on the property.

[37] Ibid 290-291.

The trust instrument was silent as to the duties imposed upon Mr Kendle by the trust, and merely provided that the trustee 'stands possessed of and holds the undivided interest in the Property as tenant in common upon trust for [Mrs Byrnes] absolutely.'[38] Indeed, it was argued by the respondent that under the instrument he had no active duties to perform and characterised himself as a 'bare trustee.'[39] In discussing this submission, French CJ cited both *Jacobs' Law of Trusts in Australia*[40] and *Lewin on Trusts,*[41] and noted that whilst Jacobs defines a bare trustee as one 'who has no interest in the trust assets other than that existing by reason of the office of trustee and the holding of the legal title . . . ,'[42] Lewin observed that a bare trustee may 'owe active duties to manage the trust property, with corresponding powers.'[43] Accordingly, His Honour concluded that the trust was not a bare trust, stating that:

> The co-existence of beneficial interests, one held by the trustee in his own right and the other by Mrs Byrnes as beneficiary under the trust, are consistent with the necessity for, and existence of, a power on Mr Kendle's part to manage the property and to let it when he and Mrs Byrnes vacated it. That power was associated with a duty, existing at general law, to manage the property in spite of the absence of any specific direction to that effect in the Acknowledgement of Trust.[44]

Thus, Mr Kendle had exercised his power to grant a lease over the property and, by doing so 'may be assumed to have discharged his duty to let the property by letting it to his son.'[45] Once let, however, Mr Kendle had a continuing duty to ensure that the rent was paid. This duty was fiduciary in nature and 'which he assumed when he declared the trust and retained legal title to the land.'[46] His Honour concluded that the Full Court of the Supreme Court of South Australia Court of Appeal had erred in finding that Mr Kendle's failure to collect rent from his son did not constitute breach of duty.

Gummow and Hayne JJ took a slightly different approach, but arrived at the same conclusion. The opening statement of their joint judgment

[38] Ibid 268.
[39] Ibid 264.
[40] Heydon and Leeming, above n 23.
[41] Thomas Lewin, *Lewin on Trusts* (Sweet and Maxwell, 18th ed, 2008).
[42] Heydon and Leeming, above n 23 , 48.
[43] Lewin, above n 41, 18.
[44] *Byrnes*, above n 2, 265.
[45] Ibid.
[46] Ibid.

in regard to this issue indicates both their approach and their conclusion:

> As a general proposition, where the trust estate includes land, it is the duty of the trustee to render the land productive by leasing it, and this is so even if the instrument does not expressly so provide.[47]

Therefore, although the trust instrument did not expressly require Mr Kendle to lease the property, upon such 'ordinary principles'[48] he had a duty to lease the property so rendering it productive during the remainder of the joint lives of the respondent and Mrs Byrnes.[49]

Their Honours then go on to review the decision of Doyle CJ handed down in the appeal, and who had disposed of the trust issue upon the basis that the trust was a device used by the parties for holding the property. His Honour had therefore concluded that had Mr Kendle and Mrs Byrnes been merely co-owners, there would have been no fiduciary relationship between them and, consequently, no obligations on either side. Upon this basis, therefore, 'the Chief Justice decided that there had been "no affirmative duty on Mr Kendle to let out the property."'[50] Their Honours, however, eschewed the apparent lack of reasoning presented in Doyle CJ's judgment, stating that, by executing the Acknowledgement of Trust in 1997:

> . . . the co-owners chose in a formal fashion to create a particular trust relationship. This operated upon what would otherwise have been the legal incidents of their co-ownership. It is to reverse the relationship between law and equity, and is without logic, to base considerations as to the obligations assumed by Mr Kendle as trustee from the position which would have obtained at common law had there been no trust.[51]

The comments of Heydon and Crennan JJ were slightly less trenchant in regard to the decision of the lower courts, both at first instance and on appeal. Their Honours conceded that, while Mrs Byrnes and Mr Kendle lived in the property at Rachel Street, no duties devolved upon Mr Kendle to let it: a logical and obvious conclusion. Once the parties had vacated the property, however, the duty to let it crystallised. On this point they state:

> Even if there is no direction in the trust instrument that the trust property be invested, it is the duty of the trustee to invest the trust

[47] Ibid 277.
[48] Ibid.
[49] Ibid 277-278.
[50] Ibid 278.
[51] Ibid.

> property subject to the limits permitted by the legislation in force under the proper law of the trust and subject to any limits stated in the trust instrument. If there are no limits of that kind, a trustee who receives a trust asset must . . . obtain income from the trust property if it is capable of yielding an income.[52]

Thus, if the subject property is money, it should be invested in some way capable of producing income. If the property is land which can be let, it should be leased.

Heydon and Crennan JJ also considered whether s 6 of the *Trustee Act* 1936 (SA) placed any limits upon the duty of the respondent, and decided in the negative. There were no restrictions upon Mr Kendle leasing the land.

Finally, the attention of their Honours turned once more to the deficiencies of the decision of Full Court of the Supreme Court of South Australia Court of Appeal, which had held that although Mr Kendle was trustee, the 'co-ownership displaced the trust duties. This is not so. Whatever the position at law if there had been no trust, the position in equity once the trust was created was that Mr Kendle's duty as trustee prevailed.'[53]

VII. Acquiescence And Consent

As a defence to the appellant's claim of breach of duty, the respondent had raised the defence of acquiescence, and/or consent, in that Mrs Byrnes and later her son, had acquiesced in or consented to the breach or otherwise waived their rights to seek a remedy. The respondent also raised estoppel, based upon his reliance upon Mrs Byrnes alleged acquiescence. The latter defence received scant attention from all five justices once the defences of acquiescence, consent and waiver had been dismissed. It was likewise dismissed.

Far more interesting, however, is the Court's various approaches to and discussion of the defences of acquiescence and consent. Whilst neither defence offers any great complexity, the various comments in the three judgments provide an interesting review of the applicable principles.

In his judgment, French CJ begins by quoting with approval the distinction between acquiescence and consent made by both Handley

[52] Ibid 291-292.
[53] Ibid 292.

JA and Young AJA in *Spellson v George*.[54] In this case, Handley JA addresses the issue of what constitutes consent and notes that:

> Consent may take various forms. These include active encouragement or inducement, participation with or without direct financial benefit, and express consent. Consent may also be inferred from silence and lack of activity with knowledge. However consent means something more than a state of mind. The trustee must know of the consent prior to the breach.[55]

French CJ goes on to mention that Young AJA, on the other hand, distinguishes between consent, which implies 'concurrence in a breach,'[56] and acquiescence, which arises after the breach.[57] Thus, it can be inferred that consent to a breach must be given prior to or during the occurrence of the breach, whilst acquiescence occurs after the breach has been committed.

Furthermore, in order for the defence of consent to succeed, it is necessary to examine all of the circumstances surrounding the breach in order to determine 'whether it was fair and equitable to allow the plaintiff to sue the defendants for the breaches of trust.'[58] Thus, on the facts of the case, French CJ found that the evidence did not support a defence of consent.

His Honour then turned his attention to the defence of acquiescence and outlined the two different senses in which the term is used. First, it may be raised in circumstances when a person 'who is aware that an act is about to be done to his or her prejudice, takes no steps to object to it.'[59] Second, it will arise when a person fails to take 'timely proceedings' to remedy an infringement of his or her rights. Such a delay in taking proceedings founds the defence of laches.[60] No defence of laches was raised by the respondent and French CJ considered the first category of acquiescence in relation to the facts of the case, finding that nothing in Mrs Byrnes' conduct suggested acquiescence to the breaches of the respondent. Rather, 'Mrs Byrnes' inaction, if it can be called that, is to be understood by reference to the matrimonial

[54] (1992) 26 NSWLR 666.
[55] Ibid, 669-670.
[56] *Byrnes*, above n 2, 266.
[57] Ibid.
[58] Ibid 267.
[59] Ibid.
[60] Ibid.

relationship and the fact that a member of Mr Kendle's family was at the centre of his ongoing failure to insist on the rental payment.'[61] Finally, His Honour found that in the circumstances it was not either unfair or inequitable to allow Mrs Byrnes to seek a remedy for the breach of trust.[62]

Gummow and Hayne JJ deal with the issue of consent and acquiescence more succinctly, concentrating upon the definition and explication of terminology associated with the defences in preference to a statement of and analysis of the underlying principles. Although there is a fine distinction between the definition of a term and an examination of the principles and circumstances necessary to invoke its application, that line, nevertheless, exists. Thus, whilst the definitions in themselves are interesting, they only partly serve to elucidate the application of the concepts to the facts of the case.

Gummow and Hayne JJ, however, do provide an interesting and possibly useful observation regarding the word 'waiver.' They conclude that rather than representing a discrete defence in its own right, 'in the present case "waiver" is best understood as a genus comprising consent, estoppel and acquiescence.'[63]

Like French CJ, Heydon and Crennan JJ take a more substantive approach to the examination of Mrs Byrnes' conduct and the relevant defences. This approach is the result of what they describe as 'the unclarity of the applicable law.'[64]

After outlining the facts upon which Mrs Byrnes' alleged acquiescence or consensual conduct was based, their Honours examine the concept of acquiescence in some detail, with reference to the judgment of Dean J in *Orr v Ford*,[65] in which he 'set out the various meanings of acquiescence'.[66] These meanings coalesce into a knowing acceptance of what would be an infringement of rights.

[61] Ibid 268.
[62] Ibid.
[63] Ibid 279.
[64] Ibid 293. This "unclarity" may also explain the concentration of Gummow and Hayne JJ upon defining the terms, in an attempt to impose some degree of semantic precision and intelligibility upon the amorphous terminology.
[65] (1989) 167 CLR 316.
[66] Ibid.

Having resolved that 'there was no evidence to support contemporaneous consent by the appellant,'[67] their Honours move on to consider what the respondent must prove to sustain a claim to release of liability from the appellant. Briefly, he must show that if a release was given, it was given by the appellant beneficiary with full knowledge not only of all of the facts and circumstances, but also of his or her own rights and potential claims against the trustee.[68] On this basis, their Honours found that Mrs Byrnes did not act 'deliberately and advisedly or with knowledge of her own rights and claims against the respondent,'[69] and therefore, did not release Mr Kendle of liability for the breaches.

VIII. CONCLUSION

There is little doubt that the decision in *Byrnes* represents a contribution to the annals of equitable principle. Although no new insights were offered, the re-statement and explanation of the duties of a trustee where the trust instrument is silent in regard to the powers and duties conferred under the deed, provides succinct and authoritative guidance for lower courts and practitioners alike, when faced with a deed such as the one upon what the litigation devolved. Similarly, the clarifications offered in all three decisions in relation to the defences of acquiescence, consent and waiver both elucidate and affirm the established principles. However, it is arguable that the Court's decisions in regard to the construction of trust instruments and the minimisation of the importance of the settlor's intention, will cause consternation among practitioners.

The trust has, in effect, become central to contemporary private and commercial financial arrangements. It is not unusual for trusts to be used a devices to further an ulterior purpose. Some of these ulterior purposes may be nefarious, others bona fide. For example, as discussed previously, the trust in *Jolliffe* was declared to circumvent statute. On the other hand, trusts may be declared over property to place that property beyond the reach of certain parties, or for the purposes of income distribution and re-distribution. It is not always the case that the beneficiaries are aware of the trust. Of course, where such trusts are created to contravene statute, they may be terminated. For example, if a trust is caught by s 106B of the *Family Law Act* 1975 (Cth), as a transaction intended to defeat a property settlement and thereby the power of the Court.

[67] Ibid.
[68] Ibid.
[69] Ibid.

However, the question remains as to what happens when a trust is created as a device, but is not voidable pursuant to statute. Arguably, under the principles expounded in *Byrnes*, the trust will stand, irrespective of the intention of the settlor and, indeed, any knowledge of the trust on the part of the beneficiary. Depending upon the circumstances of the case, this state of affairs could lead not merely to unfairness, but also prove to be contrary to the very principles of equity itself. The maxim 'equity looks to the substance (or intent) not the form' is central to the resolution of such cases. It could be suggested that ignoring the 'intent' in favour of the 'form' effectively reduces equitable principles to the level of inflexible dogma, more reminiscent of pre-Judicature Acts common law than equity in the twenty first century.

It will be interesting to note any further decisions by the Court on this point. There is a danger, however, that the issue will languish in the doldrums in the same way as the once lively debate undertaken by the High Court, in a previous incarnation, in relation to the nature of equitable estoppel, and thus become an innocent victim of the High Court's conservatism.