

Journal of Equity

Volume 19 Part 1

(Articles included in this part are linked to the LexisNexis platform)

CONTENTS

Articles

[‘Pistols at dawn’ and the powers of trustees, appointors, and guardians: who comes trumps in a dispute over a family trust?](#)

— *Katy Barnett*

1

Australian trust drafters often include third party officers, such as appointors and guardians in discretionary trust deeds, giving these third party officers a capacity to exercise certain discretionary powers in relation to a trust, including to terminate or change the role of the trustee. When trustee and third party officers fall out and attempt to remove each other from office, current Australian case law suggests that the party who exercises a valid deed first will succeed in removing the other. This article suggests that Australian courts need to draw on case law from other jurisdictions, including offshore jurisdictions, to allow them to consider whether discretionary powers have been exercised for a proper purpose and in light of proper considerations, allowing Australian courts to respond to the underlying question of whether such powers were exercised justly.

[The onshoring of private purpose trusts in Scotland](#)

— *Alexandra Braun*

22

Over the course of the past 30 or so years, offshore jurisdictions have pushed the boundaries of trust law, often with the objective of attracting and competing for foreign investment. Some of these offshore innovations have reached onshore territories. This is not entirely surprising, for it is not uncommon for legislatures to draw on foreign models and, at times, to transplant foreign instruments into their own home jurisdiction. However, in the context of trust law, legal scholars have expressed concerns about such developments, especially because offshore jurisdictions have developed types of trusts that have taken the trust concept to its limits and that can be put to all manner of uses.

This article provides a comprehensive examination of an example of such onshoring of a foreign type of trust in Scotland: the introduction of private purpose trusts in the Trusts and Succession (Scotland) Act 2024. It shows that the drafters of this new Act (which for the most part is not yet in force) have heavily drawn on offshore models whilst also going a step further in providing a legal framework for private purpose trusts that is even more flexible and settlor-friendly than some of the offshore instruments that have inspired it. This framework raises several concerns related especially to (i) the lack of accountability of trustees and supervisors of Scottish private purpose trusts; (ii) the enforceability of such trusts more generally; (iii) the permissive and open textured nature of some of the legislative provisions; as well as (iv) their scope and impact on the rights of potential beneficiaries under such trusts. More fundamentally, there is a danger that these private purpose trusts will be used to create a vacuum in beneficial entitlement to property. While many of these concerns are not unique to Scotland, as the article shows, they are heightened by some of the choices that the Scottish drafters have made and certain specific features of Scottish trust law within which the new framework will operate. The article further illustrates that despite the ambitions of the drafters, the new

framework may not necessarily attract greater international investments in Scotland nor lead to more trust business for the Scottish legal profession. It also argues that its effects are not necessarily limited to Scotland.

Waiting to merge: The interaction between declaratory relief and *res judicata* in Australia

— *Seung Chan Rhee*

48

‘Res judicata’ encompasses a panoply of doctrines and rules central to which is finality. Relevantly, merger subsumes a plaintiff’s causes of action in a final judgment or order, where subsequent litigation can only be by reference to that judgment or order. A previously unresolved question was whether solely declaratory relief attracted the operation of merger. This was recently answered ‘no’ in England. The question remains theoretically open in Australia. This article makes the case that, despite perceived divergences between the treatment of *res judicata* in the two jurisdictions, there is no principled reason for Australia to not follow the position now prevailing in England. It is further argued that there already has been implicit convergence when examining the law on leave to appeal in Australia.

Prudence as process

— *M Scott Donald*

79

This article argues that the evolution in the concept of trustee investment prudence is on the brink of a new step. It draws attention to the emphasis placed on decision processes in the increasingly intricate regimes regulating the trustees of superannuation funds, managed investment schemes and charities. That emphasis encourages the proposition that a prudent trustee will be one who not only invests within power, and in a careful and diligent manner, but one who also creates and maintains an institutional capability, tailored to its circumstances, that enables it to make investment decisions with the pace demanded by modern financial markets. That capability will arise from structures and processes established by the trustee to ensure that all investment decisions are taken in accordance with its objectives, intentions and constraints. ‘Prudence is process’, as the aphorism has it, but that means much more today than has traditionally been appreciated.