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Articles

The equitable doctrine of 'knowing assistance' in breaches of fiduciary duties, particularly by company directors, affords a long arm to unravel webs of deception. The remedies against the assistant may be proprietary or pecuniary in nature. Recent decisions in two disputes, one in the UK and the other in New South Wales, highlight the differences between the application of equity in England and Australia, in particular distinctions between the 'institutional' and 'remedial' constructive trust. There are also issues of pecuniary remedies that arise between assistants and the principal and between multiple assistants themselves. The latter issues include questions of primary and secondary liability, joint and several liability, contribution and the consequences of a release of some only of the participants.

As attention surrounding the use of trusts in asset protection strategies has increased in recent years, so have questions surrounding the validity of such trusts. Central to this has been an attempted expansion of the sham doctrine from its traditional limits. These limits are that sham only considers the terms of arrangements as a point of comparison with a contrary shamming intention: that is, has the arrangement been used as a façade for the parties' true arrangement? Yet recent caselaw has advanced a view that an arrangement's terms matter in a more substantive way by themselves disclosing a shamming intention. This article challenges that view, asserting that sham should only be understood in its traditional sense for sound doctrinal reasons; and that expanding the sham doctrine in such a way conflates sham with improper motives for creating trusts and would introduce into the law value-judgments regarding what is, and what is not, an appropriate use of trusts.

The choice to grant damages or an injunction can have enormous consequences for public interests beyond the parties to a proceeding. Australian courts' exercise of their discretion to award damages in lieu of an injunction (their 'Lord Cairns' Act' discretion), and their application of the 'good working rule' set out by A L Smith LJ in *Shelfer v City of London Electric Lighting Co*, is in need of review. This article addresses the history of the discretion and the UK Supreme Court's 2014 decision, *Lawrence v Fen Tigers Ltd*. It then surveys Australian courts' exercise of the discretion and the influence of Fen Tigers. It is argued, in light of that decision, Australian courts should adopt a step-by-step approach

to the consideration of public interests when deciding whether to award damages in lieu of an injunction.

Business succession planning is one of the greatest challenges facing small businesses today. Often, business succession plans are implemented through the estate plan of a business owner and involve the owner making contracts or promises during their lifetime to leave their business to specific beneficiaries on death. Unbeknown to the owner and promisee, the business succession plan is exposed to claims under family provision law which if successful can lead to the fragmentation, or destruction, of a business's viability by diminishing the property available to satisfy a promisee's entitlement. This article considers the policy tensions existent in family provision cases involving business property, and argues that the existing Australian law largely resolves these tensions in favour of family provision claimants at the expense of testamentary freedom, the interests of promisees, and broader considerations relevant to maintaining the viability of family businesses. This article explores three reform options, which redress the perceived policy imbalance.

The withholding of charitable status from institutions aimed at changing domestic legislation (the 'law reform rule') has been near-universally criticised by academic commentators and, in recent years, rejected by the highest courts in Australia and New Zealand. This article explains the shortcomings both in the arguments mounted by the law reform rule's critics and in the reasonings which led to its rejection in Australia and New Zealand. In turn, it argues that the rule should remain the law of England and Wales, on grounds that the rationale for the rule provided by the English courts coheres with well-established constitutional limitations on the scope of the English judiciary's decision-making.