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Articles

The origin of the usual undertaking as to damages when obtaining interlocutory injunctive relief

— *Ben Kremer*

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Although the usual undertaking as to damages given as the price of obtaining an interlocutory injunction is well-known, there does not appear to have been any in-depth analysis of its origins. This article shows that the first reported use of the undertaking was by Vice-Chancellor James Knight Bruce on 22 December 1842, in the patent infringement case of *Muntz v Grenfell* (1842) 2 Coop temp Cott 61, 47 ER 1050. The evidence suggests that Knight Bruce did not originate the usual undertaking himself. Rather, it was probably first suggested by Edward Jacob QC on 10 December 1838 in another patent case, *Bickford v Skewes*, which is barely reported in the nominate reports. Knight Bruce was almost certainly Jacob's opponent on that occasion, and he appears to have developed Jacob's suggestion into the modern undertaking not long after he went to the Bench. It is not coincidental that both cases were patent cases. It had long been recognised that interlocutory injunctions to restrain alleged infringement of a patent acutely raised a problem of how to compensate a wrongly-restrained defendant, and the usual undertaking was invented to solve this problem. The utility of the undertaking as to damages meant that it was quickly adopted in all cases in which interlocutory injunctive relief was sought. The development of the usual undertaking is an illustration of how mid-nineteenth century practitioners and judges developed the principles of injunctive relief at a time when the jurisdictional separation of common law and equity, as well as the absence of Lord Cairns' Act, raised significant obstacles to fashioning relief in cases where common law, statutory or prerogative rights were in issue.

Working out the priority rules for competing claims to the trustee's indemnity

— *Derek Whayman*

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The trustee's indemnity, at its simplest, is the right of the trustee to have recourse to trust property for expenses properly incurred in the service of the trust. It is a proprietary right, but there is no legislation determining its priority rules between trust entities. While the rules for priority as between trustees and beneficiaries, trust creditors and personal creditors, and between trustees, have been settled by the courts, the others have not.

This article therefore considers the possible priority rules and their justifications in those cases. In doing so it sets out the settled rules for convenient reference and basis for further argument. It goes on to consider cases of contests between trust creditors of the same class, between trust creditors of different classes (bearing in mind contractual and legislative provisions limiting recourse to personal assets) and between beneficiary-investors.

donationes mortis causa of real property: Missed opportunities and foreclosed possibilities

— *David A Pittavino and Xavier P Walsh*

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The doctrine of *donatio mortis causa* defies and problematises the taxonomy of the common law. It stands both as an archaic monument to Western legal thought several millennia old, and as an informal, intimate, and human mode of disposition of property in the face of death. In New South Wales, there is stark resistance to extending the doctrine to gifts of real property. This article examines the justifications usually proffered for that resistance; critiques the strengths thereof; and argues that none, as a matter of doctrine, survives proper scrutiny. Part I of this article outlines three common objections raised against *donationes mortis causa* of realty, and contends that each fails fully to accord with fundamental tenets of the doctrine, in both its historical and contemporary contexts. Part II of this article explores the place for *donatio mortis causa* in the era of e-Conveyancing, and suggests that, in relation to Torrens Title land, any room left for the doctrine is now confined to circumstances where a donor transfers legal title to the property to the donee, revocation of which may give rise to an *in personam* exception to indefeasibility of title.

Knowing assistance and liability for omissions

— *James O'Hara*

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In commercial fiduciary disputes, there are often good reasons to sue third parties who are implicated in the fraud. Commonly, a victim of fraud will do so by calling in aid the knowing assistance cause of action. Under that action, a third party who assists, with knowledge, in a breach of fiduciary duty may be liable as if they were a fiduciary themselves. That may be so even if the third party actually receives no benefit at all from their wrongdoing. An under-examined question is what constitutes 'assistance' in this context. What conduct actually implicates a third party? In particular, must there be positive action? Or are omissions, acquiescence or silence enough? What if a third party does nothing where they might be expected to have taken positive action to prevent fraud because they have some duty to act by reason of their position? This article suggests that reasons of policy, principle and coherence all indicate that omissions should be capable of constituting assistance where a third party breaches some positive duty to act, rendering the omission causally significant.