

Case Note

Secret Intentions and Slippery Words: *Byrnes v Kendle*

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Abstract

In *Byrnes v Kendle*, the High Court was invited to decide the relevance of subjective intention in determining whether an express trust has been created. It held that the legal effect of a document is not ascertained by extrinsic evidence as to the subjective intentions of its parties, but rather by an objective construction of its words. The case overturns *Commissioner of Stamp Duties (Qld) v Jolliffe* to the extent that it stood for the proposition that a secret intention can contradict a written trust instrument, such as the disputed deeds of trust in *Byrnes v Kendle*. In reaching this conclusion, their Honours explained the similar and interrelated qualities of contract and trust, and relied on the objective theory of contract to establish an objective test for intention in relation to a declaration of trust. The Court, however, declined to establish whether the principles for finding the requisite intention of a trust wholly follow the objective theory of contract. Despite reliance on the objective theory, the Court has not explicitly established an objective theory of trust. This awaits further articulation and support from future High Court cases.

I Introduction

A poem, the so-called New Critics¹ contend, is ‘detached from the author at birth and goes about the world beyond his power to intend about it and control it’.² Efforts to pry into the psychology of the poet in order to discover the true, actual or real authorial design are not desirable in order to judge the success of a work of literary art.³ So too has the High Court judged of the secret intentions of settlors. That is, the three judgments of *Byrnes v Kendle* (2011) 243 CLR 253, handed down on 3 August 2011, hold unanimously that oral evidence of the subjective intention of a settlor of an express *inter vivos* trust does not determine whether such a trust has been created. Not only, therefore, does *Byrnes v Kendle* appeal to the New Critics who decry the intentional fallacy of peeping into the mental states of authors, but the case is a clear

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¹ Proponents of the mid-20th-century literary movement that emphasises the importance of a close reading of a text in order to discover how that text functions as a self-contained aesthetic work, rather than looking to external considerations, like the author’s mental state, in order to construe that text.

² W K Wimsatt and Monroe C Beardsley, ‘The Intentional Fallacy’ in W K Wimsatt *The Verbal Icon: Studies in the Meaning of Poetry* (University Press of Kentucky, 1954) 3, 5.

³ *Ibid* 3.

vindication of the ‘powerful dissent’⁴ of Isaacs J in *Commissioner of Stamp Duties (Qld) v Jolliffe*.⁵

Although it is widely acknowledged that the principles of trust creation have not been analysed with the same sophistication as have the principles of contract formation,⁶ the judgments of the High Court in *Byrnes v Kendle* seem grounded in the objective theory of contract,⁷ and in considerations of practical necessity and commercial certainty. One concern, however, remains: whether *Byrnes v Kendle* is now authority for the proposition that the principles of determining the existence of a trust wholly follow the objective theory of contract. It is in Heydon and Crennan JJ’s ‘broader approach’⁸ to the construction of the *Constitution*, statute, contract and trust that an overarching and unifying theme of text construction emerges. As a result, much like the New Criticism, it would seem that an express inter vivos trust is detached from the settlor at its birth and goes about the world beyond his or her power to intend about it.⁹

While *Byrnes v Kendle* restates the duties of a trustee with respect to trust land, clarifies the nature of acquiescence, and determines the appropriate relief to be granted for breach of trust, this case note isolates and examines the debate on the intention to create a trust. Part II establishes the background circumstances of the case. Part III explains the jurisprudence on the subjective intention of a settlor. Part IV analyses *Byrnes v Kendle*’s rejection of the subjective intention approach. Part V discusses the position of the objective intention of a settlor within the jurisprudence of the objective theory of contract.

II Background Circumstances

A Relevant Facts¹⁰

The respondent, Clifford Kendle, and the second appellant, Joan Byrnes, were married. In 1984, the respondent purchased realty in Brighton, South Australia, and was its sole registered proprietor under the *Real Property Act 1886* (SA). In 1989, the respondent executed a deed, an ‘Acknowledgement of Trust’, which, under cl 1, purported to declare a trust in favour of the second appellant over one undivided half interest in the Brighton property. The deed was valid pursuant to s 41 of the *Law of Property Act 1936* (SA). In 1994, the Brighton property was sold and its proceeds were applied to the purchase of realty in Murray Bridge, South Australia. Again, the respondent was its sole registered proprietor pursuant to the relevant Act. In 1997, the respondent executed a second valid deed, an ‘Acknowledgement of Trust’, which, under cl 1, purported to declare a trust in favour of the second appellant over one undivided half interest in the Murray Bridge property. Later, the respondent and

⁴ John Mowbray et al, *Lewin on Trusts* (Sweet & Maxwell, 17th ed, 2000) 81 n 6.

⁵ *Commissioner of Stamp Duties (Qld) v Jolliffe* (1920) 28 CLR 178 (‘Jolliffe’), 182–94 (Isaacs J).

⁶ *Byrnes v Kendle* (2011) 243 CLR 253, 289 [113] (Heydon and Crennan JJ).

⁷ *Ibid* 275 [59] (Gummow and Hayne JJ); 283 [97] (Heydon and Crennan JJ).

⁸ C W Pincus, ‘The Writing Is What Matters’ (2011) 85 *Australian Law Journal* 734, 734.

⁹ Wimsatt and Beardsley, above n 2.

¹⁰ *Byrnes v Kendle* (2011) 243 CLR 253, 268–71 (Gummow and Hayne JJ).

second appellant moved out of the Murray Bridge property and then separated. The respondent let the Murray Bridge property for several years to his son who paid only two weeks' rent. No efforts were made by the respondent to collect the arrears. In 2007, the second appellant assigned her interest in the Murray Bridge property to the first appellant, Martin Byrnes, her son, in consideration of \$40,000. In 2008, the Murray Bridge property was sold.

B *Procedural History*

The appellants sued the respondent in the District Court of South Australia for breach of trust. Among other things, the respondent denied the existence of the trust by oral evidence demonstrating no real subjective intention to create the trust. The trial judge found for the respondent.¹¹ On appeal, the Full Court of the Supreme Court of South Australia reversed the trial judge's finding on this point and found that the respondent had indeed created an express trust in favour of the second appellant.¹² On appeal to the High Court of Australia, the respondent sought to challenge this finding adverse to him.¹³

III **The Subjective Intention**

Whether the Subjective Intention Is Determinative

It is trite that certainty of intention is essential to a valid express trust. The respondent submitted that the test for intention in relation to a declaration of trust is subjective.¹⁴ In accordance with this submission, the trial judge's factual finding that there was no real mental design on the respondent's part to create a trust ought to have determined the issue.¹⁵ The finding necessarily hampers the appellants' submissions that they are beneficiaries under a trust over the Murray Bridge property, and that the respondent breached his duties as a trustee at general law and under the *Trustee Act 1936* (SA). Despite the force with which the judgments in *Byrnes v Kendle* reject the subjective test for intention, there is authority for this position.

First, the broad proposition that a secret intention can contradict a written trust instrument, unaffected by vitiating factors, is found in *Jolliffe*. The High Court transcript of *Byrnes v Kendle* reveals that the respondent relied heavily on the brief judgment of Knox CJ and Gavan Duffy J.¹⁶ The majority held that 'a trust can[not] be created contrary to the real intention of the person alleged to have

¹¹ *Byrnes v Kendle* [2009] SADC 36 (31 March 2009) [33] (Judge Boylan).

¹² *Byrnes v Kendle* [2009] SASC (18 December 2009) [32] (Doyle CJ).

¹³ *Byrnes v Kendle* (2011) 243 CLR 253, 256.

¹⁴ *Commissioner of Stamp Duties (Qld) v Jolliffe* (1920) 28 CLR 178, 181 (Knox CJ and Gavan Duffy J); *Starr v Starr* [1935] SASR 263, 266 (Napier J); *Hyhonie Holdings Pty Ltd v Leroy* [2003] NSWSC 624 (11 July 2003) (Young CJ in Eq); *Hyhonie Holdings Pty Ltd v Leroy* [2004] NSWCA 72 (18 March 2004) (Mason P, Handley and Hodgson JJA); *Owens v Lofthouse* [2007] FCA 1968 (12 December 2007) [57], [62]–[67] (Weinberg J).

¹⁵ *Byrnes v Kendle* [2009] SADC 36 (31 March 2009) [33] (Judge Boylan).

¹⁶ Transcript of Proceedings, *Byrnes v Kendle* [2010] HCATrans 322 (8 December 2010) (M A Frayne SC) (during argument).

created it'.¹⁷ Here, the argument is clear. The case law insists on certainty of intention, which is defined as that which the settlor subjectively meant or contemplated in his or her own mind.¹⁸ Where there is a dichotomy between the actual intention of the settlor and the words of the purported trust instrument, credence is to be given to the former. This is especially so for voluntary and unilateral declarations of trust,¹⁹ of which the trust instruments in *Byrnes v Kendle* are examples.

Second, if *Jolliffe* is to be accepted as the correct statement of the principle that subjective intentions are paramount, there is a line of Australian cases²⁰ that follow the majority decision of *Jolliffe*. For example, the respondent in *Byrnes v Kendle* leant²¹ on the words of Young CJ in Eq in *Hyhonie Holdings v Leroy*,²² which hold that notwithstanding a written declaration of trust,²³ a plaintiff bears the onus of proving that a purported settlor had the requisite subjective intention to create such a trust.²⁴ While Young CJ in Eq acknowledged that *Jolliffe* bound his decision, considerations of surrounding circumstances, which were known to all parties, and evidence as to the subjective intention of the purported settlor informed the factual finding that no trust existed.

Third, the historical principles of finding the existence of a trust favour an inquiry into the subjective intention of a purported settlor. That is, Chancery was empowered within its jurisdiction to look into the mental states of parties to an alleged trust. In *Hyhonie Holdings v Leroy*, Young CJ in Eq quotes the *Treatise on the Principles and Practice of the High Court of Chancery* in which it is asserted that:

The Rules of Evidence at Law and in Equity, Lord Hardwicke observes, does not differ in general, but only in particular, cases, where Fraud is charged by a Bill, or in cases of Trusts, as to which Courts of Equity do not confine themselves within such strict Rules as they do at Law, but for the sake of Justice and Equity will enter into the merits of the case, in order to come at Fraud, or to know the true and real Intention of a Trust or Use declared under Deeds.²⁵

Here, the author affirms that there is an equitable jurisdiction to peep into the actual or subjective mental state of a party to a purported trust. The subjective intention of

¹⁷ *Commissioner of Stamp Duties (Qld) v Jolliffe* (1920) 28 CLR 178, 181 (Knox CJ and Gavan Duffy J).

¹⁸ Thomas Lewin, *A Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 11th ed, 1904) 85.

¹⁹ Peter W Young, Clyde Croft and Megan Louise Smith, *On Equity* (Lawbook, 2009) 394.

²⁰ *Owens v Lofthouse* [2007] FCA 1968 (12 December 2007) [71] (Weinberg J); *Hyhonie Holdings v Leroy* [2003] NSWSC 624 (11 July 2003) [38] (Young CJ in Eq); *B & M Property Enterprises Pty Ltd (in liq) v Pettingill* [2001] SASC 75, [122]–[126] (Perry J); *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588, 605 (Gaudron, McHugh, Gummow and Hayne JJ); *Starr v Starr* [1935] SASR 263, 266 (Napier J).

²¹ Transcript of Proceedings, *Byrnes v Kendle* [2010] HCATrans 322 (8 December 2010) (M A Frayne SC) (during argument).

²² [2003] NSWSC 624 (11 July 2003) (Young CJ in Eq); *Hyhonie Holdings Pty Ltd v Leroy* [2003] NSWSC 520 (12 June 2003) (Young CJ in Eq).

²³ Weinberg J describes the relevant trust instrument as having been 'impeccably drawn': *Owens v Lofthouse* [2007] FCA 1968 (12 December 2007) [53].

²⁴ *Hyhonie Holdings v Leroy* [2003] NSWSC 624 (11 July 2003) [38].

²⁵ *Hyhonie Holdings Pty Ltd v Leroy* [2003] NSWSC 520 (12 June 2003) [17] (Young CJ in Eq) quoting Henry Maddock, *Treatise on the Principles and Practice of the High Court of Chancery* (J & W T Clarke, 2nd ed, 1820) vol 2, 436–7.

the purported settlor is therefore persuasive, if not decisive, in determining the existence of a trust. Despite the introduction of the Evidence Acts, Young CJ in Eq suggests the possibility that such 'Equity Evidence' has not been extinguished. In application of this special rule of evidence, equity would prevent the appellants in *Byrnes v Kendle* by an in personam order from objecting to the admissibility of evidence that goes to the mental state of the respondent, the purported settlor.²⁶ The respondent, however, made no such submission.

Fourth, the majority judgment in *Jolliffe* and the rationale of the above 'Equity Evidence' is grounded in the maxim that equity looks to intent or substance over form. Lord Romilly MR in *Parkin v Thorold* explains that equity prevents a party from insisting on form, if, by insisting on form, the substance is defeated.²⁷ Also, in *AMEV-UDC Finance v Austin*, Deane J holds that 'all rules with true equitable foundations ... are concerned with substance rather than form'.²⁸ As a result, in *Byrnes v Kendle*, if the substance of the relationship between the parties is rooted in the subjective intention of the respondent, that subjective intention ought to prevail over any insistence on the form of the Acknowledgement of Trust. While the maxim is not an inflexible statement of general law, it nevertheless justifies the authorities, such as *Jolliffe*, which establish a subjective test for intention in relation to a declaration of trust.

If the above pronouncements on the subjective test for intention are correct and applicable, the trial judge's factual finding as to the subjective intention of the respondent in *Byrnes v Kendle* is, therefore, entirely relevant. At first instance, Mr Kendle, having been asked whether he was trustee for his wife, answered: 'Yes. May I make a statement here? To me that was automatic [sic] reaction, she was my wife, we were partners so naturally half of it was hers'.²⁹ Here, the trial judge construed this language as indicating nothing more than an acknowledgement that Mrs Byrnes would receive half the net proceeds of the sale of the Murray Bridge property.³⁰ There was no subjective intention to create an express trust. Although Heydon and Crennan JJ construe this oral evidence and language as 'extremely obscure',³¹ it nevertheless evinces no certain intention of the purported settlor to create a trust. The trial judge's finding as to the absence of the respondent's subjective intention to create a trust was appropriately determinative of its existence.

IV Rejecting the Subjective Intention

A *Whether the Subjective Intention Inquiry Is Valid*

The subjective intention test is, however, fraught with many difficulties. As a consequence, *Byrnes v Kendle* addresses the reluctance with which Australian authorities have applied *Jolliffe*. The legal effect of a document is not ascertained by

²⁶ *Hyhonie Holdings Pty Ltd v Leroy* [2003] NSWSC 520 (12 June 2003) [18] (Young CJ in Eq).

²⁷ *Parkin v Thorold* (1852) 16 Beav 59, 66–7 (Lord Romilly MR).

²⁸ *AMEV-UDC Finance v Austin* (1986) 162 CLR 170, 197 (Deane J).

²⁹ *Byrnes v Kendle* [2009] SADC 36 (31 March 2009) [33] (Judge Boylan).

³⁰ *Ibid.*

³¹ *Byrnes v Kendle* (2011) 243 CLR 253, 291 [117] (Heydon and Crennan JJ).

extrinsic evidence as to the subjective intentions of its parties, but rather by an objective construction of its words. This seems to undermine the maxim that equity looks to intent rather than form, and cuts against the case law that relies on *Jolliffe*. Although *Byrnes v Kendle* establishes that an inquiry into subjective intention is irrelevant, the judgments do not make this pronouncement with equal vigour.

B Justices Gummow and Hayne on the Subjective Intention

The judgment of Gummow and Hayne JJ disapproves *Jolliffe*. Central to their Honours' decision is the notion that the 'real intention' of a settlor is irrelevant.³²

First, the judgment identifies the conflicting senses of the word 'intention' for the construction of deeds. It is observed that 'intention' connotes either that which a party means to say or the meaning of that which a party has said.³³ English³⁴ and Australian³⁵ authority asserts that only the latter sense is relevant. Further, what is true of deeds is also true of wills that create testamentary trusts.³⁶ Given that each Acknowledgement of Trust in *Byrnes v Kendle* was executed as a valid deed pursuant to s 41 of the *Law of Property Act 1936* (SA), the principles construing deeds and wills prevent the respondent from relying on oral evidence as to his subjective intention to contradict the written trust instruments.

Second, Gummow and Hayne JJ resort to English authority that rejects an inquiry into the subjective intentions of purported settlors: '[a] settlor must, of course, possess the necessary intention to create a trust, but his subjective intentions are irrelevant'.³⁷ Here, Lord Millett holds that any investigation into the mental state of a settlor is unnecessary. By eschewing this investigation, the court does not ignore the requirement for the first of the three certainties; rather, the proper inquiry as to intention is whether the purported settlor intends to enter into arrangements that might produce a trust. This inquiry is objective and sits well with the way the House of Lords construes the actions of parties to an equitable charge. That is, a party is presumed to intend the consequences of his or her acts.³⁸ On this point, the judgment of Gummow and Hayne JJ corresponds with what Heydon and Crennan JJ say about parties being bound to things that they did not actually or subjectively intend.³⁹

This reasoning is consistent with the principle that it is not necessary that a settlor of a trust appreciate that his or her acts have the legal consequences inherent

³² Ibid 274 [55], 277 [65] (Gummow and Hayne JJ).

³³ Ibid 273 [53] (Gummow and Hayne JJ).

³⁴ *Twinssectra Ltd v Yardley* [2002] 2 AC 164, 185 [71] (Lord Millett); *Mills v Sportsdirect.com Retail Ltd* [2010] 2 BCLC 143, 158 [52]–[54]; *Grey v Pearson* (1857) 6 HL Cas 61, 106 (Lord Wensleydale).

³⁵ *Currie v Glen* (1936) 54 CLR 445, 458 (Dixon J); *Brennan v Permanent Trustee Co of New South Wales Ltd* (1945) 73 CLR 404, 412 (Starke J).

³⁶ *Byrnes v Kendle* (2011) 243 CLR 253, 273 [53] (Gummow and Hayne JJ); *Currie v Glen* (1936) 54 CLR 445, 458 (Dixon J); *Brennan v Permanent Trustee Co of New South Wales Ltd* (1945) 73 CLR 404, 412 (Starke J).

³⁷ *Twinssectra Ltd v Yardley* [2002] 2 AC 164, 185 [71] (Lord Millett).

³⁸ *Swiss Bank Corporation v Lloyds Bank Ltd* [1982] AC 584, 615–6 (Lord Wilberforce) approving *Swiss Bank Corporation v Lloyds Bank Ltd* [1980] 3 WLR 457, 467 (Buckley LJ).

³⁹ *Byrnes v Kendle* (2011) 243 CLR 253, 274 [55], 285 [100] (Heydon and Crennan JJ).

in a trust.⁴⁰ This joins the American position, which holds that ‘it is immaterial whether or not the settlor knows that the intended relationship is called a trust, and whether or not the settlor knows the precise characteristics of a trust relationship’.⁴¹ As a consequence, an inquiry into the actual mental state of a person in order to establish the existence of an alleged trust would be futile because an express trust can arise independent of a subjective intention that it should exist.

Third, this approach is consistent with the ‘traditional attitude’⁴² that the intention of an express trust is found objectively in the language of the trust instrument.⁴³ This attitude suggests that courts ought to be reluctant to find an express trust, which would explain the reason English courts have tended, as an alternative, to impose constructive trusts.⁴⁴ This is not, however, the position in Australia. In *Bahr v Nicolay [No 2]*, the court held that:

If the inference to be drawn is that the parties intended to create or protect an interest in a third party and the trust relationship is the appropriate means of creating or protecting that interest or of giving effect to the intention, then there is no reason why in a given case an intention to create a trust should not be inferred.⁴⁵

Likewise, in *Re Australian Elizabethan Theatre Trust*, Gummow J held that:

The relevant intention is to be inferred from the language employed by the parties in question and to that end the court may look also to the nature of the transaction and the relevant circumstances attending the relationship between them... There is no need for particular caution in drawing the inference that a trust was intended...⁴⁶

While these authorities counsel against reluctance in finding the requisite intention to create a trust, they do not permit an inquiry into a party’s actual state of mind. Regard ought to be had to the relevant or surrounding circumstances in order to find an objective, not subjective, intention. The respondent’s oral averment at trial that he did not subjectively intend to create a trust does not, therefore, form part of the relevant inquiry into objective intention. Also, the distinction between an inquiry into surrounding circumstances to find objective intention as opposed to an inquiry into surrounding circumstances to find subjective intention is perhaps too fine a distinction in practice. There is, however, no such difficulty in *Byrnes v Kendle*. Evidence of the respondent’s subjective intention did not form part of the surrounding circumstances of the settlement of the trust. If the respondent did have a subjective intention not to create a trust, it was kept secret until his oral averment. A hidden intention does not form part of surrounding circumstances.

⁴⁰ H A J Ford and W A Lee, *Principles of the Law of Trusts* (Law Book Co, 1983) 63.

⁴¹ American Law Institute, *Restatement of the Law: Trusts* (American Law Institute, 2003) vol 1, § 13 cmt (a).

⁴² *Bahr v Nicolay [No 2]* (1988) 164 CLR 604, 618 (Mason CJ and Dawson J).

⁴³ *In re Schebsman; Ex parte Official Receiver v Cargo Superintendents (London) Ltd* [1944] Ch 83, 104 (du Parcq LJ).

⁴⁴ *Binions v Evans* [1972] Ch 359; *Lyus v Prowsa* [1982] 1 WLR 1044.

⁴⁵ *Bahr v Nicolay [No 2]* (1988) 164 CLR 604, 618–19 (Mason CJ and Dawson J).

⁴⁶ *Re Australian Elizabethan Theatre Trust; Lord v Commonwealth Bank of Australia* (1991) 30 FCR 491, 502 (‘*Re Australian Elizabethan Theatre Trust*’) (Gummow J).

Fourth, the judgment sits well with the academic writings, which insist on *manifestations* of intention, rather than actual intention. A manifestation of intention satisfies the first of the three certainties.⁴⁷ Further, the emphasis on manifestation, rather than actual intention, is found in American writings.⁴⁸ These writings support Isaacs J's dissent in which his Honour contends that it is the declaration or manifestation of trust that causes 'the effectual vesting of the property in equity in the beneficiary'.⁴⁹ In other words, relying on Maitland's *Lectures on Equity*, the moment a party declares a trust over its property in favour of another, 'there is already a perfect trust in the technical sense'.⁵⁰ Employment of technical or quasi-technical terms⁵¹ in a declaration satisfies equity's requirement of certainty of intention. There is no recourse to the mental state of the declarant, but 'equity's requirement of an intention to create a trust will be at least prima facie satisfied if the terms of the contract expressly or impliedly manifest that intention'.⁵² Although this statement of Deane J in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* speaks of bilateral agreements to create trusts, Gummow and Hayne JJ's judgment extends the principle to unilateral declarations of trust, like that in *Byrnes v Kendle*.

Last, their Honours held that the inquiry in *Jolliffe* ought to have been directed towards the statutory purpose of the *Queensland Government Savings Bank Act 1916* (Qld).⁵³ As a result, even if evidence of the respondent's subjective intention were admitted, his secret intention should have yielded to the policy of the Act. This analysis corresponds to Heydon and Crennan JJ's remarks about ensuring that statutory interpretation should not be subverted by extrinsic evidence.⁵⁴ As such, Gummow and Hayne JJ wholly reject *Jolliffe*, which cannot 'be regarded as retaining any authority ... [that] regard may be had to all the relevant circumstances ... to show what the relevant actor meant to convey as a matter of "real intention"'.⁵⁵ The rejection of *Jolliffe*'s reasoning renders the case of little worth.

C Chief Justice French on the Subjective Intention

By contrast, although French CJ agrees with the reasons of Gummow and Hayne JJ,⁵⁶ his Honour does not challenge the subjective intention approach as vigorously.

⁴⁷ Mark L Ascher, Austin Wakeman Scott and William Franklin Fratcher, *Scott and Ascher on Trusts* (Aspen Publishers, 5th ed, 2006) vol 1, §4.1; H A J Ford and W A Lee, *Principles of the Law of Trusts* (Law Book Co, 1983) 63; John Mowbray, Lynton Tucker, Nicholas Le Poidevin and Edwin Simpson, *Lewin on Trusts* (Sweet & Maxwell, 17th ed, 2000) 69; David J Hayton, *Underhill and Hayton: Law Relating to Trusts and Trustees* (Butterworths, 14th ed, 1987) 37.

⁴⁸ American Law Institute, above n 41.

⁴⁹ *Commissioner of Stamp Duties (Qld) v Jolliffe* (1920) 28 CLR 178, 190 (Isaacs J).
Ibid.

⁵¹ Clause 1 of each Acknowledgement of Trust uses the technical phrase 'upon trust'.

⁵² *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 147 (Deane J).

⁵³ *Byrnes v Kendle* (2011) 243 CLR 253, 277 [64] (Gummow and Hayne JJ).

⁵⁴ Ibid 283–4 [97] (Heydon and Crennan JJ).

⁵⁵ Ibid 277 [65] (Gummow and Hayne JJ).

⁵⁶ Ibid 263 [17] (French CJ).

First, this judgment pivots on the notion that *Jolliffe* does not stand for the wide proposition that extrinsic evidence as to intention can contradict a written instrument; rather, that proposition is expressed too broadly.⁵⁷ Here, French CJ implies that the statement is not entirely incorrect, but has merely been inappropriately expanded. Such reservation contrasts markedly with the pronouncements of Gummow and Hayne JJ, which hold with unmistakable clarity that the subjective intention is irrelevant.

Second, French CJ does not devote the same level of analysis to the subjective intention issue because the purported trust in *Byrnes v Kendle* is distinguished from the impugned trust in *Jolliffe*. That is, Knox CJ and Gavan Duffy J's pronouncement of law can only apply to sham trusts, and not to the wider field of all express trusts. In *Jolliffe*, it was submitted against the respondent that he lacked an actual or subjective intention to make a gift to his wife under trust.⁵⁸ He, therefore, only gave the appearance of a trust in order to circumvent *Queensland Government Savings Bank Act 1916* (Qld) sch 1 s 12, which provided that '[s]ubject to this Act no person shall have more than one account in the Bank ... this section shall not prevent any person having, *bonâ fide*, in addition to his own account, (a) accounts in his own name in trust for other persons.'⁵⁹ Given this particular statutory scheme, French CJ finds that 'shamming intent'⁶⁰ was the core of the trust. His Honour's analysis correctly corresponds to Diplock LJ's conception of shamming intent in *Snook v London and West Riding Investments*:

[i]t means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.⁶¹

Whereas the respondent in *Byrnes v Kendle* did not assert the existence of a trust, the respondent in *Jolliffe* subjectively intended to give the appearance of a trust, while secretly maintaining full control and ownership of the 'trust' money. In application of Diplock LJ's judgment, *Jolliffe* is, therefore, a case about the sham doctrine, which ought not to apply to *Byrnes v Kendle*. By distinguishing *Byrnes v Kendle* from *Jolliffe*, French CJ does not, like the remainder of the bench, so vigorously challenge the subjective intention approach. Contrary to the statements of Australian cases,⁶² *Jolliffe* never stood for the broad proposition that a written declaration of trust, unaffected by vitiating factors, could be contradicted by extrinsic evidence of subjective intention.

⁵⁷ Ibid 263–4 [18] (French CJ).

⁵⁸ *Commissioner of Stamp Duties (Qld) v Jolliffe* (1920) 28 CLR 178, 179–80.

⁵⁹ *Queensland Government Savings Bank Act 1916* (Qld) sch 1, s 12.

⁶⁰ *Byrnes v Kendle* (2011) 243 CLR 253, 261 [14] (French CJ).

⁶¹ *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, 802 (Diplock LJ).

⁶² *B & M Property Enterprises Pty Ltd v Pettingill* [2001] SASR 75, [125] (Perry J); *Starr v Starr* [1935] SASR 263, 266–7 (Napier J).

D *Justices Heydon and Crennan on the Subjective Intention*

Heydon and Crennan JJ offer the broadest judgment, but most compelling rejection of the inquiry into subjective intention.⁶³ Their Honours' analysis clears a path through the principles of text construction in general, by eschewing any investigation into an author's subjective mental state.

First, the judgment propounds the argument that a text ought not to be deemed lower-ranking or 'second-best' to the actual mental state of its creator.⁶⁴ By inquiring into authorial intent, the construer of a document ignores the fact that an author has chosen specific words, with particular linguistic connotations, in order to embody the actual intention. Heydon and Crennan JJ agree with the conservative former Solicitor-General of the United States who evocatively rejects the process of routinely 'tak[ing] the top off the heads of authors and framers — like soft-boiled eggs — to look inside for the truest account of their brain states at the moment that the texts were created'.⁶⁵ There is no real dichotomy or conflict between the intentions of text and author because the text contains the only relevant intention. Also, Heydon and Crennan JJ mirror the approach taken by the majority in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* in which it was held that '[a]s with legislation, it is impermissible to receive contextual material or extrinsic evidence to indicate what the *subjective* intentions, beliefs or expectations of the makers were'.⁶⁶ It is this fundamental principle, which emerges from the construction of the *Constitution*, statute⁶⁷ and contract, which runs throughout their Honours' analysis.

Second, Heydon and Crennan JJ do not wholly disapprove of *Jolliffe*, but rather explain the operation of that case within its particular statutory context.⁶⁸ Much like French CJ, they minimise the applicability of *Jolliffe* by identifying the specific facts and statutory scheme that are required to justify recourse to that case. The judgment clearly rejects the broad proposition, as contained in the 11th edition of *Lewin on Trusts*, that a court imputes no trust 'where a settlor does not mean to create one'.⁶⁹ The clear rejection of this proposition cuts against the reasoning in *Hyhonie Holdings v Leroy* on which the respondent relied during the oral arguments⁷⁰ of *Byrnes v Kendle* before the High Court.

Third, much like Gummow and Hayne JJ, this judgment observes that the inquiry into trust creation and contract formation is closely related. Their Honours assert that while the nature and origin of contract and trust are different, 'there is

⁶³ *Byrnes v Kendle* (2011) 243 CLR 253, 281 [94] (French CJ).

⁶⁴ *Ibid* 282 [95] (Heydon and Crennan JJ); Charles Fried, 'Sonnet LXV and the "Black Ink" of the Framers' Intention' (1987) 100 *Harvard Law Review* 751, 758–9.

⁶⁵ Fried, above n 64.

⁶⁶ *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

⁶⁷ Pincus asserts that '[i]t may be assumed, however, that in dealing with statutes, attention to certain extrinsic materials will continue to be given'. Pincus, above n 8.

⁶⁸ *Byrnes v Kendle* (2011) 243 CLR 253, 290–1 [116] (Heydon and Crennan JJ).

⁶⁹ *Ibid* 290–1 [116] (Heydon and Crennan JJ).

⁷⁰ Transcript of Proceedings, *Byrnes v Kendle* [2010] HCATrans 322 (8 December 2010) (M A Frayne SC) (during argument).

however no dichotomy between the two'.⁷¹ This is correct. There is significant consistency between trust declaration and contract formation by virtue of the fact that contractual agreements are often the vehicle for express trusts. This corresponds to the reasoning in *Gosper v Sawyer* in which Mason and Deane JJ hold that contractual relationships are a common basis for the establishment and definition of express and implied trusts.⁷² Conversely, implied trusts often arise to protect contractual rights and to empower parties to avail themselves of those rights. Despite the separate legal histories of contract and trust, the application of their principles is so often enmeshed. This necessitates consistency between the principles of trust declaration and contract formation. An inquiry into subjective intention is, therefore, fundamentally irrelevant.⁷³

E *Whether the Subjective Intention Is Wholly Irrelevant*

Each judgment admits clear exceptions to the proposition that an inquiry into subjective intention is irrelevant.⁷⁴ It is not surprising that evidence of subjective intention is relevant and desirable when an arrangement is open to some equitable challenge or application for modification. As such, allegations of fraud,⁷⁵ undue influence,⁷⁶ mistake, misrepresentation,⁷⁷ unconscionable dealing, estoppel, and general law claims of *non est factum*,⁷⁸ duress, rectification, illegality,⁷⁹ shams⁸⁰ and unfulfilled contractual conditions⁸¹ fall within the exception. The High Court transcript of *Byrnes v Kendle* reveals that the respondent did not rely on any one of these exceptions.⁸² Also, while such evidence is relevant in these exceptional circumstances, Heydon and Crennan JJ hold that subjective intention is wholly irrelevant as to whether a trust exists.⁸³

F *Whether Byrnes v Kendle Offends Substance over Form*

As discussed in Part III, an inquiry into the subjective intention of a party to a trust seems entirely consistent with the equitable maxim that equity looks to intent or substance rather than form. There is, however, a bright caveat. Although the maxim is broad, it cannot be understood to 'flout all common law principles'⁸⁴ and rewrite documents according to the actual intentions of a party. This sentiment is expressed

⁷¹ *Gosper v Sawyer* (1985) 160 CLR 548, 568–9 (Mason and Deane JJ).

⁷² *Ibid.*

⁷³ *Byrnes v Kendle* (2011) 243 CLR 253, 290 [115] (Heydon and Crennan JJ).

⁷⁴ *Ibid* 262 [15] (French CJ), 273 [52] (Gummow and Hayne JJ); 290 [115] (Heydon and Crennan JJ).

⁷⁵ *The Law of Trusts by Thomas and Hudson* (Oxford University Press, 2nd ed, 2010) 1495 [58.04].

⁷⁶ *Byrnes v Kendle* (2011) 243 CLR 253, 262 [15] (French CJ).

⁷⁷ *Commissioner of Stamp Duties (Qld) v Jolliffe* (1920) 28 CLR 178, 191 (Isaacs J).

⁷⁸ *Forrest v Cosmetic Co Pty Ltd* (2008) 218 FLR 109, 116–7 [32] (White J); *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 181–2 [46]–[47].

⁷⁹ *Nelson v Nelson* (1995) 184 CLR 538.

⁸⁰ *Rafiland Pty Ltd v Federal Commissioner of Taxation* (2008) 238 CLR 516, 531–2 [35], 567 [173]–[174]; *Starr v Starr* [1935] SASR 263.

⁸¹ *Commissioner of Stamp Duties (Qld) v Jolliffe* (1920) 28 CLR 178, 191 (Isaacs J).

⁸² Transcript of Proceedings, *Byrnes v Kendle* [2010] HCATrans 322 (8 December 2010).

⁸³ *Byrnes v Kendle* (2011) 243 CLR 253, 290 [115] (Heydon and Crennan JJ).

⁸⁴ Young, Croft and Smith, above n 19, 186.

by Gummow and Hayne JJ who clearly explain that “the maxim that “equity looks to the substance rather than the form” would be misapplied and misunderstood if used to warrant “the substitution of a different transaction for the one into which the parties [to the 1997 Deed] have entered””.⁸⁵ Although this maxim is broad, even broader concerns for transactional certainty ought to prevail. If the maxim were to win out, there could be a greater incidence of litigation and an enhanced uncertainty with which beneficiaries under trusts could enjoy their equitable interests. Also, arrangements similar to the facts in *Byrnes v Kendle* would be susceptible to re-characterisation and the need for court intervention would necessarily increase. It is, therefore, a necessary legal policy that holds parties to their written words in the terms that they have accepted.⁸⁶

Further, giving precedence to this maxim would open the trust to abuse by settlors, who, as a general rule, do not have an inherent and continuing power of revocation.⁸⁷ That is, if a settlor were able to avoid a trust merely by oral testimony that he or she lacked an actual intention to create a trust, the settlor could always retain, in essence, a right of revocation that would not be explicitly provided for in the trust instrument. Such a latent right empowers the settlor to the detriment of the beneficiary whose equitable interest under the trust is compromised by a secret power of avoidance of trust.

G *Whether Rejection of the Subjective Intention Obscures Transparency*

The rejection of evidence regarding subjective intention potentially renders the law less transparent. If the court is denied an inquiry into the actual mental states of parties to a trust, it is perhaps hampered in moulding appropriate relief. It is found, however, that ‘in one form or another evidence of the actual intentions of the parties often does come to the attention of the judge on disputes about interpretation’ such that ‘in practice judges are influenced by this evidence when it assists in determining the objective meaning of the words’.⁸⁸ This suggests that the practice of distinguishing the objective from the subjective is narrow and not strictly observed. As a result, evidence of actual intention may indirectly enter an inquiry into the objective construction of words. Also, while transparency as to actual intentions might be desirable, *Byrnes v Kendle* is not a case in which subjective intentions are obscured by defects in the trust instrument. The language of the Acknowledgements of Trust is clear. The judgments now stand as weighty authority that actual intention cannot influence the mind of the court in determining the existence of a trust.

⁸⁵ *Byrnes v Kendle* (2011) 243 CLR 253, 273 [52] (Gummow and Hayne JJ) quoting *KD Morris & Sons Pty Ltd (In liq) v Bank of Queensland Ltd* (1980) 146 CLR 165, 199 (Aickin J).

⁸⁶ *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 771.

⁸⁷ N C Kelly, *Garrows Law of Trusts and Trustees* (Butterworths, 4th ed, 1972) 103.

⁸⁸ Donald Nicholls, ‘My Kingdom for a Horse: The Meaning of Words’ (2005) 121 *Law Quarterly Review* 577, 585.

H *Whether Third Parties and Beneficiaries Are Protected*

In respect of third parties, it is surely good legal policy to honour the written words of documents over the secret intentions of parties. Otherwise, third parties and beneficiaries are left vulnerable. If it were found that the respondent in *Byrnes v Kendle* did not create an equitable interest in favour of the second appellant, the second appellant would have had no proprietary interest to assign for value to the first appellant. A secret intention would have only given the illusion of the second appellant's equitable interest in the realty.

Further, in a commercial context, the value of a beneficiary's equitable interest under a trust would be greatly diminished because a third party would not have certainty as to the existence of the beneficiary's interest. Much like contract,⁸⁹ therefore, honouring the words of a document enhances the certainty of the existence of equitable property on which third parties can rely. This secures its commercial value.

V *Accepting the Objective Theory of Contract?*

A *Whether the Principles of Trust Creation Follow Contract*

The judgments of *Byrnes v Kendle* resort to the objective theory of contract, which, as it were, stands 'in command of the field'.⁹⁰ Such recourse is a matter of necessity because, as Heydon and Crennan JJ observe, the principles of establishing and defining a trust have not been analysed with the sophistication devoted in England to the principles of establishing and defining a contract.⁹¹ Their Honours hold that the objective theory does not have regard to the actual intentions of the parties, but rather the greater emphasis is placed on the outward manifestations of those intentions.⁹² The objective theory is best articulated by Mason J in *Codelfa Construction v State Rail Authority (NSW)* in which he held that extrinsic evidence is not admissible to the extent to which it is reflective of the actual intentions and expectations of parties.⁹³ This pronouncement has been followed by subsequent Australian authority⁹⁴ and given extra-curial approval by Heydon J in his speech at the Trusts Symposium of 2011.⁹⁵ However, while the judgments in *Byrnes v Kendle* lean on the objective theory of contract, it is unclear whether this case explicitly stands for the proposition that the principles of trust creation now follow the objective theory of contract.

First, as discussed in Part IV Section D, the High Court explains that although the institutions of contract and trust are different, there is 'no dichotomy

⁸⁹ John Dyson Heydon, 'Implications of *Chartbrook Ltd v Persimmon Homes Ltd* for the Law of Trusts' (Speech delivered at the Trusts Symposium, South Australia, 18 February 2011) <<http://www.anthonygrant.com/trusts.html>>.

⁹⁰ *Taylor v Johnson* (1983) 151 CLR 422, 429 (Mason ACJ, Murphy and Deane JJ).

⁹¹ *Byrnes v Kendle* (2011) 243 CLR 253, 289 [113] (Heydon and Crennan JJ).

⁹² *Taylor v Johnson* (1983) 151 CLR 422, 428 (Mason ACJ, Murphy and Deane JJ).

⁹³ *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 352 (Mason J).

⁹⁴ See *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45.

⁹⁵ Heydon, above n 89.

between the two'.⁹⁶ So often are the institutions enmeshed that to apply the same theory of construction would decrease the complications of inconsistency. For example, where a trust is created by a contract, it is difficult to grapple with the practical complications of applying one system of construction to the contract and another to the trust. A single approach to construction allays these practical problems. This has led authority, subsequent to *Byrnes v Kendle*, to hold that:

[t]he task of ascertaining whether there is an intention to create a trust and, if so, on what terms is a similar one to ascertaining the intention of parties to a contract for the purpose of deciding whether there is an intention to enter contractual relations and the terms of any contract that has been entered.⁹⁷

Further, Heydon J supports this model. Although he concedes that the rules for contract formation have not been openly and wholly applied to Australian principles of trust creation, he suggests that the objective theory of contract is the standard by which trust creation is to be judged.⁹⁸ Also, much like Mason J's formulation in *Codelfa Construction v State Rail Authority (NSW)*, Heydon and Crennan JJ in *Byrnes v Kendle* held that it would be 'revolutionary' to accept evidence exogenous to the written contract in order to ascertain that which a party subjectively means.⁹⁹ The insistence on the exclusion of this type of evidence is indicative of the adoption of the objective theory of contract formation.

Second, *Byrnes v Kendle* holds that a dispute as to a settlor's intention is resolved by evidence of the 'surrounding circumstances'¹⁰⁰ or the 'relevant circumstances'.¹⁰¹ This accords with Mason J in *Codelfa Construction v State Rail Authority (NSW)*, who held that evidence of surrounding circumstances is admissible in contract interpretation where its language is susceptible to multiple meanings.¹⁰² According to the judgments of *Byrnes v Kendle* and of Mason J, a contract and a trust ought to mean that which a reasonable person having knowledge of the surrounding circumstances available to all the parties would have understood the language of that contract or trust to mean. Moreover, Heydon J, in his Trusts Symposium paper, refers to old authority holding that, when taking the words of an agreement, the court is also to look to the surrounding circumstances.¹⁰³ The objective theory holds, however, that while contracts cannot be interpreted according to the secret intentions of a party, the actual or subjective intentions of a party are not entirely irrelevant.¹⁰⁴ That is, the subjective intention of a party ought to prevail where that party is led reasonably to believe that the other parties accepted that meaning.

This appears to conflict with what their Honours in *Byrnes v Kendle* have declared: the subjective intention is irrelevant. The trouble is, however, easily resolved. If a subjective intention is known, or ought reasonably to have been

⁹⁶ *Gosper v Sawyer* (1985) 160 CLR 548, 568–9 (Mason and Deane JJ).

⁹⁷ *Raulfs v Fishy Bite* [2012] NSWCA 135 (11 May 2012) [47] (Campbell JA).

⁹⁸ Heydon, above n 89.

⁹⁹ *Byrnes v Kendle* (2011) 243 CLR 253, 285 [99] (Heydon and Crennan JJ).

¹⁰⁰ *Ibid* 286 [104] (Heydon and Crennan JJ).

¹⁰¹ *Ibid* 274 [54] (Gummow and Hayne JJ).

¹⁰² *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 352 (Mason J).

¹⁰³ Heydon, above n 89, referring to *Buttery & Co v Inglis* (1877) 5 R 58, 68 (Ormidale LJ).

¹⁰⁴ David Mclauchlan, 'Contract Interpretation: What Is It About?' (2009) 31 *Sydney Law Review* 5, 13.

known by all the relevant parties to a contract, that subjective intention forms part of the surrounding circumstances of that contract. The intention is no longer subjective, but rather forms part of the objective intention of the arrangement. Further, the judgments' pronouncements as to excluding evidence of subjective intention can never produce the situation where all the relevant parties are held to an interpretation that is contrary to their intention. If the actual intention is known and forms part of the surrounding circumstances, evidence of the actual intention becomes relevant. All parties together are unlikely to be bound by an interpretation of an arrangement that is contrary to their mutual intentions.¹⁰⁵ There is, therefore, synthesis of *Byrnes v Kendle*'s principles of trust creation and the objective theory of contract as to surrounding circumstances.

Third, the law of contract and trust are both concerned with the uncertainty and unreliability of oral testimony that aims to contradict written agreements. In both Heydon and Crennan JJ's judgment¹⁰⁶ and Heydon J's speech,¹⁰⁷ recourse is had to old English authority that characterises oral evidence of intention as the 'uncertain testimony of slippery memory'.¹⁰⁸ The history is compelling. In the *Countess of Rutland's Case*, Edward Earl of Rutland, owner of land in fee simple, declared a trust by indenture over land in favour of his wife, Isabel Countess of Rutland. The Earl subsequently declared another trust by indenture over the same land in favour of the male heirs of Thomas Earl of Rutland. Both trusts were not fully constituted. The Earl varied the indentures such that if neither trust were constituted within a said time, the land would pass, upon the death of the Earl, to the male heirs of Thomas Earl of Rutland. The Earl died and the Countess gave oral testimony that the Earl intended that the first trust by indenture was to prevail. Popham CJ, however, rejected such testimony because oral evidence as to intention is of a lower nature or quality than that of written evidence. Further, his Honour held: *nihil tam conveniens est naturali aequitati unumquodque dissolvi eo ligamine quo ligatum est*.¹⁰⁹ As a consequence, evidence can only be undone by evidence of the same nature and written evidence prevails over spoken. *Countess of Rutland's Case* is significant because it reveals, as early as 1604, the interrelatedness of contract and trust and the insistence on a single policy of text construction. It would seem, therefore, that *Byrnes v Kendle* ought to be the restated authority for the proposition that the rules of trust creation follow the objective theory of contract.

B *Whether the Parol Evidence Rule Applies to Trust Creation*

Although the close relationship between contract and trust is stressed in *Byrnes v Kendle*, the Court does not explicitly adopt the parol evidence rule. The rule is vital to Mason J's articulation of the objective theory of contract in *Codelfa Construction v State Rail Authority (NSW)*.¹¹⁰ In *Byrnes v Kendle*, the parol evidence rule is

¹⁰⁵ Ibid 35.

¹⁰⁶ *Byrnes v Kendle* (2011) 243 CLR 253, 286 [104] (Heydon and Crennan JJ).

¹⁰⁷ Heydon, above n 89.

¹⁰⁸ *Countess of Rutland's Case* (1604) 5 Co Rep 25b, 26a–26b (Popham CJ).

¹⁰⁹ *Countess of Rutland's Case* (1604) 5 Co Rep 25b, 26a (Popham CJ). Nothing is so agreeable to natural equity as that a thing be unbound by the same means by which it was bound.

¹¹⁰ (1982) 149 CLR 337, 352 (Mason J).

mentioned only once in a quotation by Isaacs J in French CJ's judgment.¹¹¹ No judgment, however, expressly adopts the parol evidence rule as a principle for determining the existence of a trust. The rule holds that direct evidence of the intention of a party is not relevant to a written document.¹¹² If the rule operates so as to exclude extrinsic evidence of actual intentions,¹¹³ which the judgments of *Byrnes v Kendle* clearly aim to do, it seems odd that their Honours do not explicitly adopt the rule and state that the principles for determining the existence of a trust follow the principles of the objective theory of contract. The reasons to do so are compelling.

First, the vigorous dissent¹¹⁴ of Isaacs J in *Jolliffe* expressly embraced the parol evidence rule in order to prevent oral testimony from contradicting the written document. He held that it is not so radical to exclude parol evidence of a secret intention that undermines that which a written document, such as a deed or will, purports to effect.¹¹⁵ In accordance with this statement, each Acknowledgement of Trust in *Byrnes v Kendle* was executed as a deed, which, under Isaacs J's analysis, necessarily excludes the extrinsic oral evidence of the respondent's subjective intention.

Second, the American authorities have adopted the parol evidence rule to prevent the admission of extrinsic evidence of the actual intention of a purported settlor in relation to a written declaration of trust. The rule, according to § 21(1)(c) of the *Restatement of the Law: Trusts*, operates to exclude extrinsic evidence that seeks to reveal that an owner of property actually intended to hold that property free of trust in circumstances where that owner declares a trust over the property by writing.¹¹⁶ The judgments of Heydon and Crennan JJ and Gummow and Hayne JJ speak to the same effect.¹¹⁷ The American position is not, however, a bright-line rule. The parol evidence rule operates where the manifestation of a settlor's intention is integrated in writing, that is, where the written document is the complete expression of the settlor's intention.¹¹⁸ Also, the reporter's note asserts that, in relation to integration, 'extrinsic evidence is admissible in determining whether the parties intended an integrated document'.¹¹⁹ This suggests that, notwithstanding this rule of exclusion, American authorities are more inclined to look into actual or subjective intention in order to ascertain the existence and nature of a trust.¹²⁰ Recourse to American authorities is unhelpful in determining

¹¹¹ *Byrnes v Kendle* (2011) 243 CLR 253, 262 [15] (French CJ).

¹¹² *Farmer v Honan* (1919) 26 CLR 183, 195 (Isaacs and Rich JJ).

¹¹³ *Owens v Lofthouse* [2007] FCA 1968 (12 December 2007) [65] (Weinberg J); *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 352 (Mason J).

¹¹⁴ Transcript of Proceedings, *Byrnes v Kendle* [2010] HCATrans 322 (8 December 2010) (Gummow J) (during argument).

¹¹⁵ *Commissioner of Stamp Duties (Qld) v Jolliffe* (1920) 28 CLR 178, 191 (Isaacs J).

¹¹⁶ American Law Institute, above n 41, § 21(1)(c).

¹¹⁷ *Byrnes v Kendle* (2011) 243 CLR 253, 285 [99] (Heydon and Crennan JJ).

¹¹⁸ American Law Institute, above n 41, § 21 cmt a.

¹¹⁹ *Ibid* § 21, Reporter's note, cmt a.

¹²⁰ Sanford Schane, 'Ambiguity and Misunderstanding in the Law' (2002) 25 *Thomas Jefferson Law Review* 167, 180. Schane states that the American 'subjective theory of contract ... requires that there be a meeting of the minds — that without an agreement of intention properly expressed, a contract has not been created. Judges adhering to this doctrine have no qualms about admitting extrinsic evidence in order to ascertain each party's intent, even where the parties thought that they had created a final expression of their agreement'.

whether the parol evidence rule ought to apply to trust creation because it conflicts with the objective theory of contract that is preferred in Australia.

Third, the majority's reluctance explicitly to adopt the parol evidence rule for unilateral declarations of trusts might be understood by the factual circumstances of *Byrnes v Kendle*. Commentators have noted that the parol evidence rule seems inappropriate in contexts where the relevant parties are family members. Such agreements are 'unavoidably predominantly personal', despite the appearance of a formal business arrangement,¹²¹ like the Acknowledgement of Trust in *Byrnes v Kendle*. In light of this, the personal relationships of the parties in *Byrnes v Kendle*, with the possibility of mutual understandings or outward intimations of subjective intention, would militate against a strict application and adoption of the parol evidence rule for all declarations of trust. Nevertheless the policy considerations, as discussed above, require the application of the rule in *Byrnes v Kendle*, without stating explicitly that the rule should be adopted for all cases in the future.

VI Conclusion

It is certain that *Jolliffe* is no longer binding or persuasive authority for the significance of subjective intention in trust creation. *Byrnes v Kendle* is consistent with Australian and English authority that a document is not to be construed according to extrinsic evidence of the subjective intentions of its parties, but rather by an objective construction of its words. While this case is definitive Australian authority that a secret intention cannot thwart the existence of a trust, it remains to be answered whether the principles for determining the existence of a trust now completely follow the principles of the objective theory of contract. Their Honours' reliance on the objective theory, with its rules regarding 'surrounding circumstances' and rejection of extrinsic evidence of subjective intention, would support the notion that there is now an objective theory of trust. This is, however, not explicitly stated in the judgments and awaits further articulation and support in future High Court cases.

¹²¹ Tony Cole, 'The Parol Evidence Rule: A Comparative Analysis and Proposal' (2003) 26 *University of New South Wales Law Journal* 680, 701.