

AUSTRALIA / JUDGMENT

Thynne v Jevny Pty Ltd

[2026] NSWCA 40

COURT

Court of Appeal

DECIDED

26 March 2026

BEFORELeeming JA at [1]
Mitchelmore JA at [78]
Adamson JA at [79]**CASE / FILE NUMBER**2025/367093
Decision under appeal

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Court of Appeal

Supreme Court

New South Wales

Amendment notes

Medium Neutral Citation: Thynne v Jevny Pty Ltd [2026] NSWCA 40

Hearing dates: 12 March 2026

Decision date: 26 March 2026

Before: Leeming JA at [1]
Mitchelmore JA at [78]
Adamson JA at [79]Decision: (1) Dismiss the appeal.
(2) Order the appellant to pay the first and second respondent's costs of the appeal.

Catchwords: EQUITY — trusts and trustees — breaches of trust — discretionary family trust — where primary judge found the trustee breached its duties by making unauthorised distributions to non-beneficiaries — where primary judge relieved the trustee from liability pursuant to s 85 of the Trustee Act 1925 (NSW) on the basis that it had acted honestly and reasonably — whether the primary judge erred in his discretion in refusing to order an account or for restoration of the unauthorised distributions
LIMITATION OF ACTIONS — breach of trust — account — where limitation period has expired — effect of s 48 of the Limitation Act 1969 (NSW) on a claim for an account or order for restoration based on alleged breach of trust — where s 68A of the Limitation Act provides for an extinction of title where limitation period applies
RELIEF — where breach of trust established — whether order for restoration of the trust property ought be made or whether declaratory relief sufficient
TRIAL — party bound by conduct of proceedings — ought not be permitted to challenge in separate proceedings for an account matters which have already been litigated in contested proceedings where all material evidence before the primary judge

RELIEF — when an account will be ordered — no utility in ordering an account where the amounts distributed in breach of trust have already been quantified following contested proceedings

Legislation Cited:

Courts Legislation Amendment Act 2005 (NSW), Sch 13
Equity Act 1901 (NSW), s 11
Limitation Act 1623 (21 Ja 1 c 16), s 3
Limitation Act 1969 (NSW), ss 15, 45, 48, 68A, Div 1 Pt 4
Supreme Court Act 1970 (NSW), s 101
Trustee Act 1925 (NSW), ss 70, 85

Cases Cited:

ACES Sogutlu Holdings Pty Ltd (in liq) v Commonwealth Bank of Australia (2014) 89 NSWLR 209; [2014] NSWCA 402
Agricultural Land Management Ltd v Jackson (No 2) (2014) 48 WAR 1; [2014] WASC 102
Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (2000) 202 CLR 588; [2000] HCA 25
Attorney-General v Mayor of Dublin (1827) 1 Bli NS 312; 4 ER 888
Baboo Janokey Doss v Bindabun Doss (1843) 3 Moo Ind App 175; 18 ER 464
Bird v DP (A Pseudonym) (2024) 98 ALJR 1349; [2024] HCA 41
Campbell v Gillespie [1900] 1 Ch 225
Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd (2006) 229 CLR 386; [2006] HCA 41
Cohen v Cohen (1929) 42 CLR 91; [1929] HCA 15
Commonwealth of Australia v Winston (2024) 116 NSWLR 111; [2024] NSWCA 277
Edwards v Attorney General (2004) 60 NSWLR 667; [2004] NSWCA 272
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22
Gerace v Auzhair Supplies Pty Ltd (in liq) (2014) 87 NSWLR 435; [2014] NSWCA 181
Hancock v Rinehart [2015] NSWSC 646; 13 ASTLR 1
House v The King (1936) 55 CLR 499; [1936] HCA 40
In re Blake; Jones v Blake (1885) 29 Ch D 913
In re Grindey [1898] 2 Ch 593
In re the Will of FB Gilbert (1946) 46 SR (NSW) 318
Libertarian Investments Ltd v Hall (2013) 16 HKCFAR 681
London Chatham & Dover Railway Co v South Eastern Railway Co [1892] 1 Ch 120
Mackenzie v Johnston (1819) 4 Madd 373; 56 ER 742
Maguire v Makaronis (1997) 188 CLR 449; [1997] HCA 23
Manning v Federal Commissioner of Taxation (1928) 40 CLR 506; [1928] HCA 9
Meehan v Glazier Holdings Pty Ltd (2002) 54 NSWLR 146; [2002] NSWCA 22
National Trustees Company of Australasia Ltd v General Finance Company of Australia Ltd [1905] AC 373
North Eastern Railway Co v Martin (1848) 2 Ph 758; 41 ER 1136
Ogden Industries Pty Ltd v Lucas (1967) 116 CLR 537; [1967] HCA 30
Padwick v Stanley (1852) 9 Ha 627; 68 ER 664
Pardoe v Price (1847) 16 M & W 451
Phillipson v Downer [1904] SALR 128
Re Dion Investments Pty Ltd (2014) 87 NSWLR 753; [2014] NSWCA 367
Re Fish; Bennett v Bennett [1893] 2 Ch 413
Re Simersall; Blackwell v Bray (1992) 35 FCR 584
Re Tollemache [1903] 1 Ch 457
Re Wilson (1885) 28 Ch D 457
Roberts v Mawabe Pty Ltd [2025] NSWSC 374
Rockcote Enterprises Pty Ltd v FS Architects Pty Ltd; Carelli v FS Architects Pty Ltd

[2008] NSWCA 39

Rowe v National Australia Bank Ltd (2019) 56 WAR 1; [2019] WASCA 140

Spellson v George (1987) 11 NSWLR 300

Sze Tu v Lowe (2014) 89 NSWLR 317; [2014] NSWCA 462

The Workers' Compensation Board of Queensland v Technical Products Pty Ltd (1988) 165 CLR 642; [1988] HCA 49

Thynne v Jevny Pty Ltd (No 3) [2025] NSWSC 986

Tito v Waddell (No 2) [1977] Ch 106

Torlonia v Wright [2016] NSWSC 1139

Tsolis v Health Care Complaints Commission [2024] NSWCA 284

Williams v Central Bank of Nigeria [2014] AC 1189

Youyang Pty Ltd v Minter Ellison Morris Fletcher (2003) 212 CLR 484; [2003] HCA 15

Texts Cited:

H Maine, Early Law and Custom (John Murray, 1883)

Heydon JD and Leeming MJ, Jacobs' Law of Trusts in Australia (8th ed, 2016, LexisNexis Butterworths)

Heydon JD, Leeming MJ, and Turner PG, Meagher, Gummow & Lehane's Equity: Doctrines & Remedies (5th ed, 2015, LexisNexis Butterworths)

J Watson, The Duty to Account: Development and Principles (Federation Press, 2015)

M Cleaver and A Televantos, "Accounting and Breach of Trust in the Nineteenth Century" in D Foster and C Mitchell (eds), Essays on the History of Equity (Hart Publishing, 2026), 429

M Conaglen, "Equitable Compensation for Breach of Trust: Off Target" (2016) 40 Melbourne University Law Review 126

R Andrews and A Stoney, The Supreme Court of Judicature Acts (3rd ed 1883, Reeves & Turner)

W Parker, The Practice in Equity (Law Book Company, 1930)

Category:

Principal judgment

Parties:

Harry Bernard Thynne (Appellant)

Jevny Pty Ltd (First Respondent)

Victoria Diane Sheringham (Second Respondent)

Patrick Lachlan Thynne (Third Respondent)

Elanora Farming Pty Ltd (Fourth Respondent)

Representation:**Counsel:**

J C Kelly SC / S V Shepherd (Appellant)

P M Knowles SC / C M R Ernst (First and Second respondents)

Submitting appearance (Third respondent)

Submitting appearance (Fourth respondent)

Solicitors:

I D Haege Solicitor (Appellant)

O'Neill McDonald Lawyers (First and Second Respondents)

File Number(s):

2025/367093

Decision under appeal

Court or tribunal:

Supreme Court

Jurisdiction:

Equity Division

Citation:

Thynne v Jevny Pty Limited (No 3) [2025] NSWSC 986

Date of Decision: 28 August 2025

Before: Hmelnitsky J

File Number(s): 2022/220085

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

Harry Thynne, the appellant, appeals against the refusal of his claim for an account or an order for restoration of the trust property for distributions made in breach of the Thynne Family Trust (the trust) of which Jevny Pty Ltd, the first respondent, is trustee. The trust was created in the 1980s at the suggestion of James Thynne (Jim), Harry's father and the husband of Victoria Sheringham, the second respondent and Harry's stepmother. Since Jim's death in June 2011, Victoria has been responsible for the administration of the trust including running Elanora, a property in the mid-North coast which comprises the major asset of the trust. Elanora Farming Pty Ltd, the fourth respondent and a company controlled by Victoria, has provided services to assist in the running of Elanora.

The primary judge found that distributions made to Victoria prior to Jim's death in June 2011 by the trustee (which was then controlled by Jim) were unauthorised and made in breach of trust because Victoria was not a beneficiary of the trust. The primary judge also found that distributions made by the trustee (which was then controlled by Victoria) to Elanora Farming Pty Ltd after Jim's death, were unauthorised as it was not a beneficiary. His Honour excused the trustee from liability for the unauthorised distributions to Elanora Farming Pty Ltd pursuant to s 85 of the Trustee Act 1925 (NSW) on the basis that the trustee (controlled by Victoria) had acted honestly and reasonably. However, the primary judge refused to grant relief to the trustee pursuant to s 85 in respect of the distribution made by the trustee (controlled by Jim) as his Honour was not satisfied that the trustee had acted reasonably. The primary judge made declaratory relief but refused to order an account (on the basis that it was unnecessary) or to order that the trustee restore the trust property, finding that it could be left to the trustee to restore the trust. The primary judge did not address the trustee's defence under the Limitation Act 1969 (NSW).

On appeal, Harry challenged the primary judge's refusal to order either that an account be taken of the unauthorised distributions or that the trustee remedy the breaches of trust constituted by the unauthorised distributions by restoring the trust property. The trustee relied on an amended notice of contention to submit that an account was not available by reason of the way Harry had conducted the proceedings and that the claim for relief in respect of the distributions to Victoria had been extinguished under the Limitation Act.

The Court (Leeming JA, Mitchelmore JA, Adamson JA) held, dismissing the appeal: (1) Section 48 of the Limitation Act 1969 (NSW) applied in relation to distributions made by the trustee to Victoria prior to Jim's death in 2011: [63]-[71], [78], [161]-[166]. *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484; [2003] HCA 15; *The Workers' Compensation Board of Queensland v Technical Products Pty Ltd* (1988) 165 CLR 642; [1988] HCA 49; and *Commonwealth of Australia v Winston* (2024) 116 NSWLR 111; [2024] NSWCA 277 applied.

(2) The purpose of s 85 of the Trustee Act 1925 (NSW), is to excuse breaches of trust “where the trustee has acted honestly and reasonably and ought fairly be excused for the breach”. Section 85 of the Trustee Act is a complete answer to the relief sought in grounds 3 and 4: [56]-[62], [78], [148]-[149].

(3) Harry had the opportunity, in the course of the hearing, to explore any alleged discrepancies which he identified between the trust accounts and other financial records with a view to establishing that the distributions were other than as found by the primary judge. Harry is bound by the way he conducted his case in the court below: [49]-[55], [78], [137].

Bird v DP (A Pseudonym) (2024) 98 ALJR 1349; [2024] HCA 41 applied.

Consideration, by
Leeming JA, of:

- (a) the nature of a claim for a common account: [18]-[32], and
- (b) whether a beneficiary was entitled to an account as of right: [33]-[48].

JUDGMENT

LEEMING JA: This appeal concerns the nature of a beneficiary’s claim against a trustee for an account in common form, and the operation of defences under s 85 of the Trustee Act 1925 (NSW) and ss 15 and 48 of the Limitation Act 1969 (NSW). I agree with Adamson JA that this appeal should be dismissed, although I prefer to give my own reasons. I can do so succinctly, because the relevant background, which was almost entirely unchallenged on appeal, is contained in her Honour’s reasons for judgment, and may be summarised in the following nine paragraphs.

Background

Many years ago, the late James Thynne established a discretionary trust known as “The Thynne Family Trust”. The original deed of settlement was not in evidence. Its terms were in dispute at first instance but not in this Court. The only issue in this appeal concerns certain distributions purportedly made by the trustee, Jevny Pty Ltd, which is the first respondent. The trustee had an absolute discretion to distribute trust income each financial year to any or all “Income Beneficiaries” and to the extent that there was undistributed income, it was held on trust absolutely for the “Default Income Beneficiaries”. The Income Beneficiaries were his parents, himself and “each child of James Bernard Thynne”, while the Default Income Beneficiaries were himself and, after his death, his children in equal shares.

An attempt was made, following James Thynne’s marriage to the second respondent, Victoria Sheringham, to amend the trust so as to make her a discretionary object. The primary judge held that the attempt failed, and there is no appeal from that finding.

Jevny purported to make distributions of trust income to Victoria in each of the financial years ended 30 June 1998 to 2011 save for the year ended 30 June 2002. Jevny also purported to make distributions of trust income to Victoria’s company Elanora Farming Pty Ltd, the fourth respondent, in each of the financial years ending 30 June 2015-2020. In the earlier period, Jevny was controlled by James Thynne; in the latter period, Jevny was controlled by Victoria. The primary judge found that the distributions to Victoria totalled \$740,137, while those to Elanora

Farming totalled \$172,242.

The appellant, Harry Bernard Thynne, is the son of James Thynne from an earlier marriage. He is unquestionably a discretionary object of the trust. He received distributions (in the amount of \$211,646) during a four year period when Jevny was controlled by his father.

The exercise by Jevny of its discretion to distribute income was made by trustee resolutions which have the appearance of being drafted by accountants. The distributions were made by crediting a loan account maintained by the accountants retained by the trustee in favour of the discretionary object. Thus, by way of example, the last distribution made to Victoria, in the financial year ended 30 June 2011, was in the amount of \$16,000. It was not suggested that the distribution was made by paying her cash or crediting her bank account; instead, the distribution was effected by the trustee's indebtedness to Victoria increasing from \$751,820 to \$769,906. (The Court was not taken to any document explaining why the increased indebtedness is slightly more than \$16,000.) Victoria recorded the amount of \$16,000 in her tax return and that amount contributed to her taxable income on which she paid tax in that year. The trustee's tax return for the same financial year showed that it had distributed the entirety of its income, including \$16,000 to Victoria. This was consistent with the profit and loss statement of the James Thynne Family Trust for that financial year.

At all times, the distributions made by trustee resolutions produced the result that Jevny had no undistributed trust income at the end of each financial year, and so Harry never enjoyed any benefits as a Default Income Beneficiary. That, of course, is a common position, brought about by the taxation treatment of trust estates.

There were thousands of pages of financial, accounting and taxation records of Jevny, the trust and Victoria in evidence at trial, and in the blue books on appeal. The Court was taken to none of them in oral submissions, and very little in the appellant's written submissions.

Jevny advanced a defence under s 85 of the Trustee Act, and Jevny and Victoria also relied on a defence under ss 15 and 48 of the Limitation Act. The primary judge upheld the s 85 defence, but only in respect of the time during which Jevny was controlled by Victoria. His Honour did not address the limitation defence. His Honour did not reach that defence, because he rejected the application for an account for these reasons at [240]-[241]:

Finally, it is appropriate to consider what other relief may be appropriate given my conclusions. Harry seeks an order for an accounting going back to 1998, which is when a distribution was first made to Victoria.

It is not appropriate to order an accounting here, notwithstanding my conclusion that distributions to Victoria prior to 2011 were not authorised. All of these distributions are already recorded in loan accounts. There is no need for those accounts to be recreated. It will be a matter for the trustee to determine what action is required in order to remedy the breaches of trust identified in these reasons.

The position in summary was that:

there were unchallenged findings of distributions made by the trustee, to Victoria for the periods 1998-2001 and 2003-2011, and to Elanora Farming for the period 2015-2020, all in breach of trust;

Jevny had the benefit of a s 85 defence for the period after 2011 but not before;

there was an undetermined limitation defence, and

the primary judge had declined to give any relief in respect of the pre-2011 breaches of trust as a matter of discretion.

Issues on appeal

By judgment given on 28 August 2025, promptly delivered after a five day trial in late July 2025, the primary judge gave limited declaratory relief, but no pecuniary relief, and declined to order an account for the reasons reproduced above: *Thynne v Jevny Pty Ltd (No 3)* [2025] NSWSC 986. Harry appealed as of right from the dismissal of the substantive proceedings. Although Harry is not personally entitled to the distributions found to have been made in breach of trust, s 101(2)(r) (ii) of the Supreme Court Act 1970 (NSW) is satisfied because there is a “claim, demand or question to or respecting any property” of the value of \$100,000: see *Re Dion Investments Pty Ltd* (2014) 87 NSWLR 753; [2014] NSWCA 367 at [5].

By grounds 1 and 2 of his appeal, Harry challenged the refusal of relief by way of account. He said that until the identity of the discretionary objects had been established, it was not possible to determine a full accounting of the trust estate. He raised questions concerning certain aspects of the trustee’s accounts for the financial years ended 30 June 2001, 2006, 2007 and 2011, and also for the more recent years. He also maintained, and this point was made more emphatically in oral address, that even if there had been a sufficient accounting by reason of what had occurred at trial, the Court should have ordered the repayment of the \$740,137, plus interest, which had been unauthorised, this being an aspect of the account sought in the further amended statement of claim.

By grounds 3 and 4 of his appeal, Harry challenged the finding that Jevny was entitled to a defence under s 85 for the period after 2011. It was said that his Honour erred in “[n]ot giving effect to the appellant’s right to due administration of the Trust by not ordering an account in administration irrespective of any breach of trust or breach of fiduciary duty”, by “[n]ot having regard to the fact that the Trustee did not offer to do equity by restoring the Post-22 June 2011 Distributions to the Trust” and by “[n]ot requiring the Trustee to do equity by restoring the Post-22 June 2011 Distributions to the Trust”. Harry said that instead, Jevny should have been ordered to repay \$188,242, plus interest, to the trust assets.

By notice of contention, Victoria and Jevny said that the entirety of Harry's claim was statute-barred insofar as it concerned distributions made by Jevny before 27 July 2016 (being six years before the proceedings were filed), and that the claims for equitable compensation had not been advanced at trial and should not be permitted to be raised on appeal.

Consideration

As Adamson JA has explained, in order to dismiss the appeal, it is sufficient to reject the challenge to the s 85 defence (which applies to distributions made after 2011) and to uphold the limitation defence (which applies to all distributions made before 2016). I agree that the appeal should be dismissed on those bases. However, the logical starting point to the issues presented on appeal is anterior. It is the juristic nature of the claim advanced at first instance, and whether having regard to the way the trial was run, it is open to Harry to seek pecuniary relief in this Court.

First, in fairness to the reasons of the primary judge, the entirety of this appeal focussed on a relatively minor subset of the issues resolved following a five day trial. The relative insignificance of the issues is reflected in the following three observations.

Of the 187 paragraphs in the plaintiff's closing submissions, a mere three (paras 146-148) concerned the limitation defence, and even there the main point sought to be made was that this had been a case of concealed fraud, something rejected by the primary judge and entirely (and properly) disavowed by senior counsel who appeared on appeal.

Paragraphs 93-110 of the submissions addressed honest and reasonable excuse within the meaning of s 85 of the Trustee Act, but they were directed to the evidence and factual findings sought, rather than the points now made on appeal.

Nothing whatsoever was said concerning the remedy of account, at least so far as appears from my own reading of Harry's written submissions, and the transcript of his oral submissions. The written submissions supplied in opposition to the second ground of the notice of contention did not refer to any such submissions. Still further, this Court gave Mr Kelly SC (who had not appeared below) an opportunity to point out any references after the luncheon adjournment if there were any (Transcript, 12 March 2026, 5.33-39) and none was supplied.

In short, the matters advanced by different counsel in this Court bear only slight resemblance to Harry's case as presented at trial. That does not necessarily stand in the way of accepting the new, or substantially new, submissions, but it does explain why the primary judge gave little or no attention to points which were either not raised, or if they were raised, were far from the forefront of the trial. Lest there be any doubt about it, even if contrary to the conclusion I have reached the appeal were to be allowed, serious attention would need to be given to whether Harry's success on a limited appeal on a basis which was substantially new would warrant a departure from the usual position that costs follow the event: see *Rockcote Enterprises Pty Ltd v FS Architects Pty Ltd*; *Carelli v FS Architects Pty Ltd* [2008] NSWCA 39 at [123].

Was equitable compensation alive at trial? (notice of contention, ground 2)

Prayers 4-6 of the pleading were as follows:

4. Order that there be common account for money paid away in breach of trust together with interest.
5. Order that [Jevny] render accounts to the court and to the Thynne Family Trust and that these proceedings be referred to an associate justice for the taking of accounts.
6. Order that [Jevny] pay to the account of the Thynne Family Trust such amount as is certified on the taking of accounts as being due to Thynne Family Trust by [Jevny] after all just allowances are made.

Prayer 5 has the appearance of having been taken from some precedent without much thought as to its continuing applicability. It is hard to see what it adds to prayers 4 and 6, while it is easy to see that it discloses error. What for some centuries had been Masters became “Associate Judges” in 2005 (by amendments in Schedule 13 of the Courts Legislation Amendment Act 2005 (NSW)). However, there have been no Associate Justices in the Equity Division for some years. Moreover, the “Thynne Family Trust” is not a legal person (see *ACES Sogutlu Holdings Pty Ltd (in liq) v Commonwealth Bank of Australia* (2014) 89 NSWLR 209; [2014] NSWCA 402 at [15]-[20]) and it does not make sense for the trustee to be ordered to render accounts to the trust.

However, prayers 4 and 6 substantially adopt in explicit form the traditional relief by way of an account in common form.

Account is a very ancient remedy. It is in fact older than the development of equity, but the common law action was superseded no later than the 18th century, as Lord Redesdale observed in *Attorney-General v Mayor of Dublin* (1827) 1 Bli NS 312 at 336-337; 4 ER 888 at 898. Many parties might have to account, including stewards, bailees, receivers, executors and guardians: see generally J Watson, *The Duty to Account: Development and Principles* (Federation Press, 2016), pp 78-98. Indeed, the categories are not closed: *North Eastern Railway Co v Martin* (1848) 2 Ph 758 at 762; 41 ER 1136 at 1138; Watson, above, at pp 6-7 and 125.

The obligation to account turned on it being shown that the defendant was an accounting party vis-à-vis the plaintiff. “Before a party can be ordered to account, liability to account must be established”: *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588; [2000] HCA 25 at [51]. However, and axiomatically, a trustee is an accounting party. Decisions stating as much include *Manning v Federal Commissioner of Taxation* (1928) 40 CLR 506 at 509; [1928] HCA 9 (Knox CJ, sitting alone); *Spellson v George* (1987) 11 NSWLR 300 at 315-316; *Re Simersall*; *Blackwell v Bray* (1992) 35 FCR 584 at 588-590; *Hancock v Rinehart* [2015] NSWSC 646; 13 ASTLR 1 at [339] and *Roberts v Mawabe Pty Ltd* [2025] NSWSC 374 at [29].

An account in “common form” (sometimes, “in usual form”) was and is in contradistinction with an account on the basis of “wilful default”. The distinction was explained by Giles JA writing for this Court in *Meehan v Glazier Holdings Pty Ltd* (2002) 54 NSWLR 146; [2002] NSWCA 22 at [13]-[14]:

Although it had earlier been in contest, in the appeal it was accepted that order 4 was an order for taking accounts in common form. Under such an order the accounting party accounts only for what has actually been received and disposed of. The other party to the accounting can challenge the accounting party’s account by asserting that more was received (in the old terminology, surcharging) or by asserting that less was disposed of (in the old terminology, falsifying).

There is an alternative basis for taking accounts. An order may be made for taking accounts on the basis of wilful default (sometimes the words are wilful neglect and default). Under such an order the accounting party must account not only for what has actually been received, but also for what should have been received: that is, for what would have been received if the relevant duties of the accounting party had been properly discharged. Thus in *Partington v Reynolds* (1858) 4 Drew 253 at 256; 62 ER 98 at 99 it was said that on this basis an executor or administrator must account “not only for what he has received, but also for what he might, without his wilful neglect or default have received, although he has not received it”.

Importantly, for the purposes of the submissions on the limitation defence, an account on the basis of wilful default depended on establishing at least one breach of trust, but an account in common form did not. As Professor Conaglen has explained by reference to *Re Fish; Bennett v Bennett* [1893] 2 Ch 413 at 427, beneficiaries could fail in a claim that the trustee of a trading trust had acted in breach of trust in continuing to operate a business, but were nonetheless entitled to see the trustee’s statement of account and to object to items in it: M Conaglen, “Equitable Compensation for Breach of Trust: Off Target” (2016) 40 Melbourne University Law Review 126 at 129.

Two aspects of an account in common form are relevant to Harry’s submissions advanced in this appeal. The first is whether a prayer for an account carries with it a claim for the payment of the amount found to be outstanding. The second is whether an account is available as of right.

I would accept the first aspect of Harry’s submission. The purpose of an account was not merely to oblige the accounting party to demonstrate the accuracy of the receipts and disbursements into and out of a fund. It was to oblige the accounting party to pay any deficit identified following that process.

Dr Lushington, giving the advice of the Judicial Committee of the Privy Council in *Baboo Janokey Doss v Bindabun Doss* (1843) 3 Moo Ind App 175 at 196-197; 18 ER 464 at 472, observed:

A Decree for an account is not, as appears to have been assumed, a mere direction to inquire and report. It proceeds, and must always proceed, upon the assumption that the party calling for it is entitled to the sum found due. It is a Decree affirming his rights, only leaving it to be inquired into, how much is due to him from the party accounting.

This has been affirmed in *Torlonia v Wright* [2016] NSWSC 1139 at [8] and more recently in *Rowe v National Australia Bank Ltd* (2019) 56 WAR 1; [2019] WASCA 140 at [3]-[4].

The result of the accounting is an “equitable debt”, which is to say, a pecuniary obligation to pay which could not be sued upon in a common law court: see the explanation by M Cleaver and A Televantos in their article “Accounting and Breach of Trust in the Nineteenth Century” in D Foster and C Mitchell (eds), *Essays on the History of Equity* (Hart Publishing, 2026), 429 at 433. The obligation was equitable, because, as Rolfe B explained in *Pardoe v Price* (1847) 16 M & W 451 at 458-459, the beneficiary had no legal remedy (for example, by way of money had and received) to obtain an amount held by the trustee: “so long as there is no liability except as trustee, the cestui que trust has no legal remedy”. There were exceptions to that rule which Rolfe B noted (including by admission, or by settling accounts on the basis that the trustee was liable to an action at law), but generally speaking, the trustee’s liability was exclusively in equity.

Thus, even if prayer 4 seeking a “common account” stood alone, there would be an argument that it carried with it a claim that there be payment of the amount determined to be owing. But not only did Harry in prayer 4 of his pleading seek a “common account”, he went further by prayer 6 and sought orders for the repayment of amounts found to be due to the trustee.

I have a deal of sympathy for the primary judge. In a trial with many issues, his Honour was entitled to be told by counsel appearing at trial for Harry that Harry sought compulsive orders for the repayment to Jevny of unauthorised distributions made by it. Instead, forensic attention was directed to other factual issues (the Mona Road Property and certain artworks) and a more red-blooded case which failed, in support of an application for the removal of Jevny as trustee. It would have been desirable for Harry to say, in effect, “If your Honour is with me on the distributions to Victoria and Elanora Farming being unauthorised, but against me on the removal of Jevny, and if your Honour does not accept the limitation and s 85 defences, then I do seek an order that those distributions be repaid”. No such submission was made.

However, despite this aspect of the pleaded case not having been advanced at trial, I incline to the view that there was error in treating the prayer for an account in a fashion which appears to resemble what occurred in *Doss v Doss*. Ultimately, when prayers 4 and 6 of the pleading are borne in mind, the second ground of the notice of contention amounts to a submission that Harry is to be taken to have acquiesced in an implicit abandonment of the pecuniary aspects of his claim, and I doubt that that would be the correct conclusion. However, in light of what follows concerning the first ground of the notice of contention and the third and fourth grounds of the appeal, it is unnecessary for me to reach a concluded view.

Was an account available as of right?

The second relevant aspect of an account in common form is that it was said that Harry was entitled, in the absence of any discretionary defence such as laches (which would have required pleading), to the remedy of an account in common form. This was related to the submission that the account being in common form, it was independent of any breach of trust. One reason for the submission was to challenge the exercise of discretion by the primary judge; another was to

distance what was sought from s 48 of the Limitation Act and s 85 of the Trustee Act, both of which turn on a breach of trust. The propositions were propounded, with commendable clarity, at the commencement of Harry's oral submissions:

[W]e contend that the entitlement of a beneficiary or any other person who is entitled to insist upon the due administration of the trust arises by reason of the relationship between the trustee and the beneficiary or object of a discretion. That's because the trustee is liable to account because it is an accounting party, not because of any breach of trust ... in that way the beneficiary is entitled to an order for an account of administration in common form as of right. Not by reason of any breach of trust. As a consequence of those several propositions, we contend that the Limitation Act has no application at all.

There was once a time when orders for an account in common form were obtainable as of right in equity's exclusive jurisdiction. This may be seen in passages in early 19th century decisions such as *Mackenzie v Johnston* (1819) 4 Madd 373 at 375; 56 ER 742 at 743 ("wherever such a relation [scil, principal/agent] exists, a Bill will lie for an Account"). To similar effect, Sir George Turner VC in *Padwick v Stanley* (1852) 9 Ha 627 at 628; 68 ER 664 at 664 explained that although a principal was entitled to have an account taken in equity against his agent, the agent lacked a similar right because "the agent reposes no such trust or confidence in the principal".

But all this changed in 1883. In what follows, I have been assisted by the analysis in the chapter by Drs Cleaver and Televantos.

The administration of the remedy of account, much of which took place in chambers and before Masters and other court officers, was and is ultimately regulated by rules of court. I shall pass over the reforms in the first half of the 19th century, discussed by Cleaver and Televantos at 436-437, and indeed over the Judicature reforms of 1873 and 1875. The new rules applicable to the Supreme Court of Judicature were themselves substantially revised in 1883. Many of the 1883 rules could be traced back to the 1875 rules, and before then to Chancery practice (see for example *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; [2006] HCA 41 at [45]) but some were new. One work for practitioners said of Order LV in the 1883 rules that, "This Order is entirely new. By it the Chancery Chamber practice is codified": R Andrews and A Stoney, *The Supreme Court of Judicature Acts* (3rd ed 1883, Reeves & Turner), p 378. Rule 3 gave a broad entitlement to the determination, by originating summons which extended to "[t]he furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts": r 3(c), and r 4 authorised, among others, "any person claiming to be interested in the relief sought ... as cestui que trust under the trust of any deed or instrument" "may in like manner apply for and obtain an order for ... (c) the administration of the trust".

Importantly, r 10 provided:

It shall not be obligatory on the Court or a Judge to pronounce or make a judgment or order, whether on summons or otherwise, for the administration of any trust, or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order.

This was a reversal of the default position that a common accounting was obtainable “as a mere matter of course”. That was how Pearson J in *Re Wilson* (1885) 28 Ch D 457 at 460-461 referred to the earlier practice. A similar description was given by Cozens-Hardy J in *Campbell v Gillespie* [1900] 1 Ch 225 at 228. His Lordship had two proceedings before him, one alleging wilful default, the other seeking an account in common form. He had previously rejected a contention that there had been wilful default. He then said:

Under the old law I think it is plain that the defendant would have been entitled, as a matter of right, to a common account ... There has been no release; there has been no settled account; there has been nothing upon which the defendant could rely by way of defence. But happily, under Order LV r 10, I have now a discretion, and I am not bound to give the plaintiff a decree for a common account if the questions between the parties can be properly determined without such a decree.

The result was that Cozens-Hardy J went directly to the evidence, expressed his view that the trust accounts had been honestly, properly and accurately kept, and that there were two relatively small amounts retained by the trustee, as well as substantial borrowing and repayment shortly thereafter for the purposes of a theatre unconnected with the trust, which incurred amounts of interest. Accordingly, the proceeding seeking wilful default was dismissed with costs, but the Court made declarations in respect of the two amounts and the interest, which the trustee was to refund, as well as ordering the trustee to pay costs of the second proceeding.

Campbell v Gillespie illustrates how procedural reforms can have substantive effect. It is a modern example of Sir Henry Maine’s famous observation, coincidentally in the same year when Order LV r 10 was first made, that “substantive law has at first the look of being gradually secreted in the interstices of procedure”: H Maine, *Early Law and Custom* (John Murray, 1883), 389. The reforms to the procedural rules facilitated a change of substance: where the precise pecuniary remedy consequent upon a breach of trust could be determined without a full administration, the court proceeded to do just that. In *Campbell v Gillespie*, Cozens-Hardy J issued relief which a century later would be styled “equitable compensation”, instead of a protracted court-supervised accounting.

The process may be seen in other cases. Cleaver and Televantos write at 449-450:

By these steps, court-supervised accounting lost its central place in legal debate about the measure of trustee liability. Principles governing ‘compensation for the loss the trust estate had sustained’ were now unhooked from the procedures on which they were premised: breach of trust could be litigated without explicit reference to charge and discharge accounting concepts. Thus in *Speight v Gaunt* (1883) it was uncontroversial that loss to a trust estate occasioned by wilful default could be remedied without court-supervised accounting; in *Re Brogden* (1888) the

quantum of liability for wilful default was determined on the papers, both sides assuring the court that preliminary inquiries were unnecessary; and in *Re Salmon* (1889) the beneficiaries simply sought a declaration that an investment was a breach of trust and that the fund be replaced, or the trustee otherwise make good the loss.

See also *In re Blake; Jones v Blake* (1885) 29 Ch D 913, where Cotton LJ said at 916 that formerly an interested person “had the right to require, and as a matter of course obtained, the full decree for the administration of the estate” and the Court “found itself fettered and unable to restrict the accounts and inquiries to such only as were necessary” but now, under Order LV r 10, “the Court may restrict the order simply to those points which will enable the question which requires to be adjudicated upon to be settled”.

The same power to decline to order a common account was found in Australian courts, as may be seen in *Phillipson v Downer* [1904] SALR 128 at 133 and 143-144, where Sir Samuel Way CJ said that “an administration order is no longer a matter of right, as was the case under the old practice”. In New South Wales, the delayed adoption of the judicature system did not stand in the way. Section 11 of the Equity Act 1901 (NSW) was in materially identical terms to r 10 of Order LV of the 1883 rules. The first edition of W Parker’s *The Practice in Equity* (Law Book Company, 1930) stated at p 17 of this rule that:

Formerly in the Court of Chancery large numbers of administration suits were necessarily instituted, not because general administration was desired, but because under the old practice isolated questions under a will could only be brought before the Court in an administration suit. ... The full decree for administration ... was granted as a matter of course, the Court having no power to restrict the accounts and enquiries to those which were necessary to work out the question requiring decision ... until [1900] an administration decree remained *ex debito justitiae*.

The gravamen of the foregoing, albeit not the detail, was raised during the hearing, when reliance was placed on what had been said in *Agricultural Land Management Ltd v Jackson* (No 2) (2014) 48 WAR 1; [2014] WASC 102 at [334]ff:

LEEMING JA: Mr Kelly, you keep on referring to this as though it’s in the present tense. It’s a historical account of what happened in the 19th century.

KELLY: It still represents, in our respectful submission, the law relating to common account.

I do not agree. The position changed no later than 1883 in England and 1901 in New South Wales. While traditionally there had been an entitlement as of right to an account, that ceased to be the case following the changes summarised above, and it was evidently regarded as an important change by judges at the time who were well placed to appreciate its significance, including Cozens-Hardy J and Way CJ.

Further, I do not see anything inconsistent in the foregoing and what was said by Lord Milette NPJ in *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 in the last and second-last sentences of [167], upon which Harry relied:

Once the trust or fiduciary relationship is established or conceded the beneficiary or principal is entitled to an account as of right. Although like all equitable remedies an order for an account is discretionary, in making the order the court is not granting a remedy for wrong but enforcing performance of an obligation.

His Lordship's point was that the Court's order was not granting a remedy for a wrong but enforcing performance of an obligation. What was said immediately beforehand concerning the entitlement as of right or as a matter of discretion was not directed to the change in procedure after 1883, and his reasons like the reasons of any judgment must be read according to its context, directed to the point being made: see *Tsolis v Health Care Complaints Commission* [2024] NSWCA 284 at [33] and the authorities there cited. His Lordship's statement thereafter at [172], on which Harry also relied, to the effect that an unauthorised disbursement may be established by evidence, so that an account is unnecessary and the plaintiff can ask for the appropriate amount of equitable compensation, is wholly consistent with the above.

For those reasons I do not accept that Harry was entitled to an account as of right, in the absence of any pleaded equitable defence.

Should Harry be permitted to re-agitate aspects of the accounts?

The primary judge saw no utility in a further accounting by the trustee. There had been two orders for discovery, and a great deal of material had been produced. It was less than all of the documents which would once have been available, but that is unsurprising since Harry sought to challenge what had occurred a quarter of a century ago. In this Court, Harry made two submissions challenging the declining of an order for an account.

The first was that until it had been established that Victoria was not a discretionary object of the trust, there could be no account. It was said that it would be "entirely premature to proceed into the arithmetic on a final accounting basis unless and until it's established that the two persons concerned were not authorised to receive payments". I do not agree. This is a matter of procedure, not principle.

By way of example, it would be possible to have a construction suit, which determined the legal meaning of some aspect of the trust deed, and thereafter have an account. If the construction suit were litigated without discovery and cross-examination, then it may very well not have been possible to conclude that an account was not warranted. But that is not what happened in the present case. Harry's proceedings went to trial on a pleading which included a series of particularised breaches of trust, some of which were made out, and were responded to by defences including s 85 and estoppel which turned on the parties' conduct over many years. Harry obtained orders for voluminous discovery, and a great deal of documents were produced and tendered. This was no mere construction suit. The result was that the primary judge had before him volumes of evidence concerning distributions made by the trustee, and the cross-examination of both Victoria and the trustee's accountant during a five day trial. There is nothing to suggest that Harry could not have raised any of the matters now put forward in his written submissions concerning additional amounts said to have been made in breach of trust, and to be

fair Harry made no submission in this Court that he had been precluded from doing so. To the contrary, as Mr Knowles SC, who appeared with Ms Ernst in this Court and at trial observed, Victoria's cross-examination proceeded expressly on the basis that all of the declarations of trust were recorded in the loan accounts, and that the rent paid to Jevny was taken from the loan accounts (Transcript, 23 July 2025, 197.23-24, 198.1-2).

Secondly, in his written submissions, Harry identified four particular matters which were said to give rise to concern. One was a distribution made on 30 June 2011, another was a distribution in the year ended 30 June 2006, and a third was in the following financial year. The fourth maintained that an entry for the year ended 30 June 2001 cannot have been retained as a credit because of an entry in the general ledger in the following year.

Those matters concern events of 15, 19, 20 and 25 years ago. Even assuming there might be some utility in a further examination of the documents over and above what occurred at trial, all are, for the reasons that follow, statute-barred.

For completeness, I should add that there is a statement at [173] in *Libertarian Investments* to the effect that an appellate court is in as good a position as the trial judge in reaching a decision on a procedural issue of this nature, such as whether or not to order further accounts or inquiries. With that I am, respectfully, unable to agree, and I do not regard it as consistent with the deference that is associated in this jurisdiction with *In re the Will of FB Gilbert* (1946) 46 SR (NSW) 318, or the approach to discretionary decisions in *House v The King* (1936) 55 CLR 499; [1936] HCA 40.

I do not consider that any error was made by the primary judge, still less any appellable error, having heard the trial and seen the documents and the cross-examination on them, in forming the view that nothing useful would be served by a further account.

The distributions to Elanora Farming attract the s 85 defence (grounds 3 and 4 of the appeal)

The determination that Jevny, when controlled by Victoria, acted honestly and reasonably and ought fairly to be excused, was informed by his Honour's assessment of Victoria and the trustee's accountant, including in cross-examination. No attempt was made to challenge the conclusion on the basis stated in *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22, nor could it be. It is to be borne in mind that this was not a case where discretionary objects were lent trust funds by a trustee, which later forgave the debt, thereby bringing about the position that the discretionary objects had money in their hands which was not (because it was at least in form a loan) income. Indeed, this was the opposite of such a case. When a distribution was made, Jevny's indebtedness to Victoria increased, and while her taxable income increased, she received no cash or money.

The grounds of appeal complained that the primary judge had failed either to insist that the trustee offer to restore the amounts distributed, or to order the trustee to restore the amounts, which points were not developed orally. I do not accept those submissions. The explicit purpose of s 85 is to relieve a trustee from liability which would otherwise pertain to breach of trust; it cannot be erroneous to fail to have regard to the immunising consequences of a s 85 defence.

The grounds of appeal also claimed that the orders pursuant to s 85 failed to give effect to Harry's right to due administration, which did not turn on any breach of trust. This was developed orally:

... what s 85 does is provide relief against a breach of trust, whereas fundamentally we contend that the obligation of the trustee to make good doesn't depend upon any breach, so relief from a breach misses the point that the trustee is still obliged to make good the unauthorised payments. At a more fundamental level, of course, his Honour did not, in our respectful submission, take into account the liability of the trustee to replenish the trust fund regardless of any breach. It's one thing to get relief against the consequences of a breach, but if the obligation to pay is an obligation to specifically perform the duties of a trustee which is to maintain the trust fund to be intact and not make unauthorised payments, the two ships pass in the night.

I do not accept this. One reason is that if that were so, s 85 would be devoid of content. This was raised at the hearing:

LEEMING JA: So, to be really precise, I think I hear you to say that irrespective of the success of ground 4, to the extent that the trustee paid \$26,221 slightly more than a decade ago to Elanora Farming, it's personally liable to replace that amount probably with interest into the trust fund.

KELLY: Yes, your Honour.

LEEMING JA: What does the 85 relief order give the trustee in that case? ... Was it a complete waste of time?

KELLY: No, it would be close to it, though, because one does not fundamentally alter the relationship between a trustee and its trust simply by giving relief against breaches. Because it's not the breach of trust which gives rise to the obligation to pay the money. The obligation to pay the money is generated by the obligation of the trustee to perform that trust. There is - and that is an obligation which exists regardless of any breach.

Moreover, and more fundamentally, when s 85 relieves a trustee "from personal liability for the breach", that means what it says, and includes the personal liability to cause the trust property to be restored, or to make good a deficiency in the trust property brought about by an unauthorised distribution. The effect of s 85 was described in *Re Tollemache* [1903] 1 Ch 457 at 465-466, in a passage reproduced in *Edwards v Attorney General* (2004) 60 NSWLR 667; [2004] NSWCA 272 at [119], as "to bind the beneficiaries to accept what was done as if it were no breach of trust at all". It may be acknowledged that "liability" is a complex word; Windeyer J once observed that it could be the heading of a chapter in a work of analytical jurisprudence: *Ogden Industries Pty Ltd v Lucas* (1967) 116 CLR 537 at 584; [1967] HCA 30. But an order relieving a trustee from personal liability for a breach of trust must extend to freeing the trustee of an obligation to restore trust

funds paid away by the very breach of trust to which the order is directed.

Authority points in the same direction. An example is *In re Grindey* [1898] 2 Ch 593, where the English equivalent extended to a trustee who failed to recover a debt due to the estate occasioning loss. True it is that in *National Trustees Company of Australasia Ltd v General Finance Company of Australasia Ltd* [1905] AC 373, the Judicial Committee declined to grant relief to a professional trustee company which had acted honestly and reasonably in making a payment in breach of trust. Their Lordships were evidently influenced by the fact (which would have been unusual in their experience) that the trustee was a “limited joint stock company, formed for the purpose of earning profits”, as opposed to a gratuitous trustee: see at 381. Even then, the Judicial Committee fell short of saying that the remedial provision of the Victorian equivalent to s 85 should never be applied to a commercial trustee.

I would reject these grounds of appeal.

Is the claim for distributions made before 2016 statute-barred?

Sections 15 and 48 of the Limitation Act are as follows:

15 Accounts

An action on a cause of action for an account founded on a liability at law to account is not maintainable in respect of any matter if brought after the expiration of a limitation period of six years running from the date on which the matter arises.

48 Breach of trust

An action on a cause of action in respect of a breach of trust is not maintainable if brought after the expiration of the only or later to expire of such of the following periods of limitation as are applicable—

- (a) a limitation period of six years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims, and
- (b) the limitation period for the cause of action fixed by or under any provision of this Act other than this section.

Section 15 of the Limitation Act is an awkward provision. Sir Robert Megarry VC said of the English equivalent in *Tito v Waddell (No 2)* [1977] Ch 106 at 250 that the law seemed to be in “a curious state”. One reason is that although the statute derives from s 3 of the Limitation Act 1623 (21 Ja 1 c 16), the common law action for account had been superseded centuries before either the 1939 Act his Lordship was considering, or the 1969 legislation applicable in New South Wales. Yet s 15 speaks of an “action” which is founded on “a liability at law to account”. While “action” is defined in s 11(1) to include “any proceeding in a court”, and plainly extends to a suit in equity, the language of “a liability at law to account” intractably points against a trustee’s obligation to account to a beneficiary in equity’s exclusive jurisdiction. I proceed on the basis that s 15 does not apply directly.

That in turn raises a question whether s 15 is to be applied by analogy. Here the approach is as stated in *Sze Tu v Lowe* (2014) 89 NSWLR 317; [2014] NSWCA 462 at [363]: one asks first whether some other limitation statute applies directly, and if not, then does the equitable claim “correspond” to the legal claim governed by s 15. Thus the first question is whether s 48 applied directly, and the second question is, if it does not, whether s 15 applies by analogy.

Harry stressed that his claim was for a common account, not an account on the basis of wilful default, and a claim for a common account did not require a breach of trust.

Harry was right to submit that there may be an account in the absence of any actual or alleged breach of trust. But that is no answer to the application of s 48 in partial answer to Harry’s claim in these proceedings. The application of s 48 is not resolved by considering the juristic nature of an account in common form in the abstract. Instead, the application of s 48 turns on the particular “action on a cause of action” advanced at trial.

The present litigation, although it started with mere requests for information, went to trial on the basis of elaborate pleadings that explicitly (in accordance with the rules of pleading) alleged breaches of trusts, and which attracted a fully litigated defence under s 85, the premise of which was that the allegations of breach of trust made by Harry might be found to have been established. Nothing could be clearer than that breaches of trust, which were in fact found by the primary judge and which were not the subject of challenge on appeal, had been fully litigated before his Honour. Those breaches of trust occurred when each distribution was made to Victoria. It was at that point in time that the loss of trust funds occurred: *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484; [2003] HCA 15 at [63], rather than, contrary to Harry’s submission, when it was determined that Victoria was not a discretionary object.

The actual proceedings brought by Harry alleged breaches of trust, and in issue was not merely the alleged breaches of trust, but also whether the trustee should be excused under s 85. On that basis alone, so much of the proceeding as sought relief based on the breaches of trust by making distributions to Victoria answered the description in s 48. Further, for all of the reasons earlier given, the relief sought in prayers 4 and 6 was relief by way of account concluding in an order that the net amount paid in breach of trust be restored to the trust assets. That ultimate order sought by Harry was intimately connected to the alleged breaches of trust. It was the direct consequence of those breaches, it was to be quantified by reference to those breaches, and it reflected equity’s remedial response to those breaches. It requires no straining of language to regard the order sought by Harry that the trustee repay to trust assets the amounts wrongly distributed to Victoria in breach of trust as a proceeding on a cause of action in respect of a breach of trust.

Another way of making this point is that the accounting sought by Harry was not merely an exercise in good bookkeeping. It was an application to achieve an end, namely, to require the trustee to restore amounts wrongly distributed by it, which at its core concerned his complaint that Victoria was not a discretionary object and distributions to her were in breach of trust.

It may be that a beneficiary could seek an account in common form and not be bound directly by s 48 because no element of the application involved a breach of trust. That need not be decided by this judgment. But the particular account sought by Harry was, for the reasons given above, a proceeding on a cause of action in respect of breaches of trust within the meaning of s 48. I conclude that s 48 applies directly.

If I were wrong about that, I consider that s 15 would apply by analogy. There is the closest analogy to the account at law to which s 15 is directed, and the account in common form in equity's exclusive jurisdiction sought by a beneficiary against a trustee. To the extent that the account sought by Harry is "in respect of any matter" predating 2016, it is barred by analogy with s 15. There is no reason to deny Jevny's entitlement to rely on the limitation defence because it would be unconscionable: cf *Gerace v Auzhair Supplies Pty Ltd (in liq)* (2014) 87 NSWLR 435; [2014] NSWCA 181 at [70].

However, if I were wrong about both ss 15 and 48, then I would respectfully accept Harry's submission that there was error in the approach taken by the primary judge in leaving the position to the trustee to remedy the breach of trust.

An attempt was made by Jevny and Victoria to contend that this was a special case because of the fact that the distributions made in breach of trust were effected by account debits and credits. It was said:

... rather than having to sue to recover the funds, there are ways in which the trustee, including with the consent of the purported, but not actual beneficiary, could return or effectively return the trust to its position by restating the loan accounts and effectively cancelling the debt. It doesn't require action to be taken beyond ordinary accounting and taxation matters.

This I do not accept. So far as I can see, nothing relevantly turns on the fact that, as a matter of accounting as between trustee and discretionary object (or putative discretionary object), the purported distributions were reflected by entries in a loan account, rather than by a transfer of money. The loan accounts maintained by the trustee were real, and no party contended to the contrary. That was necessarily so. The loan accounts were what caused the trustee to distribute the entirety of the trust estate income in each financial year, thereby avoiding the obligation to pay income tax at the top marginal rate. Further, the credits to Victoria's loan accounts were reflected in amounts derived as distributions from a trustee recorded in her own personal tax returns, and which contributed to her taxable income (and on which she paid tax). So far as I can see, no relevant difference for the purposes of this appeal arises from the recognition of, in effect, a distribution in a loan account entry, as opposed to the transfer of money. But on the view I take as to ss 15 and 48, this does not arise.

Conclusion and orders

There was full argument in this Court on the operation of the Limitation Act and on the s 85 defence, and those matters are themselves sufficient to require the appeal to be dismissed. Part of what has been said above, especially concerning the nature of an account in common form,

travelled further than the written and oral submissions, and were it determinative of any order, I would at the least give consideration to whether it would be appropriate for the parties to be further heard. But since those aspects do not affect the outcome, no good purpose would be served by the additional costs and delay that would follow any such opportunity.

For those reasons I agree with Adamson JA that the appeal should be dismissed with costs.

MITCHELMORE JA: I have had the advantage of reading in draft the reasons of Adamson JA and the reasons of Leeming JA. I agree with the orders Adamson JA proposes for the reasons her Honour gives and for the additional reasons given by Leeming JA.

ADAMSON JA: This appeal arises from a dispute between a step-son, Harry Thynne (Harry), the appellant, and his step-mother, Victoria Sheringham (Victoria), the second respondent, relating to the administration of the Thynne Family Trust (the trust). The trust was a discretionary trust created in December 1980, at the suggestion of James Thynne (Jim), who was Harry's father and Victoria's husband. Jim was an experienced commercial solicitor at the law firm then known as Allen Allen and Hemsley, of which he later became Chair. The first respondent, Jevny Pty Ltd (the trustee), is the trustee.

Jim's parents, Bernard and Leonne Thynne, were cattle farmers who owned a property known as Elanora, on the mid-north coast of New South Wales near Valla Beach. Elanora comprised the major asset of the trust. The trust was designed to transfer wealth from Jim's parents to Jim and his family and minimise the tax liability of the participants.

Harry is the child of Jim's second marriage. Patrick Thynne (Patrick), the third respondent, is Jim and Victoria's child of Jim's third marriage. Patrick filed a submitting appearance in the proceedings which Harry commenced in the Equity Division of the Supreme Court (the Court below) and in this Court.

Since Jim's death on 22 June 2011, Victoria has run Elanora with the assistance of services provided by the fourth respondent, Elanora Farming Pty Ltd (Elanora Farming), a company which Victoria controls. Elanora Farming filed a submitting appearance in the Court below and in this Court.

Hmelnitsky J (the primary judge) found that the trustee's distributions to Victoria and Elanora Farming were unauthorised because Jim, as Appointor of the trust, had not complied with the conditions of the trust for adding them as beneficiaries. His Honour made declarations to that effect: J[175]-[181]; [189]-[190]. His Honour excused the breaches constituted by the unauthorised distributions to Elanora Farming by relieving the trustee (which was controlled by Victoria when the distributions were made) pursuant to s 85 of the Trustee Act 1925 (NSW) which permits a court to excuse a trustee who has acted honestly and reasonably. However, as the trustee was controlled by Jim when the distributions were made to Victoria, the primary judge refused to grant relief to the trustee pursuant to s 85 since his Honour, though satisfied that Jim had acted honestly, was not satisfied that he had acted reasonably.

Despite the finding of breach, which was not excused with respect to the distributions made to Victoria, the primary judge neither ordered an account nor ordered that the trustee restore the trust property.

On appeal, Harry challenged the primary judge's refusal to order either that an account be taken of these unauthorised distributions or that the trustee remedy the breaches of trust constituted by the unauthorised distributions by restoring the trust property.

The proceedings in the Court below

The commencement of proceedings by Harry and the trustee's application for judicial advice

Harry commenced the proceedings in the Court below by filing a summons on 27 July 2022. Victoria retained a new solicitor, Mr McDonald of O'Neill McDonald Lawyers, to conduct the proceedings on her behalf. He had previously advised her and the trustee in 2019 and 2020 regarding a land tax issue: J[151].

On 2 December 2022, the trustee filed an amended notice of motion seeking judicial advice. Lindsay J advised that the trustee would be justified in opposing Harry's claims for relief in so far as they concerned the administration of the trust and in refraining, until the final determination of the proceedings, from making any distributions to any persons unless all objects of the trust consented or the Court gave leave: J[156]-[157].

The pleadings and relief claimed in the Court below

The summons filed on 27 July 2022

The only relief sought in the summons was, relevantly, an order that the trustee provide documents relating to the trust, including the trust deed, trust resolutions and financial records of the trust. This claim for relief was not replicated in the further amended statement of claim.

The further amended statement of claim filed on 19 March 2024

In the further amended statement of claim filed on 19 March 2024, Harry alleged that:

the trustee had duties which included a duty to "familiarise itself with the terms of the [t]rust and act strictly in accordance with such terms";

the trustee had breached the trust by making distributions to Victoria and Elanora Farming, neither of whom was a beneficiary of the trust; and

the trustee had a duty to recover distributions from the trust which were paid in breach of trust (paragraphs 37-46, 55-63).

The nexus between the alleged breaches and the relief claimed was alleged in paragraph 64 of the further amended statement of claim, as follows:

Liability of [the trustee] and Victoria ...

64 By reason of the matters pleaded at paragraphs 37 to 46 and 55 to 63 ... [the trustee] is liable to account in common form for breaches of trust and of fiduciary duty resulting in depletion of the ... trust fund.

In the further amended statement of claim Harry relevantly sought declarations as to the terms of the trust and that the trustee had breached the trust by making distributions to Victoria and Elanora Farming. He also sought orders for the taking of accounts and consequential orders, including that the trustee restore the trust property by the amount of any unauthorised distributions. He sought an order that he and Patrick confer to identify a new trustee. If there was agreement as to the identity of the new trustee, Harry sought an order that the trustee be removed and the new trustee appointed. If such agreement was not forthcoming, Harry sought an order that a receiver be appointed for the sale of the trust's assets and the distribution of the proceeds to him and Patrick in equal shares.

Harry succeeded in obtaining declarations as to the terms of the trust and that the distributions to Victoria and Elanora Farming were unauthorised. The primary judge refused his other claims for relief.

Orders for discovery by the trustee and Victoria

On 4 September 2024, the Court below, on Harry's application, ordered Victoria to give discovery of documents in the possession of the trustee, including the financial statements and tax returns of the trust from 30 June 2011; records of distributions from the trust to beneficiaries and payments to third parties; and documents in Victoria's possession to record distributions to her from the trust, including but not limited to bank statements and tax returns. It was not suggested that this order had not been complied with. Indeed, the six Blue Books on appeal, which totalled almost 3,000 pages, substantially comprised financial records of the trustee, Victoria and Elanora Farming.

The amended cross-claim filed on 28 May 2024 by the trustee and Victoria

In their amended cross-claim filed on 28 May 2024, the trustee and Victoria sought, of present relevance:

Orders pursuant to s 85 of the Trustee Act relieving [the trustee] from any liability in respect of any breach of duty established by Harry.

The amendment to the defence made in the course of the hearing

On the first day of the hearing in the Court below, Mr Knowles SC, who appeared on behalf of the trustee and Victoria with Ms Ernst in the Court below and in this Court, applied for leave to amend the trustee's defence to add a limitation defence. Mr Shepherd, who appeared for Harry in the Court below and with Mr Kelly SC in this Court, did not oppose the amendment. As Mr Knowles explained in the Court below, the effect of the amendment was to allege that any

account which was ordered or any order to restore the trust property could go back no earlier than 27 July 2016 (the proceedings having been commenced by summons filed on 27 July 2022).

In paragraph 61 of the trustee's amended defence filed on 22 July 2025, the trustee alleged that "insofar as the Plaintiff seeks a taking of account for payments made out of the [trust] prior to 27 July 2016, the claim is barred". The particulars given were as follows:

Limitation Act 1969 (NSW), ss 15 (directly or, alternatively, by analogy) and/or 48.

The evidence adduced in the Court below

It was common ground in the Court below that if Victoria and Elanora Farming were not beneficiaries of the trust, any distributions to them were unauthorised and would amount to breaches of trust.

In the Court below, the trustee relied on affidavit evidence from Victoria and from Amanda Rogers, the accountant of the trust, and Mr McDonald, a solicitor of O'Neill McDonald Lawyers. Ms Rogers' affidavit of 15 December 2022 included a schedule of documents exhibited to her affidavit, which largely comprised the financial records of the trust, and amounted to some 500 pages. She also deposed to preparing a spreadsheet of the distributions made by the trust from 2009-2021. Her spreadsheet was not the subject of challenge in cross-examination. Mr McDonald also prepared a corresponding spreadsheet which summarised the distributions made from the trust, which was exhibited to one of Ms Rogers' affidavits. Mr McDonald was not cross-examined.

The primary judge's findings, at J[50] (extracted below), as to the timing and quantum of the distributions made by the trustee accord with the unchallenged evidence of Ms Rogers and Mr McDonald.

Ms Rogers was cross-examined about payments made by Victoria for expenses incurred for the maintenance of Elanora, including the cost of maintaining roads on the property. In the course of this cross-examination, the following exchange occurred:

Q. She'd pay for it [the cost of road maintenance] and claim it as a deduction [in her personal tax return]?

A. Well yeah, the trust didn't pay for anything, okay. Anyway, it had a - it did have a bank account once upon a time, but there's no bank account now, in action - active use for the trust.

Harry submitted that the primary judge's understanding that the trustee did not have a bank account and did not make payments was incorrect and that this error caused the miscarriage of his Honour's discretion neither to order accounts nor to order the trustee to restore the trust property.

The parties' submissions in the Court below in so far as they are relevant to the grounds of appeal

Harry's submissions in the Court below included submissions that the trustee had failed to keep proper records. This allegation would appear to have been made to support his prayer that the trustee be removed and replaced. There was ultimately no separate submission put that the process of an account should be ordered to determine what distributions had been made in breach of trust, as had been alleged in paragraph 64 of the further amended statement of claim (extracted above).

The issues in the Court below in light of the way in which the trial was conducted

The issues in the Court below included:

whether Victoria and Elanora Farming were beneficiaries of the trust (it being accepted that if they were not, any distributions to them were made in breach of trust);

if not, the amount of the distributions made to them, and therefore the amount by which the trust property had been depleted;

whether the trustee was liable to restore the trust property or whether the trustee:

ought be excused pursuant to s 85 of the Trustee Act; or

was not liable because Harry's cause of action had been extinguished under the Limitation Act 1969 (NSW); and

if the trustee was liable, whether an order ought be made that the trustee restore the trust property.

The primary judge determined all issues other than (3)(b).

The findings and reasons of the primary judge

The distributions of income

The primary judge set out in table form the distributions of net income made by the trustee from 30 June 1991 to 30 June 2021 (J[50]):

The primary judge said:

51 I was informed that there was no net income to distribute in the years ending 30 June 1991, 2012 and 2013. In the 2014 year, [the trustee] had net income of \$41,510.51 but there was no distribution. As such, it was liable to pay tax on the whole of that amount pursuant to s 99 of the Income Tax Assessment Act 1936 (Cth).

52 [The trustee] does not have a bank account and I was informed that [the trustee] has never made payment of any amount distributed. Instead, distributed income is recorded as a debt to the relevant [b]eneficiary in the [t]rust's loan accounts.

The trustee's powers to amend the trust and add a beneficiary

The primary judge set out the relevant powers to amend the trust and to add a beneficiary: J[160]. The consent of the Appointor was required for the exercise of each of these powers. A beneficiary could only be added by deed. No Appointor was nominated in the "Recording Deed", a document created in 1996, which set out the terms of the original deed of settlement of the trust, which had been misplaced: J[40].

The primary judge found that, despite the deficiencies in documentary evidence, Jim was the Appointor but that he had not appointed a successor: J[169]. Further, his Honour found that neither Victoria nor Elanora Farming had validly been made beneficiaries of the trust. Shortly prior to his death, Jim attempted to rectify these deficiencies but his attempts were ineffective: J[132]. There was no challenge to these findings.

In 2019, Victoria obtained legal advice which called into question her status as a beneficiary of the trust: J[136]-[138]. The primary judge said at J[139]:

In cross-examination, Victoria said that it was at about this point that she instructed Ms Rogers that she should stop all distributions to herself and Elanora Farming out of the Trust. The records show that the Trust has not distributed any income to Victoria or Elanora Farming subsequent to the year ending 30 June 2020.

The terms of the trust and whether the distributions to Victoria and Elanora Farming were authorised

The primary judge found that between 1 November 1990 and 6 March 2003 Jim was either a director or shadow director of the trustee. His Honour made a declaration to that effect under s 9AC of the Corporations Act 2001 (Cth): J[174].

As referred to above, the primary judge was not satisfied that Jim amended the terms of the trust to add Victoria as a beneficiary or appointed another Appointor. His Honour also rejected the defendants' submission that the presumption of regularity assisted them or that the trustee, any Appointor and Harry were estopped from denying that Victoria and Elanora Farming were beneficiaries of the trust: J[182]-[188]. The effect of these findings was that the distributions to Victoria and Elanora Farming were not authorised by the terms of the trust: J[188]-[190].

Whether the trustee's liability for unauthorised distributions ought be relieved under s 85 of the Trustee Act

Section 85 of the Trustee Act relevantly provides:

85 Excusable breaches of trust

- (1) Where a trustee is or may be personally liable for any breach of trust, the Court may relieve the trustee either wholly or partly from personal liability for the breach.

- (2) The relief may not be given unless it appears to the Court that the trustee has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the direction of the Court in the matter in which the trustee committed the breach.

The primary judge distinguished between unauthorised distributions made by the trustee before Jim's death (for which the primary judge inferred that Jim's mind was the guiding mind of the trustee as he was the director of the trustee as well as the Appointor) and those made afterwards (for which Victoria's mind was the guiding mind as she was the director of the trustee).

Distributions made prior to Jim's death on 22 June 2011

In respect of the period up to Jim's death in June 2011, the primary judge inferred that Jim would not have caused distributions to be made to anyone whom he did not honestly believe was a beneficiary of the trust and found, accordingly, that the trustee (through Jim) had acted honestly: J[195]. However, the primary judge was not satisfied, on the basis of the available evidence, that "Jim's undoubted belief that he had caused Victoria to become a [b]eneficiary was a reasonable one": J[196]. Accordingly, the primary judge did not grant relief under s 85 of the Trustee Act in respect of distributions to Victoria up to June 2011: J[196].

The primary judge did not address the trustee's limitation defence in the reasons for judgment.

Distributions made after Jim's death on 22 June 2011

In respect of the period after Jim's death, the primary judge found that the trustee's "ultimate decision-making responsibility lay with Victoria": J[197]. The primary judge said further:

197 [Victoria's] position was altogether different to that of Jim. Whereas Jim was a highly experienced commercial lawyer who had managed the [t]rust for decades, Victoria was entirely new to the role. She had trained and worked briefly as a lawyer but had no experience in managing a trust of any kind. Moreover, she found herself taking over the administration of the [t]rust from Jim, whom she justifiably regarded as someone who was vastly more qualified to administer a family trust than she was. She knew that he considered her to be a [b]eneficiary of the [t]rust and had no reason to doubt that he was correct in doing so.

198 Victoria also relied – and continues to rely – on Ms Rogers in administering the [t]rust. She is justified in doing so. Ms Rogers in turn had been handed the Amending Document by Jim and had been told by him personally that the document showed an amendment to the Recording Deed. She also was justified in acting accordingly, both before and after Jim's death.

199 When it became apparent in the 2020 year as a result of Mr McDonald's advice that the failure of the Recording Deed to name an Appointor may cast doubt on the purported amendment, Victoria prudently decided to make no further distributions to Elanora Farming and herself, until the issue was resolved. She eventually obtained judicial advice that she was justified in making no income distributions pending the final determination of these proceedings.

200 If, as both Victoria and Ms Rogers quite reasonably believed, the Amending Document correctly stated who the Beneficiaries of the Trust were, they were entitled to proceed on the basis that Elanora Farming was also a [b]eneficiary. The fact that the document defined the class of Beneficiaries by reference to the expression 'Parent' would not have been a reason for a non-lawyer (or a former lawyer in Victoria's position) to suppose that the document was unreliable, particularly when both Ms Rogers and Victoria knew that Jim had acted on the basis of it. They may have been uncertain as to whether the expression 'Parent' referred to Jim or to his parents, but nothing would have turned on this distinction because, either way, both Victoria and Elanora Farming would be 'Beneficiaries'.

The primary judge also considered it to be relevant that, as soon as Victoria received the advice that there was a question about whether the distributions to her and Elanora Farming were authorised, she immediately ceased causing such distributions: J[203].

The primary judge expressed his conclusion on relief under s 85 of the Trustee Act at J[209], as follows:

In my view, [the trustee] has acted honestly and reasonably in making distributions since Jim's death. It is entitled to an order under s 85 relieving it of any personal liability in relation to the making of distributions of trust income to Victoria in the 2011 year and to Elanora Farming in the 2015 to 2020 years of income.

Refusal of Harry's claims for relief other than declaratory relief

The primary judge dismissed Harry's claim for an order that the trustee be removed: J[239]. In respect of Harry's application for an order for accounting going back to 1998, which was when the first distribution was made, the primary judge said, at J[241]:

It is not appropriate to order an accounting here, notwithstanding my conclusion that distributions to Victoria prior to 2011 were not authorised. All of these distributions are already recorded in loan accounts. There is no need for those accounts to be recreated.

The primary judge refused Harry's claim for an order that the trustee restore the trust property and said, at J[241]:

It will be a matter for the trustee to determine what action is required in order to remedy the breaches of trust identified in these reasons.

The primary judge's reasoning in J[241] is challenged on appeal.

The primary judge's orders

On 28 August 2025, the primary judge relevantly made the following orders (J[243]):

- (1) Declare that the terms of the Thynne Family Trust are as contained in the document entitled 'Discretionary Trust Deed' annexed to the statutory declaration made by James Bernard Thynne on 27 June 1996 (the Deed).

- (2) Declare that James Bernard Thynne was the Appointor of the Thynne Family Trust from the date of settlement until his death.
- (3) Declare that James Bernard Thynne was a director of Jevny Pty Ltd within the meaning of s 9AC of the Corporations Act 2001 (Cth) between 1 November 1990 and 6 March 2003.
- (4) Declare that neither Victoria Sheringham nor Elanora Farming Pty Ltd is a 'Beneficiary' of the Thynne Family Trust within the meaning of the Deed.
- (5) Declare that Jevny Pty Ltd was not authorised by the terms of the Thynne Family Trust to distribute trust income to Victoria Sheringham or Elanora Farming Pty Ltd.
- (6) Order pursuant to s 85 of the Trustee Act 1925 (NSW) that Jevny Pty Ltd be relieved of personal liability for any breach of trust involved in making distributions of the income of the Thynne Family Trust to Victoria Sheringham and Elanora Farming Pty Ltd subsequent to 22 June 2011.
- (7) The proceedings are otherwise dismissed.

On 25 September 2025, the primary judge ordered Harry to pay 75% of the trustee's and Victoria's costs of the proceedings.

The grounds of appeal

Harry appeals on the following grounds:

Pre-22 June 2011 Breaches of Trust and Fiduciary Duty

1 The discretion of the Court below miscarried when the Court declined to order an account and require the first respondent (Trustee) to restore the unauthorised distributions of trust income of the Thynne Family Trust (Trust) that the Trustee made to the second respondent as per the declaration in Order (5) made on 28 August 2025 (Pre- 22 June 2011 Distributions), by having regard to incorrect facts and acting on wrong principle when reasoning (in J[241]) that:

- a. All of the Pre-22 June 2011 Distributions were already recorded in the loan accounts;
- b. There is no need for those accounts to be recreated; and
- c. It will be a matter for the trustee to determine what action is required in order to remedy its breaches of trust in relation to the Pre-22 June 2011 Distributions.

2 The Court below should have:

- a. Held that the Trustee was liable for and should be ordered to restore the Pre-22 June 2011 Distributions to the Trust together with interest by reason of the fact that the Pre-22 June 2011 Distributions were made by the Trustee without authority and in breach of trust and breach of fiduciary duty;

- b. Ordered the Trustee to account for the Pre-22 June 2011 Distributions, in order to ascertain the amount the Trustee is obliged to restore to the Trust in respect of those unauthorised distributions; and
- c. Further and in the alternative, ordered that the Trustee pay equitable compensation of \$724,337 together with interest at the pre-judgment prescribed rate (which is calculated to be \$1,262,723 to 31 December 2025) in order to make good the loss occasioned to the Trust by the Pre-22 June 2011 Distributions.

Post 22 June 2011 Breaches of Trust and Fiduciary Duty

3 The discretion of the Court below miscarried by ordering pursuant to section 85 of the Trustee Act 1925 (NSW) (Act) that the Trustee be relieved of personal liability for any breach of trust involved in making distributions of the income of the Thynne Family Trust to the second and fourth respondents subsequent to 22 June 2011 as per Order (6) made on 28 August 2025 (Post-22 June 2011 Distributions) by failing to have regard to relevant considerations and acting on wrong principle when reasoning (in J[235]-[239]) that the first respondent, by its sole director, the second respondent, acted honestly and reasonably when making the Post-22 June 2011 Distributions and should be excused from personal liability for its breach of trust and breach of fiduciary duty when making those distributions by:

- a. Not giving effect to the appellant's right to due administration of the Trust by not ordering an account in administration irrespective of any breach of trust or breach of fiduciary duty;
- b. Not having regard to the fact that the Trustee did not offer to do equity by restoring the Post-22 June 2011 Distributions to the Trust; and
- c. Not requiring the Trustee to do equity by restoring the Post-22 June 2011 Distributions to the Trust.

4 The Court below should have:

- a. Declined to make an order excusing the Trustee from personal liability for any breach of trust in respect of the Post-22 June 2011 Distributions;
- b. Held that the Trustee was liable to account for and should be ordered to restore the Post-22 June 2011 Distributions to the Trust together with interest by reason of the fact that the Post-22 June 2011 Distributions were made by the Trustee without authority and in breach of trust and breach of fiduciary duty;
- c. Ordered the Trustee to account for the Post-2011 Distributions, in order to ascertain the amount the Trustee is obliged to restore to the Trust in respect of those distributions;

d . Further and in the alternative, ordered that the Trustee pay equitable compensation of \$188,242 together with interest at the prescribed rate (which is calculated to be \$92,797 to 31 December 2025) in order to make good the loss occasioned to the Trust by the Post- 22 June 2011 Distributions; and

e. Ordered an account in administration of the Trust in any event.

Harry has not challenged any of the figures in the table at J[50] or any of the findings at J[51]-[52] (extracted above). Nor has he challenged the primary judge's finding that the trustee acted honestly and reasonably in making the unauthorised distributions. He has not filed a statement pursuant to Uniform Civil Procedure Rules 2005 (NSW) (UCPR), r 51.36(2). In these circumstances, this Court ought determine the grounds on the basis that these findings stand.

The amended notice of contention

On 21 January 2026 the trustee and Victoria filed an amended notice of contention which alleged the following two grounds:

1 The claim for a taking of account (prayer 3 of the orders sought in the [n]otice of [a]ppeal) is time barred insofar as it concerns payments made out of the [trust] prior to 27 July 2016, by reason of:

- (a) Limitation Act 1969 (NSW), s 15 (directly or by analogy); and/or
- (b) Limitation Act, s 48.

2 The claim for equitable compensation (prayer 4 of the orders sought in the [n]otice of [a]ppeal):

- (a) was not advanced in the Court below and ought not be permitted to be raised on appeal;
- (b) cannot be maintained in circumstances where the primary judge found (J[52] and J[241]) that the [trustee] has never made payment to beneficiaries in respect of any distribution from the trust; and
- (c) is in any event time barred by reason of s 48 of the Limitation Act insofar as it concerns payments made out of the [trust] prior to 18 November 2019.

Consideration

The appeal ought be dismissed. In summary, Harry's challenge to the distributions made to Elanora Farming fails because grounds 3 and 4 have not been made out. No error has been established in the primary judge's order pursuant to s 85 of the Trustee Act, excusing the trustee from liability for the unauthorised distributions to Elanora Farming. Such an order precludes the making of an order for an account or an order that the trustee restore the trust property. Harry's challenge to the distributions made to Victoria prior to 30 June 2011 also fails because Harry's causes of action in respect of these distributions are, as alleged in paragraph 1 of the amended notice of contention, time-barred under s 15 or s 48 of the Limitation Act and were extinguished before he commenced the proceedings.

These matters are dispositive of the appeal. Nonetheless, I propose to address further non-dispositive submissions, having regard to the way in which the matter was conducted in the Court below.

Alleged miscarriage of discretion in refusing to order an account or an order for restoration of the unauthorised distributions to Victoria before 22 June 2011

Mr Kelly submitted that the primary judge's discretion miscarried in the *House v The King* (1936) 55 CLR 499; [1936] HCA 40 sense as his Honour "had regard to incorrect facts and acted on wrong principle" when reasoning that:

all of the distributions to Victoria prior to 2011 were "already recorded in loan accounts";

there was no need for "those accounts" to be recreated; and

it will be "a matter for the trustee" to determine what action is required in order to remedy its breaches of trust.

The matters referred to in (1) and (2) pertain to whether the primary judge was correct not to order that an account be taken. The matter referred to in (3) pertains to a different question: whether the primary judge ought to have ordered that the trustee restore the trust property by the amount of the unauthorised distributions.

Mr Kelly submitted that the declarations made by the primary judge that the distributions to Victoria and Elanora Farming were not authorised as they were not beneficiaries entitled Harry, as of right, to an order for account and an order for restitution of the unauthorised distributions. He submitted that, in refusing to order an account, the primary judge "denied [Harry] his right to due administration of the [t]rust".

Mr Kelly also sought to challenge the quantum of the unauthorised distributions. In respect of the entries for the financial year ended 30 June 2011 (the last financial year of Jim's life) in the table, Harry identified distributions of \$16,000 to Victoria and of \$54,000 to "Estate of Jim". He noted that how and when each of those distributions was made was not the subject of any finding.

Mr Kelly also submitted that the primary judge's observation at J[52], as follows, was not factually correct:

... [the trustee] does not have a bank account and I was informed that [the trustee] has never made payment of any amount distributed. Instead, distributed income is recorded as a debt to the relevant [b]eneficiary in the [t]rust's loan accounts ...

Mr Kelly further submitted that the finding that all of the distributions to Victoria were already recorded in the loan accounts was incorrect.

In support of these submissions, Mr Kelly identified three apparent inconsistencies between the amounts set out in the table of distributions which appears in the primary judge's reasons at J[50], and which is reproduced above, and the evidence. The alleged inconsistencies are as follows:

between the figure in the Notes to the 2007 Financial Statements of the trust, which record a distribution to Victoria of \$96,000 in the financial year ended 30 June 2006 and the figure of \$32,000 for that year which is included in the table;

between the closing balance of undrawn funds in Victoria's loan account which, as at 30 June 2006, was recorded as \$64,000 and the distribution in the following year of \$70,000 which was shown as having been "fully drawn", in circumstances where the balance of her loan account at the end of the 2007 financial year was shown as nil, with the consequence that the end of year balance of \$64,000, as at 30 June 2006, was not accounted for; and

between the distribution to Victoria of \$344,597 in the financial year ended 30 June 2001 recorded in the table and the balance of the loan account having been reduced to nil in the Annual General Ledger of the trust for the financial year ended 30 June 2002.

For the reasons set out below, I am not persuaded that it is open to Harry to raise these discrepancies in this Court, when he failed to take the opportunity to do so in the Court below.

Whether an account ought to have been ordered having regard to the way Harry conducted the case in the Court below (paragraph 2 of the notice of contention)

The material on which Harry relied as evidencing discrepancies between the table at J[50] and the financial records of the trustee was in evidence in the Court below. Victoria and Ms Rogers gave evidence and were cross-examined about the accounts of the trust and the loan accounts. Harry had the opportunity, in the course of the hearing, to explore with these witnesses any discrepancies which he had identified between the trust accounts and other financial records, with a view to establishing that the distributions were other than as the primary judge found in the table at J[50]. As referred to above, no challenge was made to the spreadsheets of Ms Rogers and Mr McDonald which set out the distributions made by the trust. Harry is bound by the way he conducted his case in the Court below: *Bird v DP (A Pseudonym)* (2024) 98 ALJR 1349; [2024] HCA 41 at [39] (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ).

Part 46 of the UCPR makes detailed provision for the taking of an account, which is a procedure for determining the respective rights of parties in respect of disputed funds by a review of financial dealings. The Court may order that an account may be taken: UCPR, r 46.2. The order may be made at any stage of the proceedings: UCPR, r 46.3. Directions may be given for the taking of an account: UCPR, r 46.4. UCPR, r 46.5 makes provision for the form and verification of accounts. The discretion whether to order an account is informed by the nature of the dispute, the conduct of the parties and the suitability of the remedy. Part 6 of the Civil Procedure Act 2005 (NSW) also applies. Accordingly, a court must, in deciding whether to order an account, have regard to whether the ordering of an account would "facilitate the just, quick and cheap resolution of the real issues in the proceeding": s 56(1) of the Civil Procedure Act.

An order for an account will only be made if it is necessary to give effect to the plaintiff's equitable right: Heydon JD, Leeming MJ, and Turner PG, Meagher, Gummow & Lehane's Equity: Doctrines & Remedies (5th ed, 2015, LexisNexis Butterworths) [26-015], citing London Chatham & Dover Railway Co v South Eastern Railway Co [1892] 1 Ch 120 at 140.

Had the parties in the Court below chosen to litigate only the question whether Victoria and Elanora Farming were beneficiaries, it may have been appropriate for the primary judge to order the taking of an account to determine the quantum of the unauthorised distributions made to them. However, the case was conducted on the basis that the trustee would quantify the distributions to Victoria and Elanora Farming in the proceedings. Harry participated in that process, including by seeking discovery of all the financial records of the trust, and by cross-examining Victoria and Ms Rogers. In the course of the hearing in the Court below, Harry did not challenge the trustee's evidence of the distributions made. In these circumstances, the remedy of an account was not necessary as the quantum was determined by the process of a contested hearing.

Having had the opportunity to litigate the quantum of the unauthorised distributions to Victoria and Elanora Farming, Harry is not entitled to a second chance through the process of an account. In these circumstances, it would not have been appropriate for the primary judge to order that an account be taken of the dealings and transactions of the trustee. Harry has not established that the primary judge's discretion not to order an account miscarried.

Whether the primary judge ought to have ordered the trustee to restore the trust property by the amount of the unauthorised distributions

The relevant principle was articulated in Maguire v Makaronis (1997) 188 CLR 449 at 469 (Brennan CJ, Gaudron, McHugh and Gummow JJ); [1997] HCA 23, as follows:

The obligation of a defaulting trustee is essentially one of effecting restitution to the trust estate. In Target Holdings Ltd v Redferns, Lord Browne-Wilkinson said:

The equitable rules of compensation for breach of trust have been largely developed in relation to such traditional trusts, where the only way in which all the beneficiaries' rights can be protected is to restore to the trust fund what ought to be there. In such a case the basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss. Courts of equity did not award damages but, acting in personam, ordered the defaulting trustee to restore the trust estate.

Such an order may be made following the taking of an account: see the discussion of the history of common accounts in Agricultural Land Management Ltd v Jackson (No 2) (2014) 48 WAR 1; [2014] WASC 102 at [333]-[349] (Edelman J). It may also be made following quantification by a Court of the amount by which the breach of trust depleted the trust property in contested proceedings, as occurred in Youyang Pty Ltd v Minter Ellison Morris Fletcher (2003) 212 CLR 484; [2003] HCA 15, where the amount of the depletion was established by evidence led in the

proceedings.

For the reasons given below, I consider that, but for the order under s 85 of the Trustee Act and the Limitation Act defence, it would have been appropriate for the primary judge to have ordered the trustee to restore the trust property by the amount of the unauthorised distributions. A claim for such an order was sufficiently made in the further amended statement of claim although it is unclear the extent to which it was ultimately pressed.

Harry, as a beneficiary of the trust, was entitled to invoke the jurisdiction of the Court to compel the performance of the trust: Heydon JD and Leeming MJ, *Jacobs' Law of Trusts in Australia* (8th ed, 2016, LexisNexis Butterworths) at [23-03]. While declaratory relief is sufficient when the breach has either been excused under s 85 of the Trustee Act or is time-barred, an order for restoration is generally appropriate where a breach of trust has been found but not, as at the date of the order, remedied. Although it can be expected that a trustee will obtain legal and accounting advice when determining by what mechanism the trust property is to be restored to remedy the breach, a beneficiary's right to due administration of the trust ought generally be vindicated by an order that the trustee restore the trust property by the quantum of the unauthorised distributions made in breach of trust.

Alleged error in refraining from ordering an account or ordering the trustee to restore the trust property affected by unauthorised distributions made to Elanora Farming post June 2011

Grounds 3 and 4: relief in respect of the unauthorised distributions made to Elanora Farming

Harry did not challenge the primary judge's finding that post-June 2011 the trustee (through Victoria, whose mind was, relevantly, that of the trustee at the time of the distributions to Elanora Farming) acted honestly and reasonably. However, in written submissions, Mr Kelly submitted that the discretion whether to relieve the trustee from liability under s 85 of the Trustee Act miscarried because of the matters identified in ground 3. This submission was not developed orally although it was not expressly abandoned. I did not understand Mr Kelly to advance a positive case that the primary judge was wrong to excuse the trustee pursuant to s 85 of the Trustee Act. In so far as he sought to challenge the order under s 85 on the basis that the trustee took into account incorrect facts, I do not consider that, for the reasons given above, Mr Kelly is entitled to challenge the correctness of those facts in this Court, having regard to the way in which Harry's case was conducted in the Court below.

However, Mr Kelly submitted orally, in the alternative, that, even if the order under s 85 of the Trustee Act were not disturbed, an account ought still have been ordered in respect of distributions to Elanora Farming or, in the alternative, an order made requiring the trustee to make good the trust property to the extent of the unauthorised distributions to Elanora Farming. He submitted that Harry, having invoked the jurisdiction of the Court and having established a breach of trust, was entitled to an order which would require the trustee to remedy the breach, notwithstanding the order under s 85 of the Trustee Act. This submission was not developed. Nor

was any authority cited to support the proposition for which Mr Kelly contended.

If s 85 of the Trustee Act did not have the effect of protecting the trustee from liability for unauthorised distributions nominated in the order made under that section, its utility would be negated. Preference is to be given to an interpretation which would promote the purpose of a statutory provision: s 33 of the Interpretation Act 1987 (NSW). The purpose of s 85 of the Trustee Act, as is evident from the wording of s 85(2) and the title of the section (“[e]xcusable breaches of trust”), is to excuse breaches of trust “where the trustee has acted honestly and reasonably, and ought fairly be excused for the breach”. The text and purpose of the provision are entirely inconsistent with the proposition for which Mr Kelly contended. I reject the appellant’s submission that an order under s 85 does not have the effect of relieving the trustee in the present case from the obligation it would otherwise have had of restoring the trust property as a consequence of the unauthorised distributions to Elanora Farming.

Conclusion

In circumstances where the order under s 85 of the Trustee Act is a complete answer to the consequential relief sought in grounds 3 and 4, the primary judge was correct to limit the relief granted in respect of the unauthorised distributions to Elanora Farming to declaratory relief.

The appeal in so far as it concerns distributions made to Victoria prior to Jim’s death on 22 June 2011 when Jim was the controlling mind of the trustee

As referred to above, the primary judge refused relief under s 85 of the Trustee Act to the trustee for distributions made prior to 30 June 2011 as his Honour was not satisfied that Jim’s conduct was “reasonable” although he accepted that it was “honest”. There is no cross-appeal against this finding.

Mr Kelly submitted that, given that the trustee’s breach of trust in respect of the distributions to Victoria had not been excused, Harry was entitled to an order for an account or an order against the trustee that the trustee restore the trust property. He argued that, in circumstances where a breach of trust (unauthorised distributions to persons who were not beneficiaries) had been established, the primary judge was in error, in effect, to leave it up to the trustee to work out how to remedy the breach by restoring the trust property. For the reasons given above, Harry was not entitled to an order for account.

However, for the reasons given above in respect of the distributions to Elanora Farming, Harry was, subject to his cause of action having been extinguished by operation of the Limitation Act (addressed below), entitled to an order requiring the trustee to restore the trust property by the sum of the unauthorised distributions to Victoria. I do not accept the contention in paragraph 2 of the notice of contention that this claim for relief ought not be addressed on appeal as it was not claimed in the Court below. While the claim for restoration was not described in the further amended statement of claim as a claim for equitable compensation, the relief claimed included, in substance, such a claim (although, as I have observed above, it is difficult to discern the extent to which it was ultimately pressed). In the Court below, Harry claimed that the trust be

compensated for the trustee's breach of trust by an order that the trustee restore the trust property (either following an account or as a consequence of the Court's findings as to the quantum of the unauthorised distributions).

Whether Harry's cause of action against the trustee in respect of the pre-22 June 2011 distributions to Victoria is time-barred

Given the primary judge's order under s 85 of the Trustee Act in respect of the distributions to Elanora Farming, the limitation defence is relevant only to the claim in respect of the distributions to Victoria, each of which was made prior to 22 June 2011.

Mr Kelly accepted, in relation to the pre-22 June 2011 distributions, that, if the appellant's cause of action against the trustee were time-barred and therefore extinguished, it was not necessary to determine whether an account ought to have been ordered. However, he submitted that the appellant's action against the trustee was not time-barred because time would only start to run against the appellant when an order for payment was made against the trustee following an account being taken.

Mr Kelly put the following propositions in support of this submission:

an account in common form is an equitable remedy which is analogous to specific performance rather than damages;

the beneficiary of a discretionary trust is entitled to an account in common form as of right because of the relationship between the beneficiary and the trustee which entitles the beneficiary to due administration of the trust;

the beneficiary's entitlement to an account in common form does not depend on there being a breach of trust;

the process of taking an account in common form entitles the applicant beneficiary (in this case, the appellant) to an order that the trustee make good any deficiency in the trust property which may be found on the taking of an account;

the only "cause of action" which accrues, accrues on the taking of an account; and

accordingly, the Limitation Act has no application in the present case as time has not started to run against Harry.

The effect of these submissions, if accepted, would be that a beneficiary in Harry's position is always entitled to an order for an account in common form no matter how many years have passed since the trust was created. I reject these submissions for the reasons given below.

In further support of his submissions, Mr Kelly referred to passages extracted from various authorities as to the nature of the equitable remedy of account and the extent to which, if at all, access to that remedy can be time-barred. However, the cases to which he referred, including *Williams v Central Bank of Nigeria* [2014] AC 1189 (Williams) (which concerned persons in respect of whose holding of property was the subject of the imposition of a remedial constructive

trust), turned on the construction of statutes which are materially different from the Limitation Act. It is not necessary to detail the legislative history of the statutes under consideration in the authorities, such as the Victorian statute of limitations considered in *Cohen v Cohen* (1929) 42 CLR 91; [1929] HCA 15, cited in the course of argument or the Trustee Act 1888 (UK) which, as the Court in *Williams* observed at [12], introduced a statutory time bar to a claim by a beneficiary against a trustee (which hitherto could only be defeated by the equitable, and therefore discretionary, defences of laches and acquiescence).

The relevant sections of the Limitation Act on which the trustee relied in its amended defence filed on 22 July 2025 to Harry's claim for account are as follows:

15 Accounts

An action on a cause of action for an account founded on a liability at law to account is not maintainable in respect of any matter if brought after the expiration of a limitation period of six years running from the date on which the matter arises.

...

48 Breach of trust

An action on a cause of action in respect of a breach of trust is not maintainable if brought after the expiration of the only or later to expire of such of the following periods of limitation as are applicable—

- (a) a limitation period of six years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims, and
- (b) the limitation period for the cause of action fixed by or under any provision of this Act other than this section.

Division 1 of Pt 4 of the Limitation Act, entitled "Extinction of right and title", contains sections (ss 63-68) which variously provide that upon the expiration of the relevant limitation period, the right and/or title of the person formerly having the cause of action is extinguished. The right to rely on the extinction of a right is dependent on a limitation defence having been pleaded: s 68A of the Limitation Act. A defence under the Limitation Act is a non-discretionary defence and is to be distinguished from laches, which is an equitable defence, which is fact-specific and discretionary: *Gerace v Auzhair Supplies Pty Ltd (in liq)* (2014) 87 NSWLR 435; [2014] NSWCA 181 at [51] (Meagher JA, Beazley P agreeing).

Further, the Limitation Act is to be distinguished from other limitation statutes which do not provide for extinction of a cause of action. As Leeming JA explained in *Commonwealth of Australia v Winston* (2024) 116 NSWLR 111; [2024] NSWCA 277 at [43] (Gleeson JA and myself agreeing):

Limitation statutes in the traditional form do not extinguish a cause of action; instead, they merely bar the remedy and not the right, thereby creating a defence which must be pleaded, and until and unless that occurs, the statutory bar does not arise for consideration by the court: see *Commonwealth v Verwayen* (1990) 170 CLR 394 at 405; [1990] HCA 39, *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420; [2010] HCA 34 at [30] and *Minister for Home Affairs v DMA18 as litigation guardian for DLZ18* (2020) 270 CLR 372; [2020] HCA 43 at [31]. However, the Limitation Act goes further. It does not merely provide a defence which may be pleaded. Speaking generally, upon the expiration of the limitation period the “right and title” of the person who formerly had the cause of action is extinguished: s 63.

As referred to above, the trustee’s defence was amended to add the allegation that the remedy of account for payments made prior to 27 July 2016 was time-barred. Accordingly, if the limitation period in either s 15 or s 48 applies, the effect of Division 1 of Part 4 of the Limitation Act is that Harry’s cause of action against the trustee (including for an account or for an order to remedy the breaches) in respect of any of the distributions made to Victoria was extinguished prior to the commencement of the proceedings, subject to s 68A of the Limitation Act.

Since the remedy of an account in common form is an equitable remedy, s 15 of the Limitation Act does not apply in terms because it is not founded on a liability at law. If this were the only relevant provision, it would be necessary to consider whether s 15 applies by analogy. However, as I consider that s 48 applies directly in terms to the present case, there is no reason to apply s 15 by analogy.

The limitation period in s 48 applies to “[a]n action on a cause of action in respect of a breach of trust”. The prefatory words “in respect of” take their meaning from the context in which they appear: *The Workers’ Compensation Board of Queensland v Technical Products Pty Ltd* (1988) 165 CLR 642 at 653-654 (Deane, Dawson and Toohey JJ); [1988] HCA 49.

Mr Kelly submitted that an action for an account in common form was not a cause of action in respect of a breach of trust because a beneficiary’s right to apply for such an account did not depend on a breach of trust having been established. Even assuming this proposition to be correct, the action in the present case was in respect of an alleged breach of trust, being the distribution to persons who were not beneficiaries of the trust. This was ultimately the basis on which the application for an account in common form was brought and was pleaded as such in the further amended statement of claim (as evident from the passages from the pleading extracted above). The action brought by Harry was in respect of the breach of trust which occurred when the trust property was wrongly disbursed by the making of distributions to persons who were not beneficiaries. In the present case, as in *Youyang* at [63], “the loss of the trust funds occurred as soon as the trustee wrongly disbursed them”.

Accordingly, s 48 of the Limitation Act applies in terms. The last distribution made to Victoria was made, at the latest, on 22 June 2011. Accordingly, Harry’s cause of action for an account based on that breach of trust was extinguished, at the latest, on 22 June 2017, over four years before Harry commenced the proceedings. It is not necessary, for present purposes, to determine which of the

provisions in Division 1 of Pt 4 had the effect of extinguishing Harry's cause of action. No submissions were addressed to this question and I did not understand there to be an issue that, if s 48 applied, Harry's cause of action in respect of any distributions made more than six years before he commenced proceedings was extinguished.

Harry's cause of action in respect of distributions made by the trustee to Victoria was extinguished prior to the commencement of the proceedings. Accordingly, he could not have obtained an order for an account or an order that the trustee restore the trust property in any event. There was no challenge to the declarations made by the primary judge.

Conclusion

For the reasons given above, Harry was not entitled to other than declaratory relief:

in respect of the unauthorised distributions to Victoria because his cause of action in respect of that breach of trust was extinguished before proceedings were commenced; and

in respect of the unauthorised distributions to Elanora Farming because no error has been shown in the primary judge's excusing the trustee from personal liability by making an order under s 85 of the Trustee Act.

In these circumstances, no error has been shown in the primary judge granting no other relief to Harry other than declaratory relief. The appeal ought be dismissed.

Proposed orders

For the reasons given above, I propose the following orders:

Dismiss the appeal.

Order the appellant to pay the first and second respondent's costs of the appeal.

Amendments

24 June 2026

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[157] - "1988" replaced by "1888"

29 June 2026

-

[14] - "after" replaced by "before"

- [21] - "2015" replaced by "2016"

- [23] - "255" replaced by "256"

- [33] - inserted comma after "... pleading)"
- [61] - "Australia" replaced by "Australasia"

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29 June 2026

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Prepared on 29 October 2026 · Esheria