Former Trustee Rights, Successor Trustee Duties

6 September 2024

In *Jaken Properties Australia Pty Ltd v Naaman* [2023] NSWCA 214, the New South Wales Court of Appeal considered whether a successor trustee owes fiduciary duties to a removed trustee. The majority, Leeming JA and Kirk JA ,found that no fiduciary duty is owed. Bell CJ, in dissent and finding that a fiduciary duty is owed, observed at [33]: 'An important difference in my analysis of the issues to that of Leeming and Kirk JJA is that, whereas their Honours build upon the former trustee's interest as being in the nature of a charge or lien over the trust assets, I place more weight upon the characterisation of the former trustee's interest as a "beneficial interest in the trust estate'. Accordingly, the proper characterisation of the trustee's proprietary interest in trust assets, and what flows from that characterisation, was at the heart of the claim that a successor trustee owes fiduciary duties to the former.

Can it be said that the proprietary interest of a trustee is properly analysed as that of beneficiary of a fixed trust, thus giving rise to a fiduciary duty owed to it? Or are its features more analogous to the circumstances of the holder of a lien over the property of another, which does *not* typically give rise to a fiduciary relationship? Viscount Radcliffe cautioned in *Livingston*'s case that context was important to understanding the proper nature of an equitable interest described as a 'beneficial interest' and that such an inquiry as to the features of an interest, beyond its label, remains critical. This paper explores the features and function of the trustee's equitable proprietary interest and argues that regardless of the terminology applied to the trustee's proprietary interest, its nature is best characterised as arising to 'support' or 'secure' the trustee's right of indemnity in respect of properly incurred liabilities, functioning as an *equitable lien* and is distinguishable from the characteristics of a *beneficial interest* of a beneficiary under a trust to whom fiduciary duties are owed.

Speaker:

Associate Professor Allison Silink

University of Technology Sydney
Phone number: +61 417553777
Email address: allison.silink@uts.edu.au

PART I: INTRODUCTION

This paper considers the question whether a successor trustee of a trust owes fiduciary duties to the former trustee of that trust. The first appellate consideration of the question was in the recent litigation in the Court of Appeal of New South Wales in *Jaken Properties Australia Pty Ltd v Naaman* [2023] NSWCA 214 (*Jaken*). In *Jaken*, the majority (Leeming JA and Kirk JA, in separate reasons) found that no fiduciary duty was owed to the former trustee. Bell CJ dissented, agreeing with the decision at first instance[1] that fiduciary duties were owed to the former trustee. The former trustee was granted leave to appeal to the High Court and that appeal is due to be heard shortly.

Central to the appellant's claim that the successor trustee owes it a fiduciary duty is the characterisation of the former trustee's proprietary interest in the trust assets as a '*beneficial interest*' and what is said to flow from that analysis. Before the Court of Appeal, the trust creditor subrogated to the rights of the former trustee argued that when legal title to the assets is vested in the successor trustee, the former trustee with an outstanding right to be indemnified has an interest in the trust assets as a beneficiary. It argued that the successor trustee therefore owes fiduciary duties to the former trustee in the same way as it does to other beneficiaries of the trust on the basis that trustee-beneficiary is an accepted fiduciary relationship. This conclusion, is said to follow 'from the mere fact that the successor trustee is holding the legal title to property on trust – beneficially – for the former trustee.'[2]

It is 60 years since *Commissioner of Stamp Duties (Qld) v Livingston*[3] was decided in which Viscount Radcliffe expressly considered the different ways in which the term 'beneficial interest' can be used, and the risk of confusion as to the consequences which flow from the use of the phrase where the context is not made clear. His Lordship observed (at 22-23):

> …. *[T]he terminology of our legal system has not produced a sufficient variety of words to represent the various meanings which can be conveyed by the words 'interest' and 'property'. Thus propositions are advanced or rebutted by the employment of terms that have not in themselves a common basis of definition.* For instance, there are two passages quoted by the learned Chief Justice in his dissenting judgment in this case which illustrate the confusion. There is the remark of Jordan C.J. in McCaughey's Case [(1945) 46 SR NSW 192] '"The idea that beneficiaries in an unadministered or partially administered estate have no beneficial interest in the items which go to make up the estate is repugnant to elementary and fundamental principles of equity: [(1945) 46 SR NSW 192, 204]. If "by beneficial interest in the items" it is intended to suggest that such beneficiaries have any property right at all in any of those items, the proposition cannot be accepted as either elementary or fundamental. It is, as has been shown, contrary to the principles of equity. But, on the other hand, if the meaning is only that such beneficiaries are not without legal remedy during the course of administration to secure that the assets are properly dealt with

---

∗ I thank the BFSLA for the opportunity to present this paper at its 40th Annual Conference 2024. I acknowledge that some of the arguments in this paper in relation to the nature of the trustee's rights draw upon previously published work of mine appearing in Allison Silink, '"Priority between competing successive trustee liens: the limits of judicial innovation and the opportunity for law reform" (2024) 35 *Kings Law Journal* 129-149 https://doi.org/10.1080/09615768.2024.2323799. A revised version of this paper 'Former Trustee Rights, Successor Trustee Duties' will appear in a forthcoming issue of the *Australian Law Journal* in 2025.

[1] *Jaken Properties Australia Pty Ltd v Naaman* [2022] NSWSC 517 (Kunc J).
[2] Appellant's Submissions, page 10, [23].
[3] *Commissioner of Stamp Duties (Qld) v Livingston* (1964) 112 CLR 12 ('*Livingston*').

> and the rights that they hope will accrue to them in the future are safeguarded, the proposition is no doubt correct. *They can be said therefore to have an interest in respect of the assets, or even a beneficial interest in the assets, so long as it is understood in what sense the word 'interest' is used in such a context.* (emphasis added)

Those concerns remain as apposite today, both generally, in relation to the risks of ascribing legal consequences to the use of particular terms without clear analysis of the context in which they are being employed, and specifically, in relation to the use of the concept of a 'beneficial interest.'

The authorities show that the trustee's proprietary interest in trust assets in respect of its right of indemnity has indeed been described as a '*beneficial interest*'.[4] However, it has also been described as a 'lien'[5] or a 'charge'.[6] Discussion of the trustee's rights and interests has been bedevilled by 'imprecise' terminology.[7] As Viscount Radcliffe cautioned, the terminology applied to a particular equitable proprietary interest must be understood in context. Without a clear analysis of any underlying rights and interests, as Sarah Worthington has observed, 'the common law system is ideally suited to creating chaos: unwarranted inferences are drawn from cases and then applied inappropriately.'[8]

As the beneficial interest of a beneficiary of a fixed trust is traditionally accepted as giving rise to a fiduciary relationship, can it be said that the relationship between a successor trustee and former trustee is also properly analysed as that of a trustee and beneficiary of a fixed trust, giving rise to a fiduciary relationship? Or are the features of the former trustee's interest, and the nature of the relationship between the former and successor trustees, more analogous to the circumstances of the holder of a lien over the property of another, which does *not* typically give rise to a fiduciary relationship?

This paper argues that it is important to properly analyse the features of the trustee's proprietary interest in trust assets. One useful approach to this question may be to take a 'bundle of rights'[9] perspective and assess what rights are in the trustee's 'bundle'. Undoubtedly this analytical framework can have 'limits as an analytical tool or accurate description'[10] and 'should not control analysis'.[11] However, where significant consequences are claimed to flow from the classification as a 'beneficial interest' under a trust, and where the use of the term has been known to cause confusion as Viscount Radcliffe observed, a close analysis of the features of the proprietary interest is an important preliminary step.

It is argued in this paper that the features of this interest have more in common with the holder of a lien than the holder of a beneficial interest under a fixed trust. It is suggested that

---

[4] See for example *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367 (Stephen, Mason, Aickin and Wilson JJ) ('*Octavo*'), and *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 ('*Buckle*'), (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
[5] *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346, [43] ('*Bruton*'), 'These rights were supported by a lien over the whole of the trust assets which amounted to a proprietary interest therein…'
[6] In fact, the terms are frequently used interchangeably.
[7] *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth*, [2019] HCA 20; 268 CLR 524 ('*Carter Holt Harvey*'), [140] (Gordon J).
[8] S Worthington, 'Equitable Liens in Commercial Transactions' (1994) 53 *Cambridge Law Journal* 263, ('Worthington') 263, 265.
[9] *Yanner v Eaton* (1999) 201 CLR 351 ('*Yanner*'), 365–6 (Gleeson CJ, Gaudron, Kirby and Hayne JJ)..
[10] Ibid, 366 [17].
[11] *Hocking v Director-General of the National Archives of Australia* (2020) 94 ALJR 569; (2020) 379 ALR 395; [2020] HCA 19, [204] (Edelman J).

while fiduciary relationship may arise in an *ad hoc* way in a particular case on its facts, a fiduciary relationship does not simply arise as a corollary of the phrase 'beneficial interest' being applied to describe a trustee's unique proprietary interest in trust assets, and that the relationship between former and successor trustee is not properly characterised as one under which the successor trustee is holding assets 'on trust' for the former trustee in this way.

This paper is in four parts. Part II considers the features of the trustee's right of indemnity. Part III addresses the proper characterisation of the trustee's proprietary interest. Part IV considers the arguments that were made in *Jaken Properties* in more detail.

PART II: THE TRUSTEE'S RIGHT OF INDEMNITY

This Part examines the proper characterisation of the trustee's right of indemnity and its proprietary interest in trust assets to establish the analytical framework for determining whether a fiduciary relationship ought to be recognised when a trustee is removed and replaced, and the former trustee has a continuing proprietary interests in the trust assets in the hands of the successor trustee.

As the trust is not itself a legal entity, the trustee incurs liabilities in administering the trust personally.[12] However, to mitigate this burden, the trustee has a long-established right to be indemnified from trust assets[13] in respect of "properly incurred" liabilities incurred in the administration of the trust. The trustee's right of indemnity arises by operation of law as 'a right incidental to the character of trustee and inseparable from it'.[14] It comprises both the right of *recoupment* for liabilities discharged personally, and the right to *exoneration* from extant liabilities, thus allowing the trustee to use trust funds to pay third party creditors directly. It has been described as a 'right' of the trustee since at least 1866[15] and accepted under Australian law as a form of personal property,[16] and assignable.[17]

It is important to recognize that under Australian law, the trustee's right of indemnity and its proprietary interest are now clearly characterised as distinct rights, notwithstanding discussion in cases and commentary describing the indemnity *itself as* the proprietary right.[18] The High Court has described the indemnity as '*supported by* a lien over trust assets which amounts to a proprietary interest in the assets',[19] confirming the distinction. Most recently in

---

[12] *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 ('*Vacuum Oil*'), 324 (Latham CJ).
[13] *Worrall v Harford* (1802) 8 Ves Jr 4; 32 ER 250 ('*Worrall*'), 252 (Lord Eldon LC).
[14] *Re Exhall Coal Co Ltd* (1866) 35 Beav 449; 55 ER 97 ('*Re Exhall*'), 971-972 (Lord Romilly MR).
[15] *Ibid,* see also *Carter Holt Harvey* (n 7) [30], 'Although both of these rights of indemnity might strictly be described as powers of indemnity, their description as "rights" emphasises that they do not exist independently of the rights that the trustee holds on trust. The powers of indemnity are concerned with a means by which trust rights can be used. They are thus part and parcel of the trust "rights" in a broad sense.' (Keifel CJ, Keane and Edelman JJ).
[16] *Lane v Deputy Commissioner of Taxation* [2017] FCA 953 ('*Lane*') per Derrington J, [32], 'The right to be indemnified out of trust property is personal property...'
[17] *Break Fast Investments v Sclavenitis* [2022] VSC 288 ('*Breakfast*') per Riordan J; *Custom Credit Corp Ltd v Ravi Nominees Pty Ltd* (192) 8 WAR 42, 46 (Owen J).
[18] See for example, Matthew Conaglen, 'Trustees Competing over Indemnity Rights' (2024) 48(1) *Melbourne University Law Review* (Advance), at 20.
[19] *Bruton,* (n 5) 358-359 [43], 359 [47]; [2009] HCA 32.

Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth[20] Gordon J discussed this distinction directly, observing:

> A number of cases have adopted imprecise language in describing the nature of the proprietary interest generated in the trust assets by the trustee's right of exoneration, referring to the right of exoneration as the proprietary interest. This imprecision generates confusion… The proprietary interest generated by the trustee's right of exoneration is not the right of exoneration itself. Rather, the right of exoneration generates a proprietary interest in the trust assets. To label the right of exoneration a proprietary interest is to confuse the source of the proprietary interest with the interest itself.[21]

In the decision of the Privy Council in *Equity Trust (Jersey) Ltd v Halabi,*[22] it was held that there is 'no difference between the right of indemnity and the proprietary interest … [they] are *one and the same thing*.'[23] However, as noted above, this is not the position under Australian law.[24]

Despite the fact that the trustee's right of indemnity arises by operation of law,[25] its features are substantially like the features of a typical contractual indemnity given *inter partes* (accepting that an indemnity can take many forms). Ordinarily, an indemnity *inter partes* involves a promise by one party that they will 'keep the promisee harmless' against loss.[26] It is an independent, continuing obligation by the promisor to keep the promisee harmless and to make good any loss[27] and is not dependent on the continuing liability of the principal debtor.[28] In *Re The Exhall Coal Co Ltd*,[29] Lord Romilly MR described the trustee's right of indemnity in the same terms, as 'a right … that [the trustee] should be *saved harmless* from obligations which are attached inseparably to his office'.[30]

As a right arising from the office itself, it is suggested here that the better view is that it arises upon appointment, before any liability is necessarily incurred. There are statements in cases to the effect that the trustee's right of indemnity 'accrues when the relevant obligation is incurred'.[31] If all that is meant is that the. incurring of the legal liability enlivens the indemnity

---

[20] *Carter Holt Harvey* (n 7) 254 at [85] Bell, Gageler and Nettle JJ (with whom Gordon J agreed) accepted that the 'trustee's right of indemnity *confers* a beneficial interest in trust assets' recognising the distinction between the underlying right and the proprietary interest.

[21] Ibid [139]-[140] (Gordon J).

[22] *Equity Trust (Jersey) Ltd v Halabi* [2022] UKPC 36 ('*Halabi'*).

[23] *Halabi,* (n 22) [171] per Lord Richards and Sir Nicholas Patten.

[24] See further, Allison Silink**,** '"Priority between competing successive trustee liens: the limits of judicial innovation and the opportunity for law reform" (2024) 35 *Kings Law Journal* 129, 136-7.

[25] *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* (2008) 74 NSWLR 550, ('*Lemery'*) 553 (Brereton J).

[26] *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294, 296 (Harman LJ); see further Nuncio D'Angelo, 'The Indemnity: It's all in the drafting' (2007) *Australian Business Law Review* 93, 94.

[27] *Sutton v Grey* [1894] 1 QB 285 at 288-289 (Lord Esher MR).

[28] *Canty v PaperlinX Australia Pty Ltd* [2014] NSWCA 309 (Barrett, Emmett and Gleeson JJA); 9 BFRA 524, [39] (Gleeson JA), citing Davey LJ in *Guild & Co v Conrad* [1894] 2 QB 885, 896: '... there is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or is about to enter, into a contract of liability indemnified against that liability independently of the question whether a third person makes default or not.' approved in *Globe Church Incorporated v Allianz Australia Insurance Ltd* [2019] NSWCA 27 (Bathurst CJ, Beazley P and Ward JA) [118].

[29] *Re Exhall* (n 14).

[30] Ibid.

[31] See *Xebec Pty Ltd (in liq) v Enthe Pty Ltd* (1987) 18 ATR 893, 898; *Southern Wine Corporation Pty Ltd (in liq) v Frankland River Olive Co Ltd* (2005) 31 WAR 162 ('*Southern Wine*') [30], [62]; *Dimos v Dikeakos Nominees Pty Ltd* (1996) 68 FCR 39, 43; *Lemery*, (n 25) 554.

to recoup or exonerate that amount, that makes sense. However, strictly speaking, the personal right to be held harmless arises upon taking the appointment.

As the trustee's right of indemnity arises as by operation of law, it does not neatly conform to a Hohfeldian analysis of rights existing where there is at all times a 'correlative duty' owed by the person against whom the right is exercisable.[32] However, this does not mean that the reference to the trustee's 'right' of indemnity is no more than a power to apply trust funds to indemnify itself[33] and does not refer to a 'right' that is enforceable against any other person.[34] Equity recognises that in certain circumstances, even where trust assets have been distributed,[35] the trustee may nonetheless enforce its indemnity against the beneficiaries personally. This was confirmed over a century ago by the Privy Council in *Hardoon v Belilios.*[36] Lord Lindley there observed that:

> Where the only *cestui que trust* is a person *sui juris,* the right of the trustee to indemnity by him against liabilities incurred by the trustee by his retention of the trust property *has never been limited to the trust property*: *it extends further and imposes upon the cestui que trust a personal obligation* enforceable in equity to indemnify his trustee.[37] (emphasis added)

The modern principle is that at least where beneficiaries are of full legal capacity and absolutely entitled, they can be required to indemnify the trustee in respect of properly incurred trust liabilities. The principle has been regularly accepted and applied.[38] For example, in *Bayer v Balkin*[39] the trustees had distributed the trust property and three years later were notified of an unsatisfied tax liability associated with realising the property. There were no remaining trust assets over which to assert a lien; there could be no proprietary claim. However, the personal right to be indemnified remained. It was held the trustees were entitled to be indemnified from the beneficiaries personally for the tax paid (although not for the interest charged on account of the trustees' delay).[40] In practice, it is usually only exercised if trust assets are inadequate. However, there is no obligation to exhaust trust assets.

Accordingly, the personal right of indemnity to be held harmless from properly incurred liabilities is distinguishable from, although intrinsically related to, a power to apply liquid trust

---

[32] WN Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (New Haven, Yale University Press, 1919), at 37-40.
[33] For example, in *Southern Wine* (n 31) McLure JA observed at [30]: 'A right of indemnity is more than a power over trust assets. The trustee with a right of recoupment and exoneration has an equitable charge or lien which arises by operation of law and which gives to the trustee an equitable proprietary interest in the trust assets: *Octavo* (n 4) 367; *Buckle* (n 4) 247. Accordingly, a former trustee can claim against persons to whom title to the trust assets has passed. Loss of office does not deprive a trustee of an accrued right of indemnity: *Coates v McInerney* (1992) 7 WAR 537.'
[34] Cf Jessica Hudson, 'Trustee Succession and Indemnification' (2024) 98 *Australian Law Journal* 454 ('Hudson'), 460; J Hudson and C Mitchell, 'Trustee Recoupment: A Power Analysis' (2021) 35 Trust Law International 3.
[35] If the sole beneficiary is a life tenant or an infant then there is no right against that beneficiary personally: RA Hughes, "The Right of a Trustee to a Personal Indemnity from Beneficiaries" (1990) 62 *Australian Law Journal* 567 ('Hughes').
[36] *Hardoon v Belilios* [1901] AC 118 ('*Hardoon*'), 123 (Lord Lindley), 'the plainest principles of justice require that the *cestui que trust* who gets all the benefit of the property should bear its burdens unless he can shew some good reason why his trustee should bear them himself.'; see also *Matthews v Ruggles-Brise* [1911] 1 Ch 194.
[37] *Hardoon*, n 36, 124 (Lord Lindley).
[38] See further *Marginson v Ian Potter & Co* (1976) 136 CLR 161; *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties* (1984) 15 ATR 627; *J W Broomhead (Vic) Pty Ltd (in liq) v J W Broomhead Pty Ltd* [1985] VR 891; see also Hughes (n 35). However it has been abrogated by statute in New South Wales; see s 100A Trustee Act 1925 (NSW).
[39] *Bayer v Balkin* (1995) 31 ATR 295, upheld on appeal in *Balkin v Peck* (1998) 43 NSWLR 706 ('*Balkin*').
[40] Ibid, 714 (Mason P (with whom Priestley JA and Sheppard A-JA agreed)).

funds,[41] and is also distinguishable from the proprietary interest over trust assets which exists to support it.[42]

PART III: THE TRUSTEE'S PROPRIETARY INTEREST

A clear understanding of the features and function of the trustee's proprietary interest is important because of the former trustee's argument in *Jaken* that fiduciary duties are owed to it as the holder of a 'beneficial interest' under a trust (being a paradigm category of fiduciary relationship).

As noted above, under Australian law, the trustee's indemnity is often said to be supported, or secured (in a broad sense) by a proprietary interest described as *lien*[43] or *charge*[44] as a form of equitable proprietary interest[45] over all the trust assets, but is also described as a *beneficial interest* in the trust assets.[46]

The trustee's proprietary interest shares most of the features of equitable liens generally. Accordingly, it is useful to consider the recognised features of equitable liens as a form of equitable proprietary interest first, before analysing its description as a 'beneficial interest.'

The equitable lien

The equitable lien has been described as, 'a right against property which arises automatically by implication of equity to secure the discharge of an actual or potential indebtedness ...'.[47] It is thus said to be a 'type of equitable charge'[48] (which would explain why the courts frequently use the terms interchangeably) which attaches 'until certain

[41] See *Carter Holt Harvey* (n 7) [32]-[33], [82]-[84].
[42] *Lane* (n 16) [34] (Derrington J).
[43]There are many older English authorities which refer to the trustee's lien including *Re Exhall* (n 14); *Re Pumfrey* (1882) 22 Ch D 255, 262; *Stott v Milne* (1884) 25 Ch D 710, 715; *St Thomas's Hospital (Governors) v Richardson* [1910] 1 KB 271, 276. For Australian cases see *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties* [1984] 1 Qd R 576, 585; *Trim Perfect Australia v Albrook Constructions* [2006] NSWSC 153 ('*Trim Perfect*') [20]; *Caterpillar Financial Services Australia v Owens Nominees Pty Ltd* [2001] FCA 677 [7]; *Lemery* (n 25) [16]; *Bruton* (n 5) [43], "These rights were supported by a lien over the whole of the trust assets which amounted to a proprietary interest therein…"
[44] In fact, the terms are frequently used interchangeably.
[45] In *Re Independent Contractor Services (Aust) Pty Ltd (In Liq)* (No 2) [2016] NSWSC 106 ('*Independent Contractor'*), [111], Brereton J observed that, 'such right of indemnity is secured by an equitable lien over the trust assets which arises by operation of law and confers a proprietary interest, in the nature of a security interest, in the trust property, and has priority over the claims of beneficiaries.'
[46]See for example *Octavo* (n 4); *Buckle* (n 4).
[47] See for example *Hewett v Court* (1983) 149 CLR 639 ('*Hewett*'), 663 (Deane J).
[48] Ibid. Deane J noted that the lien is a form of equitable charge over the subject property citing *Landowners West of England and South Wales Land Drainage and Inclosure Co. v. Ashford* (1880) 16 Ch D 411) for the principle that "it does not depend upon possession and may, in general, be enforced in the same way as any other equitable charge, namely, by sale in pursuance of court order or, where the lien is over a fund, by an order for payment thereout (*Bowles v. Rogers* (1800) 6 Ves 95 n (31 ER 957) ; In re *Stucley* (1906) 1 Ch 67, at pp 76-77, 80 ; *Davies v. Littlejohn* (1923) 34 CLR 174, at p 184 ; Seton's Judgments and Orders, 7th ed. (1912), vol. 3, pp. 2220-2225)."

specific claims have been satisfied'.[49] There is a wide range of circumstances recognised as giving rise to an equitable lien.[50] However, the list is not closed.[51]

Pomeroy's *Treatise of Equity Jurisprudence* described the general equitable lien in this way:

> In an equitable lien there is a legal estate with possession in one person, and a special right over the thing held by another … This special right is not an estate of any kind; it does not entitle the holder to a conveyance of the thing nor to its use; it is merely a right to secure the performance of some outstanding obligation, by means of a proceeding directed at the thing which is subject to the lien.[52]

As this summary suggests the lien confers no entitlement to acquire title to such property, or the use of it. It is limited to seeking the assistance of the court to order the sale of the property to satisfy the obligation in respect of which the lien exists.[53] Campbell has noted that the usual enforcement of a lien by a court involves a declaration that person has a lien over property which is followed by a more specific order or set of orders, such as for taking of accounts and that the sum found due be paid from a particular source or for sale of a particular item of property.[54] The nature of the proprietary interest to which the lienee is entitled is limited by comparison with other proprietary interests. It is limited to the monetary value of the obligation or right. The lienee is not entitled to retain a beneficial interest in the assets, and the value of the lien does not alter with the value of the underlying assets. Nor is the lienee entitled to any income produced by the underlying assets.

The rationale for the lien as a species of equitable proprietary interest is difficult to identify other than through general statements of avoiding injustice.[55] It has been said that the doctrine of equitable lien 'was introduced for the sole purpose of furnishing a ground for the specific remedies which equity confers, operating upon particular identified property, instead of the general pecuniary recoveries granted by courts of law'.[56] As noted by Deane J in *Hewett v Court*,[57] it is also difficult to formulate any satisfactory statement of the necessary or sufficient circumstances for the implication of an equitable lien given the broad range of circumstances in which it is recognised. A lien is an equitable response to established circumstances or where equity determines it is required. Campbell observes that:

> Liens arise in such a wide variety of circumstances that it is hard to see that they have any common characteristic, save that *they are recognised when principles of equity call for a proprietary order to be made*. To say that the

---

[49] Worthington, (n 8) 263.
[50] Fiona Burns "The Equitable Lien Rediscovered: A Remedy for the 21st Century" (2002) 25 *UNSW Law Journal* 1, ('Burns') 6-7, gives examples including the vendor's lien, the purchaser's lien, the partnership lien, a lien identified by Joseph Story for mistaken improvements to land, and the trustee's lien, as a remedy for an unpaid purchaser of a ship being built, as an alternate remedy in the context of a breach of fiduciary obligation: *Re Hallet's Estate* (1880) 13 Ch D 696.
[51] *Hewett* (n 47) 646 (Gibbs CJ).
[52] Spencer W Symons, *John Norton Pomery: A Treatise of Equity Jurisprudence* (5th ed, 1941), vol 4, §1234.
[53] See E Sykes and S Walker, *The Law of Securities* (Lawbook Company, 5th ed, 1993), 198.
[54] See further JC Campbell, "Some historical and policy aspects of the law of equitable liens" (2009) 83 *Australian Law Journal* 97, ('Campbell') 120.
[55] See for example *Whitbread & Co Ltd v Watt* [1902] 1 Ch 835, 840 (Stirling J) in the context of vendor's and purchaser's liens.
[56] Ibid, (Vaughan Williams L.J) His Lordship. referred to the purchaser's lien for his deposit as "a right which may be said to have been invented for the purpose of doing justice. It is a fiction of a kind which is sometimes resorted to at law as well as in equity". See also Campbell (n 54).
[57] *Hewett* (n 47).

> existence of the lien is the reason why a proprietary order is made is hypostatisation, not explanation – as useful as saying that opium makes a person sleepy because of its dormative virtue. *A lien is merely the reification of the preparedness of the court to make a proprietary order*.[58] (emphasis added)

The trustee's proprietary interest

The trustee's proprietary interest shares the features of the equitable lien. The trustee has a right of realisation of assets by appointment of a receiver or judicial order for sale (if it does not otherwise have an express power of sale under the trust instrument, or by statute).[59] Sale without court order is not permissible. The trustee can claim ancillary orders such as an order to recover possession of trust property to permit these primary remedies to take effect. However, foreclosure is not available.[60] The trustee's lien is said to 'have the nature of a floating charge over all the trust assets.'[61] But for the fact that the trustee's interest is over property to which it has title, the features and effect of this interest are the same as any other equitable lien.

There are other circumstances in which equity recognises a right to an indemnity secured by a lien, such as the right of a receiver appointed by the court to an indemnity over the assets of the company in question, which is also supported by an equitable lien out of those assets.[62]

In relation to the trustee's interest, as noted by the High Court in *Buckle*:

> A court of equity may authorise the sale of assets held by the trustee so as to satisfy the right to reimbursement or exoneration. In that sense, there is an equitable charge over the "trust assets" which may be enforced in the same way as any other equitable charge.'[63]

Accordingly, the trustee's lien functions as an equitable lien, even if it is not over the property of another (at least while it is still in office),[64] nor arising in relation to a debt owed to it by another, given that it supports a right to be indemnified from trust liabilities that arises by operation of law.

Criticism of a proprietary interest over trust assets to which the trustee has title

There has been academic[65] and judicial criticism[66] of the recognition of any sort of proprietary interest in the trustee in support of its right of indemnity whilst it is incumbent on

---

[58] Campbell, (n 54) 120.
[59] See for example *Apostolou v VA Corp Aust Pty Ltd* [2011] FCAFC 103, [45] and *Jones v Matrix Partners Ltd, in the matter of Killarnee Civil and Concrete Contractors Pty Ltd (in liq)* [2018] FCAFC 40 ('*Killarnee*'), [44] per Allsop CJ.
[60] See *Trim Perfect* (n 43) and the authorities cited at [20(5)]: Tennant v Trenchard (1869) LR 4 Eq 537; *Seton's Judgments and Orders*, (7th ed, 1912) Volume 3, 2220 to 2225; see also *Ashburner's Principles of Equity*, (2nd ed, 1983), 248; EL Sykes and S Walker, *The Law of Securities*, (5th ed, 1993), 198; E L G Tyler, P W Young and C W Croft*, Fisher and Lightwood's Law of Mortgages***,** (Australian ed, 1995), p 44; *ANZ Banking Group Limited v Intagro Projects Pty Ltd* [2004] NSWSC 1054, [14].
[61] *Re Independent Contractor* (n 45) [24], 'The trustee's lien does not attach to any particular asset, nor secures any particular liability, but is in the nature of a floating charge over all the trust assets, and secures the balance of the account as between the trustee and the beneficiary from time to time.' (Brereton J)
[62] See for example, *In Re Application of Central Commodities Services Pty Ltd* [1984] 1 NSWLR 25, 26-27 (Needham J).
[63] (1998) 192 CLR 226, 246.
[64] Nor is it an encumbrance over the beneficiaries' interest in the trust assets: *Buckle* (n 4).
[65] See The Hon William Gummow AC and Aryan Mohseni, 'The selection of a defective major premise' (2023) 53 *Australian Bar Review* 11, 21 ('Gummow and Mohseni'); Hudson (n 34) 461.
[66] See *Agusta Pty Ltd v Provident Capital Ltd* [20120 NSWCA 26, 2012) 16 BPR 30,397 ('*Agusta*') [41] (Barrett JA).

the basis that it is 'anomalous'[67] that a trustee could have an equitable proprietary interest in property of which it is the legal owner. The argument is made that before removal, the indemnification of the trustee is simply the use by it of its legal rights of ownership of the assets, or the exercise of a power without a supporting proprietary interest, and that the recognition of an equitable interest in property of which the trustee is the legal owner is inconsistent with the understanding that equitable interests are 'engrafted onto' legal title, and not carved out of it.[68]

However, it is noteworthy that there are already circumstances in which it is accepted that a trustee can have an equitable interest in the trust assets of which it is the legal owner. For example, equity has long accepted that a trustee can be a *beneficiary* (as long as it is not the only one) under a trust of which it is trustee.[69] It is respectfully submitted that the rejection of an equitable proprietary interest in the trust assets of which it is the legal owner to secure its indemnity is inconsistent with accepting that the trustee can hold *another* form of equitable proprietary interest in those same assets of which it is legal owner where it is a beneficiary under the trust deed. In any event, when the trustee is replaced, the lien assumes a more traditional operation over the assets that are now owned by another – the replacement trustee.[70]

More generally, the starting point for analysis under Australian law must be the clear acceptance by the High Court that the trustee has an equitable proprietary interest in the trust assets of which it is legal owner, which survives retirement and removal and persists despite loss of legal ownership against the trust assets in the hands of the successor. Accordingly, arguments that are premised upon the rejection of the existence of an equitable proprietary interest in trust assets in support of its right of indemnity[71] would require persuading the High Court to overturn current authority that explicitly recognises this proprietary interest.[72]

The proprietary interest characterised as a 'beneficial interest'

Interchangeably with its characterisation as a 'lien', under Australian law, the trustee's proprietary interest has also been described as a 'beneficial interest' in the trust fund.[73] The question is whether the use of this phrase speaks to the recognition of a different sort of proprietary interest, being an interest of the nature of a beneficiary under a fixed trust to whom a fiduciary obligation is owed when the trust assets have passed to the successor

---

[67] Justice R W White, judge of the Court of Appeal of New South Wales, writing extra-judicially in a paper prepared for a seminar on "Tax and Equity: Current and Contentious Issues" organised by the Toongabbie Legal Centre held on 17 March 2017 [4].
[68] Ibid [25].
[69] JD Heydon and MJ Leeming, *Jacob's Law of Trusts in Australia* (Lexis Nexis, 8th ed, 2016) 3-4 [1-07] "…[T]here must be a cestui que trust or beneficiary. The trustee may be one of the beneficiaries but cannot be the sole beneficiary. If the trustee were the sole beneficiary there would be no trust because there would be no separate equitable interest vested in the beneficiary – there is a merger of any such possible interest in the legal or equitable interest to the beneficiary as trustee: *Re Cook* [1948] Ch 212; *Re Haberley , dec'd* [1971] NZLR 325, *333-4*. 346." In this way, the trustee does not fall foul of the principles discussed in *DKLR Holding Co (No. 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510 ('*DKLR*') at 518-521 [14]-[20]. (Hope J) 'an absolute owner in fee simple does not hold two estates, a legal estate and an equitable estate. He holds only the legal estate, with all the rights and incidents that attach to that estate. If he were to execute a declaration that he held the land in trust for himself absolutely, the declaration would be of no effect; it would give him no separate equitable rights; he would remain the legal owner with all the rights that a legal owner has.'
[70] See *Newcastle Airport Pty Ltd v Chief Commissioner of State Revenue* (2014) 99 ATR 748, [78] (White J).
[71] Gummow and Mohseni (n 65), 21; Hudson, (n 65), 461.
[72] *Bruton* (n 5); *Carter Holt Harvey* (n 7).
[73] See for example *Octavo* (n 4); *Buckle* (n 4).

trustee, or, whether, as Viscount Radcliffe noted in *Livingston*'s case, the phrase 'beneficial interest' is used in a sense which requires contextualizing to understand but conveys something different in the context of the trustee's interest. In the Court of Appeal in *Jaken*, as noted by Leeming JA at [91], the argument for the trust creditor was that:

> Jaken held property which was, in equity, the *property of JPG*", and that where one person holds property for the benefit of another the relationship in equity is one of trustee to beneficiary. Thus it was put that "the relationship as between JPG and Jaken with respect to JPG's equitable proprietary interest answers the description of trustee and beneficiary: a person who has the 'custody and administration of property on behalf of others' is a trustee in the ordinary sense.

Accordingly, the proper nature and features of the trustee's proprietary interest, and whether it can be said to amount to a *beneficial interest under a trust*, is the critical question.

There are many references to the trustee's interest as a beneficial interest. For example, in *Octavo*[74] the majority (Stephen, Mason, Aickin and Wilson JJ found that there are:

> *two classes of persons having a beneficial interest in the trust assets*: first the cestuis que trust… and secondly, the trustee in respect of his right to be indemnified out of the trust assets against personal liabilities incurred in the performance of the trust. The latter interest will be preferred to the former …[75]
>
> (emphasis added)

However, context is always crucial. The High Court there described the trustee's interest as 'a beneficial interest to *secure his right to an indemnity*.'[76] (emphasis added).

The description of it as a beneficial interest was repeated in *Buckle*.[77] The Court (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) held that:

> … the starting point in the class of case under consideration is that the assets held by the trustee are "no longer property held solely in the interests of the beneficiaries of the trust". The term "trust assets" may be used to identify those held by the trustee upon the terms of the trust, but, in respect of such assets, there exist the respective proprietary rights, in order of priority, of the trustee and the beneficiaries. The interests of the beneficiaries are not "encumbered" by the trustee's right of exoneration or reimbursement. Rather, the trustee's right to exoneration or recoupment "takes priority over the rights in or in reference to the assets of beneficiaries or others who stand in that situation".[78]

The critical finding in *Buckle* was that the trustee's proprietary interest in the trust assets does not encumber the *beneficiaries' interests* for the purposes of s 66 of the *Stamp Duties Act 1920* (NSW). Given the finding that the beneficiaries' interests cannot be determined *at all* until after payment of the indemnity, logically, the *beneficiaries' interests* cannot be the interests to which the lien attaches – the beneficiaries' interests are residual. In one sense, they only begin where the lien ends.[79] Accordingly, the key finding in *Buckle* was that whilst

---

[74] *Octavo* (n 4).
[75] *Ibid*, 367.
[76] *Octavo* (n 4) 369.
[77] (n 4).
[78] Ibid [50].
[79] Ibid.

the trustee has this prior proprietary interest in the trust assets *as a whole*,[80] which '*secures*'[81] in a broad sense, its right of indemnity, it is not a security interest that encumbers any particular beneficiary's interest because those interests have not yet been determined.

As we have seen, it is when a trustee actually incurs relevant expenses that the right to be indemnified from the trust assets *accrues*.[82] It would then be unconscionable for the beneficiaries to insist upon transfer of the trust property to them without payment to the trustee in respect of the obligations it owes. The interest applies to the trust assets as a whole to which the trustee has title so that the lien is said to 'have the nature of a floating charge over all the trust assets'.[83] It is argued here that the trustee's proprietary interest is therefore appropriately understood as an equitable 'security' of sorts,[84] supporting the right of indemnity to which it is entitled at law.

This interest is not equivalent to the beneficial interest of a beneficiary under a trust

Despite the use of the phrase '*beneficial interest*' there is a critical differences between, on the one hand, the proprietary interest of a trustee in the trust assets to secure its indemnity, (or the interest of a former trustee in the trust assets in the hands of the successor trustee), and the interest of a beneficiary under a trust, on the other.

The key distinguishing feature of a beneficial interest under a trust is explained by Hope JA in *DKLR Holding Co (No. 2) Pty Ltd v Commissioner of Stamp Duties*[85] where his Honour explained that:

> These essential features of interests arising under private trusts are thus described in Jacobs' Law of Trusts, 3rd ed, p 109: '… *the trustee must be under a personal obligation to deal with the trust property for the benefit of the beneficiaries, and this obligation must be annexed to the trust property. This is the equitable obligation proper. It arises from the very nature of a trust and from the origin of the trust in the separation of the common law and equitable jurisdictions in English legal history. The obligation attaches to the trustees in personam, but it is also annexed to the property so that the equitable interest resembles a right in rem.* It is not sufficient that the trustee should be under a personal obligation to hold the property for the benefit of another, unless that obligation is annexed to the property. Conversely, it is not sufficient that an obligation should be annexed to property unless the trustee is under the personal obligation.' (emphasis added)

---

[80] For example in *Lerinda P/L v Laertes Investments P/L as Trustee for the Ap-Pack Deveney Unit Trust* [2009] QSC 251 ('Lerinda'), McMurdo J observed: [3] To enforce the indemnity, a trustee has a charge or right of lien over the whole range of trust assets except for those, if any, which under the terms of the trust deed may not be used for the carrying on of the business.'

[81] See *Savage v The Union Bank of Australia Limited* (1906) 3 CLR 1170, 1196 per O'Connor J; *Octavo Investments Ltd v Knight* (1979) 144 CLR 360, 369; *Bruton* (n 5), 359 [43].

[82] *Trim Perfect* (n 43) [20](7); *Xebec Pty Limited (in liq) v Enthe Pty Limited* (1987) 18 ATR 893; *Southern Wine* (n 31) [30].

[83] *Re Independent Contractor* (n 45), [24] (Brereton J).

[84] in the broad sense of 'anything that makes the money more assured in its payment or more readily recoverable': *General Motors Acceptance Corp Australia v Southbank Traders Pty Ltd* (2007) 227 CLR 305, ('*General Motors* ') [20-[22] citing *Stroud's Judicial Dictionary* 6th ed (2000), p 2390. See also Sykes and Walker, *The Law of Securities*, 5th ed (1993),192, 203; Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) , 513 [21-04].

[85] *DKLR* (n 69) 518-521, particularly [15].

A trustee upon assuming office undertakes to hold trust property for nominated beneficiaries or classes of beneficiary under the trust (unless a purpose trust), and assumes personal obligations of trusteeship to those beneficiaries. The trust assets are held for their benefit in accordance with terms of the trust and it is to them that the property will be ultimately distributed once it is determined. Under an express trust, the requirements for certainty of intention, subject matter and object are directed to the identification of the requisite intention to hold identifiable property for those nominated beneficiaries or class of beneficiaries in accordance with the terms of the trust.

The trustee does not hold trust property for itself as a beneficiary in this sense unless it is a case where it is identified as one of those objects of the trust (and as long as the trustee is not the only beneficiary). As discussed above, it is well established that in the course of the administration of the trust, the trustee is entitled to have recourse to trust assets for payment of amounts due to it under its indemnity prior to the determination of the interests of beneficiaries. However, in identifying this entitlement to a prior interest, the trustee's proprietary interest is clearly distinguished from the interests of beneficiaries for whom the trust property is held.

In *Buckle*, the High Court observed the distinction between the interest of the trustee and the interest of the beneficiaries noting that:

> In aid of that right to reimbursement or exoneration for liabilities properly incurred in the administration of the trust, *the trustee cannot be compelled to surrender the trust property to the beneficiaries until the claim has been satisfied*.'[86] (emphasis added)

The Court continued, explaining that it was "*in that sense*" that the trustee had a prior interest to the beneficiaries, '*In that sense*, the entitlement to reimbursement or exoneration confers a priority in the further administration of the trust'.[87] It is suggested here that this clarifies the sense in which the trustee's interest, even if described as a 'beneficial interest' is distinct from the interests of beneficiaries under the terms of the trust.

The specific way in which the trustee's proprietary interest in respect of its right of indemnity interacts with its obligations to the beneficiaries under the trust was discussed by Allsop CJ in *Jones v Matrix Partners Pty Ltd; Re Killarnee Civil & Concrete Contractors Pty Ltd (In liq)*:[88]

> [T]he right (in a sense personal in that it was distinct from and superior to the interests of cestuis que trust) of the trustee to use trust assets to exonerate itself arises to meet a trust liability, and can be exercised only for that purpose. The property in the hands of the trustee remains trust property, but subject to the trustee's proprietary interest that exists for the purpose of paying the creditors. The property is not held on trust for the beneficiaries alone; *the proprietary interest of the trustee is preferential to the interests of the beneficiaries, but that interest of the trustee is shaped by its purpose and origins in the trust relationship — to pay trust creditors in order to exonerate itself from those debts. The character and limits of the interest are shaped by its purpose and origins. The*

[86] *Buckle* (n 4) [47] fn 27 citing *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367; *Re The Exhall Coal Company (Limited)* (1866) 35 Beav 449 at 452-453 [55 ER 970 at 971]; *Scott on Trusts*, 4th ed (1988), vol 3A, §244.1.
[87] Ibid, citing at fn 28 Pettit, *Equity and the Law of Trusts*, 8th ed (1997) at 458-459.
[88] *Killarnee* (n 59).

> *obligation of the trustee to use the trust assets to pay trust creditors is reflected by, and provides the foundation for, the creditors' right of subrogation*.[89] (emphasis added)

This passage was cited with approval by Gordon J in *Carter Holt Harvey*.[90]

Taken out of context, the words "The property is not held on trust for the beneficiaries alone" might suggest that the property is also held on trust for the trustee to the extent of its interest. However, in context, it is clear that this is not what was intended. Rather, what the passage in full clearly indicates is that whilst equity affords to the trustee a prior interest in the assets to 'secure' or 'support' its right of indemnity, this prior proprietary interest is stamped with its character as a prior security and shaped by this specific purpose to pay trust creditors. It is not an interest arising under the terms of the trust whereby the trustee assumes personal obligations annexed to the property the subject of the trust. By reason of the fact that the trustee's interest in respect of its indemnity survives removal, it will remain attached to the trust assets that come into the hands of the successor. However, its nature and purpose do not change. The former trustee is not under the terms of the trust one of the beneficiaries to whom the successor trustee assumes personal obligations of trusteeship under the trust, despite being bound by the proprietary interest of the former trustee.

Despite the seemingly interchangeable use of the terms by the courts at times, the cases show that when the question is confronted directly, the courts have emphasised the distinction between a proprietary interest for the purpose of securing the indemnity as opposed to the interest of a beneficiary under a trust. For example, in *In Re Stansfield DIY Wealth Pty Ltd (in liq)*,[91] Brereton J observed that, 'The equitable interest of a trustee that has a charge to secure its right of indemnity ... is in the nature of a hypothecation, and *does not equate to beneficial ownership*.'[92] (emphasis added). These authorities lend further support to a characterisation of the trustee's proprietary interest as one which secures the trustee's entitlement and retains priority over the interests of beneficiaries under the trust but does not change character into a substantively different beneficial interest as a beneficiary under a trust, attracting fiduciary obligations (amongst other trustee duties).

The High Court has made the same point about the need to look beyond the label 'beneficial interest' and undertake a careful consideration of the nature of rights comprising an equitable proprietary interest in relation to the interests of a partner in partnership assets. In *Commissioner of State Taxation (SA) v Cyril Henschke Pty L*td[93] the High Court observed that a partner's interest can only be ascertained finally on the completion of the winding up of the partnership and the identification of the surplus share of assets over liabilities. The Court noted that:

> The position here is not sufficiently or accurately expressed merely by use of the term "beneficial interest" any more than when considering the operation of discretionary trusts and unit trusts.[94]

---

[89] Ibid 324-325 [49].
[90] *Carter Holt Harvey* (n 7) [133] (Gordon J).
[91] *Re Stansfield DIY Wealth Pty Ltd (in liq)* [2014] NSWSC 1484; 291 FCR 17; 32 ACLC 14-065; 103 ACSR 401; 9 BFRA 663; 291 FLR 17 (Brereton J)
[92] Ibid [19].
[93] (2010) 242 CLR 508, 517.
[94] Ibid [25].

The nature of a partner's interest in partnership property, both before and after dissolution of the partnership, was most recently explained in *Commissioner of State Revenue (WA) v Rojoda Pty Ltd*.[95] There the Court confirmed that notwithstanding the reference in the partnership documents to the 'beneficial interest' of the partners:

> a partner's equitable interest is not accurately expressed as a "beneficial interest", *at least in the sense of being a right to any proportion of, or for the personal use of, or for the benefit from, any particular asset.*[96] (emphasis added)

These observations arguably support the same need to identify and properly characterise the features of the trustee's equitable proprietary interest in trust assets, rather than draw conclusions as to its effect from the label.

Priority of the Trustee's Proprietary Interest after Removal

As an equitable proprietary interest, it has been held under Australian law in *Richardson v Aileen*[97] and subsequently, that the general equitable priority rule of first in time applies to resolving disputes between trustee liens where the merits are otherwise equal.[98] *Richardson v Aileen* has been applied[99] and cited subsequently for this principle,[100] and re-affirmed notwithstanding the decision of the Privy Council in *Equity Trust (Jersey) Ltd v Halabi,*[101] in which the Board held that a new bespoke priority rule was warranted under which their interests rank *pari passu.* In *Francis (Trustee) in the matter of Fotios (Bankrupt) v Helios Corporation (No 3)*,[102] Colvin J held that:

> I remain of the view that it is appropriate for the priorities between successive trustees to a charge or lien over the property of the trust to be determined in accordance with general equitable principles as to competing priorities. This reflects the current state of the law in Australia.[103]

There are other Australian cases which confirm as a matter of principle that the former trustee has a 'superior'[104] or 'higher'[105] right in respect of its lien to a replacement trustee,

---

[95] (2020) 268 CLR 281; [2020] HCA 7 at [30]-[35].
[96] Ibid [33].
[97] *Richardson v Aileen* [2007] VSC 104.
[98] See generally, Allison Silink**,** '"Priority between competing successive trustee liens: the limits of judicial innovation and the opportunity for law reform" (2024) 35 *Kings Law Journal* 129-149. https://doi.org/10.1080/09615768.2024.2323799.
[99] *Francis (Trustee), Re Fotios (Bankrupt)* v *Helios Corporation Pty Ltd* [2022] FCA 199, [9] (Colvin J). Colvin J noted at [61] that the orders made were 'on the basis of the principle that the former trustee's rights have priority over a new trustee in the absence of some vitiating factor', citing *Richardson* v *Aileen*.
[100] cited with apparent approval by the New South Wales Court of Appeal in *Australia Capital Financial Management Pty Ltd* v *Linfield Developments Pty Ltd* [2017] NSWCA 99 [279] (McColl, Ward and Gleeson JJA).
[101] *Halabi* (n 22).
[102] *Francis (Trustee) in the matter of Fotios (Bankrupt) v Helios Corporation (No 3)* [2023] FCA 251 ('*Helios Corporation (No 3)*
[103]Ibid [11] (Colvin J).
[104] For example, *Re Dalewon Pty Ltd* (in liq) (2010) 79 ACSR 530, [8]; *Re Winter Holdings (WA) Pty Ltd* [2015] WASC 162, [40], *Caterpillar Financial Services Australia v Owens Nominees Pty Ltd* [2001] FCA 677, [22]; *Collie v Merlaw Nominees Pty Ltd (in liq)* [2001] VSC 39, [54]-[55]; *Lemery* (n 25) [21]; *Agusta* n 66 [44] 'After such transfer, the original trustee's preferred beneficial interest continues ..'
[105]*Synergy Concepts Pty Ltd* v *Rylegrove Pty Ltd (in liquidation)* (1997) 8 BPR 15,555 (Santow J). Santow J accepted that the defendant 'as previous trustee, by virtue of a right of indemnity conferring a lien against the relevant property as trust property, had a *higher right* to indemnity in relation to the [property] than the plaintiff [successor trustee]'. This was conceded as being 'superior' to the successor trustee's right.

who takes 'subject to' the interest of the former trustee, in the sense that '[t]he [trustee's] lien has priority over the claims of beneficiaries *and successive trustees*'.[106]

A full discussion of the divergence in the law that has arisen between the United Kingdom and Australia on this question of priority is beyond the scope of this paper. However, it is important to note that there is this Australian authority on the matter discussed above which was not referred to by the Privy Council in *Halabi* when it was noted there by Lord Briggs that, 'this question is not covered by any binding or even persuasive authority, anywhere in the common law world, so that (albeit strictly only for the purposes of the law of Jersey) the Board is called upon to decide it for the first time.'[107]

Distinction between the Right of Indemnity and the Proprietary Interest

As discussed above, the trustee's right of indemnity and supporting proprietary interest are intrinsically interrelated but they are distinct rights. The indemnity - the personal right to be held harmless - arises upon appointment. The proprietary interest can only accrue upon incurring such an indemnifiable obligation. If the trustee incurs no obligation, there is no lien in existence at that particular time. Unless or until expenses are properly incurred, there would be no basis on which a court would make declaratory or other orders against the relevant property at the suit of the trustee.[108] In those circumstances, the beneficiaries are entitled to seek to wind up the trust under the principles in *Saunders v Vautier*.

Courts continue to use the terminology of the lien or beneficial interest seemingly interchangeably to refer to the proprietary interest supporting the indemnity. However, it is important to appreciate the important ways in which it differs from the interest of a beneficiary under a fixed trust. These are fundamentally different interests even though both fall to be described as a 'beneficial interest' in the trust assets.

The trustee's right of indemnity comprises a right to claim two classes of amounts: amounts due by way of *recoupment* and amounts a trustee may use to *exonerate* itself from current outstanding trust liabilities, both of which may be withheld from distribution to beneficiaries. In respect of the amount due under the *exoneration* limb, the trust assets will only be available for the purpose of passing them on to the trust creditors. The trustee is not entitled to any personal enjoyment from them, nor the liberty to apply them for its personal use, other than in the limited sense of having its personal liability discharged.

In *Re Richardson; Governors of St Thomas Hospital*[109] the issue concerned whether funds recovered from a beneficiary personally were required to be used to discharge the trust creditor or whether they could be distributed to general creditors. The Court of Appeal held funds could only be applied to discharge the trust liability.[110] Over thirty years ago it was confirmed under Australian law in *Re Suco Gold Pty Ltd (in liq),*[111] that to allow the trust

---

[106] *Tolhurst Druce & Emmerson v Maryvell Investments Pty Ltd (in liq),* [2007] VSC 27, *[*213] (Dodds-Streeton J), cited with apparent approval in *Pitard Consortium Pty Ltd* v *Les Denny Pty Ltd* (2019) 58 VR 524, 530 [24] (McDonald J although disagreeing with Dodd-Streeton J on the entitlement to retain possession).
[107] *Halabi* (n 22) [238] (Lord Briggs).
[108]This is mirrored in relation to other equitable liens: for example, the vendor's lien for unpaid purchase money arises when the title is transferred to the purchaser and the vendor has not received the payment which has become due. A vendor has no lien as at the date of entry into the contract creating the personal obligation to pay. With respect to a vendor's lien, Gibbs CJ observed that "a person, *having got the estate of another*, shall not, as between them, keep it, and not pay the consideration" *Hewett* (n 47) 645.
[109] [1911] 2 KB 705.
[110] Ibid, 716-717.
[111] (1983) 33 SASR 99, (1983) 7 ACLR 873.

assets held for the purposes of the exoneration right to be employed for the trustee's use personally in satisfying its personal creditors, would be a misapplication of trust assets. This was upheld by the High Court in *Carter Holt Harvey*. Therefore, it is important to remember that the trustee's beneficial interest is a very limited and closely circumscribed form of beneficial interest by comparison with the interests of a beneficiary. It it is clear that there is no sense of 'beneficial ownership' (in the manner in which the courts have used that term to describe the interest of a beneficiary under a fixed trust) in the trustee's interest under the exoneration limb of the indemnity. The trustee's interest is a carefully conditional equitable proprietary interest created in equity to address the trustee's rights and is not comparable to the interests of beneficiaries in terms of rights of personal enjoyment.

Despite the frequent seemingly interchangeable use of the descriptors lien or charge or beneficial interest, the distinction between the nature of a lien and a beneficial interest under a trust discussed above remains important to observe. In the 5th edition of *John Norton Pomeroy: A Treatise of Equity Jurisprudence* published in 1941 the author noted:

> In an equitable lien there is a legal estate with possession in one person, and a special right of the thing held by another; but here the resemblance [with the beneficial interest under a trust], which at most is external, ends. *This special right is not an estate of any kind; it does not entitle the holder to a conveyance of the thing nor to its use; it is merely a right to secure the performance of some outstanding obligation, by means of a proceeding directed against the thing which is subject to the lien. To call this a trust, and the owner of the thing a trustee for the lien-holder, is a misapplication of terms which have a very distinct meaning.*[112] *(emphasis added)*

The key distinguishing features of the interest of a *beneficiary under a fixed trust* are the duties assumed by a trustee to the beneficiary under the terms of the trust, the consequences for the holder of the interest in terms of the entitlement to transfer of title, a proportionate increase in value of assets, and the rights to enjoyment of the property after transfer. On the other hand, the trustee's interest in the trust assets is never an aliquot share: it exists over the entire trust fund but remains at all times limited to the value of the combined reimbursement and exoneration claims. Accordingly, the trustee will not reap any benefit if the value of the overall fund increases. Despite its description in the cases as a *beneficial interest*, arguably it remains in substance and purpose, a form of equitable security - not in the strict sense of a security interest in the property of beneficiary which was emphatically rejected in *Buckle*,[113] but simply in the broad sense of 'anything that makes the money more assured in its payment or more readily recoverable'.[114] The trustee's proprietary interest is no more or less than an interest in the fund recognised in equity to make the money due under its indemnity 'more assured in its payment or more readily recoverable'.

For these reasons, it is suggested here that the substantive nature of the trustee's interest in trust assets in support of its right of indemnity is best characterized as an equitable lien, and even if described from time to time as a 'beneficial interest', it does not bear the features

---

[112] Spencer W Symons, *John Norton Pomeroy: A Treatise of Equity Jurisprudence* (5th ed, 1941) §1234 (fn 5) cited by Fiona Burns, (n 50) 6.
[113] *Buckle* (n 4) where the High Court held that the trustee's indemnity was *not* a security interest in this sense in the beneficiaries' interests under the deed of variation.
[114] *General Motors* (n 83).

of a beneficial interest of a beneficiary under a fixed trust to whom fiduciary duties are traditionally owed.

To summarise, returning to the identification of the 'bundle of rights' the trustee has in respect of its lien over trust assets, the lien:

1. allows a trustee to approach a court for assistance to authorise the sale of trust assets where required'.[115]

2. allows a trustee to approach a court for the appointment of a receiver, to recover the amount due to it under its indemnity.

3. does not confer a power of sale.[116]

4. confers no right to acquire title or the use of, or income from trust assets, and its value does not alter with changes to the value of the asset.

5. allows a trustee to seek injunctive relief against a successor who threatens their interest.

6. accrues upon the incurring of a relevant liability to secure, consistently with the general law in relation to charges: there can be no effective charge if there is no debt to secure.[117]

7. takes priority over the interests of beneficiaries of the trust.[118]

8. is not an encumbrance over any beneficiaries' specific interest but rather, hovers over the whole of the trust assets.[119]

9. survives retirement or removal.[120]

10. effectively means that the interests of beneficiaries cannot be calculated until the trustee's indemnity is discharged which will mean diminishing trust assets by the value of the indemnity before those beneficial interests are determined.[121]

Accordingly, the trustee's proprietary interest can rightly be seen to function as a *sui generis* form of equitable lien, as Gageler J (as his Honour then was),observed *in Carter Holt Harvey*:

---

[115] As observed by Kiefel CJ, Keane and Edelman JJ in the High Court in *Carter Holt Harvey*, (n 7) : [32] 'A court may authorise the sale of assets held by the trustee so as to satisfy the power of indemnity, as a step in the process of the trustee exonerating itself from authorised liabilities, *in the same manner as any other equitable charge*'.
[116] *Carter Holt Harvey* (n 7) at [32]. See also Sykes & Walker, *The Law of Securities* (5th ed, 1993, Lawbook Co) at p 198.
[117] The authors of Jacobs' *Law of Trusts in Australia* (2016, 8th ed) observe at [21-15]:"… it is more accurate to see the lien as one which at best attaches only potentially as the liability of the trustee arises, and crystallises only upon proceedings for its enforcement and upon it being clear that there is a balance on the account between trustee and beneficiary in favour of the former…."(citations omitted); see also *Fischer v Nemeske Pty Ltd* (2016) 257 CLR 615 [186] (Gordon J); Diccon Loxton, 'In with the Old, Out with the New? The Rights of a Replaced Trustee Against its Successor, and the Characterisation of Trustees' Proprietary Rights of Indemnity' (2017) 45 *Australian Business Law Review* 287, 315.
[118] *Helios Corporation (No 3)* (n 99).
[119] *Lerinda* (n 79) 3].
[120] *Bruton* (n 5) [43] (French CJ, Gummow, Hayne, Heydon and Bell JJ).
[121] *Buckle* (n 4).

> and thus it is said that the trustee has an equitable charge or lien over the trust assets. It is not, however, a charge or lien comparable to a synallagmatic security interest over property of another. It arises endogenously as an incident of the office of trustee in respect of the trust assets.[122]

PART IV: THE ARGUMENT FOR A FIDUCIARY RELATIONSHIP IN JAKEN

This question whether a successor trustee owes a fiduciary duty to a former trustee arose directly in *Jaken*[123] and is now due to be heard by the High Court. In fact, this question as to the existence of a fiduciary relationship is the only ground of appeal.

In *Jaken*, Jaken Property Group Pty Ltd (JPG) was appointed trustee of the Sly Fox Family Trust in 2005. Peter Sleiman was the sole director and shareholder of JPG. Two years later, in 2007, JPG was wound up and JPG was replaced by Jaken Properties Australia Pty Ltd (Jaken). Mr Sleiman was also the *de facto* or shadow director of the successor Jaken at all material times. In 2016, Mr Naaman, a creditor of the former trustee, obtained a judgment against JPG in proceedings before Young J for damages for loss of a bargain following the termination of a Deed between the trust creditor and JPG in the sum of $3,446,755.55. Thereafter, according to unchallenged findings on appeal, as noted by Kirk JA at [229], "Jaken engaged in a dishonest and fraudulent design to strip itself of assets that might otherwise be available to satisfy" the judgment debt in favour of the [trust creditor], doing so at the direction of Tony Sleiman and Peter Sleiman: *Jaken Properties Australia Pty Ltd v Naaman* [2022] NSWSC 517, also [433]". The consequence of these alleged breaches was that the successor was left with insufficient trust assets to satisfy JPG's lien in respect of its right to be indemnified from those assets for the judgment debt owed to the creditor of the former trustee, Mr Naaman. The Court accepted that these were fraudulent conveyances to defeat creditors which were liable to be set aside under s 37A, and the former trustee had the ability to trace its proprietary interest.[124] Mr Naaman, exercising the trustee's right to be subrogated to the former trustee's right of indemnity, claimed that by this conduct, Jaken had also breached its *fiduciary* duty to the former trustee. If accepted, it opens up the possibility of personal claims and proprietary claims against third parties assisting in or receiving property from the errant fiduciary.

It is claimed that "the relationship as between JPG and Jaken with respect to JPG's equitable proprietary interest answers the description of trustee and beneficiary: the successor trustee is a person who has the 'custody and administration of property on behalf of others' is a

---

[122] *Carter Holt Harvey* (n 7) [83] (Gageler J).
[123] *Jaken Properties Australia Pty Ltd v Naaman* [2023] NSWCA 214 ('*Jaken*').
[124] See *RnD Funding Pty Ltd v Roncane Pty Ltd (*2023) 297 FCR 91at [113], 'The precise nature of the equitable interest in or with respect to property which has as one of its concomitant rights an entitlement to invoke tracing in equity need not be finally determined. For present purposes the authorities indicate that it includes, at least, an interest as an equitable chargee or equitable mortgagee. It is not necessary to decide whether lesser equitable interests such as an interest in the nature of equitable lien would attract the same entitlement. Whilst the right might attach to what are commonly referred to as "mere equities": *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1956) 113 CLR 256: it may not do so in relation to "personal equities". Though, as a matter of principle, where an interest in respect of property includes a continuing right to enjoy to a benefit in respect of it, there is no self-evident reason why the right to trace in equity should not be open. In this, the concept of benefit is used in a wide sense which would include the interests of beneficiaries under trusts which have not yet vested. *At the very least, where the equitable right involves a power of disposal, being to sell either directly or through an order of the court, and an entitlement to the proceeds, the strength of the interest necessarily justifies recourse to tracing to assist in its enforcement despite any unauthorised disposition"*

trustee in the ordinary sense",[125] and the "full effect" [126] of describing the interest as a *beneficial interest* means that a successor trustee becomes a *trustee* of the former trustee's proprietary interest, giving rise to all the duties of trusteeship – including fiduciary obligations. The argument for the creditor of the former trustee was that "Jaken held property which was, in equity, the property of JPG",[127] and that where one person holds property for the benefit of another the relationship in equity is one of trustee to beneficiary. Accordingly, it is clear that the descriptor 'beneficial interest' is doing a lot of the heavy lifting in this argument: it is being applied to constitute a former trustee a beneficiary under a fixed trust to whom fiduciary duties are owed as a matter of right by the trustee.

First Instance

At first instance in *Jaken Properties Australia Pty Ltd v Naaman*,[128] the primary judge, Kunc J, held that the former trustee *was* entitled to be indemnified from the assets of the trust in respect of the judgment debt to Mr Naaman. In other words, that liability represented a properly incurred liability in respect of which JPG was entitled to be indemnified. His Honour also accepted that the relationship between Jaken and JPG was a fiduciary relationship. The consequence of that finding was that each of the respondents to whom Jaken had distributed trust assets were found to have knowingly received those trust assets or knowingly involved in Jaken's dishonest and fraudulent design in breach of fiduciary duty. These third parties were found liable for equitable compensation in respect of properties received by them. The question of quantum was reserved for further consideration.

On appeal to the New South Wales Court of Appeal

In the New South Wales Court of Appeal, the majority decision of Leeming JA and Kirk JA found that a successor trustee does *not* owe a fiduciary duty to a former trustee at any time.[129] Bell CJ, in dissent agreed with the conclusion of Kunc J.

Bell CJ's support for the finding of a fiduciary relationship turned, in part, on the trust creditor's characterisation of the former trustee's rights as being rights of a *beneficiary* just discussed. Bell CJ observed at [33]:

> An important difference in my analysis of the issues to that of Leeming and Kirk JJA is that, *whereas their Honours build upon the former trustee's interest as being in the nature of a charge or lien over the trust assets, I place more weight upon the characterisation of the former trustee's interest as a "beneficial interest in the trust estate"*, to use the language of Stephen, Mason, Aickin and Wilson JJ in Octavo at 371. That being the case, and that interest being superior to the beneficial interest of the beneficiaries of the trust to whom a fiduciary duty is owed, it is surprising that that superior interest should not be protected by a fiduciary obligation upon the legal holder of the trust estate vis-à-vis a former trustee in circumstances where the successor trustee's obligations to beneficiaries are fiduciary in nature. (emphasis added)

[125] *Jaken* n 120 [91].
[126] Ibid [94].
[127] Ibid [91].
[128] [2022] NSWSC 517.
[129] *Jaken* n 120 [115]-[141] (Leeming JA); [228]-[237] (Kirk JA); [3]-[33] (Bell CJ contra).

The Chief Justice accepted the argument that the beneficial nature of the interest attracted a fiduciary duty which arose when the successor became aware of the former trustee's interest, 'at least provided that it is aware of the former trustee's bona fide claim on, and unsatisfied right to exoneration or recoupment or indemnification, from the trust assets'.[130]

The nature of the claimed fiduciary duty

The *nature* of the fiduciary duty accepted by Bell CJ was 'a duty not to act with respect to the assets of the trust in a way which jeopardises the predecessor trustee's right of indemnity and its lien over the trust assets,' which his Honour regarded as 'an aspect of the duty of "absolute and disinterested loyalty"'.[131] His Honour described this as proscriptive,[132] although without elaboration as to how this duty fits within the nature of the duty not to make unauthorised profit or to be in a position of conflict of interest.

Before considering this in any detail, it is perhaps important to acknowledge the provenance of the formulation of a duty so expressed as, 'a duty not to deal with trust assets so as to destroy, diminish or jeopardise the former trustee's entitlement to be indemnified from those assets.' The expression apparently derives from Brereton J's reasons in *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd ('Lemery')*[133] It has been argued in the *Jaken* appeal as a fiduciary duty. However, it was not used in this way by Brereton J in *Lemery.* In *Lemery*, the question was whether a former trustee was entitled to retain assets from a successor trustee. Brereton J set out a number of starting propositions in relation to the nature of the trustee's proprietary interest as an equitable lien.[134] Brereton J accepted that the trustee's interest was of the nature of an equitable lien securing its indemnity. The issue for determination was whether a former trustee was allowed to retain assets pending exercise its right of indemnity, not as against a beneficiary, but as against a new trustee. It was in answering that question, that his Honour reasoned that:

> *50 To my mind, then, it follows in principle that a former trustee does not have a right to retain, as against a new trustee, the trust assets as security for an accrued right of indemnity, though the former trustee is entitled to ensure the new trustee does not take steps which will destroy, diminish or jeopardise the old trustee's right of security, which subsists in the trust assets after their transfer to the new trustee.* This view accords with the conclusions of Rolfe J and Barrett J in the New South Wales cases to which I have referred.[135] (emphasis added)

There was no finding that the successor trustee was a trustee of the interest of the former trustee, and no finding of a fiduciary duty owed, either in the form suggested by the trust creditor in *Jaken* of a fiduciary duty not to take steps to destroy its interest, or in terms of the accepted proscriptive fiduciary duties not to place itself in a position of conflict or to make an unauthorised profit.

---

[130] *Jaken* n 120 [24].
[131] Ibid [25] citing see *Ancient Order of Foresters in Victoria Friendly Society Limited v Lifeplan Australia Friendly Society Limited* (2018) 265 CLR 1; [2018] HCA 43 [67]
[132] Ibid [26].
[133] *Lemery* (n 25).
[134] Ibid [12].
[135] Ibid [50].

As mentioned earlier, Bell CJ observed:

> An important difference in my analysis of the issues to that of Leeming and Kirk JJA is that, whereas their Honours build upon the former trustee's interest as being in the nature of a charge or lien over the trust assets, I place more weight upon the characterisation of the former trustee's interest as a "beneficial interest in the trust estate.[136]

Accordingly, the proper characterisation of the trustee's proprietary interest in trust assets, and what flows from that characterisation, was at the heart of the claim that a successor trustee owes fiduciary duties to the former.

If it exists, when would such a fiduciary duty arise?

The primary argument advanced by counsel for Mr Naaman in relation to the *timing* at which such a fiduciary obligation arose was the submission that the duty arises automatically at the point when the successor trustee takes over, on appointment. This argument faced the difficulty that a successor trustee might be said to owe duties in respect of a claim by a former trustee in relation to which the successor has no knowledge. The secondary position advanced for the trust creditor was that there was a breach of fiduciary duty once a trustee was on notice of a reasonably arguable claimed entitlement by the former trustee and if a successor trustee distributed assets without making provision for it. It was this formulation that was accepted by Bell CJ.

Majority rejected fiduciary relationship

The majority rejected the existence of a fiduciary relationship at all. Leeming JA (with whom Kirk JA agreed) did not accept that 'merely having custody and administration of property on behalf of others converts that person into a trustee' and that 'it is to misread Barrett JA's careful language in *Agusta* to infer that his Honour was implying that the "full effect" was the creation of a relationship of trustee and beneficiary' simply from the discussion of the 'limited rights' of the former trustee.[137] Leeming JA observed:

> Many persons have equitable proprietary rights in the property of others, in circumstances where no fiduciary obligation is owed to them. Every equitable mortgagee, every equitable chargee, every unpaid solicitor with an interest in a judgment or compromise and every unpaid vendor with a lien, enjoys rights which are properly regarded as proprietary, and those mortgagors, chargors, clients and purchasers are susceptible to equitable relief commensurate with those rights. But fiduciary obligations are not owed by the mortgagors, chargors, clients or purchasers to the persons with equitable proprietary rights, and that is so even though to an extent they may be vulnerable to conduct which might defeat their equitable rights. Similarly, the recognition that the former trustee has a proprietary interest in trust assets, even when those assets are held by the successor trustee, does not entail a personal relationship of trust and confidence, to which Barnes v Addy liability attaches, between former and successor trustees.[138]

---

[136] *Jaken* n 120 [33].
[137] Ibid [129].
[138] *Jaken* n 120 [38] (Leeming JA).

Lack of authority for a fiduciary duty owed by a successor trustee

In the reasons of the primary judge, the trust creditor's submissions, and the reasons of Bell CJ, reliance was placed on the decision in *Rothmore Farms Pty Ltd (in liq) v Belgravia Pty Ltd (No 2)* [2002] SASC 390 (*Rothmore Farms (No 2))* in which Perry J stated that a successor trustee owed a fiduciary duty to a former trustee. Perry J said:

> [73] When *Belgravia was substituted as trustee and thereby acquired legal ownership of the Trust assets, it became a fiduciary vis a vis Rothmore Farms, or a constructive trustee with respect to the protection of Rothmore Farms' right of indemnity* against those assets. Belgravia was obliged not to act with respect to the assets of the Trust in a way which jeopardised Rothmore Farms' right of indemnity and its lien over the assets.

Leeming JA discussed the procedural history of that case and noted that Perry J appeared to have been under the misapprehension that in earlier proceedings in that litigation, in *Rothmore Farms Pty Ltd (in prov liq) v Belgravia Pty Ltd* [1999] FCA 745, Mansfield J had found such a duty arose. However, this was incorrect – Mansfield J made no actual finding that a fiduciary duty was owed by successor trustee to a former trustee.[139] His Honour had recorded a *claim* that Belgravia owed a fiduciary duty at [126], but did not need to decide the issue. Leeming JA noted that the more likely explanation was that the existence of a fiduciary obligation was assumed by Perry J on the incorrect basis that it had in fact been established by the Federal Court.[140] Accordingly, Leeming JA said that *Rothmore Farms (No 2)* was not authority which supports Mr Naaman's submission or the primary judge's conclusion.[141]

Leeming JA also observed that the existence of fiduciary duties owed to the former trustee has apparently never been raised before in centuries of jurisprudence on the nature of the trust and the trustee's indemnity. His Honour observed that that might be argued to engage the considerations relied on by Spigelman CJ (in a different context) in *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298; [2003] NSWCA 10 at [23], [25]-[26] where his Honour cited Viscount Simonds for the caution we should exercise when "the great equity judges of the past" have never seen the need for a particular remedy or analysis.

Vulnerability

Vulnerability was a key plank in the argument for the imposition of the fiduciary analysis as between former and successor trustee. Clearly, a former trustee is on one view *vulnerable* to the administration of the trust by the successor trustee. However, as noted by the majority, the former trustee's vulnerability is no more or less than that of any secured party. As observed by Kirk JA, 'the vulnerability of a person in the position of the respondent should also not be overstated'.[142] His Honour noted that the previous trustee has its proprietary rights, there is the potential application of provisions such as s 37A of the *Conveyancing Act 1919* (NSW), and the interest in the realty held by the trust was also capable of being

---

[139] Ibid.
[140] This is suggested by the reasons of Perry J at [57], 'it seems to me that where manifest breaches of fiduciary duties have been perpetrated by the defendants, *as was found by Mansfield J*", when in fact no such finding was made.
[141] *Jaken* n 120 [106] Leeming JA observed that decisions are not authority for what was agreed or assumed, citing *CSR Ltd v Eddy* (2005) 226 CLR 1; [2005] HCA 64 at [13]; *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 at [42], [182].
[142] *Jaken* n 120 [233].

protected by a caveat on title. The High Court has on repeated occasions noted that vulnerability is in and of itself insufficient to be the touchstone for imposition of fiduciary obligations.[143]

Findings of the majority

Leeming JA concluded that:

> The entitlement of the former trustee to have recourse to assets in the hands of third parties who are volunteers or who have notice of the breach of duty is sustained by the proprietary aspect of the entitlement. It is unnecessary to superimpose a fiduciary duty between current and former trustee, and it is quite wrong to reason that, because equity would grant relief on the application of a former trustee against a successor trustee, the latter owes a fiduciary obligation to the former.[144]

Kirk JA also rejected the imposition of a fiduciary relationship agreeing with the reasons of Leeming JA, adding reasons of his own to similar effect. His Honour noted that the owner of property does not ordinarily owe fiduciary obligations to the holder of other forms of security interest over its property. As Kirk JA noted, if it did, 'then it is difficult to see why [a fiduciary relationship] would not be recognised in other similar circumstances where one person holds property in which another has some interest, such as a mortgagee, some other type of security-holder, or a person with an equitable lien, charge or claim.' [145] Kirk JA also emphasised the ramifications of the proposition:

> …if a fiduciary duty was recognised in this type of case … [t]hat would be a significant expansion of the role of fiduciary duties in Australian law, cutting across developed legal principle.[146]

CONCLUSION

In resolving the appeal question, the High Court will be asked to address the meaning to be given to the term 'beneficial interest' with respect to the trustee's proprietary interest, given that it is the foundation for the alleged fiduciary duty on the way the appellant framed its case.

As I have argued above, an analysis of the trustee's interest as a 'beneficial interest,' giving it the 'full effect' for which the appellant argues such that the successor holds trust assets *on trust* for the beneficiary, is inconsistent with the limited nature of the trustee's proprietary interest which has the characteristics of and function of, an equitable lien. Despite the

---

[143] For example, in *Pilmer v The Duke Group Limited (in liq)* [2001] HCA 31 Kirby J noted: 'Specifically, it is not sufficient, to impose fiduciary obligations on an alleged wrong-doer, simply to point to the vulnerability of the person claiming to have been wronged. Many people who are in an arm's length relationship with each other (if they have any real relationship at all) experience a serious disproportion of power in their dealings. To turn every such case into one giving rise to fiduciary obligations would be to distort basic doctrine. …For fiduciary obligations, vulnerability to wrong-doing will certainly be a relevant consideration. However, it is not sufficient. Vulnerability can call forth remedies in a case of some proved wrong-doing. But to call forth fiduciary obligations, more than vulnerability is required.

[144] *Jaken* n 120 [136].

[145] Ibid [232].

[146] Ibid.

seemingly interchangeable use of the terms by the courts at times, the cases show that when the question is confronted directly the courts have emphasised the distinction. The High Court cases in which the phrase 'beneficial interest' has been used in relation to the trustee's proprietary interest also qualify the term to limit its function and characteristics to securing the amount to which the trustee is due under its indemnity rather than holding specific property for the former trustee. There is no suggestion in these cases that a (former) trustee otherwise has rights of the nature of a beneficiary to whom fiduciary and other trustee duties are owed.

On one view, haunting the *Jaken Properties* litigation are the ghosts of *Livingston*'s case. Just as Lord Radcliffe reasoned there, perhaps it can be said here that '[the trustees] have an interest in respect of the assets, or even a beneficial interest in the assets, so long as it is understood in what sense the word 'interest' is used in such a context.'[147] Like *Livingston*'s case, this appeal to the High Court also arguably arises from the fact that, …. [T]he terminology of our legal system has not produced a sufficient variety of words to represent the various meanings which can be conveyed by the words 'interest' and 'property'. Thus propositions are advanced or rebutted by the employment of terms that have not in themselves a common basis of definition'.[148] The claim in this case is novel and its resolution important: if a fiduciary relationship is accepted in this case, its implications for the use of trusts across the financial services sector, and for the question of fiduciary relationships arising from other security interests, will be significant.

[147] *Livingston* (n 3) 22-23.
[148] Ibid.