Before the High Court

Trustees' Indemnities and Fiduciary Duties: The High Court Appeal in *Naaman v Jaken Properties Australia Pty Ltd*

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Abstract

The High Court of Australia appeal in *Naaman v Jaken Properties* raises the question whether a successor trustee owes a 'fiduciary duty' to the former trustee to not destroy, jeopardise or diminish the former trustee's right of indemnity over trust assets. That question arises to determine whether third parties are liable to account in equity as knowing recipients of property dissipated to frustrate the former trustee's indemnity. It is argued in the appeal that the successor trustee holds the trust assets on express trust for the former trustee to the extent of the former trustee's indemnity. That conclusion does not account for the variety of equitable interests. Three main points emerge. First, a current trustee has a 'beneficial interest' in trust assets only in a superficial sense. Second, upon transfer, that 'beneficial interest' is not 'retained' by the former trustee; the entitlement of a former trustee over the trust fund changes, and becomes analogous to a charge over a fund. The language of 'beneficial interest' in each case is misleading and should be eschewed. Third, it is unnecessary to ask, for the purposes of *Barnes v Addy* liability, whether any 'duty' owed by a successor to a former trustee is a 'fiduciary duty'.

I Introduction

In *Naaman v Jaken Properties*,[1] the High Court of Australia will have occasion to consider the obligations, if any, owed by a successor trustee to a former trustee to honour the former trustee's right of recourse to the trust property for properly incurred expenses. That question arises to determine the scope of relief available in

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1 *Naaman v Jaken Properties Australia Pty Ltd*, High Court of Australia, Case No S26/2024.

equity against third parties who knowingly receive trust assets disbursed to frustrate the former trustee's right of indemnity. To that end, the appellant has framed the question as whether the relationship between former and current trustees is *fiduciary* in nature, to render third parties liable to account under *Barnes v Addy*.[2]

These questions are best answered by considering the fundamental nature of trustees' rights of recourse to trust property. What is the nature of a former trustee's right of indemnity? Does it differ from the right of an incumbent trustee? And is it helpful to speak of 'the' right continuing after retirement and transfer of title?

The issues raised in the pending High Court appeal bring into sharp focus the fallacy of dual estates, the variety of equitable interests falling short of the trust, the relation between fiduciary relationships and third-party liability in equity, and problems with reasoning downwards from an imprecise label or metaphor, such as 'beneficial interest', used to describe a legal relationship.

Importantly, to ask whether any 'duty' to honour the indemnity is a 'fiduciary duty' proceeds from a defective major premise; it is an unnecessary starting point when determining third-party liability in equity.

II The Proceedings

Jaken Property Group Pty Ltd ('JPG') was the trustee of the Sly Fox Family Trust. It incurred various expenses as a trading trustee. Before it could recoup those expenses from the trust property, JPG was replaced as trustee by Jaken Australia Pty Ltd ('Jaken'), the first respondent in the pending appeal. The Deed of Appointment vested title to the assets in Jaken. Clause 1.5 of the Deed required Jaken to 'indemnif[y] the Retiring Trustee against all debts which the Retiring Trustee has incurred and which are unpaid at the time of execution of this deed by all parties … out of the assets of the Trust'.[3]

The appellant in the pending appeal, Mr Naaman, was a trust creditor. There is no dispute that the appellant could be subrogated to JPG's equities in respect of the fund. At trial, Kunc J found that Jaken deliberately transferred trust property to 'defraud or hinder creditors'.[4] That was sufficient to void the transfers made to related parties with nominal consideration, under s 37A of the *Conveyancing Act 1919* (NSW) ('*Conveyancing Act*'). But Naaman argued, further, that third parties should be held liable to account for receiving property they knew was disbursed in breach of a 'fiduciary duty to JPG not to deal with the assets of the trust in a way which destroys, diminishes or jeopardises JPG's right of indemnity from those assets'.[5] Kunc J accepted that submission and held each of the respondents liable for equitable compensation.

On appeal,[6] Leeming JA held that there was no such duty, for reasons with which Kirk JA agreed. If the successor was a fiduciary vis-à-vis the former trustee,

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2 *Barnes v Addy* (1874) LR 9 Ch App 244.
3 *Jaken Properties Pty Ltd v Naaman* [2022] NSWSC 517, [38] (Kunc J) ('*Jaken Trial*').
4 Ibid [428].
5 Ibid [8] (Kunc J).
6 *Jaken Properties Pty Ltd v Naaman* (2023) 112 NSWLR 318 ('*Jaken Appeal*').

that would put them in a position of conflict difficult to reconcile with the 'undoubted fiduciary obligations owed to beneficiaries' of the trust.[7] JPG's rights were analogous to those of a chargee — a right of recourse to a fund for some amount. While these are undoubtedly equitable proprietary rights, 'fiduciary obligations are not [ordinarily] owed by the mortgagors, chargors, clients [of a solicitor with a lien over fruits of litigation] or purchasers [of land subject to a vendor's lien] to the persons with equitable proprietary rights'.[8] As to vulnerability, Leeming JA held that 'the former trustee is no less vulnerable than any other creditor with a security interest recognised in equity'.[9] By contrast, Bell CJ held that the relationship was fiduciary, and emphasised the fact that JPG was deprived of direct access to the trust property, and that Jaken was now able to exercise powers over property to the detriment of JPG's indemnity.[10]

In the High Court, the appellant's challenge is essentially three-fold. First, it argues that the fiduciary nature of the relationship 'follows from the authorities recognising the proprietary nature of the interest generated by the right of exoneration'.[11] The utility of the indemnity to the office of trusteeship warrants it being protected by fiduciary duties. Second, the appellant points to authority indicating that the former trustee's right of recourse to trust funds is a '"beneficial interest in" the assets of the Trust'.[12] That is language reminiscent of the archetypal fiduciary relationship. Third, and more fundamentally, the appellant argues that because Jaken received assets 'which [it] is to hold, apply or account for specifically for [Jaken's] benefit', Jaken is 'a trustee in the ordinary sense'.[13]

III The Current Trustee's Right of Indemnity

Any consideration of the above must begin with an analysis of the nature of an incumbent trustee's right of indemnity. A trust is a relationship, not an entity. The trustee is liable personally for all liabilities whether incurred in the administration of the trust or otherwise. In exchange, equity suffers the trustee rights of exoneration and reimbursement out of the trust assets for properly incurred expenses.[14] This has been called a 'lien'. Confusion with its common law counterpart has misled some to suppose that the right disappears when possession is lost.[15] Hence the unfortunate course of argument in *Equity Trust v Halabi*.[16] With more success it has been called

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7 Ibid 355 [139].
8 Ibid 331 [38].
9 Ibid 355 [141].
10 Ibid 326 [18].
11 Anthony Naaman, 'Appellant's Submissions', Submissions in *Naaman v Jaken Properties Australia Pty Ltd*, Case No S26/2024, 28 March 2024, [18] ('Appellant Submissions').
12 Ibid [19], quoting *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* (2019) 268 CLR 524, 559–62 [80]–[84] (Bell, Gageler and Nettle JJ), 578–82 [133]–[142] (Gordon J) ('*Carter Holt*').
13 Ibid [23], quoting *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493, 524 [113] (Bell, Gageler and Keane JJ).
14 *Re Johnson Shearman v Robinson* [1880] 15 Ch D 548, 552 (Jessel MR); *Jennings v Mather* [1902] 1 KB 1, 7 (Stirling LJ); *Re Beddoe* [1893] 1 Ch 547, 558 (Lindley LJ).
15 *Meritus Trust Co Ltd v Butterfield Trust (Bermuda) Ltd* [2017] SC (Bda) 82 Civ. Cf *Re Pauling's Settlement Trusts [No 2]* [1963] 1 Ch 576, 585 (Wilberforce J).
16 *Equity Trust (Jersey) Ltd v Halabi* [2023] AC 877 ('*Halabi*').

a 'charge'. But once it is appreciated that the current trustee is the legal owner of assets, the absurdity of having a charge over one's own property becomes clear.[17] The beneficial estate is engrafted onto, and does not diminish, the legal estate.[18] More fundamentally, the 'right' is not securing any debt owed to the trustee.[19] Speaking in the golden age of American equity, Harlan F Stone said:

> A 'right' without a corresponding duty on the part of some other person or persons [and] a 'lien' upon property legally owned by and under control of the lienor … are anomalous and only superficially appropriate uses of those terms.[20]

The language of 'charge' was only properly used in this context to convey a conclusion about priorities — Maitland said the trustee has a 'first charge' over the assets for their expenses, before distribution.[21] Even so, that is not because the trustee has some separate right which takes priority over the beneficiaries' equitable rights.[22] The position is more negative than positive. Rather, the current trustee's 'right' of indemnity is but an incident of their ownership. One simply cannot know what the *trust* property is — the property for which the trustee must account in equity to the beneficiaries — until the trustee has recouped their proper expenses.[23]

One way of putting this is that the current trustee's indemnity is simply an expression of trust accounting.[24] Describing the nature of a trustee's indemnity, Scott said: 'In rendering his accounts, [the trustee] credits himself with the expenditures he has made, and he is not bound to pay over any of the income to the *cestui que trust* until he has been reimbursed.'[25] The upshot is that, to the extent of those credited expenses, equity stays its hand and does not encumber the trustee's recourse to their legal title. The trustee can only be called to account for the net.[26] That is the 'indemnity'.

So while it has been argued that the indemnity is an equitable 'power',[27] that proceeds from the fallacy of dual estates. As the present author has argued elsewhere,

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17 *Agusta Pty Ltd v Provident Capital Ltd* (2012) 16 BPR 30,397, 30,406 [41] (Barrett JA) ('*Agusta*').

18 William Gummow and Aryan Mohseni, 'The Selection of a Defective Major Premise' (2023) 53(1) *Australian Bar Review* 11, 21.

19 *Ridge Estate Pty Ltd v Fairfield Pastoral Holdings Pty Ltd* (2024) 302 FCR 375, 394 [104] (Banks-Smith J).

20 Harlan F Stone, 'A Theory of Liability of Trust Estates for the Contracts and Torts of the Trustee' (1922) 22(6) *Columbia Law Review* 527, 531 (citations omitted).

21 FW Maitland, *Equity: Two Courses of Lectures* (Cambridge University Press, 1909) 96; Denis Browne (ed), *Ashburner's Principles of Equity* (Butterworth, 2nd ed, 1933) 160; *Dodds v Tuke* [1884] 25 Ch D 617, 619 (Bacon V-C).

22 *Sexton v Kessler & Co Ltd*, 225 US 90, 98–9 (Holmes J) (1912).

23 *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226, 245–7 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

24 Stone (n 20) 533–4.

25 Austin W Scott, 'Liabilities Incurred in the Administration of Trusts' (1915) 28(8) *Harvard Law Review* 725, 727.

26 George G Bogert and George T Bogert (eds), *Trusts and Trustees* (West Publishing, 2nd rev ed, 1983) 421–6 [972]; *Re Exhall Coal Co Ltd* (1866) 55 ER 970, 971 (Lord Romilly MR); *Boensch v Pascoe* (2019) 268 CLR 593, 601 [9] (Kiefel CJ, Gageler and Keane JJ).

27 HAJ Ford, 'Trading Trusts and Creditors' Rights' (1981) 13(1) *Melbourne University Law Review* 1, 26; Jessica Hudson and Charles Mitchell, 'Trustee Recoupment: A Power Analysis' (2021) 35(1) *Trust Law International* 3; Mark Leeming, 'Trusts and Trustees: Their Successes and Successors' (2023) 53 *Australian Bar Review* 97.

the 'power' of appropriating property to one's expenses is simply an entitlement that comes with absolute ownership.[28] The indemnity, if there is anything equitable about it, is an equitable *immunity*. It is true that this immunity leaves the incumbent trustee with a 'beneficial interest' in the assets — but only in a superficial sense. An absolute owner does not own two split estates — one legal and one beneficial.[29]

IV The Former Trustee's Right of Indemnity

That proposition is significant background to the appellant's argument that, upon transfer, the former trustee is divested of legal title, but retains their 'beneficial interest', such that there emerges a 'split' in estates typical of any trust relationship. Critically, the idea of the former trustee 'retaining' the same interest is problematic.

A current trustee's right of indemnity is an incident of their ownership. That is not to say that upon retirement they lose all recourse; authority suggests that equity affords the former trustee some form of recourse to the trust assets. But it is to say that once a trustee is deprived of legal title, the juristic nature of their right must change.[30]

What is the normative basis of the entitlement that equity gives the former trustee? This has been the subject of more sustained study in the United States than in England. There, Story concluded, consistently with other species of equitable lien,[31] that equity grants the former trustee recourse to the trust fund because the successor and beneficiaries 'ought not, in conscience, as between them, be allowed to keep [the fund] and not to pay the full consideration money'[32] which was, *ex hypothesi*, properly incurred to advance or preserve that fund. Pomeroy put it in the language of the 'unearned enrichment' of those interested in a common fund.[33] The idea is closely analogous to salvage,[34] being a 'reward out of the fruit of one's exertions' despite, or precisely because of, the absence of legal title to those fruits.[35] It is a similar equity that founded a bill for contribution (from a specific fund) where there is a community of interest,[36] and for the expenses of receivers,[37] liquidators,[38]

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28 Gummow and Mohseni (n 18) 18–22.

29 *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510, 519 (Hope JA).

30 Gummow and Mohseni (n 18) 21. Although it has been doubted that an 'equitable simulacrum could spring up in place of the trustee's former legal interest', that is what occurs: cf Marcus Roberts, '*Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth*: The True Nature of the Trustee's Right of Indemnity' (2020) 43(3) *Melbourne University Law Review* 1100, 1126.

31 *Hewett v Court* (1983) 149 CLR 639, 663 (Deane J).

32 Joseph Story, *Commentaries on Equity Jurisprudence* (Stevens & Haynes, 1st English ed, 1884) 849–50 [1219].

33 John N Pomeroy, *A Treatise on Equitable Remedies* (Bancroft-Whitney, 1905) vol 2, 1492; *Williams v Gibbes*, 61 US 535, 538 (1857).

34 *Shirlaw v Taylor* (1991) 31 FCR 222, 230–1 (Sheppard, Burchett and Gummow JJ) ('*Shirlaw*'); *Re Duke of Norfolk's Settlement Trusts* [1979] Ch 37, 59 (Walton J); *Halabi* (n 16) 943 [286] (Lady Arden).

35 *Sympson v Prothero* (1857) 26 LJ Ch 671, 673 (Wood V-C).

36 *Hobbs v McLean*, 117 US 567 (1886); *Shirlaw* (n 34) 228 (Sheppard, Burchett and Gummow JJ).

37 Browne (ed) (n 21) 159.

38 *Re Universal Distributing Co Ltd* (1933) 48 CLR 171, 174–5 (Dixon J); *Stewart v Atco Controls Pty Ltd* (2014) 252 CLR 307, 317–9 (Crennan, Kiefel, Bell, Gageler and Keane JJ).

retired partners,[39] co-adventurers,[40] and those who improve property under a mistaken claim.[41]

The interest thus created is apparently 'analogous to a constructive trust'[42] and is 'in the nature of a trust'.[43] But as will be seen below, these descriptions are at best metaphorical. Equity has consistently regarded the incidents of a charge — judicial sale and the appointment of receivers to that end — as sufficient to redress the unconscientious advantages described above.[44] A liquidator (usually) lacks title to the company's property, but by their industry creates a fund for the benefit of creditors. So too a litigant who spends money petitioning for the winding-up of a company, after which creditors 'come in'. In these cases, the conscientious improver has only an entitlement to 'the assistance of a court of equity to secure their rights' by judicial sale, receivership or injunctive relief, over the fund they have created.[45] Further, a solicitor by their efforts may have facilitated a settlement or judgment debt. But the solicitor has 'merely a claim to the equitable interference of the Court' for that fund to be applied to his costs.[46] The trust relationship is expressly disclaimed.[47] Again, an insured is held harmless thanks to contributions from their insurer. So where the insured also recovers from the wrongdoer, the insurer has an equitable interest in those recovered funds, to recoup their contributions.[48] But, again, 'the full panoply'[49] of the trust relationship is disclaimed,[50] and the insurer's interest in the fund is likened to a charge. '[T]o impose fiduciary liabilities on the assured is commercially undesirable and unnecessary to protect the insurers' interests.'[51] And this despite the fund's susceptibility to dissipation, and the lienee's corresponding 'vulnerability'.

That is not to deny that in all these cases, as with the successor trustee, the enriched party receives the fund based 'on her adherence to terms'[52] (whether those terms be express, for example under cl 1.5 of the Deed, or imposed by equity). But

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39 Nathaniel Lindley, *A Treatise on the Law of Partnership* (Charles H Edson, 5th ed, 1888) vol 1, 520.

40 *Ex parte Hill* (1815) 56 ER 24.

41 Story (n 32) 862 [1237]–[1238]; Fiona R Burns, 'The Equitable Lien Rediscovered: A Remedy for the 21st Century' (2002) 25(1) *UNSW Law Journal* 1.

42 Pomeroy (n 33) vol 2, 1492.

43 Story (n 32) 849 [1219]; *Thompson v Palmer* (1933) 49 CLR 507, 537 (Dixon J).

44 *Shirlaw* (n 34) 228–30 (Sheppard, Burchett and Gummow JJ); Jairus W Perry, *Treatise on the Law of Trusts* (Little, Brown & Co, 6th ed, 1911) vol 1, 206.

45 *Re Berkeley Applegate (Investment Consultants) Ltd* [1989] Ch 32, 50–1 (Edward Nugee QC sitting as a Deputy High Court Judge).

46 *Barker v St Quinton* (1844) 12 M & W 441, 445 (Parke B). See also Samuel Prentice (ed), *Chitty's Archbold's Practice of the Court of Queen's Bench* (Stevens & Haynes, 11th ed, 1862) vol 1, 137; *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2018] 1 WLR 2052, 2056 [3] (Lord Briggs JSC).

47 *Worrell v Power & Power* (1993) 46 FCR 214, 221 (Wilcox, Ryan and Gummow JJ) ('*Worrell*').

48 *Lord Napier v Hunter* [1993] AC 713, 737 (Lords Templeman, Goff, Jauncey, Browne-Wilkinson and Slynn) ('*Napier*'); Andrew Burrows (ed), *English Private Law* (Oxford University Press, 2nd ed, 2000) 451 [5.92].

49 WMC Gummow, 'Names and Equitable Liens' (1993) 109 (April) *Law Quarterly Review* 159, 163.

50 *Napier* (n 48).

51 Ibid 752 (Lords Templeman, Goff, Jauncey, Browne-Wilkinson and Slynn).

52 Appellant Submissions (n 11) [23], quoting Jessica Hudson, 'Trustee Succession and Indemnification' (2024) 98(6) *Australian Law Journal* 454, 462–3.

conditional receipt of property does not transform the relationship into one of trust.[53] There remain charges, conditional gifts and — that *rara avis* — the equitable personal obligation.[54] It is also well to remember that 'reimbursement' and the equity of 'exoneration' were terms of art in equity, indicating equitable interests in a specific fund, often falling short of beneficial ownership.[55] Indeed, those interests may even fall short of a charge.

> *Meagher, Gummow & Lehane* reminds us that
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> > equity has not confined itself to creating equitable property by means, say, of constructive trusts and equitable liens. A miscellany of equitable interests may be found, each of which owes its peculiar nature to the particular inequity which it is designed to redress or avoid.[56]

One example given in *Meagher, Gummow & Lehane* of the nature of an equitable interest in a fund for the limited purpose of recouping expenses is *Cummins v Perkins*, where Lindley MR stated: '[I]f a plaintiff had a right to be paid out of a particular fund he could in equity obtain protection to prevent that fund from being dissipated so as to defeat his rights.'[57] Chitty LJ agreeing stated: [T]he order does not create a special charge on the fund so as to give any priority, but it does give … such a species of interest in the fund as entitled the then plaintiff to interfere and save the fund from being wasted.'[58]

That is in the nature of equitable execution. All this is to say that labels and metaphors such as 'beneficial interest', 'charge' and 'lien' prove too much, and they distract from the very particular function which the former trustee's equity fulfils. Hence the underappreciated force in the Privy Council's recent statement in *Halabi* that the former trustee's equity is '*no more and no less* than the right to have the trust property applied' to their expenses.[59]

V 'Beneficial Interests' and Trusteeship

Reference has already been made to the appellant's argument that a trustee's indemnity is a beneficial interest in the trust assets which is 'continued'[60] after the trustee loses title to those assets. This was the crux of the disagreement in the Court of Appeal:

> 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

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53 Cf Hudson (n 52) 462–4.

54 *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417, 418–20 (Dixon J).

55 See Pomeroy (n 33) ch 47; Spencer W Symons (ed), *Pomeroy's Equity Jurisprudence* (Bancroft-Whitney, 5th ed, 1941) vol 4, 1070–5 [1416]–[1419].

56 JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow & Lehane's Equity: Doctrine and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 109 [4-020] ('*Meagher, Gummow & Lehane*').

57 *Cummins v Perkins* [1899] 1 Ch 16, 19 ('*Cummins*'), quoted in *Meagher, Gummow & Lehane* (n 56) 965–6 [29-065].

58 *Cummins* (n 57) 20.

59 *Halabi* (n 16) 902 [110] (Lord Richards JSC and Sir Nicholas Patten) (emphasis added).

60 Appellant Submissions (n 11) [20], quoting *Jaken Trial* (n 3) [376] (Kunc J). See also at [22], citing *Agusta* (n 17) 30,413 [83] (Barrett JA).

> more weight upon the characterisation of the former trustee's interest as a 'beneficial interest *in* the trust estate' ...[61]

It remains the crux of the dispute in the pending appeal. Hudson argues that the trust model is apt because

> [t]he former trustee, like other beneficiaries, has an entitlement to control how the successor trustee uses the trust property. This entitlement is enforceable by equitable relief, such as an injunction to prevent an unauthorised dealing with trust property ...[62]

So much may be accepted. But it does not follow that the relationship is one of trust, however 'functionally equivalent' the entitlements may be.[63] A solicitor has an equitable interest in the fruits of litigation, 'entitling the solicitor to an injunction to prevent the payment of the fund to the client'.[64] Yet no trust is created and the protection afforded to the solicitor does not extend to placing the latter in the position of a beneficiary vis-à-vis the client.[65]

Again, the purchaser under a specifically performable agreement has equities sufficient to enjoin the vendor from making dispositions to another and to order the vendor to specifically perform the conveyance. But the vendor is only a 'constructive trustee' in a very imprecise sense; the purchaser has only 'an equitable *interest* in the land *which reflects the extent to which equitable remedies are available*'.[66] A beneficial interest is not a beneficial estate. As in much of equity, the nature of the 'right' is but an expression of the sorts of relief and intervention available. The existence of a 'right' is just an elliptical way of expressing that certain remedies are available to effect a certain end.[67] This is apt to exasperate the common lawyer. The fundamental point was made extra-curially by Justice White: 'The fact that an owner makes a contract, enforceable by injunction, as to how he or she will or will not exercise his or her rights of ownership does not necessarily mean he or she ceases to enjoy "beneficial ownership".'[68]

So there is some difficulty with reasoning upward from the availability of equities grounding injunctive and proprietary relief, to the label 'beneficial interest' or 'equitable proprietary right', and then reasoning downward from that label to the conclusion that the beneficial estate is reposed in the former trustee. The problem recalls Justice Holmes's salutary warning that '[a]s long as the matter to be considered is debated in artificial terms, there is a danger of being led by a technical

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61 *Jaken Appeal* (n 6) 330 [33] (Bell CJ) (emphasis in original) (citations omitted).
62 Hudson (n 52) 463.
63 Ibid 463 n 74.
64 *Firth v Centrelink* (2002) 55 NSWLR 451, 463 [35] (Campbell J) (citations omitted) ('*Firth*').
65 *Worrell* (n 47) 221 (Wilcox, Ryan and Gummow JJ).
66 *Kern Corporation Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164, 191–2 (Deane J) (emphasis added); *Stern v McArthur* (1988) 165 CLR 489, 522–3 (Deane and Dawson JJ). See also *Thynne v Sheringham* (2023) 111 NSWLR 617.
67 *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, 332–4 [53]–[56] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).
68 Justice R White, 'The Nature of a Beneficiary's Equitable Interest in a Trust' (Speech, Supreme Court of New South Wales Annual Conference, 2007) [11] (citations omitted).

definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied'.[69]

In a long footnote when discussing equitable liens for exoneration, Pomeroy agitated against automatically transplanting personal obligations to account for profits and conflicts into this relationship, drawing on the distinction between beneficial 'interests' and beneficial 'estates'.[70] While Story considered these liens under the heading 'Implied Trusts', he also warned against the elision of charge and trust and concluded that the interposition of 'trusteeship' is a verbal embarrassment.[71] In other words, 'while the lienee acquired an "equitable interest" in the property, the lienee was never a full beneficial owner and was, at most, entitled to exercise the right to a judicial sale'.[72]

It is true that some modern authorities have also referred to the former trustee having a 'beneficial interest' in the trust assets. But they should be understood with the above nature of equitable interests firmly in mind. In *Ronori*, the former trustee's right was described as a 'beneficial interest'.[73] But that was only used in contradistinction to a common law lien, to make the limited point that the former trustee's interest is not possessory. The use of a label is 'functional, and is appropriate only to the extent of its rationale or the particular point it wishes to convey'.[74] So in *Carter Holt*, Bell, Gageler and Nettle JJ said a trustee is 'entitled to be indemnified … and *thus* enjoys a beneficial interest'[75] — and in *Ronori*, a former trustee 'continues to enjoy a beneficial interest in the trust property *commensurate with* its right of indemnity out of that property'.[76] That is, the former trustee enjoys 'the benefit of' a fund in a loose sense and to a limited extent, in a way reminiscent of security interests — the former trustee's indemnity 'is like a security (*as compared with a plain beneficial interest*)'.[77]

That final distinction was one made by no less an equity lawyer than a'Beckett J when, speaking for the Full Court of the Supreme Court of Victoria, he said that a trustee 'would be entitled to *go into* the property to indemnify themselves — *not to enjoy* the property'.[78] It is also the reason why the Privy Council recognised that

> the Australian courts have characterised the trustee's proprietary interest as a beneficial interest in the trust assets [but that] it is more in keeping with equitable principles as applied by the English courts to describe it simply as a proprietary interest.[79]

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69 *Guy v Donald*, 203 US 399, 406 (1906).
70 Symons (n 55) 693–4 [1234] n 5.
71 Story (n 32) 864–5 [1245].
72 Burns (n 41) 10–11.
73 *Ronori Pty Ltd v ACN 101 071 998 Pty Ltd* [2008] NSWSC 246, [15] (Barrett J) ('*Ronori*').
74 William Gummow and Aryan Mohseni, 'The Use and Misuse of Metaphors' (2024) 98(10) *Australian Law Journal* 1, 4.
75 *Carter Holt* (n 12) 560 [80] (emphasis added).
76 *Ronori* (n 73) [15] (Barrett J) (emphasis added).
77 *Halabi* (n 16) 931 [249] (Lord Briggs JSC) (emphasis added).
78 *Daly v Union Trustee Co of Australia Ltd* (1898) 24 VLR 460, 470 (a'Beckett J) (emphasis added).
79 *Halabi* (n 16) 909 [143] (Lord Richards JSC and Sir Nicholas Patten).

Again, it is 'no more and no less' than a right of recoupment, and there is much to be said for the view that the language of 'beneficial interests' should be eschewed in this context because of its misleading 'ambivalence'.[80]

The appellant in the pending appeal emphasises that '[a]ll members of the Court in *Carter Holt* described the former trustee's interest as a "beneficial interest in the trust assets"'.[81] Two points should be made. First, in *Carter*, the language of 'beneficial interest' was only used as an intermediate step, for the conclusion that the right is 'property' for the purposes of s 9 of the *Corporations Act 2001* (Cth) and for the limited purpose of determining whether such property is therefore amenable to distribution according to s 433 of that Act. Second, and in any event, *Carter Holt* concerned the nature of a *current* trustee's indemnity. It said nothing[82] of the situation of a *former* trustee which, as we have seen, is fundamentally different. As explained, the only sense in which a current trustee (superficially) has a 'beneficial interest' is by virtue of their unencumbered ownership. Again, the submission that 'there is no reason in principle why [the assets] should not also be subject to the *identical* interest of the former trustee'[83] mistakenly assumes that there is one continuous right. So too the submissions in the Court of Appeal with respect to the reasoning in *Carter*:

> [I]f the property constituted by the right of indemnity is 'property of' the trustee, and if that equitable proprietary interest subsists upon the retirement of a trustee, then it *must* follow that Jaken held as trustee property that was, in equity, the property of JPG.[84]

'A' proprietary interest subsists, but it is not 'that' proprietary interest the former trustee enjoyed as owner.

The judgments in *Carter Holt* went some way in warning against reasoning syllogistically from overbroad labels. The appellant invokes some statements in *Agusta* and *Lemery* that might be open to that criticism. In *Agusta*, Barrett JA said that to allow a successor's dissipation of trust assets entails an 'impermissible disregard of the beneficial interest in trust assets' which the former trustee enjoys, and that equity should 'give full effect to that beneficial interest'.[85] That teleological approach suffers from the vice upon which the High Court frowned in *Carter Holt* — to start with a label and fashion 'obligations' to fulfil that label, or to give it 'full effect'. In *Lemery*, Brereton J said that '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'.[86] *Lewin on Trusts* treats this as establishing an equitable

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80 *Arjon Pty Ltd v Commissioner of State Revenue (Vic)* (2003) 8 VR 502, 530 [62] (Phillips JA).

81 Anthony Naaman, 'Appellant's Reply', Submissions in *Naaman v Jaken Properties Australia Pty Ltd*, Case No S26/2024, 17 May 2024, [5] ('Appellant Reply'). See also Appellant Submissions (n 11) [19], [20].

82 *Halabi* (n 16) 908 [134] (Lord Richards JSC and Sir Nicholas Patten).

83 Appellant Reply (n 81) [3] (emphasis added).

84 Anthony Naaman, 'Respondent's Written Submissions', Submission in *Jaken Properties Pty Ltd v Naaman*, Case No 2022/00219923, 29 January 2023, [28] (emphasis added). See now Appellant Submissions (n 11) [23].

85 *Agusta* (n 17) 30,413 [84].

86 *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* (2008) 74 NSWLR 550, 560 [50] ('*Lemery*').

duty on the successor not to diminish or frustrate the former trustee's indemnity.[87] That is not what Brereton J said. It is not a 'duty'. Still less is it a 'fiduciary' duty. The passage simply recognises that, like in *Cummins v Perkins*, a former trustee has equities sufficient to enjoin dispositions before they are made; the former trustee 'can ask the court to restrain [the successor] from any activity that he uncovers, and which would jeopardise his indemnity right'.[88] That limited reading is fortified by the fact that Brereton J referred to *Global Funds Management v Burns Philp*, where Rolfe J made the confined point that although a former trustee has no right to withhold the assets, they may enjoin *anticipated* dispositions by the successor, quia timet.[89]

VI Fiduciary?

There remains the possibility of an ad hoc fiduciary relationship. Some statements in this appeal go so far as to suggest that to impose fiduciary obligations on what is essentially a question of 'proprietary rights' is 'a category error'.[90] As the appellant indicates, this should not mislead anyone into thinking that fiduciary relationships and proprietary rights are mutually exclusive. But it does go some way to resolving questions about 'vulnerability'.

The respondents emphasise that the former trustee 'is vulnerable to the successor's ability to deal with trust assets without notice to it'.[91] But it seems underappreciated that, dissipation apart, the former trustee can trace into disbursed assets. If Jaken's assets were disbursed with the intention to defraud creditors, that is a fraud on a power. An excessive execution is no execution of the power; the assets, if not in the hands of a bona fide purchaser, still answer the description of trust property susceptible to the former trustee's equity to seek judicial sale.[92] This was part of the claim in *Rothmore*.[93]

There is also the facility in s 37A of the *Conveyancing Act*. The former trustee is also likely to be entitled to a common account from the successor[94] (although this does not of itself suggest a fiduciary relationship).[95] And the former trustee can seek an undertaking from the successor, as is the usual practice.[96] In any event, vulnerability is not the touchstone of a fiduciary relationship. There needs to be more focus on the fact and terms of the successor's *undertaking*,[97] for example under cl 1.5

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87 Lynton Tucker, Nicholas Le Poidevin KC and Master Brightwell, *Lewin on Trusts* (Sweet & Maxwell, 20th ed, 2023) [17-071].

88 *Halabi* (n 16) 942 [282] (Lady Arden).

89 *Global Funds Management (NSW) Ltd v Burns Philp Trustee Co Ltd* (1990) 3 ACSR 183, 186–90.

90 Jaken Properties Australia, 'Respondents' Submissions', Submissions in *Naaman v Jaken Properties Australia Pty Ltd*, Case No S26/2024, 26 April 2024, [29] ('Respondent Submissions'), quoting *Jaken Appeal* (n 6) 331 [38] (Leeming JA). See also Respondent Submissions at [33].

91 Appellant Submissions (n 11) [32].

92 *Barnes v Alexander*, 232 US 117, 123 (Holmes J) (1914); Pomeroy (n 33) 1510; *West v Skip* (1749) 27 ER 1006.

93 *Rothmore Farms Pty Ltd (in liq) v Belgravia Pty Ltd* [2005] SASC 117.

94 *Meehan v Glazier Holdings Pty Ltd* (2002) 54 NSWLR 146.

95 *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366; *Meagher, Gummow & Lehane* (n 56) 808 [23-090].

96 Gummow and Mohseni (n 18).

97 *C-Shirt Pty Ltd v Barnett Marketing & Management Pty Ltd* (1996) 37 IPR 315, 336 (Lehane J).

of the Deed (even though it is unlikely that cl 1.5 adds to the general law rights of a former trustee outlined above).[98]

In response, the respondents raise the spectre of a paralysed successor trustee placed in an 'irreconcilable position'[99] of 'actual or potential conflict of interest and duty' between its duties to the beneficiaries, and to the former trustee.[100] This picks up the concerns of Leeming JA[101] and Kirk JA.[102] But the position is not so irreconcilable. To ask whether someone 'is a fiduciary only begins analysis'.[103] There remains the question of scope.[104] The scope of the fiduciary's absolute loyalty, like a trustee's duty not to treat beneficiaries differentially, accommodates itself to the exigencies of each relationship.[105] For example, a trust relationship can admit of different classes of beneficiaries (for example, income and capital), with preference being given to some over others (for example, in unit trusts). And this is to say nothing of the plasticity of the remedial constructive trust. The scope and timing of the fiduciary obligations imposed in *Birmingham v Renfrew*, for example, admitted a freedom to make inter vivos dispositions and accommodated the ambulatory nature of wills.[106]

VII Irrelevance of the 'Fiduciary' Question?

Nevertheless, there is some awkwardness in the way the question is framed before the High Court. It is not strictly necessary to say that the breach is of a fiduciary *duty* (no-conflict or no-profit) to enliven *Barnes v Addy*. '[T]he breach of duty by the trustees to which accessorial liability may attach in equity is not breach of a fiduciary duty strictly understood'.[107] It is also debateable whether the requirement of a fiduciary *relationship* should stand like a colossus astride the path to third-party liability in equity. That view seems to be encouraged by the English tendency to read *Barnes v Addy* as a code exhausting the universe of third-party liability in equity. Sir Anthony Mason warned that seeing the fiduciary relationship as a 'passport' to such relief has put too much 'pressure' on the fiduciary relationship to expand to absurd limits.[108] And Waters complained that plaintiffs tend 'to claim that fiduciary obligations have been breached when in fact the particular defendant was not a fiduciary *stricto sensu* but simply had withheld property from the plaintiff in an unconscionable manner'.[109] It may be that the preferable answer lies in the remedial

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98 *Bruton Holdings Pty Ltd v Federal Commissioner of Taxation* (2009) 239 CLR 346, 358–9 [43] (French CJ, Gummow, Hayne, Heydon and Bell JJ).

99 Respondent Submissions (n 90) [22].

100 Ibid [21].

101 *Jaken Appeal* (n 6) 355 [139].

102 Ibid 373 [236].

103 *Securities and Exchange Commission v Chenery Corporation*, 318 US 80, 85–6 (Frankfurter J) (1943).

104 *Anderson v Cannacord Genuity Financial Ltd* (2023) 113 NSWLR 151, 192–5 [152]–[166] (Gleeson, Leeming and White JJA).

105 *Howard v Federal Commissioner of Taxation* (2014) 253 CLR 83, 100–1 [34] (French CJ and Keane J).

106 *Birmingham v Renfrew* (1937) 57 CLR 666, 690 (Dixon J). See also M Cope, *Constructive Trusts* (Law Book Co, 1992) 547; *Palmer v Bank of New South Wales* (1975) 133 CLR 150, 159 (Barwick CJ).

107 Hon William Gummow, 'Knowing Assistance' (2013) 87(5) *Australian Law Journal* 311, 318.

108 Sir Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 (April) *Law Quarterly Review* 238, 248.

109 DWM Waters, *The Constructive Trust: The Case for a New Approach in English Law* (Athlone Press, 1964) 4.

constructive trust;[110] but even so, that does not necessarily make the relationship fiduciary.

The liability of third parties to account for interfering with a solicitor's equitable lien might reveal a more expansive view. In *Patience*, Jordan CJ recognised that where A (in that case, a solicitor) has an equitable right of recourse to B's fund and B and C 'make a collusive arrangement for the purpose of defeating' that equity, 'the Court will enforce that right' against the colluder.[111] The position was considered analogous to the equitable assignment of a fund (but probably only in the metaphorical sense in which an 'assignment' of a right is effected, for example, by subrogation[112]). In *Re Twigg & Keady*, Finn J left open whether this imposed on the collusive recipient a 'personal liability … to account'.[113] Nevertheless, *Firth v Centrelink* saw the circumstances as imposing an 'equitable personal obligation' on the custodian of the fund,[114] with any collusive disposition being 'at the defendant's own peril'[115] and 'in his own wrong' for which he must account.[116] This may well be a preferable course, quite apart from any 'fiduciary' analysis.

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110 Gummow and Mohseni (n 18) 22.
111 *Ex parte Patience; Makinson v Minister* (1940) 40 SR(NSW) 96, 100.
112 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 236 (Lord Hoffman).
113 *Re Twigg & Keady* (1996) 135 FLR 257, 271.
114 *Firth* (n 64) 472 [69] (Campbell J).
115 Ibid 471 [68] (Campbell J), quoting *Ross v Buxton* [1889] 42 Ch D 190, 199 (Stirling J).
116 *Firth* (n 64) 470 [65] (Campbell J), quoting *Welsh v Hole* (1779) 99 ER 155, 155–6 (Lord Mansfield). See also *Ormerod v Tate* (1801) 1 East 464; Prentice (ed) (n 46) 137–8.