TRUSTEES COMPETING OVER INDEMNITY RIGHTS

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This article considers how, if at all, trustees' indemnity rights compete with one another. Each trustee has its own right to indemnity, but each trustee's indemnity is a single right to indemnification, not a series of separate rights generated by each legitimate transaction. The indemnity is a right for the trustee to be reimbursed or exonerated out of the trust assets before the beneficiaries can lay claim to those assets. Where more than one trustee claims indemnification and there are insufficient assets to cover all such claims, it is suggested that a rateable sharing approach is preferable.

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I Introduction

This article is concerned with situations where multiple trustees are involved in the management of a trust either simultaneously or consecutively. The primary questions it addresses are whether those trustees' rights to be indemnified out of the trust assets carry any form of priority inter se and, if they do, what rule of priority applies. To answer those questions, it is necessary to be clear about the basic principles underlying the indemnity right before addressing the way in which it operates where multiple trustees are involved in the administration of a trust. The indemnity is a right for the trustee to be reimbursed or exonerated out of the trust assets before the beneficiaries can lay claim to those assets. It is suggested that each trustee has its own right to indemnity, but each trustee's indemnity is a single right to indemnification, not a series of separate rights generated by each transaction. Where more than one trustee claims indemnification and there are insufficient assets to cover all such claims, it is suggested that a rateable sharing approach is preferable.

The Privy Council has recently determined these questions for Jersey law, applying English law, in *Equity Trust (Jersey) Ltd v Halabi* ('*Equity Trust (Jersey)*').[1] However, the question remains unsettled in Australian law where 'disputes between former and successor trustees are far from unusual'[2] and where the prevalence of trading trusts makes the question more acute than in jurisdictions like England and Jersey.[3] A series of first-instance decisions proffers a view different from that adopted by the majority of the Privy Council in *Equity Trust (Jersey)*, but those decisions have not been the subject of appellate interrogation and subsequent decisions have not yet considered the issue in the light of *Equity Trust (Jersey)*.[4] The difficulty of the question is highlighted by the fact that the Privy Council split by a close margin in *Equity Trust (Jersey)* — four judges to three.[5] Further, Lord Briggs formed a part of the majority but

[1] [2023] AC 877 ('*Equity Trust (Jersey)*').

[2] *Jaken Properties Australia Pty Ltd v Naaman* (2023) 12 NSWLR 318, 354–5 [138] (Leeming JA) ('*Jaken Properties*').

[3] This was noted in *Equity Trust (Jersey)* (n 1) 900 [95], 904 [118] (Lord Richards JSC and Sir Nicholas Patten).

[4] The issue did not require consideration in *Jaken Properties* (n 2): see at 353–4 [133] (Leeming JA, Kirk JA agreeing at 371 [228]).

[5] Indeed, the point is further underlined by the fact that, of the 11 judges that decided the case across all three levels of the judicial hierarchy, only five judges were persuaded by the view that prevailed at the final stage of appeal: *Rawlinson & Hunter Trustees SA v Chiddicks* [2018] 2 JLR

indicated that he had changed his mind on the question following argument and deliberation, which further emphasises the fact that the question is not a simple one.[6]

The importance of clarifying these issues is further underscored by some nuances of Australian law. In part of Australia, a trustee's right to be indemnified by the beneficiaries, out of the beneficiaries' personal assets, has been removed by statute unless the beneficiaries have agreed to so indemnify in writing.[7] And, in several Australian states, it can be a criminal offence for an incoming trustee to indemnify an outgoing trustee unless the indemnity is sanctioned by all of the beneficiaries — which will often be practically impossible — or by the court.[8] Each of these points further reinforces the importance of clarity as to the enforceability of a trustee's right to be indemnified from the trust assets, rather than from other sources, and the practical importance of that question is only magnified when multiple claims are made on those trust assets.

The facts of one of the conjoined appeals determined in *Equity Trust (Jersey)* serve to highlight the general nature of the issue. Equity Trust (Jersey) Ltd ('ETJL') was the initial trustee of a discretionary trust settled in Jersey as part of a complex trust structure.[9] In 2006, ETJL retired and was replaced as trustee by Volaw, with ETJL taking an indemnity from Volaw.[10] In 2012, a little under six years after ETJL ceased to be trustee, Angelmist (one of the companies in the trust structure) sued ETJL and others alleging that ETJL was vicariously liable for acts of its employees while ETLJ was the trustee.[11] In 2013, ETJL notified

81, 130 [143] (Commissioner Clyde-Smith) ('*Rawlinson & Hunter Trial*'); *Equity Trust (Jersey)* (n 1) 928 [238] (Lord Briggs JSC, Lady Rose JSC agreeing, Lord Reed PSC agreeing at 832–3 [4]), 948 [310] (Lady Arden). The remaining six judges favoured the view finally adopted by a minority of the Privy Council: *Rawlinson & Hunter Trustees SA v Chiddicks* [2019] 1 JLR 87, 153 [211] (Bailiff Bailhache, Martin and Logan Martin JJA) ('*Rawlinson & Hunter Appeal*'); *Equity Trust (Jersey)* (n 1) 927 [227]–[229] (Lord Richards JSC and Sir Nicholas Patten, Lord Stephens JSC agreeing).

6 *Equity Trust (Jersey)* (n 1) 929 [239].

7 See, eg, *Trustee Act 1925* (NSW) s 100A.

8 See, eg, *Criminal Code Act 1899* (Qld) s 442F; *Crimes Act 1958* (Vic) s 180; *Criminal Code Compilation Act 1913* (WA) s 535. See generally *Re MLC Investments Ltd* [2022] NSWSC 1541, discussing s 249E of the *Crimes Act 1900* (NSW), which has since been amended by sch 1 cl 1 of the *Crimes Amendment (Corrupt Benefits for Trustees) Act 2023* (NSW) to require an element of *corrupt* conduct before the offence is committed.

9 *Equity Trust (Jersey)* (n 1) 884–5 [14] (Lord Richards JSC and Sir Nicholas Patten).

10 Ibid 884–5 [14], 885 [17] (Lord Richards JSC and Sir Nicholas Patten).

11 Ibid 885 [18] (Lord Richards JSC and Sir Nicholas Patten).

Volaw of the claim indicating that it intended to rely on the indemnity Volaw had given.[12] This led Volaw to seek directions in order to wind-up the trust for insolvency.[13] In 2015, Volaw was given judicial permission to retire and was replaced by a third trustee that continued to administer the assets of the trust under the Jersey Royal Court's supervision.[14] The Angelmist claims were later settled, with ETJL paying £16.5 million to Angelmist's liquidators.[15] Adding that sum to its own costs in the proceedings, ETJL then sought to recover £18.9 million from the trust assets.[16]

The trust assets comprised a loan due from another trust with a face value of £186 million but a true value of only about £6 million taking into account the likelihood of recovery.[17] In terms of liabilities, in addition to ETJL's indemnity claim, the trustees also owed around £211 million on loans that had been taken by the trust at various points.[18] ETJL argued that its indemnity right had priority over the other liabilities of the trust.[19] If that were correct, as the Jersey Court of Appeal held, ETJL would recover the entire £6 million value from the trust fund towards satisfaction of its £18.9 million claim, scooping the pot and leaving nothing for the other trustees and creditors.[20] If that were not correct, as the Commissioner had decided at first instance and as a majority of the Privy Council confirmed on final appeal,[21] ETJL would recover only around £330,000 of its £18.9 million claim, with the remainder of the trust funds being devoted rateably to the satisfaction of the other liabilities that the trustees had incurred.[22] The disparity between what each of the trustees (and their creditors) might recover throws into stark relief the importance of the questions under consideration.

[12] Ibid 885 [19] (Lord Richards JSC and Sir Nicholas Patten).

[13] Ibid.

[14] Ibid 885 [19], [21] (Lord Richards JSC and Sir Nicholas Patten).

[15] Ibid 885 [20].

[16] *Rawlinson & Hunter Trial* (n 5) 86–7 [3]–[10], 88 [14] (Commissioner Clyde-Smith); ibid.

[17] *Rawlinson & Hunter Appeal* (n 5) 96–7 [11] (Logan Martin JA).

[18] It was not completely clear when each of the loans was taken nor by which trustee: *Rawlinson & Hunter Trial* (n 5) 87 [12] (Commissioner Clyde-Smith).

[19] Ibid 88 [14]–[15] (Commissioner Clyde-Smith).

[20] *Rawlinson & Hunter Appeal* (n 5) 153 [211] (Logan Martin JA), 162 [251] (Bailiff Bailhache), 171 [282] (Martin JA); *Equity Trust (Jersey)* (n 1) 928 [238] (Lord Briggs JSC, Lady Rose JSC agreeing, Lord Reed PSC agreeing at 832–3 [4]), 948 [310] (Lady Arden).

[21] *Rawlinson & Hunter Trial* (n 5) 130 [143] (Commissioner Clyde-Smith).

[22] Ibid 88 [15] (Commissioner Clyde-Smith); *Rawlinson & Hunter Appeal* (n 5) 97 [15] (Logan Martin JA); *Equity Trust (Jersey)* (n 1) 885 [20] (Lord Richards JSC and Sir Nicholas Patten).

In *Equity Trust (Jersey)*, these issues arose in the context of the trustees' insolvency. That will normally be the context in which they arise, but they are not exclusively within the domain of insolvency. The questions could also be relevant where multiple trustees are independently solvent but where the trust fund is insufficient to cover all the liabilities those trustees have incurred in the administration of the trust: if one of the trustees can claim priority over the other trustees for its right of indemnification from the trust assets, that trustee is *pro tanto* in a better position than the other trustees.

In order to answer these questions, it is important to be clear about the basic nature of trustee indemnity rights and how they connect with the way trustees are held to account for their stewardship of the trust assets. The case law on those topics contains important insights for the questions under investigation here.

A *Basic Nature of Trustee Indemnity Rights*

In simple but structurally important terms, a trust is an arrangement under which a trustee owes obligations to the beneficiaries regarding the trust property. The trust is not a legal person, separate from the trustee or beneficiaries.[23] Therefore, where a trustee transacts with third parties in administering the trust, the trustee does so in its own capacity as a legal person and not (at least, normally)[24] as an agent for the beneficiaries.[25] The trustee therefore incurs a personal liability to satisfy the obligations undertaken in that transaction and the beneficiaries do not incur any direct liability.[26] In recognition of the fact that this liability is undertaken for the interests of the beneficiaries, rather than for the trustee's personal interests, the trustee can claim an indemnity out of the trust assets to cover the liability, provided that the liability was incurred properly by the trustee in accordance with the powers and duties it owes to

[23] *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* (2019) 268 CLR 524, 540 [24] (Kiefel CJ, Keane and Edelman JJ), 577 [129] (Gordon J) ('*Re Amerind*'); *ACES Sogutlu Holdings Pty Ltd (in liq) v Commonwealth Bank of Australia* (2014) 89 NSWLR 209, 213 [16] (Leeming JA); *Investec Trust (Guernsey) Ltd v Glanalla Properties Ltd* [2019] AC 271, 306 [59] (Lord Hodge JSC), 344 [202] (Lord Mance DPSC), 355 [238] (Lord Briggs JSC) ('*Investec Trust (Guernsey)*'); *Equity Trust (Jersey)* (n 1) 893 [58] (Lord Richards JSC and Sir Nicholas Patten), 934 [256] (Lord Briggs JSC), 954 [330] (Lady Arden).

[24] *Scott v Davis* (2000) 204 CLR 333, 409 [229] (Gummow J).

[25] *Investec Trust (Guernsey)* (n 23) 306 [59] (Lord Hodge JSC).

[26] *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319, 324 (Latham CJ) ('*Vacuum Oil*').

beneficiaries regarding the trust.[27] The indemnity entitles the trustee to use trust assets to exonerate itself from the liability: 'to resort in the first instance to the trust estate to enable him to make the necessary payments … he is not bound in the first instance to pay those persons out of his own pocket, and then recoup himself out of the trust estate'.[28] But if the trustee has satisfied the liability from its own assets, the indemnity entitles the trustee to be reimbursed for that expense out of the trust assets.

The exoneration right must be exercisable in advance of the right of reimbursement, in the sense that the right of exoneration permits the trustee to deploy the trust assets in satisfaction of the liability as soon as that liability is incurred, whereas the right of reimbursement only becomes exercisable against the trust assets once the trustee has satisfied the liability from its own assets, thus effectively converting the right of exoneration into one of reimbursement.

1 *Timing*

The trustee acquires the indemnity right as soon as it is appointed to the role[29] — the right to an indemnity is 'a right incidental to the character of trustee and inseparable from it' — so the trust assets are immediately subjected to the trustee's right to be exonerated or reimbursed for any expenses that may be properly incurred during the trustee's stewardship of those assets.[30] At that

[27] Ibid 324–5 (Latham CJ), 335 (Dixon J). A right of indemnity can also arise where the liability was improperly incurred but the trustee acted in good faith and the transaction has benefited the trust estate: *RWG Management Ltd v Commissioner for Corporate Affairs (Vic)* [1985] VR 385, 396 (Brooking J) ('*RWG Management*'), citing *Stott v Milne* (1884) 25 Ch D 710, 715 (Earl of Selborne LC, Cotton LJ agreeing at 715, Lindley LJ agreeing at 715) ('*Stott*'), *Re Beddoe*; *Dowes v Cottam* [1893] 1 Ch 547, 558 (Lindley LJ); *Queensland Nickel Sales Pty Ltd v Park* (2023) 299 FCR 169, 197 [185]–[186] (Markovic, Banks-Smith and Halley JJ).

[28] *Re Blundell; Blundell v Blundell* (1888) 40 Ch D 370, 377 (Stirling J). See also *Re Richardson; Ex parte the Governors of St Thomas' Hospital* [1911] 2 KB 705, 715–16 (Buckley LJ) ('*Re Richardson*'); *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties (Qld)* [1984] 1 Qd R 576, 579 (Campbell J) ('*Kemtron Industries*'); *Agusta Pty Ltd v Provident Capital Ltd* (2012) 16 BPR 30397, 30405 [38] (Barrett JA) ('*Agusta*').

[29] *Equity Trust (Jersey)* (n 1) 923 [207] (Lord Richards JSC and Sir Nicholas Patten).

[30] *Re Exhall Coal Co Ltd* (1866) 35 Beav 449; 55 ER 970, 971–2 (Lord Romilly MR) ('*Re Exhall Coal*'). The right was thus, before the statute intervened, implied into a trust even if the trust deed did not mention it expressly: *Worrall v Harford* (1802) 8 Ves Jr 4; 32 ER 250, 252 (Lord Eldon LC) ('*Worrall*'); *Dawson v Clarke* (1811) 18 Ves Jr 247; 34 ER 311, 313 (Lord Eldon LC); *A-G (UK) v Mayor of Norwich* (1837) 2 My & Cr 406; 40 ER 695, 702 (Lord Cottenham LC). The right was not, however, completely inseparable from the office, in the sense that the right would be implied into the trust deed even if the deed was silent, but it

point in time, however, the right is dormant or quiescent: it exists as a right, the effect of which may be able to be enjoyed and enforced in the future, but there is unlikely to be any outstanding liability in that particular trustee connected with the management of the trust at that point in time,[31] and so the right of indemnity does not become exercisable by the trustee until a liability is properly incurred by that trustee.[32] Thus, the suggestion that the 'right of indemnity arises when a relevant trust-related liability is incurred' is best understood as an elliptical statement of the right: the right to indemnity for properly incurred expenses arises as soon as the trustee takes office, but it becomes enforceable against the trust assets once expenses or liabilities have been properly incurred.[33] Although the analogy is not perfect, as the trustee's indemnity is not normally consensually created, the trustee's right is somewhat like an 'all moneys' bank mortgage securing a loan account that fluctuates between credit and debit. The mortgage arrangement is not dependent on advances actually

seems that — like any other implied term — the right could be excluded by the terms of the trust, provided that the exclusion was clearly expressed: *Ex parte Chippendale; Re German Mining Co* (1854) 4 De G M & G 19; 43 ER 415, 427 (Turner LJ); *RWG Management* (n 27) 395 (Brooking J). Statutory instantiations of the right of indemnity have caused the ability to exclude the right to differ between states in Australia. Some statutes indicate that the indemnity right can be excluded by contrary trust terms: see, eg, *Franknelly Nominees Pty Ltd v Abrugiato* (2013) 10 ASTLR 558, 597–602 [205]–[235] (Buss JA), discussing *Trustees Act 1962* (WA) ss 5(3), 71; *RWG Management* (n 27) 395 (Brooking J), discussing *Trustee Act 1958* (Vic) ss 2(3), 36(2); *Moyes v J & L Developments Pty Ltd [No 2]* (2007) 250 LSJS 61, 69–70 [38]–[40] (Debelle J), discussing *Trustee Act 1936* (SA) s 35(2). Other statutes provide for the right of indemnity and are silent as to its potential exclusion, which has been construed as preventing exclusion by contrary terms: see, eg, *Agusta* (n 28) 30405 [39] (Barrett JA), discussing *Trustee Act 1925* (NSW) s 59(4); *Kemtron Industries* (n 28) 58 5 (McPherson J), discussing *Trusts Act 1973* (Qld) s 65. See also at s 72.

[31] One situation where a liability might arise immediately for the trustee upon appointment could be where an outgoing trustee's pre-existing liability is undertaken by the incoming trustee by way of novation contemporaneously with the incoming trustee's appointment.

[32] Similarly, the surety's 'potential right to an indemnity [is] a contingent asset … [which] mature[s] into an immediate claim' when the surety pays the principal debt: *Re Kaupthing Singer & Friedlander Ltd (in admin) [No 2]; Mills v HSBC Trustee (CI) Ltd* [2012] 1 AC 804, 818 [24] (Lord Walker JSC, Baroness Hale JSC agreeing, Lord Clarke JSC agreeing, Lord Collins agreeing).

[33] *Southern Wine Corporation Pty Ltd (in liq) v Frankland River Olive Co Ltd* (2005) 31 WAR 162, 169 [30] (McLure JA) ('*Southern Wine*'). See also *Re Enhill Pty Ltd* [1983] 1 VR 561, 568 (Lush J, Gray J agreeing at 572); *Kemtron Industries* (n 28) 580 (Campbell J), 585 (McPherson J); *Xebec Pty Ltd (in liq) v Enthe Pty Ltd* (1987) 18 ATR 893, 897 (Derrington J); *Coates v McInerney* (1992) 7 WAR 537, 539 (Anderson J) ('*Coates*'), quoted in *Rothmore Farms Pty Ltd (in prov liq) v Belgravia Pty Ltd* (1999) 2 ITELR 159, 171 [39] (Mansfield J) ('*Rothmore Farms*'); *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* (2008) 74 NSWLR 550, 554 [19] (Brereton J) ('*Lemery Holdings*').

being made from the loan account, but the mortgage charge does not 'operate' until the loan account is overdrawn; there is 'not a fresh mortgage or charge on each such occasion but the application of an existing contractual arrangement by way of mortgage or charge in relation to a specific advance'.[34]

This point is further reinforced by what happens when trustees are declared bankrupt while in office. Where a trustee is declared bankrupt, the legal title to the trustees' assets vests in the trustee in bankruptcy,[35] and those assets are divisible among the bankrupt's creditors[36] but property held in trust for another person is not so divisible.[37] Venerable case law establishes that where the trustee that has been declared bankrupt has some form of beneficial interest in the trust assets — including by virtue of a right of indemnity exercisable over those assets — the trust assets will pass to the trustee in bankruptcy so that the value of the trustee's beneficial rights can be realised for the benefit of creditors,[38] but the assets *will not* pass to the trustee in bankruptcy where the trustee had no beneficial interest in those assets.[39] If the trustee's right of indemnity were considered a beneficial interest at all times that distinction would be incoherent and the trust assets would always vest in the trustee in bankruptcy — but that is precisely the view that the High Court considered to be 'unduly wide' in *Boensch v Pascoe* ('*Boensch*').[40] That view is unduly wide because the trustee may have incurred no relevant liability or — as in *Boensch* — because the

[34] *Sibbles v Highfern Pty Ltd* (1987) 164 CLR 214, 223 (Mason CJ, Dawson, Toohey and Gaudron JJ). See also at 222 (Mason CJ, Dawson, Toohey and Gaudron JJ); *London & County Banking Co Ltd v Ratcliffe* (1881) 6 App Cas 722, 737 (Lord Blackburn, Lord Watson agreeing at 739); *Robertson v Grigg* (1932) 47 CLR 257, 271 (Dixon J).

[35] *Bankruptcy Act 1966* (Cth) ss 58(1)(a)–(b).

[36] Ibid s 116(1).

[37] Ibid s 116(2)(a).

[38] The trustee in bankruptcy takes trust assets as a volunteer and is thus subject to the equities in favour of the beneficiaries of the trust once the trustee's right of indemnity has been satisfied: see *Boensch v Pascoe* (2019) 268 CLR 593, 599–600 [4] (Kiefel CJ, Gageler and Keane JJ), 603 [15] (Bell, Nettle, Gordon and Edelman JJ) ('*Boensch*').

[39] *Morgan v Swansea Urban Sanitary Authority* (1878) 9 Ch D 582, 585 (Jessel MR); *Governors of St Thomas's Hospital v Richardson* [1910] 1 KB 271, 276–7 (Cozens-Hardy MR), 278–9 (Fletcher Moulton LJ), 284 (Farwell LJ); *Carvalho v Burn* (1833) 4 B & Ad 382; 110 ER 499, 503 (Littledale J for the Court); *Parnham v Hurst* (1841) 8 M & W 743; 151 ER 1239, 1242 (Parke B), 1242 (Alderson B), 1243 (Rolfe B); *Scott v Surman* (1742) Willes 400; 125 ER 1235, 1236–7 (Willes CJ for the Court). See generally David Fox, 'Bankruptcy Protection for Trusts before the Judicature Acts' in Ben McFarlane and Steven Elliott (eds), *Equity Today: 150 Years after the Judicature Reforms* (Hart Publishing, 2023) 237, 245–6.

[40] *Boensch* (n 38) 600 [6] (Kiefel CJ, Gageler and Keane JJ). See also at 622 [87], 623–4 [89], 624–5 [91] (Bell, Nettle, Gordon and Edelman JJ).

trustee has incurred liabilities for which indemnity is available but the trustee has also committed breaches of trust for which it must account to the trust.[41] A trustee who has incurred debts

> would have a right as against the trust estate to indemnity in respect of the personal liabilities so incurred by him [but that] right would of course be accompanied by a collateral obligation to make good to the estate any amount which he might wrongfully have withdrawn from it, or to which he might be in default in his dealings with it.[42]

2 *Trust Accounting*

In other words, whether the trustee's right to be indemnified can be exercised at any given point in time depends on the state of the trustee's accounts both in terms of whether the trustee has incurred relevant liabilities for which indemnity can be claimed and in terms of whether the trustee owes anything to the trust fund that must be set-off against the indemnity before it can be exercised:[43] as the High Court put it in *Boensch*, if a trustee has an 'obligation to account to the trust [that] would have impeached his entitlement to indemnification from the trust so as to result in a set-off in equity of the obligation against the entitlement'.[44] It follows that 'the extent of that indemnity could not

[41] Ibid 601–2 [9] (Kiefel CJ, Gageler and Keane JJ), 627–8 [97] (Bell, Nettle, Gordon and Edelman JJ).

[42] *Jennings v Mather* [1902] 1 KB 1, 5 (Lord Collins MR) ('*Jennings Second Appeal*').

[43] This is frequently referred to as the 'clear accounts rule': see, eg, *Lane v Deputy Commissioner of Taxation (Cth)* (2017) 253 FCR 46, 68 [55] (Derrington J) ('*Lane*').

[44] *Boensch* (n 38) 601 [9] (Kiefel CJ, Gageler and Keane JJ), citing *Hill v Ziymack* (1908) 7 CLR 352, 361 (Griffith CJ), *Haws v Dean* [2014] NSWCA 380, [59]–[65] (Barrett JA). See also *Harmer v Harris* (1826) 1 Russ 155; 38 ER 61, 62 (Lord Gifford MR) ('*Harmer*'); *Birks v Micklethwait* (1864) 33 Beav 409; 55 ER 426, 427 (Romilly MR); *Re Johnson; Shearman v Robinson* (1880) 15 Ch D 548, 556 (Jessel MR) ('*Re Johnson*'); *Lewis v Trask* (1882) 21 Ch D 862, 864 (North J) ('*Lewis*'); *Re Basham; Hannay v Basham* (1883) 23 Ch D 195, 199–200 (Chitty J) ('*Re Basham*'); *Staniar v Evans* (1886) 34 Ch D 470, 473 (North J) ('*Staniar*'); *Re Evans; Evans v Evans* (1887) 34 Ch D 597, 601 (Cotton LJ); *Re Hervey; Short v Parratt* (1889) 61 LT NS 429, 430 (Kay J) ('*Re Hervey*'); *Re Kidd; Kidd v Kidd* (1894) 70 LT NS 648, 649 (Kekewich J); *Re Knott; Bax v Palmer* (1887) 56 LJ Ch NS 318, 320 (Stirling J); *RWG Management* (n 27) 397–9 (Brooking J), quoted in *CB Darvall & Darvall v Moloney [No 2]* [2007] QSC 337, [19] (Wilson J). The suggestion in *Re Frith; Newton v Rolfe* [1902] 1 Ch 342, 346 ('*Re Frith*') by Kekewich J that the defaulting trustee's right to indemnity would be completely lost, rather than merely reduced to the extent of the default, has been rejected: see, eg, *RWG Management* (n 27) 399 (Brooking J).

be ascertained until after its account had been certified'[45] and a trustee can only claim indemnity to the extent that the accounts reveal it is not otherwise indebted to the estate.[46]

3 *Separate Rights for Each Trustee*

A number of further important points emerge from the fact that the trustee's indemnity right depends on the trustee's state of account. First, the fact that the ability to exercise the right of indemnity is affected by the state of the trustee's account indicates that each trustee must have its own right to indemnification. While there is only one 'single, joint, inseparable office' of trusteeship,[47] so that if 'the trustees are not able to act unanimously, then the simple position is that they cannot act',[48] it is clear that individual trustees can commit breaches of trust (for which they must account) without any of the other trustees necessarily having committed a breach of their own.[49] Where that has happened, and those same trustees have otherwise incurred proper liabilities in the administration of the trust, each trustee will then have a different state of account and will thus be entitled to exercise its right of indemnity against the trust assets to a different extent: a trustee that has not committed any default 'is not the less entitled to be indemnified because he has a co-trustee that has run away with certain moneys'.[50]

[45] *Re British Power Traction & Lighting Co Ltd; Halifax Joint Stock Banking Co Ltd v British Power Traction & Lighting Co Ltd* [1910] 2 Ch 470, 475 (Swinfen Eady J) ('*Re British Power*'). See also *Jennings v Mather* [1901] 1 QB 108, 114 (Kennedy J, Lawrance J agreeing at 117) ('*Jennings First Appeal*').

[46] *Re British Power* (n 45) 475–6 (Swinfen Eady J).

[47] *Sky v Body* (1970) 92 WN (NSW) 934, 935 (Street J) ('*Sky*').

[48] Ibid. See also *Re Allen-Meyrick's Will Trusts; Mangnall v Allen-Meyrick* [1966] 1 WLR 499, 505 (Buckley J); *Re Estate of William Just (decd) [No 1]* (1973) 7 SASR 508, 513–14 (Jacobs J).

[49] It is, of course, notorious that where one trustee commits a breach, the other trustees may also have breached their own obligations by facilitating, or failing to prevent, that breach: see, eg, *Bahin v Hughes* (1886) 31 Ch D 390, 396 (Cotton LJ); *Thompson v Finch* (1856) 22 Beav 316; 52 ER 1130, 1132 (Romilly MR). But it remains the case that each trustee is liable for its own conduct and is not vicariously liable for misconduct by the other trustees: *Townley v Sherborne* (1634) Bridg J 35; 123 ER 1181, 1182–3 (Lord Coventry LK); JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) 543 [22-09]. See generally Joshua Getzler, 'Laying the Axe to the Root of the Tree? Shielding a Co-Trustee from Liability' in Paul S Davies, Simon Douglas and James Goudkamp (eds), *Defences in Equity* (Hart Publishing, 2018) 183.

[50] *Re Frith* (n 44) 346 (Kekewich J).

McEwan v Crombie ('*McEwan*') provides an illustration.[51] Crombie and Storer were trustees of two estates that were brought into general administration.[52] Professional accountants prepared accounts that showed that Crombie and Storer owed a large sum to the estates.[53] Both Crombie and Storer paid some of that liability individually, and Storer paid the accountants for their work, but Crombie was then adjudged bankrupt.[54] The suit then came before North J for directions as to claims on the funds by various parties including Crombie, Storer and the beneficiaries.[55] The Chief Clerk determined that Crombie owed a further £896 to the estates, which he could not pay, and that the estates owed Crombie and Storer together a sum of £745.[56] Storer argued that he was entitled to take the £745 in partial reimbursement for the money that he had paid out of his own funds; the beneficiaries argued that the £745 should be set-off against the debt due from Crombie.[57] The set-off claim was rejected by North J, as the debt owed by the estates to two trustees could not be set-off against a debt due from only one of them.[58] However, he recognised that the trustees' rights to be reimbursed for their £745 outlay was a right for them to receive what each had paid; insofar as any of that sum had been paid by Crombie, it was to be set-off against what he owed to the estate.[59] An inquiry was to therefore be conducted to determine which part of the £745 was due to Crombie and which part was due to Storer.[60] But the beneficiaries did not want an inquiry as they were concerned about the further costs that would be

[51] (1883) 25 Ch D 175 ('*McEwan*').

[52] Ibid 175.

[53] Ibid 176.

[54] Crombie paid around one eighth of what they both owed; Storer paid around one half: ibid.

[55] Ibid 175.

[56] Ibid 176–7.

[57] Ibid 177. *Bankruptcy Act 1869*, 32 & 33 Vict, c 71 pt II s 49 had changed the position of the insolvent trustee. Prior to that statute, an insolvent trustee was released by bankruptcy from any liability for breach of trust, and so thereafter there was no liability to the estate against which any further costs it incurred could be set-off, thus entitling it to recover from the trust fund all costs incurred after the bankruptcy: see, eg, *Samuel v Jones* (1843) 2 Hare 246; 67 ER 102, 103 (Wigram V-C). Section 49 of the *Bankruptcy Act 1869* (n 57) changed that, leaving the debt intact and thus permitting it to be set-off against any right of indemnity for costs that the trustee may have incurred: see ibid 179; *Lewis* (n 44) 864 (North J); *Re Basham* (n 44) 200–4 (Chitty J). The old approach remained where the executor's debt to the estate arose for reasons other than breach of trust: *Re Vowles* (1886) 32 Ch D 243, 244 (Pearson J).

[58] *McEwan* (n 51) 177.

[59] Ibid 178.

[60] Ibid.

entailed; Storer had given evidence that the £745 had been paid by him, and so North J ordered that sum to be paid to him alone (and thus not set-off against Crombie's liability).[61]

Similarly, in *Smith v Dale*, two executors appeared in proceedings represented by the same solicitor.[62] One of the executors had received money belonging to the estate but had failed to pay it over, which meant that he owed that sum to the estate.[63] The other executor was not involved in that receipt and so was not liable for the money that the other executor owed to the estate.[64] It was pointed out by Jessel MR that if the two executors had been represented separately, 'the executor who is not a debtor to the estate … would clearly have been entitled to all his costs. But the defaulting executor would have been entitled to no costs until he had made good his default.'[65] The joint representation of the two executors by one solicitor made this question more difficult,[66] as was also the case in *McEwan*,[67] but that does not detract from the clear point that each of the trustees had a different state of account, and each was thus entitled to exercise a different right of indemnity against the trust estate.[68]

4 *Singular Indemnity Right*

A second implication of the trust accounting case law is that each trustee's right of indemnification is a single right of indemnity,[69] exercisable based on the state of that trustee's account at the time of exercise, rather than a series of separate indemnities for each liability incurred.[70] In other words, if a trustee is indebted

[61] Ibid.

[62] (1881) 18 Ch D 516, 517–18 (Jessel MR) ('*Smith*').

[63] Ibid.

[64] Ibid 518 (Jessel MR).

[65] Ibid.

[66] Ibid 518–20 (Jessel MR).

[67] *McEwan* (n 51) 179–81. See also *Harmer* (n 44) 62 (Lord Gifford MR). In *McEwan* (n 51), the jointly incurred costs had to be apportioned: the costs of the trustee that had not committed a breach were paid out of the estate; the costs of the defaulting trustee had to be set-off against the amount that it owed to the estate: at 181; *Smith* (n 62) 520 (Jessel MR). See also *Watson v Row* (1874) LR 18 Eq 680, 683 (Hall V-C). But see the caveat noted by Jessel MR in *Smith* (n 62) that the non-defaulting trustee is not entitled to costs incurred by acting as surety for its co-trustee: at 520.

[68] *Equity Trust (Jersey)* (n 1) 895 [67] (Lord Richards JSC and Sir Nicholas Patten).

[69] Ibid 944 [293] (Lady Arden).

[70] This is consistent with 'the nature of an action for account in equity, which is an action for the balance found due on the taking of the account, and not for the several items to be included in it': *Manners v Pearson & Son* [1898] 1 Ch 581, 591 (Rigby LJ).

to the trust fund as a result of having committed a breach of trust (or for some other reason) but has also incurred proper expenses in running the trust that would support a right to indemnification from the trust fund, it would be irrelevant whether the debt that the trustee owes to the trust fund arose before or after the legitimate expenses were incurred. This is made particularly clear in cases where the trustee was entitled to a beneficial interest in the trust fund and assigned that interest to a third party before the trustee committed a breach of trust: the third party assignee's claim to the trustee's interest in the trust fund remained subject to the trustee's obligation to account for its stewardship of the trust fund as a whole, and thus it remained subject to any liability that the trustee might have to the trust fund in respect of breaches of trust regardless of when those breaches may have been committed.

In *Hopkins v Gowan*, for example, an executor was entitled to a legacy under the will and assigned that legacy to his solicitor for value.[71] The executor then challenged the will but was unsuccessful and so had to reimburse the deceased estate for the costs of that litigation.[72] The executor's counsel argued that his legacy could not be affected by any conduct of his after the assignment,[73] but Hart LC rejected that argument:

> If an executor assigns his legacy and afterwards is guilty of a devastavit, the court will lay its hand upon the legacy, disregarding the assignment. … [E]ven if he was a stranger, the assignee of such a legatee takes only what the decree shall adjudge to him, and if an executor misconduct himself, so that when the accounts are finally wound up, he is subject to costs, the assignee of his legacy must bear the consequence.[74]

The language is dated but the concept is clear, and the same approach was applied by numerous experienced Chancery judges in other cases.[75] An assignee

[71] (1828) 1 Mol 561, 561 (Hart LC) ('*Hopkins*').

[72] Ibid 563–4 (Hart LC). The executor was an illegitimate child of the testator and sought (along with his also illegitimate brother) to set up a different deed in place of the testator's will; after a two-day trial, the jury took just four minutes to reject the challenge to the will: *Interesting Trial: Hopkins v Gowan* (George P Bull, 1827) 40.

[73] *Hopkins* (n 71) 561 (Hart LC).

[74] Ibid 562.

[75] See, eg, *Morris v Livie* (1842) 1 Y & C Ch 380; 62 ER 934, 937–8 (Knight Bruce V-C) ('*Morris*'); *Barnett v Sheffield* (1852) 1 De G M & G 371; 42 ER 595, 599 (Cranworth LJ), 599 (Knight Bruce LJ) ('*Barnett*'); *Re Knapman; Knapman v Wreford* (1881) 18 Ch D 300, 304 (Hall V-C) (High Court), 309 (Jessel MR) (Court of Appeal) ('*Re Knapman*'); *Re Hervey* (n 44)

cannot be in any better position than the assigning trustee.[76] The trustee's fiduciary obligation prohibits it from taking any benefit from the trust fund other than in accordance with the terms of the trust and the trustee's duties, and so the trustee can only benefit from the trust assets — whether as a beneficiary or by way of indemnification against expenses properly incurred in its capacity as trustee — if it has also made good any default regarding the trust fund.[77] If that has not been done, the default must be taken into account in determining what sum the trustee can legitimately claim from the trust fund. '[W]here there is an aggregate fund in which the trustee is beneficially interested and to which he owes something, he must be taken to have paid himself that amount on account of his share'.[78] '[T]he Court treats the trustee as having received his share by anticipation'[79] and it does so 'against the defaulting trustee and his assignees although the default was after the date of the assignment'.[80]

The trustee's right of indemnification thus *increases* in value as more expenses are properly incurred or payments are made out of the trustee's personal assets in the performance of the trust; but it also *decreases* in value as the trustee

430 (Kay J); *Doering v Doering* (1889) 42 Ch D 203, 207 (Stirling J) ('*Doering*'). Some of these cases concerned situations where the trustee had an interest in the *residue* of the trust fund: see, eg, *Morris* (n 75) 934; *Re Hervey* (n 44) 430 (Kay J); *Doering* (n 75) 205. This could potentially explain these cases on the view that 'there cannot be any residue until … discharge [of the trustee's obligation] shall have taken place': *Morris* (n 75) 937 (Knight Bruce V-C). However, in *Barnett* (n 75), counsel (Richard Bethell QC, later Lord Westbury LC) expressly sought to distinguish *Morris* (n 75) on the basis that it concerned an interest in residue rather than a specific legacy: at 597–8 (Bethell) (during argument). That argument was rejected by the Court of Appeal in Chancery: *Barnett* (n 75) 598–9 (Cranworth LJ), 599 (Knight Bruce LJ). Consistently with the trustee's obligation being to account for his stewardship of a fund, the approach did not apply if the trustee was steward of two distinct funds — including where the trustee had created those two separate funds by (proper) segregation of specific legacies from what was previously one fund — and one of those distinct funds had been assigned but the trustee committed a breach of trust in respect of the other fund: see, eg, *Fraser v Murdoch* (1881) 6 App Cas 855, 865–6 (Lord Selborne LC), 879 (Lord Watson); *Edgar v Plomley* [1900] AC 431, 441–2, 444 (Lord Hobhouse for the Court); *Re Towndrow; Gratton v Machen* [1911] 1 Ch 662, 668–9 (Parker J) ('*Re Towndrow*').

[76] *Doering* (n 75) 208 (Stirling J).

[77] *Jennings Second Appeal* (n 42) 6–7 (Stirling LJ); *Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99, 105 (King CJ) ('*Re Suco Gold*').

[78] *Re Towndrow* (n 75) 666 (Parker J). See also *Jacubs v Rylance* (1874) LR 17 Eq 341, 342 (Jessel MR); *Doering* (n 75) 207–8 (Stirling J).

[79] *Doering* (n 75) 207 (Stirling J). See also *Irby v Irby [No 3]* (1858) 25 Beav 632; 53 ER 778, 780 (Romilly MR); *Re Dacre; Whitaker v Dacre* [1916] 1 Ch 344, 347 (Lord Cozens-Hardy MR), 348 (Phillimore LJ) ('*Re Dacre*').

[80] *Re Dacre* (n 79) 347 (Lord Cozens-Hardy MR). See also *Doering* (n 75) 207 (Stirling J).

takes reimbursement for expenses that have already been met from its own assets, as the trustee exonerates itself from liabilities that have been incurred or as the trustee commits a breach of trust such that it has to account to the trust fund in some amount.[81] As Kay J held in *Re Hervey; Short v Parratt*: 'It is no matter whether the assignment was made before the breach of trust or after; the rule is that the trustee cannot take anything until after the breach of trust has been made good.'[82]

5 *Indemnity Binds Entire Trust Estate*

Another point that further emphasises the fluctuating nature of the trustee's right of indemnity concerns the subject matter over which the trustee can exercise the right. It is clear that all of the trust assets are subject to the trustee's right to be indemnified[83] with the exception only of assets that the trustee was not authorised to engage in running the trust.[84] This means that the asset base over which the trustee can exercise its right of indemnity fluctuates over time as assets are disbursed from the trust in its operation but also as assets which were not trust property previously come into the trust: the indemnity affects 'the assets of the trust for the time being and is not frozen so as to be available only over the assets of the trust at the time of [a particular] transaction'.[85] As the Earl of Selborne LC put it,

> the right of trustees to indemnity against all costs and expenses properly incurred by them in the execution of the trust is a first charge *on all the trust property*, both income and *corpus*. The trustees, therefore, had a right to retain the costs out of the income until provision could be made for raising them out of the *corpus*.[86]

[81] *Re Amerind* (n 23) 582 [142] (Gordon J), citing *Re Independent Contractor Services (Aust) Pty Ltd (in liq) [No 2]* (2016) 305 FLR 222, 231 [24] (Brereton J).

[82] *Re Hervey* (n 44) 430 (Kay J).

[83] *Stott* (n 27) 715 (Earl of Selborne LC, Cotton LJ agreeing at 715, Lindley LJ agreeing at 715); *Jennings First Appeal* (n 45) 114–15 (Kennedy J); *Vacuum Oil* (n 26) 327 (Latham CJ); *Lane* (n 43) 67 [53] (Derrington J); *Re Amerind* (n 23) 563 [87] (Bell, Gageler and Nettle JJ). Cf *Kemtron Industries* (n 28) 587 (McPherson J).

[84] *Dowse v Gorton* [1891] AC 190, 207–8 (Lord Macnaghten). See also *Ex parte Garland* (1804) 10 Ves Jr 110; 32 ER 786, 790 (Lord Eldon LC), quoted in *Re Johnson* (n 44) 553 (Jessel MR); *Cutbush v Cutbush* (1839) 1 Beav 184; 48 ER 910, 911 (Lord Langdale MR); *Ex parte Richardson; Re Hodson* (1818) 3 Madd 138; 56 ER 461, 468 (Leach V-C).

[85] *Rothmore Farms* (n 33) 202 [180] (Mansfield J).

[86] *Stott* (n 27) 715 (emphasis added).

II Proprietary Nature of Trustee Indemnity Rights

The trustee's right of indemnification from the trust assets undoubtedly has priority over the beneficiaries' rights to those assets: 'the cestuis que trust are not entitled to call for a distribution of trust assets which are subject to a charge in favour of the trustee until the charge has been satisfied'.[87] This flows from the very purpose of the trustee's right of indemnity, as it gives direct effect to the principle that the trustee 'should be saved harmless from obligations which are attached inseparably to his office'.[88]

A *Proprietary Rights*

Strictly speaking, that objective could be achieved by recognising the trustee as having only a power to use trust assets for reimbursement or exoneration without recognising any form of proprietary interest in the trustee.[89] However, the case law treats the trustee's right as more fundamental than that, being a right in the trustee to take the benefit of the trust assets to the extent of the indemnity before the beneficiaries' rights can be clearly identified. In *Dodds v Tuke*, Bacon V-C held:

> [T]he trustees were entitled to their costs incurred in their character of trustees before the Plaintiffs may be said to have existed. It is a good rule that trustees

[87] *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367 (Stephen, Mason, Aickin and Wilson JJ) ('*Octavo Investments*'), citing *Vacuum Oil* (n 26). See also *Gaunt v Taylor* (1843) 2 Hare 413; 67 ER 170, 173 (Wigram V-C) ('*Gaunt*'); *Rose v Sharrod* (1863) 11 WR 356, 356 (Kindersley V-C); *Re Exhall Coal* (n 30) 971–2 (Lord Romilly MR); *Re Knapman* (n 75) 309 (Jessel MR) (Court of Appeal); *Turner v Hancock* (1882) 20 Ch D 303, 305 (Jessel MR); *Dodds v Tuke* (1884) 25 Ch D 617, 619 (Bacon V-C) ('*Dodds*'); *Re Griffith; Jones v Owen* [1904] 1 Ch 807, 810 (Farwell J) ('*Re Griffith*'); *Vacuum Oil* (n 26) 335 (Dixon J); FW Maitland, *Equity: A Course of Lectures*, ed AH Chayton, WJ Whittaker and John Brunyate (Cambridge University Press, 2nd rev ed, 1936) 91.

[88] *Re Exhall Coal* (n 30) 971–2 (Lord Romilly MR). See also *Re Turner; Wood v Turner* [1907] 2 Ch 126, 134 (Kekewich J) (High Court), affd at 136 (Cozens-Hardy MR, Barnes P agreeing at 136, Kennedy LJ agreeing at 136) (Court of Appeal); *Equity Trust (Jersey)* (n 1) 895 [69], 917–18 [182] (Lord Richards JSC and Sir Nicholas Patten), 930 [245] (Lord Briggs JSC), 942–3 [286] (Lady Arden).

[89] 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, 13.

> should have a priority for their costs, because until those costs are provided for it is impossible to say what the trust fund is.[90]

That reasoning was adopted by the High Court in *Chief Commissioner of Stamp Duties (NSW) v Buckle*[91] and again in *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)*.[92] As the Court put it in *Octavo Investments Pty Ltd v Knight*:

> [F]or the purpose of enforcing the indemnity the trustee possesses a charge or right of lien over [the trust] assets. … In such a case there are then two classes of persons having a beneficial interest in the trust assets: first the cestuis que trust, … 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, so that the cestuis que trust are not entitled to call for a distribution of trust assets which are subject to a charge in favour of the trustee until the charge has been satisfied.[93]

B *Difficulties in Description*

However, the description of the trustee's right as a charge or lien has been criticised on various grounds. One concern is whether the right is better described as a charge or a lien. Equitable liens ordinarily arise by operation of law, whereas charges are normally intentionally created by the parties, but beyond that the difference between the two labels is not of great moment for present purposes: each is an equitable right in assets that the chargee or lienee neither owns nor possesses.[94] Indeed, historically the concept of an equitable lien was treated broadly as 'an equitable obligation to do according to conscience'.[95]

A second criticism is that the trustee is the owner of the trust assets and that it 'is anomalous to refer to a person having a charge or lien over property of

[90] *Dodds* (n 87) 619 (Bacon V-C) (emphasis added). This is also consistent with the point, mentioned earlier, that *all* of the trust assets are subject to the trustee's right to be indemnified: see above Part I(A)(5).

[91] (1998) 192 CLR 226, 245–7 [47]–[50] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('*Buckle*').

[92] (2005) 224 CLR 98, 121 [51] (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ) ('*CPT Custodian*').

[93] *Octavo Investments* (n 87) 367 (Stephen, Mason, Aickin and Wilson JJ) (citations omitted). See also at 369–70 (Stephen, Mason, Aickin and Wilson JJ).

[94] *Re Beirnstein; Barnett v Beirnstein* [1925] Ch 12, 17–18 (Lawrence J).

[95] *Perry v Phelips* (1790) 1 Ves Jr 251; 30 ER 327, 330 (Lord Thurlow LC).

which the person is the owner'.[96] A charge or lien is a right (or, more accurately, a power) regarding someone else's assets: the chargee does not have ownership or possession of the asset but is entitled by virtue of the charge to look to the asset for satisfaction if some obligation is not met, normally by way of judicial sale or the appointment of a receiver.[97] Hence it is true, in a simplistic sense, that a chargee cannot have a charge over its own assets. However, it is possible for one person to give a charge to another person over rights that the chargor holds even where those rights are rights enforceable against the chargee.[98] So, it would be conceptually possible for the trustee's lien to be recognised as a charge over the beneficial interest of the beneficiaries in the trust assets that the trustee owns. However, that approach would be inconsistent with the point that has been made already: that the trustee's lien is not a right exercisable in respect of or against the beneficiaries' interests in the trust assets but rather a right that the trustee can exercise *before* the beneficiaries' interests in those trust assets can be clearly identified.[99]

A third criticism of the description of the trustee's indemnity right as a form of charge or lien is based on the fact that there is no debt or obligation the performance of which is secured by the trustee's indemnity right. This criticism is more compelling. The trustee's proprietary interest in the trust property

> is not security for the payment of a debt … because there is no debt payable by any party to the trustee. The trustee's right, enforceable in equity, is no more and

[96] *Agusta* (n 28) 30406 [41] (Barrett JA). See also Hudson and Mitchell (n 89) 16.

[97] *National Provincial & Union Bank of England v Charnley* [1924] 1 KB 431, 449–50 (Atkin LJ); *Hewett v Court* (1983) 149 CLR 639, 663 (Deane J) ('*Hewett*'); *Re Cosslett (Contractors) Ltd* [1998] Ch 495, 508 (Millett LJ); *Re Bank of Credit & Commerce International SA [No 8]* [1998] AC 214, 226 (Lord Hoffmann) ('*Re BCCI*'). The 'heterogeneous collection of circumstances in which [an equitable] lien arises' makes it 'difficult, if not impossible, to formulate any satisfactory statement of the necessary or sufficient circumstances for the implication of an equitable lien which is applicable to any relationship at all': *Firth v Centrelink* (2002) 55 NSWLR 451, 462 [32] (Campbell J), quoting *Hewett* (n 97) 668 (Deane J).

[98] See, eg, *Re BCCI* (n 97) 226–7 (Lord Hoffmann); *Cinema Plus Ltd (admin apptd) v Australia & New Zealand Banking Group Ltd* (2000) 49 NSWLR 513, 521 [30] (Spigelman CJ); *Personal Property Securities Act 2009* (Cth) s 12(3A).

[99] *Buckle* (n 91) 246–7 [50] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ), cited in *Commissioner of State Revenue (Vic) v Pioneer Concrete (Vic) Pty Ltd* (2002) 209 CLR 651, 666 [42] (Gleeson CJ, Gummow, Kirby and Hayne JJ), quoted in *Newcastle Airport Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2014) 99 ATR 748, 748–9 [77] (White J) ('*Newcastle Airport*').

> no less than the right to have the trust property applied in indemnifying the trustee against liabilities properly incurred.[100]

So, the trustee's lien is not a normal equitable charge, as it does not secure the performance of an obligation. However, 'legal concepts like "proprietary interest" and "charge" are no more than labels given to clusters of related and self-consistent rules of law'.[101] The difficulty is analogous to Viscount Radcliffe's point that 'the 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"'.[102] Where assets are held on trust:

> [I]n 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 … '. 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. However, … the charge … is not a security interest … over the interests of the beneficiaries.[103]

The reference to the trustee's right being a charge 'in that sense' emphasises that the label only imperfectly reflects the rights that the trustee has: use of the label charge

> is *really a conclusion* deriving from the fact that in proceedings in court for administration of the trust, the claim of the trustee to be indemnified will be given effect by directing that liabilities properly incurred by him are paid out of

[100] *Equity Trust (Jersey)* (n 1) 902 [110] (Lord Richards JSC and Sir Nicholas Patten). See also at 915 [170]–[171], 918 [185] (Lord Richards JSC and Sir Nicholas Patten), 931 [249], 938 [273] (Lord Briggs JSC); *Ridge Estate Pty Ltd v Fairfield Pastoral Holdings Pty Ltd* [2024] FCAFC 17, [104] (Banks-Smith J) ('*Ridge Estate*').

[101] *Re BCCI* (n 97) 228 (Lord Hoffmann).

[102] *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694, 712 (Viscount Radcliffe for the Court), quoted in *CPT Custodian* (n 92) 114 [31] (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ).

[103] *Buckle* (n 91) 247 [50] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) (emphasis added) (citations omitted).

> the trust assets in priority to the claims of beneficiaries to their interests in the trust property.[104]

Understood that way, the indemnity right is more like a beneficial interest in the trust assets than a charge over those assets. But the right of indemnification is also not a simple beneficial interest because the trustee owes equitable obligations in respect of the assets that are the subject matter of the right and also because the indemnity affects *all* of those assets until it is exercised in accordance with those obligations.[105] As the Full Court of the Supreme Court of Victoria put it in *Daly v Union Trustee Co of Australia Ltd*, the trustees 'would be entitled to go into the property to indemnify themselves — not to enjoy the property',[106] which perhaps explains the adoption in some cases of the 'charge' label notwithstanding that it is also imperfect in the circumstances.[107]

Labels are important where they convey useful information about the rights that the label represents. While there is no clearly satisfactory label, the most important point is that, no matter by what label it is described, the trustee's right of indemnification comprises some form of proprietary interest in the trust assets. As has been mentioned, that proprietary right in the trustee is then transmissible to a trustee in bankruptcy in the event of the trustee's bankruptcy, thereby ensuring that the protection of the trustee is not lost in a way that would inappropriately advantage the beneficiaries;[108] and the right is also available to the trustee's creditors by way of subrogation where the trustee is unable to pay

[104] *Kemtron Industries* (n 28) 585 (McPherson J) (emphasis added) (citations omitted). See also *Jaken Properties* (n 2) 351 [125] (Leeming JA).

[105] *Federal Commissioner of Taxation v Lane* (2020) 283 FCR 448, 469 [51] (Allsop CJ), quoting *Re Amerind* (n 23) 578–9 [133]–[135], 584 [153]–[154], 585 [156] (Gordon J). Cf *Daly v Union Trustee Co of Australia Ltd* (1898) 24 VLR 460, 469 (à Beckett J for the Court) ('*Daly*'); *Kemtron Industries* (n 28) 587 (McPherson J); *Newcastle Airport* (n 99) 767–8 [79] (White J), quoting *Buckle* (n 91) 246 [48] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). For example, a trustee that sells trust assets should realise the best price available for those assets even if it were doing so to give effect to indemnification rights: Heydon and Leeming (n 49) 459 [20-12]. Similarly, the trustee's exercise of its indemnification rights is subject to other fiduciary duties: *Wester v Borland* [2007] EWHC 2484 (Ch), [12]–[13] (Norris J); *Beck v Henley* (2014) 11 ASTLR 457, 467 [36] (Leeming JA, Beazley P agreeing at 460 [1], Sackville AJA agreeing at 478 [97]).

[106] *Daly* (n 105) 470 (à Beckett J for the Court).

[107] See, eg, *Buckle* (n 91) 246–7 [50] (Brennan CJ, Toohey, Gaurdon, McHugh and Gummow JJ); *Octavo Investments* (n 87) 367 (Stephen, Mason, Aickin and Wilson JJ).

[108] See above nn 35–8 and accompanying text.

them.[109] Importantly, the proprietary nature of the right also ensures that the trustee's protection is not lost where the trustee ceases to hold that office: the trust assets remain bound by the trustee's right to be reimbursed or exonerated until those properly incurred liabilities have been satisfied.[110] In each of these cases, however, the priority of the trustee's right is fundamentally a priority over the beneficiaries: even where creditors subrogate to the trustee's right of indemnity, they are effectively stepping into the shoes of the trustee and asserting the trustee's right to be indemnified against properly incurred expenses *before* the beneficiaries can lay claim to the trust assets.

The difficult question that needs to be addressed here is how the trustee's right behaves when it is in competition with claims *by another trustee* to indemnification from the same trust assets for expenses that that other trustee has incurred in the proper administration of that trust. The case law establishes that the trustees' indemnity rights are a form of proprietary interest in the trust assets, but the difficulty in describing them — sometimes as charges and sometimes as beneficial interests, with neither description being perfect — generates part of the difficulty in determining how the rights operate where more than one trustee claims indemnification and there are insufficient trust assets to satisfy those claims.

[109] Even where liabilities were incurred in proper performance of the trust, the creditors are not therefore creditors of the trust fund: *Worrall* (n 30) 250–1 (Lord Eldon LC). However, if there are grounds for thinking that the trustee will be unable to pay the creditors they can resort by way of subrogation to whatever indemnification rights the trustee might have in respect of the trust assets: *Re Johnson* (n 44) 552, 554 (Jessel MR); *Re Frith* (n 44) 345–6 (Kekewich J); *Vacuum Oil* (n 26) 328 (Latham CJ), 335–6 (Dixon J); *Octavo Investments* (n 87) 367, 370 (Stephen, Mason, Aickin and Wilson JJ); *Agusta* (n 28) 30411 [71] (Barrett JA); *Lane* (n 43) 70–1 [61]–[63] (Derrington J). However, while the trustee's general creditors can lay claim, by way of subrogation, to the trustee's right of reimbursement, they cannot lay claim to the right of exoneration, as that right is fettered by the trustee's obligation to use it only in proper performance of the trust: *Re Richardson* (n 28) 711 (Cozens-Hardy MR), 714 (Fletcher Moulton LJ); *Re Suco Gold* (n 77) 107–8 (King CJ); *Jones v Matrix Partners Pty Ltd; Re Killarnee Civil & Concrete Contractors Pty Ltd (in liq)* (2018) 260 FCR 310, 331 [76], [78] (Allsop CJ) ('*Jones*'); *Re Amerind* (n 23) 545–9 [35]–[44] (Kiefel CJ, Keane and Edelman JJ), 565 [92] (Bell and Gageler JJ), 578–9 [133], 584–5 [152]–[156] (Gordon J); *Federal Commissioner of Taxation v Lane* (n 105) 469–70 [51] (Allsop CJ).

[110] *Trautwein v Richardson* [1946] 52 Arg LR 129, 131 (Latham CJ), 134–5 (Dixon J); *Agusta* (n 28) 30413 [80] (Barrett JA); *Equity Trust (Jersey)* (n 1) 894–5 [64], 914–15 [164] (Lord Richards JSC and Sir Nicholas Patten). See also *Rothmore Farms* (n 33) 170 [36], 202 [181] (Mansfield J); *Southern Wine* (n 33) [30] (McLure JA); *Lemery Holdings* (n 33) 554 [21], 557 [35] (Brereton J); *Jaken Properties* (n 2) 322 [4], 328 [28] (Bell CJ), 343 [90] (Leeming JA); *Ridge Estate* (n 100) [56], [60] (Banks-Smith J).

III Disputes between Multiple Trustees

In order to answer that question it is suggested that it is helpful to think further about the differences in nature between the rights that a trustee needs to assert to gain indemnification, which depend on whether there are other trustees involved and on the timing and nature of the involvement of the other trustees — if there are any trustees and whether they are involved simultaneously or successively — in the running of the trust. Those various possible factual permutations are the focus of this Part of the article.[111]

A *Sole Trustee*

It is productive first to return to the most basic scenario: where a sole trustee incurs a liability properly in the performance of its trust obligations thus generating a right to indemnification from the trust assets. The trustee has legal title to the trust assets and the beneficiaries' interests in the trust assets are engrafted or impressed upon the trustee's legal title rather than carved out of it, so the trustee can deal with the legal title to the trust assets in satisfaction of the liability that it has incurred.[112]

The existence of the trust means the trustee 'has at law all the rights of the absolute owner in fee simple but he is not free to use those rights for his own benefit in the way he could if no trust existed'.[113] However, the indemnification right permits the trustee to use those legal rights for its own benefit provided that they are used to exonerate the liability or to reimburse a liability that was incurred in the operation of the trust and has been satisfied out of the trustee's own personal asset base (in each case, the use being limited to whatever extent the trustee's state of account permits, as discussed previously).[114] The beneficiaries' interests in the trust property are 'essentially … right[s] to compel the

[111] It is difficult to consider all of the potential permutations in a single article. For another discussion of possible situations and outcomes, see generally 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(4) *Australian Business Law Review* 285. See also William Gummow and Aryan Mohseni, 'The Selection of a Defective Major Premise' (2023) 53(1) *Australian Bar Review* 11, 22. But see *Jaken Properties* (n 2) 348 [112] (Leeming JA).

[112] *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431, 474 (Brennan J); *Re Amerind* (n 23) 560–1 [82] (Bell, Gageler and Nettle JJ).

[113] *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* [1980] 1 NSWLR 510, 519 [16] (Hope JA) ('*DKLR Holding*').

[114] See above Part I(A)(3).

trustee to hold and use his legal rights [in the trust property] in accordance with the terms of the trust',[115] and so, where the trustee is permitted to use its legal rights for its own benefit, the trust property is effectively unencumbered by the beneficiaries' rights *to that extent*. Hence, as the High Court put it:

> To the extent that the assets held by the trustee are subject to their application to reimburse or exonerate the trustee, they are not 'trust assets' or 'trust property' in the sense that they are held solely upon trusts imposing fiduciary duties which bind the trustee in favour of the beneficiaries.[116]

This analysis is comprehensible without needing to recognise any equitable interest, nor any form of charge or lien, in the trustee. The indemnification right is really a Hohfeldian immunity against suit from the beneficiaries, provided that the trustee deals with its legal title to the trust property consistently with the proper state of the trustee's account and its other obligations.[117] The trustee has a legal power, as owner, to transfer the trust assets to creditors to settle debts that the trustee owes: if the property is in the form of funds, they can be transferred to the creditor; if the property is in some other form, it can be sold to produce funds that can be transferred to the creditor.[118] (If the trustee has already satisfied the liability using its own personal assets, it can reimburse itself without even needing to transfer title to the asset simply by asserting its personal right to benefit from that parcel of what was previously recognised as part of the subject matter of the trust.)[119] The trustee's equitable obligations regarding trust assets would normally prevent the trustee from parting with the legal title to those assets — '[t]he primary duty of the trustee is to preserve the trust property in specie for the benefit of the beneficiaries' — but the indemnification right means that the trustee is protected from claim by the beneficiaries when the trustee takes those steps.[120] The beneficiaries cannot

115 *DKLR Holding* (n 113) 520 [18] (Hope JA).

116 *Buckle* (n 91) 246 [48] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) (citations omitted). See also *Octavo Investments* (n 87) 369–70 (Stephen, Mason, Aickin and Wilson JJ); *Re Amerind* (n 23) 561 [83] (Bell, Gageler and Nettle JJ).

117 RC Nolan, 'Property in a Fund' (2004) 120 (January) *Law Quarterly Review* 108, 115.

118 Ibid.

119 See above Part II(A).

120 Heydon and Leeming (n 49) 451 [20-02]. See also *A-G (UK) v Alford* (1855) 4 De G M & G 843; 43 ER 737, 741 (Lord Cranworth LC); Henry Ballow and John Fonblanque, *A Treatise of Equity: with the Addition of Marginal References and Notes* (Abraham Small, 2nd ed, 1820) vol 2, 168; Justice Story and AE Randall, *Commentaries on Equity Jurisprudence* (Sweet & Maxwell, 3rd ed, 1920) 400 [978].

complain that those assets are no longer held for them because the trustee has exercised its legal powers to transfer them to a third party, and has done so consistently with its equitable rights and obligations, so the trustee is immune from suit brought by the beneficiaries.[121]

However, the Australian case law suggests that the trustee has no power to sell trust assets in order to provide a fund for indemnification if the trust assets are not already in monetary form unless the trust deed contains a power to sell the trust assets for this purpose.[122] In this simple scenario — and assuming no insolvency process, where the trustee's powers are often removed completely, has intervened — it is suggested that this concern is misplaced.[123] This concern flows erroneously from the view that the trustee's right of indemnification is a charge or lien. It is true that an 'equitable lien or charge does not confer a right of sale of the property';[124] however, as has already been explained, a trustee's indemnity rights are not an ordinary charge or lien.[125] '[C]oncepts like "proprietary interest" and "charge" are no more than labels … [and] do not have a life of their own from which the rules are inexorably derived'.[126] The task is to determine the nature of the trustee's indemnity right and whether it should be understood as including a power to sell trust assets.

In general terms, a trustee's 'power of sale' is the trustee's legal capacity to transfer title to the assets it owns at law coupled with authorisation vis-a-vis the beneficiaries to do so in the proper performance of the trust — the power carries an immunity from suit by the beneficiaries provided the trustee has acted properly in the sale transaction.[127] The ability to sell is an incident of the

[121] See Nolan (n 117) 115.

[122] See, eg, *Jones* (n 109) 323 [44] (Allsop CJ); *Break Fast Investments Pty Ltd v Sclavenitis* (2022) 67 VR 132, 146–7 [49] (Riordan J); *Ridge Estate* (n 100) [61] (Banks-Smith J).

[123] See, eg, *Re Cremin* (2019) 136 ACSR 649, 655 [48] (Moshinsky J).

[124] *Apostolou v VA Corp of Australia Pty Ltd* [2011] FCAFC 103, [45] (Perram, Nicholas and Yates JJ). Their Honours extract the inability of trustees to sell from cases about charges that involved no trust: at [45], citing *Grissel v Money* (1869) 38 LJ Ch NS 312, 312 (Lord Romilly MR) ('*Grissel*'), *Hewett* (n 97) 663 (Deane J). A stronger analogy might be drawn with old system mortgages, as the mortgagee there became the legal owner of the property and yet, absent an express or statutory power, had no power to sell the property free of the equity of redemption: Sir Robert Megarry and HWR Wade, *The Law of Real Property* (Stevens & Sons, 5th ed, 1984) 936. However, the security function of the mortgage transaction raises doubts as to the validity of that analogy with the different nature of a trustee's indemnity.

[125] See above Part II(B).

[126] *Re BCCI* (n 97) 228 (Lord Hoffmann). See also *Re Amerind* (n 23) 561 [84] (Bell, Gageler and Nettle JJ).

[127] Nolan (n 117) 113–15.

trustee's legal ownership rather than of the 'power of sale' in the trust deed or statute; the 'power of sale' is an equitable immunity against suit where the legal power is exercised, provided that it is exercised in accordance with the terms of the trust and the trustee's other equitable obligations.[128]

Where there is no power of sale in a trust, the trustee is not permitted, vis-a-vis the beneficiaries, to sell the trust assets and so it should still have those assets and has no immunity if it has sold them. However, where a trustee is entitled to indemnification from the trust assets for a properly incurred expense, it is suggested that there is no good reason (assuming insolvency has not intervened and removed the trustee's immunities) for refusing to recognise the indemnification right as including an equitable Hohfeldian immunity where the trustee uses its legal powers to sell the assets to satisfy the recognised indemnity right.[129] As Stirling LJ put it: [W]hen the legal title to trust property is vested in the trustee, he has a right to resort to that property, *without the assistance of the Court*, for the purpose of indemnity against liabilities properly incurred by him in the administration of the trust.[130] Or, as White J put it:

> When the trustee in possession of the trust property has recourse to the trust property to satisfy its right of indemnity, the trustee is exercising its rights as legal owner and the beneficiaries do not have an equity to assert against the trustee to restrain a proper exercise of the right of indemnity by way of recoupment or exoneration. Where the trustee exercises the right of indemnity the trustee is

[128] Ibid 115.

[129] This point could be put another way: if the right of indemnity is *implied* in a trust deed that does not mention it (see above n 30 and accompanying text), a power of sale could — and should — equally be implied to give effect to that right as it is unnecessarily expensive (and thus detrimental to the beneficiaries) to say that a trustee has a right to be indemnified but cannot exercise that right without judicial assistance if a power of sale has been omitted from the trust deed. Even if that point is not accepted, a power of sale could potentially be found in statutory provisions like s 38(1) of the *Trustee Act 1925* (NSW), or the trustee could potentially use its power of appropriation in, for example, s 46 of that Act to give effect to its indemnification rights: see *Re Heberley (decd)* [1971] NZLR 325, 332–3 (Turner J). These points provide a means of saying that the trustee is not acting wrongfully merely by reason of selling the trust assets but they do not mean that the trustee's sale is completely free from equitable regulation: the sale of assets would remain subject to the general obligation to obtain the best price available for those assets, and any failure in that regard will alter the state of the trustee's accounts.

[130] *Jennings Second Appeal* (n 42) 6 (Stirling LJ) (emphasis added).

realising its property. The beneficiaries' beneficial interest in the trust property is deferred to the beneficial interest of the trustee.[131]

B *Multiple Simultaneous Trustees*

Where several trustees hold that office simultaneously and they all incur an expense properly in the performance of the trust, normally all of the trustees will have joint legal title to the trust assets, and so all will need to agree to use their joint legal power to deploy a trust asset in satisfaction of the liability.[132]

If all of the trustees have incurred the liability, they all have reason to do that. And if they do so then, again, the proprietary nature of the trustees' right of indemnification is relatively unimportant: the indemnification right provides an immunity to the trustees when they exercise their powers as legal owners of the trust assets.[133] However, one can imagine situations where some of the trustees may be beneficiaries of the trust, and those trustees might refuse to agree to the use of particular assets to satisfy the liability that the trustees have incurred. Where that is so, the other trustees could seek judicial review of the trustee/beneficiary's refusal to consent to the transaction[134] or could seek to have the uncooperative trustees removed or replaced as trustees,[135] and the court might be persuaded to order a judicial sale or appoint a receiver.[136] The latter possibility again provides some explanation for the description of the indemnity rights as a 'charge' on the trust property — given that an equitable chargee's lack of ownership (unlike a trustee, which owns the trust property at law) means that an equitable charge is normally only able to be enforced against the chargor by way of judicial sale or the appointment of a receiver — but the

131 *Newcastle Airport* (n 99) 772 [96] (White J).

132 *Lewis v Nobbs* (1878) 8 Ch D 591, 594–5 (Hall V-C).

133 See above n 117 and accompanying text.

134 That is, if the decision can be shown to have been flawed in some way. The mere fact of disagreement does not necessarily establish a flawed decision: see *Tempest v Lord Camoys* (1882) 21 Ch D 571, 578 (Jessel MR) (Court of Appeal); *A-G (Cth) v Breckler* (1999) 197 CLR 83, 99–100 [7] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), quoting *Wilkinson v Clerical Administrative & Related Employees Superannuation Pty Ltd* (1998) 79 FCR 469, 480 (Heerey J).

135 This may occur either under statutory powers to replace trustees (eg the *Trustee Act 1925* (NSW) s 70) or under the court's inherent jurisdiction: see *Letterstedt v Broers* (1884) 9 App Cas 371, 390 (Lord Blackburn for the Court).

136 JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 969 [29-095].

similarity of those potential means of enforcement does not indicate that the rights must be identical in substance.[137]

If all of the trustees have incurred the liability but one alone (or fewer than all of the trustees collectively) has satisfied the liability from its personal assets, then that trustee is entitled to reimbursement from the trust assets.[138] The other trustees will no longer be liable to the creditor, as that liability has been discharged, but the trustee that is entitled to be reimbursed will prima facie need the agreement of the other trustees, which jointly hold legal title to the trust assets, before reimbursement will be possible. If those other trustees do not agree, then again the trustee that is entitled to be reimbursed will need to seek the assistance of the court: although that trustee is a legal owner of the trust assets, it is unable to deal with the legal title to the trust assets on its own as the legal title is held jointly with the other trustees. The court's assistance could again take the form of replacement or removal of the other trustees or potentially ordering a sale or the appointment of a receiver.[139] In that sense, the trustee's right to be reimbursed appears to be some form of equitable proprietary interest in the assets that are held jointly by all of the trustees.

If there are several trustees holding office simultaneously but one alone of those trustees incurs an expense or liability in the performance of the trust, that trustee's conduct may amount to a breach of trust,[140] even if the liability could have been properly incurred if all of the trustees had been party to the transaction, given trustees are prima facie expected to act jointly.[141] If that is so, the liability that the trustee has incurred vis-a-vis the third-party creditor is then not properly incurred vis-a-vis the trust, and so the trustee has 'no power to bind *cestuis que trust*' and 'could not bind the trust estate'.[142] In other words, there is then no right of indemnification from the trust assets. However, it is possible for fewer than all of the trustees to *properly* incur individual liability in the administration of the trust, in which case there *is* a right of

[137] *Hewett* (n 97) 663 (Deane J); *Grissell* (n 124) 312 (Lord Romilly MR); *Melbourne Tramways Trust v Melbourne Tramway & Omnibus Co Ltd* (1887) 13 VLR 487, 490 (Higinbotham CJ, Williams and Holroyd JJ).

[138] See above Part I(A)(3).

[139] See above nn 134–5 and accompanying text. The court's assistance could also take the form of an order against the other trustees for equitable contribution towards satisfaction of the (shared) liability, which could prompt them to agree to reimbursement.

[140] See, eg, *Re England's Settlement Trusts; Dobb v England* [1918] 1 Ch 24, 28–9, 32 (Eve J).

[141] *Sky* (n 47) 935–6 (Street J).

[142] *Luke v South Kensington Hotel Co* (1879) 11 Ch D 121, 125–6 (Jessel MR). See also *Dulhunty v Dulhunty* [2010] NSWSC 1465, [41]–[42] (Slattery J).

indemnification.[143] In *Re Griffith; Jones v Owen*, for example, one of the next of kin of an unmarried woman who died intestate brought an action against the three administrators. Two of the administrators had been active in administering the estate and defended separately from the third administrator, thus incurring two sets of legal costs.[144] The plaintiff also incurred costs and sought to have the insufficient fund shared rateably among all parties.[145] That plea was rejected by Farwell J, who ordered that the two sets of administrators' costs were to be paid in priority to the plaintiff's costs and, as between the administrators, 'the fund must be apportioned rateably'.[146]

C *Replacing a Trustee*

Where a trustee has properly incurred expenses in the administration of the trust but is then succeeded as a trustee — whether through retirement, replacement or removal from office — further complications arise with the exercise of the trustee's right of indemnification.

One question that the cases raise is whether the outgoing trustee can retain the trust assets in order to give effect to its indemnification right.[147] It is clear from the nature of the trustee indemnity right that the outgoing trustee could resist any demand from the *beneficiaries* to transfer the trust assets to them until the indemnity is satisfied,[148] but it does not follow that the outgoing trustee can resist calls from *new trustees* to transfer title to the trust assets to them: it is, after all, one of the first duties of new trustees 'to get the trust property in, protect it, and vindicate the rights attaching to it'.[149] Suggestions to the contrary appear to confuse the trustee's 'lien' with common law liens (which depend on and permit the lienee to retain possession in a way that equitable charges and

[143] An example is where powers have been validly delegated to a trustee under powers in the trust deed or the *Trustee Act 1925* (NSW) s 64. See generally Heydon and Leeming (n 49) 359–60 [17-23].

[144] *Re Griffith* (n 87) 810 (Farwell J).

[145] Ibid 808.

[146] Ibid 810, quoting *Gaunt* (n 87) 173 (Wigram V-C). See also *Wettenhall v Dennis* (1863) 33 Beav 285; 55 ER 377, 378 (Romilly MR).

[147] See 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, 1123–5.

[148] *Octavo Investments* (n 87) 367 (Stephen, Mason, Aickin and Wilson JJ).

[149] *CGU Insurance Ltd v One.Tel Ltd (in liq)* (2010) 242 CLR 174, 182 [36] (French CJ, Heydon, Crennan, Kiefel and Bell JJ). See generally Heydon and Leeming (n 49) 337–8 [17-02].

liens do not)[150] or are examples of the court's inherent jurisdiction to make *discretionary* orders for the implementation of a trust in a way that permits an outgoing trustee to retain some trust assets[151] rather than being authority for the outgoing trustee having an enforceable *right* to withhold the trust assets from new trustees.[152]

D *Successor Trustees*

Once the title to the trust assets has passed from the outgoing trustee to the new trustee, the former trustee now obviously cannot deal directly with the legal title to those assets. As has already been mentioned, the former trustee's right of indemnification is not lost on ceasing to occupy the office of trustee, although the former trustee's lack of control of the trust assets means that it may need to, and is entitled to, seek the assistance of the court to enforce that right.[153] From this point, at least, the right must now take the form of an equitable interest of some sort in the trust assets to which the new trustee now holds legal title.[154]

The former trustee's right to indemnification must continue to have priority over *the beneficiaries*' ability to compel new trustees to perform the trust in favour of the beneficiaries. Thus, for example, in *Agusta Pty Ltd v Provident Capital Ltd*, the New South Wales Court of Appeal made it clear that a new trustee could not legitimately sell trust assets that are subject to a former trustee's indemnity right and give the proceeds of sale to the beneficiaries

[150] See *Darke v Williamson* (1858) 25 Beav 622; 53 ER 774, 776 (Romilly MR); *Lemery Holdings* (n 33) 555 [26] (Brereton J). See above Part II(B).

[151] See, eg, *Ex parte James; Re Davis* (1832) 1 Deac & Ch 272; 273; *Lacey v Hill; Crowley's Claim* (1874) LR 18 Eq 182, 191 (Jessel MR); *Staniar* (n 44) 474 (North J); *Jennings Second Appeal* (n 42) 6 (Stirling J); *Global Funds Management (NSW) Ltd v Burns Philp Trustee Co Ltd (in prov liq)* (1990) 3 ACSR 183, 186 (Rolfe J) ('*Global Funds Management*'); *Coates* (n 33) 539–40 (Anderson J); *Apostolou v VA Corp of Australia Pty Ltd* (2010) 77 ACSR 84, 95 [51] (Finkelstein J) ('*Apostolou*').

[152] In *Pitard Consortium Pty Ltd v Les Denny Pty Ltd* (2019) 58 VR 524 ('*Pitard*'), McDonald J preferred the reasoning in *Lemery Holdings* (n 33) 560–1 [47]–[48] (Brereton J) over that in *Apostolou* (n 151) 94–5 [50]–[51] (Finkelstein J): *Pitard* (n 152) 527 [10]–[11], 528–9 [15]–[17], 532–4 [32]–[38]. Cf *Shirlaw v Taylor* (1991) 31 FCR 222, 228 (Sheppard, Burchett and Gummow JJ).

[153] *Re Pumfrey (decd); Worcester City & County Banking Co v Blick* (1882) 22 Ch D 255, 262 (Kay J). See also *Re Berry's Trusts* (1893) 7 QLJ 63, 64 (Griffith CJ).

[154] *Newcastle Airport* (n 99) 767 [78] (White J).

(even assuming some present entitlement to distribution had arisen in the beneficiaries' favour) as that

> would have entailed impermissible disregard of the beneficial interest in trust assets [of the former trustee], being an interest that took priority over the interests of beneficiaries and continued to subsist in trust property following the transfer to … [the] new trustee.[155]

Again, however, the more difficult question is how the former trustee's right of indemnity affects new trustees' ability to claim indemnity for expenses from the trust assets. In *Equity Trust (Jersey)*, the Privy Council considered the question not to have arisen for decision in previous authorities.[156] However, there are relevant first-instance dicta in Australia. In *Re Suco Gold Pty Ltd (in liq)*, for example, King CJ said that the trustee's lien 'confers on the trustee a right to possession of the trust property … [which] is superior to those of a new trustee or the *cestuis que trust*'.[157] The idea that the indemnity right carries a right to possession is problematic, as has already been mentioned,[158] and King CJ's obiter comment about the priority of the indemnity right over others was, while clearly correct regarding the beneficiaries, left unexplained as regards the successor trustees. Other decisions have repeated what King CJ said, again, without explaining it.[159] In others, a former trustee's priority over successor trustees has been conceded by counsel,[160] apparently reflecting the view of practitioners,[161] although in *Richardson v Aileen Pty Ltd*, Mandie J indicated that concession would be appropriate where the successor trustee had accepted the role 'with notice of the former trustee's prior equity'.[162] In *Francis v Helios Corp Pty Ltd [No 3]*, Colvin J also indicated that he too considered 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

[155] *Agusta* (n 28) 30413–14 [84] (Barrett JA).

[156] *Equity Trust (Jersey)* (n 1) 915 [168] (Lord Richards JSC and Sir Nicholas Patten), 928–9 [238] (Lord Briggs JSC).

[157] *Re Suco Gold* (n 77) 109 (King CJ).

[158] See above Part III(C).

[159] See, eg, *Tolhurst Druce & Emmerson v Maryvell Investments Pty Ltd (in liq)* [2007] VSC 271, [213]–[214] (Dodds-Streeton J). See also *Pitard* (n 152) 529–30 [18]–[24] (McDonald J).

[160] See, eg, *Synergy Concepts Pty Ltd v Rylegrove Pty Ltd (in liq)* (1997) 8 BPR 15555, 15559, 15561–2 (Santow J); *Richardson v Aileen Pty Ltd* [2007] VSC 104, [37] (Mandie J) ('*Richardson*').

[161] See, eg, *Richardson* (n 160) [25] (Mandie J).

[162] Ibid [51].

to competing priorities. This reflects the current state of the law in Australia.'[163] However, he also acknowledged that this position had not been reviewed in the light of the decision in *Equity Trust (Jersey)* — a task which he did not consider appropriate for him to undertake at first instance.[164]

Given that the trustees' respective rights to be indemnified from the trust assets are recognised as equitable proprietary rights, it is entirely understandable that these judges turned to the general equitable principle regarding priority between competing equitable interests: 'If the merits are equal, priority in time of creation is considered to give the better equity.'[165]

That 'first in time' principle undoubtedly has a deep pedigree in resolving conflicts between competing equitable interests in property.[166] However, the question that requires closer interrogation — and which is difficult — is whether that principle is the most appropriate when dealing with interests like a trustee's indemnity right. As has been discussed, the right is sometimes described as a charge or lien, but it is different from a normal charge where a creditor takes an equitable interest in property belonging to the debtor (or another) in order to protect the creditor's position vis-a-vis other creditors of that debtor.[167] The trustee's indemnity right 'is not … 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.'[168] The purpose of that right is to ensure that the trustee is 'saved harmless from obligations which are attached inseparably to his office';[169] that obviously justifies the trustees' access to the trust assets before the beneficiaries can lay claim to them, but it is less obvious that there should be priority between multiple trustees inter se.

[163] [2023] FCA 251, [11].

[164] Ibid.

[165] *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326, 333 (Gibbs CJ). See also *Walker v Linom* [1907] 2 Ch 104, 114 (Parker J); *Macmillan Inc v Bishopsgate Investment Trust plc [No 3]* [1995] 1 WLR 978, 999–1000 (Millet J); *Equity Trust (Jersey)* (n 1) 916 [176] (Lord Richards JSC and Sir Nicholas Patten).

[166] See, eg, *Brace v Duchess of Marlborough* (1728) 2 P Wms 491; 24 ER 829, 831 (Jekyll MR); *Clarke v Abbot* (1741) Barn Ch 457; 27 ER 718, 720 (Yorke MR); *Rooper v Harrison* (1855) 2 Kay & J 86; 69 ER 704, 717 (Page Wood V-C) ('*Rooper*'); *Phillips v Phillips* (1861) 4 De G F & J 208; 45 ER 1164, 1166–7 (Lord Westbury LC); *Thorpe v Holdsworth* (1868) LR 7 Eq 139, 146 (Giffard V-C).

[167] See above Part II(B).

[168] *Re Amerind* (n 23) 561 [83] (Bell, Gageler and Nettle JJ).

[169] *Re Exhall Coal* (n 30) 972 (Lord Romilly MR). See above n 88 and accompanying text.

As has been discussed, the fact that indemnity rights are not normal charges has led courts, especially in Australia, to describe them at times as beneficial interests.[170] However, they are not ordinary beneficial interests, as they are held by trustees that also continue to owe duties regarding the management of the assets in which they hold those beneficial interests. Indeed, if one takes the 'beneficial interest' description too seriously, one might say that, because the former trustee's right is recognised as a beneficial interest in the trust assets, the former trustee's indemnification right has priority over the other beneficiaries' beneficial claims on the trust assets but now ranks *behind* any rights to indemnity that new trustees have, because a new trustee's indemnity right has priority over the claims of beneficiaries and the class of beneficiaries now includes not only the original beneficiaries but also now the former trustees. This argument does not appear to have been made in the case law to date.[171] Presumably that is because, although the argument appears to abide by the principles by which the trustee's right to indemnity is normally applied, it would be inconsistent with the underpinning reasons for the recognition of that indemnification right. While giving priority to new trustees would ensure that they are 'saved harmless from obligations which are attached inseparably to his office', it would reduce the protection of the former trustee for expenses and liabilities that were also legitimately incurred while the former trustee held office.[172] In the related but slightly different context of a trustee claiming a right to impound the interests of beneficiaries who have concurred in a breach of trust in order to recoup the trustee's liability for that breach of trust, Romilly MR observed that trustees that have retired from office 'are entitled to all the same equities as if they had continued trustees'.[173] The same sort of thinking supports the view that the

[170] See above Part II(B). See also *Octavo Investments* (n 87) 367 (Stephen, Mason, Aickin and Wilson JJ); *Buckle* (n 91) 247 [51] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ), quoting *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1995) 38 NSWLR 574, 586 (Sheller JA); *Re Amerind* (n 23) 544 [32] (Kiefel CJ, Keane and Edelman JJ), 559–61 [80]–[82] (Bell, Gageler and Nettle JJ), 579–81 [137] (Gordon J).

[171] In *Richardson* (n 160), Mandie J allowed the new trustee to be paid before a former trustee, but this was not justified on the basis identified in the text; rather, it was justified by applying a 'salvage' principle, as the new trustee was appointed to resolve an impasse and realise the trust assets: at [54]–[57]. For the salvage principle, see *Re Universal Distributing Co Ltd (in liq)* (1933) 48 CLR 171, 174–5 (Dixon J); *Re Berkeley Applegate (Investment Consultants) Ltd (in liq); Harris v Conway* [1989] Ch 32, 50 (Edward Nugee QC).

[172] *Re Exhall Coal* (n 30) 972 (Lord Romilly MR). See above n 88 and accompanying text.

[173] *Barratt v Wyatt* (1862) 30 Beav 442; 54 ER 960, 960. See also at 961 (Romilly MR). But see *Re Pauling's Settlement Trusts [No 2]; Younghusband v Coutts & Co* [1963] 1 Ch 576, 585 (Wilberforce J), quoting *Fletcher v Collis* [1905] 2 Ch 24, 35 (Romer LJ).

former trustee's right to indemnification against properly incurred expenses is not subordinated to that of the incoming trustees.

Application of a 'first in time' approach requires one to identify the moment in time by reference to which one or other interest can be determined to be 'first in time'. With consensually created equitable charges, that is relatively straightforward as the dates of the instruments that create the charges can be used.[174] It is not so straightforward, however, regarding trustees' indemnity rights, which arise for quite different reasons and in a different way.

One possibility would be for the trustee's indemnity to take its priority from the timing of the debt or liability which was incurred and against which the trustee is entitled to be indemnified given it is from that point in time that the indemnity is exercisable by the trustee against the trust assets. However, this is not an appropriate approach. The majority in *Equity Trust (Jersey)* rejected it on the basis that it 'has no obvious correlation with justice or equity' but did not explain that view any further.[175] It is suggested here that there are at least three reasons, based on points that have been discussed earlier, for agreeing with that view. First, and perhaps most fundamentally, it is not the case that as each expense or liability is incurred by the trustee a new lien (or whatever other label one uses to describe the trustee's proprietary right) is generated over the trust assets.[176] Rather, as has been seen, each debt or liability merely alters the state of the trustee's account and thus affects the extent to which the trustee is entitled to enforce its right of indemnification against the trust assets.[177] Secondly, those trust assets fluctuate over time, and the trustee's indemnity right applies to *all* of the trust assets *at any given time* rather than being a charge only over assets held at the specific time when a particular debt or liability was incurred or became payable.[178] Thirdly, while perhaps '[t]rust-related liabilities should normally be paid when in the ordinary course of the administration of

[174] See, eg, *Rooper* (n 166) 716–17 (Page Wood V-C).

[175] *Equity Trust (Jersey)* (n 1) 937 [267] (Lord Briggs JSC, Lady Rose JSC agreeing, Lord Reed PSC agreeing at 882–3 [4], Lady Arden agreeing at 948 [310]).

[176] Cf Hudson and Mitchell (n 89) 25.

[177] See above Part I(A)(1).

[178] This point also emphasises a further difference from ordinary synallagmatic charges. A normal charge will not bind future property of the chargor unless the chargee has given valuable consideration for an obligation on the chargor's part to make future property available for the security; in contrast, *all* of the trust property, regardless of when it becomes trust property, is subject to the trustee's right of indemnity without need for consideration: see above Part I(A)(5).

the trust they become due and payable',[179] there is no legal duty on trustees (nor indeed anyone else) to ensure that debts are paid in any particular order, let alone in the order in which they arose.[180] Given that all of the trust assets are subject to each trustee's right to be indemnified, the fact that debts can be paid in a different order from that in which they were incurred suggests, at the very least, that the property right that a trustee has in the trust assets by reason of its right to indemnification must be subject to a power (assuming, of course, that insolvency has not intervened) to deal with those assets in satisfaction of other liabilities, including liabilities that have arisen later in time.[181] The earlier debt does not generate or carry for the creditor a prior right to payment, and so the mere fact that one debt arose earlier than another does not justify the priority of the trustee's indemnity regarding that earlier debt over the indemnity that supports the payment of debts that are incurred later in time. A further, more practical, difficulty with using the timing of the debt as the determinant of a 'first in time' approach is that it 'would be formidably difficult and expensive to administer'; this reinforces the reasons of principle that have just been given for rejecting this possible approach to the application of the 'first in time' principle.[182]

A second possible criterion for determining which trustee's indemnity right might be 'first in time' is the one adopted by the minority in *Equity Trust (Jersey)*: the timing of each trustee's appointment to the office.[183] This approach has the virtue of being consistent with the point discussed earlier that each trustee acquires its right of indemnity from the point of appointment, even if that right is not then exercisable because no liabilities have yet been incurred.[184] However, this approach also has difficulties, as it produces what appear to be rather arbitrary outcomes. Such outcomes are not arbitrary where they reflect the priority that a charge holder has bargained for; but, as has been emphasised, a trustee's indemnity right arises for different reasons from a normal charge and

[179] *Equity Trust (Jersey)* (n 1) 946 [301] (Lady Arden).

[180] 'Trustees may even have to act dishonourably (though not illegally) if the interests of their beneficiaries require it.': *Cowan v Scargill* [1985] Ch 270, 288 (Megarry V-C). See also *Buttle v Saunders* [1950] 2 All ER 193, 195 (Wynn-Parry J).

[181] See, eg, *Global Funds Management* (n 151) 186 (Rolfe J).

[182] *Equity Trust (Jersey)* (n 1) 937 [267] (Lord Briggs JSC).

[183] Ibid 923–4 [211] (Lord Richards JSC and Sir Nicholas Patten, Lord Stephens JSC agreeing). An alternative version of this approach is to focus on the date when each trustee *leaves* the office of trustee, treating the indemnity right as somehow crystallising on that date for the purposes of the application of the 'first in time' principle.

[184] See above Part I(A)(1).

is of a different kind.[185] One example of arbitrariness identified by Lord Briggs in *Equity Trust (Jersey)* arises where two (or more) trustees were appointed to the office at different times but have acted *together* in incurring a liability: in those circumstances, it is unclear why each trustee should be entitled to a different level of indemnity, in the event that the trust assets are insufficient to meet the liability in full, determined by reference to when each was appointed.[186] 'Their respective dates of appointment would be mere happenstance, having no connection of any kind with equity or justice.'[187] Lord Briggs did not mention that these trustees' exposure to a coordinate liability would presumably mean that rights of contribution could assist with equalising the trustees' collective exposure to the shortfall,[188] but that itself demonstrates that courts of equity need not accept that the date of appointment of each trustee should alone determine the recovery.[189] Similar concerns arise if trustees are appointed at different times and properly incur *separate* liabilities in the running of the trust — an earlier appointed trustee that was in default for years but later remedied its default would then be indemnified for any outstanding indemnity before, and potentially to the exclusion of, a trustee appointed one day later that had performed the trust impeccably throughout.[190]

The fundamental purpose of any trustee's right to be indemnified from the trust assets is to provide a right to resort to those assets to clear liabilities before the beneficiaries can lay claim to the assets in order that the trustees are 'saved harmless from obligations which are attached inseparably to his office'.[191] Each trustee of a trust, whether acting simultaneously alongside other trustees or consecutively, is equally placed in that regard. Of course, each trustee's state of account affects the degree to which that trustee can exercise its own right of indemnity, but the impact of any wrongdoing by one trustee is already built into

[185] See above Part II(B).

[186] *Equity Trust (Jersey)* (n 1) 933 [254].

[187] Ibid (Lord Briggs JSC, Lady Rose JSC agreeing, Lord Reed PSC agreeing at 832–3 [4]). See also at 929 [240], 934–5 [258] (Lord Briggs JSC).

[188] See *Friend v Brooker* (2009) 239 CLR 129, 148–9 [39]–[42] (French CJ, Gummow, Hayne and Bell JJ).

[189] If the dates of appointment were different, the trustees' respective indemnity rights would be brought into hotchpot: *Berridge v Berridge* (1890) 40 Ch D 168, 176 (North J); *Commissioners of State Savings Bank (Vic) v Patrick Intermarine Acceptances Ltd (in liq)* [1981] 1 NSWLR 175, 181 (Meares J), quoting *Duncan, Fox, & Co v North & South Wales Bank* (1880) 6 App Cas 1, 19 (Lord Blackburn); Heydon, Leeming and Turner (n 136) 412–13 [10-180].

[190] *Equity Trust (Jersey)* (n 1) 929 [240] (Lord Briggs JSC).

[191] *Re Exhall Coal* (n 30) 972 (Lord Romilly MR).

the exercise of the indemnification right when that trustee's state of account is brought into consideration.

It is suggested that the indemnity rights of the former and new trustees should be seen as of equal standing in equity and should give them equal claim on whatever assets are held in the trust when their indemnity rights come to be enforced. The right to be indemnified out of the pool of trust assets should be seen as neutral between trustees; and they should be treated rateably, based on the proportion of each trustee's state of account relative to the combined indemnity claim of the trustees. Where trustees act simultaneously and incur the same liability, it is very difficult to see why their right to indemnity should differ (other than by reference to other factors affecting each trustee's state of account). As Lord Briggs put it in *Equity Trust (Jersey)*: 'they all undertook as loyal and unselfish fiduciaries to perform the identical duties of a common office for the furtherance of a common enterprise, in which they were in no sense to be competitors'.[192] The difficulty is equally apparent where the indemnity right is sought to be enforced by different trustees in respect of different liabilities: each trustee that claims indemnity from the trust assets does so in respect of a liability that was *properly incurred* in the administration of the same trust — if that is not so, then no right of indemnity exists — and so the equities between them are equal.[193] Each trustee that incurs a liability in performance of the trust has made a functional contribution to the capital value of the trust fund, but without intending that the contribution will enure to the benefit of the beneficiaries other than incidentally: the trustee has committed its own personal assets to the satisfaction of the liability but is entitled to recoup the expenditure from the trust fund so that it is not left out of pocket, and the beneficiaries will thus benefit from the transaction only to the extent that the liability was incurred in order to benefit the trust fund overall.[194] Those liabilities must, *ex hypothesi*, have been properly incurred for an indemnity right to arise and so the trustees that have incurred them are effectively innocent contributors to a mixed fund (at least pro tanto, when each trustee's state of account is taken into consideration). If that fund is insufficient to repay them, each trustee is equally misfortunate.[195]

[192] *Equity Trust (Jersey)* (n 1) 934 [255].

[193] See above Part II(B).

[194] Cf *Equity Trust (Jersey)* (n 1) 923 [205] (Lord Richards JSC and Sir Nicholas Patten).

[195] The creditors of the trustees, who may wish to lay claim to the trustees' indemnity rights by way of subrogation, are also similarly misfortunate, although the trustees' indemnity rights are

It is suggested that an analogy can be drawn with equity's approach to tracing where funds have been mixed.[196] As Campbell J pointed out in *Re Sutherland; French Calendonia Travel Service Pty Ltd (in liq)*, where a trustee (or other fiduciary) mixes funds from different contributors together in one indistinguishable pool — whether those funds come from different trust funds or from combining trust funds with the trustee's own personal money — the entire fund is subject to a charge in favour of the contributors.[197] Importantly for present purposes, given the controversy over whether a trustee's right of indemnity is properly described as a charge, Campbell J recognised that the indemnity that is recognised over the mixed fund is not a charge in the sense of an order but rather a charge in the 'sense [that] there is, even prior to the grant of a remedy by the court, a charge over all the assets which are in, or have been acquired from, the mixed fund'.[198] The mixed fund is subject to a 'notional' charge in the sense that equity permits each of the contributors to lay claim to the assets in the mixture and to anything into which the assets are converted.[199] The 'notional' charge is analogous to the right of the trustee to claim indemnity from the trust assets, whatever they might be at any given time, for expenses that have been properly incurred. In the case of a trustee that has wrongfully mixed trust funds with its own money, the equities between it and the beneficiaries are not equal and so the trustee cannot claim assets from the mixture until it has rectified its wrong.[200] Similarly, as between a trustee and beneficiaries where the trustee has properly incurred an expense, the equities are not equal, and so the beneficiaries cannot claim assets from the trust fund until the trustee has been exonerated or reimbursed.[201] But as between several trustees that have incurred liabilities in the proper administration of the trust and claim indemnity from the trust assets, the analogy is closest to the claims of beneficiaries of different trusts whose funds have been indistinguishably mixed together: the ordinary outcome in such a case is generally that the beneficiaries

not created for the benefit of those creditors: Allison Silink, 'Trustee Exoneration from Trust Assets: Out on a Limb?' (2018) 12(1) *Journal of Equity* 58, 87.

196 *Equity Trust (Jersey)* (n 1) 932–3 [251]–[253] (Lord Briggs JSC). Cf at 948 [310] (Lady Arden).

197 (2003) 59 NSWLR 361, 387 [86] ('*Re Sutherland*').

198 Ibid 386 [83]. See also at 411 [153] (Campbell J).

199 *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717, 737 (Millett J), quoted in *Caron v Jahani [No 2]* (2020) 102 NSWLR 537, 552 [69] (Bell P).

200 *Re Sutherland* (n 197) 386 [83] (Campbell J).

201 See above Part II(A).

are 'rateably entitled to the available funds'.[202] The application of the pari passu concept is not limited only to distribution between unsecured creditors.[203] It is suggested that the concept provides an appropriate means of resolving disputes between trustees that have properly incurred liabilities in the administration of the trust where the trust funds are insufficient to indemnify the trustees fully against those liabilities.

This, in turn, requires some discussion of the duties of the new trustee regarding the preservation of the trust asset base for the benefit of the former trustee, because those duties potentially affect the state of the new trustee's account in a way that will in turn affect the relative values of the rateable claims that the former and new trustees can make over the remaining trust assets.[204] On taking office, the new trustee acquires legal title to the trust assets and holds that title subject to equitable obligations to perform the trust that it has undertaken. As has been discussed, those obligations include an obligation to hold the assets for the benefit of the beneficiaries,[205] but the former trustee has a right to be indemnified against properly incurred expenses *before* the beneficiaries are entitled to compel transfer of the assets to them.[206] Therefore, if the new trustee transfers the trust assets to the beneficiaries before the former trustee's liabilities have been satisfied with notice that the former trustee claims a right to be paid first, the former trustee can complain that the new trustee has acted in breach of its obligations as a trustee, and the new trustee should account to the trust for the wrongly disbursed sums.[207] The same position must obtain, a fortiori, if the new trustee disburses funds from the trust to a non-beneficiary who has *no* right to receive them under the trust. As Lord Romer said in *Guardian Trust & Executors Co of New Zealand Ltd v Public Trustee of New Zealand* ('*Guardian Trust*'), it is one of

> the well established principles of equity … that if a trustee or other person in a fiduciary capacity has received notice that a fund in his possession is, or may be,

[202] *Keefe v Law Society of New South Wales* (1998) 44 NSWLR 451, 460 (Priestley JA, Sheller JA agreeing at 462, Powell JA agreeing at 462).

[203] Cf *Equity Trust (Jersey)* (n 1) 918 [185] (Lord Richards JSC and Sir Nicholas Patten).

[204] These points are also potentially relevant insofar as there may be any surplus assets available to the beneficiaries, but if that is the case then the issue that forms the focus of this article will not arise as all of the trustees will have been indemnified before any surplus can arise for the beneficiaries.

[205] See above n 120 and accompanying text.

[206] See above Part II(A).

[207] *Agusta* (n 28) [83]–[84] (Barrett JA).

> claimed by A, he will be liable to A if he deals with the fund in disregard of that notice should the claim subsequently prove to be well founded.[208]

If the former trustee were to find out that the new trustee intended to do disburse funds in this way, the former trustee could seek injunctive relief or take other steps to protect its position, including applying for judicial sale or the appointment of a receiver.[209] However, consistently with what has been discussed already, the new trustee would not be so liable if the trustee disposed of the trust assets in satisfaction of liabilities that the new trustee has incurred in the proper administration of the trust, as that would be a legitimate disbursement of trust assets that would supersede any beneficial claim that the beneficiaries or the former trustees could make vis-a-vis those assets.[210] Insofar as there may be uncertainty as to whether and how the new trustee can act, the facility of judicial advice is available, as Lord Romer noted in *Guardian Trust*.[211]

The new trustee should also be liable if it runs down the value of the trust assets without justification in a way that reduces the possibility of the former trustee (or its creditors) claiming an effective indemnity. That situation may seem unlikely, but that was precisely what new trustees were held to have done

[208] *Guardian Trust & Executors Co of New Zealand Ltd v Public Trustee of New Zealand* [1942] AC 115, 127 (Lord Romer for the Court) ('*Guardian Trust*'). Lord Romer's speech was quoted in *Lane v Cullens Solicitors* [2012] QB 693, 697–8 [15] (Lloyd LJ) and *MCP Pension Trustees Ltd v Aon Pension Trustees Ltd* [2010] 2 WLR 268, 274–5 [25] (Jeremy Cousins QC), and it was cited in *MCP Pension Trustees Ltd v Aon Pension Trustees Ltd* [2011] 3 WLR 455, 459 [8] (Elias LJ) ('*MCP Appeal*') and *Von Westenholz v Gregson* [2022] EWHC (Ch) 2947, [198]–[210] (Robin Vos) ('*Von Westenholz*'). See also *Mackechnie v Marjoribanks* (1870) 39 LJ Ch 604, 606 (James V-C); *Harrison v Randall* (1852) 9 Hare 397; 68 ER 562, 567 (Turner V-C). It is the *trustee's* notice that supports the claim, rather than the *recipient's* notice, and so this liability is not inconsistent with *Carl Zeiss Stiftung v Herbert Smith & Co [No 2]* [1969] 2 Ch 276: see at 290 (Danckwets LJ), 296 (Sachs LJ), 304 (Davies LJ). Cf Paul Matthews et al, *Underhill and Hayton: Law Relating to Trusts and Trustees* (LexisNexis, 20th ed, 2022) 866 [56.7]; Lynton Tucker, Nicholas Le Poidevin and James Brightwell, *Lewin on Trusts*, ed Thomas Fletcher (Sweet & Maxwell, 20th ed, 2020) vol 1, 1081 [24-031].

[209] *Agusta* (n 28) [84] (Barrett JA), [103] (Sackville AJA); *Jaken Properties* (n 2) 348–9 [116] (Leeming JA), citing *Lemery Holdings* (n 33) 561 [50] (Brereton J).

[210] See above n 127 and accompanying text.

[211] *Guardian Trust* (n 208) 128 (Lord Romer for the Court). See also *MCP Appeal* (n 208) 463 [23] (Arden LJ); *Von Westenholz* (n 208) [209] (Robin Vos); *Jaken Properties* (n 2) 329 [30] (Bell CJ). See, eg, *Trustee Act 1925* (NSW) s 63. '[R]esolving those doubts means that the interests of the trust will be protected': *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66, 94 [71] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

in *Jaken Properties Australia Pty Ltd v Naaman*.[212] Case law that establishes that the former trustee cannot refuse to hand trust assets over to the new trustee also indicates, in the same breath, 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, which subsists in the trust assets after their transfer to the new trustee'.[213] For the reasons just discussed, that 'entitlement' cannot include preventing the trustee from administering the trust properly, such as by satisfying liabilities that the new trustee might incur in the course of that proper administration, but it does include a 'duty not to deal with assets so as to prejudice the former trustee's entitlement to be indemnified from those assets', for example by increasing the trust's borrowing for no commercial benefit or by transferring valuable trust assets away for no or inadequate consideration.[214]

These liabilities for misapplication of trust assets by the new trustee generate an obligation to replace the trust funds and the new trustee's obligation to account for those sums will also, until satisfied, reduce pro tanto any right of indemnity that the trustee might have in the meantime, thereby strengthening the indemnity available to the former trustee.[215] However, insofar as that state of account shows a sum owing to both the new trustee as well as the former trustee, those rights to be indemnified are both enforceable against the trust

[212] *Jaken Properties* (n 2) 334–5 [53]–[59] (Leeming JA). See also *Jaken Properties Australia Pty Ltd v Naaman* [2022] NSWSC 517, [430]–[431], [467], [508] (Kunc J).

[213] *Lemery Holdings* (n 33) 561 [50] (Brereton J), cited in *Jaken Properties* (n 2) 322 [4], 327 [22] (Bell CJ), 348–9 [116] (Leeming JA). See also *Jaken Properties* (n 2) 330–1 [37] (Leeming JA).

[214] *Jaken Properties* (n 2) 330–1 [37] (Leeming JA).

[215] *Alexander v Perpetual Trustees WA Ltd* (2004) 216 CLR 109, 126–7 [44] (Gleeson CJ, Gummow and Hayne JJ). The assets may also be recoverable from third parties to whom they were wrongfully transferred if the third parties still have them: *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch 91, 122 [75]–[76] (Lloyd LJ). If the third parties do not still have the assets, *personal* claims could potentially be brought against the third parties: *Barnes v Addy* (1874) LR 9 Ch App 244, 251–2 (Lord Selborne LC). However, the New South Wales Court of Appeal's decision in *Jaken Properties* (n 2) held that the successor trustee's duties were not *fiduciary* and so could not support personal claims against third parties under *Barnes v Addy*: *Jaken Properties* (n 2) 331 [38] (Leeming JA). Counsel in that case appears not to have argued whether a breach of trust that is not a breach of fiduciary duty could support *Barnes v Addy* liability: *Jaken Properties* (n 2) 346 [104] (Leeming JA). See generally Matthew Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) 121 (July) *Law Quarterly Review* 452, 478–9; William Gummow, 'Knowing Assistance' (2013) 87(2) *Australian Law Journal* 311, 318; Matthew Conaglen, 'Interaction between Statutory and General Law Duties concerning Company Director Conflicts' (2013) 31(7) *Company and Securities Law Journal* 403, 407.

assets ahead of the beneficiaries' rights to those assets; and insofar as that asset pool might be insufficient to cover both, trustees' indemnities each should abate rateably.

IV Conclusions

The difficult question of how trustees' indemnity rights compete with one another, if they do at all, is best addressed by considering the nature of those rights from first principles. A trustee's right to be indemnified out of trust assets is a right acquired as soon as the trustee is appointed to the role, but it is only enforceable against the trust assets once relevant liabilities have been incurred and also only if the trustee's account is in credit. It follows that each trustee must have its own right to indemnity, rather than there being a single indemnity right shared by all of the trustees, but that each trustee's indemnity right is a single right to indemnification rather than a series of separate rights generated by each legitimate transaction. The indemnity right is a proprietary right, and so it continues to bind the trust assets in the hands of the new trustee although the best nomenclature for that proprietary right is contested, and none is perfect. The indemnity is fundamentally a right for the trustee to be reimbursed or exonerated out of the trust assets before the beneficiaries can lay claim to those assets. Where more than one trustee claims indemnification, and there are insufficient assets to cover all such claims, it is suggested that the various possible options that would support a 'first in time' approach to that competition do not properly reflect the nature of the indemnification rights and that a rateable sharing approach is preferable.