Trusts & Trustees, 2025, **31**, 1–4
https://doi.org/10.1093/tandt/ttaf026
Case Note

OXFORD

Case Note

Does a successor trustee owe a fiduciary obligation to the former trustee not to frustrate their indemnity?

Aryan Mohseni[*,†]

[*]University of Sydney Law School—New Law Building, 3 Law School, Eastern Ave, Camperdown NSW 2050, Australia.
Email: aryan.mohseni@sydney.edu.au
[†]Eleven Wentworth Chambers - 11/180 Philip St, Sydney NSW 2000, Australia

ABSTRACT

The nature of a trustee's indemnity has been the subject of recent appellate judicial treatment in the United Kingdom and in Australia. Owing to the prevalence of the trading trust in Australia, the High Court of Australia has recently had occasion to consider whether a successor trustee owes a fiduciary duty to not frustrate a former trustee's indemnity over trust assets. That decision has addressed divergences between Australia and the United Kingdom on the nature of the indemnity and reminds us of fundamental starting points about the law of trusts that are often forgotten.

The indemnity of trustees has recently attracted the attention of academic and appellate judicial authority in the United Kingdom and Australia. In Australia, that is in part because of the prevalence of the trading trust, which provided the occasion for the recent decision of the High Court of Australia in *Naaman v Jaken Properties* [2025] HCA 1. The appeal, and the way it was argued, raises some elementary points raised some decades ago, first in *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694 about the nature of equitable interests and the poverty of such language as "duty" and "beneficial interest" as descriptions thereof; and, second, by Professor Waters as to the wrongful conflation of constructive trusteeship with the fiduciary relationship.

The facts are simple. JPG was the corporate trustee of a trading trust indebted in some $10 million to a trust creditor, Mr Naaman. That was a properly incurred expense for which JPG enjoyed a right of indemnity out of the trust assets. Upon JPG's retirement as trustee, the successor trustee, Jaken Properties ('Jaken'), further undertook under clause 1.5 of the Deed of Appointment to "pay and discharge all such debts [of the Retiring Trustee] out of the assets of the Trust". The debt remained unpaid, and Jaken transferred most of its assets to related third parties who then dissipated those assets. Subrogating to JPG's right of indemnity, Mr Naaman sought equitable compensation from those third parties on the basis that they were knowing recipients of trust property transferred to them in breach of Jaken's "fiduciary duty" not to jeopardise JPG's indemnity.

At trial in the Supreme Court of New South Wales, Kunc J made detailed findings that the third parties were privy to Jaken's dishonest scheme to "defraud and hinder creditors" (*Jaken Properties Pty Ltd v Naaman* [2022] NSWSC 517, [38]). The upshot was that the third parties were liable to account having knowingly received property transferred in breach of a "fiduciary duty to JPG not to deal with the assets of the trust in a way which destroys, diminishes or jeopardises JPG's right of indemnity from those assets" (*Jaken Properties Pty Ltd v Naaman* [2022] NSWSC 517, [8]).

In the New South Wales Court of Appeal, Leeming JA (Kirk JA agreeing) held that a successor trustee owes no such fiduciary duty to a former trustee. A former trustee's right of indemnity over trust assets was in the nature of a charge, constituting rights to judicial sale of trust property, the appointment of receivers and the availability of injunctive and interim relief to that end. Were Jaken a fiduciary, "[e]very equitable mortgagee, every equitable chargee, every unpaid solicitor" would be owed fiduciary duties by every mortgagor, charger or client (*Jaken Properties Australia Pty Ltd v Naaman* [2023] NSWCA 214, [38]). The majority was also alive to the spectre of a successor trustee owing conflicting fiduciary duties to the beneficiaries and to a former trustee.

© The Author(s) (2025). Published by Oxford University Press.
This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivs licence (https://creativecommons.org/licenses/by-nc-nd/4.0/), which permits non-commercial reproduction and distribution of the work, in any medium, provided the original work is not altered or transformed in any way, and that the work is properly cited. For commercial re-use, please contact reprints@oup.com for reprints and translation rights for reprints. All other permissions can be obtained through our RightsLink service via the Permissions link on the article page on our site—for further information please contact journals.permissions@oup.com.

Bell CJ, dissenting, placed greater store on the characterisation of a former trustee's indemnity as a "'beneficial interest' *in* the trust assets rather than a 'charge or lien *over* the trust assets', in a way deliberately recalling the archetype of fiduciary relationships—the trust. Bell CJ also emphasised that a former trustee, by losing control of trust assets upon the making of vesting orders, is made peculiarly "vulnerable to conduct which might defeat their equitable rights".

On appeal, the High Court split 4-3. Gageler CJ, Gleeson, Jagot and Beech-Jones JJ dismissed the appeal, largely adopting Leeming JA's reasoning. The appellant maintained the argument it presented in the Court of Appeal—that the former trustee had a "beneficial interest" in the trust assets when they owned them; upon the making of vesting orders, the legal title "split" from that beneficial interest in a way reminiscent of the trust relationship.

That argument was rejected. Valuable clarification was given to the language of "beneficial interest". It is a mistake to regard "beneficial" in this context as a cognate of "beneficiary" ([15]-[17]). The majority held that the interest is tantamount to a charge. The successor trustee, for example, does not owe trust accounting obligations to the former trustee. Hence the force of the description throughout the majority judgment of the "entitlement to indemnification and *commensurate* beneficial interest in the trust assets" ([30]). The nature of the "beneficial interest" in the fund is limited to a right of recourse to the fund for certain amounts, not to enjoy the property beneficially.

What is being attempted is, by some linguistic shift, an accommodation of the earlier remarks in *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* (2019) 268 CLR 524 and *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360—to the effect that a trustee's right of indemnity is a "beneficial interest" in assets—with the more worldly remarks of the Privy Council in *Equity Trust v Halabi* [2022] UKPC 36 at [143]:

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

It should also not be forgotten that "beneficial interest" is a protean term. It was only used in *Carter Holt*, in an insolvency context, as an intermediate step towards the conclusion that a current trustee's right of indemnity is "property" for the very limited purposes of determining whether such "property" was amenable to distribution to ranked creditors under a *statutory* insolvency regime.

Given the majority's more confined characterisation of the nature of the right of indemnity, there was therefore "insufficient justification for superimposing on the entitlement to indemnification ... a personal fiduciary obligation" ([12]). It is surprising that the appellant did not focus more on the express undertaking to act in another's interests, instead relying principally on the proprietary aspects of the indemnity as the foundation for a fiduciary obligation. All this affirms that "vulnerability" is not a "touchstone" of the fiduciary relationship.

The Court also gave short shrift to the respondents' submission that the postulated fiduciary duty would be inconsistent with the NSW equivalent of s 31 of the *Trustee Act 2000* (UK), which gave a statutory right of indemnity.

The dissenting judgment of Edelman, Gordon and Steward JJ is of some interest. It has four limbs. First, it disclaimed the characterisation of a former trustee's indemnity as an equitable lien, because "the right of indemnity secures no underlying debt" ([55]). That does not follow. Liquidators realising assets for the benefit of unsecured creditors enjoy an equitable lien over that fund for their properly incurred expenses, not on the basis that the creditors owe an "underlying debt" to the liquidator but because it would be unconscientious for those taking advantage of a fund not to account for expenses incurred in creating it. In truth, the equitable lien of a former trustee resembles closely the various instances of equitable liens for salvage or improvement of assets to which the conscientious salvor no longer has title (*Re Duke of Norfolk's Settlement Trusts* [1979] Ch 37, 59; *Re Berkeley Applegate (Investment Consultants) Ltd* [1989] Ch 32, 50–1; *Halabi*, [286] (Lady Arden)).

Yet by some process of elimination, it apparently followed that "the closer analogy is the right of a beneficiary to performance under a bare trust by payment of the trust fund" ([55]). That is quite a leap, and assumes that security interests and beneficial estates exhaust equity's universe. That assumption was implicit in the appellant's submissions, and is the product of the fact that much modern undergraduate teaching in equity focuses obsessively on the institution of the trust. But "equity has not confined itself to creating equitable property by means, say, of constructive trusts and equitable liens. A miscellany of equitable interests may be found, each of which owes its peculiar nature to the particular inequity which it is designed to redress or avoid" (*Meagher, Gummow & Lehane's Equity: Doctrine and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 109 [4-020]).

It is also well to remember that the "equity of exoneration" was a term of art in Chancery indicating equitable interests in a specific fund falling short of beneficial ownership (see John N Pomeroy, *A Treatise on Equitable Remedies* (Bancroft-Whitney, 1905) ch 47; Spencer W Symons (ed), *Pomeroy's Equity Jurisprudence* (Bancroft-Whitney, 5th ed, 1941) vol 4, [1416]– [1419]).

Yet the dissent preferred Bell CJ's use of the language of a "beneficial interest *in* the assets" to describe JPG's rights and employed it as a major premise to its conclusion of a fiduciary obligation by analogy with the trust relationship, saying at [89]:

> This reference to a "beneficial interest" demonstrates the close identity of the right of indemnity and the proprietary interest of the beneficiaries of a bare trust fund, in the sense explained by Gummow J as a trustee who holds legal rights to an asset "without any duty or further duty to perform, except to convey ... upon demand to the beneficiary or beneficiaries or as directed by them".

The dissent noted earlier, at [51], that "to the extent of that equitable proprietary interest, the assets of the trust are not held solely for the beneficiaries" because the trustee too has a beneficial interest in the assets. But that is to extrapolate a proposition concerning the nature of a *current* trustee's right of indemnity to the position of a *former* trustee. A current trustee's right of indemnity is an incident of the trustee's legal ownership of the assets. On an accounting, the current trustee is credited with all properly incurred expenses and to that extent equity stays its hand and does not encumber the trustee's recourse to their legal title—this is an equitable *immunity*, not a separate "power" as some have suggested: cf Hudson and Mitchell, "Trustee Recoupment: A Power Analysis" (2021) 35 (1) *Trust Law International* 3. To that extent it is a "beneficial interest". But that says nothing of the position of the former trustee divested of title. In that case, the interest is more attenuated, becoming in the nature merely of a charge over another's property.

The dissentients also called in aid the analogy drawn by Sir Nicholas Patten in *Halabi* between a former trustee's indemnity and the interest of a purchaser under a specifically performable agreement. True it is that the latter has been described as a "beneficial interest" under a "constructive trust". But just as the interposition of "trusteeship" in that area is a "superfluous concept" (Waters, "Constructive Trust—Vendor and Purchaser" (1961) 14(1) *Current Legal Problems* 76, 76), so it is a verbal embarrassment in the case at hand. A purchaser of land pending completion has only "an equitable interest in the land which reflects the extent to which equitable remedies are available", being specific performance and injunctive relief in aid thereof. It is a mistake to reason that, because one may have equities sufficient to trace into property and to enjoin fraudulent dispositions, the beneficial estate is reposed in another. All this exposes the misleading ambiguities associated with the term "beneficial interest", as the Privy Council pointed out in *Livingston's* case, and the reason for the Privy Council's more recent preference to describe the right of indemnity "simply as a proprietary interest" (*Halabi* at [143]). It is "no more and no less than the right to have the trust property applied" to the former trustee's expenses.

The third premise proceeded from what the dissentients assumed was a "finding" by Leeming JA that a successor trustee owes a "duty" to the former trustee "not to deal with [the trust] assets so as to prejudice the former trustee's entitlement to be indemnified from those assets" ([97]). *Lewin on Trusts* (20th ed, [17-071]) makes the same assumption. This puts too much store on the language of "duty". It exposes the risks of reasoning syllogistically from labels or short-hand. Common lawyers, as well as those trained in Roman Law, tend often to assume that wherever there is a remedy there must have been some underlying "duty". Equity is more sophisticated—and spontaneous—and does not always proceed on the fiction that it is enforcing some pre-existing jural "obligation" as, say, does the common law of tort.

A successor trustee has only a "duty" in the limited sense that they are subject to equities sufficient to enjoin wasteful dissipations. In *Cummins v Perkins* [1899] 1 Ch 16, for example, Chitty LJ said that a right to be paid out of a fund for the limited purpose of recouping expenses may not "create a special charge", but it "does give … such a species of interest as entitled the then plaintiff to interfere and save the fund from being wasted". It is only in that sense that there is a "duty" to "not take steps which will destroy, diminish or jeopardise the old trustee's right of security". The bare susceptibility to injunctive and other interim relief is an unpropitious foundation for a "duty", let alone one said to be fiduciary.

The fourth premise was that the characterisation of such a duty as fiduciary is unexceptional. True it is that a *fraudulent* dissipation to a related party may merely be a manifestation of the well-established conflicts principle. But if one manifestation of the conflicts principle applies, so must it all (within the scope of the relationship, of course); and it is well established that the conflicts principle is not circumscribed by bad faith (*Boardman v Phipps* [1967] 2 AC 46). So is there really a "reasonable expectation" (to use Professor Finn's language) that the successor trustee not put themselves in a position, however innocent or benign, of conflict between its duties to the former trustee and its duties to another in respect of its custody of the assets and to account to the former trustee if otherwise?

For all this, one wonders whether both parties were striking at false issues. For one, readers should not be distracted from the basic point that, dissipation apart, tracing would be available. If Jaken disbursed its assets to defraud creditors, that is a fraud on a power. An excessive execution is no execution of the power; the assets, if not in the hands of a bona fide purchaser, are still trust property susceptible to the former trustee's equity to seek judicial sale (*RnD Funding Pty Limited v Roncane Pty Limited* [2023] FCAFC 28).

The importance of statute should also not be overlooked. In the United Kingdom, former trustees and other trust creditors could avail themselves of section 173, and what was section 172, of the *Law of Property Act 1972* (UK) to void conveyances made with intent to defraud them.

Where assets are no longer traceable and the former trustee seeks equitable compensation from a third party, is it necessary to characterise the successor trustee as a fiduciary? That view is motivated in no small part by the English tendency to see *Barnes v Addy* as a code exhausting the universe of third party liability in equity. Even so, it was wrong for the question to be framed as whether any such obligation was a fiduciary duty; "the breach of duty by the trustees to which accessorial liability may attach in equity is not breach of a fiduciary duty strictly understood" (Gummow, "Knowing Assistance" (2013) 87(5) *Australian Law Journal* 311, 318).

There may be alternatives, quite apart from any fiduciary analysis.

One possibility flows from the fact that the successor trustee is a trustee. Jaken's distribution to third parties was clearly a breach of its trust obligations to beneficiaries, and any knowing recipient of trust property is liable under *Barnes v Addy*. Not being a beneficiary, a third-party creditor such as the former trustee has no standing to enforce those obligations. But it was not argued that, by adaptation of the principles expounded by James LJ in *Sharpe v San Paulo Railway Company* (1873) LR 8 Ch App 597 at 609-610, the former trustee could, in "special circumstances" (such as collusion),

sue in its own name or in that of the successor trustee to vindicate the third party's duty to account to the trust estate. *Daniell's Chancery Practice* (7th ed, pp 245-256) had always contemplated the possibility of a creditor to a trust estate, in those exceptional circumstances where debtor, trustee and beneficiary were colluding and there was therefore no one sufficiently interested to vindicate the irreducible core of the trust, bringing a bill to sue the debtor in the trustee's name.

Another possibility flows from the fact that, as the majority recognised, the successor trustee is an equitable lienor, being in much the same position as a judgment-debtor holding a fund subject to a solicitor's equitable lien for unpaid costs. As Sir Frederick Jordan recognised in *ex parte Patience* (1940) 40 SR (NSW) 96 at 100–101, drawing on such English authorities as *Ross v Buxton* [1889] 42 Ch D 190, a custodian of the fund with notice of the lienee's equitable interest collusively dissipates the fund to a third party "at his own peril" and is *thereby* made a constructive trustee liable personally to account to the lienee. That was said to be analogous to the position of a debtor with notice of an equitable assignment.

If a successor trustee were liable to account to the former trustee from the moment they fraudulently divested themselves of the assets to frustrate the former trustee's charge (cf *Byers v Saudi National Bank* [2023] UKSC 51 at [60]–[61]), why, then, is a third party who knowingly assists or receives from that constructive trustee not equally liable to account? For one, this does not mean that there was a "duty" existing *ab initio*, inhering in the office of successor trustee, not to fraudulently dissipate the assets (as the dissent thought); only that an accounting obligation arises from the moment the successor trustee deals unconscientiously with the fund, with the third-party recipient becoming an accessory. The second fallacy consists in supposing that every instance of "constructive trusteeship" is necessarily "fiduciary" in a consensual sense.

All this recalls Professor Waters' prescient observation, more than 60 years ago, that plaintiffs tend "to claim that fiduciary obligations have been breached when in fact the particular defendant was not a fiduciary *stricto sensu* but simply had withheld property from the plaintiff in an unconscionable manner": *The Constructive Trust* (Athlone Press, 1964) 4. To that may be added Sir Anthony Mason's salutary caution that seeing fiduciary obligations as a "passport" to equitable relief against third parties risks putting too much "pressure" on the fiduciary concept to expand to absurd limits: "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 (April) *Law Quarterly Review* 238, 248.

AUTHOR BIOGRAPHY

Aryan Mohseni is Reader, Eleven Wentworth Chambers, Sydney Bar, Australia and Lecturer (part-time) in Equity and in Federal Constitutional Law, University of Sydney Law School.

© The Author(s) (2025). Published by Oxford University Press.
This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivs licence (https://creativecommons.org/licenses/by-nc-nd/4.0/), which permits non-commercial reproduction and distribution of the work, in any medium, provided the original work is not altered or transformed in any way, and that the work is properly cited. For commercial re-use, please contact reprints@oup.com for reprints and translation rights for reprints. All other permissions can be obtained through our RightsLink service via the Permissions link on the article page on our site—for further information please contact journals.permissions@oup.com.
Trusts & Trustees, 2025, 31, 1–4
https://doi.org/10.1093/tandt/ttaf026
Case Note