

THE 25TH WA LEE EQUITY LECTURE

TOUR OF CONTEMPORARY DEVELOPMENTS AND ISSUES IN EQUITY

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I INTRODUCTION

I am honoured to have been invited to deliver the 25th WA Lee Lecture at the University of Queensland on the lands of the Jagera people and the Turrbal people (the traditional custodians of Meanjin (Brisbane)), whose elders I acknowledge. Apart from the fact that equity (whether conceived of as an area of study, practice, and/or a mode of conscience) is very dear to my heart (as a former Chief Judge in Equity), it is a privilege to be able to pay tribute to a formidable equity scholar whose texts grace the bookshelves of judges, academics, practitioners and students alike.

The now retired (but still academically astute) Professor Tony Lee was born in Wales in 1930 and educated in law at Manchester University. Professor Lee practised widely across England and Wales before arriving at the University of Queensland in 1965 as a Senior Lecturer. Retiring from that position in 1989, Professor Lee continued in the law variously as either an adjunct professor, visiting professor, a chair on faculty boards, or later as a part-time Commissioner of the Queensland Law Reform Commission.

As I studied law at the University of Sydney, I do not have the good fortune to be able to count myself as one of Professor Lee's students but I was fortunate enough to speak with him briefly when preparing this paper and I can attest to his continuing interest in trusts (and his concern that equity not be reduced to some statutory formulation). Of Professor Lee's various works, I need only mention his *pièce de résistance*, *Principles of the Law of Trusts*,¹ which surely never remains on the shelf long enough to collect dust; and of which he has only recently retired as co-editor.

* President of the Court of Appeal, Supreme Court of New South Wales. I wish to acknowledge and thank my Researchers in the Court of Appeal, Isaac Morgan and Oscar Clark, for their invaluable research and proofing assistance in the preparation of this paper. All errors are mine!

¹ HAJ Ford and WA Lee, Law Book Co, *The Law of Trusts*. Now a looseleaf service, the first edition was published as HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Law Book Co, 1983).

Last time I delivered a paper in this Banco Court in Queensland it was on the topic of ‘Fragmenting Equities’. Today, in step (I hope) with the array of distinguished speakers who have given this lecture before me, I look forward to taking you around the grounds (so to speak), on a tour of some of the contemporary developments and issues in equity as at 2024, which speak in my opinion to the dynamic nature of equity.

I make the disclaimer in advance that I have drawn heavily on some recent decisions of my own Court (the NSW Court of Appeal) but I also make the caveat that we are awaiting the High Court’s consideration of two of those decisions. Whichever way the High Court decides, the grant of special leave in those cases at least validates my belief that they raise novel issues worth discussion in this lecture.²

II *JAKEN* — FIDUCIARY DUTIES OWED BY SUCCESSOR TRUSTEE TO FORMER TRUSTEE

I will begin with one such decision, in respect of which special leave was granted earlier this year, the matter having been heard by the High Court in the last couple of months.

In *Jaken Properties Australia Pty Ltd v Naaman* (‘*Jaken*’), the NSW Court of Appeal considered whether fiduciary duties are owed by a successor trustee to its predecessor trustee.³ Of particular interest in this case is the divergence in views between Leeming JA (no mean academic in the area of equity and trusts himself), with whom Kirk JA agreed, providing additional reasons, and Bell CJ. It will come as no surprise that there is much interest in our Court on the High Court’s conclusion on this issue. It should probably also come as little surprise that English academics have also weighed in on the controversy (I was interested, for example, to hear the views of Professor Charles Mitchell on this topic when he was in Sydney recently).

Although you may be familiar with the facts, it is worth noting the following. The case concerns a family trust, in respect of which the first appellant (*Jaken Properties Australia Pty Ltd*, ‘*Jaken*’), had replaced the former trustee (*Jaken Property Group Pty Ltd*, ‘*JPG*’). The respondent (Mr Anthony Naaman), was a judgment creditor of *JPG*, for a sum over \$3.4 million. There was no dispute between the parties that Mr Naaman could be subrogated to the rights of *JPG* to be indemnified out of trust assets for liabilities incurred by it, including the judgment debt. However, Mr Naaman’s complaint was that *Jaken* had (improperly) transferred trust assets to other parties, such that there were now insufficient assets to satisfy the judgment debt. Mr Naaman contended that *Jaken*, as the successor trustee, owed a fiduciary duty to *JPG*, as the former trustee

² For my consideration of each of these High Court cases, see the Postscript to this article in Part VI.

³ (2023) 112 NSWLR 318 (‘*Jaken*’).

(broadly speaking a duty not to deal with trust assets so as to jeopardise the former trustee's entitlement to an indemnity out of the assets).

The key issue on appeal was whether a successor trustee owes a *fiduciary* obligation to a former trustee not to deal with trust assets so as to destroy, diminish, or jeopardise the former trustee's entitlement to be indemnified from those assets.

There was no dispute as to the fact that a successor trustee owes obligations of some kind to the former trustee; rather, the question was whether those obligations were of a fiduciary nature. The significance of whether those obligations were fiduciary or not was that the primary judge had found that Jaken had transferred trust assets to third parties who knew of the trustee's fraudulent design. On a finding that the obligation was fiduciary in character, those third parties who (knowingly) received trust assets or who assisted in their transfer would be personally liable pursuant to the principles set out in *Barnes v Addy*.⁴

The primary judge (Kunc J) had found that the obligation was fiduciary in character. His Honour summarised his conclusion on the issue as such:

JPG (and, by subrogation, Mr Naaman) was entitled to follow those assets into the hands of third parties (other than bona fide purchasers for value without notice) who will hold them on a constructive trust imposed by the court in aid of JPG's proprietary interest in the [trust] assets.⁵

Jaken submitted that the course adopted by the primary judge constituted a 'radical development of the law' that was unsupported by authority, devoid of reasoning, and wrong in principle.⁶

A *Leeming JA*

Leeming JA, with whom Kirk JA agreed, concluded that a successor trustee does not owe fiduciary obligations to a former trustee.⁷

Leeming JA observed that disputes between former and successor trustees are far from unusual but concluded that a fiduciary obligation of the sort propounded by Mr Naaman had not been established. His Honour commenced by noting the rights of the former trustee that were common ground between the parties, being an entitlement to apply for judicial sale or to appoint a receiver over trust assets in aid of its right of indemnity; and that this entitlement sufficed to enable the former trustee to obtain interlocutory relief to prevent the transfer of trust assets.⁸ His Honour, in considering the case law on the effect of a receivership order, pointed out that many authorities spoke of the limited entitlement conferred by the former trustee's rights over the trust assets, often

⁴ (1874) LR 9 Ch App 244.

⁵ *Jaken* (n 3) 337 [69] (Leeming JA).

⁶ *Ibid* 330 [36].

⁷ *Ibid* 356 [141].

⁸ *Ibid* 348 [116].

described as a ‘charge or lien’.⁹ Here, though, Leeming JA referred to the sui generis nature of the former trustee’s proprietary rights; and cautioned against deploying general principles relating to charges or liens.¹⁰ Given this, his Honour proceeded on the basis of first principles when considering the nature of the former trustee’s interest in the trust property.

At the outset, Leeming JA made the point that merely having custody and administration of property on behalf of others does not convert a person into a trustee; giving the example of a trustee holding Torrens system land on trust which is mortgaged.¹¹ Although the mortgagee has a proprietary interest in land which takes priority over the beneficial interest of the beneficiaries, it cannot prevent an *in specie* distribution to beneficiaries. The trustee does not owe fiduciary obligations to the mortgagee; and no constructive trust will be imposed.

His Honour, citing those well-known cases *Hospital Products v United States Surgical Corporation*¹² and *John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd*¹³ noted that the critical feature of a fiduciary relationship is that the fiduciary undertakes to exercise a power for or on behalf of another person, in the interests of that person.¹⁴ His Honour considered it difficult to see how the successor trustee could be seen to be exercising the trustee’s power for or on behalf of the former trustee.¹⁵ It was noted that the successor trustee has duties to the beneficiaries and may be compelled to exercise its powers for their benefit,¹⁶ such as in the case of a *Saunders v Vautier* direction.¹⁷ His Honour emphasised the difficulty of reconciling the fiduciary obligation owed to a former trustee with the fiduciary obligations owed to the beneficiaries.¹⁸

On the point of vulnerability (which was acknowledged by all three judges to be a relevant consideration), Leeming JA considered that the former trustee is no less vulnerable than any other creditor with a security interest recognised in equity, again pointing to the rights available to the former trustee; namely that it can protect its security (such as by caveat or injunction) and can enforce it through judicial sale.¹⁹

A final point of discomfort for Leeming JA was the issue as to when the fiduciary obligation would arise; as the successor trustee may not be aware of the existence or extent of the former trustee’s claim for indemnity.²⁰ In oral submissions before the Court of Appeal, counsel for Mr Naaman had argued that

⁹ Ibid 350 [121].

¹⁰ Ibid 351 [125].

¹¹ Ibid 353 [131].

¹² (1984) 156 CLR 41.

¹³ (2010) 241 CLR 1.

¹⁴ *Jaken* (n 3) 355 [140].

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ See *Saunders v Vautier* [1841] 4 Beav 115.

¹⁸ *Jaken* (n 3) 355 [140] (Leeming JA).

¹⁹ Ibid.

²⁰ Ibid.

the fiduciary duty arose upon the successor trustee learning of the existence and size of a realistic claim for indemnity from the former trustee; a position that Leeming JA described as ‘decidedly odd’, and distinct from any recognised category of fiduciary duty.²¹

Ultimately, his Honour emphasised the strength of the remedies available to the predecessor trustee, even without the imposition of a fiduciary obligation over the relationship.²² The former trustee has an entitlement (sustained by its proprietary aspect) to have recourse to assets in the hands of third parties with notice of the successor trustee’s breach of duty. Leeming JA concluded that it was unnecessary to superimpose a fiduciary duty between the current and former trustees, and wrong to reason that because equity would grant relief on the application of a former trustee, the former trustees are owed a fiduciary obligation by their successor.²³

Leeming JA therefore summarised his findings on this issue as follows. As a starting point, JPG was entitled to be indemnified for liabilities properly incurred in the office of trustee. While in office, JPG had legal title to trust assets, which it could use to indemnify itself. Following its removal from office, JPG continued to have recourse to trust assets to discharge those liabilities. Although not through ownership in law, it could apply to the Court for the appointment of a receiver. At that point, Jaken held the assets on trust, subject to JPG’s prior ranking entitlement to have recourse to them, which could be vindicated by the appointment of a receiver. However, none of those matters gave rise, in his Honour’s opinion to a fiduciary obligation owed by Jaken as successor trustee to JPG as the former trustee.

This finding had obvious consequences for the claims of liability for knowing receipt or assistance pursuant to the principles in *Barnes v Addy*. However, on the facts of this case, Mr Naaman as a creditor of the trust was nonetheless entitled to have recourse to trust assets, including pursuant to statutory prohibitions on the voluntary alienation of land with the intent to defraud creditors.

B *Kirk JA*

Kirk JA, who agreed with Leeming JA, added some brief remarks on the character of the obligation owed to the successor trustee.

Kirk JA acknowledged the relevance of vulnerability in considering whether to recognise a fiduciary duty, comparing it to the importance of vulnerability in determining the existence of a duty of care at common law.²⁴ (I have not time here to discuss the latest decision of the High Court on the existence and scope of a

²¹ Ibid.

²² Ibid.

²³ Ibid 356 [141].

²⁴ Ibid 372 [230] (Kirk JA).

duty of care in tort in the context of claims for recovery of pure economic loss — see *Mallonland v Advanta Seeds Pty Ltd* (*'Mallonland'*) where Edelman J, straying into the area of animal husbandry — ‘we should not attempt to breed from a mule’ — was highly critical of the concept of a duty of care based on ‘salient features’ in the context of such claims.)²⁵

In *Jaken*, Kirk JA emphasised that there are many circumstances in which a party is vulnerable to the actions of another, but where there is no fiduciary duty (nor any duty of care), pointing, for example, to the interests of a mortgagor who will be vulnerable to how a mortgagee exercises a power of sale.²⁶ Similarly, his Honour noted, the mortgagee will be vulnerable to the way in which the mortgagor makes use of the subject property.²⁷ However, in general, vulnerability alone will not be sufficient to cause a fiduciary duty to arise; the interests of the vulnerable person are deemed to be sufficiently protected by their other legal rights.

Kirk JA, echoing Leeming JA, questioned how the relationship of former trustee and successor trustee could be distinguished from other circumstances in which one person holds property in which another has some interest, such as a mortgagee, or a person with some security interest, charge or equitable lien.²⁸ To apply a fiduciary relationship here, his Honour stated, would represent a significant expansion of the role of fiduciary duties.²⁹ Kirk JA also noted the ‘decidedly odd’ nature of Mr Naaman’s ultimate submission, being that the fiduciary duty would come into existence upon the successor trustee having notice of a ‘realistic’ claim; and contrasted this with the established categories of fiduciary relationships, whose existence is dependent on the nature of the relationship, rather than by notice of some claim.³⁰ His Honour also emphasised the discomfort with which a fiduciary duty owed to a former trustee would sit with the fiduciary duty owed to the beneficiaries of the trust.³¹

C *Bell CJ*

The Chief Justice, in dissent, agreed with the primary judge’s conclusion that a fiduciary obligation was owed by *Jaken* to JPG (and that it had been breached), with the consequence that third party knowing assistants should be pursuable for equitable compensation under the *Barnes v Addy* principles.³²

²⁵ (2024) ALR 25, [58] (*'Mallonland'*).

²⁶ *Jaken* (n 3) 372 [230] (Kirk JA).

²⁷ *Ibid* 372 [231].

²⁸ *Ibid* 372 [232].

²⁹ *Ibid*.

³⁰ *Ibid* 373 [234].

³¹ *Ibid* 373 [236].

³² *Ibid* 321 [3] (Bell CJ).

The Chief Justice set out the chief concern of fiduciary law, as described by the late Justice Paul Finn,³³ then a Professor at the Australian National University, being to impose standards of acceptable conduct on one party to a relationship for the benefit of the other, where the one has a responsibility for the preservation of the other's interests, noting that its function, therefore, is to secure the paramountcy of one side's interests.³⁴

While Bell CJ acknowledged that vulnerability is not 'the touchstone of fiduciary obligation', his Honour emphasised that it was a relevant factor.³⁵ The Chief Justice noted the importance of vulnerability in particular relationships, such as the fiduciary obligation owed by a mortgagee holding surplus proceeds of sale.³⁶ In considering another example, being the fiduciary obligations owed by a bailee to a bailor, his Honour stated that it would scarcely be a 'radical step' to recognise that a successor trustee is under a similar obligation when in custody of trust assets which are charged in equity with its predecessor's right to recoupment.³⁷

The Chief Justice emphasised several aspects of the relationship, including that the predecessor's beneficial interest takes priority over the interests of the ordinary beneficiaries.³⁸ In contrast with the majority, his Honour viewed it as anomalous that a successor trustee's duty to those with an inferior interest in the trust property (being the beneficiaries) would be fiduciary, while its prior-ranking duty to the predecessor trustee is not.³⁹ His Honour also called attention to the fact that the former trustee was now entirely out of possession of the trust assets.⁴⁰ While acknowledging the rights of the predecessor trustee to approach the court, his Honour said that the former trustee may often be wholly ignorant of its successor's intention; meaning that its right of indemnity may be diminished or even rendered worthless by unilateral action before it could seek the aid of a court.⁴¹

Also in contrast to the majority, Bell CJ had no concern with the issue as to when the fiduciary obligation would arise; and accepted Mr Naaman's submission that the obligation would arise no later than when the successor trustee became aware of the former trustee's claim to indemnity.⁴² The Chief Justice also saw no difficulty in reconciling the fact that the successor trustee would owe fiduciary duties to both the beneficiaries and the former trustee, his Honour there noting the longstanding rule

³³ PD Finn, 'The Fiduciary Principle' in TG Youdan, *Equity, Fiduciaries and Trusts* (Carswell, 1989) 3, 32; see generally Paul Finn, *Fiduciary Obligations* (The Federation Press, 2016).

³⁴ *Jaken* (n 3) 323–4 [8] (Bell CJ).

³⁵ *Ibid* 326 [17].

³⁶ *Ibid* 326 [19].

³⁷ *Ibid* 326–7 [20].

³⁸ *Ibid*.

³⁹ *Ibid* 328–9 [29].

⁴⁰ *Ibid* 326–7 [20].

⁴¹ *Ibid* 327 [23].

⁴² *Ibid* 328 [28].

that a trustee is not required to make a distribution to a beneficiary to the extent that the beneficiary has outstanding obligations to the trust.⁴³

In concluding, the Chief Justice (describing the ‘important difference’ in his analysis from that of Leeming and Kirk JJA) noted that, while the majority emphasised that the former trustee’s interest is in the nature of a charge *over* the trust assets, he placed greater weight on the characterisation of the interest as a beneficial interest *in* the trust estate.⁴⁴ Given that starting position, and noting the superiority of the interest over the interests of the beneficiaries (to whom fiduciary duties *are* owed), his Honour viewed it as surprising that the superior interest should not be protected by a fiduciary obligation.⁴⁵

D *Mohseni Article*

In a recent article by a lecturer at the University of Sydney, Mr Aryan Mohseni, consideration was given, in advance of the hearing before the High Court, of the issue raised by the conflicting judgments in the Court of Appeal.⁴⁶

Mohseni commences by considering the characterisation of a *current* trustee’s interest in trust property (in the context of its right of indemnity) and points to the ‘absurdity’ of having a charge over property in respect of which one is the legal owner.⁴⁷ He argues that the current trustee’s right of indemnity is simply an incident of ownership, as the trust property cannot be determined until the trustee has recouped its proper expenses.⁴⁸

Mohseni sees the reality of a current trustee’s indemnity as simply an expression of trust accounting and argues that this is critical to how the former trustee’s interest should be characterised, especially given Mr Naaman’s contention that the former trustee ‘retains’ a beneficial interest.⁴⁹ As the current trustee’s indemnity is but an incident of their absolute ownership, Mohseni opines that the current trustee has a ‘beneficial interest’ in the assets only in a superficial estate, with the result that there is no ‘retention’ of the beneficial estate on the transfer of legal title to the successor trustee.⁵⁰ He argues that there is therefore a fundamental shift in the nature of the indemnity upon this transfer, as the former trustee, no longer having title to the assets, is instead afforded an equitable lien which is afforded by equity to allow it to recoup expenses properly

⁴³ Ibid 329 [30].

⁴⁴ Ibid 330 [33].

⁴⁵ Ibid.

⁴⁶ Aryan Mohseni, ‘Trustees’ Indemnities and Fiduciary Duties: The High Court Appeal in *Naaman v Jaken Properties Australia Pty Ltd*’ (2024) 46(3) *Sydney Law Review* 373.

⁴⁷ Ibid 376.

⁴⁸ Ibid.

⁴⁹ Ibid 377.

⁵⁰ Ibid.

incurred to improve a fund now in the hands of another.⁵¹ By way of example reference is made to the equitable liens of liquidators, partners and petitioners for a winding-up over a resulting fund.⁵²

Mohseni emphasises the importance of looking to the actual function of the former trustee's equity, rather than labels such as 'beneficial interest' or 'charge' (noting that the relevant right here is the right to have the trust property applied to the trustee's expenses).⁵³ As such, he cautions against usage of the phrase 'beneficial interest' as it is no more than a beneficial interest commensurate with the former trustee's entitlement to be indemnified from the trust property;⁵⁴ in this case, the right to seek judicial sale and interlocutory relief to that effect (such as the appointment of a receiver); describing it as a right to go *into*, not to enjoy, the property. Mohseni sees this as particularly relevant to Bell CJ's dissent, since a fundamental aspect of the Chief Justice's characterisation of the obligation was that the former trustee's interest was, like the beneficiaries' interests, a beneficial interest in the trust property.⁵⁵

The point of difference, implicit in Mohseni's argument, is that the former trustee's so-called 'beneficial interest' is limited to its right of indemnity; and is distinct from the full beneficial interest enjoyed by the beneficiaries of the trust. Relatedly, Mohseni notes that the former trustee can trace into disbursed assets irrespective of whether a fiduciary relationship exists between it and the successor trustee.⁵⁶ He posits that, if trust assets were disbursed with the intention to defraud creditors, this would constitute fraud on a power (a topic to which I shall shortly turn).⁵⁷ Mohseni argues that, as a disbursement that goes beyond power is invalid and void, the assets (if not in the hands of a bona fide purchaser) are still characterised as trust property; and therefore susceptible to the former trustee's right to seek judicial sale.⁵⁸

Mohseni concludes his analysis by questioning whether it is even necessary to ask, for the purposes of establishing *Barnes v Addy* liability against third party recipients, whether any duty owed to the former trustee was fiduciary in character.⁵⁹ The argument presented is that *Barnes v Addy* liability does not require the original breach to have been a breach of a fiduciary duty of no-conflict or no-profit.⁶⁰ Here, Mohseni notes analogous situations, such as where third parties interfere with a solicitor's equitable lien (where courts have enforced the solicitor's

⁵¹ Ibid 378.

⁵² Ibid.

⁵³ Ibid 379.

⁵⁴ Ibid.

⁵⁵ Ibid 379–380.

⁵⁶ Ibid 383.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid 384.

⁶⁰ Ibid.

right of recourse against the interfering party).⁶¹ It does not appear that this argument was put to the Court of Appeal, though Leeming JA did hint at the possibility of a former trustee bringing a derivative action to restore the trust fund.

E *Discussion*

Mr Mohseni's encouragement to focus on the limited content and function of a party's equity, rather than seeking to categorise and label it (and then, he would argue, syllogistically reason as to the consequences), coheres with the caution expressed by Leeming and Kirk JJA against a hasty widening of the categories of fiduciary relationships. If the former trustee's right to seek judicial power of sale, along with the statutory entitlement under s 37A of the *Conveyancing Act 1919* (NSW) to set aside a transfer of trust assets intended to defraud creditors, provides sufficient protection for the trustee's rights of exoneration and reimbursement, there is scope for one to question whether a fiduciary obligation is necessary to be recognised. As Kirk JA has noted, there are numerous relationships with analogous vulnerability that do not attract fiduciary obligations (see also Leeming JA's observations on this issue).⁶²

On the other hand, is there merit for the dissenting view as to the protection of the superior interest of the former trustee over the interests of beneficiaries?

The case is an interesting reminder to view equitable interests through the rights that they confer, rather than by reference to the taxonomical category within which they fall. As noted earlier, we must await the decision of the High Court on this issue.⁶³

F Halabi

As an additional note on *Jaken*, the case of *Equity Trust (Jersey) Ltd v Halabi* ('*Halabi*') in the Privy Council offers further judicial consideration of the nature of a former trustee's rights in relation to trust assets.⁶⁴ The case involved a priority dispute between former and successor trustees of a discretionary trust the liabilities of which substantially exceeded its assets. Equity Trust, the former trustee, had argued that its rights of recourse to the fund should take priority over other creditors, including Halabi, on a first in time basis. Equity Trust had been unsuccessful before the Royal Court of Jersey but was successful on appeal to the Court of Appeal of Jersey. The matter ultimately came before the Privy Council. *Halabi* was heard concurrently with a case from Guernsey, in which the Guernsey

⁶¹ Ibid 385.

⁶² *Jaken* (n 3) 372 [230] (Kirk JA), 331 [38] (Leeming J).

⁶³ See Postscript, Part VI below.

⁶⁴ [2022] UKPC 36 ('*Halabi*').

Court of Appeal had held that the claims of a former trustee had priority over those of successor trustees, and that trustee claims had priority over creditors claiming through them as subrogated to their lien.

As a preliminary issue, the Privy Council held that a trustee's right of indemnity confers a proprietary interest, in the form of an equitable lien; and that this proprietary interest survives the transfer to the successor trustee.⁶⁵ However, the Privy Council overturned the Courts of Appeal of both Jersey and Guernsey, with the majority concluding that the former and successor trustees' interest in the trust assets rank *pari passu* where those assets are insufficient to meet the claims made by or through the trustees pursuant to their indemnities.⁶⁶

Lord Briggs (with whom Lord Reed and Lady Rose agreed) considered the nature and purpose of the trustee's lien, concluding that successive trustees' liens were not intended to be in competition with each other.⁶⁷ Where the trust assets were inadequate to satisfy the indemnities, the trustees had suffered a 'shared misfortune' in a single continuing institution, and as such should recover *pari passu*. It was significant to Lord Briggs that the trustees' lien was the vehicle for trust creditors to be repaid, by subrogation to the lien; to expect creditors to be aware of the various dates of appointment and determine priority on that basis was, to his Lordship, contrary to justice, fairness, equity and common sense.⁶⁸

Lady Arden, agreeing but writing separately, concluded that to adopt 'first in time' would be inconsistent with equitable principle.⁶⁹ Her Ladyship also noted the disadvantage successor trustees would be under, given the difficulty they might have in determining or verifying the various liabilities of former trustees.⁷⁰ This lack of visibility, with earlier liabilities given priority, may, in Lady Arden's view, have a 'very damaging effect' on the willingness of persons to do business with a trust.⁷¹

Lord Richards and Sir Nicholas Patten (with whom Lord Stephens agreed), dissented, emphasising that the right of indemnity exists to protect the personal position of each trustee by giving them a right to seek an order for judicial sale; and contrasted this to a lien representing security for the payment of a debt.⁷² As such, the interest of successive trustees are competing and fall under the general principle granting first in time priority.⁷³

A common thread throughout the judgments (including the dissent) was a focus on the characterisation of the right of indemnity as an equitable lien over the trust assets. As in the Mohseni article to which I have referred above, the Privy Council emphasises that the proprietary interest conferred on a trustee (whether

⁶⁵ Ibid [166] (Lord Richards and Sir Nicholas Patten), [3] (Lord Reed).

⁶⁶ Ibid [4].

⁶⁷ Ibid [254] (Lord Briggs).

⁶⁸ Ibid [277].

⁶⁹ Ibid [313].

⁷⁰ Ibid [290] (Lady Arden).

⁷¹ Ibid.

⁷² Ibid [70]–[105] (Lord Richards and Sir Nicholas Patten).

⁷³ Ibid [210].

former or current) is in the limited form of an equitable lien. Though the question of any fiduciary obligations as *between* the former and successor trustees was not an issue before the Privy Council, the conclusions reached do align with the majority position of Leeming and Kirk JJA in *Jaken*, and with the position advocated for by Mohseni.

Halabi was specifically cited in Leeming JA's judgment in *Jaken*, in which his Honour noted that the decision is inconsistent with a fiduciary duty being owed in relation to the former trustee's entitlement to have recourse against trust assets.⁷⁴ If a fiduciary duty were owed in relation to those assets, then the pro-rata ranking of the interests of former and successor trustees upheld by the Privy Council would have been replaced by priority being given to the former trustee's entitlement. As Leeming JA acknowledges, arguments along the lines of those advanced in *Jaken* were not addressed to the Privy Council in *Halabi*.⁷⁵ His Honour considered that this reflected the novelty of the argument, and reflected what his Honour suggested was the associated low likelihood that a fiduciary relationship would be recognised.⁷⁶

Of course from a practical point of view what these cases illustrate is the importance of outgoing trustees to secure indemnification before control of the trust passes to the incoming trustee (or, to adopt an analogy that might have had some force in *Mallonland* — to shut the door before the horse, or mule, has bolted).

III FRAUD ON A POWER AND THE PROPER PURPOSE RULE

I now turn to a discussion of the doctrine of fraud on a power, touched on briefly by Mr Mohseni in his article regarding *Jaken*, and which has been the subject of some academic and judicial consideration of late, including a decision of the Privy Council and a scholarly article from barrister, Dr Jessica Hudson.

A Meaning of 'Fraud on a Power' in Contemporary Australian Law

The origins of the doctrine go back to the English cases of *Topham v Duke of Portland* and *Vatcher v Paull*.⁷⁷ Fraud on a power is defined in *Vatcher v Paull* as an equitable doctrine prohibiting the exercise of a power, in certain circumstances, for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power. A power, such as a trustee power, must only be exercised with good faith and sincerity, having regard only to the purpose and object of the power. The use of the word 'fraud' can be misleading in this context:

⁷⁴ *Jaken* (n 3) 354 [137] (Bowen LJ).

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ (1869) 5 Ch App 40, 59 (Lord Hatherley and Sir Giffard LJ); (1915) AC 372, 378 (Lord Parker of Waddington).

‘fraud on a power’ does not indicate any dishonesty, but simply action beyond the implied scope of a conferred power.

The doctrine’s express adoption in Australia was seen in the High Court decision of *Ngurli v McCann* (Williams ACJ, Fullagar and Kitto JJ), which cited both *Vatcher v Paull* and *Topham v Duke of Portland* in which their Honours described the doctrine as follows:

The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, ‘beyond the scope of or not justified by the instrument creating the power’, per Lord Parker in *Vatcher v Paull*. ‘The Court will not allow him’ (that is the appointor) ‘to interpret the donor’s intention in any other sense than the Court itself holds to be the true construction of the instrument creating the power; and a literal execution of the power, with a purpose which it does not sanction, is regarded as a fraud on the power’, per Hatherley LC in *Topham v Duke of Portland*.⁷⁸

This sentiment, regarding the meaning of ‘fraud’ in this context, has been repeated in more recent case law. The Western Australian Court of Appeal, citing *Ngurli v McCann*, further elaborated on the doctrine in *Mercanti v Mercanti*,⁷⁹ stating:

in the context of the equitable doctrine of fraud on a power, a power of variation conferred on a trustee by the trust deed must not be exercised for a purpose, or with an intention, beyond the scope of or not justified by the trust deed. The power can be exercised only for the purpose for which it is conferred and not for any extraneous or ulterior purpose.⁸⁰

The focus of the doctrine on the purpose of the underlying power is clear and is particularly visible in one of the more recent Australian decisions on this topic, being the judgment of Brereton JA in *Baba v Sheehan*.⁸¹ There, his Honour described the doctrine as requiring that a power be exercised bona fide for the purpose for which it was conferred.⁸² His Honour repeated, from *Vatcher v Paull*, the foundation of the doctrine, being that it ‘operates to avoid the exercise of a power where it has been exercised for a purpose, or with an intention, beyond the scope of, or not justified by, the instrument creating the power’.⁸³ Relevantly, Brereton JA went on to say that ‘such an exercise of power for an extraneous purpose is invalid and void’,⁸⁴ there citing *Vatcher v Paull* and *Mills v Mills*.⁸⁵ In *Mills v Mills*, Dixon J stated that ‘fiduciary agents’ must not exercise a power for a

⁷⁸ (1953) 90 CLR 425, 438 (Williams ACJ, Fullagar and Kitto JJ).

⁷⁹ (2016) 50 WAR 495, [244]–[245] (Buss P).

⁸⁰ (2016) 340 ALR 290, [245] (Newnes and Murphy JJ).

⁸¹ (2021) 151 ASCR 462.

⁸² *Ibid* [5] (Brereton JA).

⁸³ *Ibid* [6].

⁸⁴ *Ibid*.

⁸⁵ (1938) 60 CLR 150, 185 (Dixon J).

purpose foreign to the power, describing it as an application of the ‘general doctrine’ expressed by Lord Northington in *Aleyn v Belchier*.⁸⁶

Brereton JA concluded that the concern of the doctrine is therefore on ‘the purpose for which the power is conferred on its repository’.⁸⁷ While the language of ‘fraud on a power’ is employed throughout these judgments, the emphasis by all judges is that the relevant conduct is distinct from dishonesty or immorality, and the focus is on the purpose of the power. This sets the stage for the recent developments in the area, which have advocated for a change in terminology.

B Grand View v Wong — *Privy Council*

Another name for the doctrine is the ‘proper purpose rule’, which controls the exercise by a trustees of their powers (whether conferred on them by general law or by the trust instrument) by requiring that the power be exercised for the purpose for which it was conferred. Some secondary sources, such as Thomson Reuter’s Practical Law service, describe ‘fraud on a power’ as another, albeit misleading, name for the proper purpose rule.⁸⁸

The propriety of those descriptors as labels for the doctrine was the subject of a recent decision of the Privy Council, namely, *Grand View Private Trust Co Ltd v Wen-Young Wong* (‘*Grand View*’).⁸⁹

Grand View related to two trusts in Bermuda, set up by brothers Wang Yung-Ching and Wang Yung-Tsai. The first of these was a fully discretionary trust set up for the benefit of the brothers’ family. The second was a purpose trust for the perpetuation of the brothers’ business, along with some charitable purposes; relevantly, it conferred no benefit on family members. In 2005, the trustees of the discretionary trust excluded the family members from the beneficial class of the trust, and added the trustee of the purpose trust as the sole beneficiary. All assets of the discretionary trust were then appointed to the trustee of the purpose trust. The trustees justified their action on their powers in the trust deed, which permitted them to add or remove ‘any person or class or description of persons’ to the beneficiaries of the trust. Various heirs of the brothers brought proceedings against the trustees seeking to restrain the action.

At first instance, the Supreme Court of Bermuda found for the heirs, concluding that in removing the family beneficiaries, the trustees had altered the ‘substratum’ of the discretionary trust, as its underlying character was an irrevocable settlement for the benefit of family members. The trustees were successful in their appeal to the Bermuda Court of Appeal, which held that there

⁸⁶ Ibid, citing *Aleyn v Belchier* (1758) 28 ER 634.

⁸⁷ *Baba v Sheehan* (n 81) [7] (Brereton JA).

⁸⁸ Thomson Reuters, *Practical Law* (online at <<https://uk.practicallaw.thomsonreuters.com>>) ‘proper purpose rule’.

⁸⁹ [2022] UKPC 47 (‘*Grand View*’).

was no standalone rule that an exercise of trust powers could be set aside on the basis that it affected the 'substratum' of the trust. The Court of Appeal also held that the exercise of power had been for a proper purpose, and that it could be used without regard to the interests of the existing beneficiaries.

Finally, the Privy Council allowed the family members' appeal, holding that the amendments to the beneficial class of the trust was void.⁹⁰ While agreeing with the Court of Appeal that there the substratum rule did not exist as a freestanding, absolute rule which would in all cases circumscribe powers of amendment, Lord Richards (with whom Lords Hodge, Sale and Burrows and Lady Rose agreed) emphasised that the underlying purpose of the trust was of central importance in determining whether the actions were within power.⁹¹

Lord Richards noted the general view that, in the case of fiduciary powers conferred on a trustee of a trust with identified beneficiaries, those powers must be exercised to further the interests of the beneficiaries.⁹² In considering the power to add or exclude beneficiaries, a power Lord Richards described as one with the capacity to effect 'significant' or 'fundamental' changes to the trust, the relevant question is whether it is intended for the power to have any purpose that goes beyond simply furthering the interests of the beneficiaries.⁹³ Here, the context of the particular trust is key; in this case, a consideration of the trust instrument and circumstances surrounding it revealed the purpose of the trust, being to benefit the brothers' heirs. As such, the transfer of trust assets to the trustee of a purpose trust from which the family members would receive no benefit, could not be for a proper purpose.

As to the effect of that finding, Lord Richards noted the debate as to whether the purported exercise of power would be void or voidable; however in that case the parties agreed that the decision would be void.⁹⁴ This does align with the apparent Australian position on the issue, with Brereton JA in *Baba v Sheehan* stating that an exercise of power for an improper purpose would be 'invalid and void';⁹⁵ however, I will return to the issue of void and voidability.

As could be foreseen in even the earliest decisions on this topic, the Privy Council was critical of the use of the term 'fraud on a power', due to the potential application of the proper purpose rule even to good faith and genuine actions by a trustee. Lord Richards noted the description of 'fraud on a power' as 'historical language' by the New Zealand Supreme Court in *Kain v Hutton*,⁹⁶ and the remarks of Lord Sumption in *Eclairs Group Ltd v JKN Oil & Gas plc* that it was an

⁹⁰ Ibid [128] (Lord Richards).

⁹¹ Ibid [114].

⁹² Ibid [120].

⁹³ Ibid [121].

⁹⁴ Ibid [122].

⁹⁵ *Baba v Sheehan* (n 81) [6] (Brereton JA).

⁹⁶ [2008] NZLR 589, [46] (Tipping J).

‘inappropriate’ term.⁹⁷ His Lordship went so far as to advise that the Privy Council ‘considers that there is much to be said for discarding this historical language and referring instead to the proper purpose rule’.⁹⁸ Joel Nitikman KC, a Canadian lawyer and author, in his provocatively titled article ‘Goodbye and Good Riddance to the Doctrines of “Fraud on a Power” and “the Entire Substratum” — Now if Only We Could Figure Out the “Proper Purpose” Rule’, has concluded that, in the aftermath of *Grand View*, the only relevant question is whether the exercise of power is within the scope of power as written; with the doctrines of ‘fraud on a power’ and ‘substratum’ to be discarded in their entirety.⁹⁹

C *Dr Hudson’s Article*

To conclude the discussion of fraud on a power and the proper purpose rule, I briefly return to the question of the effect of the doctrine. I will do so by reference to an article written by Dr Jessica Hudson, formerly an Associate Professor and now an Adjunct Associate Professor at the University of New South Wales Faculty of Law and Justice. One argument set out in her article is that the effect of fraud on a power can be described as neither void or voidable.¹⁰⁰

Dr Hudson suggests that the more important question is as to the priority of equity’s response to the improper exercise, which will be determined by the interaction between the doctrine and the type of power purportedly exercised.¹⁰¹ The scope of the article encompasses a broad sweep of private powers, considering institutions such as companies and agency in addition to express trusts. However, for the purposes of this lecture I will confine myself to Dr Hudson’s commentary on express trusts.

As a preliminary point, Dr Hudson emphasises that the doctrine should be viewed as, at least in principle, imposing a *disability* rather than a *duty* on the holder of the power, such that the object of the power enjoys a correlative immunity from exercise (ie, the object’s legal relations cannot be changed by the purported exercise of the power for an improper purpose).¹⁰² Subsequently, Dr Hudson notes the importance of the context of the power, stating that in some settings the doctrine imposes an actual disability, and actually confines the scope of the power, while in other contexts does not confine the scope of the power, but generates an equity for relief as if the donee were disabled; something she

⁹⁷ [2015] UKSC 71, [15] (Lord Sumption).

⁹⁸ *Grand View* (n 89) [56] (Lord Richards).

⁹⁹ Joel Nitikman, ‘Goodbye and Good Riddance to the Doctrines of “Fraud on a Power” and “the Entire Substratum” — Now if Only We Could Figure Out the “Proper Purpose” Rule’ (2023) 29(3) *Trusts & Trustees* 248, 252.

¹⁰⁰ Jessica Hudson, ‘One Thicket in Fraud on a Power’ (2019) 39(3) *Oxford Journal of Legal Studies* 577.

¹⁰¹ *Ibid.*

¹⁰² *Ibid* 579.

describes as an ‘in-principle disability’.¹⁰³ Dr Hudson therefore advocates against an approach aiming to characterise the effect of fraud on a power as either void or voidable, arguing that the better approach is to look to whether an actual or in-principle disability is imposed, which allows for consideration of the type and priority of the equity for relief that is generated.¹⁰⁴

A key aspect of the argument is the importance of distinguishing between various powers. In respect of powers to vary, create, or extinguish the equitable interest under a trust, Dr Hudson argues that the doctrine does operate to define the scope of such powers.¹⁰⁵ The effect of the proper purpose rule is therefore to render the purported exercise ineffective, with an actual disability imposed on the holder of the power, such that the object of the power enjoys an immunity from the fraudulent exercise.¹⁰⁶

The basis for this argument is that powers that vary, create, or extinguish equitable interests are effective only to the extent that a court would order the person holding title to the relevant property to act in accordance with the exercise of the power.¹⁰⁷ In the case of a fraudulent exercise of power, a court would not make such an order. In this sense, Dr Hudson argues that the purported exercise of power, if for an improper purpose, is ineffective.¹⁰⁸ In cases involving fraud on a power and express trusts, beneficiaries have been able to rely on their pre-existing equitable interest, such as to assert a proprietary claim to seek recovery of property (as in the cases of *Foskett v McKeown* and *Akers v Samba Financial Group*,¹⁰⁹ or to assert the priority of their equitable title (as in *Daubeny v Cockburn*, *In Re Marsden’s Trust* and *Cloutte v Storey*).¹¹⁰ That the exercise of power for an improper purpose is ineffective is also demonstrated by the fact that ratification from the beneficiary is not possible. Rather than being effective, but capable of being set aside, the purported exercise of power is ineffective from the outset.

In contrast, Dr Hudson considers the power of a trustee to deal with the legal title to the trust property; in this case, fraud on a power does not prima facie limit the scope of the power.¹¹¹ As the power to deal with trust property is an incident of the trustee’s title, the scope of the power is therefore determined by the applicable law (for example, where the trust property is land, by the law of real property). However, where fraud on a power may give effect to an *in-principle* disability is where the doctrine has disabled the exercise of the separate power to overreach the beneficiary’s interest. As the scope of the power to overreach is defined by the proper purpose rule (as with other powers to vary or extinguish equitable interests),

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid 583.

¹⁰⁶ Ibid 584.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid 585.

¹⁰⁹ [2001] 1 AC 102, 127 (Lord Millett); [2017] UKSC 6.

¹¹⁰ (1816) 1 Mer 626 (Ch); (1859) 4 Drewry 594 (Ch); [1911] 1 Ch 18 (CA).

¹¹¹ Hudson (n 100) 585.

the power to deal with legal title may become subject to an in-principle disability where it would represent a fraudulent use of the power to overreach.

By example, in cases such as in *Wong v Burt*, where a trustee transfers title to trust property to third parties for an improper purpose, although the transfer itself is not rendered ineffective, and the third party does receive title, the beneficiaries are able to rely on their pre-existing equitable interest to seek recovery of the property.¹¹² Dr Hudson uses this example to demonstrate that the labels of void and voidable are not helpful — the trustee's dealing with title is 'voidable', in the sense that the transfer is effective in conferring title, but can also be described as 'void', due to the doctrine's disabling of the trustee's power to overreach.¹¹³

Dr Hudson acknowledges the consequences of her argument, being that a default preference arises for the trust beneficiary's equitable interest as against third parties with later equitable interests, rather than a mere equity to set aside the transaction which may be deferred in priority.¹¹⁴ Dr Hudson defends this position by noting the presence of equitable discretionary factors which still provide protections for a third party, and the strong policy justification for a default preference in favour of the trust beneficiary, particularly the position that equity should acknowledge and protect the institution of the express trust.¹¹⁵

In recent significant cases to consider fraud on a power, the discussion of the effect of the doctrine has either been a non-issue (such as in *Grand View*) or, when considered in any depth (for example in *Pitt v Holt*),¹¹⁶ has largely been confined to a discussion of whether the purported exercise of power is void or voidable. Dr Hudson's article goes beyond that question and has interesting implications for the future of this doctrine; as Dr Hudson herself acknowledges, the analysis she propounds may somewhat disturb the current state of the law relating to priority contests.¹¹⁷ As with the 'slimmed-down' approach to the rule itself proposed by the Privy Council in *Grand View*, it will be interesting to see over the coming years to what extent, if any, Australian courts adopt Dr Hudson's proposed approach to the consequences of the proper purpose rule.

IV *KRAMER V STONE* — STANDARDS OF KNOWLEDGE IN EQUITABLE ESTOPPEL

Moving away from trustee duties but returning to the theme of New South Wales Court of Appeal decisions in respect of which special leave has been granted, I will conclude by touching on the case of *Kramer v Stone* ('*Kramer*'), which most

¹¹² [2004] NZCA 174.

¹¹³ Hudson (n 100) 588.

¹¹⁴ *Ibid* 591.

¹¹⁵ *Ibid* 591–2.

¹¹⁶ [2013] UKSC 26.

¹¹⁷ Hudson (n 100) 602.

interestingly (at least to my mind) concerned the requisite standard of knowledge on the part of the representor for an estoppel by encouragement to be made out.¹¹⁸ As with *Jaken*, the High Court, having heard the appeal in September, is currently reserved. In the High Court the argument (by reference to the transcript) appeared to be put somewhat differently than it was in the Court of Appeal. In the High Court it was said that there were two cascading propositions — first, that in the field of proprietary estoppel by encouragement, the equity arises in favour of an intended donee from the conduct of the donor *after* the element of encouragement that is said to give rise to the relevant unconscionability and, second that in a case where the only conduct of the donor after making the voluntary promise is said to be knowledge of the detrimental reliance, constructive knowledge is insufficient for that purpose.

This case involved a dispute around a farming property in the Hawkesbury region of New South Wales, owned by the late Dame Leonie Kramer (formerly a Professor of Literature at the University of Sydney), following the death of her late husband Dr Harry Kramer. Under Dame Leonie's final will, the property was left to her daughter, Hilary, the first appellant.

However, Mr David Stone, the respondent, brought proceedings alleging that he was entitled to the property on the basis of an equitable estoppel. Mr Stone had farmed the property under an oral share farming agreement since 1975, and claimed that Dame Leonie had made a representation to him that he would receive the property on her death, following earlier representations made by Dr Harry Kramer to similar effect.

The primary judge (Robb J), finding for Mr Stone, held that the property was held on constructive trust for him, on the basis of an equitable estoppel arising out of the representation made by the deceased.¹¹⁹ The primary judge agreed that Mr Stone had relied on the representation to his detriment; and found that Dame Leonie 'ought reasonably to have assumed'¹²⁰ and 'ought to have known' that Mr Stone had continued with the share farming agreement on the expectation that he would inherit the property.¹²¹ The primary judge specifically addressed the standard of knowledge required of the representor, stating that:

subjective knowledge on the part of the representor is not essential, provided that a reasonable person in the position of the representor would understand that it was probable that the representee was engaging in the conduct in the expectation that the representation would be realised.¹²²

This was in reliance on the statements of Deane J in *Commonwealth of Australia v Verwayen* ('*Verwayen*') that 'a critical consideration will commonly be

¹¹⁸ (2023) 112 NSWLR 564 ('*Kramer*').

¹¹⁹ *Stone v Kramer* (Supreme Court of New South Wales, Robb J, 10 November 2021) [252].

¹²⁰ *Ibid* [234].

¹²¹ *Ibid* [251].

¹²² *Ibid* [234].

that the allegedly estopped party knew or intended or clearly ought to have known that the other party would be induced by his conduct to adopt, and act on the basis of, the assumption'.¹²³

On appeal brought by Hilary and her co-executor before a court constituted by Leeming JA, Kirk JA and me, a key issue was whether it was necessary for there to have been a finding of actual knowledge by Dame Leonie that Mr Stone had acted to his detriment (where constructive knowledge had been made out).

The appellants contended that, for a case of estoppel by encouragement, actual knowledge is required; there citing the judgment of Brennan J in *Waltons Stores v Maher* ('*Waltons Stores*'),¹²⁴ and its explicit acceptance in the New South Wales Court of Appeal in the cases of *DHJPM v Blackthorn Resources* ('*DHJPM*') per Meagher JA,¹²⁵ and *Doueihi v Construction Technologies Australia* per Gleeson JA.¹²⁶ The appellants argued that the requirement in a *Dillwyn v Llewelyn* proprietary estoppel case,¹²⁷ that the representor knew or intended that the representee would act to their detriment, had its genesis in Lord Kingsdown's dissent in *Ramsden v Dyson*,¹²⁸ which was quoted with approval by both Brennan J in *Waltons Stores* and Meagher JA in *DHJPM*.¹²⁹ The appellants emphasised that Brennan J's matters necessary to establish an equitable estoppel included the requirements that 'the plaintiff acts or abstains from acting in reliance on the assumption or expectation' and that the defendant 'knew or intended him to do so'.¹³⁰

As to the 'clearly ought to have known' formulation applied by the primary judge, in reliance on Deane J's judgment in *Verwayen*, the appellants noted that his Honour's statement of the general doctrine of estoppel by conduct has not been accepted by either this Court or the High Court,¹³¹ noting Gleeson JA's decision in *Doueihi* and the decisions of Dawson and McHugh JJ in *Giumelli v Giumelli*.¹³² The appellants, characterising this case as an orthodox proprietary estoppel case, involving an estoppel by encouragement, argued that the primary judge was bound by *DHJPM* to apply the test of actual knowledge or intention articulated by Brennan J in *Waltons Stores*, and erred in applying the constructive knowledge test as in Deane J's formulation in *Verwayen*.¹³³

¹²³ (1990) 170 CLR 394 ('*Verwayen*').

¹²⁴ (1988) 164 CLR 387 ('*Walton Stores*').

¹²⁵ (2011) 83 NSWLR 728 ('*DHJPM*').

¹²⁶ (2016) 92 NSWLR 247 ('*Doueihi*').

¹²⁷ (1862) 4 De GF & J 517.

¹²⁸ (1866) LR 1 HL 129.

¹²⁹ *Kramer* (n 118) [172].

¹³⁰ *Ibid.*

¹³¹ *Ibid* [176].

¹³² (1999) 196 CLR 101.

¹³³ *Kramer* (n 118) [177] (Ward P).

A *Ward P*

I considered that the fundamental issue was:

whether, in the case of an estoppel by encouragement (where, ex hypothesi, there has been an express or implied representation made by the defendant capable of establishing the necessary element of encouragement), it is necessary that the defendant have actual knowledge of the acts undertaken in (detrimental) reliance on the representation, i.e., knowledge of the acts (or abstention of acts) of reliance ‘after’ the making of the representation.¹³⁴

In a case of estoppel by encouragement, the question of the representor’s knowledge of reliance goes to whether departure from the representation would be unconscionable so as to warrant equitable intervention to prevent the defendant resiling from the representation. It seemed to me, therefore, that knowledge of acts in reliance on the representation is a necessary element for a proprietary estoppel by acquiescence (since it is the knowledge and standing by that engages the conscience of the party sought to be estopped) but not necessary in an estoppel by encouragement, where the conscience has been sufficiently engaged through the encouragement made by the representation in the first place.¹³⁵ I considered that this approach resolved the seeming conflict between the approaches by Deane J in *Verwayen* and Brennan J in *Waltons Stores*, and also enabled cohesion with the standard of proof borne by a plaintiff in proving the detrimental reliance (which is also an objective standard).¹³⁶

As the focus of equitable estoppel is on unconscionability, knowledge of the acts undertaken in detrimental reliance on the representation or promise is relevant, but not essential, in a case of estoppel by encouragement — the encouragement in making the representation should be sufficient to satisfy the requirement of unconscionable conduct, where there has in fact been reasonable reliance on the representation.

On the facts of *Kramer*, it was (and is) my view that the primary judge’s finding that the deceased ought to have known of the detrimental reliance did not demonstrate error in the finding of estoppel by encouragement.¹³⁷ The question of the representor’s knowledge of the detrimental reliance, whether actual or constructive, went to the unconscionability of the estate resiling from the representation; as such, it was not necessary for me to express any concluded view in that case as to whether such knowledge must be actual or constructive.¹³⁸

¹³⁴ Ibid [197].

¹³⁵ Ibid [200].

¹³⁶ Ibid [199].

¹³⁷ Ibid [203].

¹³⁸ Ibid [202].

B *Leeming JA*

Leeming JA, agreeing but writing separately on this point, did express a view as to the standard of knowledge required. His Honour also identified the key issue as: ‘whether a claim based on estoppel by encouragement was available if it were not shown that the representor ... had actual knowledge of the plaintiff’s ... assumption’.¹³⁹

His Honour considered that while the point was not yet settled, the weight of authority suggested that actual knowledge is not necessary.¹⁴⁰

Leeming JA considered Brennan J’s judgment in *Waltons Stores*,¹⁴¹ being as it was the foundation of the appellants’ argument, noting in particular Brennan J’s reference to, and approval of, passages from the judgment of Dixon J in *Thompson v Palmer*.¹⁴² It is clear from that passage that Dixon J distinguished between cases of estoppel by encouragement, where the assumption is brought about by an express representation, and estoppel by silence, where the assumption is known to but uncorrected by the defendant. Consistently with that distinction, it was in the context of an equitable estoppel arising by silence in which Brennan J insisted upon knowledge.

Where the inducement comes about not by standing by as the plaintiff laboured under an incorrect assumption, but because of the representor’s own positive encouragement, the element of inducing the assumption may be satisfied by the encouragement alone; here Leeming JA emphasised the significance of the words ‘or intended him to do so’ in Brennan J’s judgment.¹⁴³ Leeming JA’s view was that Brennan J’s requirement that ‘the defendant knew or intended him to do so’ was a disjunctive, intended to capture first, cases of silence where the defendant *knew* that the plaintiff was labouring under an incorrect assumption, and second, cases of encouragement where the defendant *intended* the plaintiff to hold the assumption.¹⁴⁴ In a case where the plaintiff’s assumption has been brought about by the defendant’s own express assumption, his Honour stated, the weight of authority suggests that actual knowledge of that assumption is not necessary.¹⁴⁵

Noting the debate as to whether there had been assimilation into a single equitable estoppel, Leeming JA (as did I), emphasised the distinction between the two species of proprietary estoppel — estoppel by encouragement and by acquiescence — and, relevantly, distinguished between the tests for those two species.¹⁴⁶ His Honour stated that, in a case where the equitable estoppel could be supported by silence, Brennan J’s judgment in *Waltons Stores* makes it clear that

¹³⁹ Ibid [278] (Leeming JA).

¹⁴⁰ Ibid [291].

¹⁴¹ Ibid [285].

¹⁴² (1933) 49 CLR 507, 547 (Dixon J).

¹⁴³ *Kramer* (n 118) [287] (Leeming JA).

¹⁴⁴ Ibid [288].

¹⁴⁵ Ibid [291].

¹⁴⁶ Ibid [293].

knowledge is required; however, in a case of positive encouragement, it is artificial to require that the defendant both knew that they had encouraged the plaintiff to adopt an assumption, *and* knew that the plaintiff had relied on the encouragement.¹⁴⁷ Leeming JA here noted the example of two landowners, both of whom had made the same representations to their neighbours, who had then acted upon it, and queried why one should be in a different position if they were thereafter absent from the country and had no means of knowing what steps the neighbours had taken.¹⁴⁸

Leeming JA (as, again, did I), favoured the dismissal of the appeal, and concluded that the weight of authority favoured the primary judge's conclusion that actual knowledge of detrimental reliance is not required in a case where the defendant's own positive encouragement brought about the plaintiff's assumption.¹⁴⁹

C Conclusions

What Leeming JA and I emphasised was that the focus in any specie of equitable estoppel must be on unconscionability; specifically, whether the departure by the defendant from an assumption adopted by the plaintiff was or would be unconscionable. It is logical, therefore, that any knowledge requirements on the part of the defendant depend on how that assumption was formed. In a case of express and intentional encouragement, then it will likely be unconscionable for the representor to resile from the assumptions they have created, regardless of their actual knowledge of the steps taken pursuant to that assumption. In contrast, where the estoppel involves a defendant standing by in silence as the plaintiff labours under an incorrect assumption, it is of course necessary that the defendant had knowledge of that assumption.

This position has been explicitly advocated for (if not so clearly by courts) by academics for some time. As noted by Leeming JA,¹⁵⁰ Professor Andrew Robertson stated in 1988 in the *Monash University Law Review* that, '[i]t is only in cases where the representor has not actively induced the adoption of the relevant assumption that questions of knowledge or intention become relevant'.¹⁵¹

Again, we await the High Court's view on this issue with interest (if, on the somewhat revised formulation put to the High Court, this arises for determination).¹⁵²

¹⁴⁷ Ibid [294].

¹⁴⁸ Ibid.

¹⁴⁹ Ibid [295].

¹⁵⁰ Ibid [294].

¹⁵¹ Andrew Robertson, 'Knowledge and Unconscionability in a Unified Estoppel' (1998) 24 *Monash University Law Review* 115, 117.

¹⁵² See Postscript, Part VI below.

V CONCLUSION

I have spoken before about the etymological derivation of equity (the Roman *aequitas*) and have observed that on some accounts the contemporary principles of equity can be traced back even further than ancient Rome.¹⁵³

The articulation by Aristotle of the justification for equity as a ‘correction’¹⁵⁴ or ‘rectification’¹⁵⁵ of law where it is deficient on account of its universality accords with Professor Lee’s emphasis, in his telephone conversation with me before this talk on ‘conscience’ as the foundation of equity or equitable principle. The bright thread of equity as ‘a correction of [common] law’ can readily be seen in more modern notions of equity (see, for example, Lord Ellesmere’s judgment in *The Earl of Oxford’s Case*,¹⁵⁶ which has been regarded as the ‘wellspring of equity in modern English law’).¹⁵⁷

The continuing development of equity, even after hundreds of years, is nothing short of remarkable. So, for example, the doctrine of fraud on a power, 300 years after it was created by what Mr Nitikman KC described as ‘one judge’s off-the-cuff remark’,¹⁵⁸ now sees a significant overhaul, at least in respect of terminology, and likely also through a simplification of the approach taken to an allegation of fraud on a power — or, should I say, improper purpose. Even since *Grand View*, the historical language of fraud on a power has continued to be used in Australia (for example, in *Soulos v Pagones*, albeit in passing),¹⁵⁹ so it will be interesting to see if both the terminology and approach advocated for by the Privy Council are adopted in this jurisdiction if a case arises in which it is a central issue. I am similarly intrigued to see whether a case arises in the coming years that requires a court to give any consideration to Dr Hudson’s arguments regarding the effects of the doctrine.

All of which is goes to say that the future for debate by academics and lawyers as to equitable principle remains bright! And the apocryphal length of the Chancellor’s foot (which in my day was generally shod with quite fashionable shoes if I do say so myself!) will remain relevant for quite some time (to quote John Selden’s well-known aphorism for equity’s measure).

My thanks to the Queensland Gives (Queensland Community Foundation) chaired by the Hon Margaret McMurdo AC and to the University of Queensland (and particularly Professor Rick Bigwood) and other sponsors for the opportunity to present this lecture. I am indeed honoured that this is the first to have been presented by a guest lecturer from outside your beautiful State!

¹⁵³ See Catharine Titi, *The Function of Equity In International Law* (Oxford University Press, 2021) 17.

¹⁵⁴ Aristotle, *Nicomachean Ethics*, tr Roger Crisp (Cambridge University Press, 2004) 100.

¹⁵⁵ Aristotle, *Nicomachean Ethics*, tr Terence Irwin (Penguin, 1999) Book V ch 10.

¹⁵⁶ (1615) 1 Chan Rep 1.

¹⁵⁷ Gary Watt, *Equity Stirring* (Hart, 2009) 67.

¹⁵⁸ Nitikman (n 999) 248.

¹⁵⁹ [2023] NSWCA 243, [243] (Ward P).

VI POSTSCRIPT

Since this paper was delivered, the High Court has handed down its decisions in the two appeals referred to in my paper where judgment was reserved at the time (*Jaken* and *Kramer*). In both cases the appeal was dismissed by a majority of the High Court. In view of their importance to the modern development of equity in Australia, I briefly address those decisions.

A *Kramer v Stone*

In *Kramer v Stone*, the High Court on 11 December 2024, by majority (Gageler CJ, Gordon, Edelman and Beech-Jones JJ) dismissed Kramer's appeal. Justice Gleeson dissented.¹⁶⁰

The appellants in the High Court proceeded on two bases: first, that the equity in cases of estoppel by encouragement 'arises... from the conduct of the donor after the making of the voluntary promise',¹⁶¹ thus requiring some act of further encouragement after the making of the promise or representation; and, second, that constructive knowledge of detrimental reliance is insufficient to establish unconscionability, at least where knowledge is the only matter which would support an unconscionability finding.

Neither of those propositions was accepted by the majority.¹⁶²

As to the first (that there must be further subsequent encouragement after the promise), the majority said this inappropriately transposed the principles concerning the circumstances in which equity is said to perfect an imperfect gift.¹⁶³ As to the second (that actual knowledge of reliance on the promise is required), the majority said that this erroneously conflated the principles of estoppel by encouragement from a promise with the principles concerning estoppel by acquiescence.¹⁶⁴ Thus, the majority considered that it is the act of positive encouragement, together with the expectation (or knowledge thereof) that the promise would be relied upon in the general (detrimental) manner upon which it was relied, which binds the conscience of the promisor, so as to give rise to the equity.

As noted above, Gleeson J dissented, departing from the majority on the first of the propositions relied upon by the appellants. Her Honour considered that the first contention (that it was necessary for there to be conduct of encouragement after the promise) was correct.¹⁶⁵

¹⁶⁰ (2024) 99 ALJR 126.

¹⁶¹ *Corin v Patton* (1990) 169 CLR 540, 557 (Mason CJ and McHugh J).

¹⁶² *Kramer v Stone* (n 160) [34]–[35] (Gageler CJ, Gordon, Edelman, Beech-Jones JJ).

¹⁶³ *Ibid* [44].

¹⁶⁴ *Ibid*.

¹⁶⁵ *Ibid* [68].

Her Honour considered that a series of cases, including *Dillwyn v Llewelyn* and *Giumelli v Giumelli*,¹⁶⁶ established the principle that, for proprietary estoppel by encouragement, something more than a promise and detrimental reliance upon the promise is required.¹⁶⁷ As such, her Honour found that the promisor must encourage the promisee's reliance upon the relevant expectation or belief through acts subsequent to the promise; the corollary to this being that it thereby denies the creation of estoppel by mere reliance or an executory promise to do something.¹⁶⁸

Her Honour considered that such a requirement recognised that a voluntary promise would rarely be sufficient to induce an assumption that a promisee will inherit a property so as to bind the promisor to that voluntary promise (referring in this context to what was said in *Waltons Stores*).¹⁶⁹

The majority decision in *Kramer* thus confirms the position under Australian law as to the elements required to establish estoppel by encouragement.

B Naaman v Jaken Properties Australia Pty Ltd

On 5 February 2025, in *Naaman v Jaken Properties Australia Pty Ltd* the High Court handed down its decision on the *Jaken* appeal, dismissing the appeal.¹⁷⁰ Their Honours were more divided on this appeal. Gageler CJ, Gleeson, Jagot and Beech-Jones JJ were in the majority; Gordon, Edelman and Steward JJ in dissent.

The question posed to the High Court, as it was to the Court of Appeal, was whether a fiduciary obligation is owed by a successor trustee in respect of the entitlement of the former trustee to indemnification out of trust assets or a commensurate beneficial interest in trust assets following the former trustee's replacement by the successor trustee.

The majority answered this question in the negative,¹⁷¹ explaining that the answer lay in the limited and focused nature of the trustee's entitlement to indemnification out of the trust assets, that being an entitlement to have the trust assets applied for the purpose of recouping expenditure or exonerating liability properly incurred by the trustee.¹⁷² Their Honours went on to say that:

Once the nature of the entitlement is appreciated to be so limited and so focused, there is insufficient justification for superimposing on the entitlement to indemnification and commensurate beneficial interest in the trust assets retained by a former trustee a personal fiduciary obligation on the part of the successor trustee to the former

¹⁶⁶ (n 124); (n 132).

¹⁶⁷ *Kramer v Stone* (n 160) [93] (Gleeson J).

¹⁶⁸ *Ibid* [94].

¹⁶⁹ *Ibid* [68], [95], citing *Waltons Stores* (n 124) 406.

¹⁷⁰ *Naaman v Jaken Properties Australia Pty Ltd* (2025) 99 ALJR 295.

¹⁷¹ *Ibid* [6] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) ('*Jaken 2025*').

¹⁷² *Ibid* [12].

trustee, either generally or upon the successor trustee becoming aware of the former trustee having a claim to indemnification.¹⁷³

Though noting the semantic indeterminacy of attempting neatly to ascribe nomenclature to the nature of the interest, referring to *Halabi*, their Honours characterised the trustee's interest in the trust assets as akin to a charge.¹⁷⁴ However, they noted this characterisation is not of the synallagmatic or conventional kind,¹⁷⁵ referring to *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth*.¹⁷⁶

The majority noted that the equitable remedies which are attendant with breaches of fiduciary obligation, namely, equitable compensation and account, are not available to the former trustee; and that the final order that a court of equity would make on the application of a trustee to enforce its entitlement, though *in personam*, would not concern any pre-existing obligation on the part of the successor trustee — rather, it would enforce the entitlement of the former trustee of the kind as described above.¹⁷⁷ The majority pointed out that the interim steps a court of equity may take to prevent the destruction, diminution or otherwise jeopardising of this equitable entitlement by a successor trustee likewise did not depend for their making on any pre-existing obligation on the part of the successor trustee to the former trustee,¹⁷⁸ referring to *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd*.¹⁷⁹ At [30], their Honours emphasised that:

The important point for present purposes is that it is unnecessary to postulate the successor trustee owing any obligation to the former trustee for a court of equity to be able to protect the former trustee's entitlement to indemnification out of and commensurate beneficial interest in the trust assets from being destroyed, diminished, or jeopardised by any conduct of the successor trustee. Whether a successor trustee owes any fiduciary obligation to a former trustee in respect of the entitlement to indemnification out of trust assets or the commensurate beneficial interest in the trust assets is accordingly to be answered at the level of equitable principle in the context of the absence of such need.

The majority expressly rejected the reliance by the appellant on the notions of vulnerability and incoherence which had found favour with Bell CJ in the Court of Appeal.¹⁸⁰

As to the argument by reference to vulnerability (founded on the reality that a former trustee is at risk of a successor trustee dealing with the trust assets in a manner adverse to the former trustee's entitlement to indemnification and

¹⁷³ Ibid.

¹⁷⁴ Ibid [22].

¹⁷⁵ Ibid [20]–[21].

¹⁷⁶ (2019) 268 CLR 524, 560.

¹⁷⁷ *Naaman v Jaken Properties Australia Pty Ltd* (n 170) [27] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

¹⁷⁸ Ibid [29].

¹⁷⁹ (2008) 74 NSWLR 550, 561 (Brereton J),

¹⁸⁰ *Naaman v Jaken Properties Australia Pty Ltd* (n 170) [41].

commensurate beneficial interest without notice to the former trustee and therefore without the former trustee having an opportunity to approach a court of equity to seek an interlocutory injunction or the appointment of a receiver to protect the former trustee's entitlement to indemnification), the majority said that this was the inevitable consequence of the transmission of the trust assets from one trustee to the other,¹⁸¹ and that 'vulnerability is not the touchstone of a fiduciary relationship'.¹⁸²

The majority said that vulnerability is relevant to the existence of a fiduciary relationship only to the extent that the vulnerability in question is suggestive of a responsibility on the part of the putative fiduciary to act in the interests of the vulnerable party to the exclusion of the interests of the putative fiduciary,¹⁸³ and that the vulnerability of a former trustee to an unnotified dealing with the trust assets by a successor trustee

is no more suggestive of a responsibility on the part of the successor trustee to act solely in the interests of the former trustee than the vulnerability of a chargee under a conventional equitable charge to an unnotified dealing with the charged property by the chargor is suggestive of a responsibility on the part of the chargor to act solely in the interests of the charge.¹⁸⁴

this being 'in truth no more than a complaint that the equitable remedies available to a former trustee are inadequate'.¹⁸⁵

As to the argument by reference to incoherence, the majority considered that this came down

to an assertion that for a successor trustee to owe fiduciary obligations to a *cestui que trust* but not to owe a fiduciary obligation to a former trustee would be anomalous given that both have beneficial interests in the trust assets and would be especially anomalous given that the beneficial interest of the former trustee takes priority over that of the *cestui que trust*.¹⁸⁶

They further said that the basis for that perception of anomaly is removed once it is recognised that, as has been explained, the beneficial interest of the former trustee is of a different nature from the beneficial interest of the *cestui que trust*.¹⁸⁷

At [46], the majority considered the absence of anomaly to be even more apparent having regard to the fact that the successor trustee, by reason of its own entitlement to indemnification, has its own beneficial interest in the trust assets of the same nature as the beneficial interest of the former trustee. Their Honours

¹⁸¹ Ibid [42].

¹⁸² Ibid [43].

¹⁸³ Ibid.

¹⁸⁴ Ibid [44].

¹⁸⁵ Ibid.

¹⁸⁶ Ibid [45].

¹⁸⁷ Ibid.

said that notice could be taken of the co-existence of the beneficial interests of the former trustee and of the successor trustee without needing to examine whether the two interests rank *pari passu* or whether the interest of the former trustee takes priority over the equivalent interest of the successor trustee (referring to *Halabi*).

The minority held that there was a fiduciary obligation as the appellant had contended, saying that this arose because the relationship between the successor trustee and the former trustee was one by which the successor trustee assumes a responsibility to the former trustee as would reasonably entitle the former trustee to expect that the successor trustee will act in relation to the trust assets in the interests of the former trustee to the exclusion of its own or a third party's interest.¹⁸⁸ The minority said that it was an obligation not to allow the successor trustee's personal interests to conflict with its objectively assumed duty of loyalty to the former trustee when dealing with assets to which the former trustee has an equitable proprietary right, noting that the conflict principle is the irreducible core of the fiduciary obligation.¹⁸⁹ Their Honours considered that the fact that the former trustee's right of exoneration out of the trust assets for the expenses or liabilities incurred by the trustee takes priority over the claims of beneficiaries reinforced the fiduciary nature of the obligation not to deal with the trust estate so as intentionally to destroy, diminish or jeopardise the former trustee's entitlement to be indemnified from the trust estate.¹⁹⁰

At [92], the minority emphasised that the issue in the appeal was not resolved by looking only at the nature or extent of the former trustee's rights against the trust fund or only by recognising that the successor trustee holds property in which the former trustee has a preferred equitable proprietary interest. Rather, the minority said that it was to be the issue is to be decided by recognising, first, that the former trustee had an existing right of exoneration out of the trust property (not merely a contingent right) which gave rise to equitable proprietary rights in relation to the trust estate and, second, that the successor trustee was bound to prioritise that right over the claims of the beneficiaries of the trust.

At [94], the minority appears to have accepted the incoherence argument, saying that

[i]t is peculiar indeed if the critical feature of a fiduciary relationship — an undertaking to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense — supported only a fiduciary relationship with the beneficiaries of the trust and not with the former trustee whose equitable proprietary

¹⁸⁸ Ibid [54] (Gordon, Edelman and Steward JJ).

¹⁸⁹ Ibid.

¹⁹⁰ Ibid [55].

interest in relation to the trust assets, objectively apparent to the successor trustee, is given legal priority over that of the beneficiaries.

And at [95], their Honours addressed the argument as to vulnerability, saying that:

where a person has undertaken to perform a function for, or has assumed a responsibility to, another as would thereby reasonably entitle that other to expect that they will act in that other's interest to the exclusion of their own or a third party's interest, such a relationship may be fiduciary. The objective undertaking of an express trustee, even of a bare trust, is to act in relation to the trust assets in the interests of those holding equitable proprietary rights in relation to those assets. The relationship is one in which the former trustee relevantly stands in the same position of vulnerability as the beneficiaries of the trust with respect to its equitable proprietary interests in relation to the trust assets, as to which the successor trustee has accepted responsibility. Put in different terms, in circumstances where no positive obligation is owed to either a former trustee or beneficiaries, the nature and content of the rights in substance are the same and it does not matter whether the successor trustee is described as holding the trust property *for* the beneficiaries or the former trustee, or *subject* to the interest of the beneficiaries or the former trustee (emphasis in original).

As noted in my paper, the issue here determined by the High Court has obvious ramifications for claims against third party knowing recipients of trust funds in circumstances as arose in *Jaken*, since the absence of a fiduciary duty precludes *Barnes v Addy* liability arising.