Trust Law Committee
Discussion Document

Trustee Indemnities and the Priority Ranking of Claims against Trust Property

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1. Introduction

1. Recent decisions of the Privy Council and the Australian appellate courts have shown that significant analytical and policy questions arise in connection with the law affecting trustee indemnities and the priority ranking of claims against trust property, including but not limited to claims by retired and current trustees. The decisions include *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth of Australia* (2019) 268 CLR 524, *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2019] AC 271, *Equity Trust (Jersey) Ltd v Halabi* [2023] AC 877 and *Jaken Properties Australia Pty Ltd v Naaman* [2023] NSWCA 214. It is assumed that readers are familiar with these cases. This document sets out some of the questions to stimulate discussion and possible suggestions for law reform.

2. Part 2 concerns conceptual and analytical problems which are baked into the language commonly used by courts, counsel and commentators when speaking of a trustee's 'right to indemnity' and a trustee's 'lien' over or 'proprietary interest in' the trust property to secure this right. It is suggested that this language conceals and perpetuates misunderstandings about the way that trusts work.

3. Part 3 concerns the relationship between retired and current trustees. Policy questions arise in connection with this that can be decided whatever view one takes of the analytical problems identified in Part 2. These include whether current trustees should owe retired trustees a duty to preserve trust property out of which retired trustees might take an indemnity; and whether trustees can agree among themselves, and/or with beneficiaries, and/or with third parties, to depart from any 'priority ranking' of claims against trust property arising at law, of the kind considered in Part 4.

4. Part 4 concerns the resolution of 'priority disputes' between trustees seeking indemnities and/or other parties with claims against trust property. Do the cases disclose a default 'priority ranking' of claims against trust property, to resolve competition between claimants when there are insufficient funds to go round?

2. Analytical and Conceptual Questions about Trustee Indemnities

5. Many authorities, including *Investec* [59](v) and *Equity Trust* (passim) hold that a trustee has a 'right' to be indemnified for authorised trust expenses out of the trust fund. In *Equity Trust* it was also said that because the court will give effect to the trustee's right, the trustee has an 'equitable proprietary right': [63]-[65], [72], [77], [94], [110], [114]. The court did not give a full and clear explanation of what sort of proprietary right this was and Lord Briggs described it as *sui generis*: [250]. Questions arise about this characterisation of a trustee's power to pay authorised trust expenses out of the trust property or to reimburse herself out of the trust property where she has paid such expenses out of her own resources.

(a) Do trustees have 'rights' to indemnity at all?

6. Although trustees are commonly said to have 'rights' to be indemnified out of trust property, it is suggested that this cannot always mean that trustees have 'claim-rights'. This term is derived from the work of Wesley Hohfeld. It denotes rights against another person to have things done for one, a corresponding duty to do the relevant things being owed by the other person; in Hohfeld's terminology, such rights differ from 'liberties', which are rights to do things for oneself. To explain why a trustee's ability to take an indemnity out of trust property cannot always be a claim-right, a distinction must be drawn between current and retired trustees.

(i) Current trustees

7. A current trustee owns the trust property and it is nonsensical to speak of the trustee having a claim-right against herself that she should use the property to indemnify herself for incurring trust expenses. It is more meaningful to describe a current trustee's 'right' as being a *power* or *permission* to use the trust property for the purposes of indemnification.

8. It is suggested that the position of a current trustee is this:[1] (i) when running the trust affairs, the trustee may legitimately incur debts and other obligations; (ii) 'the trust' has no legal personality, and so these obligations can only be owed to relevant third parties by the trustee; (iii) because these are duties incurred in the performance of the trustee's office she is empowered or permitted to pay for them out of the trust property, either by transferring trust property to the relevant third party directly, or by paying the third party herself and then treating trust property as her own to the extent required to make good her loss; (iv) in trust accounting terms, when the trustee reasonably and properly incurs expenses she is discharged from her duty as trustee to hold an equivalent amount of trust property for the beneficiaries and can treat that amount of the trust property as belonging to herself absolutely; (v) where a trustee has paid trust expenses out of her own resources but has not yet taken an indemnity out of the trust property, she can withhold the trust property from the beneficiaries until after she has taken her indemnity; and (vi) on retirement, she can defer transferring ownership of the trust property to successor trustees until after she has taken her indemnity.

9. Consistently with this description, Kiefel CJ, Keane and Edelman JJ said in *Carter Holt Harvey* at [32] that describing the trustee's power as a 'right' (and saying that the trustee has 'a proprietary interest' in the trust property) is only another way of saying that 'where a trustee has legal title, as well as equitable or statutory powers of indemnity that are concerned with ways in which the legal title can be used, the legal title is not independent of those powers of indemnity'.

10. In practice, various questions can arise with regard to a current trustee's indemnification and answers given by the courts are often expressed in 'rights' language. It is suggested that these questions and answers could all be expressed in terms of the trustee's power or permission to use the trust property in authorised ways and this change in language would make matters clearer. They include

    - whether a current trustee's expenditure was actually authorised - the answer to which will determine whether the trustee is empowered or permitted to use trust property to take an indemnity;

[1] Further discussion in S Agnew and K Purkis, 'Trustees' Indemnities – Is Timing Everything?' (2018) 24 T&T 989; J Hudson and C Mitchell, 'Trustee Recoupment: A Power Analysis' (2021) 35 Tru LI 3.

- whether the administrator of an insolvent current trustee can access the trust property to the extent needed to indemnify her for expenditure – the answer to which may affect the position of the trustee's personal creditors and also the position of trust creditors seeking to claim against the trust property via subrogation; and

- whether a current but imminently retiring trustee can resist transferring ownership of the trust property to a successor trustee pending indemnification.

(ii) Retired trustees

11. Retiring trustees typically transfer ownership of the trust property to successor trustees after outstanding indemnity issues have been resolved. Thereafter, a retired trustee's position is significantly different from the position of a current trustee. Once a retired trustee has ceased to be the owner of the trust property, which is thereafter owned instead by successor trustees, it becomes conceptually meaningful to say that they might owe her an obligation to use their powers as owners to use trust property to indemnify her for expenses incurred during her time in office.

12. In practice, various questions can arise regarding a retired trustee's indemnification, answers to which can be expressed in 'rights' language. They include:

    - whether a retired trustee's expenditure was authorised - the answer to which will determine whether or not she has the right to compel the current trustees to use trust property to indemnify her; and

    - whether the administrator of an insolvent retired trustee can do the same – the answer to which may affect the position of the retired trustee's personal creditors and also the position of trust creditors seeking to claim against the trust property via subrogation 'through' the retired trustee.

13. Where current and retired trustees all wish to recover an indemnity out of trust property which is insufficient to pay them all in full, a 'priority dispute' may arise between them. In such cases, neither 'rights' language nor 'permission' language is apt to describe the

competition between the two groups of trustees, and deciding such disputes requires consideration of policy questions as noted below in Part 4. Courts should not approach the resolution of such disputes as though the answer follows as a necessary consequence from the terminology they use to describe the trustees' 'rights' or 'powers'.

(b) Does a trustee have a 'proprietary' right?

14. When considering this question it is helpful, again, to distinguish the situation of current and retired trustees. As noted already, current trustees own trust property out of which they can take an indemnity and it is nonsensical to explain this in terms of the trustees having a claim-right enforceable against themselves to use the property for this purpose. To this it can be added that because a current trustee is the owner of the trust property it makes no sense to talk about her having, as well as her title as owner, a 'charge' or 'lien' or other interest in the property which secures her 'right' to an indemnity. It makes better sense to say that current trustees are owners of the property with a power or permission to use this interest to obtain indemnification by the process described above.

15. This power or permission is conferred on a trustee as a way of enabling her to perform her responsibilities as trustee without having to pay trust expenses out of her own resources – a point repeatedly made by the courts, as in e.g. *Price v Saundry* [2019] EWCA Civ 2261 [23], looking back to *Turner v Hancock* (1882) 20 Ch D 303, 305. Once the trustee has retired, however, she no longer has responsibilities to perform and will therefore incur no future expenses as trustee (although liabilities incurred while she was trustee may emerge in the future).

16. Moreover, the effect of transferring ownership of the trust property to successor trustees is that the retired trustee's power / permission to use the property for indemnification purposes necessarily comes to an end because it was premised on her being the owner of the trust property. Once ownership has been transferred to successor trustees, only they can have a power / permission *as owners* of the property to use it in accordance with the trust terms, including for the purposes of indemnifying themselves and, where necessary, retired trustees for expenses incurred while they were in office. Retired trustees themselves have no power as owners to use the property in this way, nor do they have a 'proprietary interest or right' in the property that continues after ownership

has been transferred to successor trustees because they never had a 'right' to indemnify themselves in the first place, let alone a 'proprietary interest' in the trust property which secured the enforcement of their 'right'.

17. This is not to deny that a retired trustee may acquire a new right, secured on the trust property, to require successor trustees to use their powers as owners to indemnify the retired trustee out of the trust property. Such a new right can come into existence once successor trustees have acquired ownership, but it can arise only by agreement between the old and new trustees, or by operation of law. In principle, current trustees cannot have a proprietary interest which 'keeps going' after their retirement, and it is suggested that authorities which rely on this idea to explain why retired trustees have proprietary interests in the trust property are confused: see e.g. *Investec* [59](v) (citing *Re Johnson* (1880) 15 Ch D 548 which is not in point); *Dimos v Dikeakos Nominees Ltd* (1996) 68 FCR 39 [35]; *Meritus Trust Co Ltd v Butterfield Trust (Bermuda) Ltd* [2017] SC (Bda) 82 Civ [13]–[14]; Trusts (Guernsey) Law 2007, Art 44(1) and (2). It is further suggested that the law would be improved if it were put on a different analytical footing and this confusion were eradicated.

18. And in fact, some existing authorities already point in this direction. For example, consider the permissive (as opposed to 'rights-based') language of the Trustee Act 1925, s 30(2), which provides that 'A trustee <u>may</u> reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers' (emphasis added). Again, in *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at [50] the High Court of Australia held that a trustee has an 'equitable charge "over trust assets"' only in the sense that 'a court of equity may authorise the sale of assets held by the trustee so as to satisfy the right to reimbursement or exonoration'; and in *Carter Holt Harvey* at [83] Bell, Gageler and Nettle JJ said that a charge or lien for expenses is not 'comparable to a synallagmatic security interest over property of another' but arises 'endogenously as an incident of the office of trustee in respect of the trust assets'.

(c) Equitable proprietary rights of trustees after Equity Trust

19. In *Equity Trust*, the members of the Board agreed that a trustee has an equitable proprietary right and that, although this right might be called a 'lien' or 'equitable charge', it is not a 'security interest' in the usual sense of the term, nor does it appear to be identical to a beneficial interest under a trust. Ultimately, therefore, it seems that the trustee's right to payment from the fund is to be regarded as a distinct form of equitable proprietary right.

20. On the minority view, the trustee has a right to payment from the fund, which is specifically enforceable. They refer to the fact that in equity a contract to transfer or charge a subject matter passes a beneficial interest if the contract is one of which equity will decree specific performance. They say the same principle applies even where there is no agreement and no debt due from one person to another but where, as here, a person is entitled to payment out of a specified fund. Therefore, they say, an equitable charge arises in favour of the trustee, which gives her a proprietary interest in the fund (see [109]-[111]). Later, they emphasise that the fact that the 'remedy' to enforce the trustee's right is an order that the trust fund be applied in paying the amount due is what allows the right to be characterised as conferring a proprietary interest, and here they draw analogies with contractual specific performance (at [172]-[174]). And in their view, the charge is subject to the usual equitable priority rules. Lord Briggs agrees with the minority's view that trustee's right is a property right. However, in his view, it is a sui generis equitable property right that is both similar to and different from the orthodox forms of equitable charge/lien (see [249]-[250]), and it is *not* subject to the usual equitable priority rules.

21. This leads to some difficult questions:

- How strong is the minority's reasoning to the effect that the trustee has a specifically enforceable right against the fund, which gives rise to an equitable charge in her favour? Are the analogies with contractual specific performance compelling? And does it necessarily follow that because the court may order that the expenses of a trustee (or former trustee) be paid out of the fund, *therefore* the trustee has a proprietary right in the fund? What are the consequences of the minority reasoning?

For example, does it follow that a term would be implied by law into every express trust to the effect that the original trustee has a first charge on the fund before the beneficiaries' entitlements arise? Can insights be drawn from other areas of law to support this analysis?

- How does Lord Briggs' conclusion that the trustee's right is a sui generis equitable property right fit with the *numerus clausus* principle? And, given Lord Briggs' view that this property right does *not* give a trustee priority over successor trustees, why disturb the *numerus clausus* principle when an alternative non-proprietary analysis could potentially achieve the same result (as to which see para 23 below)?

- Does the disagreement between the majority and the minority as to the effect of the trustee's equitable proprietary right have any impact on the nature of the right and how it is to be understood?

22. If this is now to be the law, more work is needed to articulate how the equitable proprietary interest works and why it arises. For example, if its purpose is to further a policy of encouraging good trusts administration and ensuring fairness to trustees, this must be clearly articulated, and against this must be offset the problems of potential unfairness to beneficiaries and third parties, the proper balance to be struck between these considerations then providing a reason to draw the line between situations where the right arises and situations where it does not.

23. Finally, in light of the above, would it be useful to think about other bases on which a trustee could be indemnified after leaving office? Possibilities include:

    - To say that the court can address this question as part of its inherent jurisdiction to supervise the administration of trusts. This would involve a balancing of interests between the retired and current trustees in each case, which would drive up litigation costs, to the detriment of the trust fund.

    - Therefore, a clear set of rules rule might be better, which stipulate e.g. (a) that any indemnity 'right' vested in a retired trustee is a new right and not a right 'carried over' from her time in office because during that period she never had a 'right' and

only had a power or permission as described above; (b) that retired trustees are entitled to such a new right by operation of a default rule, i.e. by operation of a legal rule which can be excluded by agreement, which might stipulate e.g. that current trustees owe a duty to retired trustees to protect their interests in the trust property to the extent needed to supply them with an indemnity; or alternatively (c) that no such default rule exists but that retiring and continuing trustees can create such duties by agreement embodied in a deed of retirement and appointment ('DORA') – these possibilities are canvassed in Part 3; and (d) how claims against the trust property by retired and current trustees should be ranked where they both have rights or powers to obtain an indemnity out of the fund where there is insufficient property to pay them all – a question considered in Part 4.

3. Trustee Succession and Relations between Current and Retired Trustees

24. In *Belar Pty Ltd (in liq) v Mahaffey* [2000] 1 Qd R 477 [24] the Queensland Court of Appeal held that as a matter of general law, 'A former trustee may assert its claim for indemnity against the continuing trustee, and in that respect may assert the right of the new trustee to indemnity by bringing an action against him.' However, in *Equity Trust* [163] the minority rejected this proposition, holding that 'The new trustee incurs no personal liability to the former trustee in respect of the expenses incurred by the latter while it was the trustee. The new trustee therefore has no claim of its own, in respect of such expenses, for indemnity out of the trust property and therefore there is no such claim to which the former trustee could be subrogated.'

25. In other words, the *Equity Trust* minority understand a successor trustee's power / permission to use trust property for the purposes of indemnification to be available only where the successor trustee incurs an obligation to another person while managing the trust affairs and as a matter of general law, successor trustees incur no such obligation to indemnify retired trustees for previously incurred expenses. However, this leaves open the possibility that the trustees might agree between themselves that successor trustees do owe retired trustees such an obligation and that the performance of this duty this is secured on the trust property.

26. Where such an obligation exists, either because the trustees have agreed that it should or because it arises as a matter of law, the further question arises whether a successor trustee owes a separate duty to a retired trustee to preserve the trust property for the latter's benefit? In *Jaken Properties* at [37] Leeming JA held that 'A former trustee can prevent its successor dealing with trust assets in ways which would destroy, diminish or jeopardise the former trustee's entitlement to be indemnified from those assets. That is a simple consequence of the fact that the equitable entitlement on the part of the former trustee to have recourse to trust assets to indemnify itself for expenses properly incurred has proprietary aspects which survive the trustee's removal. To say that the successor trustee is subject to a duty not to deal with assets so as to prejudice the former trustee's entitlement to be indemnified from those assets is merely the Hohfeldian correlative of that entitlement.'

27. This reasoning depends on the idea which has been doubted in the previous part, that current trustees have a 'proprietary interest' in the trust property that carries on after their retirement. Leaving that point to one side, Leeming JA went on to hold that the successor trustee's 'duty' is not a 'fiduciary duty' sounding in a personal liability either by the successor trustee or by third parties who have knowingly received trust property from the successor trustee in breach of 'fiduciary duty'.

28. His discussion of this point would be clearer if he had distinguished more clearly between the two meanings of 'fiduciary duty' that are commonly encountered in trusts (and other) cases: sometimes this term is used to describe a rule which requires parties in certain well-known types of relationship to avoid conflicts between their personal interests and those of a principal, or between the interests of two principals; sometimes it is used to describe a rule requiring parties who hold property for the benefit of others to comply with the terms of their engagement so that they cannot validly exercise powers as owners or controllers of the property in an unauthorised fashion. However, Leeming JA's essential point was that trusts would be unworkable if trustees were subjected to an ongoing duty not to enter transactions in the course of managing the trust affairs, or to distribute trust property to beneficiaries, if this would prejudice the ability of former trustees to obtain an indemnity out of trust property for past liabilities of which they were unaware at the time of their retirement, rendering them unable to make express provision for these at that time.

29. Following *Jaken* it remains a live question exactly what rights successor trustees have as a result of the proprietary interest in the trust property which Leeming JA assumes them to own. On his analysis, it seems that they can obtain a receivership order against successor trustees, and perhaps also an interim injunction, in cases where they become aware of hitherto unrecognised liabilities to prevent successor trustees from disposing of trust funds; but they have no right of redress against successor trustees after trust funds have been paid away and cannot sue third party recipients for knowing receipt or dishonest assistance either, although they can assert an equitable proprietary claim against them in cases where they still have the relevant property.

30. The practical consequence of this is that retired trustees who become aware that they have (or might have) incurred a hitherto unrecognised liability during their time in office may have to move quickly against current trustees if they want to protect themselves. Purchasing insurance to guard against this contingency may be advisable in some cases.

31. Whatever the position regarding relations between past and present trustees it seems likely that the law in this area consists of default rules, i.e. rules which can be excluded or varied by agreement between the parties. But questions arise in this regard as well. One would expect well-advised retiring trustees to hold off from executing a DORA until the position regarding known past liabilities has been settled; they may also wish to have it spelt out that they have rights to an indemnity for unknown past liabilities which are secured on the trust property and that successor trustees must protect their position. However, some of their possible wishes in this regard may not coincide with the legal position (consider also the rule established in *Equity Trust* that past and present trustees' claims against trust property should be ranked *pari passu*, discussed in Part 4). Can retiring and continuing trustees agree to disapply these rules? If they do, what consequences might this have for the beneficiaries and third parties?

4. Priority Ranking of Claims against Trust Property

(a) 'Priority disputes' between trustees after Equity Trust

32. In *Equity Trust* there was a 'priority dispute' between current and retired trustees regarding their respective 'rights' of indemnity. The Board disagreed as to how the trust property should be divided between them. The minority favoured the first in time rule and the majority preferred a *pari passu* approach in all cases save for undefined 'exceptional circumstances' which would 'shock the conscience of the court'. A number of questions arise from this decision.

33. First, in what sense was it right to speak of a 'priority' question arising between the trustees at all? Note Lady Arden's view at [287]-[288] that any discussion of priorities between trustees is misplaced, and the 'first in time' maxim does not apply where the contest does not involve beneficiaries. She was not convinced by Lord Briggs's 'common misfortune' idea.

34. Second, does the *pari passu* approach produce a fairer result? The answer would seem to depend on whether you are looking at the situation from the perspective of retired and current trustees. From a current trustee's perspective, *pari passu* ranking is fairer, as she may not know about uncrystallised liabilities that arose on the retired trustee's watch. But from the perspective of the retired trustee, a first in time approach is fairer, as she is exposed to the risk of the trust becoming 'insolvent' on the current trustee's watch. (For a good discussion of the competing interests and considerations, see the decision of Commissioner Clyde-Smith in *Re The Z II Trust* [2018] JRC 119.)

35. When considering why a retired trustee should have to take the consequences of the administration of the fund over which they had relinquished control, Lord Briggs stated that there were good answers 'on the facts of the case'. Most of the difficulty had been caused by the retired trustee, which entered into the loan agreements with the BVI companies and failed to ringfence them properly to protect the trust (see the earlier *Investec Trust* decision).

36. Third, what circumstances are sufficiently 'exceptional' to justify displacing the *pari passu* approach? Must a trustee have been at fault and if so to what level of negligence, gross negligence, unconscionability, bad faith or dishonesty? Would it make a difference if a retired or current trustee was also a beneficiary?

37. There is no parallel here with directors dealing with assets and section 423 of the Insolvency Act 1986 (trading with knowledge of impending insolvency) or the similar Pauline action in Jersey law. So, what happens if e.g. the current trustee knows that the retired trustee may have some outstanding liability that needs to be paid but she goes ahead and indemnifies herself first or makes a distribution to beneficiaries, leaving insufficient assets in the trust fund to pay the retired trustee? It is submitted that the best way of giving certainty would be to define the starting point – e.g. first in time / *pari passu* – and then clearly define the exceptions that would apply.

38. Fourth, what practical difficulties may arise from the majority's decision to choose the *pari passu* approach? It is suggested that there are several:

    - Hitherto, incoming trustees would usually take out an insurance policy to cater for the possible liabilities of former trustees. Now, a former trustee seems to have a floating interest over the whole fund. Does this floating interest need to crystallise at some point? (According to Lord Briggs this is unnecessary because the former trustee's interest is always 'proprietary' – but what does this mean?)

    - Are outgoing trustees more likely to insist on retaining trust assets when they retire to make themselves more secure? And if they do, would their right of indemnity against *those* assets rank in priority to the rights of the continuing trustees by virtue of retention?

    - Are incoming trustees more likely to require outgoing trustees to release their 'liens'?

    - The majority's reasoning in *Equity Trust* suggests that the *pari passu* rule applies only when there are insufficient trust funds to indemnify all trustees for expenses, but what exactly does this mean and when exactly does it occur? For example,

consider a case where a former trustee claims an indemnity against a current trustee, and the current trustee suspects that she will herself have to pay some trust expenses in the future but she is not sure of the amount or whether the trust fund is sufficient to cover both sets of expenses? Does the *pari passu* rule apply here or not?

(b) Questions relating to the position of trustees' creditors

39. First, if it is correct to say (as has been suggested in Part 2 above) that the 'rights' conception of a trustee's ability to obtain an indemnity out of trust property is less analytically straightforward than is commonly supposed, then what are the consequences of this for a trust creditor's supposed ability to acquire a trustee's indemnity 'right' via subrogation?

40. For example, if it is correct to say that a current trustee's 'right' to an indemnity is not a claim-right, then this has the knock-on effect of destroying the premise on which trust creditors' 'subrogation rights' are currently understood. The authorities on this topic assume that the trustee has a 'right' which a trust creditor can acquire via subrogation in some circumstances, meaning that he is entitled to be treated as though the trustee's 'right' has been assigned to him so that he can enforce it for his own benefit.[2] However the cases also observe that in some respects the subrogation process is fictional because the trustee's right is not 'really' assigned to the creditor; and if the trustee's isn't 'really' a right either then there is a double fiction which is even less satisfactory.

41. Subrogation takes different forms in different contexts, but in another context the fictional nature of the 'assignment' of rights it entails was stressed by Lord Hoffmann in the *Banque Financiere* case [1999] 1 AC 221 at 236 (a 'metaphor' and 'not a literal truth'), where he also said that it operates to generate a new equitable right for the 'subrogated' claimant. If a similar view were taken of the 'subrogation rights' of trustee creditors, then it would become possible to analyse their position in a simpler way.

42. In cases where a current trustee owns the trust assets and has a power or a permission to treat them as her own, it could be said that equity generates a new equitable interest

[2] e.g. cases cited and discussed in C Mitchell and S Watterson, *The Law of Subrogation* (OUP 2007) ch 12; Lewin on Trusts ch 21, esp para 21.048: T's 'right of indemnity is an asset' of T.

in the assets for the creditor to the extent that the trustee has this power or permission. And the same would be true of cases where a trustee has retired and transferred ownership to a new trustee. So far as the retired trustee is concerned, cases of this kind are different if she really does have a claim right against the new trustee post-retirement for an indemnity against costs previously incurred. But the analysis of the creditor's basic position in the second class of case can still be the same, because whatever right the creditor acquires is a new equitable right and recognising this when identifying the content and priority status of the new right would become easier if one could cut through to the policy reasons why one might want to rank the creditor above, below or *pari passu* with the two trustees and the beneficiaries.

43. Second, in *Equity Trust* the Board held that it was unnecessary to decide if the claims of all trustees (past and current) collectively rank *pari passu* with the claims of all their trust creditors collectively, or in priority to them, but this appears to be a live issue.

44. Third, can only 'trust creditors' benefit from the proceeds of a trustee's 'right to an indemnity' or are the proceeds available to all the trustee's creditors? There is little English authority on this question, but such authority as exists suggests that the answer is that only 'trust creditors' can benefit from the trustee's exercise of a power to obtain an indemnity. These cases say that the trustee's 'lien' gives her a beneficial interest in respect of the trust assets to which she is entitled only by virtue of her office and which she (or her trustee in bankruptcy in cases of insolvency) must therefore enforce only for the benefit of the trust creditors.

45. There are also Australian authorities to this effect, including *Carter Holt Harvey*, but a distinction is drawn in the Australian cases between recoupment and exoneration: they say that when a trustee has paid an expense herself and has not yet exercised her power of recoupment to obtain an indemnity, then any and all of her creditors are entitled to share in the proceeds, but where the trustee has not yet paid a trust creditor and has a power of exoneration then this power can be exercised only in the trust creditor's favour.

(c) The bigger picture

46. Finally, the question arises, whether a ‘priority ranking’ for all ‘claims’ against trust property can be identified and if so, where the ‘claims’ of retired and current trustees fit within this bigger picture?