M Leeming, "Trusts and trustees: Their successes and successors (2023) 53 *Aust Bar Rev* 97-111

Trusts and trustees: Their successes and successors

Mark Leeming[*]

It is a great honour to be invited to present the tenth John Lehane Memorial Lecture. Previous speakers have been extraordinarily distinguished judges of ultimate appellate courts. They have left impossibly large shoes to fill, but perhaps there is one small compensating factor in my favour. It is that I had some personal knowledge of John. Since the purpose of this lecture is to remember the man, I shall commence by sharing my memories of him with you. Then I shall say something of the successes of trusts, and finally I shall turn to the position of a trustee's successor.

Some memories of John Lehane

I met John Lehane some 33 years ago, at a law dinner at St Paul's College within the University of Sydney. I thereafter joined the college choir, and over the following 3 years I regularly looked down upon him and his family on Tuesday evenings from the Chapel's choir gallery. That was my introduction to the splendours of the English choral repertory, which profoundly influenced my understanding of harmony and collaboration and working in a group. Any chorister and any appellate judge know that harmony is important, and it is vital to be in step with the others. Choirs occasionally sing in unison and if you have heard it, it can be quite disturbing. That choir sang Benjamin Britten's 'Rejoice in the Lamb' in around 1989 to an audience that included, I believe, John and his family. It is a strange, mystic work, written in 1943, based on the eighteenth century poetry of Christopher Smart, composed in an asylum, and described by one biographer as 'a series of prophetic, reverential madhouse ravings'.[1] Britten summoned extraordinary skills to replicate in music the poet's mental illness, including an eerie opening 13 bars in unison. Sometimes I pause to think of the relations between harmony and unison, and whether the principles extend to appellate decision making — but with

---

[*] Judge of Appeal, Supreme Court of New South Wales; Challis Lecturer in Equity, University of Sydney. This is a lightly edited version of the tenth John Lehane Memorial Lecture, presented on 7 December 2022 at the Banco Court in the Supreme Court of New South Wales. I acknowledge the assistance of Ms Beata Szabo, but all errors are mine.

[1] P Kildea, *Benjamin Britten: A Life in the Twentieth Century* (Allen Lane, 2013) p 224.

> my Chief Justice and President (herself a talented singer) in the audience, those thoughts are best left unpursued.
>
> I was too young to know John well. We met when I was an undergraduate and he a senior partner at Allens. I was in a sense following in his footsteps, sharing the same schools and universities and degrees, with both of us reading Latin and Greek, although I moved to mathematics. Victor Windeyer (who had **[98]** married John's aunt) once said that it was doubtless more important for a practising lawyer today to be able to read a balance-sheet than to have read Justinian — I am by the way almost sure that his tongue was firmly in cheek, and in any event I am certain that he was not thinking of pure mathematics — but he added that 'a lawyer should have had enough Latin to retain a feeling for language that is terse, precise, neat and a vehicle for elegance. We might be spared some amorphous sentences'.[2] There were no amorphous sentences, and a great deal that was precise and elegant, in John Lehane's prose, as may be seen from chapter 6 on equitable assignments in the first, second or third editions of the book for which he is most famous. It could also be seen in his lectures. John Lehane taught me Equity, 20 years after he had started teaching part-time at the University of Sydney. He also taught a final year elective called Commercial Equity, created after the powers that be deemed the compulsory unit too long and too hard. One of the unexpected pleasures of preparing for this occasion was reviewing my notes from that course. I have a handout dated 10 March 1992, headed 'Note on the style of examination in this subject'. It is two pages long. It contains 11 lines of text explaining that what was being tested was comprehension of the principles, and that having got the point, answers could usually be brief. It contained an apt warning that 'verbose answers usually betray an unsure grasp of the relevant area (or no grasp at all)' — which is capable of applying to written and oral submissions in the Court of Appeal — and a quote from Bill Gummow's article on 'Legal Education'[3] which, like Windeyer's paper on the same subject mentioned above, bears re-reading today. Both concern the importance of understanding basic principle as opposed to complexities at the margins. Astonishingly, the handout concluded with 21 questions from the All Souls Fellowship exam, gems such as 'What is treason? Can it ever be justified' and 'What is the point of opera?' and so on. None concerned law. I cannot imagine the nameless university administrators who now must approve course guides approving such a document today. And yet this was a very real example of

---

2 V Windeyer, 'Learning the Law' (1961) 35 *Australian Law Journal* 102 at 107.

3 W Gummow, 'Legal Education' (1988) 11 *Sydney Law Review* 439.

adhering to the university's motto, *sidere mens eadem mutato*, which I would translate in this context as 'the same intellectual attitude under different stars',[4] defiant in the face of efforts to shrink the content of the course. There was more real explanation and insight in those two pages than in any course outline I have seen subsequently. The course ended with a 2½ hour closed-book exam, in which candidates were to answer four of eight questions. All were short, to the point, and designed to show an understanding of basic principle. I have no reason to doubt that John Lehane had a hand in writing all those documents.

I have my notes from 18 and 25 March 1992. John Lehane's topics were 'Relief against Penalties and Forfeitures', and the 'Equity of Redemption'. Unlike some witnesses who have improbable verbatim recollections of conversations a decade or so ago, I have no recollection of those 4 hours. But my notes were very clear. I think they capture something of the clarity of the lecturer's exposition — for they are much clearer than the notes I took in other **[99]** courses. They contain short statements of principle, then the important decisions, giving the essence of case factual background, reasons and some comments. There was no attempt to dumb down the decisions, some of which were quite technical. I now realise that I was taught — or more precisely *educated* in the original sense of that verb — to a very high standard.

It was a great but daunting pleasure to spend some months in 1998 and 1999 working on the 4th edition of the book he co-wrote with Roddy Meagher and Bill Gummow, after the latter's appointment to the High Court. The timing was good — very junior counsel tend to have time on their hands, and so it was with me. And it was not a little intimidating for a very junior junior to present his attempt at updating the chapters on subrogation and contribution and marshalling to Roddy and John. Roddy said something to the effect that my efforts were pretty reasonable. John merely smiled encouragingly. I suspect many in this audience had similar experiences.

In his capacity as a judge of the Federal Court, John Lehane very kindly cited a note I had had published in the *Law Quarterly Review* in support of the proposition that where the benefit of a guarantee had been assigned in equity, the assignee could sue in its own

[4] Echoing Horace, *Epistles* Bk 1, Ep XI (*coelum non animum mutant qui trans mare currunt*), and giving weight to the shift from *animus* to *mens*.

name in proceedings where the assignor was a party.[5] Recognition of that publication meant a lot to a barrister launching into a career at the Bar, and it is something of which I am conscious to this day when considering citing academic work in reasons for judgment. The judgment also revealed something of the man. The reasons gently make it clear that he had been unassisted by counsel on the point,[6] but he nonetheless was concerned to resolve the case in accordance with principle, even though far from fully exposed by the efforts of the litigants, and even though the result was unreported and unreportable. It was the attitude shared by the gargoyle carver or cathedral ceiling decorator: craftsmanship at the highest level, done in the certain knowledge that its details would likely never be seen again, but nonetheless done well.

I appeared before Lehane J in only one final hearing.[7] In part that was because of my youth, in part it was because I had the misfortune to be involved in a large trial in Melbourne in 1997, in part because he had the misfortune to be presiding over a large trial in Sydney throughout 1998,[8] but mostly because of his untimely death, aged only 59.

Of course, his two co-authors knew him much better than me. Roddy Meagher, not known for false praise, resorted to music and Constant Lambert in order to capture something of his essence:

> If you tried to describe Richard Strauss's music you would stress the brilliance of his orchestration, if it was Sibelius you would stress the austerity of his bleak Nordic melodies, but if it was Mozart all you could say was, accurately but dully, that his music was wonderful. In a way, one has a similar problem talking of John Lehane. He did not utter any famous statements, he never got violently angry, he never got **[100]** drunk, he did nothing outrageous, he was not colourful yet he was one of the greatest lawyers and one of the nicest men any of us will ever meet.[9]

John Lehane's classically-trained mind sought precision, but simultaneously saw humour wherever it could possibly occur. I think the nature of the problem of the relations between former and successor trustee would appeal to his mind, I hope he

---

5 *Zaknic Pty Ltd v Svelte Corporation Pty Ltd* [1996] FCA 1704.

6 See above, at [136].

7 *Spinks v Prentice* (1998) 87 FCR 89; 157 ALR 555.

8 *Hadid v Lenfest Communications Inc* [1999] FCA 1798.

9 R Meagher and S Fieldhouse, *Portraits on Yellow Paper* (Central Queensland University Press, 2004) p 52.

would approve of my inflected Horatian title, and I am sure that he would want an occasion such as this to be substantially devoted to serious legal analysis.

The trust as a successful institution

English law developed the institution of the trust and came to insist that there be a trustee, and some trust property, and some trust objects or else a charitable purpose. The two main points of the institution in Plantaganet and Tudor times were to permit the devise of an equitable interest by will, and to avoid the ordinary incidents of property ownership, especially taxes. One scholar identified the following advantages to the employment of the use as a legal device:

> (1) one could evade the feudal incidents of wardship, marriage, and relief; (2) the law of forfeiture for treason and escheat for felony would have no application; (3) the mortmain statutes could be circumvented; (4) property could be lawfully hidden from creditors; (5) property could be transferred to aliens; and (6) a person could invest himself with a power similar to that of devising land. In fact, even the dower rights possessed by the wife of a cestui que use could be defeated, for these would not attach themselves to the equitable interest.[10]

It is sometimes said — a little simplistically — that the law of trusts was a response to Henry VIII's Statute of Uses.[11] That statement overlooks the facts that statutes were being passed in Henry's father's reign,[12] and indeed by Edward III and Richard III to similar ends,[13] and that the real author of Henry VIII's Statute of 1535 was Thomas Cromwell, whom the late Hilary Mantel brought vividly to life with prose as concise and precise as John Lehane's. Certainly, Cromwell pushed the passage of the statute through a hostile Parliament, including men who had recently acquired much land formerly owned by the Church through Cromwell's earlier efforts. Based upon a note partly in Cromwell's own hand, one biographer says the statute 'had almost certainly been Cromwell's brainchild'.[14] However it came to be enacted, the preamble is a marvel of

---

[10] D Smith, 'The Statute of Uses: A Look at Its Historical Evolution and Demise' (1966) 18 *Case Western Reserve Law Review* 40 at 44.

[11] 27 Hen 8, c 10 (1535).

[12] 4 Hen VII, c 5; 4 Hen VII, c 17; 4 Hen VII, c 15.

[13] 50 Ed III c 6; 1 Rich III, c 1. See W Carnahan, 'An Introduction to the Statute of Uses' (1936) 24 *Kentucky Law Journal* 172 at 177–8.

[14] T Borman, *Thomas Cromwell: The Untold Story of Henry VIII's Most Faithful Servant* (Hodder & Stoughton, 2014) p 271, relying on Hen VIII, *Letters and Papers*, Vol 8 no 892.

Tudor propaganda. I shall read it to you, partly because of the marvellous language, partly because it is a way of immersing **[101]** oneself in an earlier age, but mostly because it relates to a theme of this address. It's only a single sentence (if you like, have a guess how many words it contains):

> Where by the common laws of this realm, lands, tenements, and hereditaments be not devisable by testament, nor ought to be transferred from one to another, but by solemn livery and seisin, matter of record, writing sufficient made bona fide, without covin or fraud; yet nevertheless divers and sundry imaginations, subtle inventions and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses, intents, and trusts; and also by wills and testaments, sometime made by nude parole and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have scantly had any good memory or remembrance; at which times they being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscretely and unadvisedly their lands and inheritances; by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries and other like assurances to uses, confidence and trusts, divers and many heirs have been unjustly at sundry times disherited, the lords have lost their wards, marriages, reliefs, harriots, escheats, aids put fair fitz chivalier, et pur file marier, and scantly any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or executions for their rights, titles, and duties; also men married have lost their tenancies by the curtesy, women their dowers, manifest perjuries by trial of such secret wills and uses have been committed; the king's highness has lost the profits and advantages of the lands of persons attainted, and of the lands craftily put in feoffments to the use of aliens born, and also the profits of waste for a year and a day of lands of felons attainted, and the lords their escheats thereof; and many other inconveniences have happened, and daily do increase among the king's subjects, to their great trouble and inquietness, and to the utter subversion of the ancient common laws of this realm, for the extirping and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses, and errors heretofore used and accustomed in this realm, to the subversion of the good and ancient laws of the same, and to the intent that the king's highness, or any other his subjects of this realm, shall not in any wise hereafter by any means or inventions be deceived, damaged, or hurt, by reason of such trusts, uses, or confidences[15]

The answer, by the way, is 438. The preamble is longer than the substantive sections of the statute. It is the opposite of terse, precise prose. Central to the mischief to which the statute was directed was the devise of interests in land by will, and the effect upon tax avoidance and obligations owed to other creditors. Broadly speaking, the statute deemed

[15] 2 Chitty, Statutes of Practical Utility 727 (6th ed, 1911), reproduced in full in Smith (n 10) 53–4.

> the beneficiary to have a legal estate, and as such to be liable to the usual incidents of legal ownership including feudal taxes. The purpose of that statute, made almost half a millennium ago, is not greatly different from that of much more modern **[102]** legislation dealing with trusts, deeming beneficiaries who are presently entitled to trust income to have derived that income, or indeed the modern legislation deeming something called a trust estate to be a legal person and directly liable to pay tax, which has led to such sustained misapprehension of the legal nature of a trust.[16]

We tend to think of the trust as a creation of Chancery, and it is undoubtedly true as a matter of history that the trust emerged following decisions that the statute did not apply to cases of a use upon a use, at least where the conveyancer imposed an active duty, and then many years thereafter, extended to passive trusts.[17] It is said that the first decision upholding the device of a 'use upon a use', is the *Duchess of Suffolk's case* of 1560. The occasion was typically Tudor: the protestant Duchess fled, disguised, to Poland to escape persecution under Queen Mary, having executed the document in favour of a lawyer in Maidstone in order to protect her estates from confiscation. When after Elizabeth I acceded to the throne the lawyer declined to reconvey the properties, Lord Keeper Sir Nicholas Bacon found that there was a trust,[18] with a contemporaneous report stating (in Latin) that the course of equity was contrary to the common law.[19] Two points may be made. The first is that there was a sophisticated legal system with separate bodies of common law and equity and rules concerning their interaction some 5 centuries ago. The second is that the Statute of Wills of 1540[20] (made after Cromwell's arrest and shortly before his execution) was also a direct response to the Statute of Uses. One scholar wrote that it 'prevented a revolution'.[21] Landowners who had formerly been able to convey the beneficial interest in land by will ceased to be able to do so, and their protests led to a measure which permitted the devise of all lands held in socage and two-thirds of the lands held by knight service and which is a foundation of the modern law of testate

---

16 See, eg, *ACES Sogutlu Holdings Pty Ltd (in liq) v Commonwealth Bank of Australia* (2014) 89 NSWLR 209; [2014] NSWCA 402 at [13]–[20].

17 See J Ames, "The Origin of Uses and Trusts" in E Freund et al (eds), *Select Essays in Anglo-American Legal History* (Little, Brown and Co, 1908) ii, 737 at 747-8.

18 See J Baker, *An Introduction to English Legal History* (5th ed, Oxford University Press, 2019) p 310; J Baker, 'The Use upon a Use in Equity 1558-1624' (1977) 93 *Law Quarterly Review* 33.

19 *Cursus cancellarie equitatis causa contra communem legem* (see Baker, 'The Use upon a Use in Equity 1558-1624' (n 18) at 36).

20 32 Hen VIII, c 1.

21 J Gaubatz, 'Notes toward a Truly Modern Wills Act' (1977) 31 *University of Miami Law Review* 498 at 513.

succession.[22] This is an example of something Owen Dixon once observed about the difficulties of foreseeing the consequences of law reform.[23]

Not all statutes have been hostile to trusts. There have been many times when Parliament has enacted laws favouring the institution. Examples are the defence provided by late nineteenth century laws confronted with a shortage of people willing to be trustee, whereby trustees who could show they had acted honestly and reasonably and ought fairly to be excused were not liable for a breach of trust,[24] or the streamlined procedure for obtaining judicial **[103]** advice.[25] The vesting orders that may be made when the last surviving trustee dies without leaving a personal representative, or when a trustee is removed, are a product of unusual *imperial* legislation made in 1850 authorising a court to make a vesting order 'to all property in any part of Her Majesty's dominions except Scotland',[26] and since at least 1859 there has been legislation confirming the trustee's right of indemnity. Today there is something of a move to codify all, or large sections of, the law of trusts, as may be seen in the attempts throughout Australia to harmonise aspects of the legislation, and more recently the enactment of the Trusts Act 2019 (NZ).

Trusts serve important uses in estate planning, in management of assets, in finance and indeed in the trading trusts which are popular in Australia and New Zealand but much less so elsewhere. But it is important not to be too self-congratulatory. The hostility evident in Cromwell's 1535 statute, reflects a hostility to an institution which lends itself to secrecy and in turn to defeating the entitlements of creditors and governments. It might be regarded as a dubious distinction that Liechtenstein and certain other jurisdictions associated with secretive financial practices have enacted provisions seeking to put in place as a matter of statute a local equivalent of a trust, to complement Germanic law's Stiftung and Anstellung,[27] or the development of the VISTA trust in the British Virgin Islands[28] or the Cayman STAR trust.[29] It would be wrong to deny that

---

22 See R Megarry, 'The Statute of Uses and the Power to Devise' (1941) 7 *Cambridge Law Journal* 354.

23 O Dixon, 'Remarks about Law Reform' (Paper presented at the 10th Australian Legal Convention, Melbourne, 15 July 1957) pp 3–4.

24 See *Maguire v Makaronis* (1997) 188 CLR 449 at 473-474; [1997] HCA 23.

25 See *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66; [2008] HCA 42 at [37]-[42]

26 *Trustee Act 1850*, held to extend to orders in Ireland: *Re Taitt's Trusts* [1870] WN 257 and Canada: *Re Groom's Trust* (1869) 11 LT 336.

27 See Liechtenstein Persons and Companies Act, Arts 897-932, and, generally, F Schurr (ed), *Trusts in the Principality of Liechtenstein and Similar Jurisdictions* (Dike, Zurich, 2014).

28 Named after the *Virgin Islands Special Trusts Act, 2003*.

> today the misuse of trusts and trust-like arrangements by organised crime and by those seeking to avoid their tax obligations and defeat their creditors is of major concern and a fitting subject of legislative intervention. And indeed, legislative intervention may be seen here and overseas.[30] But the fact that an institution may be abused does not make it a failure. The known fact that many elderly people will be preyed upon by persons to whom they have granted enduring powers of attorney does not mean that the institution has failed, although it may mean that reform is required. I do not think that a fair measure of the success or otherwise of a legal institution is the fact that it may be used for purposes which are unlawful or contrary to public policy. There has been no attempt subsequent to the 1535 statute to collapse all trusts.
>
> We tend to think of the law of trusts as part of equity — indeed, in equity's heartland. We tend to gloss over the early statutes which gave rise to the modern trust, the nineteenth century ameliorating statutes which enhanced the institution and the twentieth and twenty-first century statutes which harmonised it. There are many others. I have not so far mentioned the Charitable Trusts Act 1993 (NSW), or the suite of legislation which employs trusts for statutory purposes, such as the federal provisions governing clients' **[104]** segregated accounts for securities dealers and futures brokers,[31] or the variety of State and Territory regimes regulating lawyers, travel agents, real estate agents and other professions which hold client money, on the basis that the personal and proprietary obligations which are incidents of a trust are a sound way to protect clients.
>
> This interaction between statute and judge-made law is far from unique to the law of trusts. Take the law of negligence. The whole of the law — duty, breach, causation, damages, contributory negligence, contribution between tortfeasors, defences of peer professional opinion, obvious risks, dangerous activities and for public authorities and vicarious liability and much more — cannot be understood or applied without the civil liability legislation. Further, much of the statutory influence upon the law is much older and for that reason better concealed. The element of duty may be traced from statutes regulating canals and railways;[32] the immunity of highway authorities was very ancient

---

29 Named after the *Special Trusts (Alternative Regime) Law 1997*.

30 See, eg, H Dagan and I Samet-Perat, 'What is Wrong with Massively Discretionary Trusts' (2022) 138 *Law Quarterly Review* 624 at 630–1.

31 See *Re MF Global Australia Ltd (in liq)* (2012) 267 FLR 27; [2012] NSWSC 994 at [25]–[26], referring to Pt 7.8 of the *Corporations Act 2001* (Cth).

32 See M Leeming, *The Statutory Foundations of Negligence* (Federation Press, 2019) ch 2: the book addresses much

> indeed before a majority of the High Court abolished it in 2001, in a decision where Gleeson CJ stated that the immunity was a rule of statutory construction.[33] I do not think that is controversial to anyone who has looked at this history, although it would have come as a surprise to the hundreds of practitioners who ran and defended such cases before 2001. Of course, the immunity has returned in a different form in the civil liability legislation, everywhere except the Northern Territory. We may think it natural that a passenger may sue his or her spouse for negligent driving, that an employee injured by the negligence of a fellow employee can sue, and that 'contributory negligence' is not a complete defence, but the position at common law was the opposite, and it required statutes of not so many decades ago to achieve those results. What happens is that the statutes get forgotten and it is the decisions upon those statutes which are subsequently invoked and applied. Karl Llewellyn pointed this out nearly a century ago to his German audience, under the insightful heading 'Desirable Interaction of Precedent and Statute',[34] when he wrote 'Once a statute is adopted, though, there is room again for the case law method, for only through it can legislative insight be elaborated, corrected, and perfected in light of the subsequent, unforeseen cases.' A standard work on the Uniform Commercial Code commences with the proposition that 'In our system of law statutory law tends to be transformed into case law'.[35] But perhaps Michael Kirby best captured this point, when he said of advocates in the High Court, 'Lawyers love the common law; they hate statutes.'[36]
>
> I have mentioned all this background to make one main point. The continued statutory engagement with, and adoption for its own purposes, of **[105]** the institution of the trust is a signal objective measure of its success. It is an institution which has proven to be useful over centuries despite enormous changes in social and political life, and it has continued to attract the attention of legislatures to adopt it and enhance its utility and adapt it to changing conditions. The result is a vast body of judge-made law, based in part upon many statutes enacted over the centuries, which forms a tradition throughout the common law world.

---

more fully the other themes in this paragraph.

[33] *Brodie v Singleton Shire Council* (2001) 206 CLR 512; 180 ALR 145; [2001] HCA 29 at [33].

[34] K Llewellyn, *The Case Law System in America* (University of Chicago Press, 1989) tr by M Ansaldi, at p 66 (heading to section 47).

[35] J White and R Summers, *Handbook of the Law under the Uniform Commercial Code* (West Publishing, 1972) third sentence of preface.

[36] *Vigolo v Bostin* [2004] HCATrans 107 (2 April 2004).

Relations between former and successor trustees

I shall now turn from the success of trusts, to the successors of trustees. I wish to look at only one thing: the relationship between a former trustee and their successor as trustee. Unsurprisingly as a well-developed institution, there are rules and principles to address the variety of circumstances which may befall the replacement of the trustee. Like the advice on the course outline I received in John Lehane's course 30 years ago, there is a central core of certainty with the capacity for uncertainty and divergent views at the periphery.

One trustee may be replaced by another in a number of ways. Where there are multiple trustees, one may resign and another may be appointed. A power may be given to a third person (an appointor) to remove a person as a trustee and replace them with another. The instrument establishing the trust may make provision for the automatic removal of a trustee, say, if the trustee becomes bankrupt, or imprisoned, or leaves the country. A court may order a removal of a trustee and as mentioned above, may vest the trust property in a successor. The trust is a very flexible institution; that is part of its success.

What is the legal significance of the death of a (natural person) trustee? Here it is necessary to distinguish the trustee's office and the trustee's estate, because the office does not devolve to the trustee's legal representative. Normally, the surviving trustees — if there are any — can continue to exercise and perform the trust (that is the default position in s 57 of the Trustee Act 1925 (NSW)), subject to the contrary intention being expressed in the instrument creating the trust. When the sole or last trustee dies, the office becomes vacant. Thus in *Re Crunden and Meux's Contract*,[37] a testator devised his estate to his wife, brother and two sons on trust for his widow during her lifetime and thereafter to sell. After the death of the widow and the brother and both sons, without any other trustee being appointed, the executors of the last son to die sought to sell some real property. Parker J held that the executors could not make good title to execute the trust.

What is going on here is a conflict between the common law principle that an estate or

[37] [1909] 1 Ch 690.

interest in trust assets must descend in accordance with ordinary common law rules, and the equitable principles that no one can be forced to accept the burdens of trusteeship, even if the trust property happens to descend upon the person upon the death of a sole surviving trustee, and that one can only have the power, authority and discretions of a trustee if appointed by the creator of the trust.[38] Once again, the course of equity has departed from **[106]** common law. The result was a recognition that where property devolved to a person who was not authorised to exercise the powers of the trustee, that person held the property on a bare trust until a new trustee was appointed. This is modified in Victoria, Tasmania and Western Australia by statute conferring the powers of the trust upon the personal representatives,[39] and separately in Queensland the Public Trustee is given such powers.[40]

What if a trust is settled upon on a dead person? This commonly happens in testamentary trusts. The question then is whether the testator intended the nominated trustee and only that person to hold the property on trust. If so, then the trust will fail. Otherwise, the property will be held by the personal representative of the nominated trustee.

The difficulties involving the death of trustees who are natural persons led to a novel colonial solution. It may be less well known than it should be that the Australian colonies (together with New Zealand and the South African colonies) were nineteenth century innovators in enacting laws to establish corporate trustees, which could perform the important roles of holding assets and administering deceased estates in places where there was no well-established society to perform those roles and indeed there could be no great assurance that one's family and colleagues would be willing or able to perform those roles when required to do so. Those corporations, created by private statute,[41] are the direct ancestors of the listed corporations familiar today. They indicate the innovation in the Australian colonies, the role of statutes in making innovative and

---

[38] A partial solution was to include the personal representatives, heirs and assigns in the description of the trustees in the deed, but even so that does not deal with the case where an executor renounces probate or, separately, declines to undertake the trusteeship, as Vaughan Williams LJ explained in *Re Benett* [1906] 1 Ch 216 at 225.

[39] Trustee Act 1958 (Vic) s 22; Conveyancing and Property Law Act 1884 (Tas) s 34; Trustees Act 1962 (WA) s 45.

[40] Trusts Act 1973 (Qld) s 16.

[41] Including Permanent Trustee Company of New South Wales (Limited) Act (1888); Perpetual Trustee Company (Limited) Act (1888); The Union Trustee Company of Australia, Limited, Act (1914); Elder's Trustee and Executor Company, Limited Act (1920); Executor Trustee and Agency Company of South Australia Limited Act (1925); The Trustees, Executors, and Agency Company Limited Act (1927).

useful changes to the law of trusts, and the flexibility of that institution.

The former trustee's obligations are not limited to transferring possession and ownership of trust property. The administration of the trust is apt to give rise to documents. Some of those documents will be trust documents, in the sense that they form part of the trust assets (eg, legal or accounting advice). If so, then title will vest no later than when a vesting order is made, and further statute provides for an outgoing trustee to be deemed to have executed a deed transferring title to the successor trustee.[42] That is to say, statute creates a deeming to replicate the position at common law concerning property as an incident of the trust relationship. It is a neat illustration of the interaction of statute, common law and equity, and in fact it reflects the current local form of the imperial legislation enacted in 1850 mentioned above.[43]

A former trustee may also have documents used in the course of administering the trust which were not part of trust assets. That may more **[107]** probably be the case where the trustee fails to keep a strict delineation between the affairs of the trust and the trustee's own affairs. This was the case for the trust of which Ms Gina Rinehart was trustee, and from which she resigned shortly before proceedings to remove her came to trial. There was a dispute over what she was to hand over to her successor. The primary judge held, following an analogous English case decided in 1952,[44] that the new trustee was entitled to have provided to her documents acquired by the former trustee and used by her in the administration of the trust if she had failed to take copies for the purpose of the trust but had used documents which had come into her possession in another capacity (such as director of a company). An appeal was dismissed.[45] The leading English text, *Lewin on Trusts*, states the position by reference to the Australian authority,[46] and that was in turn cited last year by the New Zealand Supreme Court.[47] Indeed, now that the Trusts Act 2019 (NZ) applies, the position is confirmed by statute.[48] Once again, one sees the interaction of common law, equity and statute, and a global enterprise amongst courts in

---

42 See Trustee Act 1925 (NSW) s 78(2).

43 Each of ss 7–19 of 13 & 14 Vic, c 60 describing different cases when a vesting order might be made concludes 'and the Order shall have the same Effect as if the Trustee … had duly executed a Conveyance'.

44 *Tiger v Barclays Bank Ltd* [1952] 1 All ER 85.

45 *Rinehart v Rinehart* (2022) 402 ALR 345; [2022] NSWCA 66, see especially at [19]–[20].

46 *Lewin on Trusts* (20th ed, Sweet & Maxwell, 2020) vol 1 at para 21-119.

47 *Lambie Trust Ltd v Addleman* [2021] 1 NZLR 307; [2021] NZSC 54 at [47].

48 Section 48 provides: 'At the time that the trusteeship of a trustee ends, if the trust continues, the trustee must give at least 1 replacement trustee or continuing trustee the documents that the trustee holds at that time.'

jurisdictions which inherited English common law. I have elsewhere referred to equity being distinctively part of an international tradition, and there being greater scope for the development of equitable principle by reference to foreign jurisdictions which received English law.[49] Professor Lunney has recently remarked that this was an aspect of 'the commitment of Australian lawyers to the grand, corporate project of developing the common law'.[50] That paper also addresses the highly significant series of 1960s decisions in *Parker v R*,[51] *Skelton v Collins*[52] and *Australian Consolidated Press Ltd v Uren* (*Uren*),[53] concluding with the Privy Council's acknowledgement that common law throughout the Commonwealth need not be uniform. It also states that 'as the third year law student at Sydney University, John Lehane, presciently noted, much would depend on whether the Privy Council's attitude as expressed in *Uren* would lead to a lasting change of approach'.[54] That note, like so much of John Lehane's writing, is highly perceptive. It is politely critical of the decision of the Privy Council, in entertaining an appeal *by the successful party*, based on its dissatisfaction with the reasons although not the orders. The publisher had succeeded in the High Court in setting aside the verdict against it and obtaining a retrial, but yet **[108]** sought to bring a further appeal. The undergraduate Lehane wrote that 'the appeal from the High Court's reasons rather than its order was a most unusual proceeding, and at variance with the ordinary conception of an appeal',[55] identifying the numb of the issue, notwithstanding all of the attempts of Lord Morris (writing for the Board) to camouflage that basic jurisdictional point by reference to the 'ample powers of the prerogative' and the 'somewhat special' circumstances of the case. Lehane the undergraduate was also astute to appreciate the consequences of accepting in *Uren* that the common law need not be uniform, namely, that a Privy Council decision on appeal from Ceylon or New Zealand was not binding on Australian courts, giving rise to precedential complexities in cases where the High Court had spoken on the same point.[56]

---

[49] See M Leeming, 'The Comparative Distinctiveness of Equity' (2016) 2 *Canadian Journal of Comparative and Contemporary Law* 403.

[50] M Lunney, 'From *Parker* to the Australia Acts: Sir Victor Windeyer and the Short-Lived Triumph of the Independent Australian Britons' (2021) 74 *Current Legal Problems* 61 at 64.

[51] (1963) 111 CLR 610; [1963] HCA 14.

[52] (1966) 115 CLR 94; [1966] ALR 449.

[53] (1967) 117 CLR 221; [1968] ALR 3.

[54] Lunney (n 50) at 84, citing J Lehane, 'Stare Decisis, Judicial Policy and Punitive Damages: *Uren v John Fairfax & Sons Limited; Australian Consolidated Press Limited v Uren*' (1968) 6 *Sydney Law Review* 111.

[55] Lehane (n 54) at 114.

[56] Lehane gave as an example: *Radaich v Smith* (1959) 101 CLR 209; [1959] ALR 1253; *Isaac v Hotel de Paris Ltd* [1960] 1 All ER 348.

Even where the former trustee has a right of indemnity against the trust assets, the better view is that they must still be transferred to the new trustee.[57] That view is not without controversy, as Diccon Loxton (and others) have maintained,[58] although it was recently affirmed in *Meritus Trust Co Ltd v Butterfield Trust (Bermuda) Ltd*.[59] The difficulty with the alternative view is that it requires reading down the unqualified language of the Trustee Acts and indeed any vesting orders to exclude part of the trust property necessary to satisfy the right of the indemnity.

As already noted, these problems are international, and their resolution by courts across the world speaks volumes of the continuing commonality of common law jurisdictions. Indeed, around 6 weeks ago an enlarged bench of the Privy Council determined two appeals argued over 3 days concerning the rights of indemnity of a former and a current trustee as between themselves.[60] Those rights reflect an interaction of equity and statute which dates back at least to 1859.[61] One was an appeal from the Jersey Court of Appeal; the other from the Guernsey Court of Appeal. The reasons contain extensive citation of Australian authority, following the statement that while trading trusts 'are not a feature of commercial life in the United Kingdom but which for many years have been widely used in Australia'.[62] All agreed that the proprietary rights of a former trustee were not extinguished by the appointment of a successor, relying in part on an extensive line of New South **[109]** Wales authority including first instance decisions of White, Barrett and Brereton JJ as well as dicta in the High Court and the Court of Appeal.[63] Interestingly, there seems to have been no suggestion that the altered local conditions which were a

---

57 *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* (2008) 74 NSWLR 550; [2008] NSWSC 1344 (although the former trustee's rights are not thereby extinguished).

58 See D Loxton, 'In with the Old, Out with the New? The Rights of a Replaced Trustee against Its Successor, and the Characterisation of Trustees' Proprietary Rights of Indemnity' (2017) 45 *Australian Business Law Review* 285 at 290; M Roberts, 'Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth - The True Nature of the Trustee's Right of Indemnity' (2020) 43 *Melbourne University Law Review* 1100.

59 [2017] SC (Bda) 82 Civ.

60 *Equity Trust (Jersey) Ltd (Respondent) v Halabi* [2022] UKPC 36.

61 Williams J referred to its being given 'statutory recognition' by the deemed clause authorising reimbursement of expenses in s 31 of the Law of Property and Trustees Relief Act 1859 (UK) in *National Trustees Executors and Agency Co of Australasia Ltd v Barnes* (1941) 64 CLR 268 at 277.

62 *Equity Trust* (n 60) at [95].

63 Including *Glazier Holdings Pty Ltd (in liq) v Australian Men's Health Pty Ltd (in liq)* [2006] NSWSC 1240 (White J); *Ronori Pty Ltd v ACN 101 071 998 Pty Ltd* [2008] NSWSC 246 (Barrett J); *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* (2008) 74 NSWLR 550; [2008] NSWSC 1344; *Bruton Holdings Pty Ltd v Commissioner of Taxation* (2009) 239 CLR 346; [2009] HCA 32 at [43]; *Agusta Pty Ltd v Provident Capital Ltd* [2012] NSWCA 26.

feature in *Uren* played any part in determining the nature of the trustee's right of indemnity. The Privy Council observed that 'that the numerous Australian authorities in which the survival of a trustee's proprietary interest in the trust assets after transfer to a new trustee has been considered provide substantial support that such interest is not lost on transfer of the assets to a new trustee', and reached the same conclusion.[64]

The Privy Council divided 4:3, with a partial disagreement amongst the majority, as to whether the entitlement of the former trustee took priority over or ranked pari passu with, the entitlement of the successor. Lord Richards and Sir Nicholas Patten, with whom Lord Stephens agreed, favoured a first in time approach, essentially on the basis that that was the default position, and there were insufficient reasons to displace it. Lord Briggs, with whom Lord Reed and Lady Rose agreed, favoured a pari passu approach as did Lady Arden, but for separate reasons. Time does not permit anything like a full examination of the reasons, and I shall only offer two points on an important decision which I know has already been the subject of thoughtful criticism supplied to the Editor of the *Australian Bar Review*.

The first is that the Board was not referred to any authority on point. Perhaps that is unsurprising. The issue will only arise if *both* the original trustee and the successor trustee have properly incurred liabilities as trustee, and there are insufficient assets in the trust to discharge both trustees' rights of indemnity. It is inherently improbable that a successor trustee who accepts that office without obtaining a release, or ensuring there are sufficient assets, will go on to incur further liabilities. Yet any observer or participant of the processes of litigation will confirm that often the most improbable factual circumstances go to trial, and indeed the appellate process favours improbable facts, if only because most familiar factual circumstances do not give rise to points for appeal.

In the absence of authority, the issue falls to be resolved as a matter of principle. A trustee who is the legal owner of trust property can use the trust property to discharge liabilities properly incurred by the trustee, and to reimburse itself for expenses properly incurred which it has paid for out of its own funds. In that sense, the right of indemnity may be seen as a Hohfeldian power in respect of the trust property, and indeed as an incident of the relations between trustee and trust property and the trust objects. As the

64 *Equity Trust* ()n 60) at [164]-[166] (citations omitted).

High Court said in *CPT Custodian Pty Ltd v Commissioner of State Revenue* (*CPT Custodian*), '[u]ntil satisfaction of rights of reimbursement or exoneration, it was impossible to say what the trust fund in question was'.[65] It is plain from the **[110]** fact that the right is not lost when a successor trustee is appointed, that the right is more than a power to realise for the trustee's own benefit some of the assets held on trust. But it is also plain that the nature of the right must change because the successor trustee can, and the former trustee cannot, discharge trust liabilities and reimburse itself for expenses from trust property in the trustee's own name.

But few things in law are absolutely new, and even if they are, legal reasoning often proceeds by way of analogy. If one were looking for comparable situations, one might consider the equitable rights a solicitor enjoys over the fruits of judgment which amount to a security for the client's obligation to pay the solicitor's costs, which Sir Frederick Jordan famously explained in *Ex parte Patience; Makinson v The Minister*,[66] a luminous account of common law liens and the equitable and statutory rights solicitors enjoyed when a judgment had been obtained in favour of their client, which Lehane J also addressed.[67] The entitlement is available even if the solicitor is not on the record when the judgment or compromise is made, and indeed Lehane J's decision remains a leading authority on the extent to which a solicitor must have been involved in order to enjoy the right. That in turn gives rise to the possibility of a dispute between former and successor solicitor, which was resolved in favour of the latter. As the Privy Council put it, 'where successively retained solicitors both contribute to the generation of the fruits of the litigation it is the second to be retained, not the first, who enjoys priority if the fruits are insufficient'.[68] The majority relied on this as a consideration tending against the first in time rule.[69] Yet it scarcely supports a pari passu approach. In truth, the result is at odds with the conclusions reached by both majority and minority. There is in my respectful

---

65 (2005) 224 CLR 98; 221 ALR 196; [2005] HCA 53 at [51].

66 (1940) 40 SR NSW 96.

67 *Roam Australia Pty Ltd v Telstra Corp Ltd t/as Telecom Australia* [1997] FCA 980 (*Roam Australia*).

68 Above, at [272], citing *Re Wadsworth* (1886) 34 Ch D 155.

69 See *Equity Trust* at [272]:

> Solicitors also enjoy an equitable lien over recoveries made from litigation in which they are retained. It has recently been likened to a charge, in *Edmondson*. But where successively retained solicitors both contribute to the generation of the fruits of the litigation it is the second to be retained, not the first, who enjoys priority if the fruits are insufficient: see *In re Wadsworth* (1886) 34 Ch D 155. This is the exact opposite of a first in time rule, yet their liens constitute proprietary equitable interests in the fund, like trustees' liens. This order of priority between solicitors no doubt has its own justification, but it demonstrates that there is no history of applying a first in time rule to equitable liens.

opinion something to be said for the proposition that the analysis in the Privy Council proceeded on an incorrect premiss. The entitlement of a former trustee to approach a Court of Equity to compel some of the trust assets to be used to discharge a liability properly incurred is quite different from the successor trustee's entitlement to sell property which he she or it owns at law in discharge of a liability which the successor trustee has properly incurred. This is far removed from a competition between two competing security interests, and contrary to what was said in *CPT Custodian* mentioned above. But when some such criticism is made, or even more commonly, when it is said that a court has 'missed an opportunity', it is all too easy to miss the cardinal purpose of the court's **[111]** decision. The court's primary role is not to clarify all aspects of the law for the benefit of the wider society, or the narrower segment of society that wishes to comment upon judgments. It is to resolve the dispute between the parties. There are occasions when, during the course of argument, and more likely in appellate courts than at trial, it may be appropriate for the court to offer for the parties' submissions a proposition in addition to those debated by them, especially if there is a general question of principle. But caution is required before doing so. That course will expand the dispute and inflict further costs on the parties. In the 3 days of hearing in the Privy Council from parties who were more than adequately represented, it would have been no small thing to expand the issues in the way envisaged above. One of the reasons for the success of the common law tradition (including equity) is its incremental development by analogy and its explicit connection with the past, and that is enhanced by tending to minimise the issues resolved to those raised by the parties.

Conclusion

I have mentioned old statutes, and newer statutes, and their effect upon the law of trusts, with a focus on the relations between former trustees and their successors, interspersed with a little music and Tudor history, and the way Australian, English and other common law courts have developed and continue to develop the law of trusts, as part of what may be seen as a worldwide shared endeavour. That choice reflects the man we remember tonight. John Lehane's legal writings played no small part in that shared endeavour, and his wide-ranging mind actively engaged with issues outside the law. I also mentioned the views of his co-author Roddy Meagher. His other co-author, Bill Gummow, has reminded me of something that Sir Victor Windeyer said 51 years ago. The occasion was John's wedding. He simply referred to 'my learned and agreeable nephew'. That was

very high praise. Sir Victor was a man who did not waste words and who used language precisely. Those two characteristics encapsulated many aspects of John Lehane’s career, including those I have mentioned. Tonight we commemorate that man and his legacy. Thank you for your attendance and your attention.