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Priority between Competing Successive Trustee Liens: The Limits of Judicial Innovation and the Opportunity for Law Reform

Allison Silink*

1. INTRODUCTION

A trustee has a right in equity to be indemnified from trust assets in respect of properly incurred liabilities in administering the trust. To support this indemnity, the trustee has an equitable proprietary interest over the whole of the trust assets to secure the amount to which it is entitled. This interest, frequently described by the courts as an equitable 'lien', survives the trustee's retirement or removal and any successor trustee takes the trust assets subject to the former trustee's interest. If the value of trust assets in the hands of the successor trustee is insufficient to discharge the amounts due under their respective liens – in other words, where there is an 'insolvent trust'[1]—a priority dispute arises. Unlike corporate insolvency and personal bankruptcy which have long

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1 See generally N D'Angelo, *Transacting with Trusts and Trustees* (LexisNexis Butterworths Australia, 2020) ('D'Angelo'), 413; N D'Angelo, 'The trust as a surrogate company: the challenge of insolvency' (2014) 8 *Journal of Equity* 299. In summary, D'Angelo asserts that a trust may be regarded as insolvent if the trustee is unable to pay all trust debts as and when they become due and payable out of trust assets and (where it is obliged to do so) its own assets.

been regulated by statute, the insolvency of a trust is administered according to equitable principles.

Equity's general rule for resolving the priority of competing equitable proprietary interests is encapsulated in the maxim *qui prior est tempore potior est jure* – the holder who is first in time prevails. The principle has been consistently applied for least three centuries.[2] Its application to a priority dispute between a former and successor trustee has received surprisingly little judicial or scholarly consideration. Existing Australian cases support its application in this context.[3] However, when the question was considered for the first time by the Privy Council in *Equity Trust (Jersey) Ltd v Halabi,*[4] the Board held, by a narrow majority, that a new bespoke priority rule was warranted under which the interests of trustees rank *pari passu*.

This judicial innovation in *Halabi* has both practical and doctrinal significance. The commercial implications are self-evident: if a former trustee's lien has no priority and the trust is insolvent, its recovery will be vulnerable to the extent of any subsequent trustees' liabilities, in respect of which it will have had little or no oversight or even knowledge. There are corresponding consequences for the former trustee's creditors who will share in a smaller pool if the trust assets are deficient and the former trustee's lien does not have priority. There are also important anterior questions about the proper characterisation of a trustee's rights, and when they arise. Across Anglo-Australian law there appear to be somewhat divergent analyses of the trustee's rights and interests. Any priority rule must build upon a clear understanding of their nature and operation.

In relation to these issues, this article has two aims. The first is to examine the jurisdictional differences in the way courts have described the nature of the trustee's rights of indemnity and lien. Are these rights 'one and the same thing?[5] Or are they distinct in that the indemnity is 'secured by', 'supported by' or 'conferring' the equitable lien, and if so, what is the consequence of the difference? In *Halabi* it was held that the rights are 'one and the same thing' and that the lien dates from the date of the trustee's appointment.[6] Under Australian law, the trustee's personal right to be indemnified arises as an incident of office,[7] and the lien is recognised as a separate proprietary interest over the trust assets which secures the right of indemnity.[8] It is argued that the lien is better analysed as a separate proprietary interest supporting the trustee's personal right of indemnity, accruing if or when the trustee incurs a

2 *Cave v Cave* (1880) 15 Ch D 639; *Phillips v Phillips* (1861) 4 De FG & J 208; 45 ER 1164 ('*Phillips*'); *Rice v Rice* (1853) 2 Drewry 73; 61 ER 646; *Brace v Duchess of Marlborough* (1728) 2 P Wms 491; 24 ER 829 ('*Brace*').

3 See *Richardson v Aileen* [2007] VSC 104 ('*Richardson*'); *Francis (Trustee) in the matter of Fotios (Bankrupt) v Helios Corporation (No 3)* [2023] FCA 251 ('*Fotios*') [11] (Colvin J).

4 *Equity Trust (Jersey) Ltd v Halabi* [2022] UKPC 36 ('*Halabi*').

5 *Halabi* (n 4) [171] (Lord Richards and Sir Nicholas Patten).

6 *Halabi* (n 4) [250] (Lord Briggs).

7 I*n re the Exhall Coal Company* (1866) 35 Beav 449, 453; 55 ER 970, 971 ('*Exhall Coal*').

8 See for example *Lane v Deputy Commissioner of Taxation* [2017] FCA 953, (2017) 253 FCR 46 [34] ('Lane') (Derrington J); *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth* [2019] HCA 20; 268 CLR 524 ('*Amerind*') [139]-[140] (Gordon J)

relevant obligation. Unless or until the trustee incurs a relevant liability, there is nothing to enforce by way of the proprietary rights that attach to the holder of an equitable lien. The priority dispute is therefore to be determined between the accrued equitable liens of the former and successor trustees.

Secondly, this article considers the nature of the first in time rule. It has long been applied between a variety of competing equitable proprietary interests. It arguably reflects a broader social value placed upon the claim of being the 'first' to acquire a valuable interest.[9] It has very few exceptions (at least where the merits are equal). In considering whether the rule should apply between trustees' equitable proprietary interests,[10] it is suggested that to bring the rule into play, it is not necessary to demonstrate that the *purpose* of a particular equitable interest is to afford priority over another interest. Rather, the first in time rule is equity's starting point in resolving a competition between two or more equitable proprietary interests, regardless of the type or purpose of interest. The article then considers the judicial support for the application of the first in time rule between trustee liens under Australian law, and compares this with the majority's reasoning for rejecting it in *Halabi*. In *Halabi,* Lord Briggs noted that the 'central' reason for doing so was the perception of the trust as an 'economic entity' that has an 'enduring' quality like a company, drawing on analogies between the fiduciary roles of trustee and company directors, and the expectations of a trustee's creditors to rank *pari passu* comparably to claims lodged in a corporate insolvency.

Whilst an analogy may be drawn between a trust fund and a company insofar as each functions as an economic entity, it is argued that this of limited assistance to the determination of the priority rule that should apply between trustee liens, given that the trust is not a legal entity like a company, and the competing proprietary interests are not comparable. There are fundamental differences between the rights and interests of trustees and directors, and between the rights of trust creditors and unsecured company creditors.[11] Importantly, adopting a *pari passu* rule as between the interests of trustees does not result in a comparable outcome for trust creditors to unsecured creditors of a company. The reality is that trust creditors' rights remain subject to equitable limitations by reason of the nature of their subrogated rights to the rights of the trustee with whom they have dealt. Recovery by trust creditors is always liable to be limited or reduced by the trustee's conduct and the state of its account, and therefore vulnerable to the extent of the trustee's interest. They have no rights against the fund like unsecured creditors who prove in the insolvency of the company.

Calls for statutory reform to facilitate the commercial use of trust as an economic entity and recommendations for statutory regulation of the insolvency of trusts (at least in relation to trading trusts)[12] are long standing in Australia and have recently been

9 See Lawrence Berger, 'An Analysis of the Doctrine That "First in Time Is First in Right" (1985) 64 *Nebraska Law Review* 349 ('Berger').

10 *Halabi* (n 4) [246].

11 See D'Angelo (n 1).

12 *Ibid.*

renewed.[13] To the extent that there are policy reasons to support comparable rights in insolvency between trust creditors and unsecured creditors of a company, it is argued that only comprehensive legislative reform can achieve meaningful parity of position of trust creditor with that of corporate unsecured creditor as one aspect of broader interrelated reforms. Piecemeal judicial innovation is neither effective nor sufficient.

These issues are considered in two sections that follow. The first section examines the nature of the underlying rights of indemnity and the trustee's lien, and the time at which the lien arises. The second section considers the general equitable priority rule itself as the appropriate starting point for the priority of trustee liens at general law, and discusses the divergence between English and Australian law. The article concludes with a brief consideration of reasons why law reform is the preferable route to address trust creditor expectations.

2. THE JURIDICAL NATURE OF THE TRUSTEE'S INDEMNITY AND LIEN

This section examines the proper characterisation of the rights underlying the trustee's indemnity and lien, in order to establish the analytical framework for determining the appropriate priority rule. Without a clear analysis of any underlying rights and interests at general law, as Worthington has observed, 'the common law system is ideally suited to creating chaos: unwarranted inferences are drawn from cases and then applied inappropriately.'[14] Discussion of the trustee's rights and interests has been bedevilled by 'imprecise' terminology.[15] The trustee's proprietary interest has been described as a *charge,* a *lien,* a *beneficial interest* and a *security*. At times, courts appear to speak of a trustee's indemnity and lien as the same thing and at other times maintaining a distinction between them. Accordingly, a clear understanding of the nature of each right is crucial.

A. The Right of Indemnity

The trustee has a right in equity to be indemnified for properly incurred liabilities in administering the trust. This indemnity is 'incidental' to the office of trustee[16] ameliorating the harshness of the trustee's personal liability for debts incurred in the capacity of

13 Parliamentary Joint Committee on Corporations and Financial Services Report, Corporate insolvency in Australia, 12 July 2023, Commonwealth of Australia, ('PJC Report') chapter 14. <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report>.

14 S Worthington, 'Equitable Liens in Commercial Transactions' (1994) 53 *Cambridge Law Journal* 263, 265.

15 *Amerind* (n 6) [140] (Gordon J).

16 *Worrall v Harford* (1802) 8 Ves 4, 8, (Lord Eldon LC); *Exhall Coal* (n 8) 453 (Lord Romilly MR).

trustee. The indemnity comprises both a right of *recoupment* of amounts from the trust fund that the trustee has already paid out of its own pocket, and a right of *exoneration* in respect of amounts still owing to creditors.[17] Despite the fact that the right of indemnity arises by operation of law,[18] it functions in a broad sense like any other contractual indemnity (accepting that indemnities arise in a wide range of circumstances and their scope will be necessarily tailored to the particular circumstances). Broadly speaking, an indemnity *inter partes* involves a promise by the promisor that they will 'keep the promisee harmless' against certain loss.'[19] It is not dependent upon the existence of a debt or obligation of another; it is an independent promise by the promisor to hold the promisee harmless from liability that may arise.[20] The trustee's indemnity is to the same broad effect and has been described in precisely the same terms of holding the trustee harmless. In *Exhall Coal*,[21] Lord Romilly MR observed that the trustee's right of indemnity is 'a right incidental to the character of trustee and inseparable from it, that he should be *saved harmless* from obligations which are attached inseparably to his office.'[22] It is also acknowledged as a 'personal right' arguably distinguishing it from a proprietary interest.[23]

B. The Nature of the Trustee's Lien

There is long-standing authority that the trustee's indemnity is supported,[24] or 'secured'[25] by an equitable proprietary interest described as a *lien*[26] or *charge*[27] over the trust assets. One of the reasons that the Privy Council gave in *Halabi* for considering that the trustee's lien was 'worthy of a carefully worked-out priority rule of its own' was the fact that it was analysed as a 'truly *sui generis*' form of lien distinguishable from other

17 *Halabi* (n 4).

18 *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* (2008) 74 NSWLR 550, ('*Lemery*') 553 (Brereton J).

19 *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294, 296 (Harman LJ); see further Nuncio D'Angelo, 'The Indemnity: It's all in the drafting' (2007) *Australian Business Law Review* 93, 94.

20 See for example *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778, 784 (Vaughan Williams LJ).

21 *Exhall Coal* (n 7).

22 *Ibid*, 971–72 (emphasis added).

23 *Break Fast Investments v Sclavenitis* [2022] VSC 288 ('*Break Fast*') (Riordan J); *Custom Credit Corp Ltd v Ravi Nominees Pty Ltd* (192) 8 WAR 42, 46 (Owen J).

24 *Octavo Investment Pty Ltd v Knight* (1979) 144 CLR 360; [1979] HCA 61 [13] ('*Octavo*').

25 See *Savage v The Union Bank of Australia Limited* (1906) 3 CLR 1170, 1196 per O'Connor J; *Octavo, n 27*, 369; *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346 [43] ('*Bruton*').

26 There are many older English authorities which confirm the trustee's lien including *Exhall Coal, n 9*; *Re Pumfrey* (1882) 22 Ch D 255, 262; *Stott v Milne* (1884) 25 Ch D 710, 715; *St Thomas's Hospital (Governors) v Richardson* [1910] 1 KB 271, 276. For Australian cases see *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties* [1984] 1 Qd R 576, 585; *Trim Perfect Australia v Albrook Constructions* [2006] NSWSC 153, [20] ('Trim Perfect'); *Caterpillar Financial Services Australia v Owens Nominees Pty Ltd* [2001] FCA 677 [7]; *Lemery* (n 18) [16]; *Bruton* (n 25) [43].

27 In fact, the terms are frequently used interchangeably.

forms of legal or equitable security device. It noted that the trustee's lien is a 'a means of payment, not a security for payment' in the usual sense, lacking a debtor for whom the lien stands as security, and having 'no close parallel in the world of equitable proprietary interests.'[28]

We now turn to consider the features of an equitable lien generally, and then compare them with a trustee's lien. Accepting as the courts have done, that it is an interest in trust assets of which the trustee is owner and not against the assets of a debtor, or other party, nonetheless, it is argued that a trustee's lien functions, in a practical sense, as any other equitable lien, securing the trustee's right to payment from assets over which the proprietary interest exists by an entitlement to seek relevant orders from the court.

The equitable lien has been described as 'a right against property which arises automatically by implication of equity to secure the discharge of an actual or potential indebtedness.'[29] In *Hewett v Court*, Deane J noted that:

> The word 'lien' is used somewhat imprecisely in the phrase 'equitable lien' to describe not a negative right of retention of some legal or equitable interest but what is essentially a positive right to obtain, in certain circumstances, an order for the sale of the subject property or for actual payment from the subject fund.[30]

It is said to be a 'type of equitable charge'[31] which attaches to the underlying asset 'until certain specific claims have been satisfied.'[32] It confers no entitlement to acquire title to such asset, or the use of, or income from it, and its value does not alter with changes to the value of the asset. It is limited to a right to withhold the subject property from another who is otherwise entitled to it, and a right to seek the assistance of the court to order the sale of the subject property to satisfy the obligation.[33] As Campbell observes, the lien is 'the reification of the preparedness of the court to make a proprietary order.'[34] A single rationale for the equitable lien as a species of proprietary right is difficult to identify. There are general statements of liens being recognised to avoid injustice[35] by furnishing a ground for the specific remedies which equity confers, operating upon particular identified property.[36] It has once been described by reference to conferring a priority: Justice Holmes, writing in the United States context, observed over a century ago that, 'the phrase equitable lien may not … do much more than

28 *Halabi* (n 4) [249]-[250] (Lord Briggs)
29 See for example *Hewett v Court* (1983) 149 CLR 639, 663 ('Hewett') (Deane J).
30 *Ibid*, 664.
31 *Ibid*.
32 Worthington (n 14) 263.
33 See E Sykes and S Walker, *The Law of Securities* (Lawbook Company, 5th ed, 1993), 198 ('Sykes & Walker').
34 JC Campbell, 'Some historical and policy aspects of the law of equitable liens' (2009) 83 *Australian Law Journal* 97, 120.
35 See, for eg, *Whitbread & Co Ltd v Watt* [1902] 1 Ch 835, 840 (Stirling J) in the context of vendor's and purchaser's liens.
36 *Ibid*, 838 (Vaughan Williams LJ); See further Campbell (n 34).

express the opinion of the court that the facts give a priority to the party said to have it.'[37] At a basic level of generality, all equitable liens function as a security device, protecting the holder's equitable rights of recovery pursuant to equitable principle.

The trustee's lien shares these substantive characteristics even though there is no 'debtor' from whom the payment is due as the entitlement arises by operation of law. The trustee has a right to withhold trust property from the beneficiaries pending satisfaction, and a right to approach the court for assistance in realising those assets by appointment of a receiver or judicial order for sale (if it does not otherwise have an express power of sale under the trust instrument, or by statute).[38] Otherwise, sale of trust assets to satisfy its indemnity is not permissible. There is no process of foreclosure to permit taking or retaining title to trust property to enjoy beneficially.[39] The lien is said to have the nature of a floating charge over all the trust assets.

As has been discussed, the trustee's lien differs in one other glaringly obvious way to other liens. In *McEntire v Crossley Brothers Limited*,[40] Lord Herschell stated categorically, 'a man does not have a lien on his own property or a charge either.'[41] Yet the trustee is the legal owner of the very trust property over which this form of lien exists. However, the heavy burden of trusteeship prevents the trustee from enjoying any rights of ownership of the assets which explains the long standing recognition of this *suis generis* proprietary interest: the trustee is conscience-bound in equity to administer the trust for the benefit of the beneficiaries and not its own interests, except to the extent that its indemnity (and the trust instrument) permits. The trustee is precluded from exercising the ordinary incidents of legal ownership on its own behalf so that its proprietary interest operates as a form of lien requiring the assistance of the court to enforce, (even though, of course, under Anglo-Australian trust law a trustee does not have a separate representative capacity and there is no 'other' against whom the right is enforced). When the trustee is replaced, the lien assumes a more traditional operation over the assets that are now owned by another – the replacement trustee.[42] Accordingly, despite being suis generis, the trustee's lien shares the ordinary remedial function of an equitable lien, distinguishing it from the exercise of rights of ownership.[43]

37 *Sexton v Kessler* (1912) 225 US 90, 98–99.

38 See for example *Apostolou v VA Corp Aust Pty Ltd* [2011] FCAFC 103 [45] and *Jones v Matrix Partners Ltd, in the matter of Killarnee Civil and Concrete Contractors Pty Ltd (in liq)* [2018] FCAFC 40 [44] ('Jones')(Allsop CJ).

39 See *Trim Perfect* (n 26), and the authorities cited at [20(5)]: *Tennant v Trenchard* (1869) LR 4 Eq 537; *Seton's Judgments and Orders*, 7th ed, 1912, vol 3 pp 2220 to 2225; see also *Ashburner's Principles of Equity*, 2nd ed (1983) p 248; *Sykes & Walker* (n 33) 198; E L G Tyler, P W Young and C W Croft, *Fisher and Lightwood's Law of Mortgages* (LexisNexis, 2nd Australian ed,1995) 44; *ANZ Banking Group Limited v Intagro Projects Pty Limited* [2004] NSWSC 1054 [14].

40 [1895] AC 457, 466 cited in D Ong, *Ong on Subrogation* (Federation Press, 2014) 16.

41 See also *Agusta Pty Ltd v Provident Capital Ltd* [20120 NSWCA 26, 2012) 16 BPR 30 [41] ('*Agusta*') (Barrett JA).

42 See *Newcastle Airport Pty Ltd v Chief Commissioner of State Revenue* (2014) 99 ATR 748 [78] (White J).

43 Nor is it an encumbrance over the beneficiaries' interest in the trust assets: *Commissioner of Stamp Duties v Buckle* (1998) 192 CLR 226.

C. When does the Trustee's Lien Arise?

How does equity determine the time at which proprietary interests arise?[44] Writing in 1994, Worthington observed that 'it remains unacceptably difficult to say when [the liens of the vendor and purchaser] accrue.'[45] The same might be said today of the trustee's lien. There are dicta in Australian cases which support the analysis that the trustee's lien accrues when the relevant liability is *incurred*.[46] However, in *Halabi,* the Board unanimously accepted that for the purpose of a priority dispute, the trustee's lien dates from the trustee's appointment.

The reasoning in *Halabi* appears to flow from the Board's assumption that the lien and the indemnity are 'one and the same thing.'[47] In *Halabi* it was held that there is 'no difference between the right of indemnity and the proprietary interest … [they] are *one and the same thing*.'[48] On this reasoning,'[t]he right, and its concomitant interest, are thus created on appointment.'[49] However, under Australian law, the indemnity and lien are characterised as distinct rights: the indemnity is '*supported* by a lien over trust assets which amounts to a proprietary interest in the assets.'[50] Most recently in *Amerind*[51] Gordon J discussed this distinction directly, observing:

> A number of cases have adopted imprecise language in describing the nature of the proprietary interest generated in the trust assets by the trustee's right of exoneration, referring to the right of exoneration as the proprietary interest. This imprecision generates confusion … The proprietary interest generated by the trustee's right of exoneration is not the right of exoneration itself. Rather, the right of exoneration generates a proprietary interest in the trust assets. To label the right of exoneration a proprietary interest is to confuse the source of the proprietary interest with the interest itself.[52]

It is argued here that the characterisation of the indemnity and lien as distinct rights is supported by their differing operation at times. For example, in certain circumstances, the right to be indemnified in respect of properly incurred trust liabilities can be enforced against a beneficiary after the distribution of trust assets. In *Hardoon v. Belilios*[53] Lord Lindley observed that:

44 Worthington (n 14) 264.
45 *Ibid*, 263.
46 See Diccon Loxton, 'In with the Old, Out with the New? The Rights of a Replaced Trustee Against its Successor, and the Characterisation of Trustees' Proprietary Rights of Indemnity' (2017) 45 *Australian Business Law Review* 287, 315.
47 citing *Exhall Coal* (n 7).
48 *Halabi* (n 4) [171] (Lord Richards and Sir Nicholas Patten).
49 *Halabi* (n 4) [207] and [240].
50 *Bruton* (n 25) [47].
51 *Amerind* (n 6) [85] Bell, Gageler and Nettle JJ (with whom Gordon J agreed) accepted that the 'trustee's right of indemnity *confers* a beneficial interest in trust assets'.
52 *Ibid*, [139]-[140] (Gordon J).
53 [1901] AC 118.

> 'Where the only *cestui que trust* is a person *sui juris,* the right of the trustee to indemnity by him against liabilities incurred by the trustee by his retention of the trust property *has never been limited to the trust property*: *it extends further and imposes upon the cestui que trust a personal obligation* enforceable in equity to indemnify his trustee.[54] (emphasis added)

In other words, the right to be indemnified against properly incurred liabilities can be enforceable in ways other than the proprietary remedies pursuant to the lien, demonstrating that the indemnity and lien are not entirely co-extensive. This analysis supports the characterisation of the indemnity and lien as rights which are in fact distinct, while intrinsically interrelated.

Returning to the question of when a lien accrues, relevant scholarship supports the view that any equitable lien arises only at the time when the obligation to which it relates falls to be performed.[55] In the context of the liens of vendor and purchaser, for example, Worthington has argued that in every case equity applies the maxim that what ought to be done (if anything) is considered done, which requires careful consideration of what precisely equity requires to be done.[56] Between vendor and purchaser, 'only when the property has been transferred does equity consider that the purchaser "ought" to pay the price, and only then will it impose a lien on the sale property to secure such payment.'[57] This makes sense as a matter of logic: the nature of any equitable lien as a proprietary right to seek court assistance by way of an order for sale or appointment of a receiver to vindicate an amount due to the lienee, can arguably only accrue and become enforceable upon incurring an obligation which the court will enforce.

The obligation that gives rise to a trustee's lien is any properly incurred trust liability for which the trustee is personally liable. When such a liability is incurred, this gives rise to the accrual of the lien to support the equitable personal right to be indemnified against such a liability by operation of law.[58] It would then be unconscionable for the beneficiaries to insist upon transfer of the trust property to them without payment to the trustee of the amounts it owes. However, unless or until the trustee incurs a liability, there is nothing to enforce. It is argued that the better view is that whilst the right to be *indemnified* arises as an incident of office upon appointment, the trustee's *lien* will only accrue upon the incurring of a relevant liability so as to secure the trustee's right to payment. This is consistent with the general law in relation to charges: there can be no effective charge if there is no underlying debt to secure.[59]

The proposition can be tested further. Consider a call by beneficiaries to wind up the trust under the rule in *Saunders v Vautier*.[60] If there are no outstanding liabilities

54 *Ibid*, 124 (Lord Lindley).
55 WJ Gough, *Company Charges*, (London, Butterworths, 1978) 224; Worthington (n 14).
56 *Ibid*, 264–65.
57 *Ibid*, 265. See further Campbell (n 34) 101.
58 *Trim Perfect* (n 26).
59 *Fischer v Nemeske Pty Ltd* (2016) 257 CLR 615 [186] (Gordon J).
60 (1841) 4 Beav 115; 49 ER 282.

(ie there is nothing in respect of which the trustee may wish to exercise its indemnity), and the beneficiaries are otherwise of age and entitled, there is no basis for the trustee to resist the call. In other words, the existence of a lien which would preclude the termination of the trust and distribution of assets, is directly referable to the existence of a relevant obligation. Secondly, take the position of a trustee who grants an equitable charge over trust assets to a third party trust creditor at a time at which it has no outstanding liabilities, and then later incurs a liability. Unless provided for in the charge, arguably the trustee would not be permitted to claim that its equitable lien in respect of a later incurred liability has priority over the earlier equitable security. Accordingly, it is argued that the preferable analysis is that whilst the *personal right* to be indemnified against properly incurred trust liabilities arises as an incident of office and dates from appointment, the *proprietary interest* by way of lien only accrues at the time that a relevant liability is incurred. A priority competition falls to be considered as between accrued proprietary interests.

3. THE PRIORITY RULE: JUDICIAL INNOVATION LEADING TO JURISDICTIONAL DIVERSION AND A CASE FOR LAW REFORM

As alluded to in the Introduction, there is now an apparent difference between English (and Welsh) law and Australian law in the proper approach to a priority dispute between successive trustees' liens. This section examines the nature of equity's first in time rule and this jurisdictional divergence.

A. The Nature of the 'First in Time' Rule

The first in time priority rule is long standing. Leading nineteenth century cases on the rule acknowledged that the rule embodied 'elementary rules',[61] going back at least a century.[62] Its rationale has been described as being that 'priority in time is considered to give the better equity.'[63] It has been held frequently that this is the true meaning of the maxim *qui prior est tempore potior est jure*.[64]

It has been observed that the 'first in time' rule has long been applied in resolving a wide array of human conflicts, both in law and according to social custom. Berger has examined its normative justification on grounds of 'the promotion of economic efficiency through encouraging development,' to create incentives by valuing the enterprise of the first to any endeavour, observing:[65]

61 *Phillips* (n 2) 217.
62 *Brace* (n 2).
63 *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLE 265, 276 ('Latec') (Kitto J).
64 *Ibid*, 276 (Kitto J) citing *Rice* (n 2) 78.
65 *Berger* (n 9) 388.

> The legal rules about finding, water rights, nuisance, prescription, patents, wild animals, creditors' rights, franchises, recording and priorities in realty, and scores of other issues are wholly or partially governed by it. People follow it as unwritten law in their social interaction. The line waiting in front of a movie theater obeys its commands. The notion seems to be grounded in something almost instinctual; yet there is much more to it than that. Different policies serve to justify its application in various legal disputes.

This also appears to explain the policy underpinning equity's first in time priority rule. Where the merits are equal, the fact of being first to acquire an equitable proprietary interest in disputed property is sufficient reason to prefer that interest, rather than require the multiple interests to share *pari passu*. It is equity's starting position in resolving a priority dispute between competing equitable proprietary interests of almost any sort, with very few exceptions.[66] The general application of the first in time rule was restated by Millett LJ in *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)*:[67]

> In English law the order of priority between two competing interests in the same property depends primarily on whether they are legal or merely equitable interests. Where both interests are equitable – or both legal, for that matter – the basic rule is that the two interests rank in the order of their creation. In the case of equitable interests the order of priority may be reversed in special circumstances, but 'where the equities are equal, the first in time prevails'. The absence of notice of the earlier interest by the party who acquired the later interest is irrelevant, even if he gave value.

Courts have recognised particular circumstances in which the later interest has the better equity. Otherwise, save for the exception known as the rule in *Dearle v Hall*[68] (which is not without its critics[69]), the first in time priority rule has proven a remarkably durable and workable feature of equity. Priority is one of the hallmark characteristics of a proprietary interest.[70] As Lord Browne-Wilkinson observed in *Foskett v McKeown,*[71] (albeit in a different context) '[t]he rules establishing equitable proprietary interests and their enforceability against certain parties have been developed over the centuries and are an integral part of the property law of England.'[72] It has been said that '[a]ll priority problems may be solved by applying [four] basic rules'[73] of which the first in time rule is one.

66 Between fruits of litigation liens' priority was given to the solicitor who brought in the assets: In *Re Wadsworth; Rhodes v Sugden* (1886) 34 Ch D 155. cf *Atkinson v Pengelly* [1995] 3 NZLR 104 where held to rank pari passu.

67 *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 3 All ER 747, 999–100 (Millet LJ).

68 (1828) 3 Russ 1; 38 ER 475.

69 In *Ward v Duncombe* (1893) AC 369 Lord MacNaghten observed that 'the rule in *Dearle v Hall* has on the whole produced at least as much injustice as it has prevented.'

70 JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th edn (LexisNexis, 2014) 108, [4-015].

71 [2001] AC 102.

72 *Ibid*, 109.

73 Young, Croft, Smith, *On Equity* (Lawbook Co Ltd, 2009), 591.

The first in time rule has been applied between a great variety of types of equitable interest, including other interests also recognised as *sui generis*[74] and interests where the purpose of the interest has not been proven to give it priority over another interest.[75] Examples include disputes involving the lien of an unpaid vendor,[76] the equitable interest of a purchaser,[77] the interest of a beneficiary under a constructive trust,[78] the interest of a partner in a partnership,[79] and in many other combinations of different equitable proprietary interests as well as equitable security interests.

Do the cases support its application to a priority dispute between competing trustee liens? In *Halabi*, the perceived lack of any authority for priority to be recognised between competing trustee liens in other common law jurisdictions was noted as a significant reason to see the issue as open for determination.[80] However, there is existing judicial support for the application of the general priority rule to trustee liens under Australian law.

B. Australia

Numerous Australian cases confirm, as a matter of principle, that the former trustee has a 'superior'[81] or 'higher'[82] right in respect of its lien to a successor trustee, who takes 'subject to' the interest of the former trustee, in the sense that '[t]he [trustee's] lien has priority over the claims of beneficiaries *and successive trustees*'.[83] Courts have also expressly applied the first in time priority rule to disputes between successive trustees' liens.

In *Richardson v Aileen*,[84] the successor trustee was appointed following the settlement of proceedings for the removal of the former trustee, and sought an order that he be paid from the balance of proceeds of sale of trust assets, all his proper and reasonable costs and disbursements associated with carrying out his obligations in priority to the former trustee.[85] The trust assets were insufficient to pay both the

74 In *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321, 328, ('Canny Gabriel') the High Court of Australia described the interest of a partner in partnership assets as a *sui generis* interest and applied the first in time rule to it.

75 *Halabi* (n 4) [246].

76 *Hewett* (n 29).

77 *General Finance Agency & Guarantee Co. of Australia Ltd. (In Liquidation) v Perpetual Executors & Trustees Association of Australia Ltd* (1902) 27 VLR 739

78 *Youssef v Victoria University of Technology* [2005] VSC 223 (Whelan J)

79 *Canny Gabriel* (n 77).

80 *Halabi* (n 4) [238] (Lord Briggs).

81 For example, *Re Dalewon Pty Ltd* (in liq) (2010) 79 ACSR 530 [8]; *Re Winter Holdings (WA) Pty Ltd* [2015] WASC 162 [40], *Caterpillar Financial Services Australia v Owens Nominees Pty Ltd* [2001] FCA 677 [22]; *Collie v Merlaw Nominees Pty Ltd (in liq)* [2001] VSC 39 [54]-[55]; *Lemery* (n 18) [21]; *Agusta* (n 41) [44].

82 *Synergy Concepts Pty Ltd* v *Rylegrove Pty Ltd (in liquidation)* (1997) 8 BPR 15,555 (Santow J)

83 *Tolhurst Druce & Emmerson v Maryvell Investments Pty Ltd (in liq)* [213] (Dodds-Streeton J), cited with apparent approval in *Pitard Consortium Pty Ltd* v *Les Denny Pty Ltd* (2019) 58 VR 524 [24] (McDonald J).

84 [2007] VSC 104.

85 in accordance with the equitable principle in *Re Universal Distributing Company Ltd (in liq* (1933) 48 CLR 171.

former and successor trustees. The applicability of the first in time rule was accepted.[86] However, in the circumstances, it was held that there were reasons to postpone the earlier interest. This case has been applied[87] and cited subsequently for this principle,[88] and re-affirmed again recently in light of the decision in *Halabi*, in *Fotios*, where Colvin J held that:

> I remain of the view that it is appropriate for the priorities between successive trustees to a charge or lien over the property of the trust to be determined in accordance with general equitable principles as to competing priorities. This reflects the current state of the law in Australia.[89]

There is also New Zealand authority which accepts the priority of the former trustee's lien. In *Camray Farms Limited (in liq)* v *BL (Nature Sunshine) Trustee Limited as Trustee of the Camray Farm Trust*,[90] in the New Zealand High Court, Edwards J observed that:

> The new trustee takes the trust property subject to the former trustee's equitable proprietary interest arising out of the right of indemnity. *That means in this case that [the former trustee's] rights to the trust property are superior to those of [the successor trustee]* … [91]

Camray Farms confirms that the expression 'subject to' is also used by the courts as a way of recognising that taking *subject to* the former trustee's lien means accepting its priority.

C. *Halabi* in the Privy Council

In *Halabi,* the Privy Council heard two appeals, one from Jersey and one from Guernsey, both of which concerned a priority dispute between a former and successor trustee. Both trusts were governed by Jersey law but the case was decided on English trust law principles.[92] In the appeal brought from the Jersey Court of Appeal,[93] Equity Trust (Jersey) Ltd was the former trustee of a discretionary trust. Six years after it had retired, it was sued by the liquidator of a company in that corporate group in relation to breaches of fiduciary duty by former directors and employees, in respect of which it

86 *Ibid*, [51], citing for example, *Moffett* v *Dillon* [1999] 2 VR 480.

87 *Fotio* (n 3) [9] and [61] that the orders made were 'on the basis of the principle that the former trustee's rights have priority over a new trustee in the absence of some vitiating factor', citing *Richardson* v *Aileen*.

88 cited with apparent approval by the New South Wales Court of Appeal in *Australia Capital Financial Management Pty Ltd* v *Linfield Developments Pty Ltd* [2017] NSWCA 99 [279] (per Ward JA, with whom McColl and Gleeson JJA agreed).

89 *Fotios* (n 3) [11] (Colvin J).

90 [2019] NZHC 2536.

91 *Ibid*, [61] cited with approval in *Temple 88 Limited (in liq)* v *Hassine* [2021] NZHC 2351 [19]-[21].

92 *Halabi* (n 4) [52]-[58].

93 *Representation of Rawlinson and Hunter Trustees SA re Z Trusts* [2019] JCA 106 (Sir William Bailhache, Bailliff, Martin JA and Logan Martin JA).

was found vicariously liable. The claim was settled and the former trustee sought reimbursement out of the trust assets from its successor trustee on the basis that its lien in respect of properly incurred liabilities relating to its office had priority.

The appeal from the Guernsey Court of Appeal[94] concerned a former trustee of a discretionary trust, Investec Trust (Guernsey) Ltd which had entered into certain loans whilst trustee with its co-trustee in relation to which a dispute arose. The co-trustees commenced proceedings to determine whether they had incurred personal liabilities in particular transactions. Following demands for repayment of the sums owed, they were removed as trustees and replaced. The appeal focused on the priority of the former trustee's costs in those proceedings (incurred before removal), and for unpaid remuneration.

The issue that divided the Board was the proper approach to the priority questions in both appeals. On this question, the Board split narrowly, four to three. The minority[95] accepted that the first in time rule was applicable to determine the priority of trustee liens. In their view, the proprietary interests of successive trustees are 'clearly competing or equal' equitable proprietary interests,[96] and that in the absence of special circumstances that would make it inequitable for a former trustee to rely on its priority – and no such circumstances were suggested to exist – the general rule should apply.[97] Lord Briggs whose reasons represent the opinion of the majority on this issue,[98] was persuaded that there were 'sufficiently powerful reasons, of justice, equity, fairness and common sense for preferring a pari passu rule.'[99] He gave four main reasons to support this conclusion.

First, Lord Briggs emphasised the lack of express *purpose* of the trustee's lien being to confer priority over another trustee[100] which was regarded as 'striking' and in 'marked contrast' to other equitable security interests.[101] As discussed above, in its long history, equity has applied the first in time rule to a wide range of different equitable interests in addition to the holder of an equitable charge. It is respectfully suggested that the purpose of the grant of the interest to afford priority is not a hurdle to the application of the rule. Rather, it is equity's prima facie response to competing proprietary claims – of any nature—to the same property, where the merits are equal. The rule may be seen as a 'deadlock breaker', applied unless grounds to prefer the later equity are established.

94 *ITG Limited* v *Glenalla Properties Limited* [2020] GCA 43.

95 Lord Richards and Sir Nicholas Patten delivered a joint judgment, (the Joint Opinion), with which Lord Stephens agreed.

96 *ITG* (n 96) [177].

97 *Ibid.*

98 Lord Briggs delivered a separate judgment on the Priority Question with which Lord Reed and Lady Rose agreed, and Lady Arden agreed in the result whilst delivering brief additional reasons.

99 *Halabi* (n 4) [239].

100 *Ibid,* [246].

101 *Ibid.*

Secondly, Lord Briggs considered a range of hypothetical scenarios not raised on the facts of the appeal such as rolling succession, and multiple trustees appointed consecutively who serve concurrently and retire at different times. It was accepted that priority afforded by the 'mere happenstance'[102] of appointment would not serve the interests of justice. Lord Briggs reasoned that these examples demonstrated that a first in time rule based on appointment date would not 'work better equity or justice, or even rational common sense, than a pari passu rule'.[103] Much of the criticism of applying the priority rule to trustees' liens in these circumstances arose from the assumption that a trustee's lien dated from *appointment*. Lord Briggs explained:

> I cannot imagine for example why five trustees appointed on successive working days during a single week … should be presumed to think it just or fair that … the trustee appointed on a Monday should get paid in full, but the trustee (perhaps with a much larger claim) who happened to have been appointed on a Friday should get nothing.[104]

Brief consideration was given to the alternative argument discussed above that a lien accrues when the trustee incurs a relevant liability. However, Lord Briggs thought that it bore 'no obvious correlation with justice or equity and would be formidably difficult and expensive to administer.'[105] With respect, the administrative difficulty is not entirely clear. Certainly in the ordinary case of a priority dispute between a former and successor trustee where the former trustee's lien relates to prior, properly incurred liabilities, there is unlikely to be any administrative or accounting difficulty. The temporal questions will usually be very straightforward – the former trustee's lien in respect of liabilities incurred before the trustee was removed will accrue before the successor trustee's lien in respect of liabilities incurred later, and the initial question in applying the first in time rule would be whether the merits of the respective interests are equal.

Even if a particular case did give rise to accounting complexity, is this a reason to reject the application of the general rule entirely? Arguably, any accounting complexity could be resolved in the typically pragmatic way that courts of equity deal with complex accounting or evidentiary processes. For example, where the cost and complexity of applying the lowest intermediate balance rule in tracing into a mixed account is too great, a court of equity can determine to apply a *pari passu* rule.[106] In *Halabi*, both Lord Briggs and Lady Arden accepted that there might be exceptional cases where a different approach to the *pari passu* rule might be more appropriate. However, it might equally be reasoned the other way around: in exceptional circumstances, the general 'first in time' rule might give way to a different approach. It is respectfully

102 *Ibid*, [258].
103 *Halabi* (n 4) [259] (Lord Briggs).
104 *Ibid*, [254].
105 *Ibid*, [206] (Joint Opinion); [267] (Lord Briggs).
106 *Caron and Seidlitz v Jahani and McInerney in their capacity as liquidators of Courtenay House Pty Ltd (in liq) & Courtenay House Capital Trading Group Pty Ltd (in liq) (No 2)* [2020] NSWCA 117 [122]-[123] (Bell P).

suggested that hypothetical administrative complexity (which did not arise on the facts of the case) seems an unusual basis upon which to reject the general rule.

Thirdly, Lord Briggs accepted the perception of a trust as having 'an enduring quality of its own',[107] like a company, and this was 'central' to his view that the insufficiency of the fund is a common misfortune for trustees for which *pari passu* was the 'fairest, or least worst, general rule'.[108] Lord Briggs considered that it would be inappropriate between fiduciaries serving the interests of their beneficiaries in a 'continuing trust relationship' to have any rule other than ranking equally, to avoid competition between them which would be incompatible with their 'joint pursuit of a common cause'.[109]

However, the differences between a trust and a company are so fundamental and numerous, and particularly stark in insolvency, that the ostensible parallels between trust and company, between trustee and director (or board of directors), and between trust creditor and unsecured creditor of a company, are fraught. Over 35 years ago, Ford and Hardingham observed that:

> The differences between trading trusts and registered companies are highly technical and outside the understanding of not only most lay investors but most professional advisers. Only when liquidation in insolvency supervenes will minds be concentrated enough to appreciate the technicalities.[110]

It is not the purpose of this article to list the many complex differences between trust and company which have been amply described in existing literature.[111] In the current context, it suffices to note the following. Lord Briggs compared trustees with 'occupants of other fiduciary offices', and found a parallel in company directors who have no claim priority in respect of their claims against a company in its insolvency.[112] However, a director has neither a recognised right of indemnity arising by operation of law, nor proprietary interest in the assets of the company. Their rights cannot be regarded as analogous to the proprietary right of a trustee over trust assets to secure its indemnity.

Finally, Lord Briggs was of the view that trust creditors would *expect* to rank comparably to unsecured creditors of a company in liquidation. In his words:

> [Trust creditors'] natural expectation, as unsecured creditors, would be that all trust creditors should share pari passu the consequences of the inadequacy of the fund, just as they would share the consequences of having given credit to an insolvent company or a bankrupt individual.[113]

107 *Ibid*, [256]-[257].
108 *Ibid*, [257].
109 *Ibid*, [277].
110 HAJ Ford and IJ Hardingham, 'Trading Trusts: Rights and Liabilities of Beneficiaries' in PD Finn (ed) *Equity and Commercial Relationships* (Law Book Co, 1987) 84.
111 D'Angelo (n 1).
112 *Halabi* (n 4) [271].
113 *Ibid*, [276].

It is important to bear in mind that a priority dispute will not necessarily involve any trust creditors at all. Where the creditor has been satisfied, the trustee's claim is simply to be reimbursed for their own outlay. The expectations of creditors will be irrelevant. However, even where a trustee is claiming a right of exoneration to pay its trust creditors, any expectation of parity by trust creditors with the position of unsecured creditors of a company is misconceived. Unsecured creditors of an insolvent company have a statutory right to lodge a proof of debt in respect of a claim to receive a share of the pool of remaining company assets, in respect of which they rank *pari passu* (within a class). However, a trust creditor has no rights against the trust fund, only the derivative right to be subrogated to the trustee's interest which can be limited in several ways and even lost as a result of trustee misconduct. It is as D' Angelo has put it, a 'parity myth.'[114] A trustee can only seek indemnity for 'properly incurred' liabilities. A trust creditor expecting that a trustee has a right of indemnity can find that the indemnity is reduced or non-existent if the trustee's liabilities were not properly incurred. Secondly, the so-called 'clear accounts rule' is another potential obstacle to recovery. Pursuant to this rule, if the trustee is indebted to the trust estate on any account at all, it will have its liability offset against the amount to which it is entitled under its indemnity.[115] This also has the potential to reduce (including to zero) the value of a trustee's right to indemnity, and consequently, undermine that trustee creditors' rights to be subrogated to it.

Accordingly, any such expectations of trust creditors of parity with the position of an unsecured creditor of an insolvent company cannot be met by judicial reform of the priority rule alone, but arguably requires comprehensive law reform to address the equitable limitations upon recovery for trust creditors.

D. Difficult Cases – Where the Former Trustee Incurs a Liability after Replacement

As discussed above, in the ordinary case, a former trustee's lien will be referable to liabilities incurred before it retires or is removed. However, what happens when the former trustee incurs a liability *after replacement*, and after its successor has incurred its own liabilities?

One of the appeals in the *Halabi* case involved precisely this unusual situation. In the appeal from the Jersey Court of Appeal,[116] the former trustee was trustee of a discretionary trust from which it retired in 2006. In 2012, the former trustee was sued by the liquidator of a related company in relation to breaches of fiduciary duty by two

114 See Nuncio D'Angelo, 'Shares and Units: The Parity Myth and the Truth about Limited Liability' (2011) 29 C&SLJ 477 at 499-450 and generally, D'Angelo (n 1) ch 5.

115 See *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385 (SC) 397–98 (Brooking J); *Australian Securities and Investments Commission v Letten (No 17)* (2011) 286 ALR 346 [19]–[20] (Gordon J).

116 *Halabi* (n 4).

former directors and certain employees, in respect of which the former trustee was found vicariously liable. In 2015, the claim was settled on the basis that it paid approximately £16.5 million to the company which had brought the proceedings. The Privy Council accepted that this was a properly incurred trust liability incurred after removal. The former trustee claimed priority in respect of its claim to be indemnified from trust assets.

A recent Australian case has raised a similar question on its facts although the priority question was not the issue on the appeal. In *Jaken Properties Australia v Naaman*[117] Jaken Property Group Pty Ltd (JPG) was appointed trustee in 2005. Two years later, JPG was replaced by the appellant. In 2016, a creditor of the former trustee obtained a judgment against it for damages for loss of a bargain following the termination of a Deed between the trust creditor and the former trustee. At first instance the court declared that the former trustee was entitled to be indemnified from the assets of the trust. The question on appeal was whether the successor trustee owes a fiduciary duty to the former trustee,[118] not the priority question. Nevertheless, the facts of the case raise the same priority issue in respect of which there is no decided Australian case on point: how is the priority of the respective proprietary interests to be determined where the former trustee incurs a liability *after* the successor trustee?

It remains to be seen how this will be resolved under Australian law. There is an argument that a successor trustee's lien may be the first in time in circumstances where the successor trustee has properly incurred liabilities *before* the former trustee incurs an unexpected liability after leaving office (unless perhaps the crystallisation of an earlier incurred liability or obligation). However, it raises squarely the distinction between the right of indemnity which arises as an incident of office and the proprietary interest by way of lien and when each right accrues.

E. Opportunity for Reform in Australia

To the extent that reforming the law to achieve parity between the positions of trust creditors and unsecured creditors of a company in insolvency is a valid goal as a matter of policy, reform of the equitable priority rule alone is insufficient. It will require comprehensive legislative reform of not only the priority rule but also the clear accounts rule, and other limitations inherent in the nature of the subrogated rights of trust creditors. An opportunity for such comprehensive reform has presented itself in Australia. Recently, the Parliamentary Joint Committee on Corporations and Financial Services in its Report, *Corporate insolvency in Australia*, published on 12 July 2023[119] expressly recommended legislative reform to clarify the treatment of

117 [2023] NSWCA 214 (Leeming JA and Kirk JJA; Bell CJ dissenting).

118 It was held that the successor trustee owes no fiduciary duty to the former trustee: (n 121) [115]-[141] (Leeming JA); [228]-[237] (Kirk JA); [3]-[33] (Bell CJ contra).

119 (n 13).

trusts with corporate trustees during insolvency. Its recommendations followed extensive consultations and many submissions made to the Inquiry supporting such reform (including by this author).

The Committee's recommendations echo those made over 35 years ago by the Australian Law Reform Commission in the *General Insolvency Inquiry* (Harmer Report), in which it observed that the then companies legislation made 'little or no provision for corporate trustees which become insolvent' and recommended the insertion of a new part into the act to deal with these entities. There are many other important aspects of the insolvency of a corporate trustee, (or of the trusts of which it is trustee) which were discussed in the numerous submissions made to the inquiry and some which have been identified by courts including: statutory recognition of the trust fund as a separate economic entity, ranking of trust creditor claims comparable to the statutory waterfall that applies in corporate insolvency, how to deal with multiple trusts of which a company is trustee,[120] issues of hotchpot and marshalling as between trust creditors who also have rights against the assets of the company with general creditors,[121] the allocation of administration costs where there are multiple trusts,[122] the assignability of the trustee's lien,[123] priority between a trustee's claim for reimbursement and its trust creditors' claims to be subrogated to the trustee's right of exoneration, and other matters. It can only be hoped that the momentum in Australia is not lost and the recommended reforms advance, at last, into draft legislation.

For present purposes, the point is that if there are policy reasons to support it, it will only be through comprehensive law reform that any meaningful parity of position of trust creditor with that of corporate unsecured creditor can be achieved. This parity cannot result from piecemeal judicial reform of the priority rule in isolation.

F. Opportunity for Reform in the United Kingdom?

In 2017, the Law Commission of England and Wales, as part of its Thirteenth Programme of Law Reform, announced a project entitled, '*Modernising Trust Law for a Global Britain*'. The Law Commission proposed a review of trust law to 'see how the law can be modernised and help ensure Britain's trust services are competitive in the global market.'[124] The project if commenced would be 'a scoping study investigating which areas of trust law would be suitable for further review and reform'.[125] This

120 *Amerind* (n 6) [95] to [97] per Bell, Gageler and Nettle JJ and at [153] to [172] per Gordon J.

121 *Jones* (n 38) [108] (Allsop CJ).

122 *Amerind* (n 6) [167] to [172] per Gordon J.

123 See H Ford, WA Lee, M Bryan, J Glover and I Fullerton, *Ford and Lee: The Law of Trusts* (Lawbook Co, 2012) [14.290] doubting that it is assignable (other than to a trustee in bankruptcy or representative of a deceased trustee); cf *Break Fast* (n 23) [78]-[79] ((Riordan J).

124 <https://www.lawcom.gov.uk/project/modernising-trust-law-for-a-global-britain/>

125 *Ibid.*

project has not commenced, but it is suggested here that if or when it does, the insolvency of trusts is an area ripe for reform for the same reasons as it has received such overwhelming support in Australia, discussed above.

4. CONCLUSION

In time, like the rule in *Dearle v Hall*, the Privy Council's new rule to determine the priority for trustee liens may well become known as 'the rule in *Equity Trust (Jersey) Ltd v Halabi*.' In jurisdictions bound by (or likely to be persuaded by) the decision, the rule is likely to have significant consequences for the steps trustees are advised to take to protect their positions and increased lead to focus on the terms of deeds of retirement and appointment. Other jurisdictions yet to the decide the priority of trustee liens should consider the implications closely.

To that end, this article has sought to highlight the importance of a close analysis of the underlying proprietary interests and when they arise in assessing the effect of the first in time priority rule in equity and whether it should be replaced. It has argued that the better view is that the indemnity and lien are not 'one and the same thing.'[126] Rather, it is suggested that the better construction is that the trustee's right of indemnity is a personal right supported by a proprietary interest being a *suis generis* form of equitable lien as recognised by the courts,[127] which functions substantially as any other lien but for the lack of debtor over whose property the interest exists. Secondly, it has offered a critique of the nature and rationale for equity's first in time priority rule, and noted the jurisdictional divergence as to its application to a priority dispute between trustees' liens where the merits are otherwise equal. Finally, it has argued that the significant differences between the equitable rights of a trustee's creditors to subrogation and the statutory rights of unsecured creditors of a company in the event of insolvency do not support the creation of a *pari passu* priority rule between trustees in the name of an analogy to be drawn between trust and company.

That said, there are strong arguments to be made for statutory reform to deal with the insolvency of trusts, especially trading trusts. The former Chief Justice of the Supreme Court of New South Wales, the Hon TF Bathurst, once observed extrajudicially that:

> [d]espite the issue being noted in the Harmer Report and subsequently, there is still no legislative scheme covering [trusts] in the event of insolvency. Instead this is probably one of the last outposts in insolvency law which has been left to the ingenuity of the Courts and the general law to solve.[128]

126 *Halabi* (n 4) [171] per Lord Richards and Sir Nicholas Patten.

127 See for example *Lane* (n 6)[34] (Derrington J); *Amerind* (n 6) [139]-[140] (Gordon J).

128 The Hon TF Bathurst 'The Historical Development of Insolvency Law' (Speech delivered at the Francis Forbes Society for Australian Legal History, 3 September 2014), [97].

However, given the complex range of issues in the insolvency of a trust , comprehensive law reform is preferable to piecemeal development of an insolvency law for trusts through judicial innovations such as the new priority rule in *Halabi*.

DISCLOSURE STATEMENT

No potential conflict of interest was reported by the author(s).