

# The Nature of a Beneficiary's Equitable Interest in a Trust<sup>1</sup>

## Introduction

1 The title of this paper is far more ambitious than my intentions. The title was suggested by four revenue cases decided in the last decade: *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226; *Chief Commissioner of Stamp Duties v ISPT Pty Ltd* (1998) 45 NSWLR 639; *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98; and *Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 224 ALR 79. This paper considers what can be gleaned from those decisions.

2 I have not attempted to revisit Maitland's Lectures on Equity and his insistence that while the right of a beneficiary to enforce his personal right against a trustee begins to look somewhat like a right *in rem*, it never becomes so.<sup>2</sup> Nor do I deal with the *Baker v Archer-Shee*<sup>3</sup> cases or *Livingston v Commissioner of Stamp Duties*<sup>4</sup> which will be well known. I do not discuss the rights of beneficiaries under implied, constructive or resulting trusts. Nor do I deal with *Gartside v Inland Revenue Commissioner*<sup>5</sup> and whether an object of a discretionary trust has such a definable interest in the trust property to be liable to taxation. Nor do I deal, except in passing, with the concept of a bare trust.<sup>6</sup>

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<sup>1</sup> A slightly revised version of a paper delivered to the Supreme Court of NSW Annual Conference 2007. The author wishes to acknowledge the research and assistance of his tipstaff Ms Sharna Clemmett in the preparation of this paper.

<sup>2</sup> FW Maitland, *Equity: A Course of Lectures*, 2<sup>nd</sup> ed (1949) Cambridge, Cambridge University Press at 29.

<sup>3</sup> [1927] AC 844.

<sup>4</sup> (1960) 107 CLR 411; (1964) 112 CLR 12.

<sup>5</sup> [1968] AC 553.

<sup>6</sup> As to which see *Herdegan v Federal Commissioner of Taxation* (1988) 84 ALR 271 per Gummow J at 281; *Chief Commissioner of Stamp Duties v ISPT Pty Ltd* per Mason P at 650-652; *ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue* [2003] ATC 4,697; [2003] NSWSC 697 per Barrett J at 4,751-4,755 [275]-[295].

- 3 In *Chief Commissioner of Stamp Duties (NSW) v Buckle*, the High Court held that a trustee's right of indemnity out of trust assets was not an encumbrance upon the interests of the beneficiaries. Until the trustee's right of reimbursement or exoneration has been satisfied, it is impossible to say what the trust fund is, in the sense that it is impossible to identify assets which are held solely upon trusts binding the trustee in favour of the beneficiaries. The right of the trustee to be indemnified has priority over the right of beneficiaries in relation to the assets.<sup>7</sup>
- 4 In *Chief Commissioner of Stamp Duties v ISPT Pty Ltd*, the Court of Appeal held by majority that there was no change in the beneficial ownership of an estate or interest in land where A sold land to B and received the purchase price, but where B acquired the land in its capacity as trustee of a unit trust, all of the units in which were held by A. The *ratio decidendi* of this decision is narrow.<sup>8</sup> I argue below that the majority's reasoning is inconsistent with *DKLR Holding Co (No. 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510; (1982) 149 CLR 431.
- 5 In *CPT Custodian Pty Ltd v Commissioner of State Revenue*, the High Court held that on the terms of the particular trust deed, even where there was only one unit holder of a trust, that unit holder did not have an interest amounting to ownership. In reaching that conclusion, the High Court considered the right of a beneficiary *sui juris* and absolutely entitled to bring the trust to an end.
- 6 *Halloran v Minister Administering National Parks and Wildlife Act 1974* involved an attempt to take advantage of the Court of Appeal's decision in *Chief Commissioner of Stamp Duties v ISPT Pty Ltd*. Sealark, being entitled in

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<sup>7</sup> (1998) 192 CLR 226 at 245-247 [47]-[51].

<sup>8</sup> *ISPT Nominees v Chief Commissioner of State Revenue (NSW)* at 4,734-4, [182]-[236]; *Halloran v Minister Administering National Parks and Wildlife Act 1974* at 85 [23].

equity to land, agreed to transfer its interest to Pacinette as trustee of the Pacinette Property Trust in consideration of the issue of units in the trust to Sealark, such that Sealark was the sole unit holder. In contrast to *ISPT Pty Ltd*, the High Court held that this did involve a change in beneficial ownership of the land.

### **A Beneficial Interest is Engrafted Onto, Not Carved Out of, the Legal Estate**

7 Before considering these cases in more detail, it is as well to recall what Hope JA said in *DKLR Holding Co (No. 2) Pty Ltd v Commissioner of Stamp Duties* as to the nature of a beneficiary's interest in a trust. His Honour's judgment remains the best exposition of the subject. To overlook his remarks is a recipe for error. In *DKLR Holding*, the registered proprietor of land resolved to ask B to act as trustee for A to receive a transfer of land owned by A on the basis that B would hold only the legal estate of the land, there being no intention on the part of A to part with beneficial ownership of the land. The directors of B resolved to accept a transfer of the land on that basis and resolved that B should execute a declaration of trust in favour of A. The directors of B resolved that B should affix its seal to a transfer of the bare legal estate in the land. B executed a declaration of trust in relation to the land. A and B executed a memorandum of transfer of the land in the usual form. The question was whether the memorandum of transfer and the declaration of trust were liable to *ad valorem* stamp duty. One of the issues was what was the nature of the property conveyed by the transfer. It was argued that the only property transferred was the bare legal estate because immediately after the transfer, A was the absolute owner of an equitable estate in fee simple. The Court of Appeal and the High Court were united in rejecting this argument. Hope JA said:

“(14) ... After some hesitation, a trust interest in respect of land came to be regarded, not merely as some kind of equitable chose in action, conferring rights enforceable against the trustee, but as an interest in property. The fact that equitable estates were not enforceable against everyone acquiring a legal title to the property did not prevent them from being so regarded; a legal owner of land could lose his estate in, or become unable to enforce his rights in respect of, land in a number of ways. Although there has long been a controversy whether trust interests are true rights in rem ... there can be no doubt that the interest of the cestui que trust is an interest in property. ...

(15) These essential features of interests arising under private trusts are thus described in Jacobs' Law of Trusts, 3rd ed, p 109: ‘... the trustee must be under a personal obligation to deal with the trust property for the benefit of the beneficiaries, and this obligation must be annexed to the trust property. This is the equitable obligation proper. It arises from the very nature of a trust and from the origin of the trust in the separation of the common law and equitable jurisdictions in English legal history. The obligation attaches to the trustees *in personam*, but it is also annexed to the property so that the equitable interest resembles a right *in rem*. It is not sufficient that the trustee should be under a personal obligation to hold the property for the benefit of another, unless that obligation is annexed to the property. Conversely, it is not sufficient that an obligation should be annexed to property unless the trustee is under the personal obligation.’

(16) Several consequences follow. Firstly, an absolute owner in fee simple does not hold two estates, a legal estate and an equitable estate. He holds only the legal estate, with all the rights and incidents that attach to that estate. If he were to execute a declaration that he held the land in trust for himself absolutely, the declaration would be of no effect; it would give him no separate equitable rights; he would remain the legal owner with all the rights that a legal owner has. At least where co-extensive and commensurate legal and equitable interests are concerned, ‘... a man cannot be a trustee for himself.’: Goodright v Wells (10a), per Lord Mansfield. ‘You cannot have a legal estate in trust for yourself.’: Harmood v Oglander (11a), per Lord Eldon. Secondly, although the equitable estate is an interest in property, its essential character still bears the stamp which its origin placed upon it. Where the trustee is the owner of the legal fee simple, the right of the beneficiary, although annexed to the land, is a right to compel the legal owner to hold and use the rights which the law gives him in accordance with the obligations which equity has imposed upon him. The trustee, in such a case,

has at law all the rights of the absolute owner in fee simple, but he is not free to use those rights for his own benefit in the way he could if no trust existed. Equitable obligations require him to use them in some particular way for the benefit of other persons. ...

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- (18) This position can be analyzed in a similar way in respect of all the rights given to a trustee who holds property at law in trust absolutely for a beneficiary. In some cases the rights vested in the trustee may be such that he cannot be compelled to allow the beneficiary to exercise it except (unless, because of the nature of the right, it is not permissible to do so) in his, the trustee's, name. If this analysis be correct, although the beneficiary has an interest in the trust property, the content of that interest is essentially a right to compel the trustee to hold and use his legal rights in accordance with the terms of the trust. Where the trustee holds absolutely for the beneficiary, the beneficiary has a right in equity to be put, so far as practicable and generally subject to appropriate indemnities being given, into a position where directly, or indirectly, or for all practical purposes, he enjoys or exercises the rights which the law has vested in the trustee.

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- (20) What then is the result of the actions of the plaintiff and of 29 Macquarie, and of the instruments executed by them; or, rather, what will their effect be when the transfer has been registered? Before the passing of the resolutions and the execution of the instruments, 29 Macquarie was the registered proprietor of the land for an estate in fee simple. It can, no doubt, be said that it was the beneficial owner of that land, but it held no separate equitable interest in the land; the statement means merely that it was the legal owner, and there was no equitable right in anyone to regulate or control the way in which it might exercise the rights which the legal ownership gave to it. The passing of the resolutions and the execution of the instruments have not yet changed that position. When the transfer is registered, the plaintiff will undoubtedly be the registered proprietor of the land for an estate in fee simple, and will have, at law, all the rights and powers in respect of the land which the ownership of the fee simple will give. However, consequent upon its becoming entitled to these rights and powers, there will be created, at the same time as it becomes so entitled, an equitable estate in the land in 29 Macquarie, an estate which will entitle 29 Macquarie to require the plaintiff to hold and exercise its rights and powers, so far as practicable, as 29 Macquarie shall direct. Although it may not matter, the interest so arising in 29 Macquarie will not

*flow from the simple circumstance that the transfer was made without valuable consideration; it will arise (so far as it appears in the stated case) because of the intention of the parties evidenced by the resolutions and the declaration of trust. The interest will arise only because the rights and powers which were previously vested in 29 Macquarie have been transferred to the plaintiff. It would not have been possible for 29 Macquarie to have acquired its equitable interest by some kind of exception from the transfer of the legal title. In a loose or popular sense, it may be said that 29 Macquarie transferred a bare legal title to the plaintiff and retained for itself the beneficial ownership, but that is not a correct description of what the memorandum of transfer, and the resolutions and declarations of trust achieved. They achieved a transfer of the estate in fee simple and, thereupon, the creation of an equitable estate in 29 Macquarie." (Emphasis added.)<sup>9</sup>*

- 8 The following points should be emphasised. The first is that the content of the beneficiary's interest is a right to compel the trustee to adhere to the terms of the trust.<sup>10</sup> As the High Court later stressed in *CPT Custodian*, it is a mistake to characterise a trust as a discretionary trust, or a unit trust, and assume that such a characterisation has a "constant, fixed normative meaning".<sup>11</sup>
- 9 The second and most important point is that a beneficiary's interest in a trust is something imposed on the holder of the legal title; it is not carved out of the legal estate. In *Re Transphere Pty Ltd* (1986) 5 NSWLR 309, the question to be decided was whether a statutory power to appoint a receiver to the property of a body corporate which was under investigation extended to such an appointment being made of property of which the body corporate was trustee. In answering that question affirmatively, McLelland J said:

*"It is important to recognize the true nature and incidents of legal and equitable estates in property subject to a trust. They are clearly and succinctly described in the judgment of Hope JA in DKL Holding Co*

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<sup>9</sup> [1980] 1 NSWLR 510 at 518-521 [14]-[20].

<sup>10</sup> From [18].

<sup>11</sup> At [15].

(No 2) Pty Ltd v Commissioner of Stamp Duties [1980] 1 NSWLR 510 at 518–520. (His Honour's analysis is not affected by the decision of the High Court in that case: see 149 CLR 431.) I would not wish to detract from the value of Hope JA's exposition by trying to summarize it. But what is significant for present purposes is the imprecision of the notion that absolute ownership of property can properly be divided up into a legal estate and an equitable estate. An absolute owner holds only the legal estate, with all the rights and incidents that attach to that estate. Where a legal owner holds property on trust for another, he has at law all the rights of an absolute owner but the beneficiary has the right to compel him to hold and use those rights which the law gives him in accordance with the obligations which equity has imposed on him by virtue of the existence of the trust. Although this right of the beneficiary constitutes an equitable estate in the property, it is engrafted onto, not carved out of, the legal estate. Hope JA illustrates the point by the following quotation from Maitland, Lectures on Equity, 2nd ed (1949) at 17:

Equity did not say that the *cestui que trust* was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the *cestui que trust*. There was no conflict here.”

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- 10 That passage has been frequently cited and was approved in *Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* (2005) 220 CLR 592.<sup>13</sup>
- 11 The third point is Hope JA's description<sup>14</sup> of what it means to say that the legal owner of property is also the beneficial owner. Statutes often talk about beneficial ownership as if it always existed running alongside the legal estate when that is not so. Hope JA's statement that to say that the legal owner is also the beneficial owner means that there is no equitable right in any one to control the exercise of legal ownership needs to be qualified. The fact that an owner makes a contract, enforceable by injunction, as to how he or she will or will not exercise his or her rights of ownership does not necessarily mean he or she ceases to enjoy “beneficial ownership”.<sup>15</sup> A mortgagee will have the right to regulate the

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<sup>12</sup> (1986) 5 NSWLR 309 at 311.

<sup>13</sup> At 606 [30].

<sup>14</sup> [1980] 1 NSWLR 510 at 520-521 [20].

<sup>15</sup> *Kuper v Keywest Constructions Pty Ltd* (1990) 3 WAR 419 at 432; *Jessica Holdings Pty Ltd v Anglican Property Trust Diocese of Sydney* (1992) 27 NSWLR 140 at 150-152; *Re Henderson's Caveat* [1998] 1 Qd

mortgagor's right to deal with property, e.g. to lease it, but it would not follow that a mortgagor was not the beneficial owner. But Hope JA usefully points out that to describe a legal owner of property as being the beneficial owner, means that there is no other person with an equitable interest in the property with rights amounting to ownership on whose behalf the legal owner can be compelled to exercise his or her rights in respect of the property.

### *Chief Commissioner of Stamp Duties v Buckle*

12 There were essentially two issues in *Chief Commissioner of Stamp Duties v Buckle*. There, a trustee of a discretionary trust exercised his power of amendment of the trust deed to vary the interests of his children as takers in default of appointment. The first question was whether the amendment of the trust deed involved a resettlement of all of the trust property or whether all that was conveyed by the amending deed was a resettlement of the children's future interests in remainder. It was held that the property conveyed was the future interests of the beneficiaries. Stamp duty was charged on the unencumbered value of the property conveyed. The value of the trust fund exceeded \$4,000,000 but the trustee had borrowed \$4m and was entitled to be indemnified out of the assets of the trust in respect of that liability. The second issue was whether, in valuing the beneficiaries' future interests, the trustee's right of indemnity should be ignored because it was an encumbrance. In *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, Stephen, Mason, Aiken and Wilson JJ said that a trustee:

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R 632 at 637-638 and 642; *Forder v Cemcorp Pty Ltd* (2001) 51 NSWLR 486 at 492; *Sahade v BP Australia Pty Ltd* (2004) 12 BPR 22,149 at 22,157-22,159 [37]-[46]; *GPT RE Ltd v Lend Lease Real Estate Investments Ltd* (2005) 12 BPR 23,217 at 23,225 [55]. A contract for sale under which the vendor's obligation to convey is subject to the vendor's obligation to fulfil a condition will entitle the purchaser to an order to compel the vendor to do that which is necessary to fulfil that condition. The purchaser's interest, though sufficient to support a caveat, and thereby control the vendor's exercise of rights of ownership, is not an interest in the nature of beneficial ownership: *Butts v O'Dwyer* (1952) 87 CLR 267 at 282-283; *GPT RE Ltd v Lend Lease Real Estate Investments Ltd* at 23,225 [55].



*“is entitled to be indemnified against [liabilities incurred in discharge of the trust] from the trust assets held by him and for the purpose of enforcing the indemnity the trustee possesses a charge or right of lien over those assets ... the charge is not capable of differential application to certain only of such assets. It applies to the whole range of trust assets in the trustee’s possession except for those assets, if any, which under the terms of the trust deed the trustee is not authorised to use for the purposes of carrying on the business. ...*

*In such a case there are then two classes of persons having a beneficial interest in the trust assets: first, the cestuis que trustent, those for whose benefit the business was being carried on; and secondly, the trustee in respect of his right to be indemnified out of the trust assets against personal liabilities incurred in the performance of the trust. The latter interest will be preferred to the former, so that the cestuis que trust are not entitled to call for a distribution of trust assets which are subject to a charge in favour of the trustee until the charge has been satisfied.”<sup>16</sup>*

13 Notwithstanding the description of the trustee’s right of indemnity as a charge and a lien, the High Court held in *Buckle* that the right of a trustee to be indemnified out of the trust assets was not in the nature of an encumbrance.

14 This must follow from the proposition that the right of a beneficiary, (which is deferred to the right of the trustee to be indemnified), is a right engrafted onto, not carved out of, the legal estate. The trustee holds the property as legal owner and is entitled to reimburse himself or herself from the trust property or to apply the trust property to meet the liability. The beneficiary’s right to compel the trustee to hold his or her legal right to the trust property for the beneficiary is subject to the trustee being entitled to reimbursement or exoneration from the trust property. In *Buckle*, the High Court said:

*“[48] Until the right to reimbursement or exoneration has been satisfied, ‘it is impossible to say what the trust fund is.’<sup>17</sup> The entitlement of the beneficiaries in respect of the assets held by the trustee which*

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<sup>16</sup> At 367.

<sup>17</sup> *Dodds v Tuke* (1884) 25 Ch D 617 at 619.

*constitutes the 'property' to which the beneficiaries are entitled in equity is to be distinguished from the assets themselves. The entitlement of the beneficiaries is confined to so much of those assets as is available after the liabilities in question have been discharged or provision has been made for them.<sup>18</sup> To the extent that the assets held by the trustee are subject to their application to reimburse or exonerate the trustee, they are not 'trust assets' or 'trust property' in the sense that they are held solely upon trusts imposing fiduciary duties which bind the trustee in favour of the beneficiaries.<sup>19</sup>"<sup>20</sup>*

- 15 In *Chief Commissioner of Stamp Duties v ISPT Pty Ltd*, Mason P suggested that:

*"The reference in Chief Commissioner of Stamp Duties v Buckle to 'priority' simply means that, if termination of a trust is sought by all beneficiaries in accordance with the rule in Saunders v Vautier, the trustee has (at that stage) a right in the nature of a lien for the recoupment of any trust expenses actually incurred at that point of time, such right being superior (prior) to that of the beneficiaries to receive the trust assets: see Vacuum Oil Co Pty Ltd v Wiltshire (1945) 72 CLR 319 at 335; Octavo Investments Pty Ltd v Knight (1979) 144 CLR 360 at 369-370."*<sup>21</sup>

- 16 In my respectful view, the observations of the High Court in *Buckle* are not so limited. Rather, if the trustee has incurred liabilities for which he or she is entitled to be indemnified, the beneficiary's interest in the trust assets is thereupon qualified because the beneficiary cannot assert a right to compel the trustee to adhere to the terms of the trust to hold the property on the beneficiary's behalf without allowing for the trustee's right of indemnity. In *CPT Custodian v Commissioner of State Revenue*, the High Court considered whether the sole owner of all of the issued units in the unit trust could be said to have rights to the trust property amounting to equitable ownership because, as the only person beneficially entitled to the trust assets, it had the power to bring the trust to an end and to require the transfer to it of the trust assets. The High Court said:

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<sup>18</sup> *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties (Q)* [1984] 1 Qd R 576 at 587.

<sup>19</sup> *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 370.

<sup>20</sup> (1998) 192 CLR 226 at 264 [48].

<sup>21</sup> (1998) 45 NSWLR 639 at 653.

*"[50] The classic nineteenth century formulation by the English courts of the rule in Saunders v Vautier did not give consideration to the significance of the right of the trustee under the general law to reimbursement or exoneration for the discharge of liabilities incurred in administration of the trust. In Wharton v Masterman<sup>22</sup>, Lord Davey approached the rule in Saunders v Vautier from the viewpoint of the law respecting accumulations of income for an excessive period; if no person had any interest in the trust other than the legatee, the legatee might put an end to the accumulation which was exclusively for the benefit of that person and as a result there was no effective or enforceable direction for any accumulation.<sup>23</sup> However, his Lordship's discussion of the authorities<sup>24</sup> does indicate that the rule in Saunders v Vautier could not apply if, by reason of the charging of legacies on the fund and accumulations, the persons seeking to put an end to the accumulations were 'only entitled to an undetermined and uncertain surplus (if any) which might be left of the fund after payment of the legacies'.<sup>25</sup>*

*[51] In the present case, the unsatisfied trustees' right of indemnity was expressed as an actual liability in each of the relevant accounts at each 31 December date and rendered applicable the sense of the above words of Lord Davey. Until satisfaction of rights of reimbursement or exoneration, it was impossible to say what the trust fund in question was.<sup>26</sup>"<sup>27</sup>*

17 Although the trust had not been terminated, the trustee's unsatisfied right of indemnity precluded the beneficiary's having an equitable interest in the trust property amounting to ownership. This shows that the trustee's "preferred beneficial interest" is not something which only arises if termination of the trust is sought. It exists whenever the trustee has incurred liabilities in the due execution of the trust for which he or she has not been reimbursed.

18 In *Lord Sudeley v Attorney-General* [1897] AC 11 the House of Lords held that a beneficiary under a will, where the deceased's estate has not been

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<sup>22</sup> [1895] AC 186

<sup>23</sup> [1895] AC 186 at 198-200.

<sup>24</sup> [1895] AC 186 at 200-201.

<sup>25</sup> [1985] AC 186 at 201.

<sup>26</sup> *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 246 [48].

<sup>27</sup> (2005) 224 CLR 98 at 120-121 [50] and [51].

administered, does not have an interest in the property of the estate because, prior to administration, it is not possible to identify any part of the assets of the estate as those to which the beneficiary is entitled. Can a beneficiary have a proprietary interest in trust assets where a trustee has incurred liabilities for which he or she is entitled to be indemnified, given that the existence of such liabilities leads to the result that “it is impossible to say what the trust fund is”<sup>28</sup>? I merely raise the question.

- 19 It may be accurate to describe a trustee’s right of indemnity as a right in the nature of a lien or charge, but that is so only in the sense that a court of equity may authorise the sale of trust assets to satisfy the trustee’s right of reimbursement or exoneration,<sup>29</sup> and it can be enforced notwithstanding a change of trustees.

*Chief Commissioner of Stamp Duties v ISPT Pty Ltd*

- 20 In *Chief Commissioner of Stamp Duties v ISPT Pty Ltd*, the taxpayer sought to take advantage of a statutory exemption for changes in beneficial ownership arising from the redemption or issue of units in a unit trust scheme. Section 44(1)(a) of the *Stamp Duties Act 1920* (NSW) provides that Division 3A applies “to a transaction which ... causes or results in a change in the beneficial ownership of an estate or interest in ... land situated in New South Wales.” Section 44(2)(d) provides that “a reference to a change in beneficial ownership in this section does not include a reference to a change in beneficial ownership occurring as the consequence of ... the issue or redemption of units in a unit trust scheme.”

- 21 Section 44A(1)(b) relevantly provides that:

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<sup>28</sup> (1998) 192 CLR 226 at 465 [48].

<sup>29</sup> (1998) 192 CLR 226 at 246-247 [50].

*“a person, being a party to a transaction to which ... Division [3A] applies which is not effected or evidenced by an instrument chargeable with ad valorem duty in accordance with the Second Schedule under ... the heading ‘Conveyances of Any Property’ or ... any other heading whereby duty is charged as on a conveyance of property, shall, if the person would have been liable to pay such ad valorem duty in respect of the transaction had such an instrument been executed, lodge with the Chief Commissioner a statement in respect of the transaction.”*

- 22 Section 44A(5) provides that such a statement shall be deemed to be an instrument effecting the transaction to which it relates and is chargeable with the *ad valorem* duty appropriate to the transaction. Section 44A(6) provides that the statement shall be deemed to have been first executed when the change in beneficial ownership occurred. Section 44A(7) provides that the *ad valorem* duty with which a statement is chargeable is charged on the unencumbered value of the property the subject of the transaction as at the date on which the change in beneficial ownership occurred, or the amount of the consideration in respect of the transaction, whichever is the greater.
- 23 The transaction involved the transfer of two shopping centres owned by Coles Myer Property Investments Pty Ltd (“CMPI”). The idea was to bring about a change in the beneficial ownership of the land only as a consequence of the issue or redemption of units in the unit trust scheme such that Division 3A did not apply. The transfer of the Forster shopping centre was taken. The following steps were involved:
1. By a deed executed by CMPI and ISPT Pty Ltd (“ISPT”) a trust known as the Forster No. 1 Trust was established of which ISPT was trustee.
  2. CMPI applied for the issue of 17,973,996 units in the Forster No. 1 Trust and provided ISPT with a cheque for \$17,973,996. At this stage there was no other unit holder.

3. ISPT as trustee of the Forster No. 1 Trust made a written offer to CMPI to purchase the shopping centre for \$17,973,995. The offer provided that CMPI would hold the property as a nominee under the trust deed for so long as it remained the registered proprietor.
4. The offer was orally accepted.
5. The cheque for \$17,973,996 in favour of ISPT as trustee of the Forster No. 1 Trust was endorsed by ISPT in favour of CMPI and returned to it and an overpayment of \$1 was returned to ISPT as trustee of the Forster No. 1 Trust.
6. ISPT as trustee of another trust (the ISPT Trust) and ISPT Custodians Pty Ltd as trustee of a third trust, each applied for 8,986,998 units in the Forster No. 1 Trust and paid for those units by a cheque for \$8,986,998 in favour of ISPT as trustee of the Forster No. 1 Trust. 8,986,998 units were issued to each of ISPT as trustee of the second trust and ISPT Custodians as trustee of the third trust.
7. ISPT as trustee of the Forster No. 1 Trust redeemed the 17,973,996 units which had previously been issued to CMPI and endorsed the two cheques, each for \$8,986,998 to CMPI.
8. CMPI resigned as nominee of ISPT under the Forster No. 1 Trust and was replaced as nominee by ISPT Nominees.

9. The shopping centre was transferred by CMPI to ISPT Nominees as the nominee of ISPT under the Forster No. 1 Trust for nil consideration.<sup>30</sup>
- 24 ISPT successfully contended that there was no change of beneficial ownership of the shopping centre until there was an issue and subsequent redemption of units in the Forster No. 1 Trust. The subsequent transfer of the property from CMPI to ISPT Nominees was liable only to a fixed duty of \$2 because it was a conveyance made for nominal consideration consequential upon the change of trustees from CMPI (which held the land as nominee for ISPT as trustee of the Forster No. 1 Trust) to ISPT Nominees which replaced it as “nominee”.<sup>31</sup>
- 25 The issue was why there was not a change in beneficial ownership of the land when:
- (a) CMPI orally accepted the offer by ISPT as trustee of the Forster No. 1 Trust to buy the shopping centre and agreed for so long as it remained registered proprietor to hold the land as nominee for ISPT; or
  - (b) CMPI received payment of \$17,973,995.
- 26 Prior to those steps, CMPI did not hold separate legal and equitable estates in the land. It was the legal owner of the property. It was the beneficial owner only in the sense that no other person had a right recognised in equity on whose behalf it was obliged to act and who was entitled to regulate or control the way in which it exercised its rights as the legal owner. Subject to arguments in relation to ss 23C and 54A of the

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<sup>30</sup> (1998) 45 NSWLR 639 per Fitzgerald AJA at 655-656.

<sup>31</sup> *Stamp Duties Act 1920, s 73(2A); ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue (NSW)*.

*Conveyancing Act 1919* (NSW) and subject to an argument that at that point ISPT was a bare trustee which disappeared from the picture, at either step 4 or step 5, CMPI held the property on trust for ISPT, which in turn held it on the trusts of the Forster No. 1 Trust of which CMPI was the sole beneficiary. *Prima facie*, ISPT held the beneficial interest in the land, but in turn, held that interest on trust for CMPI, so that CMPI's claim to beneficial ownership depended upon its right to compel ISPT to hold and use its rights as beneficiary in accordance with the terms of the trust. Unless ISPT dropped out of the picture, or unless s 23C of the *Conveyancing Act* precluded the creation of a trust, there must at least have been a change in the nature of CMPI's beneficial ownership.

- 27 The majority of the Court of Appeal (Meagher JA and Fitzgerald AJA) concluded that there was no change of beneficial ownership, but not for the same reasons. Meagher JA said:

*"...the owner at law of the freehold was Coles Myer Property Investments; ISPT made an offer to purchase the land from Coles Myer Property Investments for a nominated figure; Coles Myer Property Investments orally accepted that offer. ISPT paid the full purchase price to Coles Myer Property Investments. However, ISPT made its offer as trustee for a unit trust, all units in which were held by Coles Myer Property Investments. Could that transaction result in a transfer of the beneficial interest in the land from Coles Myer Property Investments to ISPT, as the appellant alleges?"*

*I must confess I am quite unable to see how it could. The legal estate resided in Coles Myer Property Investments both before and after steps (5) and (6). [Steps (4) and (5) above.] Either s 23C and s 54A of the Conveyancing Act 1919, applied to nullify the ordinary effect of those two steps, or they did not. If they did, the beneficial interest remained with Coles Myer Property Investments. If they did not, the beneficial interest also remained in Coles Myer Property Investments, in its capacity as sole unit holder in ISPT. In neither event is there any change of beneficial interest. On this basis the appellant's submission must fail."*<sup>32</sup>

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<sup>32</sup> (1998) 45 NSWLR 639 at 654.



28 This, with respect, embraces the fallacy that CMPI as legal owner of the land held separate legal and equitable estates such that it had a beneficial interest whilst it was a legal owner which “remained” when it was the sole unit holder in the Forster No. 1 Trust.

29 Mason P (dissenting) held that, upon payment of the purchase price and CMPI’s acceptance that it would hold the land as nominee for ISPT as trustee under the trust deed, the entire beneficial interest in the land moved “into the Forster No. 1 Property Trust”<sup>33</sup> and that the beneficial interest passed to ISPT as a sub-trustee so that it was held by ISPT for the benefit of the ultimate beneficiary.<sup>34</sup> His Honour said that:

*“... a change in beneficial interest in the land occurred ... when Coles Myer Property Investments received the agreed purchase price and accepted the role as nominee for ISPT. In order to effectuate the intentions of the parties, which was to bring the entire equitable interest in the land into the Forster No 1 Trust, ISPT received the property subject to the equitable obligations of an active sub-trustee. An equitable interest is capable of being made the subject of a (sub) trust, and it is axiomatic that the creation of a trust creates an equitable estate ... This was a change in beneficial ownership sufficient to engage s 44(1).”<sup>35</sup>*

30 In reaching this conclusion, Mason P said that neither s 23C nor s 54A of the *Conveyancing Act* precluded the creation of such a trust in favour of ISPT and sub-trust of which CMPI was then the sole beneficiary.<sup>36</sup> In later litigation, Barrett J reached the same conclusion.<sup>37</sup> This conclusion is consistent with *Halloran v Minister Administering National Parks and Wildlife Act 1974*.<sup>38</sup>

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<sup>33</sup> *Id.*, at 649.

<sup>34</sup> *Id.*, at 649, 650-651, 652.

<sup>35</sup> *Id.*, at 652.

<sup>36</sup> *Id.*, at 649.

<sup>37</sup> *ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue (NSW)* at 4,755-4,759 [297]-[325].

<sup>38</sup> (2006) 224 ALR 79 at 90 [45], 96 [72]-[74] and per Heydon J at 100 [93]-[94].

31 Mason P rejected ISPT's contention that because CMPI as the registered proprietor of the land, and therefore the owner at law, held the land on trust for ISPT which in turn held it on trust for CMPI, that ISPT disappeared from the picture. In *Corin v Patton* (1990) 169 CLR 540, Deane J said that:

*"... equity, with its regard for substance rather than form, would not go through the charade of intervening to create trusts of property under which the legal owner held as bare trustee for another who in turn held as bare trustee for the legal owner. To the contrary, equity firmly denies the possibility of any such intervention in that it would disregard the interposed beneficiary whom it would see as having no interest in the property at all. ... That means that such a trust is not possible since, once the interposed beneficiary is disregarded, the trustee and the beneficiary would be the same person with the result that the legal and beneficial interests were merged."*<sup>39</sup>

32 Mason P held that the trust upon which ISPT held the beneficial interest in the land was an active trust, not a bare trust, and therefore the trust did not "disappear". His Honour said that:

*"... the active nature of the sub-trust means that, of necessity, the equitable interest had to pass from Coles Myer Property Investments to ISPT en route to being held on trust for the beneficiaries from time to time of the Forster No 1 Trust (Coles Myer Property Investments, at the relevant time)." <sup>40</sup>*

33 Neither Meagher JA, nor Fitzgerald AJA expressly dealt with the "merger" argument. As Barrett J later pointed out,<sup>41</sup> Fitzgerald AJA held that a trust and sub-trust did arise on payment of the purchase price and agreement by CMPI to hold the property as a nominee, but held that the creation of such a trust did not amount to a change in the beneficial ownership of the land under s 44(1). Fitzgerald AJA's reasoning was that it was necessary for the Commissioner to establish that ISPT became the full beneficial

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<sup>39</sup> At 579.

<sup>40</sup> (1998) 45 NSWLR 639 at 651.

<sup>41</sup> *ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue (NSW)* at 4,740 and 4,743 [211], [212] and [230].

owner of the property.<sup>42</sup> His Honour said that under the trust deed of the Forster No. 1 Trust, the sole unit holder was entitled to the full beneficial ownership of the trust fund and its constituent assets, subject only to any rights of the trustee with respect to those assets at the particular time.<sup>43</sup> His Honour said that it followed that ISPT as trustee of the trust would not ordinarily be the beneficial owner of the land and would have no estate or beneficial interest in the assets comprising the fund beyond any estate derived from its rights as trustee under the trust deed or the general law.<sup>44</sup> His Honour concluded that:

*“The beneficial estate or interest in the Forster Shopping Village which passed to ISPT was the concatenation of rights, enforceable in equity against Coles Myer Property Investments both as vendor and sole unit holder, which ISPT obtained in respect of the property under the contract of sale and purchase and the trust deed with respect to the Forster No 1 Trust. Nothing else passed to ISPT, or to or from Coles Myer Property Investments.”<sup>45</sup>*

His Honour’s reasoning was that this did not amount to a change in beneficial ownership within the meaning of s 44.

- 34 *Chief Commissioner of Stamp Duties v ISPT Pty Ltd* stands as authority that on the steps taken, there was no change of beneficial ownership in the Shopping Village within the meaning of s 44(1), notwithstanding that a trust was created when ISPT’s offer was accepted and the purchase price was paid, and notwithstanding that ISPT held its beneficial interest under that trust on a sub-trust for CMPI. That conclusion is difficult to reconcile with the proposition that the right of a beneficiary constituting an equitable estate in property is engrafted onto, not carved out of, the legal estate. The same should be true of a sub-trust where the property held by the sub-trustee is itself an equitable interest in property. The right of the

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<sup>42</sup> (1998) 45 NSWLR 639 at 657.

<sup>43</sup> *Id.*, at 659.

<sup>44</sup> *Id.*, at 659.

sub-beneficiary is a right to compel the sub-trustee to deal with the sub-trustee's beneficial interest in accordance with the terms of the sub-trust. In the same way, the sub-trustee's right, as a beneficiary of the head trust, is a right to compel the holder of the legal estate to use his or her rights as legal owner in accordance with the terms of that trust, which right is engrafted onto, not carved out of, the legal estate.

35 As Hope JA said in *DKLR Holding Co (No 2)*,<sup>46</sup> it would not be possible for a legal owner, who transferred legal title to land to a trustee for it, to acquire an equitable interest by some kind of exception from that transfer of legal title. There would have to be a transfer of the fee simple and a trust of the fee simple. The fact that at steps 4 and 5 there was no transfer of legal title, but CMPI held as nominee for ISPT, should make no difference. With due respect to the majority in *Chief Commissioner of Stamp Duties v ISPT Pty Ltd*, it should follow, as Mason P held, that there was a change of beneficial ownership. ISPT, as a beneficiary of a constructive trust arising from its payment of the purchase price, or as a beneficiary under an express trust arising from CMPI's acceptance that it held the land as a nominee (if such a trust were not defeated by s 23C(1)(b)), had a beneficial interest which was engrafted onto the legal estate. In turn, CMPI as the sole unit holder and sub-beneficiary had a beneficial interest which was engrafted onto ISPT's equitable interest in the land. The sub-trust depended for its existence upon ISPT holding trust property, being its beneficial interest in the land, for the benefit of the unit holder.

36 It may be noted as a post-script that the Commissioner had assessed the memorandum of transfer of the land from CMPI to ISPT Nominees to duty of \$2 as a transfer consequential upon a change of trustees. Following the decision of the Court of Appeal, the Commissioner amended the

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<sup>45</sup> *Id.*, at 660.

<sup>46</sup> [1980] 1 NSWLR 510 at 521 [20].

assessment and claimed *ad valorem* duty on the transfer. The Chief Commissioner argued that, as the Court of Appeal had found that the legal and ultimate beneficial interest was held by CMPI both before and after the purchase price was paid, the land never became the subject of the Forster No. 1 Trust, so that the transfer from CMPI to ISPT Nominees was not exempt from *ad valorem* duty pursuant to s 73(2A).<sup>47</sup> This contention was rightly rejected by Barrett J. His Honour held, in substantial agreement with the reasoning of Mason P, that a trust and sub-trust were created so that the subsequent transfer was a consequence of a change of trustees. His Honour held that the ratio of the Court of Appeal's decision was that the creation of such trusts did not amount to a change of beneficial ownership within the meaning of s 44(1), and there was no binding decision in relation to the formalities for the creation of trusts or the characteristics of sub-trusts.<sup>48</sup>

### ***CPT Custodian Pty Ltd v Commissioner of State Revenue***

37 *CPT Custodian Pty Ltd v Commissioner of State Revenue* was a land tax case from Victoria. Land tax was charged on the unimproved value of all land of which the taxpayer was “the owner” at the end of the year. The word “owner” meant, relevantly, “every person entitled to any land for any estate of freehold in possession”. Land was held by trustees under trust deeds constituting unit trusts. The unit holders, rather than the trustee, were assessed for duty. Gzell J has observed that the reason for assessing the beneficiary rather than the trustee was to subject to tax all other land of which the beneficiary was owner.<sup>49</sup> The Court of Appeal in Victoria had held that a unit holder who held less than all of the issued units was not

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<sup>47</sup> *ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue (NSW)* at 4,734 [180].

<sup>48</sup> *Id.*, at [236].

<sup>49</sup> I V Gzell, *State Taxes in NSW*, (2006) 3 (8&9) *Australian Stamp Duties in Practice* 73 at 77.

the owner of an estate of freehold in possession, but that a unit holder who held all of the issued units in the unit trust was such an owner.<sup>50</sup>

38 The beneficial interest in the fund was divided into units. No unit conferred any interest in any particular part of the trust fund or any investment. Unit holders were not entitled to require a transfer of any property comprising the fund except as provided by the deed. Unit holders were entitled to two periodic distributions of income and were entitled to distribution of the fund upon the determination of the trust. The trustee and manager were entitled to significant fees to be paid out of the trust fund and to the monthly reimbursement from the fund of their costs, charges and expenses.

39 It was held that the rights of unit holders, even a sole unit holder, were not rights amounting to ownership. The High Court rejected the proposition that, where property is held on trust, somebody other than the trustee must be the owner of the equitable estate.<sup>51</sup> The High Court said:

*“Glenn v Federal Commissioner of Land Tax<sup>52</sup>*

[25] *In that case, Griffith CJ said of an argument for the revenue that it was:*<sup>53</sup>

based on the assumption that whenever the legal estate in land is vested in a trustee there must be some person other than the trustee entitled to it in equity for an estate of freehold in possession, so that the only question to be answered is who is the owner of that equitable estate. In my opinion, there is a prior inquiry, namely, whether there is any such person. If there is not, the trustee is entitled to the whole estate in possession, both legal and equitable.

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<sup>50</sup> *Commissioner of State Revenue v Karingal 2 Holdings Pty Ltd; Commissioner of State Revenue v CPT Custodian Pty Ltd* (2003) 8 VR 532.

<sup>51</sup> (2005) 224 CLR 98 at 112 [25].

<sup>52</sup> (1915) 20 CLR 490; [1915] HCA 57.

<sup>53</sup> (1915) 20 CLR 490 at 497 ; [1915] HCA 57.

*That statement was a prescient rejection of a 'dogma' that, where ownership is vested in a trustee, equitable ownership must necessarily be vested in someone else because it is an essential attribute of a trust that it confers upon individuals a complex of beneficial legal relations which may be called ownership.<sup>54</sup> The current state of authority, exemplified by Commissioner of Taxation v Linter Textiles Australia Ltd (in liq),<sup>55</sup> bears out what was said in Glenn by Griffith CJ. General remarks in Chief Commissioner of Stamp Duties v ISPT Pty Ltd,<sup>56</sup> a case referred to extensively in Arjon,<sup>57</sup> may be at odds with what was said in Glenn to the extent that they go beyond construction of the particular New South Wales stamp duty legislation, but it is unnecessary to pursue the question here."*

- 40 The "general remarks" in *Chief Commissioner of Stamp Duties v ISPT Pty Ltd* which are referred to are the remarks of Meagher JA at 654.
- 41 The "dogma" that a beneficiary of a trust or, if more than one, the class of persons on whose behalf the trustee holds trust property, has the equitable ownership of the trust property, was not unsupported by authority. Nor was it denied by Griffith CJ in *Glenn v Federal Commissioner of Land Tax*. The issue in *Glenn* was whether beneficiaries of a trust under a will which was subject to a prior trust for accumulation held equitable interests in possession (as Rich J held) or in remainder (as Griffith CJ and Isaacs J held). Griffith CJ's remarks merely emphasised that a settlor can create trusts creating only future beneficial interests, and until that future time, there will be no estate in possession in that property in any person other than the trustee.

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<sup>54</sup> See Harris, 'Trust, Power and Duty', (1971) 87 Law Quarterly Review 31 at 47.

<sup>55</sup> (2005) 215 ALR 1 at 9 [30]; 79 ALJR 913 at 919; [2005] HCA 20. See also *Kent v SS 'Maria Luisa'* (No 2) (2003) 130 FCR 12 at 32–3; [2003] FCAFC 93.

<sup>56</sup> (1998) 45 NSWLR 639 at 654.

<sup>57</sup> (2003) 8 VR 502 at 515–17; [2003] VSCA 213.

- 42 In *Glenn v Federal Commissioner of Land Tax*, Isaacs J cited with approval Sir William Grant MR in *Pearson v Lane* (1809) 17 Ves. 101; (1809) 34 ER 39<sup>58</sup> that:

*“The equitable interest in that estate must have resided somewhere: the trustees themselves could not be the beneficial owners; and, if they were mere trustees, there must have been some cestui que trust. In order to ascertain who they are, in such a case a Court of equity inquires, for whose benefit the trust was created; and determines, that those, who are the objects of the trust, have the interest in the thing, which is the subject of it.”*<sup>59</sup>

Isaacs J went on to say that “... it must not be overlooked that the complete interest in the thing is shared by all the objects of the trust.”<sup>60</sup>

The beneficiaries assessed for land tax were not liable as owners of an estate of freehold in possession because the trustees had prior duties to other legatees who were entitled to annuities and on whose behalf the trustees were required to hold the land and deal with it.

- 43 In *Livingston v Commissioner of Stamp Duties (Qld)* (1960) 107 CLR 411, Kitto J, referring to *Pearson v Lane* and *Glenn v Federal Commissioner of Land Tax* per Isaacs J at 503, said that it was axiomatic that, with the one exception provided by the law of charities, the whole beneficial interest must rest in some individual or collection of individuals.<sup>61</sup>

- 44 That does not exclude the beneficial ownership being divided between the trustee and the beneficiaries, so that the beneficiaries, although having a proprietary interest in the assets, do not have rights amounting to ownership. That would follow from the fact that a beneficiary’s interest is engrafted onto the legal estate, but is deferred to a trustee’s right to be

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<sup>58</sup> (1809) 17 Ves. 101; (1809) 34 ER 39 at 104; 40.

<sup>59</sup> (1915) 20 CLR 490 at 503.

<sup>60</sup> *Ibid.*



indemnified from the assets held on trust for liabilities incurred in execution of the trust.

- 45 The interests of beneficiaries in *CPT Custodian* were not future interests. But while the trust was on foot they were less than ownership. They had no interest in particular assets. They were entitled to distributions of income but not to a transfer of the property comprising the trust fund. But could a sole unit holder, or all unit holders if they were *sui juris*, be said to have equitable ownership because they could bring the trusts to an end by calling for a transfer of the trust property? The answer was no.
- 46 One reason was that the trustee had an unsatisfied right of indemnity out of the trust fund against liabilities incurred in execution of the trust and until the right of indemnity was satisfied, it was impossible to say what the trust fund was.<sup>62</sup>
- 47 Another reason was that, under the terms of the trust deed, the trustee and manager were entitled to fees for carrying out their instructions. In *Sir Moses Montefiore Jewish Home v Howell and Co. (No. 7)* [1984] 2 NSWLR 406, Kearney J said that the power to require a trustee to bring the trust to an end by transferring trust property was reposed in all the persons entitled to call for the due administration of the trust.<sup>63</sup> In *CPT Custodian*, the High Court said that the trustee and the manager, who were entitled to their fees, were interested in the due administration of the trust in this sense, such that the unit holders were not the only person in whose favour the property might be applied.<sup>64</sup> For this reason also the unit holders were

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<sup>61</sup> (1960) 107 CLR 411 at 449.

<sup>62</sup> (2005) 224 CLR 98 at 120-121 [50]-[51], quoted in para [16] above.

<sup>63</sup> [1984] 2 NSWLR 406 at 410-411.

<sup>64</sup> (2005) 224 CLR 98 at 120 [48]-[49].

not entitled to call for a transfer of the trust property on the principles of *Saunders v Vautier*.<sup>65</sup>

48 In *CPT Custodian*, the High Court did not deny that unit holders under such trust deeds had a proprietary interest in the trust property vested in the trustee. All that the Court held was that the unit holders (or unit holder) did not have a proprietary interest amounting to ownership. Nonetheless, the decision was seen in some quarters as being a reinstatement of Maitland's view that a beneficiary's right rises no higher than a personal right against the trustee to compel due administration of the trust, and creates no proprietary interest in the trust assets. *CPT Custodian* did not so decide. The High Court emphasised that the nature of a beneficiary's interest depended on the terms of the trust. In *Charles v Federal Commissioner of Taxation* (1954) 90 CLR 598, it was held that the trust deed there under consideration did confer a proprietary interest in the unit holders in all of the property which, for the time being, was subject to the trusts of the deed, and this was not doubted in *CPT Custodian*. However, where the trustee has an unsatisfied right of indemnity, that question arises by parity of reasoning with *Lord Sudeley v Attorney-General* (see para [18] above).

#### ***Halloran v Minister Administering National Parks and Wildlife Act 1974***

49 In *Halloran*, Port Stephens Development Pty Ltd ("Port Stephens") was the registered proprietor of land at Jervis Bay. The Federal Court had approved a scheme of arrangement and ordered that the whole of the property of Port Stephens be transferred to Sealark Pty Ltd ("Sealark"). Sealark thereby acquired an equitable interest in the land. Those interested in Sealark wanted to maximise their claims for compensation following the resumption of the land by creating a large number of

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<sup>65</sup> (1841) 4 Beav 115; 49 ER 282.

different equitable owners of non-contiguous lots, and to do so without incurring *ad valorem* stamp duty. They attempted to implement the scheme successfully deployed in *ISPT* to transfer the beneficial ownership of land to new owners, but only as a consequence of the redemption and issue of units in a unit trust, thereby attracting the exemption from Div 3A of the *Stamp Duties Act* afforded by s 44(2)(d).

50 Seven hundred and seventy trust deeds were prepared. A trust deed called the Pacinette Property Trust was taken as a representative example of claimants for compensation by reason of being beneficial owners of lots. Pacinette was appointed as trustee of the Pacinette Property Trust Deed. The trustee established two classes of units: A class units and ordinary units. Sealark initially held ten A class units. The trust deed provided that if the trustee allotted A class units, the property received in consideration for the allotment would form a separate fund (the A fund), and that “A class unit holders were entitled to a fractional interest in the corpus of the A fund.”<sup>66</sup>

51 There was a separate fund called the “trust fund”. Ordinary class unit holders were not entitled to any interest in the assets of the A fund, and A class unit holders had no interest in assets in the trust fund. On the redemption of all A class units, the assets previously part of the A fund would cease to be assets of that fund and become a part of the trust fund.

52 Pacinette made a written offer to Sealark to buy certain land in consideration of the allotment to Sealark of 79,000 one-dollar A class units in the Pacinette Property Trust. Upon the directors of Sealark resolving to accept that offer, Pacinette allotted 79,000 A class units to Sealark. Pacinette resolved to apply in its personal capacity for 79,010 ordinary

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<sup>66</sup> (2006) 224 ALR 79 at 89 [41].

class units, and to pay for them using a bill of exchange drawn by Pacinette on Sealark as an accommodation acceptor. The A class units would then be redeemed by the endorsement of the bill of exchange to Sealark. Sealark would cease to be a unit holder. There being no other A class unit holders, the land would cease to be an asset of the A fund and become part of the trust fund. Thereby Pacinette would become the beneficial owner of the land, but, it was said, would do so as a consequence of the redemption and issue of units in the unit trust.

53 The question was whether Pacinette was precluded from proving that it had acquired the beneficial ownership of the land because it was necessary for it to prove the acceptance by Sealark of Pacinette's offer to buy the land in consideration of the allotment of A class units in the Pacinette property trust, the resolution to allot the 79,000 A class units and the issue of the unit certificate. Section 29(3) of the *Stamp Duties Act* precluded such proof if those steps in the transaction resulted in a change of beneficial ownership of the land where duty payable pursuant to s 44A had not been paid. This was the same issue dealt with by the Court of Appeal in *Chief Commissioner of Stamp Duties v ISPT Pty Ltd*.

54 Without reference to the reasoning of the majority of the Court of Appeal in *Chief Commissioner of Stamp Duties v ISPT Pty Ltd*, the High Court held that there was such a change of beneficial ownership prior to the redemption of units of Sealark and issue of units to Pacinette in its personal capacity. The majority of the High Court said:

[71] ... there was to be a written offer, accepted by Sealark and recorded in minutes, and the issue of a certificate for the 79,000 \$1 A class units which was the consideration moving to Sealark.

[72] At the time when that consideration was provided to Sealark, if not earlier, upon acceptance by Sealark of the written offer, a change in the relationship between Sealark and Pacinette took

*place. The equitable interest in the land later to be resumed was now vested in Pacinette as a trustee of the Pacinette Property Trust. In the eye of equity, which provided the critical conspectus because the subject matter was purely equitable, nothing remained to be done in order to define the respective rights of Sealark and Pacinette with respect to that equitable interest ..."*<sup>67</sup>

55 Section 23C(1)(c) did not prevent the disposition of the equitable interest either because a constructive trust arose binding Sealark or because it would be to use the statute as an instrument of fraud to rely on s 23C(1)(c).

56 What of the reasoning of the majority in *Chief Commissioner of Stamp Duties v ISPT Pty Ltd*, that the creation of such a trust nonetheless does not involve a change in beneficial ownership where the party owning the land (or in this case, the equitable interest in the land) is the sole unit holder of the trust on which the purchaser acquires the equitable interest? That was answered as follows:

*"[75] However, it no doubt is true that Sealark would hold all the issued A Class units in the Pacinette property trust. Would the fact that Sealark was sole unit holder of those units have the consequence, as the appellants submitted, that the 'beneficial ownership' of the equitable interest in land had not changed because that interest was still to be found, by reason of the issue of the units, in the hands of Sealark? The answer must be that there had been a change. Consistently with the reasoning in CPT Custodian Pty Ltd v Cmr of State Revenue and with the terms of the Pacinette trust deed, to which reference has been made earlier in these reasons, Sealark would not have any interest in any particular part of the trust fund or in any investment thereof."*<sup>68</sup>

57 This is somewhat curious, as the terms of the trust deed referred to at 89 [41] of the High Court's reasons provided that at the time of the transaction the land was to form the A fund, and that the A class unit holders were entitled to a fractional interest in the corpus of the A fund. Sealark was the only A class unit holder. This would suggest that, unlike the deed in ISPT, Sealark was to have a proprietary interest in the trust fund and the investment which it comprised.

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<sup>67</sup> (2006) 224 ALR 79 at 96.

- 58 Heydon J held that at the time Sealark accepted Pacinette's offer, a constructive trust of Sealark's equitable interest arose and the beneficial ownership of Sealark's equitable interest changed to some extent.<sup>69</sup> That change was not a result of the issue and redemption of 79,000 A class units, but was the result of the promise to issue them.<sup>70</sup> Nonetheless, at the time of the acceptance of the offer, Sealark was the sole unitholder – holding the 10 A class units. It may be that at that point the beneficial interest in Sealark's equitable interest did not form part of the A fund, but the issue was not further discussed.
- 59 There were a number of features of the facts in *Halloran* which distinguished it from *Chief Commissioner of Stamp Duties v ISPT*. However, it was not those differences which informed the High Court's reasoning. On this key issue, the majority's reasoning was that Sealark as the holder of A class units did not have any interest in any particular part of the trust fund or in any investment thereof. It seems to be implicit that, as a result, Sealark could not assert beneficial ownership against Pacinette in respect of the property of which Pacinette was a sub-sub-trustee. Sealark no doubt had a right against Pacinette to compel the due administration of the trust. This right however did not amount to beneficial ownership.
- 60 The terms of the trust deed in *Chief Commissioner of Stamp Duties v ISPT* were closer to the terms of the trust deed in *CPT Custodian* than was the trust deed in *Halloran*. The trust deed in *ISPT* provided that no unit conferred any interest in any particular part of the trust fund or in any investment or asset comprising the assets of the trust but only a beneficial interest in the fund as a whole.<sup>71</sup> A conclusion that such a unit holder has

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<sup>68</sup> (2006) 224 ALR 79 at 97-8.

<sup>69</sup> *Id* at 100 [93]

<sup>70</sup> *Id* at 100 [94]

<sup>71</sup> (1998) 45 NSWLR 639 at 643.

no proprietary interest in any asset of the trust, even where the unit holder is the sole unit holder, and *a fortiori* does not have an interest amounting to ownership of the asset, would appear to flow from the High Court's reference in *Halloran* to *CPT Custodian*. That may explain why there was no reference in *Halloran* to the reasoning of the majority in *ISPT*; because *ISPT* had been decided before *CPT Custodian*.<sup>72</sup>

61 However, it is regrettable that there was no further elaboration in *Halloran*. It is not clear why it should be said in *Halloran* that Sealark, as an A class unit holder in the Pacinette property trust, would not have had an interest in the investment comprising the A fund. But assuming that were so, as there was no indication that Pacinette, as trustee of the Pacinette property trust, had an unsatisfied right to be indemnified out of trust assets for liabilities incurred in executing the trust, or any right to fees for performing its duties as trustee, it may have been arguable that Sealark could have called for a transfer of the trust property and was the equitable owner of the property held on the sub-sub-trust, assuming that trust did not disappear. In that case the question would be whether there was a change in beneficial ownership by the creation of the sub-sub-trust. It is unfortunate that the reasoning of the majority of the Court of Appeal in *ISPT* was not addressed. Presumably this was due to the way the matter was argued.

### Subsequent Cases

62 In *CPT Manager Ltd v Chief Commissioner of State Revenue* (2006) 64 ATR 654; [2006] NSWSC 1286, Gzell J said that:

“50 *There is nothing in CPT nor in the later decision of the High Court in Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 80 ALJR 519 to suggest that the

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<sup>72</sup> (2006) 224 ALR 79 at 85 [23].

*holder of a unit in a unit trust lacks an equitable interest in the trust property.*

...

53 *[Halloran] foundered because, there being a change in beneficial ownership outside the exception in the Stamp Duties Act, 1920, s 44(2)(d), Pacinette was denied the right to prove that change and, thereby, its entitlement to compensation for resumption of the land, because s 29(3) provided that no unstamped instrument in respect of a transaction to which s 44(1) applied could, except in criminal proceedings, be given in evidence.*

54 *It follows that if a constructive trust in favour of Pacinette came into existence, it acquired an equitable interest in the land. It was that which caused the change in beneficial ownership. The decision is silent upon the question whether a unit holder in a unit trust holds an equitable interest in the trust assets.”<sup>73</sup>*

63 It is no doubt correct that *Halloran* does not decide that as a general proposition the holder of a unit in a unit trust lacks an equitable interest in the trust assets. The emphasis of the High Court’s reasoning in *CPT Custodian* was that, whether or not a unit holder in a unit trust has a proprietary interest in the assets of the trust, and if so, whether the unit holder has a proprietary interest amounting to ownership, depends upon the terms of the particular trust deed.

64 However, in *Halloran*, the High Court did hold that the holder of units in the unit trust in that case lacked a proprietary interest in the trust asset. The reasons for that conclusion are not clear.

65 The question of whether a beneficiary of a unit trust has a proprietary interest in the trust assets is apt to arise in the context of whether such a unit holder is entitled to lodge a caveat; particularly where the trust deed provides that the beneficial interest in the trust fund will be vested in the unit holders for the time being, but that a unit holder is not entitled to any



particular asset or investment comprised in the trust fund or any part thereof. In *Costa & Duppe Properties Pty Ltd v Duppe* [1986] VR 90, Brooking J held that under such a trust deed, because a unit holder had a proprietary interest in all of the trust property, there must be a proprietary interest in each of the assets of which the entirety is composed.<sup>74</sup> Brooking J applied *Charles v Federal Commissioner of Taxation* and *Octavo Investments Pty Ltd v Knight* in reaching that conclusion.

66 In *CPT Custodian*, the High Court found it unnecessary to decide whether *Duppe* was correctly decided. The High Court did say that *Duppe* did not have the general significance of establishing that, irrespective of the terms of the trust deed, unit holders of a unit trust have beneficial interests in the trust assets. Each trust deed must be considered in its terms, recognising that a trustee may be entitled to the whole estate in possession because the rights of beneficiaries may rise no higher than the right to compel due administration of the trust, and may not constitute a proprietary interest in trust assets.<sup>75</sup>

67 In *Schmidt v 28 Myola Street Pty Ltd* (2006) 14 VR 447, Warren CJ recognised that the exact nature of a unit trust and the right of a beneficiary under a unit trust will depend upon the terms of the trust deed. Nonetheless, the general characteristics of such a trust are that unit holders have a proprietary interest in the trust property,<sup>76</sup> although this will depend upon the terms of the trust deed.<sup>77</sup> It does not follow that a caveat by a unit holder will be permitted to remain on the register if that is to the detriment of the trust as a whole,<sup>78</sup> or if the proposed dealing with the trust property by the trustee is within the trustee's powers.

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<sup>73</sup> At 662 [50].

<sup>74</sup> At 96.

<sup>75</sup> (2005) 224 CLR 98 at 113 [30]-[32].

<sup>76</sup> At 455 [29].

<sup>77</sup> At 457 [33].

<sup>78</sup> At 456-457 [30]-[32].

68 Her Honour concluded that where the trust deed provided that each unit entitled the holder thereof, together with other unit holders, to the beneficial interest in the trust fund as an entirety, but did not entitle a unit holder to any particular security or investment comprised in the trust fund or any part thereof, it was arguable that the unit holder had a beneficial interest in the trust property and hence was entitled to lodge a caveat.<sup>79</sup>

### **Other applications of *Re Transphere Pty Ltd***

69 The principle, most clearly articulated by McLelland J in *Re Transphere Pty Ltd*, that an equitable interest is imposed on, not carved out of, the legal estate, has a surprising range of application. It should have been applied in *Chief Commissioner of Stamp Duties v ISPT Pty Ltd*. It was applied by McLelland J himself in *Re Indopal Pty Ltd* (1987) 12 ACLR 54, where directors had failed to submit a statement as to the affairs of the company to a liquidator. The directors contended that the obligation to provide a report as to the affairs of the company did not extend to providing a report as to the affairs of the trust of which the company was trustee. McLelland J said that:

*“True it is that for some accounting purposes, in the case of a solvent trust, trust assets and liabilities are conventionally treated as if the trust were a separate entity from the trustee. However where insolvency intervenes such conventional treatment has no justification. In the case of a company trustee which becomes insolvent, trust liabilities are in every sense liabilities of the company itself and provable in its winding up, even where the company ceases to be trustee. In strict legal theory trust assets are the property of the company, in respect of which the company has equitable obligations which give rise to equitable interests in the beneficiaries. Those equitable interests are however engrafted onto, not carved out of, the company's legal ownership of the assets in question: see D K L R Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties [1980] 1 NSWLR 510 at 518–20 and Re Transphere Pty Ltd (1986) 10 ACLR 776 at 777; ; 4 ACLC 426 at 427–8. The equitable*

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<sup>79</sup> At 458 [39].

*interests of the beneficiaries may in turn be subject to the trustee's equitable lien securing its right to indemnity. These considerations serve to emphasise that the identity and value of trust assets, as well as trust liabilities, are very much part of the "affairs" of an insolvent company trustee, whether or not the company has ceased to hold the office of trustee under the terms of the trust (and it should be noted also that mere cessation in office as trustee does not effect a divestiture of the legal ownership of trust assets). The report as to affairs required by s 375(1) should therefore include particulars of trust assets and liabilities as at the relevant date, identified as such, and the prescribed form should be adapted accordingly."*<sup>80</sup>

70 In *Perpetual Trustee Co Ltd v Commissioner of State Revenue* (2000) 44 ATR 273; [2000] VSC 177, the vendor made an offer to sell a shopping centre on elaborate specified terms. The offer was accepted by payment of the purchase price. This created a concluded agreement for sale on the terms of the offer and made the vendor constructive trustee for the purchaser. The parties then entered into a deed of retirement and appointment of trustee. The vendor retired as trustee of the land and the purchaser, as beneficiary of the trust, and the vendor as the former trustee, appointed Perpetual as a new trustee of the trust. The vendor then executed a transfer in favour of Perpetual. Perpetual claimed that the transfer was exempt from stamp duty as it was made solely in consequence of the change of trustee. Hansen J rejected the argument that the exemption was applicable. It was then submitted that the value of the estate conveyed by the instrument of transfer was merely nominal because at the time of the transfer, the purchaser was already entitled in equity to the land and the vendor had become a bare trustee of the land for it. It was argued that the effect of the transfer was to transfer the bare legal interest only. Hansen J rejected this argument, holding that the transfer conveyed all the estate and rights of the absolute owner in fee simple in the land sold. There are not two estates, legal and equitable, which aggregate to the fee simple. There is but one estate onto which the equitable estate is engrafted. The transfer of the legal estate to a trustee for the purchaser at the purchaser's

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<sup>80</sup> (1987) 12 ACLR 54 at 58.

request transferred an absolute estate in fee simple. The transferee (Perpetual) would thereafter hold the land on trust for the purchaser because the fee simple was engrafted with that equitable estate. What was conveyed was not a bare legal title.<sup>81</sup>

71 Gzell J reached a similar conclusion in *Sports Corp Australia Pty Ltd v Chief Commissioner of State Revenue* (2004) 213 ALR 795. A trustee transferred land to the beneficiaries of the trust. Gzell J rejected the argument that all that was conveyed to the transferees was the bare legal estate which was of negligible value. Applying *DKLR Holding Co (No. 2) Pty Ltd v Commissioner of Stamp Duties* and *Re Transphere Pty Ltd*, his Honour concluded that the property transferred was the legal estate in the land, the value of which was the unencumbered value of the land and not the unencumbered value of a bare legal title.

72 In *GPT RE Ltd v Lend Lease Real Estate Investments Ltd* (2005) 12 BPR 23,217, I held that a right of pre-emption which was triggered if a party disposed of its interest, or part of its interests, in a shopping centre was not triggered where the party granted a conditional call option. Even though I was constrained to hold that the grant of the conditional call option conferred on the grantee a contingent equitable interest commensurate with its entitlement to equitable relief, that equitable interest was imposed on, not carved out of, the grantor's legal ownership of the shopping centre. It operated as an imposition on its title, not as a subtraction from it, and therefore did not operate as an immediate disposition or parting with its interest. This conclusion was upheld on appeal.<sup>82</sup>

73 This conclusion involved ignoring certain loose language used by Deane and Dawson JJ in *Stern v McArthur* (1988) 165 CLR 489, where their

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<sup>81</sup> At 293 [81].

<sup>82</sup> *Lend Lease Real Estate Investments Ltd v GPT RE Ltd* [2006] NSWCA 207 at [35].

Honours said that “... it is not really possible with accuracy to go further than to say that the purchaser acquires an equitable interest in the land sold and to that extent the beneficial interest of the vendor in the land is diminished.”<sup>83</sup> It would have been more accurate to say that the vendor’s exercise of his rights as legal owner was subject to such rights as the purchaser had acquired commensurate with the purchaser’s equitable interest in the land.

**Conclusion: What do these recent cases tell us?**

74 First, they establish that the nature of a beneficiary’s interest in an express trust - whether that interest amounts to more than a chose in action against the trustee to compel due administration of the trust, or whether it amounts to a proprietary interest in the trust assets, and if the latter, whether it amounts to an interest in the nature of ownership - depends upon the terms of the trust. This is an unremarkable proposition, but the decisions in *CPT Custodian* and in *Halloran* show that it bears emphasis.

75 The second, more informative conclusion, is that many of the conclusions reached by the High Court in *Buckle* and in *CPT Custodian* are the corollary of the proposition that a beneficiary’s interest is engrafted onto, and not carved out of, the legal estate. It is for this reason that, where a trustee has an unsatisfied right to be indemnified out of trust assets, it is impossible to identify what the trust fund comprises. The trustee owns the property. He or she is entitled to have recourse to it to meet a liability duly incurred in execution of the trusts and the beneficiary’s right to compel him or her to hold the property for his or her benefit and in accordance with the trust is subject to the trustee’s superior right to be satisfied from the property. The inability of a sole beneficiary, who is *sui juris*, to require a trust to be terminated and the trust property to be transferred to him if the trustee has an unsatisfied right of indemnity, or, if the trustee has an interest in

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<sup>83</sup> At 522.

the due administration of the trust, is another application of the same principle. The principle is of importance not only in revenue cases but in others, as exemplified in *Re Transphere Pty Ltd* itself involving the construction of a statutory power for the appointment of a receiver to a company's property, and is important in the construction of instruments. It is respectfully submitted that, had the majority of the Court of Appeal in *Chief Commissioner of Stamp Duties v ISPT Pty Ltd* given closer attention to the principle and its implications, the result of that case would have been different.

- 76 The third, more problematic question, is what should be drawn from the statement in *Halloran* at 96-97 [75], that the beneficiary there did not have any interest in any particular part of the investment comprising the trust fund. I suggest that this is not a return to the position before *Baker v Archer-Shee*. The High Court did not say that all beneficiaries' rights are only *in personam* rights against the trustee to compel due execution of the trust. That would be inconsistent with the endorsement in *CPT Custodian of Charles v Federal Commissioner of Taxation* and would be a fundamental change to the received understanding of the nature of beneficiaries' interests. Such a change would not be made without discussion. All that can be said of *Halloran* is that the reason for the statement that the beneficiary in that case had no proprietary interest in the trust asset was not elaborated.

R W White