



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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BETWEEN:

ANTHONY NAAMAN

Appellant

AND:

JAKEN PROPERTIES AUSTRALIA PTY LIMITED ACN 123 423 432 & ORS

Respondents

OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANT

PART I INTERNET PUBLICATION

This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

1. The right of exoneration generates a proprietary interest in the assets of the trust: **AS [19]-[20]**; *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth* (2019) 268 CLR 524 at [80]-[84] (Bell, Gageler and Nettle JJ), [128]-[142] (Gordon J) (**Vol 2, Tab 18**); *Jones v Matrix Partners Pty Ltd; Re Killarnee Civil & Concrete Contractors Pty Ltd (In Liq)* (2018) 260 FCR 310 at [49], [87] (Allsop CJ).
2. The interest generated by the right of exoneration takes priority over the interests of beneficiaries: **AS [17]-[18]**; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at [47]-[48] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) (**Vol 2, Tab 19**).
3. The right of exoneration and the proprietary interest it generates survive the loss of office as trustee. The assets come to the successor trustee with their history and inherent characteristics. The device of replacing a trustee, and transferring legal title of the “trust assets” to that trustee, does nothing to diminish the right of exoneration nor the proprietary interest generated by it: **AS [21]-[22]**; *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346 at [43] (French CJ, Gummow, Hayne, Heydon and Bell JJ) (**Vol 2, Tab 17**).
4. The right of exoneration restrains the freedom of the successor trustee to deal with the property, because it is subject to a prior proprietary claim. It stands in priority to the

- interests of beneficiaries. Such a restraint falls naturally within the scope of the fiduciary principle: **AS [23], [29]-[30]**; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-98 (Mason J), see also 68 (Gibbs CJ) (**Vol 3, Tab 20**); *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at [50]-[51] (**Vol 2, Tab 15**); *Residential Housing Corporation v Esber* (2011) 80 NSWLR 69 at [144] (**Vol 5, Tab 39**).
5. The equitable interest of the former trustee satisfies the rationales for the existence of a fiduciary duty and the public policy underlying the fiduciary principle. The right of exoneration plays a valuable societal role in encouraging the assumption of the obligations of trusteeship: **AS [16], [24]-[25]**; **CA [21] CAB 191** (Bell CJ).
 6. Recognition of the duty creates no conflict between the trustee's obligation to the beneficiaries and the former trustee (cf **RS [21]**). The trustee is subject to "a fiduciary duty to use the funds of the trust for trust purposes": *Jones v Matrix Partners Pty Ltd; Re Killarnee Civil & Concrete Contractors Pty Ltd (In Liq)* (2018) 260 FCR 310 at [51] (Allsop CJ). It is inherent in the preferential nature of the former trustee's interest that it would be protected by the same fiduciary duty: **AS [35], [37]**; **CA [6] CAB 184-185** (Bell CJ).
 7. Nothing in *Equity Trust (Jersey) Ltd v Halabi* [2023] AC 877 (**Vol 4, Tab 31**) is inconsistent with that fiduciary duty: cf **CA [137] CAB 232** (Leeming JA). The *pari passu* entitlement of successor trustees is not inconsistent with the successor owing a fiduciary duty to protect the former trustee's *pari passu* entitlement.
 8. The majority recognised the successor trustee was under some form of a "duty" but deprived it of practical content: **CA [37], [136] CAB 197, 232** (Leeming JA). This approach immunises a successor trustee and persons knowingly involved in the fraudulent dissipation of trust assets, at the expense of the former trustee. It deprives the former trustee of an effective remedy to satisfy its right of exoneration where there has been prior unlawful dissipation of trust assets.
 9. The claim which culminated in the judgment debt the subject of the appellant's subrogated interest had been commenced by the appellant on 6 November 2006: **J [34] CAB 17**. JPG was retired and replaced by Jaken as trustee on 13 February 2007: **CA [50] CAB 201**. Peter Sleiman (Jaken's alter ego) (**J [311]-[313], [494(3)] CAB 77-78, 146**) was the architect of a fraudulent and dishonest design to strip Jaken of the trust's assets to avoid satisfying the judgment debt owed to the appellant: **J [431], [433] CAB 121-122**. If notice of a claim is necessary, Jaken plainly had that notice, prior to taking transfer of the assets: **AS [8]; AR [11]**.

10. An objection on the basis of novelty is unpersuasive in this context: cf **CA [138] CAB S26/2024 233**. The conduct in this case bears closer analogy to the imaginings of a law school professor than behaviour seen “over the course of centuries”: cf *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at [23] (**Vol 5, Tab 33**), but see *Rothmore Farms Pty Ltd (in provisional liquidation) v Belgravia Pty Ltd & Ors* [2005] SASC 117 at [85] (**Vol 5, Tab 42**). In any event, “a useful jurisdiction should not be fettered, the categories of fiduciary relationship are not closed”: **AR [10]**.

Dated: 11 October 2024



Bret Walker



Pouyan Afshar



Naomi Wootton