



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 17 May 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: S26/2024
File Title: Naaman v. Jaken Properties Australia Pty Limited ACN 123 42
Registry: Sydney
Document filed: Form 27E - Appellant's Reply
Filing party: Appellant
Date filed: 17 May 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

3. The existence of a fiduciary relationship is “a question of relationship *characterisation*”,² arising across a broad range of legal relationships, it does not arise only where no other legal obligations subsist. The fiduciary duty here does not “alter” the operation of any contract between the two trustees (cf **RS [19(c), [22]]**). Clauses 2.1 and 2.2 of the Deed of Appointment required Jaken to act in accordance with the Trust Deed and clause 1.5 imposed an obligation to indemnify JPG for all debts incurred. The respondents offer no reasoning beyond assertion as to how the duty recognised alters the “operation which the contract was intended to have”³ (**RS [22]**). The proposition that a successor trustee owes a duty of “absolute and disinterested loyalty” to beneficiaries (**RS [19(a)]**) is both correct and incomplete because that duty is of course subject to the successor’s own self-interested right of indemnity. There is no reason in principle why it should not also be subject to the identical interest of the former trustee, especially in circumstances where the right of the former trustee stands in priority to the rights of the beneficiaries.

The rationale for the fiduciary principle

4. The respondents contend that no “practical purpose” is served by the imposition of the fiduciary duty, other than to enable accessorial and recipient liability claims to be brought against third parties (**RS [24]**). This approach subverts proper analysis: the accessorial and recipient liability which equity has devised is not extraneous to the fiduciary relationship, but a recognition of the significance of it. Nor is the fiduciary duty recognised by the trial judge “antithetical to any policy which is intended to protect trustees” (cf **RS [24]**). It offers a practical means of protection for the former trustee (and persons who have dealt with the trustee). The respondents’ approach would instead immunise the successor and persons knowingly involved in the dissipation of its assets.

Proprietary and personal rights

5. The respondents’ argument proceeds from two fallacies, *first* to characterise the relationship between former and successor trustee as one (only) meeting the description of equitable chargee and chargor,⁴ and *second* to erect a distinction between personal and proprietary rights as if the latter operates to the exclusion of the former (**RS [26]-[30]**). As the plurality of Bell, Gageler and Nettle JJ explained in *Carter Holt*, the trustee’s

² Paul Finn, “Contract and the Fiduciary Principle” (1989) 12(1) *University of New South Wales Law Journal* 76 at 87.

³ *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 97 (Mason J).

⁴ As a result, the respondents’ reliance on *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588 at **RS [33]** is misplaced.

interest “is not ... a charge or lien comparable to a synallagmatic security interest over property of another”.⁵ Rather, it arises “endogenously as an incident of the office of trustee in respect of the trust assets”. The plurality acknowledged this result as “the characteristic blending of personal rights and obligations with proprietary interests which is the ‘genius’ of the trust institution”.⁶ All members of the Court in *Carter Holt* described the former trustee’s interest as a “beneficial interest in the trust assets”.⁷ The relationship between the trustees is *not* merely one of chargor and chargee, nor is the nature of the right *only* proprietary, to the exclusion of personal. This is to ignore the import of the comments in *Carter Holt*, that “the choice of description should conform to, rather than dictate, the application of the fundamental principles to solving the concrete legal problem”.⁸

10

6. The proprietary description of the right of indemnity was not applied in *Carter Holt* as some mere intensifying epithet. It describes a claim to trust property, proprietary in nature, which means that the new trustee holds the whole of that trust property subject to the former’s proprietary claim. It is a claim of significance: it prevents a *Saunders v Vautier* direction from operating (which is itself a significant proprietary right), and it can be asserted in priority to the rights of the beneficiaries. Applying the concept of a proprietary interest to the right of indemnity is to say that this interest operates at the level of the freedom of the successor trustee to deal with the property, because it is subject to a prior proprietary claim. Such a restraint falls naturally and ordinarily within the scope of the fiduciary principle, even more so in the factual circumstances of the transfer of the legal interest in the Trust property to Jaken in this case (see **AS [8]**). Restrictions on dealings with trust property are well known as part of the trust institution, and the fiduciary duty imposed by the trial judge would have little to no practical impact on the practical operation of trusts, including trading trusts. Trustees resolve competing claims to property and competing obligations to others daily, including by applying for and receiving judicial advice.

20

Residual arguments

7. There is a useful analogy to be drawn from the mortgagee holding surplus proceeds at the

⁵ (2019) 268 CLR 524 at [83] (Bell, Gageler and Nettle JJ).

⁶ (2019) 268 CLR 524 at [84] (Bell, Gageler and Nettle JJ).

⁷ (2019) 268 CLR 524 at [84] (Bell, Gageler and Nettle JJ), see also at [32] (Kiefel CJ, Keane and Edelman JJ) and [140] (Gordon J).

⁸ (2019) 268 CLR 524 at [84] (Bell, Gageler and Nettle JJ).

level of *principle*, as to why equity imposes an obligation in such circumstances (and why it should do so here) (cf **RS [36]**). At **RS [37]** the respondents erect and destruct a strawman; the appellant has never contended that there will always be a fiduciary relationship between bailor and bailee, just that there *may* be in some circumstances. What is required is the examination of the particular circumstances of the relationship. The resolution of this appeal does not require the Court to find more than this: the relationship of former and successor trustees may be fiduciary in nature, according to the circumstances. As to vulnerability, it existed in this case and is not determinative, but remains a factor for consideration (cf **RS [42]-[43]**).

- 10 8. The reliance on the underlined phrase of *Equity Trust (Jersey) Ltd v Halabi*⁹ at **RS [40]** — that the “new trustee incurs no personal liability to the former trustee in respect of the expenses incurred by the latter” — ignores that this is a case involving the *failure* to indemnify. The passage in *Halabi* cannot sensibly be read as recognising the existence of the indemnity whilst denying the possibility of any liability for its breach (cf **RS [41]**).
9. The duty contended for is classically proscriptive: Jaken has a legal obligation not to act *against* the interests of JPG (cf **RS [48]**). That is not mere “negative syntax” (cf **RS [50]**). Jaken engaged in a dishonest and fraudulent design to strip the Trust of its assets so as to evade liability to the appellant. The duty *not* to do that is not to fulfil a “positive obligation” (cf **RS [51]**). It just precludes the trustee from dissipating the assets away.
- 20 10. The objection to novelty at **RS [54]** is unpersuasive in a jurisdiction in which legal principle is worked out case by case. The strikingly unmeritorious manoeuvres which have produced the litigated issue in this case are rightly not seen as common place (nor can they be described as behaviour seen “over the course of centuries” (cf **RS [54]**, citing *Harris v Digital Pulse Pty Ltd*¹⁰). In any event, what Professor Finn described as a “perennially repeated observation” bears repetition once more: a “useful jurisdiction should not be fettered; ‘the categories of fiduciary relationship are not closed’”.¹¹

Factual matters

11. No factual complexity attends whether Jaken had notice of a claim for indemnity out of the assets by JPG (cf **RS [10]**). The primary judge found that Jaken had engaged in a

⁹ [2023] AC 877 at [163].

¹⁰ (2003) 56 NSWLR 298.

¹¹ Paul Finn, “Contract and the Fiduciary Principle” (1989) 12(1) *University of New South Wales Law Journal* 76 at 85.

10 “fraudulent and dishonest design to strip itself of assets that might otherwise be available to satisfy JPG’s power of indemnity to which [the Appellant] was subrogated”, to which the other respondents were accessories (**J [431] CAB 121**). Peter Sleiman was the architect of this fraudulent scheme (**J [8(4)] CAB 10**). He was the sole director of JPG at the time JPG entered into the deed with the appellant from which the dispute arose and for a period after that (**J [20]-[21], [36], [37] CAB 15, 18**), a party to the Deed of Appointment replacing JPG as trustee (**J [38] CAB 18**), a party to the appellant’s proceeding involving JPG (**J [71] CAB 23**), the de facto and shadow director of Jaken and its alter ego (**J [311]-[313], [469] CAB 77-78, 136**). The suggestion now that there is some dispute about whether Jaken had notice of the claim for indemnity is frankly bizarre: the whole factual substratum of the conduct in this case occurred *because* Jaken (i.e. Peter Sleiman) knew about JPG’s claim for indemnity and set about a fraudulent course of conduct designed to avoid its satisfaction. None of those factual findings were challenged in the Court of Appeal nor do any of the factual findings of fraud assume the existence or scope of the fiduciary duty alleged (cf **RS [11]**).

20 12. The facts recited at **RS [13]** (the fact there may be other *alleged* creditors of Jaken) and **RS [14]** (as to priorities) are irrelevant. None render the question for which special leave to appeal was granted moot, and if some oblique suggestion to that effect is the point of **RS [12]-[15]**, it should be rejected. JPG’s entitlement to be indemnified was not “established” by the orders of Young AJ on 25 February 2016 (cf **RS [25]**), it arose prior to its declaration by the Court. In any event, all of the impugned transactions in this case were undertaken to put the assets of the Trust beyond the reach of JPG’s claim for indemnity. The respondents’ attempt to deploy the timing of the impugned transactions to deny the fiduciary duty only highlights the need for its imposition, particularly in view of the increasing use of the discretionary trading trust in modern commerce.

Dated: 17 May 2024



Bret Walker
Fifth Floor St James’ Hall

caroline.davoren@stjames.net.au
(02) 8257 2527



Pouyan Afshar
Nine Wentworth

pafshar@ninewentworth.com.au
(02) 8815 9244



Naomi Wootton
Sixth Floor
Selborne/Wentworth

nwootton@sixthfloor.com.au
(02) 8915 2610

SCHEDULE OF PARTIES

ANTHONY NAAMAN
Appellant

and

JAKEN PROPERTIES AUSTRALIA PTY LIMITED ACN 123 423 432
First Respondent

and

PETER SLEIMAN
Second Respondent

and

TONY SLEIMAN
Third Respondent

and

SUPERIOR FAMILY INVESTMENTS PTY LTD ACN 156 135 072
Fourth Respondent

and

O'MALLEY'S HOTEL PTY LTD ACN 608 025 636
Fifth Respondent

and

PSJK HOLDINGS PTY LTD ACN 133 251 537
Sixth Respondent

and

POWERHOUSE CORPORATION PTY LTD ACN 112 759 985
Seventh Respondent