



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN

ANTHONY NAAMAN

Appellant

and

**JAKEN PROPERTIES AUSTRALIA PTY LIMITED ACN 123 423 432
& OTHERS (ACCORDING TO THE SCHEDULE)**

Respondents

RESPONDENTS' OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

These submissions are in a form suitable for publication on the internet.

Part II: Outline of Propositions to be advanced in Oral Argument

1. The court below did not err in concluding that the first respondent as successor trustee did not owe a fiduciary duty to the former trustee, in the terms alleged, or at all.
2. The relationship between a successor trustee and a former trustee is that of equitable chargor and chargee, as distinct from that of trustee and beneficiary.¹
3. In the present case, there are unchallenged declarations to that effect.²
4. The essential difference between the institutions of a charge and a trust is the absence of any personal obligation of the chargor to hold the property in question for the benefit of the charge.³
5. The equitable charge or lien held by the former trustee is a security interest in the trust property in the sense of an equitable proprietary interest or charge or lien in or over trust assets; it is not full equitable ownership in the same way as a beneficiary under a trust.⁴

¹ *Lemery* at [46] (JBA 1442).

² Order 1 made 1 July 2022: CAB [160]; Orders 5 and 6 entered on 25 February 2016: CA [56] CAB 203.

³ *Associated Alloys* at [6] (JBA 198); *Jacobs'* 6th ed at [227]-[229] (JBA 1706); *Hamersley Iron* at [49] (JBA 1361); *Jacobs'*, 8th ed at [2.26] (JBA 1709).

⁴ *Carter Holt* at [133]-[140]; esp. [139] (JBA 414-417).

Filed on behalf of the Respondents by:
Jeresyn Legal

Date of this document: 11 October 2024
Telephone: 0410 627 520
Lawyer's email: jnasr@jeresynlegal.com.au

6. Accordingly:
- a. The property in the hands of the successor trustee remains trust property, but it is subject to the former trustee's proprietary interest that exists for the purpose of paying the creditors of the trust.⁵
 - b. A trustee's interest in the fund rises and falls as debts are incurred on behalf of the trust, and satisfied out of the fund;⁶
 - c. The remedy available to a former trustee as equitable chargee or lienholder is against the property itself; not against the holder of the property;
 - d. If a debt has accrued and remains unpaid, the chargee may proceed in equity for the appointment of a receiver or an order for judicial sale; in contrast, the beneficiary of a trust may call for the trust property and, if needs be, proceed in equity for performance of the trust, not sale of the trust property.
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7. The argument propounded by the appellant to superimpose a trust upon the relationship of chargor and chargee,⁷ is misconceived:
- a. The argument conflates the former trustee's right of exoneration out of trust property with the interest in the trust property generated by that right; namely, the equitable charge or lien over the trust property which arises because equity will lend its aid to a trustee to obtain payment for liabilities incurred in the administration of its trust even though the former trustee is no longer in possession of the trust property;⁸
 - b. On appointment, the successor trustee takes title to the trust assets, not to the former trustee's right of exoneration or to the former trustee's equitable charge or lien over the trust property; in that way, the successor trustee holds property which is subject to the former trustee's charge or lien, it does not hold any property for the former trustee; and,
 - c. The imposition of a fiduciary duty in favour of the former trustee is inimical to the existence of the former trustee's charge.
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8. Contrary to the minority opinion of the Chief Justice, there is nothing anomalous in the equitable interest of a former trustee not attracting a fiduciary duty when "the lesser

⁵ *Octavo* at 367, 370 (JBA 798, 801)); *Hewett v Court* at 663 (CA [142] CAB 227); *Buckle* at 246 (JBA 448); *Bruton* at [43] (JBA 356-57); *Lemery* at [46] (JBA 1442); and *Carter Holt* at [29]-[33], [80]-[85] and [142] (JBA 377-80; 394-97; 417).

⁶ *Carter Holt* at [142] (JBA 417).

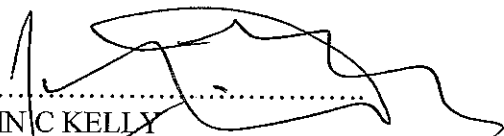
⁷ Appellant's Submissions, [23], second sentence.

⁸ *Carter Holt* at [80]-[85] (JBA 394-95) and [140]-[142] (JBA 416-17).

and subordinated or inferior rights of the ordinary beneficiaries do attract fiduciary obligations...⁹; the absence of such a duty is wholly explicable in terms of the institutional differences between a charge and a trust, in which the absence of such a duty defines the paradigm.

9. The respondents adopt the reasons of Leeming and Kirk JJA, including the proposition, at the “core” of those reasons; namely, it is a category error to confuse proprietary and personal rights.¹⁰
10. The respondents also rely upon the factors set out in Part V of their written submissions:
 - a. **RS [21]**: The imposition of a duty of absolute undivided loyalty would cut across the protection of permissible self-interest conferred by s 59(4) of the *Trustee Act* 1925 (NSW); give rise to irreconcilable conflicts, and be unworkable.
 - b. **RS [22]**: Such a duty would likewise cut across the protection afforded by cll 10 and 16 of the Trust Deed and cll 1.5 and 2.1 of the Deed of Appointment.
 - c. **RS [23]-[25]**: No good purpose would be served by the imposition of a duty that would not sit comfortably with the provisions of ss 6 and 59(4) of the Act, or the contracts which are given primacy by ss 6 (13) and 59(3).
 - d. **RS [26]-[34]**: It would be anomalous to impose such a duty because it would obliterate the distinction between an equitable charge and a trust and be uncertain.
 - e. **RS [35]**: The appellant’s reliance upon *Rothmore (No 2)* is misplaced.
 - f. **RS [36]-[38]**: No principled analogy may be drawn with a mortgagee holding surplus funds or the duties of bailees.
 - g. **RS [39]-[41]**: *Halabi* at [163] supports the proposition that a successor trustee incurs no personal liability to a former trustee.
 - h. **RS [42]-[46]**: Vulnerability is not determinative, especially in a recognised relationship in which proprietary and personal rights should not be confused.
 - i. **(9) RS [47]**: The applicable contracts and statutory provisions militate against the imposition of the duty, rather than in favour of such a duty.
 - j. **RS [48]-[54]**: In any event, the scope of the proposed duty is in substance proscriptive, and contrary to settled law.

Dated: 11 October 2024


 JOHN C KELLY
 Counsel for the Respondents

⁹ CA [6] CAB 184 *per* Bell CJ.

¹⁰ CA [38] CAB 197 *per* Leeming JA, with whom Kirk JA agreed at CA [226] CAB 259.