



## HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

**BETWEEN:**

**ANTHONY NAAMAN**  
Appellant

and

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

### **APPELLANT'S SUBMISSIONS**

#### **PART I      CERTIFICATION**

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

#### **PART II     ISSUES PRESENTED BY THE APPEAL**

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20     2.     Does a successor trustee owe a fiduciary obligation to a former trustee in respect of the proprietary interest in the trust assets conferred by the former trustee's right of exoneration?

#### **PART III    SECTION 78B NOTICE**

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3.     The appellant considers that no notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

#### **PART IV    CITATION**

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4.     The judgment of the Court of Appeal of the Supreme Court of New South Wales has not been reported, its medium neutral citation is *Jaken Properties Australia Pty Ltd v Naaman* [2023] NSWCA 214 (CA). The judgment of the primary judge has not been reported, its medium neutral citation is *Jaken Properties Australia Pty Ltd v Naaman* [2022] NSWSC 517 (J).

**PART V: RELEVANT FACTS**

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5. The former trustee is Jaken Property Group Pty Ltd (In Liq) (**JPG**) and the successor trustee is Jaken Properties Australia Pty Limited (**Jaken**, the first respondent) (**CA [41] CAB 198**). The second respondent (**Peter Sleiman**) was the sole director and shareholder of JPG, and the *de facto*/shadow director of Jaken at all material times (**CA [41] CAB 198**). JPG was appointed the trustee of the Sly Fox Family Trust (the **Trust**) in June 2005 (**CA [42] CAB 198**). In November 2006, the appellant commenced proceedings against JPG as trustee of the Trust, seeking damages in the sum of \$2 million (**CA [49] CAB 200**).

10 6. On 13 February 2007, JPG was retired and replaced by Jaken as trustee of the Trust by way of a “Deed of appointment and retirement of trustee of discretionary trust” (**Deed of Appointment**) (**CA [50] CAB 201**). JPG was promised an indemnity from Jaken as successor trustee (clause 1.5) in the following terms (**CA [50] CAB 201**):

*1.5 Indemnity*

The New Trustee indemnifies the Retiring Trustee against all debts which the Retiring Trustee has incurred and which are unpaid at the time of execution of this deed by all parties, while acting under and in terms of the Trust Deed and undertakes and agrees that the New Trustee will pay and discharge all such debts out of the assets of the Trust in accordance with the terms of credit or otherwise under which such debts were incurred.

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7. JPG was then wound up because of a claim for \$2,500 made by the Sleiman family’s accountants, with the effect that the appellant’s pending proceedings were stayed (**CA [52] CAB 201**). Legal title to the Trust assets, being real property described in the judgments as the “Victorian Properties”, the “Granville Land”, and the “Kings Cross Property”, were transferred to Jaken as trustee of the Trust (**CA [51] CAB 201**). The transfer of the Victorian Properties to Jaken was registered on 5 February 2008 (**CA [51] CAB 201**). Applications to record Jaken as the new registered proprietor of the Granville Land and the Kings Cross Property were made on 9 October 2008 (**J [58] CAB 21**).

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8. JPG (the former trustee) transferred to Jaken (the successor trustee) its legal interest in the property of the Trust in circumstances where Jaken was aware of the claims the appellant was making, and where JPG had a right to be indemnified out of the assets of the Trust in respect of those claims. This is clear from at least the following matters (a) proceedings were commenced by the appellant against JPG on 6 November 2006 (**J [34] CAB 17**), (b) Peter Sleiman was a director of JPG (**CA [41] CAB 198**), (c) Peter Sleiman

was at all times a *de facto* / shadow director of Jaken (CA [41] CAB 198), and its alter ego (J [494(3)] CAB 146), (d) caveats were lodged by the appellant on the Kings Cross Property and the Granville Land in respect of its claim in March 2007 (J [45] CAB 19-20), (e) caveats were *also* lodged by the liquidator of JPG in respect of its right of indemnity (J [47] CAB 20), and (e) it was only with the liquidator's subsequent consent that Jaken came to be the legal owner of the Trust properties (J [53] CAB 21).

9. Subsequently, on 5 March 2014, default judgment was entered in favour of the appellant against JPG (which had been reinstated and joined), in the sum of \$2m plus interest (CA [54] CAB 202). The judgment was set aside by consent, and the proceedings were  
10 reheard in December 2014 (CA [55] CAB 202). On 25 February 2016, Young J made orders entering judgment for the appellant against JPG in the amount of \$3.4 million, declaring that JPG was entitled, "as against the second defendant and generally, to be indemnified out of the assets of the [Trust] for liabilities incurred by it in its capacity as trustee of the [Trust], including in respect of the judgment entered against the third defendant in these proceedings" and declaring that the appellant was "subrogated to the rights of [JPG] for its entitlement to be indemnified from the assets of the [Trust] in respect of the judgment to be entered in these proceedings" (CA [56] CAB 203). There was no dispute in the courts below that the appellant "is entitled by way of subrogation in equity to the rights of JPG to be indemnified out of the assets of the [Trust]", and that  
20 JPG's right of indemnity extends to that judgment debt (CA [46] CAB 200).
10. In the meantime, and unknown to JPG, its liquidator or the appellant, the Trust's assets were whittled away in what the primary judge described as Jaken having "engaged in a dishonest and fraudulent design to strip itself of assets that might otherwise be available to satisfy" the judgment debt in favour of the appellant, doing so at the direction of Peter and Tony Sleiman (the third respondent) (J [431], [433] CAB 121-122). The other respondents were either knowingly involved in the conduct or received Trust property. Those findings were not challenged on appeal.
11. Jaken used various means to dissipate its assets so as to put them beyond the reach of JPG. Certain properties were transferred to related parties (CA [146]-[160] CAB 236-  
30 240). The sum of \$3.6m was effectively transferred to a related party by the transactions that constituted the "Draw Down" (CA [182] CAB 245-246). Jaken also purported to undertake a transaction (CA [215] CAB 255) to transfer the equitable interest in the Kings Cross Property from the Trust to two unit trusts (of which Jaken was also trustee),

which transaction the respondents conceded was ineffective on the first day of trial (J [285] CAB 63).

12. None of the recipients of the Trust property were *bona fide* purchasers for value without notice; nor was any commercial (or other) explanation given for any of the transactions by the respondents at trial. Each impugned transaction was found to have been made with the intention to defraud creditors pursuant to section 37A of the *Conveyancing Act 1919* (NSW) (CA [152] CAB 238), findings which were not disturbed by the NSWCA (save in respect of the Draw Down, where the NSWCA found that no order should be made until Jaken's bank, the NAB, was joined to the proceeding, but did not disturb the finding that there had been an alienation within the meaning of section 37A with the requisite intention (CA [217] CAB 255-256)).

### The primary judge's decision

13. Before the primary judge, the appellant claimed, *inter alia*, that each of the impugned transactions was part of a dishonest and fraudulent design, in breach of fiduciary duties owed by Jaken to JPG, and made claims for equitable compensation against the directors (Peter and Tony Sleiman), as well as for knowing receipt by the transferees of the Trust property. The primary judge accepted that the relationship between Jaken and JPG was a fiduciary relationship, finding support for his conclusions in the decision of Perry J in *Rothmore Farms Pty Ltd (in liq) v Belgravia Pty Ltd* [2005] SASC 117 (*Rothmore No 2*) (CA [389] CAB 105). His Honour concluded that Jaken was liable for breach of fiduciary duty, and each of the other respondents knowingly received trust assets or were knowingly involved in Jaken's dishonest and fraudulent design in breach of fiduciary duty, and were liable for equitable compensation (J [431]-[432] CAB 121 (in relation to the Granville Land), J [467]-[469] CAB 135-136 (in relation to the Draw Down), J [494] CAB 145-146 (in relation to the Victorian Properties)). The question of quantum of that equitable compensation was reserved for further consideration (J [508] CAB 150).

### The Court of Appeal's decision

14. The majority judgment was delivered by Leeming JA, with Kirk JA agreeing in separate reasons. Leeming JA concluded that Jaken did not owe a fiduciary obligation to JPG at any time, instead concluding that the only final recourse which Jaken had as against JPG was the appointment of a receiver (CA [141] CAB 234-235). Kirk JA similarly concluded that a fiduciary duty should not be recognised (CA [237] CAB 262). Chief Justice Bell

dissented, agreeing with the primary judge that a fiduciary obligation was owed and breached, with consequences for the respondents who had knowingly assisted in a dishonest and fraudulent breach of that duty (CA [3] CAB 182). For the reasons which follow, the Chief Justice was correct.

## PART VI: ARGUMENT

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### The importance of trustee indemnification to trust administration

15. The question raised by the one ground of the appeal is whether the successor trustee (Jaken) owed a fiduciary obligation to its predecessor trustee (JPG) in respect of the latter's right to be exonerated out of the trust assets. It is significant to the appellant because it determines whether he can engage the principles in *Barnes v Addy* to secure equitable compensation from those respondents who were held to have knowingly assisted in Jaken's dishonest and fraudulent design to strip itself of the Trust assets out of which JPG was entitled to be exonerated. But it is significant to trust administration more generally, arising at the intersection of the rights and interests of trustees, beneficiaries and trust creditors.
16. In respect of trustees, the right of indemnity or exoneration "plays a valuable societal role in encouraging the assumption of high obligations of trusteeship" (CA [21] CAB 191). The purpose of the indemnity is to "ensure, as far as the trust assets permit, that the trustee is not required to bear liabilities which are not incurred for the trustee's personal benefit".<sup>1</sup> In *In re Exhall Coal Co Ltd*, Lord Romilly MR said that the right of indemnity was "a right incidental to the character of trustee and inseparable from it";<sup>2</sup> in *Hardoon v Belilos* Lord Lindley explained that its rationale was to be found in the "plainest principles of justice".<sup>3</sup> That is, the onerous obligations which are placed on trustees "with great stringency" render it "only just that, on the other hand, he should be legally protected against all liabilities properly incurred by him in the administration of the trust estate".<sup>4</sup>
17. As for creditors, the principles relating to indemnification operate to protect their interests as third parties with whom a trustee transacts in the course of administration of the trust. As Jessel MR explained in *In Re Johnson; Shearman v Robinson*, "[t]he trust assets

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<sup>1</sup> *Equity Trust (Jersey) Ltd v Halabi* [2023] AC 877 at [69] (Lord Richards JSC and Sir Nicholas Patten).

<sup>2</sup> (1866) 35 Beav 449 at 453.

<sup>3</sup> [1901] AC 118 at 123.

<sup>4</sup> *Jennings v Mather* [1902] 1 KB 1 at 6-7 (Stirling LJ).

having been devoted to carrying on the trade, it would not be right that the cestui que trust should get the benefit of the trade without paying the liabilities; therefore the Court says to him, You shall not set up a trustee who may be a man of straw, and make him a bankrupt to avoid the responsibility of the assets for carrying on the trade”.<sup>5</sup> As regards the beneficiaries, the right of exoneration generates a proprietary interest in the trust fund in favour of the trustee, which takes priority over competing interests of the beneficiaries.<sup>6</sup> That is, it is an interest of the trustee which arises in principle precisely *in order* to prefer those interests over those of the beneficiaries.

10 18. These features are important in considering whether the fiduciary principle has application in this context, because as Professor Finn explained, “the fiduciary principle ... is, itself, an instrument of public policy” that is “demonstrably used, to maintain the integrity, credibility and utility of relationships perceived to be of importance in a society” and to “protect interests, both personal and economic, which a society is perceived to deem valuable”.<sup>7</sup> A conclusion that a fiduciary relationship can arise between a former and successor trustee is consistent with the importance of the right of indemnity or exoneration, its subsistence following trustee succession, and the priority attaching to the interest of the former trustee as against the beneficiaries. As Bell CJ recognised, the successor trustee should be held to at least the same standard of loyalty in relation to the former trustee’s rights in the trust estate as it owes to the ordinary beneficiaries in the trust (CA [29] CAB 194). There is also a principled justification for the recognition of the fiduciary principle in this context, which follows from the authorities recognising the proprietary nature of the interest generated by the right of exoneration.

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### **The proprietary nature of the interest conferred by the right of exoneration**

19. The right which JPG had to be exonerated out of the Trust property in respect of the liability owed to the appellant, prior to JPG’s retirement, conferred an equitable proprietary interest in the trust estate.<sup>8</sup> The nature of this interest is a “beneficial interest in” the assets of the Trust.<sup>9</sup> It is one which takes priority over the interests of beneficiaries,

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<sup>5</sup> (1880) 15 Ch D 548 at 552.

<sup>6</sup> *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth* (2019) 268 CLR 524 at [32] (Kiefel CJ, Keane and Edelman JJ), [83] (Bell, Gageler and Nettle JJ), [142] (Gordon J) (*Carter Holt*).

<sup>7</sup> PD Finn, “The Fiduciary Principle” in Youdan (ed) *Equity, Fiduciaries and Trusts* (LawBook Co, 1989) 1 at 26.

<sup>8</sup> *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 370; *Carter Holt* (2019) 268 CLR 524 at [32].

<sup>9</sup> *Carter Holt* (2019) 268 CLR 524 at [80]-[84] (Bell, Gageler and Nettle JJ), [133]-[142] (Gordon J).

including their right to issue a *Saunders v Vautier* direction to transfer trust property to a presently entitled beneficiary.<sup>10</sup> As the Court stated in *Buckle*, “[t]o 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* on trust imposing fiduciary duties which bind the trustee in favour of the beneficiaries”.<sup>11</sup>

20. In *Carter Holt, Bell, Gageler and Nettle JJ* observed that the “trustee’s right to apply trust assets in satisfaction of trust liabilities is proprietary in that it may be exercised in priority to the beneficial interests of the beneficiaries”, concluding that this “beneficial interest in the trust assets” falls “naturally and ordinarily within the definition of ‘property’ in s 9 of the *Corporations Act*”.<sup>12</sup> Justice Gordon agreed with the reasons of Bell, Gageler and Nettle JJ and emphasised that the “proprietary interest generated by the trustee’s right of exoneration is not the right of exoneration itself. Rather, the right of exoneration generates a proprietary interest in the trust assets”.<sup>13</sup> Kiefel CJ, Keane and Edelman JJ, by reference to the decision in *Buckle*, stated that “the ‘trust assets’ are subject to competing ‘proprietary rights, in order of priority, of the trustees and the beneficiaries” and “[t]he trustee’s rights take priority over those of the beneficiaries to the extent of the trustee’s powers of indemnity”.<sup>14</sup> The primary judge correctly accepted this proposition: “[t]ranslated to the facts of this case, when JPG ceased to be trustee of the [Trust], its right of indemnity continued to be supported by a lien over the whole of that trust’s assets and which gave JPG a proprietary interest in those assets” (**J [376] CAB 99**).

### **The nature of the former trustee’s interest after succession**

21. Upon the transfer of legal title from a former to successor trustee, the former trustee no longer enjoys direct recourse to the assets in order to satisfy its right of indemnity. Although proprietary, its right of indemnity or exoneration is not possessory.<sup>15</sup> The former trustee has no right to retain or reclaim possession of the assets pending

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<sup>10</sup> *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 at 335; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 (**Buckle**) citing *Dodds v Tuke* (1884) 25 Ch D 617 at 619; *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties* [1984] 1 Qd R 576 at 585.

<sup>11</sup> (1998) 192 CLR 226 at [48] citing *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 370.

<sup>12</sup> (2019) 268 CLR 524 at [84].

<sup>13</sup> (2019) 268 CLR 524 at [140].

<sup>14</sup> (2019) 268 CLR 524 at [32].

<sup>15</sup> *Ronori Pty Ltd v ACN 101 071 998 Pty Ltd* [2008] NSWSC 246 at [15] (Barrett J).



satisfaction of their right of indemnity.<sup>16</sup> The transfer of legal title does not have the effect of extinguishing the former trustee's equitable proprietary interest. As the Court concluded in *Bruton Holdings Pty Limited (in liq) v Federal Commissioner of Taxation*, the rights of recoupment or exoneration "amounted to a proprietary interest [in the trust assets] and they survived the appellant's loss of office as trustee".<sup>17</sup>

22. Thus, the vesting of the property in Jaken following removal of JPG as trustee of the Trust was subject to JPG's equitable proprietary interest in it. As Black J explained in *Re Glenvine Pty Limited (in liquidation)*, a subsequent transferee of property cannot "acquire an equitable interest in the property free of [the former trustee's] right of exoneration".<sup>18</sup>
- 10 The Court of Appeal (Barrett JA, Campbell JA and Sackville AJA agreeing) recognised in *Agusta Pty Ltd v Provident Capital* that "[t]he trust assets, when received by the new trustee, continued to have imposed upon them the entitlements derived by creditors from the former trustee's preferred beneficial interest".<sup>19</sup> Jaken, therefore, held its legal title to the property of the Trust subject to JPG's equitable interest. The primary judge correctly accepted this proposition: "that lien and interest, to the enforcement of which [the appellant] is subrogated, continued after JPG had ceased to be trustee in relation to the assets of the [Trust] now legally held by Jaken" (**J [376] CAB 99**).

### **The nature of the relationship between former and successor trustee**

- 20 23. The question is then the proper characterisation of the relationship between former and successor trustee. If the property constituted by the right of exoneration is a proprietary interest of the former trustee, and if that equitable proprietary interest subsists upon the retirement of a trustee, then it follows that the successor trustee holds property that is, in equity, the property of the former trustee. "[U]nless there is something in the circumstances of the case to indicate otherwise, a person who has 'the custody and administration of property on behalf of others' or who 'has received, as and for the beneficial property of another, something which he is to hold, apply or account for

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<sup>16</sup> *Hillig v Darkinjung Local Aboriginal Land Council* (2006) 205 FLR 450; *Pitard Consortium Pty Ltd v Les Denny Pty Ltd* (2019) 58 VR 524 at [2], [11], [38] (McDonald J); *Michell (Liquidator) v Dellta Holdings Pty Ltd (in liq) atf The Brookhill Trust* [2019] FCA 2133 at [8] (Davies J). Cf *Apostolou v VA Corporation Aust Pty Ltd* (2010) 77 ACSR 84 at 94–5 (Finkelstein J); *Prior v Simeon (No 2)* [2011] WASC 61 at [20] (Corboy J); *Re Neeeat Holdings (in liq)* (2013) 299 ALR 744 at [22] (Kenny J). See also *Caterpillar Financial Australia Ltd v Ovens Nominees Pty Ltd* [2011] FCA 677 at [20] (Gordon J).

<sup>17</sup> (2009) 239 CLR 346 at [43] (French CJ, Gummow, Hayne, Heydon and Bell JJ) (emphasis added).

<sup>18</sup> [2020] NSWSC 866 at [40].

<sup>19</sup> [2012] NSWCA 26 at [83] (*Agusta*).

specifically for his benefit' is a trustee in the ordinary sense".<sup>20</sup> This relationship bears the "essential feature of any other trust relationship: the successor trustee's authority to use the legal entitlements held on trust is conditioned on her adherence to terms".<sup>21</sup> The right of exoneration generates a beneficial interest, which is proprietary in nature and in priority to the beneficial interest of the beneficiaries. Thus, the trustee in office is trustee of the former trustee to that extent. That follows from the mere fact that the successor trustee is holding the legal title to property on trust — beneficially — for the former trustee. The consequence is to create a fiduciary relationship between the former and successor trustee: "the archetype of a fiduciary is of course the trustee".<sup>22</sup> It would be anomalous for this relationship of trusteeship not to attract fiduciary principles. This is an aspect of the majority's reasoning which is particularly curious. It accepted the interest was proprietary, and appears to have accepted that there was a duty of some kind owed, but just did not consider it to be fiduciary in nature (and did not otherwise explain what kind of equitable duty the successor trustee owed) (**J [136] CAB 232**).

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24. In *RnD Funding Pty Ltd v Roncane Pty Ltd* (in the context of an analysis of whether a fiduciary relationship was a precondition to the right to trace), the Full Court of the Federal Court (Derrington J, Beach and Halley JJ agreeing) recognised that the "bifurcation" of equitable and legal interests "has the concomitant consequence that the holder of the legal title has some obligation to the holder of the equitable interest" which arises from the "inherent consequences of the proprietary interests which are created".<sup>23</sup> The Full Court observed that "most equitable interests in property" satisfy the "rationales for the existence of a fiduciary duty",<sup>24</sup> such that "[t]he holder of the equitable interest can rely on the equitable obligation imposed upon the holder of the legal title or person in control of the property to justify *in personam* enforcement of equitable obligations".<sup>25</sup>
25. That same conclusion follows here, in the context of a successor trustee who has voluntarily assumed the responsibilities of trusteeship. That conduct bears the character

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<sup>20</sup> *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at [113] (Bell, Gageler and Keane JJ). See also *Reading v The King* [1949] 2 KB 232 at 236 (Asquith LJ) (affirmed [1951] AC 507).

<sup>21</sup> J Hudson, 'Trustee Succession and Indemnification' (2024) 98 ALJ (forthcoming, June issue) (accessed at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4752297](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4752297)> (at 12)).

<sup>22</sup> *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 68 (Gibbs CJ) (***Hospital Products***).

<sup>23</sup> (2023) 297 FCR 91 at [90] (Derrington J, Beach and Halley JJ agreeing).

<sup>24</sup> (2023) 297 FCR 91 at [91] (Derrington J, Beach and Halley JJ agreeing).

<sup>25</sup> (2023) 297 FCR 91 at [91] (Derrington J, Beach and Halley JJ agreeing).

of the critical feature of a fiduciary relationship, that the fiduciary “undertakes or agrees to act for or on behalf or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense”.<sup>26</sup> In taking the responsibilities of the trusteeship, the successor has “undertaken to perform such a function for, or has assumed such a responsibility to” the former trustee as would “thereby reasonably entitle [the former trustee] to expect that he or she will act in [the former trustee]’s interest to the exclusion of his or her own or a third party’s interest”.<sup>27</sup>

10 26. In the circumstances of this case, JPG transferred the legal interest in the Trust property to Jaken in circumstances where it was aware of the claims which the appellant was making and in circumstances where it had a right of exoneration in respect of those claims out of the assets of the Trust. Jaken had accepted its appointment as trustee and promised an indemnity to JPG. In doing so, JPG reposed a special trust and confidence in Jaken that it would, at the very least, protect its equitable proprietary right, constituted by the right of exoneration which subsisted in that property. The relationship gave Jaken the “opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position”.<sup>28</sup> This relationship accommodates and conforms to the contractual obligations undertaken by Jaken pursuant to clause 1.5 of the Deed of Appointment with respect to paying and discharging debts incurred by JPG, out of the assets of the Trust<sup>29</sup> (see further at [35] below).

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### ***Rothmore (No 2)***

27. The primary judge and Bell CJ both found support for this characterisation of the relationship between current and former trustee in the decision of *Rothmore (No 2)*.<sup>30</sup> The facts there bear a close analogy to this case: the transfer of trust assets to a beneficiary, then a related party, with the intention of defrauding trust creditors. In the first iteration of the proceedings, Mansfield J declared that the trustee’s equitable lien subsisted in the trust property in the hands of the recipients.<sup>31</sup> However, limited recovery was

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<sup>26</sup> *Hospital Products* (1984) 156 CLR 41 at 96-97 (Mason J).

<sup>27</sup> *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [177] (Finn, Stone and Perram JJ).

<sup>28</sup> *Hospital Products* (1984) 156 CLR 41 at [68] (Mason J).

<sup>29</sup> *Streetscape Projects (Australia) Pty Ltd v City of Sydney* (2013) 85 NSWLR 196 at [100] (Barrett JA, Meagher and Ward JJA agreeing).

<sup>30</sup> [2005] SASC 117.

<sup>31</sup> *Rothmore Farms Pty Ltd (in provisional liquidation) v Belgravia Pty Ltd & Ors* [1999] FCA 745.

subsequently obtained, and the former trustee sought to recover the shortfall by way of equitable compensation from the remaining defendants. Justice Perry reasoned that the new trustee was a fiduciary, stating:<sup>32</sup>

When [the successor trustee] was substituted as trustee and thereby acquired legal ownership of the Trust assets, it became a fiduciary vis a vis [the former trustee] or a constructive trustee with respect to the protection of [the former trustee's] right of indemnity against those assets. [The successor trustee] was obliged not to act with respect to the assets of the Trust in a way which jeopardised [the former trustee's] right of indemnity and its lien over the assets.

- 10 28. The obligation of the successor was to “maintain the Trust, rather than to dissolve it, so as to protect [the former trustee's] right of indemnity against the Trust assets” and that its “distribution of the whole of those assets to one of the beneficiaries was a flagrant breach of that fiduciary duty”.<sup>33</sup> The logic of the reasoning is compelling, that it was not ponderous does not disqualify its correctness as a matter of principle, nor its value as a matter of precedent (cf CA [105]-[107] CAB 220-221).

#### **A principled analogy with the mortgagee holding surplus proceeds of sale**

- 20 29. There is an analogy, at the level of principle, with that of a mortgagee holding surplus proceeds who owes an obligation to account to all subsequent interest-holders. In *Bofinger v Kingsway Group Ltd*, the Court held that the first mortgagee was “required by equity to account for the net surplus”.<sup>34</sup> The Court held that the first mortgagee was a constructive trustee and “to that extent it must account to the appellants as a defaulting fiduciary”, and that breach of such fiduciary obligation was sufficient to engage the principles associated with the second limb in *Barnes v Addy*.<sup>35</sup> In *Residential Housing Corporation v Esber*,<sup>36</sup> Campbell JA described the relevant fiduciary obligation of the mortgagee as “a fiduciary obligation to all subsequent interest holders to account to them for the manner in which the surplus is disposed of, and not to prejudice their interest in the surplus by the manner in which he disposes of it”.<sup>37</sup>

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<sup>32</sup> [2005] SASC 117 at [73].

<sup>33</sup> [2005] SASC 117 at [85].

<sup>34</sup> (2009) 239 CLR 269 at [79] (*Bofinger*).

<sup>35</sup> (2009) 239 CLR 269 at [50]-[51]

<sup>36</sup> (2011) 80 NSWLR 69 (*Esber*).

<sup>37</sup> (2011) 80 NSWLR 69 at [143] (emphasis added).

30. Thus, the mortgagee was under a fiduciary obligation to pay to the subsequent interest-holders “the amount to which each was respectively entitled”, and an equitable obligation “not to prejudice the right of [the subsequent interest-holders] to receive that part of the Surplus Proceeds to which each was respectively entitled”.<sup>38</sup> The breach of that obligation sounded in equitable compensation.<sup>39</sup> The basis in principle for the mortgagee’s fiduciary obligation, as explained in *Esber*, is analogous to the basis in principle for the existence of a fiduciary relationship here, namely the holding of property which is not one’s own:<sup>40</sup>

10 The selling mortgagee who holds a surplus, or a subsequent mortgagee to whom the selling mortgagee hands more of the proceeds of sale than that subsequent mortgagee is entitled to, are each in the position of holding property that is not their own. That position of control of the property gives rise to a fiduciary obligation not to harm the interest of the person beneficially entitled to the property. It is analogous to the fiduciary obligation that a bailee has to the owner of the goods bailed (*Re Hallet's Estate* (1880) 13 Ch D 696 at 708-709; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 101 per Mason J; *Brambles Security Services Ltd v Bi-Lo Pty Ltd* (NSWCA 19 June 1992) at 31 per Clarke JA, with whom Kirby P agreed; (1992) Aust Tort Rep 81-161). It is the sort of obligation that arises from holding property one knows is not one's own. Thus, it is capable of applying to any subsequent mortgagee into whose hands the surplus proceeds come.

20 31. There is nothing in the reasons of the majority that detracts from this conclusion. That the first mortgagee holds the surplus proceeds for the benefit of the second mortgagee or the mortgagor (CA [134] CAB 231-232) and not for its own benefit conforms precisely with the rationale for the fiduciary principle to operate here. Similarly, whilst it can be accepted that not *all* bailees will owe fiduciary obligations (CA [129] CAB 229), some will. As was explained in *Re Andrabell Ltd*, one “has to examine the relationship in each individual case to see whether it is fiduciary in nature”.<sup>41</sup> But the features of the relationship between former and successor trustee in this case amply provide support for the proposition that JPG was reasonably entitled to expect Jaken would act in its interest, to the exclusion of its own, in respect of JPG’s interest in the Trust assets generated by its right of exoneration.<sup>42</sup>

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<sup>38</sup> (2011) 80 NSWLR 69 at [168].

<sup>39</sup> (2011) 80 NSWLR 69 at [168].

<sup>40</sup> (2011) 80 NSWLR 69 at [144] (emphasis added).

<sup>41</sup> [1984] 3 All ER 407 at 414 (Peter Gibson J).

<sup>42</sup> See PD Finn, “Fiduciary Reflections” in *Fiduciary Obligations: 40<sup>th</sup> Anniversary Republication with Additional Essays* (Federation Press, 2016) 356 at 368-369.

## Vulnerability

32. The feature of vulnerability, whilst not decisive, is of “doubtless importance” in establishing a relationship of a kind suggesting an entitlement of one party to expect the other will act in his interests.<sup>43</sup> The majority accepted that a former trustee was vulnerable in respect of its right of exoneration (**CA [140] CAB 234, CA [230] CAB 259**). So much is obvious, particularly having regard to the circumstances of this case. A former trustee who has lost control of the assets, from which the indemnity or recoupment can be sourced, is vulnerable to the successor’s ability to deal with trust assets without notice to it.<sup>44</sup> It cannot retain title to the assets to afford itself protection. Its proprietary interest in the trust assets is subject to the complete control of the successor, and it is vulnerable to that extent.
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33. The majority offered two answers to vulnerability. Justice Leeming suggested that the “former trustee can protect its security by caveat and if necessary injunction and can enforce it through judicial sale” (**CA [140] CAB 234**). The facts of this case are sufficient to dispose of the suggestion that caveats can offer sufficient protection, noting the Draw Down took place at a time when a caveat was registered on the title of the Kings Cross Property and interim asset protection orders were in place (**J [461] CAB 132; CA [198] CAB 251-251**). Injunctive relief depends, inter alia, on the former trustee somehow intuiting that the successor is going to deal with the assets in a manner destructive of its right of exoneration. Judicial sale has no practical utility (as in this case) after the trust property has been unlawfully dissipated in a fraudulent and dishonest design by the successor trustee. Relatedly, there was misplaced reliance by the majority on the decision in *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd*<sup>45</sup> for the proposition that the “only entitlement by way of final relief” was judicial sale or the appointment of a receiver (**CA [144] CAB 235**). The passage relied on by the majority ((2008) 74 NSWLR 550 at [18]) does not provide a basis for its conclusion, as it was in terms concerned with the contrast between judicial sale or the appointment of a receiver on the one hand, and foreclosure or sale out of court on the other (as Bell CJ recognised: **CA**
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<sup>43</sup> *News Ltd v Australian Rugby Football League* (1996) 64 FCR 410 at [54] quoting PD Finn, “The Fiduciary Principle” in Youdan (ed) *Equity, Fiduciaries and Trusts* (LawBook Co, 1989) 1 at 46.

<sup>44</sup> *John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [82]-[83].

<sup>45</sup> (2008) 74 NSWLR 550.

[27] CAB 193). The Court was not addressing or delimiting the availability of all remedies in all circumstances.

34. Justice Kirk relied on the fact the previous trustee has “proprietary rights” (CA [233] CAB 261). For the reasons given at paragraphs 23 to 26 above, the proprietary nature of the former trustee’s interest is a feature which points to the existence of a fiduciary relationship, it does not tend against it.

#### Coherence with contract, statute and other duties

35. The recognition of the fiduciary duty here is coherent both with the contractual and statutory duties owed by Jaken to JPG, and the obligations which equity imposed on Jaken vis-à-vis the beneficiaries of the trust. As for the contractual duties, Jaken expressly undertook by way of the Deed of Appointment to indemnify JPG in respect of liabilities incurred as trustees (CA 50] CAB 201). Fiduciary relationships are commonly founded on contract: “[i]ndeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship”.<sup>46</sup> The critical feature is that the fiduciary undertakes or agrees to act in the interests of another person.<sup>47</sup> Here, the Deed of Appointment provided, inter alia, that in relation to trust property to which JPG had a right of indemnity or exoneration, the “New Trustee will pay and discharge all such debts out of the assets of the Trust” (CA [50] CAB 201). In addition, the Trust Deed by clause 14 provided that the Trustee “shall be entitled to be indemnified out of the assets for the time being comprising the Trust Fund against liabilities incurred by them in the execution or attempted execution or as a consequence of the failure to exercise any of the trusts authorities powers and discretions hereof” (J [363] CAB 93-94). The fiduciary duty conformed to Jaken’s contractual obligations to JPG with which it had voluntarily undertaken to comply and with the obligations contained in the Trust Deed.
36. It is also consistent with the statutory recognition of the indemnity in s 59(4) of the *Trustee Act 1925* (NSW) which provides that “[a] trustee may reimburse himself or

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<sup>46</sup> *Hospital Products* (1984) 156 CLR 41 at 97 (Mason J); *Gosper v Sawyer* (1985) 160 CLR 548 at 568-569 (Mason and Deane JJ).

<sup>47</sup> *Hospital Products* (1984) 156 CLR 41 at 97 (Mason J); *Pilmer v Duke Group (In liq)* (2001) 207 CLR 165 at [70]-[71] (McHugh, Gummow, Hayne and Callinan JJ).

herself, or pay or discharge out of the trust property all expenses incurred in or about execution of the trustee's trusts or powers”, and its cognates in all other jurisdictions.<sup>48</sup>

37. As for Jaken’s obligations in equity, that the successor trustee may owe a fiduciary obligation to the former in respect of a claim for exoneration accords conceptual coherence with the fact that equity recognises the former trustee’s proprietary interest as having priority over the interests of the beneficiaries. That being the case, as Bell CJ emphasised, the obligation of loyalty owed to the former trustee must be at least “as strong as those owed to beneficiaries whose interests were inferior in terms of priority to those of the former trustee” (CA [29] CAB 194).
- 10 38. Thus, when considering the possibility that a new trustee could sell trust assets and distribute the proceeds to beneficiaries without first satisfying a trust creditor’s judgment debt, the Court of Appeal in *Agusta* concluded that “[s]uch action ... would have entailed impermissible disregard of the beneficial interest in trust assets to which trust creditors were entitled by subrogation ... being an interest that ... continued to subsist in trust property following the transfer to [the] new trustee. Equity would have given full effect to that preferred beneficial interest”.<sup>49</sup> That “full effect” is given content by subjecting the successor trustee to fiduciary obligations in dealing with trust property, at least where it is aware of a claim by a former trustee and unsatisfied right of exoneration from the trust assets, and by enabling the former trustee to be made whole by orders for equitable compensation against those knowingly involved in the breach of the above obligations or
- 20 in knowing receipt of trust property.

### Not a prescriptive duty

39. As the Chief Justice concluded, the fiduciary duty imposed by the trial judge on Jaken vis-à-vis JPG is not prescriptive, but “classically, proscriptive” (CA [26] CAB 193). A fiduciary duty is one of “absolute and disinterested loyalty”, “within the scope of the venture or undertaking in respect of which the person in the fiduciary position has undertaken or assumed a responsibility to act in the exclusive interests of that other person”.<sup>50</sup> It is imposed in equity by means of two overlapping prospective obligations,

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<sup>48</sup> *Trustee Act 1925* (ACT), s 59(4); *Trustee Act 1893* (NT), s 26; *Trusts Act 1973* (Qld), s 72; *Trustee Act 1936* (SA), s 35(2); *Trustee Act 1898* (Tas), s 27(2); *Trustee Act 1958* (Vic), s 36(2); *Trustees Act 1962* (WA), s 71.

<sup>49</sup> [2012] NSWCA 26 at [84] (Barrett JA, Campbell JA and Sackville AJA agreeing).

<sup>50</sup> *Ancient Order of Foresters in Victoria Friendly Society Limited v Lifepan Australia Friendly Society Limited* (2018) 265 CLR 1 at [67] (Gageler J).



the conflict rule and the profit rule. The duty which was imposed by the trial judge was not to deal with the trust assets in a way which would destroy, diminish or jeopardise the former trustee's right of exoneration from those assets, breached here by the fraudulent and dishonest design intended to strip out the assets of the Trust to evade liability to the former trustee, to which the appellant was subrogated. It falls comfortably within the scope of the conflict rule, keeping in mind the observations of Lord Upjohn in his dissenting speech in *Phipps v Boardman*,<sup>51</sup> that “[r]ules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case”. The fiduciary duty — at its base — is one of loyalty. There is no doubt that the conduct of Jaken constituted a breach of that obligation of loyalty vis-à-vis JPG.

### Notice

40. The appellant's primary submission in the Court of Appeal was that it is irrelevant whether the successor trustee is on notice of a claim to exoneration by the former trustee (CA [108] CAB 222). It does not matter one way or another, because the question of notice is not controversial here: Jaken took the property with notice of JPG's claim and ultimately engaged in a fraudulent and dishonest design to avoid that claim. Chief Justice Bell concluded that the fiduciary obligation arose “no later than when the successor trustee becomes aware of the former trustee's claim to indemnity from the trust assets” (CA [28] CAB 193). There is nothing “odd” about a fiduciary obligation arising upon notice of a claim. First, there is no requirement for a fiduciary duty to arise at the outset of a particular relationship. In the context of a mortgagee holding surplus funds, the fiduciary obligation arises at the point “he has paid himself what is due”.<sup>52</sup> Second, it offers a principled balance between the rights of successor and former trustees. Trusteeship is not thrust upon an unsuspecting successor by compulsion; it must be accepted voluntarily. In agreeing to undertake the “onerous and sometimes dangerous”<sup>53</sup> obligations of trusteeship, it is reasonable to expect the successor to at least make enquiries or investigate whether there are any claims or debts against the trust. It can

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<sup>51</sup> [1967] 2 AC 46 at 123. See also *In re Taylor; Howitt v Union Trustee Co of Australia* [1950] VLR 476 at 482-483 (Herring CJ).

<sup>52</sup> *Adams v Bank of New South Wales* [1984] 1 NSWLR 285 at [35] cited in *Bofinger* (2009) 239 CLR 269 at [35].

<sup>53</sup> *In re Grimthorpe* [1958] Ch 615 at 623 (Danckwerts J) cited in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at [69] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

obtain warranties from the former trustee in that regard. A former trustee who sits silently with knowledge of claims may well be met with a claim of equitable estoppel barring any later claim for breach of fiduciary duty.

41. In any event, notice is not critical to the existence of the fiduciary obligation. The existence of the successor trustee's duty does not depend on knowledge of a claim, its basis in principle is in the subsistence of the right of exoneration after succession. The *in terrorem* suggestion that this would mean a trustee is at "risk every time it made a distribution", even if it complied with a *Saunders v Vautier* direction (**CA [109] CAB 222**) fails to account for the availability of relief from personal liability available to trustees pursuant to s 85 of the *Trustee Act 1925* (NSW) and its cognates,<sup>54</sup> and that a trustee may be indemnified out of the trust fund in respect of such liabilities. It also fails to account for the steps which a successor trustee can take upon assuming the liabilities of the trust to protect itself against unknown liabilities (and the concomitant lack of protection available to a former trustee, who may be removed as trustee involuntarily). For example, the Trust Deed in this case limited the liability of the trustee except in cases of fraudulent breach of duty (**J [363] CAB 93**) (which fraudulent breaches were found to have occurred).
42. Any perceived difficulty of reconciling the successor trustee's duties in a particular case are to be answered in the usual way: by seeking judicial advice. If notice is necessary, there is no need to introduce notions of a "realistic" claim (**cf [110] CAB 223**).

***Equity Trust (Jersey) Ltd v Halabi* [2023] AC 877**

43. Contrary to **CA [137] (CAB 232)**, the decision of the primary judge is unaffected by the reasoning of the Privy Council in *Equity Trust (Jersey) Ltd v Halabi*, which concerned the ranking of the proprietary interests of former and successor trustees.<sup>55</sup> The fact that the Privy Council found that the interests were found to rank *pari passu* does not preclude the existence of a fiduciary duty between former and successor trustee in that case, or in this case. In other words, that decision deals with an issue that does not arise in this case. In particular, that case did not involve the successor trustee engaging in a dishonest and fraudulent design to strip itself of assets for the express purpose of evading liability to the

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<sup>54</sup> *Trustee Act 1925* (ACT), s 85; *Trustee Act 1893* (NT), s 49A; *Trusts Act 1973* (Qld), s 76; *Trustee Act 1936* (SA), s 56; *Trustee Act 1898* (Tas), s 50; *Trustee Act 1958* (Vic), s 67; *Trustees Act 1962* (WA), s 75.

<sup>55</sup> [2023] AC 877 (PC).

former trustee, and there are real doubts as to whether in that circumstance equity would rank the interests of the former and successor trustee *pari passu*.

44. In any event, it is not necessary in this case to decide whether the decision in *Halabi* is correct, but it has been observed that a “preferable answer” to the question raised in *Halabi* may lie in the application of the remedial constructive trust in the absence of specific arrangement between retiring and successor trustee.<sup>56</sup> That conceptual framework may, in a case where it arises, offer reconciliation between the fiduciary duty which equity should recognise is owed to the former trustee and the rights of the subsequent trustee incurring liabilities without knowledge of the former.<sup>57</sup>

## 10 PART VII: ORDERS SOUGHT

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45. The following orders are sought:<sup>58</sup>
- i. Appeal allowed with costs.
  - ii. Set aside orders 2, 3 and 4 of the Court of Appeal of the Supreme Court of New South Wales made on 8 September 2023 and remit the matter to the Court of Appeal for further determination.

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<sup>56</sup> The Hon W Gummow AC and A Mohseni, “The selection of a defective major premise” (2023) 53 *Australian Bar Review* 11 at 22.

<sup>57</sup> An alternative view is offered in J Hudson, ‘Trustee Succession and Indemnification’ (2024) 98 ALJ (forthcoming, June issue) (accessed at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4752297](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4752297)> (at 15).

<sup>58</sup> On 28 March 2024, the appellant filed an application for special leave (S42/2024) (and application for an extension of time) in relation to the consequential orders of the Court of Appeal made on 26 October 2023\* which answered the separate questions posed by the trial judge, which are included at **CAB 278**. The purpose of that application for special leave is purely to regularise matters procedurally, to ensure that if the Court grants the appeal and sets aside the orders made on 8 September 2023, there are not inconsistent judgments (cf *Wishart v Fraser* (1941) 64 CLR 470 at 483 and *R v Marks* (1981) 147 CLR 471 at 476). The appellant understands that the respondent consents to an order granting special leave in respect of the 26 October 2023 orders (noting the appellant had originally sought such an order by consent, but was directed to file a new application for special leave). The appellant has done so, and sought expedition so that that appeal can be consolidated with this one. He does not seek to make any additional written submissions in relation to that appeal (noting the ground of appeal is identical, as are the orders sought, which are to remit the matter to the NSWCA for further determination). If this appeal were to be dismissed, so too would any appeal in respect of the 26 October 2023 orders. \*Note: the orders in the CAB were originally issued by the Court of Appeal in relation to a notice of motion, and therefore do not have the correct parties listed. The appellant has obtained corrected orders from the Court of Appeal (entered on 20 March 2024), but the orders in respect of which a grant of special leave is necessary are exactly the same as those included at **CAB 278**.

**PART VIII: ESTIMATE OF HOURS**

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46. The appellant estimates that 2 hours will be required for the presentation of oral argument.

**Dated: 28 March 2024**



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**ANNEXURE TO APPELLANT’S SUBMISSIONS: LIST OF STATUTES AND  
STATUTORY INSTRUMENTS**

Pursuant to Practice Direction No. 1 of 2019, the appellant sets out below a list of the statutes and statutory instruments referred to in these submissions.

<u>No.</u>	<u>Title</u>	<u>Version as at relevant date</u>
	<i>Statutes</i>	
1.	<i>Conveyancing Act 1919</i> (NSW), s 37A	Historical version for 1 December 2021 to 29 October 2023
2.	<i>Trustee Act 1893</i> (NT), ss 26, 49A	Current (Compilation dated 22 November 2017)
3.	<i>Trustee Act 1898</i> (Tas), ss 27, 50	Current (Compilation dated 17 February 2014)
4.	<i>Trustee Act 1925</i> (ACT), ss 59, 85	Current (Compilation No 22)
5.	<i>Trustee Act 1925</i> (NSW), ss 59, 85	Current (Compilation dated 28 September 2020)
6.	<i>Trustee Act 1936</i> (SA), ss 35, 56	Current (Compilation dated 19 September 2019)
7.	<i>Trustee Act 1958</i> (Vic), ss 36, 67	Current (Compilation No 127)
8.	<i>Trustee Act 1962</i> (WA), ss 71, 75	Current (Compilation dated 16 January 2013)
9.	<i>Trusts Act 1973</i> (Qld), ss 72, 76	Current (Compilation dated 24 November 2017)

**SCHEDULE OF PARTIES**

S26/2024

**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