



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
 SYDNEY REGISTRY

BETWEEN

ANTHONY NAAMAN

Appellant

and

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

Respondents

RESPONDENTS' SUBMISSIONS

Part I: Certification

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

Part II: Statement of Issues

2. Does the first respondent as successor trustee owe a fiduciary duty to the former trustee not to deal with trust assets so as to destroy, diminish or jeopardise the former trustee's right of indemnity or exoneration from those assets?

Part III: Notice under s 78B of the *Judiciary Act* 1903

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3. The respondents consider no notice under s 78B of the *Judiciary Act* 1903 is required.

Part IV: Statement of Facts

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4. This is a case in which the appellant invites the Court to superimpose a fiduciary duty upon a contract made between the former trustee of a discretionary trust (**JPG**) and a successor trustee (**Jaken**) on 13 February 2007.
5. The terms of the contract are contained in a "Deed of appointment and retirement of trustee of discretionary trust" (**Deed of Appointment**) (**CA [50] CAB 201**), made between JPG as the "Retiring Trustee", Jaken as the "New Trustee" and the second respondent (**Peter Sleiman**) as the "Appointor".

6. In addition to the contractual indemnity in clause 1.5 of the Deed of Appointment (which has been set out in [6] of the Appellant’s Submissions (AS)) (Clause 1.5), the Deed of Appointment contains clauses 2.1 and 2.2, in the following terms:¹

2.1 Appointment of New Trustee

The Appointor in exercise of the Appointor’s powers appoints the New Trustee as trustee of the Trust in place of the Retiring Trustee to undertake and to assume, as from the date of this deed the trusts, powers, duties and obligations conferred by the Trust Deed upon the trustee of the Trust as if the New Trustee were a party to the Trust Deed. (Clause 2.1)

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2.2 New Trustee

The New Trustee agrees that as from the date of this deed it will be bound by and observe and administer the trusts, powers, discretions and obligations conferred by the Trust Deed as if it were named in the Trust Deed as the original trustee. (Clause 2.2)

7. The “Trust Deed” referred to in Clauses 2.1 and 2.2 is the Discretionary Trust Deed made between Mr Kostas Augerinos, as Settlor, and JPG, as Trustee of the Sly Fox Family Trust (Trust), dated 21 June 2005 (Trust Deed) (J [18] CAB 15).² Peter Sleiman was named as the “Specified” and “Default” beneficiaries of the Trust when the Trust Deed was made. The term “General Beneficiaries” is defined to mean and include the Specified Beneficiary and the spouse, children and grandchildren of the Specified Beneficiary, together with a long list of other persons and entities who have a connection in some way with Peter Sleiman.³

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8. The Trust Deed also contains clauses 10 and 16 in the following terms:

10 TRUSTEES ONLY LIABLE IF FRAUDULENT

NO Trustees shall be responsible for-

- (i) Any loss or damage occasioned to the Trust Fund or any part thereof or to any person by the exercise of any discretion or power hereby or by law conferred on the Trustees or by any alleged failure to exercise any such discretion or power;
- or
- (ii) Any breach of duty or trust whatsoever-

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Unless the same shall be proved to have been committed made or omitted in person conscious and fraudulent bad faith by the Trustees charged to be so liable. All persons claiming any interest in the income or capital of the Trust Fund shall be deemed to take with notice of and subject to the protection hereby conferred on the Trustees. (Clause 10)

16 INDEMNITY FOR THE TRUSTEES

THE Trustees 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 exercise or

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¹ Document No. 2, Respondents’ Book of Further Materials page 38.

² Document No.1, Respondents’ Book of Further Materials page 5.

³ Document No.1, Respondents’ Book of Further Materials pages 7–8 and 34.

attempted exercise or as a consequence of the failure to exercise any of the trusts authorities powers and discretions hereof or by virtue of being the Trustees hereof but the Trustees shall not be entitled to be indemnified by any Beneficiary personally in respect of any liabilities or other matters aforesaid other than in respect of any duty or tax which they are entitled to recover from the Beneficiary by law(**Clause 16**)

9. Section 6(8) of the *Trustee Act* 1925 (NSW) (s **6(8)**) provides that every trustee appointed under an instrument “shall have the same powers authorities and discretions, and may in all respects act as if the new trustee had been originally appointed a trustee by the instrument, if any, creating the trust”. Section 59 of that *Act* (s **59**) says:

59 IMPLIED INDEMNITY

- (1) A trustee shall be chargeable only for money and securities actually received by the trustee, notwithstanding the trustee's signing any receipt for the sake of conformity.
- (2) A trustee shall be answerable and accountable only for the trustee's own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through the trustee's own wilful neglect or default.
- (3) Nothing in subsections (1) and (2) shall prejudice the provisions of the instrument, if any, creating the trust.
- (4) A trustee may reimburse himself or herself or pay or discharge out of the trust property all expenses incurred in or about execution of the trustee's trusts or powers.
- (5) This section applies to trusts created either before or after the commencement of this Act.⁴

10. The respondents accept the accuracy of [5], [6] and [7] of the appellant’s statement of Relevant Facts. AS [8] is in a different category. The question whether Jaken owed any and if so what fiduciary duty to JPG is a question of law. If the answer to that question depends in some way upon the question whether and if so when Jaken had notice of a “realistic” claim for indemnity out of the assets of the Trust by JPG,⁵ that is a complex question of fact which was not considered below and it is not a question that the Court would determine in this appeal.
11. The respondents also accept the accuracy of AS [9]. There is no issue that JPG is entitled to be indemnified “out of the assets of the [Trust]” or that the appellant is entitled by way of subrogation in equity to the rights of JPG to be indemnified, from those assets, for the judgment sum entered by Young AJ on 25 February 2016. Orders 5 and 6, made on that occasion, were to that effect (**J [210] CAB 46**). AS [10], [11] and

⁴ Section 36(2) of the *Trustee Act* 1958 (Vic) in substantively the same terms as s 59(4) of the NSW Act.

⁵ To adopt the term embraced by the appellant in argument (**CA [110] CAB 223**).

[12] are in a different position again. Those paragraphs assume the existence and scope of the duty which is in dispute. As such, the assertions in those paragraphs are not relevant to the issues for determination in this appeal. Colourful language, such as the assertion in AS [10] that “the Trust’s assets were whittled away”, is similarly unhelpful. If it goes to anything, it goes to causation, which in turn is not in issue in the appeal.

12. The primary judge reserved a number of questions for further consideration, including the quantum of the equitable compensation for which the various cross-defendants were found to be liable (**J [506] CAB 149**). Another reservation was the taking of an account (**J [508 (43)] CAB 159**). The view his Honour took of causation was, “*Insofar as there may be a shortfall in Mr Naaman’s recovery by subrogation to JPG between what would have been the outcome if the Impugned Transactions had not occurred and the final position after NAB’s receivership and other steps, the Court is satisfied that shortfall is the result of the breaches of fiduciary duty identified in this judgment*” (**J [507] CAB 149**). Leaving aside whether that is the correct approach to causation in a case such as the present, the question whether the assets of the Trust are sufficient to meet all of the Trust liabilities and how any shortfall was caused can only be determined after the value of all of the recoveries on behalf of the Trust pursuant to s 37A of the *Conveyancing Act* 1919 (NSW) and s 172(1) of the *Property Law Act* 1958 (Vic), has been ascertained and any competing claims for priority between Trust creditors have been resolved.

13. There are other Trust creditors⁶. There is also a dispute between the appellant and the National Australia Bank Limited (**NAB**) in which the appellant claims that the equitable charge or lien over Trust assets to which he is entitled by way of subrogation to the right of indemnity of JPG has priority over the securities granted by Jaken to that bank, including a registered charge No. 2264405 dated 26 October 2011.⁷

14. The principal asset of the Trust had been O’Malley’s Hotel at Kings Cross before it was sold by the bank’s receivers in April 2021. There is an issue of priority concerning the proceeds of sale any shortfall. Relevantly in orders made by the primary judge on 16 March 2021 (**J 281 CAB 59-60**), the Court noted that “*The Defendant/Cross-claimant [appellant] has commenced separate proceedings against NAB in Supreme Court of NSW proceeding number 2020/00260302 in which the Defendant/ Cross-*

⁶ Document No. 4, Respondents’ Book of Further Materials, page 57 shows Beneficiary Loans of \$2,512,567.

⁷ Document No. 3, Respondents’ Book of Further Materials, page 41.

claimant alleges or will allege priority against NAB in respect of a portion of any sale proceeds ...”.

15. In order 1(a) made on 1 July 2022 (**CAB 160**), the primary judge declared that “*Mr Naaman, having been subrogated to the rights of (JPG) by the declaration in paragraph 6 of the orders of Young AJ dated 22 February 2016 in proceeding 2009/00289622 ... had and has an equitable charge or lien over the assets from time to time of the ... (Trust) including: a. the O’Malley’s Hotel, 228 William Street, Kings Cross ... and the O’Malley’s hotel business*”. His Honour reserved consideration the quantum of any equitable compensation for which the various cross-defendants were to be liable (**J [506] CAB 149**) on the basis that “*quantum cannot be sensibly addressed until such matters have been addressed as the NAB receivership of the King’s Cross Property and O’Malley Hotel, whether it will be necessary to appoint receivers to the Victorian Properties and the Granville Land ... and no doubt other issues which will be identified by the parties*” (**J [507] CAB 149-150**).
16. The respondents’ appeal in relation to the Granville Land and the Victorian Properties was successful insofar as the appellant’s claims were based upon the alleged fiduciary duty but not in relation to the s 37A claim in relation to Granville Land or the s 172(1) claim in relation to the Victorian Properties. The appeal in relation to the “\$3.6 Million Drawdown” was successful in relation to both the fiduciary duty claims and the applicable s 37A claim. All of the orders made by the primary judge in relation to the “\$3.6 Million Drawdown” were set aside by the Court of Appeal,⁸ as was his Honour’s affirmative answer to the question “16 , *Was the Draw Down (a) Voidable pursuant to s 37A of the Conveyancing Act?*” (**J [508] CAB 153**).
17. The Court of Appeal unanimously answered that question: “*Inappropriate to answer in light of the ambiguity in the definition of ‘Draw Down’ and the answer not binding the Bank*” (**CA Addendum of 10 November 2023, 16 (a), CAB 284**).
18. Accordingly, the s 37A claim in relation to the \$3.6 Million Drawdown needs to be re-pleaded and determined on remitter along with the other questions that were reserved by the primary judge for further consideration (**CA [224] CAB 257**).

⁸ Orders 1(c) and 7 to 12 inclusive at **CAB 160-161** were the orders made by Kunc J on 1 July 2022. All of those orders were set aside by the Court of Appeal by Order 4 made on 8 September 2023 at **CAB 263**.

Part V: Argument

19. The applicable principles are not in doubt. Those principles include:

- a. A fiduciary duty is a duty of "*absolute and disinterested loyalty*".⁹
- b. The duty arises when "*the person in a fiduciary position has undertaken or assumed a responsibility to act in the exclusive interests of that other person*".¹⁰
- c. Where the undertaking or assumption of responsibility is governed by a contract, "*the ordinary rules of construction of contracts apply*" in determining the existence of a fiduciary relationship and the scope of any fiduciary obligation.¹¹ In *Hospital Products Ltd v United States Surgical Corporation*, Mason J said:

In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.¹²

- d. Where it is suggested that a trust relationship arose between the former and successor trustees, at some point, the question whether the parties intended a trust relationship is to be determined by reference to the outward manifestation of the intention of the parties within the totality of the circumstances. In *Legal Services Board v Gillespie-Jones*¹³, Bell, Gageler and Keane JJ said:

Such trust relationship as may arise to give effect to the inferred intention of the parties must mould to statutory rights and obligations of the parties. A trust relationship is not to be recognised or enforced, and is therefore not to be inferred, if and to the extent the trust relationship would give rise to rights or obligations inconsistent with those conferred or imposed by statute.¹⁴

⁹ *Ancient Order of Foresters in Victoria Friendly Society Limited v Lifeplan Australia Friendly Society Limited* (2018) 265 CLR 1 at [67] per Gageler J citing *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41 at 104; [1984] HCA 64, quoting *Phelan v Middle States Oil Corporation* [1955] USCA2 324; 220 F 2d 593 at 602 (1955). See also *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18; *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6; (2012) 200 FCR 296 at 344-345 [174].

¹⁰ *Gibson Motorsport Merchandise Pty Ltd v Forbes* [2006] FCAFC 44; (2006) 149 FCR 569 at 574-575 [11]- [12]. See also *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 407-409; [1929] HCA 24.

¹¹ *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35, 77 [281] (Jacobson J).

¹² *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 97 (***Hospital Products***). See also *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 36-7 [91]-[93].

¹³ *Legal Services Board v Gillespie-Jones* [2013] HCA 35; (2013) 249 CLR 493 at [119] (***Gillespie-Jones***).

¹⁴ *Nelson v Nelson* (1995) 184 CLR 538 at 551-552; [1995] HCA 25; *Miller v Miller* (2011) 242 CLR 446 at 457-459 [24]-[27]; [2011] HCA 9.

- e. The finding of any inconsistency with rights or obligation conferred or imposed statute involves consideration of the scope and purpose of the applicable statute.

In *Nelson v Nelson*¹⁵, Deane and Gummow JJ said,

(Courts) act not in response to a direct legislative prohibition but, as it is said, from "the policy of the law". The finding of such policy involves consideration of the scope and purpose of the particular statute. The formulation of the appropriate public policy in this class of case may more readily accommodate equitable doctrines and remedies and restitutionary money claims than is possible where the making of the contract offends an express or implied statutory prohibition.

- f. Statute and contract apart, the "critical" feature of fiduciary relationships is that "the fiduciary undertakes or agrees to act for or on behalf of 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" with the effect that the other person is "vulnerable to abuse by the fiduciary of his position" in that way.¹⁶

- g. Other circumstances may point towards a fiduciary relationship including, "a relation of confidence; inequality of bargaining powers; an undertaking by one party to perform a task or fulfil a duty in the interests of another party; the scope for one party to unilaterally exercise a discretion or power which may affect the rights or interests of another; and a dependency or vulnerability on the part of one party that causes that party to rely on another".¹⁷ In *Adventure Golf Systems Australia Pty Ltd v Belgravia Health & Leisure Group Pt Ltd*¹⁸, Santamaria JA (with whom Kaye and Ashley JJA agreed) said,

The existence of one or more of the above indicia is not determinative of the existence of a fiduciary relationship; 'the fundamental question is for what purpose, and for the promotion of whose interests, are powers held?'¹⁹ That being said, a fundamental and inflexible feature of a fiduciary relationship is the existence of an obligation of loyalty: '[t]he principal is entitled to the single-minded loyalty of his fiduciary'.²⁰

20. The respondents advance the following reasons why the majority was correct to find that Jaken did not owe JPG a fiduciary duty.

¹⁵ *Nelson v Nelson* (1995) 184 CLR 538 at 551-552; [1995] HCA 25.

¹⁶ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97 per Mason J.

¹⁷ *Breen v Williams* (1996) 186 CLR 71 at 107 per Gaudron and McHugh JJ.

¹⁸ *Adventure Golf Systems Australia Pty Ltd v Belgravia Health & Leisure Group Pty Ltd* [2017] VSCA 326 at 124.

¹⁹ *C-Shirt Pty Ltd v Barnett Marketing and Management Pty Ltd* (1996) 37 IPR 315, 335 (Lehane J). See also *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410, 541.

²⁰ *Bristol & West Building Society v Mothew* [1998] Ch 1, 18 (Millett LJ). See *Boardman v Phipps* [1967] 2 AC 46, 123; *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, 345 [178].

21. **First, the duty contended for is inconsistent with statute.** Section 59(4) gives Jaken, as the trustee of the Trust, a legal right to have recourse to the Trust property to “reimburse” itself or “pay or discharge out of the trust property all expenses incurred in or about execution of the trustee's trusts or powers”.²¹ Relief to like effect is available to trustees under the general law.²² The effect of the statute and the general law is that trust property is no longer to be regarded as held solely in the interests of the beneficiaries.²³ In that way, the law recognises a measure of permissible self-interest in a trustee. In that circumstance, it would be inconsistent with the legal rights conferred upon a successor trustee by s 59(4), to impose a duty of “absolute disinterested loyalty” upon a trustee for the benefit of a third party, such as a former trustee. To do so would produce the surprising and hardly intended consequence that the successor trustee would, on acceptance of its appointment, be placed in a position of actual or potential conflict of interest and duty so far as the former trustee is concerned - and a conflict of duty and duty so far as the beneficiaries of the Trust are concerned. At that point, the trustee would be duty bound to eschew its actual and potential conflicts²⁴. It would be a strange case, indeed, in which a successor trustee could ever undertake or assume a responsibility to act in the “exclusive” interests of a former trustee. That could only happen if the beneficiaries of the Trust and the former trustee were to give their fully informed consent to the successor trustee being in a position of conflict otherwise the successor trustee would be obliged to decline the appointment.

22. **Secondly, the relationship between Jaken and JPG is contractual, not fiduciary.** The Deed of Appointment does not oblige Jaken to act for or on behalf of JPG in any respect, let alone in the exercise of any power or discretion that will affect the interests of JPG in the legal or practical sense referred to in *Hospital Products*²⁵ and *John Alexander's Clubs*²⁶. The obligation of Jaken in Clause 1.5 is to indemnify JPG against all debts which JPG had incurred and were unpaid at the time of execution of the Deed

²¹ Section 36(2) of the *Trustee Act* 1958 (Vic) is to the same effect.

²² *Hardoon v Belilios* [1901] AC 118 at 125.

²³ *Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 246-247, [48]-[51]; indeed, it is impossible to know what the trust property is until the trustee's right of indemnity and exoneration have been satisfied: *CPT Custodian Pty Ltd v Commissioner of State Revenue* [2005] HCA 53; (2005) 224 CLR 98.

²⁴ See *Agricultural Land Management Ltd v Jackson (No 2)* [2014] WASC 102 at [273] citing Dixon J that a fiduciary is under a duty to refrain from engagements which conflict, or which might possibly conflict, with the interest of those whom the fiduciary is bound to protect: *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 408; and citing *Breen v Williams* (1996) 186 CLR 71 at 108 per Gaudron and McHugh JJ quoting *Bray v Ford* [1896] AC 44 at 51-52).

²⁵ (1984) 156 CLR 41 at 96-97; [1984] HCA 64.

²⁶ (2010) 241 CLR 1; [2010] HCA 19 at [86]-[87].

of Appointment. That is an obligation to pay money, not an obligation to act for JPG in any representational sense. To superimpose a fiduciary duty upon Jaken in favour of JPG would alter the contract by oblige Jaken to act with absolute disinterested loyalty to JPG and to the exclusion of its own interests and the interests of the beneficiaries. A term to that effect would not be implied because it would be contrary to the express terms contained in Clauses 2.1 and 2.2; nor would it be necessary to give business efficacy to the contract²⁷. Quite the opposite; it would paralyse the appointment of the successor trustee by placing it in a position of irreconcilable conflict from inception.

23. **Thirdly, the scope and purpose of the Act do not support the imposition of a fiduciary duty in favour of a former trustee.** Section 6 of the *Trustee Act 1925* (NSW) contains a suite of provisions which govern the appointment of new trustees. Section 59 contains provisions which recognise the importance of trustee indemnification. Sections s 6(13) and 59(3) give primacy to the instrument which creates the trust. In the present case, s6(8) and Clauses 2.1 and 2.2 of the Deed of Appointment operate to give Jaken the benefit of the exclusions in Clause 10(i) and (ii) of the Trust Deed and the indemnity in Clause 16.²⁸ Sections 59(2) and (4) provide statutory exclusions and indemnity in similar (but not identical) terms. In that way, the statute and the instrument which has been given primacy, satisfy the apparent scope and purpose of the *Act* insofar as it involves the protection of trustees in the administration of trusts. The imposition of a fiduciary duty upon a successor trustee in favour of a former trustee would not advance that purpose. For the reasons earlier given, such a duty would entangle the administration of trusts in actual or potential conflicts and be entirely dysfunctional (especially if the existence or scope of the duty were somehow to depend upon notice of a “realistic” claim).

24. No practical purpose is served by the imposition of the fiduciary duty contended for other than to enable accessorial and recipient liability claims to be brought against third parties under the principles in *Barnes v Addy*. Expanding the liability of trustees in that way is antithetical to any policy which is intended to protect trustees; it would expose trustees to a newfound range of personal risk, of an indefinite variety, arising out of circumstances which predate their appointment. It is also unnecessary for the protection

²⁷ *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 per Brennan CJ, Dawson and Toohey JJ at 422.

²⁸ See in particular: *Trustee Act 1925* (NSW) s 6(8); *Trustee Act 1925* (ACT), s 6(9); *Trustee Act 1893* (NT), s 11(3); *Trusts Act 1973* (Qld) s 12(6); *Trustee Act 1936* (SA), ss 14(3); *Trustee Act 1898* (Tas), s 13(3); *Trustee Act 1958* (Vic), s 41(7); *Trustees Act 1962* (WA) s 7(6).

of a former trustee and any creditor who is subrogated to the right of indemnity out of trust assets of a former trustee because they have a range of proprietary remedies available to them, including the appointment of a receiver or an order for judicial sale and the avoidance of any alienation of trust property which is made with the intention to defraud creditors.

25. In the present case, the entitlement of JPG to be indemnified out of the assets of the Trust for the judgment entered by order of Young AJ on 25 February 2016 was established by the declarations and orders made on that occasion, in the 2009 Proceedings (**J [210] CAB 46**). Asset preservation orders were also granted on that occasion. The Granville and Victoria Properties were transferred in 2007 and 2008 and were the subject of the successful s37A claims in the Courts below. O'Malley's Hotel was sold in April 2021 by the receivers and managers appointed by the NAB in December 2020. As a practical matter, the value of recoveries may or may not be found to exceed the value of all of the liabilities of the Trust, including the shortfall occasioned by the sale of the hotel, but the risk of insolvency of a trading trust is not a relevant consideration in point of principle.

26. *Fourthly, the "proprietary" nature of a former trustee's equitable charge or lien over Trust assets does not give rise to a trust or provide the basis for a fiduciary duty.* In AS [23], the appellant recites the passage in *Gillespie-Jones* in which Bell, Gageler and Keane JJ say: "[Unless] *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 specifically for his benefit' is a trustee in the ordinary sense*"²⁹ and submits that "a trustee in office is the trustee of the former trustee to the extent of the former trustee's proprietary interest in the Trust property" on the basis that such a duty should follow from "the mere fact that the successor trustee is holding the legal title to property on trust – beneficially". On that basis, the appellant submits that "it would be anomalous for this relationship of trusteeship not to attract fiduciary principles".

27. The fallacy in that reasoning is, the relationship between a successor trustee and a former trustee is a relationship of equitable chargor and equitable chargee. That is a circumstance of the case which indicates "otherwise", to adopt the term deployed in

²⁹ *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at 32, [113].

Gillespie-Jones. An equitable charge or lien is a security interest; it is not a trust. The essential element of a trust which is missing from an equitable charge, and which distinguishes an equitable charge from a trust and precludes the relationship created by an equitable charge from giving rise to any of the incidents of a trust, including a fiduciary duty, is the absence of a personal obligation. High Court authority for the proposition that the proprietary interest created by an equitable charge is held by way of security, “so that the chargee may resort to the charged asset only for the purpose of satisfying (the) liability due to the charge” (emphasis added), is to be found in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd*³⁰, where Gaudron, McHugh, Gummow and Hayne JJ said,

In *In re Bank of Credit and Commerce International SA (No 8)*³¹, Lord Hoffmann, with whose speech the other Law Lords agreed, gave a description of an equitable charge in which he emphasised that the proprietary interest created thereby is held by way of security, so that the chargee may resort to the charged asset only for the purpose of satisfying some liability due to the chargee. The charge is subject to the equity of redemption retained by the owner. However, the beneficial interest held under an express trust is not so limited in nature. The remedy of the beneficiary is to proceed in equity for the performance of the trust, not for the sale of trust property to satisfy a secured liability³².

28. Accordingly, the learned authors of *Jacob’s* say, “*In the case of an equitable charge, the remedy of the person is whose favour the property is charged is against the property itself and not against the holder of the property. Where the holder does not meet the charge, the other party may proceed in equity for the sale of the property and for payment out of the proceeds of sale. The remedy of a beneficiary under a trust is to proceed in equity for performance of the trust and not for the sale of the trust property.*”³³

29. In AS [23], the appellant criticises the reasoning of Leeming and Kirk JJA as “particularly curious” and “not otherwise explained”. That criticism is misconceived. Leeming JA pointed to the absence of a personal obligation on the part of an equitable chargor at the outset of his reasoning, albeit without specifically referring to *Associated Alloys*. After acknowledging that “*the equitable entitlement on the part of the former*

³⁰ *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588 at 595-596; [2000] HCA 25 at [6] (**Associated Alloys**).

³¹ *Bank of Credit and Commerce International SA (No 8)* [1998] AC 214 at 226 (**BCCI No 8**).

³² Noting that “Other distinctions are drawn in Waters, *Law of Trusts in Canada*, 2nd ed (1984) at 82-85; Meagher and Gummow, *Jacob’s Law of Trusts in Australia*, 6th ed (1997) at [227]-[229]”.

³³ *Jacob’s Law of Trusts in Australia*, 8th ed (2016), JD Heydon & MJ Leeming, 2-26 (**Jacob’s**). This paragraph was approved in *Truthful Endeavour Pty Ltd v Condon (Trustee); Re Rayhill (Bankrupt)* (2015) 321 ALR 483 at [84] and in *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd* [2018] WASCA 163; (2018) 53 WAR 325, 343 at [49] (**Hamersley Iron**).

trustee to have recourse to trust assets to indemnify itself for expenses properly incurred has proprietary aspects which survive the trustee's removal" (CA [37]CAB 197), his Honour went on to say that he disagreed with the conclusion at first instance that the successor trustee has a duty which is fiduciary and, at the "core" of his reasons, was the view that such a conclusion "*represents a category error, confusing proprietary and personal rights*" (CA [38] CAB 197) (emphasis added). That category error is the failure to recognise that the essential difference between an equitable charge and a trust is the absence of the personal obligation of the putative trustee to hold the property in question for the benefit of the other person. His Honour said:³⁴

10 Many persons have equitable proprietary rights in the property of others, in
circumstances where no fiduciary obligation is owed to them. Every equitable
mortgagee, every equitable chargee, every unpaid solicitor with an interest in a
judgment or compromise and every unpaid vendor with a lien, enjoys rights which
are properly regarded as proprietary, and those mortgagors, chargors, clients and
purchasers are susceptible to equitable relief commensurate with those rights. But
fiduciary obligations are not owed by the mortgagors, chargors, clients or
purchasers to the persons with equitable proprietary rights, and that is so even
though to an extent they may be vulnerable to conduct which might defeat their
equitable rights. Similarly, the recognition that the former trustee has a proprietary
20 interest in trust assets, even when those assets are held by the successor trustee,
does not entail a personal relationship of trust and confidence, to which *Barnes v
Ady* liability attaches, between former and successor trustees.

30. To the same effect, in *Hamersley Iron*³⁵, the Court of Appeal of the Supreme Court of
Western Australia (Murphy JA, Mitchell JA and Allanson J) applied *Associated Alloys*
and described the nature of an equitable chargee's interest in the subject property in the
following terms:

30 In general terms, the essence of an equitable charge is a proprietary interest granted
by way of security, without any transfer of title (outright title as opposed to an
equitable interest), or possession, to the chargee. Specific property of the chargor is
expressly or constructively appropriated to, or made answerable for, the payment
of a debt or other obligation. The chargee is given the right to resort to that property
for the purposes of having it realised and applied in or towards the payment of the
debt. Thus, the equitable chargee (unlike the beneficiary of a trust) has remedies
against the property itself, and not against the holder of the property.³⁶

³⁴ The four essential elements of a trust – (1) The Trustee; (2) The Trust Property; (3) The Beneficiary; and (4) A Personal Obligation Annexed to the Property are discussed in *Jacob's* at [1-04]-[1.10]. The distinction between a trust and an equitable charge or lien is explicable by the absence of the fourth essential element, namely, a personal obligation on the part of the chargor to hold the trust property for the benefit of another person: *Jacob's* [2-26.]

³⁵ *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd* [2018] WASCA 163; (2018) 53 WAR 325, 343 at [49].

³⁶ See also *Swiss Bank Corporation v Lloyd's Bank Ltd* [1982] AC 584, 594-595; and *United Travel Agencies Pty Ltd v Cain* (1990) 20 NSWLR 566, 569-570.

31. In the present case, Order 5 made by Young AJ on 22 February 2016 recognised that JPG had an equitable charge or lien over Trust assets by declaring that JPG was entitled, “as against (Jaken) 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 (JPG) in (the 2009 Proceedings)” (J [210] CAB 46) (emphasis added). In that way, Young AJ was giving effect to the former trustee’s equitable charge over the Trust property. His Honour did not declare Jaken held the Trust property in trust for JPG, as he would need to have done, had the relationship been that of trustee and beneficiary.

10 32. On the same basis, Leeming JA held that “*The former trustee had a right to be indemnified out of the trust property*” (CA [128] CAB 229) (emphasis added), which equity protects by “*granting to the trustee an interest in the trust property, and that interest survives the termination of the trusteeship*” (ibid) (emphasis added). His Honour said, “*Yet what is sought, by the creation of a fiduciary obligation owed by the successor trustee to the former trustee, is to create a personal obligation between the two ...*” (ibid) (emphasis in the original text).

20 33. Once it is appreciated that the relationship between Jaken and JPG is a relationship of equitable chargor and chargee, not trustee and beneficiary, *Associated Alloys* compels the conclusion that the rights and remedies available to JPG, to which the appellant is subrogated, are proprietary, not personal. Accordingly, there is no room to find that a personal remedy arises out of the relationship of equitable chargor and chargee, unless *Associated Alloys* is held to be wrong. Indeed, the distinction between the institution of a trust, on the one hand, and an equitable charge or lien on the other, would be obliterated if an equitable chargor were now found to have such a duty to an equitable chargee. As earlier noted, the absence of a personal duty is the essential element which distinguishes a charge from a trust³⁷.

30 34. In AS [24], the appellant refers to *RnD Funding Pty Ltd v Roncane Pty Ltd*³⁸, where the Full Court of the Federal Court observed that “most equitable interests in property” satisfy “the rationales for the existence of a fiduciary duty”, but “most” is not “all”. *RnD Funding* did not raise the question whether a successor trustee owes a fiduciary duty to a former trustee or the question whether an equitable chargee is entitled to a personal remedy against an equitable chargor. In that case, Beach, Derrington and

³⁷ *Jacob’s* [2-26].

³⁸ *RnD Funding Pty Ltd v Roncane Pty Ltd* (2023) 297 FCR 91 (*RnD Funding*).

Halley JJ considered the question whether a fiduciary duty was a prerequisite for an entitlement to a tracing remedy but decided the case on the basis that the security interest of an equitable chargee was a sufficient proprietary base to invoke that process.

10 35. *Fifthly, Rothmore (No. 2) does not shed any light on the question which is now before the Court.* The passage extracted from the judgment of Perry J in AS [27], is an assertion, not supported by any reasoning or authority, and, for the reasons given by Leeming JA (CA [103] CAB 219-220) it appears to have been made in the mistaken belief that Mansfield J had already decided the point. In the respondents' respectful submission, it is wrong. So far as one can discern from the extract, the duty is said to arise "When [the successor trustee] was substituted as trustee and thereby acquired legal ownership of the Trust assets"³⁹. That proposition assumes that the equitable charge or lien which undoubtedly arises in favour of an unpaid former trustee on that occasion, gives rise to a personal obligation in favour of the former trustee. For the reasons earlier given, that is not so; the remedies available to the former trustee are proprietary, not personal: *Associated Alloys* at [6].

20 36. *Sixthly, there is no principled analogy with a mortgagee holding surplus proceeds of sale.* For the reasons given by Leeming JA (CA [134]-[136] CAB 232), Jaken is not in the same position as the paid-out first mortgagee in *Bofinger v Kingsway Group Limited*;⁴⁰ Jaken "held the trust property as trustee for the discretionary objects, and subject to its own right of indemnity". Unlike the paid-out first mortgagee in *Bofinger* (and JPG), Jaken also had the right to possession of those assets as trustee and for the purpose of exercising its own right to indemnity.

30 37. Similarly, the relationship between a former and a successor trustee is not to be equated with the relationship between a bailor and a bailee in any principled way. A bailment does not give rise to a trust and it is inappropriate to loosely equate the two. In *MCC Proceeds Inc v Lehman Bros International (Europe)*,⁴¹ Hobhouse LJ observed that the relationship of beneficiary and trustee is not that of bailor and bailee, remarking that "[it] is in law the antithesis of that; the bailor has the legal property as does the trustee, not the beneficiary". There are rare cases in which a bailee has been held to owe a fiduciary duty to a bailor, such as *Brambles Security Services Ltd v Bi-Lo Pty Ltd*,⁴² but that was a case in which an armoured car company entered into a contract for the

³⁹ *Rothmore Farms Pty Ltd (in Liq) v Belgravia Pty Ltd (No 2)* [2005] SASC 117 at [73].

⁴⁰ *Bofinger v Kingsway Group Limited* (2009) 239 CLR 269; [2009] HCA 44 (*Bofinger*).

⁴¹ *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675 at 702.

⁴² *Brambles Security Services Ltd v Bi-Lo Pty Ltd* (1992) Aust Tort Rep 81-161.

particular purpose of collecting, securely transporting and banking the plaintiff's shop takings into a nominated bank account, in order to protect the plaintiff's cash against the risk of physical loss. There are many more instances in which a "mere" bailment does not give rise to any fiduciary obligation. See Leeming JA CA [129] CAB 229.

38. As his Honour also said (CA [127] CAB 228), "*It is better to proceed from first principles and ask what is the basal nature of the interest in respect of trust property enjoyed by a former trustee, and to then examine whether, by reference to that interest, there is a relationship between the former which is properly to be characterised as fiduciary.*" In the present case, the basal nature of the interest in the Trust property enjoyed by JPG is that of an equitable chargee over the Trust property. That is a well-recognised interest which gives rise to a well-established relationship which does not in turn give rise to any personal liability in the equitable chargor, for reasons which need not be gainsaid. In such a case, there is no need to proceed by way of analogy. *Associated Alloys* answers the point.

39. *Seventhly, the reasoning in Equity Trust (Jersey) Ltd v Halabi*⁴³ supports the reasoning of the majority. In addition to the novelty of the duty contended for, and the absence of any basis to call *Associated Alloys* into question, it is to be noted that the Privy Council considered the Australian authorities⁴⁴ and concluded that the lien or charge over trust property enjoyed by a trustee is not a separate liability imposed on a person to pay amounts due under the trustee's indemnity. There is no such liability: "*There is simply the right to have the trust assets applied in the exoneration or reimbursement of the trustee*" and "*It is that equitable right, enforceable by an order of the court requiring the trust fund to be so applied, that creates the trustee's proprietary interest*".⁴⁵

40. Indeed, in *Halabi*, at [163], Lord Richards and Sir Nicholas Patten (with whom Lord Stephens agreed) went on to say,

"With respect to the court [below], we are unable to accept that it would be open to the former trustee to bring such a claim [for indemnity] against the new trustee. The new trustee incurs no personal liability to the former trustee in respect of the expenses incurred by the latter while it was the trustee. The new trustee therefore has no claim of its own, in respect of such expenses, for indemnity out of the trust property and therefore there is no such claim to which the former trustee could be subrogated." [emphasis added].

⁴³ *Equity Trust (Jersey) Ltd v Halabi (in his capacity as Executor of the Estate of the late Madam Inisar Nouri* [2023] AC 877; [2022] UKPC 36 (*Halabi*).

⁴⁴ *Halabi* [2022] UKPC 36 at [118] to [162].

⁴⁵ *Halabi* [2022] UKPC 36 at [171].

41. If there is no personal liability of a successor trustee to a former trustee, as distinct from an entitlement to be indemnified out of trust assets for liabilities and expenses incurred in the administration of the trust, there can be no grounds for imposing the strictures of a fiduciary obligation upon a successor trustee. Any such imposition would, for the reasons set out in *Halabi*, produce an anomalous situation in which a successor trustee may become personally liable to meet a former trustee's claim but not be entitled to indemnity for that liability from trust assets. In *Halabi* at [177] their Lordships said, "... *the proprietary interests of successive trustees in the trust assets are clearly competing or equal.*" That observation underscores the impossibility of undivided loyalty.

42. *Eighthly, the concept of vulnerability is of no assistance when considering a recognised relationship such as equitable chargor and an equitable chargee.* The very nature of that relationship establishes a security interest in property until the subject debt is paid, not a personal obligation to hold the property for the benefit of another person.

43. A former trustee is not vulnerable to any abuse of power by the successor trustee in the requisite sense. The successor trustee does not act for and on behalf of or in the interests of the former trustee in any sense at all. Jaken has possession of the Trust property, together with fiduciary duties in favour of the objects of the Trust and its own interest in being indemnified for liabilities properly incurred by it in the administration of the Trust but that does not make the former trustee vulnerable in the requisite sense, nor support the finding of a fiduciary duty. Quite the opposite, it is a barrier to finding a duty of absolute disinterested loyalty to the former trustee, for the reasons earlier advanced. All secured creditors are vulnerable to a diminution of the value of their security when that property is in the hands of their debtors or a third party, in the case of collateral securities, but that does not give rise to any duty of a fiduciary character. If vulnerability in that sense was relevant, relationships such as mortgagee and mortgagor and landlord and tenant would give rise to fiduciary duties, which they plainly do not (CA [129] CAB 229 per Leeming JA). Vulnerability may be a factor but it is not of itself the test and it should not be overstated (CA [233] CAB 261 per Kirk JA). If vulnerability were the test, it would not apply to a relationship between a successor trustee and a former trustee because a former trustee has a wide range of remedies available to it to protect its own interests. It is not in any real sense vulnerable

to a successor trustee, who would always be understood by a former trustee to have a duty of undivided loyalty to the beneficiaries and a right to indemnity out of trust assets of its own.

- 10 44. At CA [25] to [26] CAB 192-193 Bell CJ opined that the relevant feature of the present case is an “aspect” of the duty “absolute and disinterested loyalty”. Relying on *Rothmore No 2*, his Honour said it was a duty not to act with respect to the assets of the trust in a way which jeopardises the predecessor trustee’s right of indemnity and its lien over the trust assets, without explaining or reasoning how the duty as expressed in *Rothmore No 2* is in substance proscriptive, other than to note the expression’s affinity with a passage from *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd*.⁴⁶
- 20 45. With respect, the passage from *Lemery* there cited by the Chief Justice does not support that proposition. Brereton J referred to what the former trustee might do, not what the subsequent trustee was obliged to do. At CA [22] and [23] CAB 191-192 the Chief Justice noted scenarios where the former trustee’s ability to protect itself would be curtailed by ignorance of the successor trustee’s intentions leading to evisceration of valuable rights at the mercy of the successor trustee, notwithstanding the successor trustee’s notice of subsisting superior claim. But that is not the test, nor does it alter the position in an established relationship such as equitable chargor and equitable chargee. The Chief Justice did not refer to *Associated Alloys*; nor otherwise recognise the distinction between proprietary and personal remedies.
- 30 46. In this case the respondent was not at the mercy of the successor trustee. As pointed out by Kirk JA at CA [233] CAB 261 there was no dispute that the appellant’s interest in the realty held by the Trust was capable of being protected by a caveat. At CA [23] CAB 192 the Chief Justice pointed out that protection by caveat was limited to cases where the assets comprised interests in land. That, however, does not detract from the protection afforded by a proprietary interest against volunteers, as noted by Leeming JA at CA [136] CAB 232.
47. *Ninthly, contract, statute and other duties militate against the imposition of the duty contended for, not in favour of any such duty.* The topics raised in AS [35]-[38] have been addressed in [21]-[25] above and need not be repeated. For present purposes, it is sufficient to note that the claims brought by the appellant in the 2009 Proceedings led to the money judgment against JPG and the declarations and orders made by Young AJ

⁴⁶ *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* (2008) 74 NSWLR 550 at [50] (*Lemery*).

on 22 February 2016. The present proceedings were brought, “... by way of what might loosely be called equitable execution of the unchallenged judgment in his favour entered on 25 February 2016” (CA [58] CAB 203), not by way of a suit for specific performance of the Deed of Appointment. Nor could any such claim have been brought. Clause 1.5 relates to “debts which the Retiring Trustee has incurred and which are unpaid at the time of execution of this deed” – which was 13 February 2007. The judgment debt, in respect of which equitable execution has been pursued by the appellant, did not come into existence until 25 February 2016, when the orders made by Young AJ on 22 February 2016 were entered.⁴⁷

10 48. *Tenthly, the scope of the duty contended for, namely, a duty not to deal with trust assets so as to destroy, diminish or jeopardise the former trustee’s right of indemnity or exoneration from those assets, is in substance prescriptive and therefore contrary to settled law. So doing would expand the scope to the point of being self-defeating by enlivening antithetical conflicts of interest. A duty which springs into existence depending upon notice of a “realistic” claim is decidedly “odd”.⁴⁸ The fact that the scope of a fiduciary duty generally in relation to conflicts “must accommodate itself to the particulars of the underlying relationship which give rise to the duty” and fiduciary duties are to be “moulded according to the nature of the relationship and the facts of the case”,⁴⁹ do not call into question the underlying orthodoxy of *Breen v Williams*⁵⁰ per*

20 Gaudron and McHugh JJ at 113 that, “...equity imposes on the fiduciary proscriptive obligations – not to obtain any unauthorized benefit from the relationship and not be in a position of conflict ... But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed.”⁵¹

49. In *Foresters* at [67] Gageler J (as his Honour then was) made clear the fundamental principles⁵²: (i) the fiduciary’s undertaking to act or assumption of responsibility to act in the exclusive interests of the other person; (ii) is a duty of absolute and disinterested loyalty; (iii) the duty is imposed by two overlapping proscriptive obligations; (iv) each

⁴⁷ J [210] CAB 46.

⁴⁸ Leeming JA at CA [140] CAB 234.

⁴⁹ *Howard v Commissioner of Taxation* [2014] HCA 21 at [34]; (2014) 253 CLR 83, [34] and *ibid*, quoting from *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41 at 102 Mason J.

⁵⁰ *Breen v Williams* (1995-1996) 186 CLR 71 at 113 (*Breen*).

⁵¹ See also *Howard v Commissioner of Taxation* (Cth) (2014) 253 CLR 83 at [31], [54] – [56]; *Friend v Brooker* (2009) 239 CLR 129 at [84]; *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at [41]; *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at 198 [74].

⁵² *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* [2018] HCA 43; (2018) 265 CLR 1.

proscriptive obligation is descriptive of circumstances showing unconscionable conduct attracting equitable remedies⁵³.

50. The appellant submits that the fiduciary obligation contended for not to deal with trust assets so as to destroy, diminish or jeopardise the proprietary interest is classically proscriptive (AS [39]). That submission should be rejected. Negative syntax masks a positive obligation which goes well beyond a fiduciary not being in a position of conflict and not obtaining an unauthorised benefit. While a duty of care may run in parallel, it is not a necessary incident of undivided loyalty. Moreover, examining whether successor trustee stands as fiduciary to the former trustee from the viewpoint of a duty not to destroy, diminish or jeopardise assets, focuses on the result of the dealing rather than the circumstances of the dealing.

51. The fiduciary duty for which the appellant contends incorporates an equitable duty of care to exercise reasonable care, skill, and diligence. As such “*It would stand established principle on its head to reason that because equity considers the defendant to be a fiduciary, therefore the defendant has a legal obligation to act in the interests of the plaintiff so that failure to fulfill that positive obligation represents a breach of fiduciary duty.*”⁵⁴

52. The scope of the duty contended is unworkable. In answer to that criticism, in the Court below, the appellant contended that notice of a claim was a necessary precondition for the existence of the duty (CA [108] CAB 222). That contention later became notice of a “realistic” claim: CA [110] CAB 223. But it is not at all clear what is said to constitute “notice” or a “claim” for the purpose of triggering the existence of the proposed duty, nor what standard is to be imposed to determine whether a claim is “realistic” or “unrealistic”. Would anything short of a letter of demand suffice? A telephone call perhaps? Or a conversation in the street? And what is the trustee supposed to do when put on notice of a claim? Not distribute the trust assets to the beneficiaries, even though the beneficiaries may have called for distribution and the successor trustee has a duty to pay?

53. Leeming JA set out the relevant passages in counsel’s arguments in CA [108] and [110] CAB 222-223. His Honour noted at CA [109] CAB 222 that there was no answer to the question of how the proposed duty to a former trustee can be reconciled with the

⁵³ Notions of trust, confidence and loyalty are central in a fiduciary relationship. In *Bristol & West Building Society v Mothew* [1998] Ch 1, Millett LJ said that “[a] fiduciary is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary.”

⁵⁴ *Breen v Williams* (1995-1996) 186 CLR 71 at 137-8 per Gummow J.

duty of the successor trustee to distribute trust assets if called upon by the beneficiaries to pay. Significantly, none of those questions has been answered in the appellant's argument. They demonstrate, without more, that the proposed duty is untenable.

54. The novelty of the duty also weighs heavily against its recognition. At CA [138] CAB 233, Leeming JA aptly observed that “[i]t is remarkable that, so far as counsel's researches disclosed, the only decision in which a fiduciary obligation has been explicitly upheld is *Rothmore Farms (No 2)*.” In *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at 307; [2003] NSWCA 10 at [23], Spigelman CJ said:

10 The fact that the relevant behaviour has occurred in the same kind of context over the course of centuries, without equity having developed a remedy of the character now urged on the Court, of itself indicates that the development of the law in a case of this kind is inappropriate.

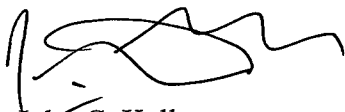
55. The appeal should be dismissed with costs.

Part VI: Estimate of Time to present oral argument.

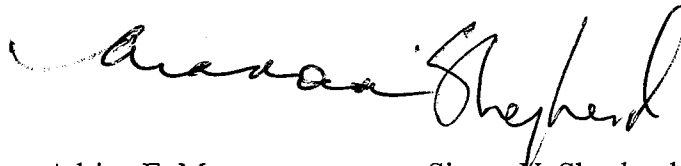
56. The respondents estimate that 1.5 hours will be required for their oral argument.

Dated 26 April 2024

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ANNEXURES TO RESPONDENTS' SUBMISSIONS

A - LIST OF LEGISLATIVE MATERIALS REFERRED TO

Pursuant to Practice Direction n. 1 of 2019, the respondents set out below a list of the statutes and statutory instruments referred to in these submissions.

No	Legislation	Provisions	Version at Relevant Time
1.	<i>Conveyancing Act 1919</i> (NSW)	s 37A	Historical version (1 December 2021 to 29 October 2023)
2.	<i>Property Law Act 1958</i> (Vic)	s 172	Historical version (1 March 2020 to 1 September 2023)
3.	<i>Trustee Act 1925</i> (NSW)	ss 6 (8), 59	Current (compilation dated 28 September 2020)
4.	<i>Trustee Act 1925</i> (ACT)	ss 6 (9), 59	Historical version (17 December 2021 to 11 December 2023)
5.	<i>Trusts Act 1973</i> (Qld)	ss 12(6), 72	Current (compilation dated 24 November 2017)
6.	<i>Trustee Act 1958</i> (VIC)	ss 41(7), 36	Historical version (1 March 2020 to 7 May 2023)
7.	<i>Trustee Act 1936</i> (SA)	ss 14(3), 35	Current (compilation dated 19 September 2019)
8.	<i>Trustee Act 1962</i> (WA)	ss 7(6), 71	Current (compilation dated 16 January 2013)
9.	<i>Trustee Act 1898</i> (TAS)	ss 13(3), 27	Current (compilation dated 17 February 2014)
10.	<i>Trustee Act 1893</i> (NT)	s 11(3), 26	Version as in force as at (22 November 2017)

B - THE RESPONDENTS' BOOK OF FURTHER MATERIALS

	DOCUMENT	DATE	REFERENCES
1.	Deed of Trust	21 June 2005	2 Blue 496-526
2.	Deed of Appointment	13 February 2007	2 Blue 804-808
3.	Registered Charge 2264405	26 October 2011	4 Blue 1608-1621
4.	Financial Statements of the Trust	30 June 2015	9 Blue 3928-3931

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