



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

**COMMISSIONER OF TAXATION
OF THE COMMONWEALTH OF AUSTRALIA**

Appellant

and

STEVEN BENDEL

First Respondent

10

GLEEWIN INVESTMENTS PTY LTD (ACN 131 785 576)

Second Respondent

APPELLANT'S SUPPLEMENTARY SUBMISSIONS

PART I: CERTIFICATION

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

PART II: SUPPLEMENTARY SUBMISSIONS

2. These supplementary submissions adopt the defined terms from the Commissioner's submissions dated 30 July 2025 (AS). They address the following questions:

- (a) whether, in connection with Gleewin resolving to "set aside" amounts of income for the benefit of Gleewin Investments in each of the years ended 30 June 2013 to 30 June 2016, separate trusts were created as contemplated by cl 3(5) of the trust deed for the 2005 Trust (**Trust Deed**);¹
- (b) whether there was a debtor-creditor relationship between Gleewin and Gleewin Investments by virtue of the resolutions and subsequent entries in the accounts of the 2005 Trust; and
- (c) how these matters affect the question of whether Gleewin Investments made "loans" to Gleewin as defined in s 109D(3) of the ITAA 1936.

Relevant facts

Clauses of the Trust Deed

3. Clause 3(1) of the Trust Deed gave Gleewin the power to "pay apply or set aside" all or any part of the "net income of the Trust Fund" for an accounting period to or for one or more of the "General Beneficiaries" of the 2005 Trust.
4. Under cl 1(19), "set aside" in relation to a beneficiary included "placing sums to the credit of such beneficiary in the books of account of the Trust Fund".
5. Under cl 3(2)(c), a determination to pay apply or set aside an amount of income for the benefit of a beneficiary under cl 3(1) could be "effectually made and satisfied" by, among other things, passing a resolution or "placing such amount to the credit of such beneficiary in the books of account of the Trust Fund".

¹ The Trust Deed is at tab 1 of the respondents' book of further material filed on 28 August 2025.

6. Clause 3(5) relevantly provided that “[a]ny amount set aside for any beneficiary... shall cease to form part of the Trust Fund and, upon such setting aside... shall thenceforth be held by the Trustee on a separate trust for such person absolutely with power to the Trustee pending payment over thereof to such person to invest or apply or deal with such Fund or any resulting income therefrom or any part thereof in the manner provided for in Clause 6 (5) hereof”.

Distribution resolutions

7. In each of the years ended 30 June 2013 to 30 June 2016, Mr Bendel (as sole director of Gleewin) resolved to distribute income of the 2005 Trust to Mr Bendel and/or Gleewin Investments: TR [49] and Annexure B (CAB 31, 70-77). Under the heading “Distribution of Income”, the resolutions were that classes or categories of income² of the 2005 Trust be “set aside for the benefit of” Mr Bendel and/or Gleewin Investments in stated proportions *and* that “the income of the Trust shall be distributed as specified above”: see, eg, TR, Annexure B (CAB 71, 73, 75, 77 – in each case immediately below the box). It is not the case that the trustee had resolved only to set aside, but not to distribute, the relevant income.³
8. Gleewin Investments’ entitlements to Gleewin’s income were recorded in the financial statements and accounting records of both Gleewin and Gleewin Investments: TR [40(d)], [44(d)] (CAB 26, 28). In particular:
- (a) Gleewin maintained a “Beneficiaries’ Current Account” in the name of Gleewin Investments, to which it posted the entitlements. The account appeared in the financial statements in the “Liabilities” side of the balance sheet, and the balance was included in the “Total Liabilities” reported: TR [40(d)] (CAB 26).⁴

² In terms, the resolutions referred to “income” (to be determined taking into account expenses and outgoings). However, the construction of the resolutions that results in validity (namely, that the resolutions were concerned with “net income”) should be preferred: *Lewski v Federal Commissioner of Taxation* (2017) 254 FCR 14 at [151].

³ Cf Transcript [2025] HCATrans 68 lns 66-72 and 1265-1267.

⁴ Relevant financial records for the 2005 Trust are at tabs 1, 2, 4, 6 and 8 of the Commissioner’s book of further material filed on 31 July 2025. By way of example, in respect of the year ended 30 June 2016:

(b) Gleewin Investments recorded the entitlements in an account named “Current Assets Steven Bendel 2005 Discretionary Trust”: TR [44(b)] (CAB 28).⁵

9. Mr Bendel caused Gleewin to meet Gleewin Investments’ tax liabilities and other expenses from time to time and entries were made in each entities’ accounts referred to above: TR [44(a) and (b)] (CAB 28). From time to time, Gleewin received amounts belonging to Gleewin Investments and did not pass them on. These amounts were also posted to the accounts reflecting an increase in Gleewin’s obligations to Gleewin Investments: TR [44(c)] (CAB 28).

10. The Tribunal made factual findings that:

(a) Gleewin did not recognise any separation of any of its assets in its accounts, or anywhere else in the evidence, reflecting or commensurate with unsatisfied entitlements to income: TR [41] (CAB 27);

(b) Gleewin did not report any asset held separately, purport to alienate or create any interest in any identified asset to meet or correspond with Gleewin Investments’ unpaid present entitlements, or report or account

(a) The “Beneficiaries Current Account” for Gleewin Investments can be seen in the balance sheet at tab 6 p 29. There, it has a closing balance of \$1,656,739 and forms part of the total liabilities of \$10,681,040.

(b) During the year, the “Beneficiaries Current Account” increased from \$1,252,889 to \$1,656,739.

(c) The movement in the account is broken down in the “Trust Distribution Statement” at tab 6 p 30. That statement shows the account increasing by a \$433,188 “Share of Profit”, that amount being equal to the amount of income resolved to be set aside for and distributed to Gleewin Investments: TR [28], [49], Annexure B (CAB 21, 31, 70-77). (Separately, the statement records a \$87,516 “Share of Profit” referable to Mr Bendel. Together, the \$433,188 and \$87,516 total \$520,704 – that amount being equal to the “Net Profit” shown in the profit and loss statement at tab 6 p 27 and the “Profit Earned This Year” and “Distribution to Beneficiaries” shown at tab 6 p 28.)

(d) The “Trust Distribution Statement” also shows the amount increasing by \$9,431 of “Capital Introduced”. The Tribunal found that the \$9,431 reflected a loan (within the ordinary meaning of that term) from Gleewin Investments to Gleewin, made when Gleewin “retained amounts [of tax refunds] belonging to Gleewin Investments”: TR [44(c)], [109], [111] (CAB 28, 57).

⁵ Relevant financial records for Gleewin Investments are at tabs 3, 5, 7 and 9 of the Commissioner’s book of further material filed on 31 July 2025. By way of example, in respect of the year ended 30 June 2016:

(a) The amount of \$433,188 (being the amount Gleewin resolved to set aside and distribute to Gleewin Investments) can be seen in the trading, profit and loss statement at tab 7 p 31, where it is described as “Trust Distributions”. The supporting schedule at tab 7 p 32 records the entirety of that amount as relating to the 2005 Trust.

(b) The amount of \$1,656,739 (being equal to the balance of the “Beneficiaries Current Account” recorded in the 2005 Trust’s balance sheet) is recorded in the balance sheet at tab 7 p 33 within current assets (and total assets), where it is described as “Steven Bendel 2005 Discretionary Trust”.

for any separate trust; and it was not possible to identify any Gleewin asset in respect of which any change in any form of ownership occurred: TR [51] (CAB 31);

- (c) Gleewin did not make any appropriation of any asset, nor any investment decision regarding the Trust Funds referable to any income entitlements and did not identify any asset or property held on account of entitlements to income: TR [77] (CAB 45).

No separate trust was created

11. The Tribunal was correct to find that amounts “set aside” by Gleewin for
10 Gleewin Investments were not held by Gleewin on a separate trust: TR [80] (CAB 45). That finding was not challenged by either party on appeal to the Full Federal Court.
12. In order to constitute a trust, it must be clear what property is subject to the trust.⁶ In other words, there must be certainty of subject matter. Here, that required certainty was absent, and so no separate trusts arose.
13. The resolutions did not identify any property of the 2005 Trust. The resolutions were to set aside and distribute particular classes or categories of income, calculated on a net basis taking into account expenses and outgoings. As the Tribunal correctly observed, income is not property: TR [75] (CAB 44).⁷
20 For greater reason, net income is not property.
14. Further, cl 3(5) of the 2005 Trust provided no mechanism to identify such property, and no steps were in fact taken to identify particular property (see paragraph 10 above).

⁶ *Kauter v Hilton* (1953) 90 CLR 86 at 97. See also *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588 at [29] and *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at [116].

⁷ Cf *Fischer v Nemeske Pty Ltd* (2016) 257 CLR 615 at [38] and [78] (Kiefel J), at [158]-[160] and [171] (Gordon J). The plurality’s findings as to the validity of the resolution under consideration did not involve a finding that there was a resettlement of the trust where identifiable assets were placed in a new trust, rather they were based on the creation of a debt owed by the trustee to the beneficiary (at [30] and [32] (French CJ and Bell J)) or an alteration of the beneficial interests in the whole of the property of the trust fund (at [98] (Gageler J)).

15. There is no basis on which to identify the putative trust property as consisting of particular receipts received from time to time.⁸ The resolutions were made towards year-end (being made in June of each year ended 30 June: TR Annexure B (CAB 70-77)) and were to set aside and distribute amounts of net income for the year, as opposed to only future amounts to be received. Further, what was resolved to be set aside was net income, not gross receipts.
16. It is true (as noted at RS [12], footnote 6) that there are cases in which courts have proceeded on the basis that a trust can validly be constituted over income. These include *Chianti Pty Ltd v Leume Pty Ltd* (2007) 35 WAR 488, where the Western Australian Court of Appeal considered a trust deed which contained materially identical clauses to those here.⁹ Parts of Buss JA's judgment appear to proceed on the basis that "the distributed amounts" were held upon a separate trust.¹⁰ However, it does not appear that the question whether there was certainty of subject matter of the separate trust was agitated before the Court. Cases in which a similar conclusion was reached also do not appear to have considered that question.¹¹
17. By contrast, the issue of certainty of subject matter was analysed in some detail by Turner J in *Commissioner of Inland Revenue v Ward*.¹² In that case, the putative declaration of trust was contained in a document executed on 29 March 1963. The trustee had purported to determine (in part) that a specified amount of "the Income of the Trust for the year ended 31 March 1963" be "held for the credit of my four children in equal shares".¹³ Turner J reasoned that, if the declaration were to have effect as a declaration of trust, it was

⁸ Cf *Associated Alloys* (2000) 202 CLR 588 at [28].

⁹ *Chianti* (2007) 35 WAR 488 at [22]-[25].

¹⁰ *Chianti* (2007) 35 WAR 488 at [65] and [68]-[70]. The position is not altogether clear because Buss JA separately held, at [67], that "the amounts distributed to the respondent were **not** held by the appellant as a separate trust fund" (emphasis added).

¹¹ *Commissioner of Taxation v Marbray Nominees Pty Ltd* (1985) 17 ATR 93 at 104; *Re Gradfan Pty Ltd (In Liq)*; *Nilant v Miling Nominees Pty Ltd* (1996) 20 ACSR 689 at 698 (lns 38-40); *Federal Commissioner of Taxation v Moignard* (2015) 228 FCR 456 at [43]; cf *Francis v Helios Corporation Pty Ltd* [2022] FCA 199 at [34].

¹² [1970] NZLR 1 at 21 (ln 20) to 21 (ln 13) (Turner J). While Turner J was in dissent as to the result, the conclusion of the majority (North P and McCarthy J) that there had been an application of income is not inconsistent the reasoning that follows, as the majority's conclusion did not depend on the existence of a separate trust: see, in particular, 30 (lns 17-23) (McCarthy J).

¹³ *Ward* [1970] NZLR 1 at 18 (lns 33-51).

“absolutely essential to say, with precision” which of the assets of the trustee became the subject of it.¹⁴ He concluded that this could not be done and “[t]here was in a word no property in the hands of the trustee of which it could be said that *that property* was impressed by the trust in the document”.¹⁵

18. The same is true here. *White v Shortall* (2006) 68 NSWLR 650 is distinguishable for that reason.¹⁶ In that case, Campbell J found that a signed document which stated “THIS LETTER IS TO CONFIRM THAT I AM HOLDING IN TRUST FOR YOU 222,000 UNITRACT SHARES”¹⁷ was a clear statement of intention that thenceforth 220,000 such shares were held on trust.¹⁸ His Honour held that a valid trust had been created in respect of the defendant’s entire shareholding of 1.5M Unitract shares, with the beneficiaries being the plaintiff as to 220,000 shares and the defendant as to the rest.¹⁹ In reaching that conclusion, Campbell J relied on the characteristics of shares as choses in action that were, in that case, relevantly indistinguishable from one another.²⁰
19. Such reasoning is inapplicable to the present case, because here there is no basis on which to conclude that the subject matter of the putative trust is one or more identified classes of fungible property. Over the relevant period, the trust property in the hands of Gleewin (in its capacity as trustee of the 2005 Trust) primarily consisted of investments in a number of unit trusts and companies, and debts.²¹ No steps were taken to identify which of those assets were to be held on any separate trust (see paragraph 10 above), and cl 3(5) does not provide any means of identification. As such, it cannot be said which of the assets of Gleewin became subject to any separate trust (let alone “with precision”),²² with the consequence that no such trust was constituted.

¹⁴ *Ward* [1970] NZLR 1 at 21 (lns 50-54)

¹⁵ *Ward* [1970] NZLR 1 at 22 (lns 6-9) (emphasis in original).

¹⁶ Cf Transcript [2025] HCATrans 68 lns 3087-3098.

¹⁷ *White v Shortall* (2006) 68 NSWLR 650 at [61].

¹⁸ *White v Shortall* (2006) 68 NSWLR 650 at [138].

¹⁹ *White v Shortall* (2006) 68 NSWLR 650 at [210].

²⁰ *White v Shortall* (2006) 68 NSWLR 650 at [193]-[200], [210]-[211], [213].

²¹ See tab 1 pp 7-8, tab 2 pp 11-12, tab 4 pp 19-20, tab 6 pp 28-29 and tab 8 pp 37-38 of the Commissioner’s book of further material filed on 31 July 2025.

²² Cf *Ward* [1970] NZLR 1 at 21 (lns 50-54).

20. The resolutions and the placing of sums to the credit of Gleewin Investments in the books of account of the Trust Fund did not alter the beneficial ownership of one or more specific trust assets or cause a resettlement of the trust fund. Rather, the resolutions and crediting effected an alteration of beneficial entitlements in *all* of the property which Gleewin held on the 2005 Trust.²³ Gleewin continued to hold the trust assets as might from time to time comprise the Trust Fund of the 2005 Trust subject to an immediate unconditional obligation on the part of Gleewin to account to each beneficiary, out of the Trust Fund, in the sums resolved to be set aside for their benefit and distributed to them.²⁴
21. That it is possible to effect an alteration of beneficial entitlements in property which the trustee continues to hold on trust under the terms of the existing settlement is orthodox as a matter of principle and unremarkable as a matter of practice.²⁵
22. While cl 3(5) of the Trust Deed did not operate to create a separate trust, it might be reasoned that it contemplated the creation of the beneficial entitlements as set out above. The “separate trust” to which the clause refers is in reality a part of the trust established by the Trust Deed. It owes its existence to the Trust Deed and the exercise of the power by the Trustee to alter the beneficial entitlements. The beneficial entitlements, as altered, were thereafter to be recognised and administered by the Trustee “as if the settlement had actually provided” for them.²⁶ This is reinforced by the fact that the Trust Deed contemplates that a setting aside of income could be effectuated by sums being placed to the credit of the beneficiary in the books of account of “the Trust Fund” – not a separate fund. So understood, cl 3(5) had a similar effect to the resolution considered in *Ward*, which McCarthy J described as follows:²⁷

²³ See *Fischer v Nemeske* (2016) 257 CLR 615 at [96]-[98] (Gageler J); see also [31] (French CJ and Bell J).

²⁴ *Fischer v Nemeske* (2016) 257 CLR 615 at [104] (Gageler J).

²⁵ *Fischer v Nemeske* (2016) 257 CLR 615 at [98] (Gageler J).

²⁶ *Fischer v Nemeske* (2016) 257 CLR 615 at [98] (Gageler J), citing *Queensland Trustees Ltd v Commissioner of Stamp Duties (Qld)* (1952) 88 CLR 54 at 65.

²⁷ *Ward* [1970] NZLR 1 at 30 (lns 17-23) (emphasis added).

The moneys covered by the resolution were of course held on trust both before and after the resolution; held, basically, under the trusts created by the original deed. The effect of the resolution was to fix the beneficiaries to whom payment would eventually have to be made and *to that extent one could perhaps speak of a new trust*, but this is by no means an unusual occurrence in the administration of trust deeds.

23. In other words, insofar as cl 3(5) gave rise to what might be described as a “new” and “separate” trust, it did so by fixing the beneficiaries to whom payment would have to be made under the trust created by the 2005 Trust and thereby altered the beneficial rights to the assets of that trust. As the Tribunal found, there was not a separate trust “in the conventional sense” or “as conventionally understood”: TR [68], [78], [80], [84(a)(i)] (CAB 41, 45, 46).

24. For the above reasons, the Tribunal was correct to find that amounts “set aside” by Gleewin for Gleewin Investments were not held by Gleewin on a separate trust and that “what was created upon the passing of the resolutions to distribute Gleewin’s income was a right or entitlement for the beneficiary coupled with the corresponding obligation of the trustee of a nature contemplated by what Gageler J said in *Fischer v Nemeske*”: TR [79]-[80] (CAB 45).

There was a debtor-creditor relationship between Gleewin and Gleewin Investments

25. The respondents conceded before the Full Federal Court, and the Full Court accepted, that Gleewin and Gleewin Investments were in a debtor-creditor relationship in respect of the amounts of income distributed but not paid (FC [92], [94] (CAB 112, 113)). The Commissioner respectfully submits that they were correct to do so.

26. It is well established that, if a trustee admits by an account stated that it holds a sum to be paid over to the *cestui que trust*, it does not hold the sum as a trustee properly so called, but as receiver for the plaintiff’s use, who may maintain an action at law for money had and received founded upon the appropriation to his use and the liability thence arising.²⁸ It is not necessary for a trust to be

²⁸ *Bartlett v Dimond* (1845) 14 M & W 49 at 56 [153 ER 385 at 387]; *Pardoe v Price* (1847) 16 M & W 451 at 458-459 [153 ER 1266 at 1269]; *Edwards v Lowndes* (1852) 1 El & Bl 81 at 89 [118 ER

“collapsed” in order to give rise to a debtor-creditor relationship,²⁹ because it is possible that the relationship of trustee and beneficiary may be overlaid with the relationship of debtor and creditor. As Gageler J said in *Fischer v Nemeske* (in remarks with which French CJ and Bell J agreed at [33]):³⁰

[A] trustee who admits to having an unconditional obligation to pay a specified amount of money to a beneficiary can thereby become liable to an action at law for the recovery of that amount as money had and received to the benefit of the beneficiary, so as to overlay the equitable relationship of trustee and beneficiary with the legal relationship of debtor and creditor. That has been settled since at least the middle of the nineteenth century.

...

[T]he coming into existence of the common law cause of action is not inconsistent with the continuing existence of a trust under which the trustee remains subject to fiduciary and other duties of a trustee for so long as the trustee’s absolute equitable obligation to pay the admitted sum of money to the admitted beneficiary remains unperformed.

27. The Full Court, with respect correctly, relied upon the first part of that passage (FC [91] (CAB 112)), and it appears that the respondents’ concession was based upon it. That passage recognises that a debtor-creditor relationship may be overlaid over a trustee-beneficiary relationship without the beneficiaries having or having exercised a *Saunders v Vautier* power to terminate the trust.³¹ For that reason, the Commissioner respectfully does not accept that “until the beneficiary takes some step either exercising the power under *Saunders v Vautier* or something else to collapse that arrangement – that is, to remove the obligations imposed on the trustee – there is no... unconditional present obligation to pay”.³²

367 at 370]; *Topham v Morecraft* (1858) 8 El & Bl 972 at 983 [120 ER 361 at 366]; each cited with approval by Griffith CJ in *Turner v NSW Mont de Piete Deposit and Investment Co Ltd* (1910) 10 CLR 539 at 545-546.

²⁹ Cf Transcript [2025] HCATrans 68 lns 167-171, 1525-1531 and 1535-1546.

³⁰ *Fischer v Nemeske* (2016) 257 CLR 615 at [105] and [111].

³¹ As to the modern formulation of the rule in *Saunders v Vautier*, see *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98 at [47].

³² Cf Transcript [2025] HCATrans 68 lns 167-171 (see also 1525-1531 and 1535-1546).

Creation of debt by admission

28. In *Roxborough v Rothmans of Pall Mall Australia Ltd*,³³ Gummow J identified two circumstances where an action for money had and received might lie at the suit of the beneficiary against the trustee: *first*, where there remains nothing to the trustee to execute except the payment over of money to the beneficiary; or *second*, where the trustee admits the debt.³⁴
29. In *Chianti*, Buss JA (with whom Martin CJ and Pullin JA agreed) held that the appellant was liable in debt to the respondent under the common law action for money had and received on both bases identified by Gummow J in *Roxborough*.³⁵ As to the second basis, the trust deed in *Chianti* contained materially identical clauses to those set out at paragraphs 3 to 6 above.³⁶ The trustee resolved that specified amounts of income be applied for the benefit of the respondent and placed the amounts to the credit of the respondent in the books of account of the trust, where they were recorded as “current liabilities” and described variously as a “Beneficiaries’ Loan Account”, “Beneficiaries’ Current Account” or “Unpaid Beneficiary Entitlement”.³⁷ Buss JA held that the financial statements and other evidence constituted admissions by the appellant that the “distributed amounts” were owing by the appellant to the respondent.³⁸
30. In the same way, Gleewin’s admissions are found in the financial statements prepared for the 2005 Trust, which recorded (within the liabilities side of the balance sheet) amounts owing to Gleewin Investments.³⁹ As the Full Court recorded, the respondents’ admission that there existed a debtor-creditor relationship was based in part on *Chianti* and the manner in which the amounts in question appeared in the accounts: FC [92] (CAB 112). That admission was correct, having regard to the principles quoted above from *Fischer v Nemeske*, *Roxborough* and *Chianti*.

³³ (2001) 208 CLR 516.

³⁴ *Roxborough* (2001) 208 CLR 516 at [67]. See also *Fischer v Nemeske* (2016) 257 CLR 615 at [17]-[18] (French CJ and Bell J) and at [105] and [108]-[110] (Gageler J).

³⁵ *Chianti* (2007) 35 WAR 488 at [70] and [77].

³⁶ *Chianti* (2007) 35 WAR 488 at [63].

³⁷ *Chianti* (2007) 35 WAR 488 at [66].

³⁸ *Chianti* (2007) 35 WAR 488 at [77].

³⁹ See footnote 4 above.

Creation of debt as an application of income

31. There is a further basis on which to conclude that a debtor-creditor relationship arose between Gleewin Investments and Gleewin.
32. The resolutions made by Gleewin were not only to “set aside” the relevant income, but also to “distribute” it.⁴⁰ Clause 32 of the Trust Deed recognises the existence in Gleewin of a power to “distribute any income... of the Trust”. The source of that power must be cl 3(1)(a) (which, relevantly, empowers the Trustee to “pay” or “apply” all or a part of the net income to or for the benefit of a beneficiary) for it is not expressed elsewhere. In addition, cl 3(2)(c) contemplates that a determination to pay or apply amounts may be effectually made and satisfied by “placing sums to the credit of a beneficiary in the books of account of the Trust Fund”. There was such a crediting here (see paragraph 8(a) above).
33. In *Fischer v Nemeske*, French CJ and Bell J held that one means of effecting an advance and application of the capital of a trust is “the creation of a debt to be satisfied out of the property of the Trust”.⁴¹ The resolution there provided for the making of a “final distribution” with a particular accounting reserve being “distributed” to Mr and Mrs Nemes.⁴² Their Honours concluded that “[t]he text of the resolution... disclosed a clear intention, indicated by the use of a form of words appropriate to the declaration of a dividend, to create a debt due by the Trustee to Mr and Mrs Nemes to the extent of the amount shown in the accounts of the Trust relating to the Asset Revaluation Reserve”.⁴³ Their Honours held that the resolution, and an associated accounting entry, constituted an advance and application within the meaning of the cl 4(b) of the Deed of Settlement (which relevantly empowered the trustee to “advance or raise any part or parts of the whole of the capital or income of the Trust Funds and to pay or to apply the same as the Trustee shall think fit...”).⁴⁴

⁴⁰ See, eg, CAB 71 (immediately below the box).

⁴¹ *Fischer v Nemeske* (2016) 257 CLR 615 at [30].

⁴² *Fischer v Nemeske* (2016) 257 CLR 615 at [2].

⁴³ *Fischer v Nemeske* (2016) 257 CLR 615 at [32].

⁴⁴ *Fischer v Nemeske* (2016) 257 CLR 615 at [32].

34. In the present case, a clear intention to create a debt due by Gleewin to Gleewin Investments (thereby effecting an application of the income of the 2005 Trust pursuant to cl 3(1)(a)) is disclosed by the text of the resolutions (specifically, their use the term “distribute”), and by the subsequent placing of sums to the credit of Gleewin Investments in the books of account of the 2005 Trust. That crediting indicated that amounts equal to the amounts of income which Gleewin had resolved to distribute to Gleewin Investments were liabilities of the 2005 Trust, to be satisfied out of the property of that trust. Other amounts that were undoubtedly debts owing by Gleewin to Gleewin Investments were credited to the same account: TR [44(c)] (CAB 28).

Gleewin Investments made “loans” to Gleewin

35. The Commissioner submits that Gleewin Investments made “loans” to Gleewin (within the meaning of s 109D(3)) for the reasons set out at AS [47]-[48].

Primary argument

36. If, for the reasons addressed above, a debtor-creditor relationship existed between Gleewin and Gleewin Investments, then the provision of financial accommodation within s 109D(3)(b) is found in Gleewin Investments’ refraining from calling for payment or taking steps to require payment. That is how Gleewin Investments allowed Gleewin (in its capacity as trustee of the 2005 Trust) to retain the ongoing use of amounts which Gleewin Investments had a right to withdraw. If the accommodation had been withdrawn then, as in *Corporate Initiatives Pty Ltd v Federal Commissioner of Taxation* (2005) 142 FCR 279 at [23], Gleewin would have had to:

... do something to arrange funds for that payment, whether by selling, or borrowing against, available assets, which would then no longer be available for other trust purposes. Not having to do this was a benefit. [The trustee] was thus in a better or more favourable position than it would have been had it been required to fund the distributions.

37. However, even if the Court holds that there was *not* a debtor-creditor relationship, there was still a provision of financial accommodation. That follows because what is important, on the Commissioner’s case, is that Gleewin Investments could have called for or taken steps to require payment of

the amounts which had been resolved to be set aside for its benefit and distributed. If that requirement is satisfied, then the precise nature of the rights in existence is otherwise immaterial. For example, the Commissioner's case would be unchanged if it were concluded, consistently with the Tribunal's finding at TR [79] (CAB 45), that Gleewin had only an immediate unconditional obligation (enforceable in equity) to account to Gleewin Investments. In such circumstances, the provision of financial accommodation would again be found in Gleewin Investments' refraining from calling for payment.

- 10 38. Alternatively, and for the reasons given at AS [48], the facts disclose a transaction which in substance effected a loan of money and was a "loan" within s 109D(3)(d). The Full Federal Court's observations in *Corporate Initiatives* are again apposite. In reference to circumstances that were materially the same as the present case, the Court stated:⁴⁵

...it is difficult to see the practical difference between a formally recorded loan and what happened here. In effect [the trustee] was the recipient of a loan repayable on demand and, as stated above, could use the amount of the loan for trust purposes.

39. So too, the substance of what occurred here is that Gleewin was the recipient of a loan repayable on demand.

20 ***Separate trust***

40. Consistently with the AS, the Commissioner's case is put above on the basis that no separate trust was created.
41. If (contrary to that position) separate trusts were created, the Commissioner submits⁴⁶ that:
- (a) in accordance with cl 3(5), Gleewin Investments was the sole beneficiary of each relevant trust, and had an absolute, vested and indefeasible interest in the capital and income;

⁴⁵ *Corporate Initiatives* (2005) 142 FCR 279 at [25].

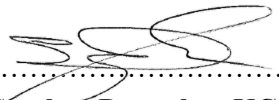
⁴⁶ This submission is consistent with the case put in the Tribunal (prior to the finding that there was no separate trust): see TR [66] (CAB 38).

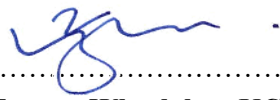
- (b) accordingly, Gleewin Investments was entitled to require the transfer of the property of the separate trust to it⁴⁷ (there being no findings – nor any evidence⁴⁸ – to support the proposition that there was any unsatisfied trustee’s right of indemnity);⁴⁹
- (c) if Gleewin Investments had taken such a step, it would have been necessary for Gleewin (in its capacity as trustee of the 2005 Trust) to do something to arrange funds for the necessary payment, as described in paragraph 36 above;
- (d) by refraining from taking such a step, Gleewin Investments provided financial accommodation to the trustee of the 2005 Trust.

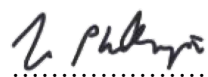
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42. The Commissioner’s contentions follow from the fact that Gleewin as trustee of the 2005 Trust had the use of amounts (or did not have to raise amounts) which were payable by it to Gleewin Investments on demand.
43. Had identifiable property been placed on a separate trust fund for the sole benefit of Gleewin Investments, and had any income derived from the investment of that separate trust fund also been held for the sole benefit of Gleewin Investments, the Commissioner would not allege that there was a loan from Gleewin Investments to Gleewin as trustee of the 2005 Trust.

Dated: 28 October 2025


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⁴⁷ *CPT Custodian* (2005) 224 CLR 98 at [47].

⁴⁸ Relevant financial records for the 2005 Trust are at tabs 1, 2, 4, 6 and 8 of the Commissioner’s book of further material filed on 31 July 2025.

⁴⁹ Cf *CPT Custodian* (2005) 224 CLR 98 at [50]-[51].