HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

ANTHONY NAAMAN APPELLANT

AND

JAKEN PROPERTIES AUSTRALIA PTY LIMITED & ORS RESPONDENTS

Naaman v Jaken Properties Australia Pty Limited
[2025] HCA 1
Date of Hearing: 11 October 2024
Date of Judgment: 5 February 2025
S26/2024

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with P Afshar Mazandaran and N A Wootton for the appellant (instructed by KB Legals)

J C Kelly SC with S V Shepherd and A E Maroya for the respondents (instructed by Jeresyn Legal)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Naaman v Jaken Properties Australia Pty Limited

Equity – Fiduciary obligation – Successor trustee and former trustee – Where former trustee has entitlement in equity to be indemnified out of trust assets for expenses and liabilities properly incurred – Where trustee has beneficial interest in trust assets commensurate with that entitlement to indemnification – Where appellant is judgment creditor of former trustee and subrogated to former trustee's entitlement to indemnification – Where successor trustee transferred trust assets to third parties leaving insufficient trust assets to satisfy former trustee's entitlement to indemnification – Whether successor trustee owes fiduciary obligation to former trustee – Whether fiduciary obligation owed in respect of entitlement of former trustee to indemnification out of trust assets or commensurate beneficial interest in trust assets retained by former trustee following replacement by successor trustee.

Words and phrases – "beneficial interest", "cestui que trust", "dishonest and fraudulent design", "equitable proprietary interest", "exoneration", "fiduciary obligation", "fiduciary relationship", "former trustee", "incoherence", "indemnification", "knowing assistance", "priority", "security interest", "successor trustee", "vulnerability".

Trustee Act 1925 (NSW), ss 6, 59.

1 GAGELER CJ, GLEESON, JAGOT AND BEECH-JONES JJ. It has been settled by decisions of this Court,[1] consistently with decisions of many other courts in Australia and elsewhere,[2] that a trustee has as an incident of office an entitlement in equity to be indemnified out of the trust assets (by way of recoupment of past expenditure or exoneration from existing liability) for expenses and liabilities properly incurred by the trustee in the execution of the trust and that the trustee has a beneficial interest in the trust assets commensurate with that entitlement to indemnification which takes priority over the beneficial interests that the persons for whose benefit the trustee is bound to administer the trust assets (the cestuis que trust) have in the trust assets. It has also been acknowledged in this Court,[3] consistently with decisions of many other courts in Australia and elsewhere,[4] that the entitlement to indemnification and the commensurate beneficial interest that the trustee has in the trust assets survive replacement of the trustee by a successor trustee.

2 The question on which this appeal turns is whether a successor trustee owes a fiduciary obligation to a former trustee in respect of the former trustee's entitlement to indemnification out of trust assets or the commensurate beneficial interest in the trust assets that the former trustee retains following replacement of the former trustee by the successor trustee.

3 The primary judge in the Equity Division of the Supreme Court of New South Wales was Kunc J.[5] Following the precedent of an earlier decision of a single

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1 *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 at 335-336; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367, 369-370; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 245-247 [47]-[50]; *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth* (2019) 268 CLR 524 at 559-562 [80]-[84].

2 See *Equity Trust (Jersey) Ltd v Halabi* [2023] AC 877 at 893-902 [56]-[105] and the cases there cited.

3 *Trautwein v Richardson* [1946] ALR 129 at 131, 134-135; *Bruton Holdings Pty Ltd (In liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346 at 358-359 [43].

4 See *Equity Trust (Jersey) Ltd v Halabi* [2023] AC 877 at 902-915 [106]-[166] and the cases there cited.

5 *Jaken Properties Australia Pty Ltd v Naaman* [2022] NSWSC 517.

judge of the Supreme Court of South Australia,[6] his Honour considered that a successor trustee owes a former trustee a fiduciary obligation not to deal with the trust assets so as to destroy, diminish or jeopardise the former trustee's entitlement to indemnification.[7]

4 The majority in the Court of Appeal of the Supreme Court of New South Wales disagreed.[8] Leeming JA[9] and Kirk JA[10] each considered that a successor trustee does not owe a fiduciary obligation to a former trustee in respect of either the entitlement of the former trustee to indemnification out of the trust assets or the commensurate beneficial interest of the former trustee in the trust assets. Bell CJ dissented.[11] His Honour considered that a fiduciary obligation in the terms identified by the primary judge is owed by the successor trustee to the former trustee at the latest upon the successor trustee becoming aware of the former trustee having a claim to indemnification.

5 The question on which the Court of Appeal divided informs the sole ground of this appeal by special leave from the decision of the Court of Appeal. The question is one of principle and is appropriate to be answered in this Court, as it was in the Court of Appeal, at the level of principle.

6 The answer to the question of equitable principle, consistently with that given by the majority in the Court of Appeal, is that a successor trustee does not owe a fiduciary obligation to a former trustee in respect of the entitlement of the former trustee to indemnification out of the trust assets or the commensurate beneficial interest that the former trustee has in the trust assets.

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6 *Rothmore Farms Pty Ltd (In liq) v Belgravia Pty Ltd* [2005] SASC 117 at [72]-[110].

7 *Jaken Properties Australia Pty Ltd v Naaman* [2022] NSWSC 517 at [8], [386]-[389].

8 *Jaken Properties Australia Pty Ltd v Naaman* (2023) 112 NSWLR 318.

9 *Jaken Properties Australia Pty Ltd v Naaman* (2023) 112 NSWLR 318 at 348-356 [115]-[141].

10 *Jaken Properties Australia Pty Ltd v Naaman* (2023) 112 NSWLR 318 at 371-374 [228]-[237].

11 *Jaken Properties Australia Pty Ltd v Naaman* (2023) 112 NSWLR 318 at 321-330 [1]-[34].

7 That answer means that there is no need to address subsidiary arguments which would arise for consideration in the determination of the appeal were the question of equitable principle answered differently. Those arguments are to the effect that the postulated duty would be inconsistent with statute[12] and would be inconsistent with express terms of the applicable trust deed.

8 Nor is there a need to detail the facts or to recite the protracted litigious history concisely summarised by Leeming JA in the Court of Appeal.[13] The background to the appeal and the context in which the question of equitable principle has arisen are adequately noted by recording the characteristics of the parties and recognising the practical significance of the resolution of the question to them.

9 The appellant, Mr Naaman, is a judgment creditor of a former trustee ("JPG") subrogated to JPG's entitlement to indemnification. The first respondent ("Jaken") is a successor trustee held by the primary judge to have owed the identified fiduciary obligation to JPG and found by the primary judge to have dishonestly and fraudulently breached that obligation by transferring trust assets to third parties leaving insufficient trust assets to satisfy JPG's entitlement to indemnification. The second to seventh respondents ("the third parties") comprise individuals involved in the management of Jaken and recipients of trust assets all of whom were found by the primary judge to have knowingly assisted Jaken in that dishonest and fraudulent breach of the identified fiduciary obligation.

10 The finding of knowing assistance by the third parties in the dishonest and fraudulent breach of the identified fiduciary obligation by Jaken formed the basis on which the primary judge held the third parties to be amenable to orders for equitable compensation and to account. His Honour reserved the ordering of those equitable remedies for further consideration.

11 The practical significance of the resolution of the question of whether Jaken owed JPG a fiduciary obligation in the terms identified by the primary judge lies in, and is confined to, the amenability of the third parties to orders for equitable compensation and to account based on their knowing assistance of Jaken. The denial of the existence of the putative fiduciary obligation by the majority in the

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12 Sections 6 and 59 of the *Trustee Act 1925* (NSW).

13 *Jaken Properties Australia Pty Ltd v Naaman* (2023) 112 NSWLR 318 at 331-335 [40]-[62].

Court of Appeal has removed the basis on which the primary judge held Mr Naaman able to obtain those equitable remedies against them.

12 The explanation for the answer to the question of equitable principle lies in the nature of a trustee's entitlement to indemnification out of the trust assets being an entitlement to have the trust assets applied for the purpose of recouping expenditure or exonerating liability properly incurred by the trustee. Once the nature of the entitlement is appreciated to be so limited and so focused, there is insufficient justification for superimposing on the entitlement to indemnification and commensurate beneficial interest in the trust assets retained by a former trustee a personal fiduciary obligation on the part of the successor trustee to the former trustee, either generally or upon the successor trustee becoming aware of the former trustee having a claim to indemnification.

The nature of a trustee's beneficial interest in trust assets

13 The interest which a trustee has in the trust assets that is commensurate with the entitlement of the trustee to be indemnified out of the trust assets for expenses and liabilities properly incurred in the execution of the trust has repeatedly been said in this Court to be properly characterised as a beneficial interest in the trust assets[14] which takes priority over the beneficial interest that the cestuis que trust have in the trust assets.[15]

14 That the interest of the trustee can be properly characterised as a beneficial interest in the trust assets does not mean, however, that the difference between the beneficial interest of the trustee and the beneficial interest of the cestuis que trust is a difference only as to priority. The difference as to priority is a manifestation of a more fundamental difference in the nature of the two categories of beneficial interest.

15 The term "beneficial" is commonly used in equity as a cognate of "beneficiary" to describe the specific interest that a cestui que trust has in trust

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14 *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367; *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth* (2019) 268 CLR 524 at 562 [84], 579-580 [137]; *Boensch v Pascoe* (2019) 268 CLR 593 at 630 [102].

15 *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367-370; *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth* (2019) 268 CLR 524 at 561 [83].

assets.[16] But the term is sometimes also used to describe other equitable proprietary interests. That is how it has been used by this Court in this context.

16 The beneficial interest of the trustee and the beneficial interest of a cestui que trust are similar insofar as each is an equitable proprietary interest in the trust assets which arises from equity acting in personam to enforce or protect an underlying equitable entitlement. The difference between them stems from a difference in the underlying equitable entitlements of the trustee and the cestui que trust and flows through to differences in the orders that a court of equity can make to enforce or protect those underlying equitable entitlements.

17 The difference was manifest in the separate explanations of the two categories of beneficial interest given by three members of this Court in *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth*.[17] The difference was similarly reflected in prior descriptions of a trustee having an entitlement to be indemnified out of the trust assets as having a "lien"[18] or an "equitable charge"[19] over the trust assets to the extent of the entitlement in the sense that a court of equity can enforce the entitlement against the trust assets in the same way as a court of equity can enforce an equitable lien or other equitable charge against other property.

18 An equitable lien is a form of equitable charge over property which arises by implication of equity to secure the discharge of an actual or potential indebtedness. Like any other form of equitable charge over property, an equitable lien is enforceable by means of a court of equity making an order authorising or requiring sale of the property and payment of the indebtedness out of the proceeds of that sale or, where the property consists of a fund, by means of a court of equity making an order authorising or requiring payment out of that fund.[20]

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16 *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)* (2005) 220 CLR 592 at 612 [52].

17 (2019) 268 CLR 524 at 560-561 [82]-[83].

18 *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 at 336.

19 *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 246-247 [50].

20 *Hewett v Court* (1983) 149 CLR 639 at 663. See also *In re Bank of Credit and Commerce International SA [No 8]* [1998] AC 214 at 226, referred to in *Associated*

19 This Court emphasised in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq)*[21] that an equitable charge is an institution of equity, distinct from the institution of a trust, which confers on the chargee an equitable proprietary interest of a nature that is different from the equitable proprietary interest of a cestui que trust. The difference in the equitable proprietary interests of the chargee and of the cestui que trust reflects the difference in the final equitable relief available to each to enforce their underlying equitable entitlements. The final equitable relief available to the chargee is directed against the property the subject of the charge and is only for the purpose of satisfying out of that property the indebtedness that is secured by the charge. The final equitable relief available to the cestui que trust is directed not against the property held on trust but against the holder of the property and is for the purpose of ensuring performance of the trust. The difference between the two interests is encapsulated by Jaken's submission that the trustee holds the trust property *for* the cestuis que trust but *subject to* the interest of the former trustee.

20 The distinction so emphasised in *Associated Alloys* between the nature of the equitable proprietary interest of a cestui que trust and the nature of the equitable proprietary interest of a chargee underlies the separate explanations given in *Carter Holt Harvey* of the beneficial interest that a cestui que trust has in the assets held on trust and the beneficial interest that the trustee has in those trust assets if and to the extent that the trustee has an entitlement to be indemnified out of them. The description of a cestui que trust "as having a beneficial interest in ... the trust assets" was explained to be appropriate "[i]nasmuch as a court of equity will aid [the cestui que trust] in the enforcement of the terms of trust".[22] The appropriateness of describing an unindemnified trustee as having "a beneficial

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Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq) (2000) 202 CLR 588 at 595-596 [6].

21 (2000) 202 CLR 588 at 595-596 [5]-[6]. See also *Truthful Endeavour Pty Ltd v Condon* (2015) 233 FCR 174 at 195-196 [84]; *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (In liq)* (2018) 53 WAR 325 at 343 [49]; Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 23-24 [2-26]-[2-27]; Waters, Gillen and Smith, *Waters' Law of Trusts in Canada*, 5th ed (2021) at 111-112; Scott and Ascher, *Scott and Ascher on Trusts*, 6th ed (2019), vol 1 at 80-89 [2.3.6].

22 (2019) 268 CLR 524 at 560-561 [82]. See also *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490 at 503.

interest in the trust assets",[23] in contrast, was explained to be founded on the very different explanation that a court of equity "will assist the trustee to realise trust assets to satisfy the trustee's right of indemnity" by reason of which "it is said that the trustee has an equitable charge or lien over the trust assets" although not "a charge or lien comparable to a synallagmatic security interest over property of another".[24]

21 The observation in *Carter Holt Harvey* that the charge or lien that a trustee has over the trust assets is not comparable to a synallagmatic or conventional security interest over property of another does not mean that the final equitable relief available to the trustee is not directed against the trust assets. The observation alludes to the interest of the trustee being unlike the interest of a chargee insofar as the interest of the trustee is not by way of security for the payment of any debt to the trustee but is commensurate with the entitlement of the trustee to have the trust assets applied by way of indemnification. The difference was earlier noted in *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties*[25] in a passage to which reference was made in *Chief Commissioner of Stamp Duties (NSW) v Buckle*.[26]

22 The difference has since been expounded in the advice of the Judicial Committee of the Privy Council in *Equity Trust (Jersey) Ltd v Halabi*. The Privy Council preferred to avoid the language of "lien", "charge" and "beneficial interest" and instead described the interest of a trustee in the trust assets "simply as a proprietary interest", remarking that "[n]othing turns on the precise language used".[27] Adjusting for that divergence in linguistic preferences, the explanation given by the Privy Council of the nature of the proprietary interest that the trustee has in the trust assets accords with prior explanations in this Court, including in *Carter Holt Harvey*.

23 The proprietary interest of a trustee in the trust assets was explained in *Halabi* to arise in consequence of the entitlement of the trustee to indemnification out of the trust assets. The entitlement itself was explained as "no more and no less than the right to have the trust property applied in indemnifying the trustee against

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23 (2019) 268 CLR 524 at 562 [84].

24 (2019) 268 CLR 524 at 561 [83].

25 [1984] 1 Qd R 576 at 585.

26 (1998) 192 CLR 226 at 245.

27 [2023] AC 877 at 909 [143], 915 [171].

liabilities properly incurred".[28] The characteristics of the entitlement were identified as including two that are presently relevant.

24 First, it was said that the entitlement does not create a personal liability on the part of any person to indemnify a trustee or former trustee but is instead "a right to have the trust property applied in payment of [the indemnified] amount".[29] In this respect, it was explained:[30]

> "There is simply the right to have the trust assets applied in the exoneration or reimbursement of the trustee. 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. There is, in other words, no difference between the right of indemnity and the proprietary interest. The right of indemnity and the application of the fund in providing the necessary exoneration or reimbursement are one and the same thing."

25 Second, it was said:[31]

> "[T]he remedy to enforce that right is an order that the trust property be applied in paying the amount due under the right of indemnity. It is the availability of this remedy which underlies the characterisation of the right of indemnity as conferring on a trustee or former trustee an equitable proprietary interest in the trust property, akin to that created by a conventional equitable charge. Equity acts in personam, so the order is not an order in rem but an order that the person holding the property must apply it so as to indemnify the trustee, but the effect is to create an equitable interest in the property. The position is analogous to the effect of specific performance as a remedy to enforce a contract of sale, which is to confer on the purchaser an equitable proprietary interest in the subject property."

26 The second of those characteristics is of particular significance to the resolution of the question of principle in this appeal. The interest that a former trustee retains in the trust assets after replacement by a successor trustee – whether described in the language of this Court as a lien or a charge and as a beneficial interest or in the language of the Privy Council as a proprietary interest akin to that

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28 [2023] AC 877 at 902 [110].

29 [2023] AC 877 at 915 [170]; see also at 894 [63].

30 [2023] AC 877 at 915 [171].

31 [2023] AC 877 at 915-916 [172].

created by a conventional equitable charge and analogous to the equitable proprietary interest of a purchaser under a specifically enforceable contract of sale – is an equitable proprietary interest[32] that arises from and is commensurate with the continuing ability that the former trustee has to obtain the assistance of a court of equity to enforce its entitlement to have the trust assets applied to recoup the former trustee's expenditure or to exonerate the former trustee from liability.

27 The final orders that a court of equity can make on the application of a former trustee to enforce its entitlement to have the trust assets applied to recoup its expenditure or to exonerate it from liability include orders authorising and, if necessary, requiring the sale of the trust assets and payment of the former trustee out of the proceeds or payment of the former trustee from trust funds. Whatever form a final order might take, it would necessarily be an order made in a proceeding to which the successor trustee, as the current holder of the trust assets, would be a party and would necessarily be an order binding the successor trustee. The final order, although in personam, would enforce the entitlement of the former trustee to have the trust assets applied to recoup its expenditure or to exonerate it from liability. The order would not enforce any pre-existing obligation on the part of the successor trustee.

28 Pending the making of any such final order for the enforcement of the entitlement of the former trustee to have the trust assets applied to recoup its expenditure or to exonerate it from liability, a court of equity has ample power to ensure the efficacy of the final order and to protect the equitable proprietary interest of the former trustee from being destroyed, diminished, or jeopardised by conduct of the successor trustee. The available interim protection is by means of the court of equity, on the application of the former trustee, being able to make an interlocutory order either granting an injunction to restrain the successor trustee or appointing a receiver to take possession of the trust assets.

29 The availability of those forms of interlocutory order underpins the correctness of the observation by Brereton J in *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd*[33] that "the former trustee is entitled to ensure the new trustee does not take steps which will destroy, diminish or jeopardise the old trustee's right of security, which subsists in the trust assets after their transfer to the new trustee". Neither an interlocutory injunction nor the appointment of a receiver would enforce any pre-existing obligation on the part of the successor

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32 See Conaglen, "Trustees Competing over Indemnity Rights" (2024) 48 *Melbourne University Law Review* 1 at 17-21.

33 (2008) 74 NSWLR 550 at 561 [50].

trustee to the former trustee, and neither form of interlocutory order would depend for its making on establishing any pre-existing obligation on the part of the successor trustee to the former trustee.

30 The important point for present purposes is that it is unnecessary to postulate the successor trustee owing any obligation to the former trustee for a court of equity to be able to protect the former trustee's entitlement to indemnification out of and commensurate beneficial interest in the trust assets from being destroyed, diminished, or jeopardised by any conduct of the successor trustee. Whether a successor trustee owes any fiduciary obligation to a former trustee in respect of the entitlement to indemnification out of trust assets or the commensurate beneficial interest in the trust assets is accordingly to be answered at the level of equitable principle in the context of the absence of such need.

The absence of a fiduciary relationship

31 For present purposes, it is unnecessary to survey the breadth and depth of the fiduciary paradigm just as it is unnecessary to examine the usefulness of attaching the label of "fiduciary obligation" to obligations other than "proscriptive obligations" concerning conflicts of interest and unauthorised profits.[34] It is enough to acknowledge that a fiduciary obligation cannot exist other than as an incident of a fiduciary relationship and that a fiduciary relationship is a relationship of "absolute and disinterested loyalty"[35] within the scope of which one party, the fiduciary, is recognised in equity as having a responsibility to act in the interests of the other party (or in their shared interests) to the exclusion of the fiduciary's own interests.[36]

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34 *Friend v Brooker* (2009) 239 CLR 129 at 160 [84]. See also Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (2016) at 368-369 [790].

35 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 104, quoting *Phelan v Middle States Oil Corporation* (1955) 220 F 2d 593 at 602.

36 *Gibson v Motorsport Merchandise Pty Ltd v Forbes* (2006) 149 FCR 569 at 574 [11]-[12]; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 34-35 [87]; *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1 at 29-30 [67].

32 No doubt "the categories of fiduciary relationships are not closed".[37] The question here, however, is not whether a fiduciary relationship should be recognised in a novel factual setting. The question is whether a novel fiduciary relationship is to be recognised within the heartland of the law of trusts.

33 This Court in *Maguire v Makaronis*[38] cautioned against a tendency "too readily to classify as fiduciary in nature relationships which might better be seen as purely contractual or as giving rise to tortious liability". The caution points to a wider concern about maintaining the integrity of legal and equitable institutions. Having regard to the onerousness of the responsibility that a fiduciary relationship entails, a fiduciary relationship should not lightly be imposed upon commercial parties who stand at arm's length in respect of interests that are protected by other institutions of the common law or of equity.[39] In particular, a fiduciary relationship should not be superimposed on another legal or equitable relationship merely to overcome perceived shortcomings in the nature or extent of the remedies available to enforce or protect other applicable institutions of the common law or of equity.[40]

34 The core of the argument of Mr Naaman is to the effect that a fiduciary relationship between a successor trustee and a former trustee is to be superimposed on the entitlement to indemnification and commensurate beneficial interest of a former trustee by reason of the successor trustee holding the trust assets subject to that beneficial interest and by reason of the successor trustee knowing that the former trustee has or claims to have an entitlement to indemnification. The argument must be rejected.

35 Plainly, one person does not come into a fiduciary relationship with another person merely by reason of holding property in which the other person has an equitable proprietary interest. And plainly, a fiduciary relationship between the person holding the property and the other person having the equitable proprietary interest is not brought into existence merely by adding the circumstance that the

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37 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96.

38 (1997) 188 CLR 449 at 474.

39 *Lord Napier and Ettrick v Hunter* [1993] AC 713 at 752.

40 *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 165 at 197 [71], quoting *Norberg v Wynrib* [1992] 2 SCR 226 at 312.

person holding the property knows that the other person has such an interest in the property or knows that the other person claims to have such an interest in it.

36 As Leeming JA observed in the judgment under appeal:[41]

> "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."

37 Nor can it be sufficient for the relationship between the holder of the property and a person known to have or to be claiming to have an equitable proprietary interest in that property to become a fiduciary relationship that the equitable proprietary interest is properly characterised as a beneficial interest. That is illustrated by the equitable proprietary interest of a purchaser under a specifically enforceable contract of sale to which the equitable proprietary interest of an unindemnified trustee in the trust assets was compared in *Halabi*.

38 *Tanwar Enterprises Pty Ltd v Cauchi*[42] confirmed that, though it can be said that a purchaser has an "equitable estate or interest in the property the subject of a contract of sale [which] is commensurate with [the purchaser's] ability to specifically enforce the contract",[43] and though it can be said that the purchaser is regarded by equity as the "beneficial owner"[44] of, or at least as having a "beneficial interest"[45] in, the estate of which the vendor is the legal owner, "it is both inaccurate and misleading to speak of the unpaid vendor under an uncompleted contract as a

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41 *Jaken Properties Australia Pty Ltd v Naaman* (2023) 112 NSWLR 318 at 331 [38]. See also Scott and Ascher, *Scott and Ascher on Trusts*, 6th ed (2019), vol 1 at 85 [2.3.6.4].

42 (2003) 217 CLR 315 at 332-333 [53]-[54].

43 *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 at 612; see also at 645-646.

44 *Chang v Registrar of Titles* (1976) 137 CLR 177 at 190.

45 *KLDE Pty Ltd v Commissioner of Stamp Duties (Q)* (1984) 155 CLR 288 at 297.

trustee for the purchaser".[46] That is because, subject to the constraints of the contract of sale, the vendor is free to deal with the property other than in the interests of the purchaser. Likewise, the successor trustee, being required to deal with the trust assets in the performance of the trust, and so in the interests of the cestuis que trust, does not act in the interests of the former trustee.

39 *Bofinger v Kingsway Group Ltd*,[47] on which Mr Naaman relies, is not authority to the contrary. In *Bofinger* the obligation of one mortgagee to account for surplus moneys and securities and not to undertake or "perform any competing engagement in that respect" which was found to be fiduciary in character[48] only arose on discharge of the mortgage when the relevant indebtedness was paid in full and there was a surplus.[49]

40 *Bofinger* is not an example of a fiduciary duty subsisting in tandem with some form of security interest, much less a fiduciary duty owed by the legal owner of property to the entity that holds the interest, which in effect Mr Naaman seeks to establish here. Instead, *Bofinger* is an example of a case where at one point the owner held property that was subject to the security interest of the relevant mortgagee and where upon its discharge that mortgagee held property (the surplus) as trustee for those beneficially entitled to that property.[50] However, this is a case where the legal owner of the property, the successor trustee, holds trust property for the cestuis que trust in circumstances where that property is subject to the interest of the former trustee that we have described. A successor trustee holding trust assets subject to the beneficial interest of a former trustee not only has its own entitlement to indemnification and commensurate beneficial interest in the trust assets but has an ongoing duty to deal with the trust assets in the performance of the trust.

41 The attempt by Mr Naaman to strengthen his argument for the existence of a fiduciary relationship between a successor trustee and a former trustee by

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46 *Kern Corporation Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164 at 192.

47 (2009) 239 CLR 269 at 291 [50]-[51]. See also *Residential Housing Corporation v Esber* (2011) 80 NSWLR 69 at 100 [144].

48 (2009) 239 CLR 269 at 290 [49].

49 (2009) 239 CLR 269 at 286 [31], 290-291 [49]. See *Charles v Jones* (1887) 35 Ch D 544 at 549-550, cited in *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at 287-288 [35], 290 [49].

50 (2009) 239 CLR 269 at 287-288 [35], 290 [49].

reference to notions of vulnerability and incoherence which found favour with Bell CJ in the Court of Appeal[51] must also be rejected.

42 The argument by reference to vulnerability is founded on the reality that a former trustee is at risk of a successor trustee dealing with the trust assets in a manner adverse to the former trustee's entitlement to indemnification and commensurate beneficial interest without notice to the former trustee and therefore without the former trustee having an opportunity to approach a court of equity to seek an interlocutory injunction or the appointment of a receiver to protect the former trustee's entitlement to indemnification. That form of vulnerability of the former trustee to unnotified and potentially clandestine conduct on the part of the successor trustee is the inevitable consequence of the transmission of the trust assets from one to the other.

43 But vulnerability is not the touchstone of a fiduciary relationship.[52] Vulnerability is relevant to the existence of a fiduciary relationship only to the extent that the vulnerability in question is suggestive of a responsibility on the part of the putative fiduciary to act in the interests of the vulnerable party to the exclusion of the interests of the putative fiduciary.[53]

44 The vulnerability of a former trustee to an unnotified dealing with the trust assets by a successor trustee is no more suggestive of a responsibility on the part of the successor trustee to act solely in the interests of the former trustee than the vulnerability of a chargee under a conventional equitable charge to an unnotified dealing with the charged property by the chargor is suggestive of a responsibility on the part of the chargor to act solely in the interests of the chargee. The argument is in truth no more than a complaint that the equitable remedies available to a former trustee are inadequate.

45 The argument by reference to incoherence comes down to an assertion that for a successor trustee to owe fiduciary obligations to a cestui que trust but not to

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51 See *Jaken Properties Australia Pty Ltd v Naaman* (2023) 112 NSWLR 318 at 323 [6], 327 [21]-[23], 328-329 [29].

52 *C-Shirt Pty Ltd v Barnett Marketing and Management Pty Ltd* (1996) 37 IPR 315 at 336. See also *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 34 [83].

53 *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 541. See also Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (2016) at 347 [736].

owe a fiduciary obligation to a former trustee would be anomalous given that both have beneficial interests in the trust assets and would be especially anomalous given that the beneficial interest of the former trustee takes priority over that of the cestui que trust. The basis for the perception of anomaly is removed once it is recognised that, as has been explained, the beneficial interest of the former trustee is of a different nature from the beneficial interest of the cestui que trust.

46 The absence of anomaly is even more apparent when it is recognised that the successor trustee, by reason of its own entitlement to indemnification, has its own beneficial interest in the trust assets of the same nature as the beneficial interest of the former trustee. Notice can be taken of the co-existence of the beneficial interests of the former trustee and of the successor trustee without needing to examine whether the two interests rank pari passu or whether the interest of the former trustee takes priority over the equivalent interest of the successor trustee, which was the issue on which the Privy Council divided in *Halabi*.[54]

Conclusion

47 The entitlement of JPG as a former trustee is to have the trust assets applied for the purpose of recouping expenditure or exonerating liability properly incurred by JPG in the execution of the trust. The beneficial interest of JPG in the trust assets is correlative to that entitlement.

48 At all times since its replacement by Jaken, JPG has been able to enforce its entitlement as a former trustee by bringing a proceeding against Jaken in the Equity Division of the Supreme Court for final relief in the form of an order for the sale of the trust assets or for payment out of trust funds. At all times since its replacement by Jaken, JPG has also been able to protect its entitlement from being destroyed, diminished, or jeopardised by conduct of Jaken by seeking in such a proceeding an interlocutory injunction or the appointment of a receiver.

49 Jaken is not in a fiduciary relationship with JPG. Therefore, Jaken owes JPG no fiduciary obligation and the remedies of equitable compensation and account are not available to JPG against the third parties.

50 The appeal should be dismissed with costs.

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54 [2023] AC 877 at 882 [1], 882-883 [4].

51 GORDON, EDELMAN AND STEWARD JJ. This appeal concerns a former trustee's right of exoneration out of trust assets for expenses and liabilities properly incurred as trustee of a trust. Five principles were not in dispute. First, the right of exoneration generates for the trustee an equitable proprietary interest in relation to the trust estate.[55] Second, to the extent of that equitable proprietary interest, the assets of the trust are not held solely for the beneficiaries.[56] Third, the trustee's equitable proprietary interest takes priority over that of the beneficiaries.[57] Fourth, the trustee's equitable proprietary interest survives the removal of the trustee.[58] Fifth, a former trustee of a trust can prevent a successor trustee from dealing in trust assets in ways that would destroy, diminish or jeopardise the former trustee's equitable proprietary interest in relation to the trust estate.[59]

52 The principal issue in this appeal is, as Leeming JA said in the judgment under appeal, both "narrow and important": where a successor trustee knows of a former trustee's equitable proprietary interest in the trust estate conferred by the former trustee's right of exoneration, is the obligation which is owed by the successor trustee to that former trustee not to deal with the trust estate so as intentionally to destroy, diminish or jeopardise the former trustee's entitlement to be indemnified from the trust estate a fiduciary obligation?

53 The Court of Appeal of the Supreme Court of New South Wales (Leeming and Kirk JJA, Bell CJ dissenting on this issue) concluded that although the successor trustee owed an obligation to the former trustee not to deal with trust assets so as to prejudice the former trustee's right of exoneration from those assets in respect of expenses or liabilities properly incurred by it in its former capacity as trustee of the trust, that obligation was not, at any time, fiduciary and that,

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55 *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth* (2019) 268 CLR 524 at 544 [32], 562 [85], 579-582 [135]-[142].

56 *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 246-247 [50]; *Carter Holt* (2019) 268 CLR 524 at 542 [28].

57 *Octavo Investments* (1979) 144 CLR 360 at 367; *Buckle* (1998) 192 CLR 226 at 247 [50]; *Carter Holt* (2019) 268 CLR 524 at 544 [32], 562 [84].

58 See *Jones v Matrix Partners Pty Ltd; Re Killarnee Civil & Concrete Contractors Pty Ltd (In liq)* (2018) 260 FCR 310 at 344 [142].

59 *Jaken Properties Australia Pty Ltd v Naaman* (2023) 112 NSWLR 318 at 322 [4], 330-331 [37]; see also *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* (2008) 74 NSWLR 550 at 561 [50].

instead, the only final recourse the former trustee had against the successor trustee was the appointment of a receiver or an order for judicial sale. We disagree. The appeal should be allowed.

54 As these reasons will explain, the successor trustee is under an obligation not to deal with the trust estate so as intentionally to destroy, diminish or jeopardise the former trustee's entitlement to be indemnified from the trust estate.[60] That obligation arises because the relationship between the successor trustee and the former trustee is one by which the successor trustee assumes a responsibility to the former trustee as would reasonably entitle the former trustee to expect that the successor trustee will act in relation to the trust assets in the interests of the former trustee to the exclusion of its own or a third party's interest.[61] It is an obligation not to allow the successor trustee's personal interests to conflict with its objectively assumed duty of loyalty to the former trustee when dealing with assets to which the former trustee has an equitable proprietary right. That conflict principle is the irreducible core of the fiduciary obligation.[62]

55 That the former trustee's right of exoneration out of the trust assets for the expenses or liabilities incurred by the trustee takes priority over the claims of beneficiaries[63] reinforces the fiduciary nature of the obligation not to deal with the trust estate so as intentionally to destroy, diminish or jeopardise the former trustee's entitlement to be indemnified from the trust estate. That right has loosely been described as a security right.[64] Even if that description were entirely accurate, it would not necessarily preclude the existence of a fiduciary duty. Although the mere existence of a security right, whether one recognised by common law or equity, is insufficient by itself to give rise to fiduciary obligations, such rights do not necessarily exclude the prospect of such obligations being owed.

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60 See below at [89]-[90].

61 See below at [94].

62 *Breen v Williams* (1996) 186 CLR 71 at 93, 108, 111, 113, 137; Finn, "The Fiduciary Principle", in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1 at 28.

63 *Lemery* (2008) 74 NSWLR 550 at 553 [16], citing *Octavo Investments* (1979) 144 CLR 360 at 367; *Buckle* (1998) 192 CLR 226 at 246 [48]; *Carter Holt* (2019) 268 CLR 524 at 544 [32].

64 *Octavo Investments* (1979) 144 CLR 360 at 367; *Buckle* (1998) 192 CLR 226 at 247 [50]; *Bruton Holdings Pty Ltd (In liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346 at 358-359 [43]; *Carter Holt* (2019) 268 CLR 524 at 544 [32], 561 [83].

As the respondents ultimately accepted, security interests and fiduciary obligations can and do exist together.[65] But, as explained later in these reasons, the right of indemnity secures no underlying debt and the closer analogy is the right of a beneficiary to performance under a bare trust by payment of the trust fund.[66]

56 In this appeal, the significance of the successor trustee's obligation not to deal intentionally with the trust estate to the prejudice of the former trustee's entitlement to be indemnified from that trust estate being fiduciary is to be understood in light of the unchallenged findings by the primary judge. First, having assumed the office of trustee in circumstances in which it is objectively apparent that the former trustee had equitable proprietary rights that prevailed over those of the beneficiaries, the successor trustee engaged in a dishonest and fraudulent design to strip itself of assets that might otherwise be available to satisfy the former trustee of its right of exoneration and thus the appellant's rights via subrogation. Second, as part of that design, the successor trustee transferred trust assets to companies, who were not bona fide purchasers for value without notice, in order to defraud creditors of the trust (including the former trustee). Third, the dishonest and fraudulent design was at the direction of two brothers who were the director and the shadow or de facto director, and the controlling minds, of the successor trustee. Fourth, the two controlling minds of the successor trustee, as well as the recipients of the property (collectively, the "third parties"), were thereby each personally liable to the former trustee, and to the appellant by reason of the appellant's unchallenged rights of subrogation.

Facts and background

57 The facts are not in dispute. The following summary is drawn from the detailed factual analysis of the primary judge and Leeming JA.

Parties and properties

58 The former trustee, Jaken Property Group Pty Ltd ("JPG"), was appointed trustee of the Sly Fox Family Trust ("the Trust") in June 2005 by a Discretionary Trust Deed ("the Trust Deed"). Mr Peter Sleiman, the second respondent, was the sole director and shareholder of JPG until at least 11 August 2006. He was also

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65 See, eg, *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at 290-291 [49]-[50]. See also *Charles v Jones* (1887) 35 Ch D 544 at 550; *Buhr v Barclays Bank* [2002] BPIR 25 at 38 [48].

66 See *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq)* (2000) 202 CLR 588 at 596 [6].

the "Specified Beneficiary", the "Default Beneficiary" and the "Appointor" of the Trust. A wide power was conferred upon the trustee to distribute or accumulate income, and to pay capital, to the Specified Beneficiary or, among others, any spouse, child, grandchild, niece, nephew, sibling, parent, grandparent or any company owned by one of the above or of which one of the above was a director.

59 In 2005 and 2006, JPG acquired two apartments in Melbourne for $640,000 ("the Victorian Properties"), land in Kings Cross, Sydney, on which the O'Malley's Hotel operated, for $8.9 million ("the Kings Cross Property") and land in Granville, New South Wales for $750,000 ("the Granville Land").

60 The other respondents to this appeal are the successor trustee, Jaken Properties Australia Pty Ltd ("Jaken"), and persons and companies found to have been involved in Jaken's dealings with the Victorian Properties, the Kings Cross Property and the Granville Land. Mr Tony Sleiman, the third respondent, is the brother of Mr Peter Sleiman and, for a time, was Jaken's sole director. Superior Family Investments Pty Ltd ("Superior"), the fourth respondent, acquired the Granville Land in 2012. The sole director of Superior is Ms Samantha Sleiman, who is Mr Peter Sleiman's wife (and is not a party to the proceedings). PSJK Holdings Pty Ltd ("PSJK"), the sixth respondent, acquired the Victorian Properties in 2012. The sole director and shareholder of PSJK was originally Mr Peter Sleiman but he was replaced by Ms Samantha Sleiman in 2010. O'Malley's Hotel Pty Ltd, the fifth respondent, ran the hotel on the Kings Cross Property. Powerhouse Corporation Pty Ltd, the seventh respondent, was the recipient of funds drawn down from a facility held by Jaken with the National Australia Bank ("NAB"), which was secured over the Kings Cross Property.

61 The sole appellant, Mr Naaman, is a judgment creditor of the former trustee, JPG, in the sum of $3,446,755.55 ("the Judgment Debt"). There was no challenge, in the court below, to the orders of the primary judge that recorded the existence of JPG's right of indemnity, that Mr Naaman, as a creditor, "is entitled by way of subrogation in equity to the rights of JPG to be indemnified out of the assets of the [Trust]"[67] and that JPG's right of indemnity extended to the Judgment Debt.

62 The unchallenged finding of the primary judge was that Jaken "engaged in a dishonest and fraudulent design to strip itself of assets that might otherwise be available to satisfy JPG's power of indemnity to which Mr Naaman was subrogated" and that Mr Peter Sleiman and Mr Tony Sleiman knowingly assisted in that dishonest and fraudulent design.

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67 See, eg, *Jones* (2018) 260 FCR 310 at 320 [34], citing *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 at 335.

Proceedings in 2006

63 In August 2006, JPG commenced proceedings against Mr Naaman and another person, based on a share sale agreement. On 11 August 2006, orders were made that JPG should pay Mr Naaman's costs in relation to a notice of motion. The following week, JPG discontinued the proceedings by consent, with orders reserving to Mr Naaman the right to bring further proceedings. On 6 November 2006, Mr Naaman commenced proceedings in the Common Law Division of the Supreme Court of New South Wales against JPG as trustee of the Trust seeking judgment in the sum of $2 million, together with interest and costs ("the Naaman Proceedings"). Mr Naaman claimed to be entitled to that amount, based on a "Guarantee Agreement" between him and JPG for unpaid amounts of purchase price of a share sale agreement between JPG, as purchaser, and Mr Naaman and two others, as vendors.[68]

Replacement of trustee and subsequent events

64 On 12 January 2007, Jaken was registered with Mr Tony Sleiman as its sole director. On 13 February 2007, JPG, Jaken and Mr Peter Sleiman entered into a "Deed of appointment and retirement of trustee of discretionary trust" ("the Deed of Appointment") by which JPG retired as the trustee of the Trust and was replaced by Jaken. There was an unchallenged finding of the primary judge that, at all relevant times, Mr Peter Sleiman was the de facto and shadow director of Jaken and one of its alter egos.

65 On 25 February 2007, Mr Naaman obtained costs certificates based on the costs orders in his favour in the discontinued proceeding, in the amount of some $25,000. On 27 February 2007, a liquidator was appointed to JPG. The only recorded liability was a $2,500 unsecured debt owing to the firm which had been the Sleiman family's accountants. The winding up of JPG effected a stay of the Naaman Proceedings. JPG was subsequently deregistered and the Naaman Proceedings dismissed.

66 In March 2007, Mr Naaman lodged caveats over the Granville Land and the Kings Cross Property in respect of his claim under the Guarantee Agreement. The liquidator of JPG then lodged caveats over the Kings Cross Property and the Granville Land in respect of his right of indemnity. With the liquidator's subsequent consent, legal title to the Victorian Properties, the Kings Cross Property and the Granville Land was transferred to Jaken as trustee of the Trust.

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68 *Naaman v Sleiman* [2015] NSWCA 259 at [6]-[16].

67 In July 2009, Mr Naaman commenced separate proceedings against Mr Peter Sleiman and Jaken ("the 2009 Proceedings"). By order made on 14 March 2013, JPG was reinstated and joined to the 2009 proceedings. On 5 March 2014, default judgment was entered in favour of Mr Naaman against JPG in the sum of $2 million plus interest. That judgment was set aside by consent and the 2009 Proceedings were reheard in December 2014 and dismissed. An appeal by Mr Naaman was allowed in part with the 2009 Proceedings being remitted to the Equity Division of the Supreme Court for determination of the quantification of damages. On 25 February 2016, judgment was entered for Mr Naaman against JPG for $3.4 million (namely, the Judgment Debt) and it was declared that:

> "[JPG] is 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 Debt].
>
> ... [Mr Naaman] is subrogated to the rights of [JPG] for its entitlement to be indemnified from the assets of [the Trust] in respect of the judgment to be entered in these proceedings".

68 Between 2012 and 2014, Jaken used various means to dissipate the assets of the Trust so as to put them beyond the reach of JPG. The Granville Land and Victorian Properties were transferred to Superior and PSJK respectively, companies controlled by Ms Samantha Sleiman.[69] By a series of transactions, Jaken transferred $3.6 million to the related party Powerhouse that had the economic effect of reducing the amount of equity in the Kings Cross Property available to Jaken's unsecured creditors ("the Draw Down"). The third parties were found to be knowingly involved in all of this conduct or to have received assets of the Trust (otherwise than as bona fide purchasers for value without notice). As noted above, these findings were not challenged on appeal.

The proceedings giving rise to the appeal

69 On 23 January 2019, Jaken filed a summons seeking removal of a caveat on the Kings Cross Property. By cross-claim, Mr Naaman sought various relief including equitable compensation, an account, damages, interest and costs, as well as orders avoiding the transfer of the Granville Land to Superior, the transfer of the Victorian Properties to PSJK and the Draw Down (collectively, "the Impugned Transactions"). In general terms, the cross-claim sought to enforce the Judgment Debt.

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69 See [60] above.

70 Before the primary judge, Mr Naaman claimed that the Impugned Transactions were part of a dishonest and fraudulent design, in breach of fiduciary duties owed by Jaken to JPG. He made claims for equitable compensation against Mr Peter Sleiman and Mr Tony Sleiman, as well as for knowing receipt by the transferees of the trust property.[70] The primary judge accepted that the relationship between Jaken and JPG was a fiduciary relationship, finding support for his conclusions in the decision of Perry J in *Rothmore Farms Pty Ltd (In liq) v Belgravia Pty Ltd*.[71] His Honour concluded that Jaken was liable for breach of fiduciary duty, and that the third parties knowingly received property subject to a fiduciary duty, or knowingly assisted Jaken's dishonest and fraudulent design in breach of fiduciary duty, and were liable for equitable compensation.[72] The question of quantum of the equitable compensation was reserved for further consideration. After judgment was reserved, receivers were appointed to the Kings Cross Property by NAB and some further applications were made concerning dealings with the Granville Land. The detail of those further applications need not be addressed here.

71 The appeal to the Court of Appeal by Jaken and the other respondents was allowed in part (by majority). The majority judgment was delivered by Leeming JA, with Kirk JA agreeing in separate reasons. Leeming JA concluded that Jaken did not owe a fiduciary obligation to JPG at any time, instead holding that the only final recourse which JPG had against Jaken was the appointment of a receiver. Kirk JA similarly concluded that a fiduciary duty should not be recognised. In dissent on this issue, Bell CJ agreed with the primary judge that a fiduciary obligation was owed to JPG and breached by Jaken, with consequences for the third parties who had knowingly assisted in a dishonest and fraudulent breach of that duty, or received property as a result of the breach of that duty.

72 Unfortunately, this appeal would not have finally resolved all the issues in dispute between the parties. Had the appeal been allowed, the proceedings would have needed to be remitted to the Court of Appeal of the Supreme Court of New South Wales, and eventually to the Equity Division for, among other things, the quantification of the equitable compensation, in relation to the transfer of the Granville Land and the Victorian properties, and the effect of the Draw Down on recourse to the Kings Cross Property.

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70 *Barnes v Addy* (1874) LR 9 Ch App 244.

71 [2005] SASC 117.

72 *Jaken Properties Australia Pty Ltd v Naaman* [2022] NSWSC 517 at [8], [428], [433], [461], [494].

Issues

73 Mr Naaman's sole appeal ground in this Court was that the Court of Appeal was wrong to conclude that Jaken, as successor trustee, did not owe a fiduciary duty to JPG, the former trustee, not to deal with trust assets so as to destroy, diminish or jeopardise JPG's right of indemnity (by exoneration) from those assets. That stated ground is too broad and must fail. As framed, the ground omits reference to critical facts: first, the circumstances that were made known to the successor trustee had the effect that JPG had an existing right of indemnity (by exoneration) which prevailed over the rights of the beneficiaries; and second, the successor trustee, Jaken, and the third parties intentionally took the steps that they did to defeat JPG's right.

74 As will be explained, when circumstances are made known to a successor trustee to the effect that a former trustee has a proprietary interest in the trust assets conferred by the former trustee's right of exoneration (and not merely a contingent right), the successor trustee assumes a responsibility to the former trustee. This would reasonably entitle the former trustee to expect that the successor trustee will act in the interests of the former trustee to the exclusion of its own or a third party's interest, such that the successor trustee owes a fiduciary obligation to the former trustee not to deal with the trust estate intentionally to the prejudice of the former trustee's entitlement to be indemnified from that trust estate.[73]

75 And, as will also be explained, although the analogy with security interests can be misleading, the fact that the obligation is properly characterised as fiduciary is not inconsistent with the loose characterisation of the former trustee's right of indemnity (by reimbursement or exoneration) out of the trust assets for the expenses or liabilities incurred by the trustee as being secured by an equitable lien over the trust assets which takes priority over the claims of beneficiaries.

Standards of conduct: Fiduciaries and fiduciary duties?

Fiduciary relationships

76 Fiduciary duties most commonly arise as an incident of a fiduciary relationship. But it has been rightly observed that "[t]he fiduciary relationship is a concept in search of a principle".[74] There is "no generally agreed and unexceptionable definition" of who is a fiduciary or when a fiduciary relationship

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73 See *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296 at 345 [177]. See also Finn, *Fiduciary Obligations* (1977), ch 2.

74 Mason, "Themes and Prospects", in Finn (ed), *Essays in Equity* (1985) 242 at 246.

will arise[75] other than the need for the relationship to be one that includes an undertaking that gives rise to an expectation that one party (the fiduciary) will act in the best interests of the other.[76] That is why the critical feature of a fiduciary relationship is one in which one person "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".[77] In short, the relationship is characterised by an undertaking of loyalty.

77 In this appeal, it is sufficient to say that a person will be in a fiduciary relationship with another when and insofar as that person has undertaken loyalty in the sense of undertaking to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that they will act in that other's interest to the exclusion of their own or a third party's interest.[78] The concern of the fiduciary principle is to "impose standards of acceptable conduct on one party to a relationship for the benefit of the other where the one has a responsibility for the preservation of the other's interests".[79]

78 The relationships that are, without more, generally recognised as fiduciary are therefore those where an undertaking of loyalty is "inherent in the position"

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75 *Grimaldi* (2012) 200 FCR 296 at 345 [177].

76 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97; *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 165 at 196-197. See also *Norberg v Wynrib* [1992] 2 SCR 226 at 273; *Galambos v Perez* [2009] 3 SCR 247 at 277-278 [69]; Scott, "The Fiduciary Principle" (1949) 37 *California Law Review* 539 at 544.

77 *Hospital Products* (1984) 156 CLR 41 at 96-97. See further Miller, "The Fiduciary Relationship", in Gold and Miller (eds), *Philosophical Foundations of Fiduciary Law* (2014) 63 at 69.

78 In the language of *Grimaldi* (2012) 200 FCR 296 at 345 [177]. See also *Hospital Products* (1984) 156 CLR 41 at 96-97; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 95-96; *Breen* (1996) 186 CLR 71 at 137; *Jaken Properties* (2023) 112 NSWLR 318 at 324-325 [10]. See also Finn, "The Fiduciary Principle", in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1 at 2, 46.

79 Finn, "The Fiduciary Principle", in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1 at 2; see also *Jaken Properties* (2023) 112 NSWLR 318 at 325 [12].

of the fiduciary:[80] lawyer to client;[81] agent and principal;[82] partner to partner;[83] to name just a few.[84] This is particularly so where the relationship undertaken requires the custody of another person's property or property in which another person has rights.[85] Hence, the paradigm of a fiduciary relationship is often said to be that of an express trustee and beneficiary.[86] The express trustee undertakes or assumes responsibility for property over which the beneficiary has rights. It is that objective assumption of responsibility to act in the best interests of the other that is the "trust" in a fiduciary relationship; subjective "trust" is not a necessary condition for the presence of a fiduciary relationship.[87] So too, in connection with the duties of company directors, fiduciary duties will arise in relation to the company, given the power they have to deal with company property and their assumption of responsibility for that company property in the best interests of the company.[88]

79 But fiduciary relationships are not confined to particular established categories of fiduciary relationship where there is a natural expectation of loyalty.

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80 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 35 [88].

81 *Breen* (1996) 186 CLR 71 at 107; *Maguire v Makaronis* (1997) 188 CLR 449; *Brown v Inland Revenue Commissioners* [1965] AC 244. See also, in relation to solicitors who do have custody of property, *Longstaff v Birtles* [2002] 1 WLR 470.

82 *Breen* (1996) 186 CLR 71 at 107.

83 *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 407; *Chan v Zacharia* (1984) 154 CLR 178 at 196; *John Taylors (a firm) v Masons (a firm)* [2005] WTLR 1519.

84 *Hospital Products* (1984) 156 CLR 41 at 96.

85 *Longstaff* [2002] 1 WLR 470.

86 See Finn, *Fiduciary Obligations* (1977) at 8. See also Birks, *The Content of Fiduciary Obligation* (2000) 34 Israel Law Review 3 at 34.

87 *Hospital Products* (1984) 156 CLR 41 at 69, 141-142; *Breen* (1996) 186 CLR 71 at 93, 137; *Bofinger* (2009) 239 CLR 269 at 291 [50]. See also *White v Jones* [1995] 2 AC 207 at 271-273.

88 See, eg, *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; *Breen* (1996) 186 CLR 71 at 107; *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443; *Cullen Investments Ltd v Brown* [2017] EWHC 1586 (Ch).

The "categories" of established fiduciary relationship are not closed[89] and a fiduciary relationship might also arise from "an undertaking [of loyalty] ... found in the facts of a particular case".[90] Conversely, even in cases falling within an established category, the circumstances might deny the existence of an undertaking of loyalty.[91] Hence, to seek to categorise or pigeonhole a particular relationship as fiduciary, or because it has some other legal characterisation to treat it as though it cannot also be fiduciary, is to err. The existence of a fiduciary relationship does not depend on the existence, or absence,[92] of any particular circumstances, although various circumstances of course may point to the existence of a fiduciary duty or obligation.[93]

80 Further, a legal relationship might not involve any expectation of loyalty but there might be obligations of loyalty undertaken in the course of that relationship. Hence, the fact that a legal relationship in itself is not fiduciary does not preclude aspects of the relationship giving rise to a fiduciary obligation.[94] In other words, "a person may stand in a fiduciary relationship to another for one purpose but not for others".[95]

Fiduciary obligations

81 There is no positive fiduciary obligation to act loyally or in the best interests of another person. Instead, fiduciary obligations (that is, obligations peculiar to

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89 *Hospital Products* (1984) 156 CLR 41 at 96; *Breen* (1996) 186 CLR 71 at 107.

90 *John Alexander's* (2010) 241 CLR 1 at 35 [88].

91 *Chan* (1984) 154 CLR 178 at 196; *Hospital Products* (1984) 156 CLR 41 at 69, 102; *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd [No 4]* (2007) 160 FCR 35 at 77 [280], 81 [314].

92 *Jaken Properties* (2023) 112 NSWLR 318 at 325 [13]. See also Finn, "The Fiduciary Principle", in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1 at 46, 54; *Plowright v Lambert* (1885) 52 LT 646 at 652.

93 See, eg, *Breen* (1996) 186 CLR 71 at 107-108.

94 *Hospital Products* (1984) 156 CLR 41 at 98; *Breen* (1996) 186 CLR 71 at 108.

95 *Jaken Properties* (2023) 112 NSWLR 318 at 323 [8], citing *Hospital Products* (1984) 156 CLR 41.

fiduciaries) arise because a person has undertaken to act in another's interests.[96] Equity then recognises the fiduciary proscriptive obligations. The widely recognised instances of those obligations are, in general terms, the obligation upon the fiduciary not to profit from their position and the obligation upon the fiduciary not to put themself in a position of actual or potential conflict between their duties to the principal and either their own interests or duties to others.[97] The scope of those obligations will be "moulded" by the particular detail of the undertaking by the fiduciary.[98] For instance, a fiduciary who undertakes an obligation as a trustee or director might do so on terms that they will be remunerated for work done. Or a fiduciary might undertake to perform work as an agent on the expressed basis that they would also act for competitors.[99]

82 Any analysis of the existence and extent of fiduciary obligations, whether they arise in the course of a fiduciary relationship or not, requires identification of "the subject matter over which the fiduciary obligations extend".[100] That inquiry is necessary because it reflects two important coterminous ideas. Fiduciary relationships are of many different types and where there is a fiduciary relationship the court *may* interfere not only to protect the person to whom the fiduciary obligation is owed but also to prevent a fiduciary retaining the benefit of acts which, between persons in a wholly independent position, would remain unaffected. But the *nature* of the fiduciary obligation must be one that justifies the interference as an aspect of the fiduciary's undertaking of loyalty. It is for that reason erroneous to regard any obligation owed by a fiduciary as attaching to

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96 *Hospital Products* (1984) 156 CLR 41 at 137; *Breen* (1996) 186 CLR 71 at 113, 137; *Pilmer* (2001) 207 CLR 165 at 197-198 [74]; *Howard v Federal Commissioner of Taxation* (2014) 253 CLR 83 at 106 [56].

97 *Boardman v Phipps* [1967] 2 AC 46 at 123*; Regal (Hastings)* [1967] 2 AC 134 at 137; *Chan* (1984) 154 CLR 178 at 198-199*; Breen* (1996) 186 CLR 71 at 93. See also *Agricultural Land Management Ltd v Jackson [No 2]* (2014) 48 WAR 1 at 51-53 [265]-[274].

98 *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 WLR 1126 at 1130; [1973] 2 All ER 1222 at 1225-1226, quoting *Birtchnell* (1929) 42 CLR 384 at 408 and *Boardman* [1967] 2 AC 46 at 123; *Hospital Products* (1984) 156 CLR 41 at 102; *Kelly v Cooper* [1993] AC 205 at 215; *Clay v Clay* (2001) 202 CLR 410 at 432-433 [46]; *Hilton v Barker Booth & Eastwood (a firm)* [2005] 1 WLR 567 at 575 [30]; [2005] 1 All ER 651 at 661.

99 *Kelly v Cooper* [1993] AC 205 at 215.

100 *Birtchnell* (1929) 42 CLR 384 at 409; *Breen* (1996) 186 CLR 71 at 82.

the fiduciary's undertaking of loyalty. Not every duty owed by a fiduciary is a fiduciary duty.[101] That is why Fletcher Moulton LJ immediately proceeded to say, in words that are as true today as they were in the 1900s – "[t]here is no class of case in which one ought more carefully to bear in mind the *facts* of the case".[102] It is because fiduciary relationships may take a wide variety of forms and fiduciaries may owe a wide variety of obligations that it is necessary to identify the nature of the particular fiduciary relationship and to define any relevant obligations that flow from it.[103]

83 Therefore, the fact that in some circumstances persons have equitable proprietary rights in relation to the property of others where no undertaking of loyalty can be inferred and no fiduciary obligation is owed to them and, yet, in other instances, a fiduciary obligation is owed to them, is not a category error and does not confuse proprietary and personal rights.[104] As we have seen, equitable proprietary rights and fiduciary obligations can exist together; they are not inconsistent. The nature of the inquiry about each is different. The result of the inquiry is different. The consequences for third parties are different.

84 As to third parties, characterising a relationship as "fiduciary" has implications for personal remedies available against those who receive property which was the subject of the fiduciary obligation or who assist in a breach of fiduciary duty. The "rule" stated in *Barnes v Addy*[105] is that agents who are not trustees or fiduciaries are not personally liable in respect of transactions on which

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101 *Permanent Building Society (In liq) v Wheeler* (1994) 11 WAR 187 at 237. See also *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 205; *Breen* (1996) 186 CLR 71 at 137; *Makaronis* (1997) 188 CLR 449 at 473; *Bristol and West Building Society v Mothew* [1998] Ch 1 at 17; *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 at 274. See further Gummow, *Change and Continuity: Statute, Equity, and Federalism* (1999) at 43.

102 *In re Coomber; Coomber v Coomber* [1911] 1 Ch 723 at 728-729 (emphasis added). See also *Breen* (1996) 186 CLR 71 at 82-83, quoting *Hospital Products* (1984) 156 CLR 41 at 102.

103 *Chan* (1984) 154 CLR 178 at 195.

104 For example, not all bailees are fiduciaries for the bailor: see *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676; [1976] 2 All ER 552; *Re Andrabell Ltd (In liq)* [1984] 3 All ER 407 at 414; *Hospital Products* (1984) 156 CLR 41 at 105.

105 (1874) LR 9 Ch App 244 at 251-252.

equitable relief would be granted "unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees". The first part of that sentence ("the first limb") is commonly referred to as "knowing receipt" and the second part ("the second limb") as "knowing assistance".[106] As to the first limb, it has been assumed that "knowing receipt" involves not just trust property, but also property which was subject to a fiduciary obligation.[107] In Australia, the second limb involves a defendant being liable for assisting a trustee or fiduciary with knowledge of a dishonest and fraudulent design on the part of the trustee or fiduciary.[108]

85 The statements in *Barnes v Addy* are not exhaustive of the circumstances in which a third party might be accountable as a constructive trustee in relation to their participation in a breach of fiduciary duty by the fiduciary.[109] In particular, the application of the "rule" in *Barnes v Addy* is separate from circumstances where the third party is the corporate creature, vehicle or alter ego of the wrongdoing fiduciary such that there is joint and several liability between the fiduciary and the company.[110] But where a director who has knowledge of fiduciary wrongdoing (whether their own or a third party's) which can be imputed to the company and the wrongdoing itself affects a transaction or dealing involving the company, the company's wrong is characteristically understood as involving *Barnes v Addy* liability.[111] Similarly, where the third party knowingly induces or procures a breach of fiduciary duty, whether for their own benefit or otherwise (as the controlling minds of the successor trustee were found to have done in this case),[112] it is not necessary to show any dishonest or fraudulent design.[113] In that circumstance,

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106 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 140 [112], 159 [159].

107 *Farah Constructions* (2007) 230 CLR 89 at 141 [113].

108 *Farah Constructions* (2007) 230 CLR 89 at 159 [160].

109 *Farah Constructions* (2007) 230 CLR 89 at 159 [161]; *Grimaldi* (2012) 200 FCR 296 at 356 [242].

110 *Grimaldi* (2012) 200 FCR 296 at 357 [243].

111 *Grimaldi* (2012) 200 FCR 296 at 357 [244].

112 See [56] above.

113 *Farah Constructions* (2007) 230 CLR 89 at 159 [161]; *Grimaldi* (2012) 200 FCR 296 at 357 [245].

the party that knowingly induces or procures the breach is jointly and severally liable for the equitable compensation which the fiduciary may be obliged to pay.

The successor trustee's relationship with, and obligations to, the former trustee

Trustee's right to be indemnified by exoneration out of trust assets

86 Although the principles set out above concerning fiduciary relationships and fiduciary obligations were largely not in dispute, it is useful to restate them because the principal issue in this proceeding is to identify what flows from the trustee's right to be indemnified (by exoneration) out of trust assets in priority to the beneficiaries when a successor trustee assumes the role of trustee, objectively accepting the former trustee's equitable proprietary interest in relation to the trust estate conferred by the former trustee's right of exoneration.

87 Where a trustee acting within its powers properly or reasonably incurs a debt or liability in the course of the administration of the trust, although the trustee is personally liable for that debt and liability,[114] it is entitled to indemnity out of the trust estate.[115] If the trustee has not discharged the liability, the trustee has a right of exoneration and is entitled to apply the trust property in discharge of the debt or liability and if the trustee has discharged the liability, the trustee has a right of reimbursement.[116]

88 The right of indemnity generates for the trustee an equitable proprietary interest in relation to the trust estate.[117] To the extent of that equitable

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114 *Carter Holt* (2019) 268 CLR 524 at 540 [25]. See also *Vacuum Oil* (1945) 72 CLR 319 at 324.

115 *Octavo Investments* (1979) 144 CLR 360 at 367, citing *Vacuum Oil* (1945) 72 CLR 319; *Carter Holt* (2019) 268 CLR 524 at 540 [24], 542-543 [29], 561 [83], 577-581 [129]-[139].

116 *Carter Holt* (2019) 268 CLR 524 at 542-544 [29]-[32], 561 [83], 577-578 [130]. If the trustee has discharged the liability out of its individual property, it is entitled to reimbursement. The circumstances of this appeal are only concerned with the right of exoneration. See also Conaglen, *Trustees Competing over Indemnity Right*s (2024) 48(1) *Melbourne University Law Review* 1 at 5-15.

117 *Octavo Investments* (1979) 144 CLR 360 at 369-370; *Buckle* (1998) 192 CLR 226 at 246-247; *Carter Holt* (2019) 268 CLR 524 at 544 [32], 559-562 [80]-[84], 577-582 [128]-[142]. See also *Bruton* (2009) 239 CLR 346 at 358-359 [43], [47]; *Jones* (2018) 260 FCR 310 at 324-325 [49], 332 [87].

proprietary interest, this Court has repeatedly held that the assets of the trust are not held solely for the beneficiaries and the trustee's equitable proprietary interest survives the removal of the trustee.[118] The nature of that right of indemnity has been loosely described as a security interest in the nature of a "lien"[119] or an "equitable charge".[120] But that loose description is not accurate. A subsequent trustee owes no debt to a former trustee. And, although it is a "prevalent notion",[121] it is a fundamental error to treat a trust as a legal person including with capacities to owe debts.[122] Hence, the right of indemnity does not secure any underlying debt and it can be misleading to rely upon analogies between the right of indemnity and true security rights such as mortgages or charges, which operate only to ensure payment of a debt by another person.[123] To adapt the words of four members of this Court in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq)*,[124] the right of indemnity is a right of recourse to the trust assets which does not exist "for the purpose of satisfying some liability due [from the trust] to the [former trustee]".

89 The trustee's equitable proprietary interest in relation to the trust assets that arises from the right of indemnity was therefore repeatedly described by Bell, Gageler and Nettle JJ[125] and Gordon J[126] in *Carter Holt*, in the same terms as the interests of beneficiaries under a trust, as a "beneficial interest in the trust assets". This reference to a "beneficial interest" demonstrates the close identity of the right of indemnity and the proprietary interest of the beneficiaries of a bare

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118 *Octavo Investments* (1979) 144 CLR 360 at 367; *Buckle* (1998) 192 CLR 226 at 246-247 [50]; *Carter Holt* (2019) 268 CLR 524 at 542 [28], 561 [83], 582 [142].

119 *Vacuum Oil* (1945) 72 CLR 319 at 336.

120 *Buckle* (1998) 192 CLR 226 at 246-247 [50].

121 *Kelly v Mina* [2014] NSWCA 9 at [103].

122 *Agricultural Land Management Ltd v Jackson [No 2]* (2014) 48 WAR 1 at 58 [302]; *Carter Holt* (2019) 268 CLR 524 at 577 [129].

123 See *Equity Trust (Jersey) Ltd v Halabi* [2023] AC 877 at 916 [173], quoting *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties* [1984] 1 Qd R 576 at 585.

124 (2000) 202 CLR 588 at 596 [6].

125 *Carter Holt* (2019) 268 CLR 524 at 560 [80], 562 [84]-[85], 568 [95].

126 *Carter Holt* (2019) 268 CLR 524 at 579-581 [137], 582 [142], quoting *Buckle* (1998) 192 CLR 226 at 246-247 [48]-[51].

trust fund, in the sense explained by Gummow J as a trustee who holds legal rights to an asset "without any duty or further duty to perform, except to convey ... upon demand to the beneficiary or beneficiaries or as directed by them".[127] Like the trustee of a bare trust, performance of the subsequent trustee's duty involves no more than distribution of the trust fund to the extent of the indemnity. Indeed, in *Equity Trust (Jersey) Ltd v Halabi*,[128] Lord Richards JSC and Sir Nicholas Patten (with whom the other members of the Privy Council agreed) rightly analogised between the former trustee's right of indemnity and the equitable proprietary interest of a purchaser of land. The Privy Council had earlier recognised the vendor with legal title to the land under an unconditional contract as a bare trustee for the purchaser.[129]

90 With this equation of the equitable proprietary interest of the former trustee with that of the beneficiaries of a trust, it is unsurprising that there is no doubt that a former trustee of a trust can obtain relief from a court to prevent a successor trustee from dealing in trust assets in ways that would destroy, diminish or jeopardise the former trustee's equitable proprietary interest in relation to the trust estate.[130] It has never been suggested that this relief is given by the court merely as protection of a future court process with the successor trustee otherwise at liberty to engage in conduct intentionally designed to destroy the former trustee's equitable proprietary interest in the trust estate. Instead, as Leeming JA rightly recognised in the Court of Appeal, the relief is given because "the successor trustee is subject to [that] duty".[131]

91 Thus it was common ground in this appeal that there were methods available to the former trustee, JPG, to seek to protect its rights, and to enforce Jaken's duties, being: lodging a caveat in respect of its interest in the property;[132] seeking injunctive relief from a court of equity against apprehended dissipation

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127 *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271 at 281.

128 [2023] AC 877 at 915-916 [169]-[174], especially at [172].

129 *Maharaj v Johnson* [2015] PNLR 27 at 560 [17], citing *Wall v Bright* (1820) 1 Jac & W 494 at 503 [37 ER 456 at 459].

130 See *Lemery* (2008) 74 NSWLR 550 at 561 [50]; *Agusta Pty Ltd v Provident Capital Ltd* [2012] NSWCA 26 at [55].

131 *Jaken Properties* (2023) 112 NSWLR 318 at 330-331 [37].

132 See, eg, *Black v Garnock* (2007) 230 CLR 438 at 470-471 [83]. See also *Jaken Properties* (2023) 112 NSWLR 318 at 356 [141], 373 [233].

of the property;[133] seeking the appointment of a receiver in respect of the property;[134] and applying for judicial sale of the trust property.[135] But there is no reason to infer that these remedies are exhaustive of the ways that equity will respond to the actions of the successor trustee, in breach of its duties, which destroy, diminish or jeopardise the former trustee's right of indemnity. And as the facts of this case demonstrate, the fraudulent design may be such that it is too late to seek relief by one or more of these means because the "property" no longer exists or the fraudulent design is so complicated in its execution (whether by number or nature of steps taken, or both) that seeking relief by only those methods is too complicated, too time consuming, or futile.[136]

The nature of the relationship between successor trustee and former trustee

92 The issue in the appeal is not resolved by looking *only* at the nature or extent of the former trustee's rights against the trust fund or *only* by recognising that the successor trustee holds property in which the former trustee has a preferred equitable proprietary interest. Rather, the issue is to be decided by recognising, first, that the former trustee in this case had an existing right of exoneration out of the trust property (not merely a contingent right) which gave rise to equitable proprietary rights in relation to the trust estate and, second, that the successor trustee was bound to prioritise that right over the claims of the beneficiaries of the trust.

93 As Bell CJ observed in his dissenting reasons on this issue in the Court of Appeal, the relationship between the successor trustee and the former trustee in these circumstances is analogous to that of a bailee who enters a contract, or otherwise objectively accepts a responsibility, involving custody of the goods of a bailor otherwise than for the bailee's own benefit.[137] Assuming that there is no

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133 See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 241 [91]; *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at 216-217 [85]. See also *Jaken Properties* (2023) 112 NSWLR 318 at 356 [141].

134 See Tyler, Young and Croft, *Fisher and Lightwood's Law of Mortgage*, 3rd Aust ed (2014) at 18.4; *Agusta Pty Ltd v Provident Capital Ltd* [2012] NSWCA 26 at [83]. See also *Jaken Properties* (2023) 112 NSWLR 318 at 356 [141].

135 *Hewett v Court* (1983) 149 CLR 639 at 663. See also *Jaken Properties* (2023) 112 NSWLR 318 at 356 [141].

136 See, eg, *Brady v Stapleton* (1952) 88 CLR 322.

137 *Jaken Properties* (2023) 112 NSWLR 318 at 326-327 [20].

term of the contract or arrangement "which contemplates that the bailee will use the chattel for [their] own benefit",[138] the bailee will "stand[] in a fiduciary relationship" with the bailor.[139] Likewise, a fiduciary relationship between the successor trustee and the former trustee arises upon the acceptance of the office of trustee by the successor trustee in circumstances in which the successor trustee holds assets to which the beneficiaries and the former trustee have equitable proprietary rights. In those circumstances it is not contemplated that the trust assets will be used for the benefit of the successor trustee.

94 The successor trustee is therefore not merely in a fiduciary relationship with the beneficiaries of an express trust who hold equitable proprietary rights in relation to the trust assets. The successor trustee is also in a fiduciary relationship with a former trustee where the circumstances make apparent that the former trustee has a right of exoneration from the trust assets. It would be peculiar indeed if the critical feature of a fiduciary relationship – an undertaking 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 – supported only a fiduciary relationship with the beneficiaries of the trust and not with the former trustee whose equitable proprietary interest in relation to the trust assets, objectively apparent to the successor trustee, is given legal priority over that of the beneficiaries. It is of no moment whether the trust is a bare trust, in which the objectively apparent interests of the former trustee and the beneficiaries are identical to the extent of the indemnity, save that the former prevails over the latter, or a trust where the trustee owes positive duties of investment.

95 To adopt and adapt the words of Dawson and Toohey JJ in *Breen v Williams*, it is not the case that whenever there is a job to be performed and entrusting the job to someone involves reposing substantial trust and confidence in the person that a fiduciary relationship arises.[140] It does not. But where a person has undertaken to perform a function for, or has assumed a responsibility to, another as would thereby reasonably entitle that other to expect that they will act in that other's interest to the exclusion of their own or a third party's interest, such a relationship may be fiduciary. The objective undertaking of an express trustee, even of a bare trust, is to act in relation to the trust assets in the interests of those holding equitable proprietary rights in relation to those assets. The relationship is

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138 Palmer, *Palmer on Bailment*, 3rd ed (2009) at 1567 [32-005].

139 *Hospital Products* (1984) 156 CLR 41 at 101. See also *Brambles Security Services Ltd v Bi-Lo Pty Ltd* [1992] Aust Torts Rep ¶81-161 at 61,275.

140 (1996) 186 CLR 71 at 93.

one in which the former trustee relevantly stands in the same position of vulnerability as the beneficiaries of the trust with respect to its equitable proprietary interests in relation to the trust assets, as to which the successor trustee has accepted responsibility. Put in different terms, in circumstances where no positive obligation is owed to either a former trustee or beneficiaries, the nature and content of the rights in substance are the same and it does not matter whether the successor trustee is described as holding the trust property *for* the beneficiaries or the former trustee, or *subject* to the interest of the beneficiaries or the former trustee.

96 In the circumstances of this appeal, the successor trustee assumed a responsibility to the former trustee by accepting appointment to replace the former trustee as trustee of the trust and receiving trust property, in circumstances in which it was objectively apparent that the former trustee had a right of exoneration out of trust assets for expenses and liabilities properly incurred by it as trustee of the trust, and not merely a contingent right. In those circumstances, the former trustee was entitled to expect that the successor trustee would act in its interests as well as those of the beneficiaries of the trust, to the exclusion of the interests of its own as the successor trustee or a third party's interest.[141]

The nature of the duty owed by the successor trustee

97 In the Court of Appeal, as in this Court, it was not in dispute, and Leeming JA accepted, that a successor trustee "is subject to a duty not to deal with [the trust] assets so as to prejudice the former trustee's entitlement to be indemnified from those assets". Leeming JA described that duty as "merely the Hohfeldian correlative of that entitlement [to be indemnified]".[142] With respect, however, the correlative of an entitlement to be indemnified is merely a liability to indemnify. Any proscriptive duty of a successor trustee not to deal with trust assets so as to prejudice the former trustee's entitlement to be indemnified from those assets must arise for different reasons.

98 Although the duty described by Leeming JA, and set out in the paragraph above, was not in dispute, its precise description was too broad. It might be doubted whether a successor trustee who acts with care owes any duty to a former trustee to prevent accidental prejudice to the former trustee's right of indemnity. And any liability of a successor trustee to a former trustee for acts that honestly

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141 See *Grimaldi* (2012) 200 FCR 296 at 345 [177]. See also Finn, *Fiduciary Obligations* (1977), ch 2.

142 *Jaken Properties* (2023) 112 NSWLR 318 at 330-331 [37].

but carelessly prejudice the former trustee's right of indemnity might be seen as a separate obligation which is a manifestation of a duty to exercise care.[143] The relevant obligation is, instead, best described as an obligation owed by the successor trustee to the former trustee not to deal with the trust estate so as intentionally to destroy, diminish or jeopardise the former trustee's entitlement to be indemnified from that trust estate.

99 The identified obligation is proscriptive and limited. It is a duty which requires the successor trustee to hold and deal with the trust funds in a way that does not intentionally defeat the interest the former trustee has in the trust property. That is, it is a duty to act in relation to the trust assets, in a disinterested manner, consistently with the right of the former trustee to be exonerated out of the trust estate. The subject matter of the duty is limited: not intentionally to defeat the continued holding and realisation of the former trustee's interest in the trust estate.

100 That proscriptive duty is no different in nature from other proscriptive duties of a trustee. Indeed, although it was not argued in this way before this Court, the proscriptive duty might be seen merely as a particular expression of a fiduciary's general duty not to put themself in a position of actual or potential conflict between their own interests and their undertaken duty to the former trustee, where their personal interest arises from whatever might motivate intentionally defeating the interest of the former trustee in the trust property.[144] In any event, in *Breen*, Gaudron and McHugh JJ emphasised that fiduciary obligations arise because a person has come under an obligation to act in another's interests and it is as a result of that obligation that equity imposes proscriptive obligations.[145] Their Honours, together with Dawson and Toohey JJ, did not suggest, and should not be taken as suggesting, that the proscriptive fiduciary obligations of a fiduciary were limited to the proscriptive duties not to obtain any unauthorised benefit from the relationship and not to put themself in a position of actual or potential conflict.

101 So understood, the identified fiduciary obligation is not inconsistent with a trading trust continuing to trade in the ordinary course of business, or inconsistent

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143 See *Wheeler* (1994) 11 WAR 187 at 237. See also *Merrett Syndicates* [1995] 2 AC 145 at 205; *Breen* (1996) 186 CLR 71 at 137; *Makaronis* (1997) 188 CLR 449 at 473; *Mothew* [1998] Ch 1 at 17; *R T Thomas & Family* (1998) 45 NSWLR 262 at 274. See further Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (2010) at 35-36.

144 See, eg, *Chan* (1984) 154 CLR 178 at 198-200; *Breen* (1996) 186 CLR 71 at 93, 113.

145 (1996) 186 CLR 71 at 113.

with a successor trustee owing the beneficiaries obligations to perform the duties required by the trust instrument or undertaking. The former trustee's right to indemnity, which arises by operation of law and confers a proprietary interest in the trust assets, takes priority over the claims of the beneficiaries, but the identified fiduciary obligation depends upon the successor trustee acting intentionally so as to defeat the interest of the former trustee in the trust property.[146]

102 It is finally necessary to address the question of coherence, or, as the respondents submitted, lack of coherence, between the imposition of such a limited proscriptive fiduciary obligation and the *Trustee Act 1925* (NSW), the Trust Deed and the Deed of Appointment. None of them preclude, contradict, or render futile the imposition of the limited identified fiduciary obligation.

103 First, a trustee has a statutory right under s 59(4) of the *Trustee Act*[147] 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. The respondents' argument of alleged inconsistency misconceives the subject matter, nature and scope of the identified duty. The obligation does not prevent any successor trustee from acting in the interests of beneficiaries generally, or in the case of a trading trust, from trading generally. The subject matter, nature and scope of the fiduciary obligation is not the undertaking of becoming a trustee at large. It is not imposed where the successor trustee has not assumed a responsibility to the former trustee as would reasonably entitle the former trustee to expect that the successor trustee will act in the interests of the former trustee to the exclusion of its own or a third party's interest. It cannot arise where the successor trustee does not intend to defeat the interests of the former trustee in the trust assets arising from the former trustee's right of indemnity (and not merely a contingent right).

104 Second, the protections afforded to the former trustee under the Trust Deed or the Deed of Appointment are consistent with the fiduciary obligation. Clause 10 of the Trust Deed provided that the trustees shall not be responsible for any loss or damage to the "Trust Fund" or any part of it or to any person by the exercise of (or the failure to exercise) any discretion or power unless committed in "conscious and fraudulent bad faith" by the trustees. Clause 16 of the Trust Deed, headed "Indemnity for the Trustees", provided that 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 execution or attempted execution or as

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146 *Lemery* (2008) 74 NSWLR 550 at 553 [16], citing *Octavo Investments* (1979) 144 CLR 360 at 367, 370 and *Buckle* (1998) 192 CLR 226 at 246. See also *Carter Holt* (2019) 268 CLR 524 at 544 [32].

147 See also, eg, s 36(2) of the *Trustee Act 1958* (Vic).

a consequence of the failure to exercise any of the [trustees'] authorities, powers and discretions**.** Next, two clauses in the Deed of Appointment were identified by the respondents. Clause 1.5, headed "Indemnity", provided that the successor trustee indemnified the former trustee against all debts which the former trustee had incurred and which were unpaid at the time of execution of this deed. Clause 2.1, headed "Appointment of New Trustee" then provided that the Appointor appointed the successor as trustee of the Trust in place of the former trustee "to undertake and to assume, as from the date of [the] deed the trusts, powers, duties and obligations conferred by the Trust Deed upon the trustee of the Trust as if the [successor trustee] were a party of the Trust Deed".

105 There is no incoherence or inconsistency between the imposition of the identified fiduciary obligation and the Trust Deed or the Deed of Appointment. The respondents' argument to the contrary misconceives the subject matter, nature and scope of the identified obligation. It does not prevent any successor trustee from acting in the interests of beneficiaries generally, or in the case of a trading trust, from trading generally. The subject matter, nature and scope of the fiduciary obligation is not a trustee at large and it cannot arise where the successor trustee has no knowledge of a former trustee's right to indemnity. Moreover, a fiduciary obligation does not arise only where no other legal obligations exist.

106 Third, the recognition of the obligation is also consistent with *Rothmore Farms*.[148] That case involved a trustee transferring trust assets to a beneficiary and a related party to defraud trust creditors. Perry J reasoned that, when the successor trustee acquired legal ownership of the trust assets, it "became a fiduciary vis a vis" the former trustee or a "constructive trustee with respect to the protection of [the former trustee's] right of indemnity".[149] The successor trustee was "obliged not to act with respect to the assets of the Trust in a way which jeopardised [the former trustee's] right of indemnity and its lien over the assets".[150] It may be accepted that it is unclear whether the characterisation of the relationship as fiduciary was the subject of argument. It is sufficient to say that the reasoning and outcome in *Rothmore Farms* does not detract from the analysis adopted here.

Conclusion

107 For those reasons, the appeal should be allowed. Orders 3 and 4 made by the Court of Appeal on 8 September 2023 and orders 1, 2 and 4 made by the Court

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148 [2005] SASC 117.

149 [2005] SASC 117 at [73].

150 [2005] SASC 117 at [73].

of Appeal on 26 October 2023 should be set aside. The proceeding should be remitted to the Court of Appeal of the Supreme Court of New South Wales for that Court to consider what further orders are necessary and the basis of the remitter to the Equity Division in light of these reasons.