# Private Client Briefing

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# *Naaman v Jaken Properties Pty Limited* [2025] HCA 1

In *Naaman v Jaken Properties Pty Limited* [2025] HCA 1, the High Court of Australia was divided on whether a trustee's right to indemnification can give rise to fiduciary obligations between successor and former trustees.

## Background

Jaken Property Group Pty Ltd (**JPG**) was the trustee of the Sly Family Trust (**Trust**), which owned property worth around AU$9 million in Victoria and New South Wales. In 2006, Mr Naaman brought proceedings against JPG as trustee, seeking AU$2 million for breach of a guarantee. In early 2007, Jaken Properties Australia Ptd Ltd (**Jaken**) replaced JPG as trustee.

In 2016, after various legal wranglings over a number of years, judgment was entered for Mr Naaman against JPG for AU$3.4 million (**Judgment Debt**). The court declared that JPG was entitled to be indemnified out of the Trust's assets for liabilities incurred in its capacity as trustee, including in respect of the Judgment Debt.[1]

Unfortunately for Mr Naaman, since taking over as trustee, Jaken had dissipated the majority of the Trust's assets in order to put them beyond JPG's reach. By the time of the 2016 court decision, the assets of the Trust were insufficient to meet the Judgment Debt.

As part of other court proceedings in 2019, Mr Naaman sought enforcement of the Judgment Debt. He claimed that the various transactions by which the Trust's assets had been dissipated "were part of a dishonest and fraudulent design, in breach of fiduciary duties owed by Jaken to JPG."[2]

In the Supreme Court of New South Wales (being the court of first instance), the judge found that Jaken and JPG were in a fiduciary relationship, which Jaken had breached by dissipating the trust assets. The third parties to whom the assets had been transferred had assisted Jaken with this breach, and were liable to pay equitable compensation.

On appeal by Jaken, the Court of Appeal disagreed, concluding that Jaken did not owe a fiduciary obligation to JPG. While it was 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, that duty was not fiduciary. Mr Naaman appealed.

Each of the parties and courts agreed on the fundamental principles that:

- a trustee has an entitlement to be indemnified out of the trust assets for expenses and liabilities properly incurred by the trustee in the execution of the trust;
- the trustee has a beneficial interest in the trust assets commensurate with that entitlement, which takes priority over the beneficial interests of the trust's beneficiaries; and
- the entitlement to indemnification (and the associated beneficial interest) survives replacement of the trustee by a successor trustee.

The sole ground of appeal was accordingly whether the majority of the Court of Appeal was wrong to conclude that Jaken, as successor trustee, did not owe a fiduciary duty to JPG not to deal with trust assets so as to destroy, diminish, or jeopardise JPG's right to indemnification from them.

1. *Naaman v Jaken Properties Pty Limited* [2025] HCA 1 at [67].
2. At [70].

# *Naaman v Jaken Properties Pty Limited* [2025] HCA 1

## The Decision

The majority of the High Court held that a successor trustee does not owe a fiduciary obligation to a former trustee in respect of their entitlement to indemnification from trust assets. This is due to the nature of the trustee's beneficial interest in the trust assets, which does not create a personal liability on the part of any person to indemnify a trustee or former trustee, but simply gives the trustee the right to have trust assets applied to reimburse them. While a former trustee is vulnerable to unnotified and potentially clandestine conduct on the part of a successor trustee, vulnerability is not the touchstone of a fiduciary relationship: "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 [their own interests]."[3] The majority of the Court further cautioned:[4]

> [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.

By a majority of four to three, the appeal was dismissed.

## Analysis

In New Zealand, it is settled law that a trustee's right to indemnification creates an equitable lien over all the trust property.[5] It is also the case that a creditor may be subrogated to a trustee's right of indemnity, and to the lien.[6] However, the New Zealand courts have not considered whether this lien creates a beneficial interest in the trust fund, nor directly faced the question of whether such a lien is capable of giving rise to fiduciary obligations in a successor trustee. Consequently, our courts will likely be influenced by the Australian High Court should a similar situation arise here.[7]

3. At [43].
4. At [33]-[35], citing *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 165 at 197 [71], itself quoting *Norberg v Wynrib* [1992] 2 SCR 22 at 312.
5. *Niak v Davidson* HC Dunedin CP15/98, 2 June 1999.
6. Our courts have previously relied on Australian authority regarding equitable liens, see *Cummins v Body Corporate 172108* [2022] NZCA 658 at [12].
7. *Marcus v Marcus* [2024] EWHC 2086 (Ch), at [11].

# ***Marcus v Marcus*** [2024] EWHC 2086 (Ch)

**In *Marcus v Marcus* [2024] EWHC 2086 (Ch), the English High Court finds that "*children*" in a trust's class of beneficiaries can include stepchildren.**

## Background

Stuart Marcus was an English toy tycoon. On 29 November 2003, he settled the SN Marcus Settlement (**Trust**) for the benefit of "*the children and remoter issue of the Settlor*" and their spouses. At the time the Trust was settled, Stuart believed he and his wife Patricia had only two children; Edward (born 1978) and Jonathan (born 1981). Stuart believed this up until his death in February 2020.

However, in March 2010, Patricia informed Edward that he was actually born from an extramarital affair between Particia and a Norwich based solicitor. Jonathan found out in May 2022 and, despite being raised as Edward's brother, brought a claim seeking a declaration that Edward was not a beneficiary of the Trust. The Trust contained £14.5 million worth of shares in three toy companies.

## The Decision

The primary issues for the court were:

1. whether Edward was Stuart's biological son; and
2. whether the word "children" in the Trust Deed included stepchildren.

The first issue was straightforward. Both the expert DNA evidence and Patricia's witness evidence overwhelmingly indicated that Edward was not Stuart's biological son. The second issue was more complex.

***Does "children" include stepchildren?***

Clause 1(c) of the Trust Deed defined the Beneficiaries as:

i. the children or remoter issue of the Settlor now in being or born hereafter;

ii. the spouses, widows and widowers of such children and remoter issue;

iii. any charities.

Whether clause 1(c)(i) included stepchildren was a matter of construction. Master Marsh determined the natural meaning of "children" and then considered whether the surrounding context of the Trust's settlement should displace or alter that natural meaning.

On the natural meaning of "children", the Master relied on a passage from *Lewin on Trusts 20th edition*, which stated:[8]

> The expression "children" in a trust for the children of a given person does not at common law include that person's grandchildren or stepchildren or any persons under a wider understanding of children found in family law (such as a "child of the family"), in the absence of an express provision to that effect or an extended meaning arising from the context. This principle has not been affected by statute in relation to the interpretation of trusts for children.

After surveying some limited case law on the issue, the Master held that "*children*" does not naturally include "*stepchildren*".[9]

Turning to whether the context of the Trust Deed displaced this meaning, the Master described the test for the Court as:[10]

> To take the natural meaning of children and to consider what a reasonable person in possession of the facts and circumstances known or assumed by the parties at the time that the document was executed, and appreciating the overall purpose of the clause and the contract would understand Stuart to have meant by ["children"].

8. At [95].
9. At [97].
10. At [103.

# ***Marcus v Marcus*** [2024] EWHC 2086 (Ch)

The Master held that a reasonable person considering the Trust Deed in 2003 would have considered both:

i. the apparent stability of Stuart and Patricia's thirty-year marriage and the equal treatment of Jonathan and Edward in their family unit; and

ii. Stuart's belief at the time of settlement that both boys were his legitimate sons.

Ultimately, there was no evidence indicating that Stuart intended for the Trust to treat Edward and Jonathan unequally. Had he wished to do so, he could have settled two different trusts:[11]

> The reasonable person who is undertaking this exercise knows about the family context and the purposes of creating the Settlement. It is known that Stuart was unlikely to have any further children. He had created a successful business that he had founded. He had a family with two sons who have reached their early 20s. There was no reason why Stuart should have wanted to have treated differently, or to have benefitted any child or children other than Edward and Jonathan.

Therefore, the circumstances "*overwhelmingly*" supported the adoption of a non-natural and stepchildren inclusive meaning of "*children*".[12]

## Analysis

The New Zealand law on the interpretation of trust provisions is closely aligned to the English law. In *Re Merona Trustees Ltd,*[13] the New Zealand High Court faced a similar issue to that in Marcus, with Justice Dunningham having to determine the meaning of the phrase "*the children of the Settlors*" in a trust deed.

In *Re Merona Trustees Ltd* one of the settlors had two sons to a previous marriage. The young boys had each been given to different family members to raise when the marriage ended abruptly. Following the settlors' marriage, one of the young sons returned to live with his mother and was raised as if he was a child of the marriage. The second son's existence was kept secret until he was in his 40s and contacted the family. After the death of the settlors, the second fostered son sought to be included in the definition of "children of the Settlors". Her Honour approached the task in a similar fashion to Master March, first ascertaining the plain meaning of the phrase, then considering it:[14]

> objectively and in light of what the trust deed would have conveyed to a reasonable person having all the background knowledge reasonably available to the parties at the time it was executed.

Her Honour held that while the natural meaning of "*the children of the settlors*" included the children of both of the settlors jointly, the background context of the deed justified an extension to include, not both children to the previous marriage, but the one son who was part of the family unit at the time the trust was established.[15]

Both cases highlight that need for settlors to work closely and honestly with their legal advisors to ensure their trust deeds are clearly and precisely drafted and accurately reflect their wishes.

11. At [104].
12. At [107].
13. *Re Merona Trustees Ltd* [2022] NZHC 1971.
14. At [79].
15. At [90].

# *Alalääkkölä v Palmer* [2025] NZSC 9

In *Alalääkkölä v Palmer* [2025] NZSC 9, the Supreme Court rules that copyright in artwork can constitute relationship property under the Property (Relationships) Act 1976 (**PRA**).

## Background

Ms Alalääkkölä and Mr Palmer were married for around 20 years. Ms Alalääkkölä is a commercial artist, and her paintings were the family's principal source of income. Mr Palmer described himself as a partner in a family business called Art by Sirpa and claimed that he had reduced his own work to help Ms Alalääkkölä's art career.

Upon separation, there was a large stock of unsold paintings that Ms Alalääkkölä had created during the relationship. While the parties agreed the physical paintings were relationship property, they disagreed over the status of the copyright in those paintings. Initially, Mr Palmer wanted to retain some of the physical artworks and intended to set up a business to reproduce and sell copies on his own account. However, he subsequently accepted Ms Alalääkkölä should retain the copyrights and instead sought to be credited with his share of their value in the distribution of other relationship property.

The Family Court concluded that the copyrights were Ms Alalääkkölä's separate property, but the High Court and Court of Appeal held that the copyrights were relationship property to be divided equally. Therefore, the Supreme Court had to consider two questions of law:

1. whether the copyrights were "property" for the purposes of the Property (Relationships) Act 1976 (**PRA**); and, if so
2. whether the copyrights were "relationship property" under the PRA.

## The Decision

The Supreme Court agreed with the Court of Appeal, finding that the copyrights were relationship property under the PRA.

***Were the copyrights "property" under the PRA?***

The starting point for the Supreme Court was the Copyright Act 1994. The Copyright Act expressly provides that copyright is a property right. Under the Copyright Act's regime, copyright has a value realisable in money: not only may an owner sell the copyright to others, but they can also protect the copyright by action for damages, injunctions and accounts. For the Court, these qualities indicated that copyright should be classified as personal property.

The Court rejected an argument that treating copyright as relationship property deters creative activity by conferring property on the non-author spouse. Instead, the Court several times emphasised the artist's partner's role in creating the artwork, suggesting that:[16]

> As a matter of fact, the use of [the author's] personal attributes and skills may be the product not only of the author's personality and skills but also the division of effort within the marriage… That is the case here.

This is consistent with the principles in section 1N of the PRA that during a relationship all contributions are treated as equal. The Court's view was that artists who wished to insulate their works from the PRA's regime could simply contract out of the PRA via a section 21 agreement.

16. At [33], [37], [43] and [44].

# *Alalääkkölä v Palmer* [2025] NZSC 9

Nonetheless, the Court acknowledged two primary concerns artists may have in the context of a hostile separation. Firstly, artists may fear their work will be treated in a derogatory manner, which is harmful to their reputation and may constitute a breach of moral rights. Secondly, artists may be concerned that their former partner will exploit copyright in ways that detract from the value of future works. Here, Ms Alalääkkölä feared Mr Palmer would create merchandise (such as fridge magnets or tea towels) to make himself a profit, at a potential cost to her reputation and future earning potential.

In the Court's view, these fears did not have a bearing on the legal issue of whether copyright could be property. Rather, the author's post-separation interests could be appropriately addressed by way of a court order, carefully designed "to minimise conflict in the distribution of property and unnecessary harm to the author's future reputation and income".[17]

### *Were the copyrights "relationship property" under the PRA?*

Having firmly established that copyright is property under the PRA, the Court held that it was also *relationship property*. Counsel for Ms Alalääkkölä had submitted that copyright is not property "acquired" during the marriage under section 8(1)(e) of the PRA. The Court disagreed, considering both the ordinary meaning of "acquire" and its usage in the PRA to be broad enough to encompass copyright. The Court explained that copyright "comprises a bundle of rights, each of which can naturally be said to have been acquired when the work was created".[18]

The Court concluded by offering guidance on how the works and associated copyrights should be valued in the parties' relationship property settlement. In doing so, it emphasised the author's interests as a primary consideration:[19]

> Because an artwork is closely associated with an artist's personality and reputation, the right to decide whether and when to disclose it to the public should be respected as far as it can be exercised with a just division of relationship property. In this case a just division will be equal by value, but so long as that is achieved the relationship property may be distributed in a manner which protects Ms Alalääkkölä's control over previously unpublished works that she does not now wish to publish.

## Analysis

The Court's final comments reinforce the importance of protecting an artist's control over their creations, even in the context of relationship property. The best way of protecting property is a contracting out agreement. However, the decision suggests that if there is sufficient value to be divided between the parties, future courts will be likely to find alternative ways to compensate the non-author for their financial interest in the copyright, rather than place control of copyright in the non-author's hands.

17. At [36].
18. At [42].
19. At [52].

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