

## **COMMISSIONER OF STATE REVENUE v ROJODA PTY LTD (P26/2019)**

Court appealed from: Court of Appeal, Supreme Court of Western Australia [2018] WASCA 224

Date of judgment: 21 December 2018

Special leave granted: 17 May 2019

In March 1972 a partnership commenced between Anthony and Maria and their three children, Rosana, John and David ('the SIC Partnership'). Anthony and Maria entered into another partnership with effect from July 1986 ('the AMS Partnership'). The business of both partnerships included property ownership and investment. Anthony died on 12 February 2011. Under his will, the balance of his estate was to be divided equally between three testamentary trusts in favour of each child. In September 2011, Maria became the registered proprietor of the SIC Partnership Properties and the AMS Partnership Properties as surviving joint tenant of those properties. In May 2011 and March 2012 respectively each Partnership was dissolved in accordance with the Partnership Deeds. The value of the cash or other current assets of both Partnerships exceeded their liabilities.

John (who was married and had four children) died intestate on 7 August 2012. The former partners of each Partnership, or the legal representatives of their estates, executed two deeds on 1 December 2013 ('the 2013 Deeds') which relevantly provided: (a) the legal personal representatives of the estates of Anthony and John "hereby transmit" that estate's beneficial share of the Partnership properties to the beneficiaries of the estate; (b) Maria, as trustee of the Partnership properties, declared that she "confirmed" that she held the legal title for the benefit of the surviving partners according to their previous Partnership proportion and for each of the beneficiaries who had received a "transmission" of property; and (c) after the transmissions and confirmations described above, Maria "resigned" as the trustee of the former Partnership properties and Rojoda Pty Ltd (Rojoda) was appointed as replacement trustee. On 13 March 2015, title to the Partnership properties was transferred to Rojoda.

The Commissioner imposed duty on each of the 2013 Deeds pursuant to s 11(1)(c) of the *Duties Act 2008* (WA) which provides that a dutiable transaction includes a "declaration of trust over dutiable property". The Commissioner contended that, before the 2013 Deeds were executed, the Partnership properties were not held by Maria upon a bare trust for the former partners or the beneficiaries of their estates, and that after the 2013 Deeds were executed they were held by Maria (and then Rojoda) upon a bare trust. Consequently, the legal effect of clause 3 of each of the 2013 Deeds was to declare a new trust.

Rojoda objected to the assessment of duty. It contended that the 2013 Deeds merely acknowledged or recorded an existing obligation of Maria that had arisen under the general law and did not declare any new trusts. The Commissioner allowed the objection in part. Rojoda applied to the State Administrative Tribunal (SAT) to review the Commissioner's decision. The SAT dismissed the application and affirmed the Commissioner's decision to only partially allow Rojoda's

objection. Rojoda's appeal to the Court of Appeal (Buss P, Murphy and Beach JJA) was successful.

The Court described the central issue of the case as follows: Is there a hard and fast rule that until the debts and other liabilities of a partnership are paid or discharged, or until the partners agree otherwise, the interest of each partner in each item of partnership property remains of a non-specific and fluctuating character? Or does equity take the more flexible view that if, and when, the surplus of partnership assets after payment of debts and discharge of other liabilities has been *sufficiently* ascertained and provided for out of particular assets, each partner will have a specific and fixed interest in the other assets comprising the surplus.

The Court considered that the authorities supported the latter view. The Court concluded that, in this case, immediately before the 2013 Deeds were executed, each partner (or their legal representative) had specific and fixed beneficial or equitable interests in the Partnership Properties, reflecting their respective proportionate share of partnership property. The partners' rights in relation to the Partnership Properties were enforceable against Maria as the registered proprietor of the Partnership properties. She held those properties on trust for the Partnerships, to enable the sale of the Partnership Properties and the distribution of proceeds to the partners or their representatives in accordance with their respective proportionate share. Against this background, cl 3 of each of the 2013 Deeds, on its proper construction, merely acknowledged or recorded an existing obligation of Maria that had arisen under the general law. Clause 3 did not create new trusts in relation to the Partnership Properties.

The grounds of the appeal include:

- The Court of Appeal ought to have held that:
  - (i) After dissolution of a partnership, but prior to the completion of its winding up, each former partner or their legal representatives only has a non-specific fluctuating interest in all the partnership assets until completion of the winding up; and
  - (ii) Clause 3 of the SIC Partnership Deed and clause 3 of the AMS Partnership Deed each constituted declarations of trust for the purposes of s 11(1)(c) of the *Duties Act 2008* (WA), as these Deeds were each executed prior to the completion of the winding up of the partnerships to which they related.

Rojoda seeks leave to rely on a notice of contention.