

**IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY**

No. P 26 of 2019

**ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF
WESTERN AUSTRALIA**

BETWEEN:

COMMISSIONER OF STATE REVENUE

Appellant

and

ROJODA PTY LTD

Respondent



RESPONDENT'S SUBMISSIONS

(The appellant's abbreviations are adopted in these submissions.)

PART I: CERTIFICATION FOR INTERNET PUBLICATION

1. Rojoda certifies that this submission is in a form suitable for publication on the internet.

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PART II: CONCISE STATEMENT OF ISSUES ROJODA CONTENDS THE APPEAL PRESENTS

2. The Commissioner purported to impose duty on each of the 2013 Deeds pursuant to ss 10 and 11(1)(c) of the *Duties Act 2008* (WA). By s 10, duty is imposed on "dutable transactions". By s 11(1)(c), a "declaration of trust" over "dutable property" is a "dutable transaction". By s 9, a "declaration of trust" is any declaration that any identified property vested in the declarant is or is to be held in trust for the person(s) mentioned in the declaration.

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3. The critical question is whether by the relevant¹ cl 3 of each of the 2013 Deeds, Maria declared that the Partnership lands were or were to be held in trust for the former partners (or successors), with the particular effect for which the Commissioner contends.

4. The effect which the Commissioner attributes to cll 3 of the 2013 Deeds is that the former partners (or successors) obtained fixed specific equitable interests in the Partnership lands, as between themselves, in place of their previous non-specific fluctuating interests, by declarations of new trusts made by Maria, in whom legal title to the Partnership lands was vested. The Commissioner's case is that the former partners' interests, as between themselves, in the Partnership lands was changed by the creation of
10 new equitable interests by Maria's alleged new trust declarations in cll 3 of the 2013 Deeds.

5. The critical question thus includes whether Maria had power, and purported, to declare those particular supposed trusts.

6. There is an underlying question whether, at all material times, the partners of the two Partnerships held proprietary interests in the partnership property, and in particular whether Maria held the Partnership lands on trust for them. Rojoda's case is that such pre-existing trusts affected Maria's rights as to the legal title vested in her (she was not entitled to declare new trusts) and explain the true operation of cll 3 (which confirmed the pre-existing trusts and the effect of the transmissions on those trusts). This issue addresses the Commissioner's grounds 2 and 3 and Rojoda's notice of contention grounds 1, 2(b)
20 and 2(c) (which Rojoda proposes to amend if the Court grants leave).

7. There is also an issue whether the 2013 Deeds constituted or evidenced agreements between the former partners (and successors) to retain (not sell²) the Partnership lands, thereby converting them into separately owned property, independently of cll 3 of the 2013 Deeds. This issue addresses ground 2(a) of the notice of contention. Ground 3 of the notice of contention is not pursued and is proposed to be deleted.

8. A further issue arises if (contrary to Rojoda's submissions as to the proper resolution of the critical issue noted in [3] above), the Court concludes that Maria could

¹ There are two cl 3 to the SIC Partnership 2013 Deed (AFM 91, 100). Hereafter, a reference to cl 3 of the SIC Partnership 2013 Deed is a reference to the second clause numbered 3.

² Sections 50 and 57(3) of the *Partnership Act 1895* (WA), as with the partnership deeds here, provide for asset realization on a partnership's dissolution (see also *United Builders Pty Ltd v Mutual Acceptance Ltd* (1980) 144 CLR 673, 688) unless the partners otherwise agree.

have declared and did declare that the Partnership lands were or were held on trusts for the former partners and successors. That issue is whether any such declarations of trust constituted agreements to transfer partnership property to the former partners according to their respective partnership interests, as to which duty was reduced to nil by force of s 78 of the *Duties Act*. This issue addresses notice of contention ground 4.

9. The Commissioner has conducted the proceedings on the basis that if cll 3 of the 2013 Deeds merely acknowledged or recorded Maria's existing legal obligations, no duty was payable due to the operation of s 78 of the *Duties Act*: CA [36], [37] (CAB 88-89).

PART III: RESPONDENT HAS CONSIDERED WHETHER S 78B NOTICE NEEDED

10 10. Rojoda certifies that notice is not required under s 78B of the *Judiciary Act 1903*.

PART IV: MATERIAL FACTS

11. Rojoda does not contest the Commissioner's narrative of the facts, save to add an additional fact and save as follows. By declarations of trust of 16 Jan 1976 (AFM 33-37) (as amended by deed of rectification of 3 Feb 1976 (AFM 39-47)) and 12 May 1988 (AFM 49-55), Anthony and Maria held the properties at 1318 Hay Street and 9 Colin Street, West Perth, respectively, expressly on trust for the partners of the SIC Partnership.

12. As to Appellant's Submissions (AS) [22]: In imposing duty on the 2013 Deeds under ss 10 and 11(1)(c), the Commissioner applied s 139(2)(b) of the *Duties Act* so that to the extent that the alleged declarations of trust in cll 3 gave effect to the distribution of Anthony's estate and/or John's estate (more particularly, the transmission of the "beneficial share of the Properties"³ held by each estate in the immediately preceding clause(s) of cl 3), nominal duty was payable (AFM 173, read with AFM 160; Agreed Facts, [39(a)], [39(b)], AFM 195-196).

PART V: ARGUMENT IN ANSWER TO APPELLANT'S ARGUMENT

13. **Overview:** The Commissioner imposed duty on the 2013 Deeds under ss 10 and 11(1)(c). The Commissioner considered that cll 3 of the 2013 Deeds was a "dutable transaction" under which, applying the definition of "declaration of trust" in s 9, Maria (apparently) declared that the Partnership lands vested in her were or were to be held upon

³ SIC Partnership 2013 Deed, cl 3 (first numbered) (AFM 100); AMS Partnership 2013 Deed, cl 2 (AFM 113).

new trusts, for the former partners and successors, with the particular effect of creating new equitable interests in land. The Partnership lands were treated as “dutiabale property” referred to in s 11(1)(c) because by s 15(a) of the *Duties Act*, land in Western Australia is “dutiabale property”. But, in truth, Maria did not have capacity to, and did not, declare any new trusts of those lands with the effect contended for by the Commissioner.

14. There is an important distinction, described in Roderick I’Anson Banks, *Lindley & Banks on Partnership* (20th ed, 2017) at p 700 [19-03], “between the internal and external perspectives” of partnership property. This important distinction assists in addressing the critical issue in this appeal. The internal perspective considers the interests which partners have, as between themselves, in partnership property. The external perspective considers the interests which partners have, as against the rest of the world, in partnership property. There can be no partnership property at all unless partners hold legal or equitable estates or interests in property, as against the rest of the world.

15. It is not in dispute that Maria held legal title to certain lands and that those lands were property of the Partnerships. It follows that, by trusts, the former partners (and successors) already held the entire absolute equitable estates, vested in possession, in the Partnership lands, as against Maria and the rest of the world. This is the external perspective.

16. The internal perspective is the product of the partners’ statutory and contractual obligations as to how partnership property is to be used and applied. These obligations constrain the partners’ ability to deal with the partnership property in a manner inconsistent with that to which partnership property is to be applied. These obligations do not affect the proprietary interests, which partners together hold in partnership property, as against the rest of the world.

17. The Commissioner’s grounds of appeal relate to the interests in partnership property which partners have as between themselves. The effect which the Commissioner (incorrectly) attributes to cll 3 of the 2013 Deeds is that Maria created new trusts, conferring new fixed specific equitable interests on the former partners (or successors), as between themselves, in place of their previous non-specific fluctuating interests. The Commissioner’s case denies the very existence of partners’ proprietary interests in partnership property, as against the rest of the world, which always exist. The

Commissioner's case misapprehends the legal effect of the constraint upon partners' ability to deal with partnership property which always belongs to them.

18. The statutory question at the heart of the appeal - whether there were dutiable trust declarations with the particular effect contended for by the Commissioner - concerns alleged exercises of power by Maria, in her capacity as the person in whom legal title to partnership property was vested. As submitted below in [74]-[82], the Commissioner's assessment was invalid because Maria had no power, in that capacity, by trust declaration or otherwise, to do anything about the former partners' and successors' interests, as between themselves, in the Partnership lands. Nor did she purport to do so.

10 19. Partners' interests, as between themselves, in partnership property may become fixed and specific by operation of law (as the Court of Appeal held) or by agreement between the partners (to the effect that the property should cease to be partnership property and should be separately owned), but not by (the purported) decision of a single partner.

20. **Statutory context:** Section 11(1)(c) of the *Duties Act* imposes duty on a declaration that any identified estate, interest or right in or over land in Western Australia vested or to be vested in the person making the declaration is or is to be held in trust for the declarees: s 11(1)(c) read with s 9 ["declaration of trust"; "dutiable property"] and s 15(a) ["land in Western Australia"] and the definition of "land" in the *Interpretation Act 1984* (WA), s 5.

20 21. In contrast with the *Stamp Act 1921* (WA) which it effectively replaced in 2008, the *Duties Act* imposes duty on transactions, not instruments. Section 11 sets out transactions which are dutiable and transactions which are not. This focus on transactions as the basis for the imposition of duty informs the construction of the *Duties Act*, just as the previous focus on instruments in *Stamp Acts* informed their construction: ***DKLR Holding Co (No 2) v CSD*** (1982) 149 CLR 431, 449; ***CSR v Pioneer Concrete (Vic)*** (2009) 209 CLR 651, 663-665 [34]-[38].

30 22. The proper construction of s 11(1)(c), having regard to this change in legislative approach, was not addressed by the Court of Appeal, because the Commissioner accepted that if the cll 3 of the 2013 Deeds merely acknowledged or recorded Maria's existing legal obligations and the issue which is now the subject of appeal ground 2 was resolved against the Commissioner, the assessments should be set aside: CA [36], [37] (CAB 88-89).

23. Section 11(1)(c) relevantly directs attention to the land that was vested in Maria when the 2013 Deeds were made and the operative legal effect, if any, of the intention

expressed by Maria in each cl 3, on that land. While Maria held her own partnership interest in the Partnership lands, that individual interest is not alleged to be the subject of a declaration of trust here.

24. Where an alleged declarant is vested with legal title to land, s 11(1)(c) is concerned with the expressed intention of the holder of legal title *in that capacity*. Unlike *DKLR* 149 CLR 431 (where 29 Macquarie transferred the whole title to the land to DKLR, and DKLR then declared a trust in 29 Macquarie's favour so that *ad valorem* duty was payable on the value of the land then declared to be held on trust), here, Maria always had the relevant lands vested in her (with Anthony, until his death) on trust. She could not and did not, as
10 legal title holder, by declarations confer new proprietary interests on the former partners and successors.

25. Anthony and Maria originally held the legal title to all of the relevant lands as joint tenants: CA [51], [52] (CAB 92). Following Anthony's death, Maria became the sole registered proprietor of those lands by survivorship, in September 2011: CA [56] (CAB 93). Thus, when the 2013 Deeds were made, legal estates in fee simple in possession of the lands had vested solely in Maria.

26. The relevant lands were property of the Partnerships. To appreciate the legal consequences of that fact in the present context, it is necessary to differentiate between the external and internal perspectives of partnership property.

20 27. As will become apparent, the Partnership lands originally belonged in equity to the partners and that remained so after the 2013 Deeds were made. There was no shifting of interests or value as a result of those Deeds. No dutiable property of any dutiable value was created or conferred by any declaration of trust for the purposes of the *Duties Act* (ss 11(1)(c), 15, 26 and 27).

28. **Partnership property – the external and internal perspectives:** Partnership property is property which belongs to the partners: *Canny Gabriel Castle Jackson Advertising v Volume Sales (Finance)* (1974) 131 CLR 321, 327; *Partnership Act 1895* (WA), s 30(1). In other words, there can only be partnership property where partner(s) or another entity own property, by holding legal or equitable interests in property. An
30 examination of the rights and interests of partners as to partnership property must recognise and give effect to the reality and the nature of the distinction between the internal and external perspectives of partnership property.

29. The internal perspective is the position as between the partners. It is governed by statutory and contractual provisions which require partnership assets to be applied for partnership purposes, including in discharge of partnership liabilities, and to be realised and distributed following dissolution (subject to agreement to the contrary).

30. The external perspective is the position between partners and the rest of the world (including the holder of legal title, where partners hold equitable interests in partnership property). It is not affected in any way by the statutory and contractual provisions which govern the internal perspective.

31. The distinction was recognised by the Court in *Canny Gabriel* (327-328):

10 “*The assets of a partnership, individually and collectively, are described as partnership property (Partnership Act, 1892, as amended (N.S.W.), s.20). This description acknowledges that they belong to the partnership, that is, to the members of the partnership.*

In In re Fuller’s Contract [[1933] Ch 632, 656], Luxmore J. (as he then was) said:

‘... as between the partners, the partnership property must be dealt with in a particular way, but so far as all the rest of the world is concerned, there is no limitation on the interests of the partners; the partners have the beneficial interest in the partnership assets, which are held together as an undivided whole, but they respectively have undivided interests in them’.

20 *It is significant that s.20(ii) of the Partnership Act, 1892, as amended (N.S.W.), treats a partner as having a beneficial interest in real estate belonging to the partnership for in this respect no distinction can be drawn between the nature of a partner’s interest in real estate and his interest in personal estate.”*

32. The distinction was also explained by Hoffman LJ (Neill and Waite LJJ agreeing) in *Inland Revenue Commissioners v Gray* [1994] STC 360, 377:

30 “*As between themselves, partners are not entitled individually to exercise proprietary rights over any of the partnership assets. This is because they have subjected their proprietary interests to the terms of the partnership deed which provides that the assets shall be employed in the partnership business, and on dissolution realised for the purposes of paying debts and distributing any surplus. As regards the outside world, however, the partnership deed is irrelevant. The partners are collectively entitled to each and every*

asset of the partnership, in which each of them therefore has an undivided share.”
[Emphasis added.]

10 33. The concept of partnership property necessarily encompasses both the external and internal perspectives. Thus, in resolving legal questions which relate to partnership property, it is necessary to identify the relevant subject matter and the relevant question. Here, the answer lies in s 11(1)(c) of the *Duties Act*, the focus of which is upon the interest in property that was vested in Maria. Maria held legal title to the Partnership lands as trustee and she was also one of the beneficiaries of the trusts. None of those interests enabled Maria to make declarations of trust with the effect which the Commissioner attributes to cll 3 of the 2013 Deeds.

34. With respect to the external perspective, general principles of property law apply. Partners who hold legal title to property enjoy the same rights and bear the same burdens, as against the rest of the world, as do persons who are not partners.

20 35. With respect to the internal perspective, the position is quite different because of the nature of the relationship of partnership. From an internal perspective, the partners are not entitled, as between each other, to deal with partnership property at, for example, the expense of creditors. Further, the internal perspective exists because a partnership is not an entity distinct from the partners composing it: Roderick I’Anson Banks, *Lindley & Banks on Partnership* (First Supplement to the 20th ed, 2018) at pp 11-12 [3-04]; pp 85-86 [19-03].

30 36. A partnership, not being a distinct entity, does not and cannot itself own partnership property. Partnership property is always owned by a distinct entity or person(s) and, save where legal title is held by all partners, is held on trust for the partners and this involves full ownership as against everyone else – the external perspective. Yet, partners as between themselves, have no right, whilst the partnership subsists, to deal with the partnership as if it was their personal property – this is the internal perspective. But it is incorrect to say (merely on account of the internal perspective) that the entity or person that happens to have legal title to the partnership property can declare a trust in favour of the partners or former partners on the partnership’s dissolution, which alters their interests in partnership property, as between themselves. This is the Commissioner’s error.

37. ***Partnership property – the external perspective:*** Partners may own property of any kind, including legal or equitable estates or interests in land, such as legal or equitable

estates in fee simple. Partners who own legal or equitable estates in fee simple are entitled to all of the rights and incidents of such ownership that apply to owners who are not partners, such as rights to sell, lease, mortgage, subdivide, improve and use land. Equally, partners who own such estates also bear the ordinary burdens of such ownership, such as liability for land tax: *Seymour Brothers v Deputy Federal Commissioner of Land Tax (SA)* (1918) 25 CLR 303. That is, as against the Crown and the rest of the world, partners who hold such estates have the same proprietary rights and interests as they would if they were not partners.

10 38. An estate in fee simple represents the largest estate known to the common law and confers the widest possible rights of enjoyment of land: *Fejo v Northern Territory* (1998) 195 CLR 96, 126 [43]; *Northern Territory v Arnhem Land Aboriginal Trust* (2008) 236 CLR 24, 93 [141]. That estate confers an exclusive right to possession of the relevant land as against the rest of the world: *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 298-299.

39. As submitted in [67] to [71] below, in equity, partnership land is regarded as being held by partners as tenants in common, even where at law they hold as joint tenants. Where an estate in fee simple is held by tenants in common, the estate is held by them together, not individually: *Nullagine Investments v WA Club Inc* (1993) 177 CLR 635, 656. That is so regardless of whether an estate in fee simple is partnership property.

20 40. A legal or equitable estate in fee simple in land is vested in possession when the holder of the estate is entitled to the present right of enjoyment of the estate: *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490, 496, 500-501.

41. As to partnership property over an equitable estate in fee simple, the question whether the estate is vested in possession is a question as to the terms of the trust by which the estate is held. It is a question about the relations as between the holder of legal title and the equitable interest, not as between the partners themselves. The restrictive effect of the partnership obligations does not, however, impinge on the external equitable title or interest at all.

30 42. The *Stamp Act 1921* treated partnership interests as property viewed from an internal perspective and levied *ad valorem* duty on conveyances on sale of property (s 16(1), schedule 2, item 4). In contrast, the *Duties Act* treats partners as having proprietary interests in partnership property by adopting the external perspective.

43. Under the *Duties Act*, duty is imposed on the acquisition of an interest in a partnership on the basis that the acquiring party obtains a proprietary interest in the dutiable property of the partnership: s 11(1)(i), read with s 9 [“partnership acquisition”]. Duty is only imposed where a partnership directly or indirectly holds land in WA (ss 70-77). Credit is given for that interest when imposing duty on a transfer or agreement to transfer dutiable partnership property to one or more partners (s 78). Thus, under the *Duties Act*, no duty is imposed where a partner who holds legal title to an item of partnership property transfers or agrees to transfer that property to all partners in their respective partnership shares, i.e. where partners obtain title to that which they already own in equity (viewed from the applicable external perspective).

44. ***Partnership property - the internal perspective:*** Partners are obliged to hold and apply partnership property exclusively for the purposes of the partnership and in accordance with the partnership agreement: *Partnership Act*, s 30(1). Partners are also obliged to apply partnership property in discharge of partnership liabilities, and on dissolution, to sell property and distribute any surplus to the partners: *Partnership Act*, ss 50, 57. These duties and rights are also often expressed in partnership agreements, as here: SIC Partnership deed, cll 11(b), 12, 13, 17, 18 (AFM 10-14); AMS Partnership deed, cll 12, 13, 16, 19 (AFM 25-26, 28-30).

45. It is these obligations which preclude partners, as between themselves, from enjoying and exercising property rights in particular partnership assets as individuals: *Commissioner of State Taxation (SA) v Cyril Henschke* (2010) 242 CLR 508, 517 [25]; *Sze Tu v Lowe* (2014) 89 NSWLR 317, 341 [122]. As a result, as between partners, partnership property is held “as an undivided whole”: *In Re Fuller’s Contract* (656). The very source and nature of these obligations is such that they do not affect the proprietary interests which partners have, as against the holder of legal title and the rest of the world, in partnership property.

46. The partners’ duties and rights are subject to agreement to the contrary between them: *Partnership Act*, s 29. Such an agreement may modify or discharge these obligations and rights. Such an agreement would not, of its own force, enlarge the proprietary rights of partners in partnership property, as between the partners and the holder of legal title to the property.

47. *Henschke*: The principal case on which the Commissioner relies needs to be considered closely. *Henschke* related to a partner's interest in a partnership, i.e. a partner's share. The personal property the subject of the conveyance was one partner's partnership interest, which was "a presently existing equitable chose in action against the other partners": 242 CLR 518-9 [28]. The issue was whether there was a "conveyance on sale" of that property within the *Stamp Duties Act 1923* (SA), s 60: 515-6 [16]-[20]. Personal property was able to be the subject of a conveyance under the *Stamp Duties Act*: 515 [16]-[17].

48. *Henschke* did not relate to a partner's equitable title to partnership property, as
10 against the holder of the legal title or the rest of the world. It concerned the internal, not external perspective. The Court held that it was not possible to avoid the consequences of a partnership's dissolution on the retirement of one of the partners (513-4 [10]-[14]), so that there was a conveyance on sale of the retiring partner's share (her equitable chose in action viewed from the internal perspective) to the new partnership following the dissolution (515-9 [19]-[30]). The decision followed established doctrine of the Court. The fact that the partners held all of the partnership property in full before the dissolution was not the issue; and, hence, the external perspective was not relevant.

49. There is nothing in *Henschke* which questions the recognised distinction between, implications of, and the present relevance of, the two perspectives explained in *Canny*
20 *Gabriel*. Indeed, in *Henschke*, the Court relied (517 [25], fn 30) on its decisions in *Livingston v CSD (Qld)* (1960) 107 CLR 411, 453 *Perpetual Executors & Trustees Assoc of Aust v FCT (Thomas' Case) [No 2]* (1955) 94 CLR 1, 27-28 and *Chan v Zacharia* (1984) 154 CLR 178, 192-193. In each of the passages of these three judgments, *In re Fuller's Contract* was treated as good authority. In *Thomas' Case*, Kitto J quoted from *Sharp v Union Trustee Co of Aust* (1944) 69 CLR 539, 551 where Rich J said, "No doubt *as between himself and his partners*, his interest in individual items is subject to their right to have all the assets of the partnership dealt with in accordance with the partnership agreement, but *his interest in them is none the less real for that*" [italics added] (which recognised both perspectives).

30 50. It is true that, with respect to the internal perspective, it is insufficient and inaccurate to say that a partner has a "beneficial interest" in particular property (*Henschke* 517 [25]), but saying so much does not cast any doubt on the accepted doctrine that the partners own the whole of the partnership property. At 517 [25], the latter point was not

addressed, but it was also not doubted. It did not need to be addressed because the Court was considering whether, on dissolution, the retiring partner's share (her equitable chose in action) was conveyed to the remaining partners.

51. Once it is seen that partners always have a full interest in partnership property (because otherwise it would not be partnership property or affected by the internal perspective), even if legal title is held by one or other of them, there is a misconception in the notion that the legal title holder can declare a new trust of that partnership property in the partners' favour enlarging their interests as between themselves.

52. *Effect which Commissioner attributes to 2013 Deeds (appeal grounds 2 and 3):*

10 In order to resolve the central statutory question, it is necessary to identify the precise effect which the Commissioner attributes to cl 3 of the 2013 Deeds.

53. The Commissioner's case is that prior to completion of winding up of the dissolved Partnerships, the former partners only had non-specific fluctuating interests in the Partnership lands – they had not obtained fixed specific interests as held by the Court of Appeal: appeal grounds 2, 3(i).

54. The Commissioner then contrasts that position with the alleged effect of the 2013 Deeds, emphasising that they were executed before the winding up of the Partnerships was completed (appeal ground 3(ii)). The Commissioner's point is that the 2013 Deeds allegedly conferred new interests which had not yet been ascertained and recognised
20 during the winding up: AS [23] (adopting the case to that effect put to the Tribunal and the Court of Appeal), [44]; Tribunal's Reasons [57]-[71] (CAB 93-98); CA [34], [37] (CAB 88-89). This makes clear that the Commissioner's argument is that the alleged effect of the 2013 Deeds was to confer new fixed specific interests in the Partnership lands on the former partners, as between themselves, in place of their previous non-specific fluctuating interests.

55. This reflects the Commissioner's final assessment decision, which was to the effect that, before the 2013 Deeds were made, as between themselves, the former partners held choses in action, giving them interests in any surplus upon winding up and that the 2013 Deeds declared new trusts giving them new and different interests instead, being
30 proprietary equitable interests in each of the Partnership lands: AFM 172-173.

56. The effect which the Commissioner attributes to the 2013 Deeds reflects an assumption that partners do not have proprietary interests in partnership property prior to

completion of winding up. So much is clearly stated in AS [47]-[59], [62]. This overlooks the very fact that partnership property is property which belongs to the partners, who necessarily hold legal or equitable interests in all partnership property, as against the rest of the world. That is none the less so because, as between themselves, partners must apply partnership property in particular ways. The internal and the external perspectives of partnership property exist concurrently.

57. Thus, the Commissioner's case is not and has never been that the internal perspective of partnership property is irrelevant and that Maria simply declared new trusts conferring new equitable estates in fee simple on the former partners and successors, leaving unchanged the partnership rights, obligations and interests (as between the former partners and successors) in the Partnership lands. Indeed, the Commissioner's case effectively denies the very existence of the external perspective which always applies to partnership property: AS [23], [47]-[59], [62].

58. Section 11(1)(c) of the *Duties Act* directs attention to an exercise of power by a person in whom dutiable property is vested. It was legal title to the Partnership lands that was vested in Maria. The Commissioner's case assumes that Maria used that title to alter (by declarations of trusts) the interests of the former partners as between themselves, creating new interests. Maria had no power, in her capacity as the person in whom legal title was vested, to alter or affect the interests of the former partners, as between themselves, in the Partnership lands.

59. Moreover, each cl 3 expressly *confirmed* pre-existing trusts on which Maria held the Partnership lands for the former partners and successors, while acknowledging the impact of the immediately preceding transmission of specific interests. It did not purport to alter their interests as between themselves. On that basis, the 2013 Deeds are not dutiable, particularly having regard to the Commissioner's approach noted at [9] above.

60. By s 11(1)(c) of the *Duties Act*, the transaction that is dutiable is a declaration of trust over dutiable property. What that requires (by the definition of "declaration of trust" in s 9) was a declaration by Maria that property vested in her in her own right was thereafter held for the former partners and successors. Maria could not (and would not) do that because the property vested in her was already (and always) partnership property vested in her as trustee for the Partnerships. Maria did not purport to create a trust over trust property.

61. As Mason J explained in *DKLR* (149 CLR 459.7), “a declaration of trust signifies a declaration which operates to create a trust – it is made by a person who holds or will hold a beneficial interest at least commensurate with the beneficial interest sought to be brought into existence by the trust”. Maria did not hold a beneficial interest commensurate with the interest (allegedly) brought into existence by cll 3 (on the Commissioner’s case) because such a beneficial interest was already held by the former partners.

62. Thus, the Commissioner’s case should fail, regardless of the correctness of the Court of Appeal’s decision, because Maria did not have the capacity, and did not purport, to declare trusts with the effect contended for by the Commissioner.

10 63. The pre-existing trusts, which explain the effect of the 2013 Deeds, and Maria’s incapacity to create any new trust of the kind alleged will be addressed now. The effect of the 2013 Deeds will be addressed in Part VI when notice of contention ground 2(a) is addressed.

64. *Trusts of partnership property*: Partners may hold equitable estates or interests in land in a variety of circumstances, such as where one partner or another entity holds legal title and there is an express trust in favour of partners or where a third party holds legal title and there is an express trust of a proportionate interest in the land in favour of partners.

65. Importantly, in the present case, partners may also hold equitable estates or interests in partnership land as a result of trusts in their favour which arise by operation of
20 law. The imposition and effect of those trusts, as between the partners and the holder of legal title, involves the external perspective.

66. The Court of Appeal held that, before the 2013 Deeds were made, Maria held the Partnership lands upon trust for the former partners and successors: CA [30], [106] (CAB 87, 113). For the following reasons, that conclusion was correct.

67. Where some, but not all, partners hold legal title to partnership property, the property is held in equity upon trust for all the partners: *Carter Bros v Renouf* (1962) 111 CLR 140, 163-164; *Chan v Zacharia* (1984) 154 CLR 178, 193-194 (Deane J) (Brennan J (186) and Dawson J (206) agreeing). These trusts are true trusts: *Chan v Zacharia*, 194; *Sze Tu* 89 NSWLR 342 [126]. This principle applied to the SIC Partnership at all times
30 and also to the AMS Partnership upon Anthony’s death.

68. Further, where legal title to partnership property is held by one or more, but not all, partners, trusts of the property in favour of all partners together also arise by force of

s 30(1) of the *Partnership Act*: *Carter Bros* 111 CLR 163; *Canny Gabriel* 131 CLR 327.9, 328.2.

69. Where partners hold legal or equitable estates or interests in land, whether purportedly as joint tenants or not, they are always regarded, in equity, as holding such estates or interests as tenants in common: *Delehunt v Carmody* (1986) 161 CLR 464, 470-471; *Malayan Credit Ltd v Jack Chi-MPH Ltd* [1986] 1 AC 549, 560 (read with 554); *Lake v Craddock* (1732) 3 P Wms 158; 24 ER 1011; *Lindley & Banks on Partnership* (20th ed, 2017) at p 706-7 [19-13].

70. Where partners hold title to partnership property as joint tenants and title passes by survivorship, a (true) trust is imposed by which all partners hold equitable estates or interests as tenants in common: E Cooke, S Bridge, M Dixon, *Megarry & Wade: The Law of Real property* (2019, 9th ed) [13-029]; *Re Ryan* (1868) 3 Ir R Eq 222, 232; *Wray v Wray* [1905] 2 Ch 349, 352.

71. Section 30(2) of the *Partnership Act* has the same effect. It provides for any *legal* estate or interest in land which is partnership property to devolve according to applicable general rules of law, but in trust so far as necessary for the persons beneficially interested under s 30.⁴

72. *Trusts of partnership property in the true sense*: The Commissioner has throughout accepted that the equitable presumption regarding the holding of partnership property in joint tenancy and s 30 of the *Partnership Act* were applicable here, but has contended that neither resulted in trusts, in the true sense, but only in a metaphorical sense: Commissioner's final assessment decision (AFM 172); SAT Reasons [57(6)] (CAB 34); CA [94] (CAB 108-9).

73. The Commissioner relied on *Sze Tu* 89 NSWLR 341-2 [123], [127], where reference was made to *Clay v Clay* (2001) 202 CLR 410, 430 [41] and *FCT v Linter Textiles Australia* (1005) 220 CLR 592, 605 [26]. Those passages referred to Lord Westbury's endorsement, in *Knox v Guy* (1872) LR 5 HL 656, of Lord Mansfield's

⁴ For completeness, the conversion of partnership land into personalty, as between the partners and as between the heirs of a deceased partner and his executors or administrators, should also be noted: *Partnership Act*, s 32. This overcame the common law rule that a deceased's realty passed directly to the heir at law and would thus not be available to meet partnership debts, and only has limited effect: K Fletcher, *The Law of Partnership in Australia* (2007, 9th ed) [5.30], [5.35]. It does not affect the rights as between partners and the holder of legal title to partnership property.

remark that “nothing in law is so apt as to mislead as a metaphor” (at 676). According to Lord Westbury, to describe a surviving partner, who held partnership property, as a “trustee”, is an improper use of metaphor. However, that view of the position of a surviving partner was rejected in *Chan v Zacharia* 154 CLR 193-194 (Deane J) (Brennan J (186) and Dawson J (206) agreeing). Neither *Clay* nor *Linter* concerned the position of a surviving partner who held trust property. In *Clay* 202 CLR 431 [43]; 433 [47], [48], reference was made to other parts Deane J’s judgment in *Chan*, but not to 193-194. No reference was made to *Chan* in *Linter*. *Clay* and *Linter* do not suggest that the trusts in question in the present case are not trusts in the true sense.

10 74. *Trusts of Partnership lands here*: There is no doubt that where one partner holds legal title to an item of partnership property, that item in that partner’s hands is trust property in the true sense: *Carter Bros* 111 CLR 163-164; *Sze Tu* 89 NSWLR 342 [126]. True trusts also arise from the equitable presumption where partners hold legal title to partnership property as joint tenants. In both instances, the interests conferred by the trusts are entire, absolute and vested in possession.

75. Two parcels of land (1318 Hay St and 9 Colin St, West Perth) were held by Anthony and Maria upon express trusts for the SICP Partnership: SAT Reasons [18] (CAB 13). All of the other relevant lands were held upon trusts which had arisen by operation of law.

20 76. Thus, when Maria obtained sole legal title by survivorship to all Partnership lands in September 2011, she held those lands upon trust for the former partners and successors, who held entire absolute equitable estates in fee simple in the lands as tenants in common in the same shares as their respective partnership shares. By these tenancies in common, as with all tenancies in common, each of those parties held fixed undivided interests in specific items of property: *Nullagine* 177 CLR 643.

77. The effect of all of the trusts was that, as between the holder of the legal title, Maria, and the former partners and successors, the former partners and successors together held the entire, absolute equitable estate in fee simple, vested in possession, in the lands, as tenants in common, before the 2013 Deeds were made.

30 78. These estates were vested in possession because the former partners and successors were entitled to full, present enjoyment of the estates and all their fruits and benefits, as against Maria and the rest of the world. The trusts conferred on them all of the rights

which the law had vested in Maria as the holder of legal title: *DKLR Holding Co (No.2) v CSD* [1980] NSWLR 510, 520.4 (para (18)). Maria was not entitled to exercise those legal rights of ownership as if no trusts existed: *DKLR* [1980] NSWLR 519.5 (para (16)). Maria was not entitled to declare new trusts of the Partnership lands.

79. ***Incapacity of Maria to alter partners' interests as between themselves:*** As submitted above, the rights and obligations of partners with respect to the use and application of partnership property derive from partnership legislation and partnership agreements which apply to the relationship of partnership. As has also been submitted, these rights and obligations, as between the partners, are capable of modification or
10 discharge by agreement between the partners.

80. The source and nature of the obligations are such that they are not capable of modification or discharge by unilateral action of an individual partner.

81. That is so even where an individual partner holds legal title to partnership property. In that circumstance, the partner will be bound by equitable trust obligations arising under the *Partnership Act*, any applicable instrument or by operation of law. The trust powers of such a person do not include power to alter any rights or obligations which bind all partners as between themselves by virtue of their partnership relationship.

82. Thus, Maria, as the person invested with legal title to lands which were property of the Partnerships, had no power to declare trusts which conferred on the former partners
20 and successors, as between themselves, new fixed specific equitable interests in those lands, in place of their previous non-specific fluctuating interests.

83. ***Court of Appeal's decision:*** Given the above submissions, it is not necessary to determine the correctness of the Court of Appeal's decision upon the ascertainment and recognition of partner's interests, as between themselves, in partnership property, that is addressed in appeal ground 2 and the second part of ground 1 of the notice of contention. That issue arose from the nature of the Commissioner's case (that cl 3 declared trusts which affected those particular interests, viewed from the internal perspective) and the Commissioner's approach noted at [9] above, but there are more fundamental answers to that case, as submitted above. Yet, the Commissioner goes too far in the criticism of the
30 Court of Appeal.

84. Buss P and Beech JA identified the relevant obligation as the "correlative obligation" to join in asset realisations: CA [21] (CAB84-85). AS [33] misstates the effect

of the last sentence of CA [21], by implying that their Honours were speaking of an obligation *to* use the cash and other assets in a particular way – something their Honours had specifically said was not so earlier in CA [21] itself. Contrary to AS [34], Murphy JA’s analysis was based upon the same “corresponding obligation”: CA [135], [137] (CAB 124). The Court of Appeal correctly identified the scope of the relevant legal obligations and then addressed how those obligations would likely be enforced in the circumstances. There was no error as alleged in AS [39].

10 **85.** With respect to AS [40], the maxim was correctly applied for the purpose of determining the practical enforcement of the rights and obligations as between the partners themselves. The Court of Appeal’s findings did not interfere with the partners’ obligations to sell assets by force of ss 50 and 57 of the *Partnership Act* and the Partnership deeds: CA [30], [139] (CAB 87, 125). The decision was consistent with numerous cases in which it has been held or acknowledged that specific interests in particular partnership assets could be ascertained and recognised, as between the partners, prior to completion of winding up, when a partnership was solvent and the assets were not required to be sold to meet debts: CA [14(3)], [15], [23]-[26], [116]-[131] (CAB 82, 83, 85-86, 115-123).

20 **86.** The confusion of concepts of partnership property evident in AS [41] has already been explained. The Commissioner’s case was based upon the 2013 Deed having affected the internal perspective. The Court of Appeal’ analysis addressed that perspective. The Commissioner ignores the external perspective relating to partnership property and the fact that the partners always together own partnership property, as against the rest of the world. That was the position here, before and after the 2013 Deeds were made.

87. Viscount Radcliffe’s observation in *CSD (Old) v Livingston* (1964) 112 CLR 12, 22 concerning recognition of equitable rights or interests was not invoked in *Henschke* 242 CLR 517 [25] to deny that a partner obtains a specific equitable interest in partnership property once such an interest is ascertainable. Rather, it was invoked to underscore the point that such recognition is both unavailable and unnecessary until such an interest is ascertainable.

30 **88.** As to AS [36], [37], the passage in *Henschke* at [25] restates general principle with respect to partners’ interests in partnership property, as between themselves. It does not address the ability to ascertain and recognise specific interests in surplus assets after liabilities have been discharged. This was noted in *Hendry v The Perpetual Executors*

and Trustees Association of Australia (1961) 106 CLR 256, 266. Specific interests are readily ascertainable when sale of some assets is not necessary to meet liabilities.

89. Moreover, the extent of any winding up of a dissolved partnership that is to occur or which is enforceable will depend on the applicable circumstances, including any agreement between the former partners and successors. Dissolution does not always result in all partnership property being sold: *Henschke* 242 CLR 513-514 [11], [12], [14].

90. The question whether winding up is complete so as to enable ascertainment of a partner's interest in surplus assets is one of substance, not form, to be determined in all the circumstances: see Murphy JA's analysis of the cases, at CA [121]-[131] (CAB 117-123), which included *In Re Holland* [1907] 2 Ch 88 and *In Re Ritson* [1899] 1 Ch 128, both of
10 which were relied upon by Kitto J in *Livingston v CSD (Qld)* (1960) 107 CLR 411, 453, in the passage applied in *Henschke* at 242 CLR 517 [25].

91. As to AS [45], [46], all of the points sought to be made regarding *Cameron v Murdoch* were decisively addressed by Murphy JA at CA [96], [116]-[131] (CAB 109-110, 115-123). In particular, Brinsden J's proposed order 8 was not contingent upon the taking of accounts under proposed order 2 and was not treated as so qualified by the Privy Council: *Cameron v Murdoch* (1986) 60 ALJR 280, 293; *Cameron v Murdoch* [1983] WAR 321, 362-363; CA [25], [123], [124], [129] (CAB 86, 118, 122). There is no reason to doubt *Cameron v Murdoch*.

20 92. There is a crucial difference between the winding up of a dissolved partnership and the administration of a deceased's estate. In the former, the partners who are entitled to share any surplus already own the partnership property. In the latter, the beneficiaries do not already own the property of the deceased. In the former case, contrary to AS [42]-[44], equity recognises specific interests when ascertainable as part of its protection of that pre-existing ownership.

PART VI: RESPONDENT'S ARGUMENT ON ITS NOTICE OF CONTENTION

93. *Notice of contention ground 1 (first part)*: As submitted above, as to first part of notice of contention ground 1, as between the holder of the legal title, Maria, and the former partners and successors, the former partners and successors together held the entire,
30 absolute equitable estate in fee simple, vested in possession, in the lands, as tenants in common, before the 2013 Deeds were made. Thus, Maria was not entitled to declare new trusts creating new interests in the Partnership lands.

94. The second part of notice of contention ground 1 has been dealt with in [92] above. The approach of equity must take account of the context which is that partnership property belongs to partners and that ownership warrants protection.

95. *Notice of contention ground 2(b)*: As submitted above, as to notice of contention ground 2(b), Maria, as the person invested with legal title to lands which were property of the Partnerships, had no power to declare trusts which conferred on the former partners and successors, as between themselves, new fixed specific equitable interests in those lands, in place of their previous non-specific fluctuating interests.

10 96. *Overview as to remaining contentions*: There are three additional issues that arise under the notice of contention. The first is whether cl 3 of the 2013 Deeds purport to have the effect sought to be attributed to them by the Commissioner (notice of contention ground 2(a)). An examination of the 2013 Deeds will reveal that, far from purporting to create new trusts of any kind at all, Maria carefully expressed an intention only to *confirm* pre-existing trusts, acknowledging the impact of the immediately preceding transmissions, and as a prelude to the change of trustee.

20 97. The second and related issue concerns the making of a conversion agreement by the former partners and successors, in or evidenced in the 2013 Deeds, by which the Partnership lands ceased to be Partnership property and became separately owned property. This agreement explains how the former partners and successors obtained fixed specific interests in the Partnership lands, as between themselves (notice of contention ground 2(a)).

98. The third issue concerns the operation of s 78, if it is found that Maria did make dutiable declarations of trust (notice of contention ground 4).

99. It is convenient to deal with the first and second issues together, as they both relate to the effect of the 2013 Deeds.

100. *Effect of 2013 Deeds*: It is not in dispute that partners may, by agreement made before or after dissolution, convert partnership property into property that is held by them as individuals: CA [95] (CAB 109). The Commissioner has characterised such an agreement as one to transfer assets out of a partnership: CA [95] (CAB 109).

30 101. There were agreed facts that the current assets of each Partnership exceeded its liabilities and that the Partnership lands were not sold in accordance with the winding up requirements: agreed statement of facts and issue [18], [22], [24] (AFM 187-189). In other words, those lands did not have to be sold to discharge Partnership liabilities.

102. In the reassessment, the Commissioner found, in effect, that there had been an *agreement by the former partners* and successors not to sell the Partnership lands as part of winding up: AFM 173.1. A finding to the same effect was made by the Tribunal, albeit mistakenly concluding that this agreement created new trusts (ignoring the pre-existing trusts, i.e. ignoring the external perspective): SAT Reasons [126] (CAB 51). Both the Commissioner and the SAT effectively found that the alteration of the interests of the former partners and successors, as between themselves, in the Partnership lands, occurred by agreement between them. Such an *agreement* was the only means available to the parties to achieve that outcome. Maria could not unilaterally declare new trusts, which changed the interest as between the former partners and successors. The surviving former partners and the representatives of the deceased partners were all parties to the respective Deeds.

103. Whether considered as agreements or potential declarations of trust, the 2013 Deeds are to be construed objectively, having due regard to objective factual context in which they were made: *Byrnes v Kendle* (2011) 243 CLR 253, 263 [17]); 273 [53]; 275 [59]; 284-290 [98]-[114].

104. The 2013 Deeds are to be construed in light of the recitals, which referred to the partners and their shares, and recited that certain properties were held in trust for the partners as at the date of Anthony's death on 12 February 2011 (ie, some 33 months before the 2013 Deeds were made); that probate of Anthony's estate had been granted; that Maria obtained legal title to the properties by survivorship in September 2011 but that the beneficial ownership had not changed; the deemed dates of dissolution; the beneficial interests in partnership assets held upon dissolution; the relevant terms of Anthony's will; his executor's wish to transmit his estate's beneficial share in the properties to each of the three beneficiaries; the beneficial ownership of the properties following those transmissions; and the desire to replace Maria, the existing trustee, with a new trustee, without affecting the beneficial ownership of the properties: SICP Partnership Deed, recitals A, B, C, D, E, F, I, J, K, L, M, T, V and W (AFM 96-99); AMS Partnership Deed, recitals A, B, C, E, F, H, I, J, O, P and Q (AFM 110-112).

105. In the SIC Partnership deed, the recitals also recited John's death intestate; the grant of letters of administration and the distribution of his beneficial share of the properties, in accordance with the *Administration Act 1903* (WA), one-third to his widow

and two-thirds divided equally between his four children: SICP Partnership Deed, recitals U and V (AFM 98-99).

106. Clause 1(d) in the SIC Partnership Deed and cl 1(c) in the AMS Partnership Deed describe the acknowledged and agreed beneficial ownership of specified properties, expressly as at dissolution, but necessarily also as at the making of the 2013 Deeds (AFM 100, 113). So much is made clear by the purpose of the clauses, as revealed by the recitals and the substantive provisions which follow each cl 1, which is to provide for the holding of the specified *properties*, in specie and for transmissions and an appointment of a new trustee to be effected on that basis.

10 **107.** The existence and terms of an agreement may be established by inference, including from the provisions and effect of an instrument construed in its factual context: *ALH Group Property Holdings v CCSR* (2012) 245 CLR 338, [31], [32]; *Hawkins v Clayton* (1988) 164 CLR 539, 544, 569-570, 591.

108. Clause 1 is the first step upon which the intention expressed in the recitals and given effect to in cl 2 to transmit specific interests (not partnership shares or shares in the proceeds of asset realisations) in the individual properties to beneficiaries is founded. These transmissions and the appointment of a new, corporate, trustee reflect an intention that the properties were to be retained, not sold as part of winding up. Transmissions of specific interests of individual properties could not occur without those interests first being
20 held by the former partners and successors. The transmissions of specific interests are inconsistent with an intention that the properties be sold as part of winding up.

109. The transmissions are also inconsistent with the Commissioner's view that the former partners and successors held no pre-existing interests in the Partnership lands and the Commissioner's view about the effect of cll 3.⁵

110. The objective intention of the former partners and successors to retain (not sell) the properties and hold specific interests is inferred from the making of the 2013 Deeds and their terms, in the circumstances recited in the Deeds. The 2013 Deeds embody or reflect and record agreements to retain the lands, not sell them as part of winding up, i.e. an

⁵ There is another inconsistency in the Commissioner's case, which attributes creational effect to the alleged declarations of trust by Maria in favour of the former *living* partners, but treats the alleged declarations of trust in favour of the successors of the *deceased* former partners as only giving effect to distributions (necessarily of that which was already owned) in their estates so as to be chargeable with only nominal duty: AFM 173, line 30; *Duties Act*, s 139(2)(b). See also Agreed Facts [39(a)], [39(b)] (AFM 195-196).

intention to convert them into separately owned property. These agreements were not dutiable under s 11(1).

111. It was in the context of the agreement as to the holding of specific shares in the properties and the transmission of some of those specific shares that each cl 3 provided that Maria “confirms that, following the transmission(s)”, she holds the properties upon stated trusts (AFM 100, 113). By cl 4, the new corporate trustee was then appointed (AFM 101, 113).

112. Each cl 3 was carefully framed, in the context of the recitals and preceding substantive provisions (which specifically set out the effect of the pre-existing trusts), to express an intention only to *confirm* the existence of trusts which had already arisen. Maria expressed no intention to create new trusts over new specific equitable interests in estates in fee simple in the lands: CA [7], [8], [31], [140] (CAB 79, 87, 125-126).

113. The terms of cll 3 are not open to a construction by which Maria purported to declare trusts conferring on the former partners and successors, as between themselves, new fixed specific equitable interests in the Partnership lands, in place of their previous non-specific fluctuating interests. There is nothing in the terms or context which could possibly suggest such a (misguided) intention.

114. *Operation of s 78:* Section 78 gives relief from duty where partnership property is transferred or agreed to be transferred to one or more partners. It recognises the fact that partnership property belongs beneficially to the partners; i.e. it approaches the issue by reference to the external perspective. The intention and underlying policy of s 78 are important to the construction of s 78.

115. Section 78 enables former partners to obtain, or to become entitled to, legal title to particular partnership property, which they already own beneficially, in accordance with their partnership shares, without imposition of duty. It also gives a former partner credit for their pre-existing partnership share in an item of partnership property if more than that share is transferred or agreed to be transferred to the former partner.

116. Section 78 is to be read with the singular including the plural, such that it operates where partners cease to be partners because of dissolution and an item of partnership property is transferred or agreed to be transferred to all of the former partners, in accordance with their respective partnership shares. In that event, the dutiable value of the transfer or agreement to transfer each share in the dutiable property of the partnership to a

retiring partner must be reduced by an amount calculated by applying that retiring partner's partnership interest in the entire item of partnership property to the unencumbered value of that entire item immediately before the dissolution.

117. Thus, if an item of partnership property belonging to four equal partners is transferred or agreed to be transferred to them in equal shares, no duty is payable.⁶

118. If the 2013 Deeds constituted or evidenced conversion agreements, as submitted above, and these took effect along with cl 3 (contrary to the submissions above and by some as yet unexplained means) to enlarge the interests of the former partners and successors, as between themselves, those agreements were of decisive force and represent
10 *agreements to transfer* partnership property which (if dutiable) attract s 78. On that approach, each cl 3 gave effect to the agreement. There was an agreement to transfer which thereby engaged s 78.

119. Alternatively, if cl 3 of the 2013 Deeds constituted dutiable declarations of trust, they were declarations of trust over Partnership lands which already belonged in equity, in the same proportions, to the former partners and successors such that those persons already held the right to take transfers of the lands from Maria and obtained no new proprietary interest from the 2013 Deeds. In that circumstance, s 78 would again apply. Because the Partnership lands were already partnership property, declarations of trust would in substance be agreements by the declarant (Maria) to transfer the property to the
20 beneficiaries upon request.

120. The Commissioner's approach to the operation of s 78 in this case (AS [62]-[65]) is founded on the former partners and successors not already holding full beneficial estates in the Partnership lands. The Commissioner's reference to new trusts is a reference to supposed trusts which confer different and greater beneficial interests than those previously enjoyed by the partners. It overlooks the fundamental point that the Partnerships lands were always partnership property which always belonged in equity to the partners.

⁶ The Commissioner's approach and the effect of it on s 78's application is also recorded in CA [36], [37] (CAB 88-89). In short, the Commissioner's approach was that if there was no change in beneficial ownership by force of cl 3 (as there was not as submitted above), s 78 applied to reduce duty to nil.

121. Also, the Commissioner focusses on a transfer, rather than an agreement to transfer, which also engages s 78. The Commissioner ignores the former partners' and successors' agreement in the 2013 Deeds.

122. Thus, by reason of the submissions above, there could have been no declaration of any trust, but if contrary to those submissions there was any declaration of trust, there was an agreement to which s 78 applies.

PART VII: ESTIMATE FOR ORAL ARGUMENT

123. The respondent's estimate of time for its oral submissions is 2 hours.

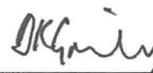
Dated: 26 August 2019.

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ANNEXURE A

Constitutional provisions, statutes and statutory instruments referred to.

Statute	Version	Relevant Date(s)
1. <i>Administration Act 1903</i> (WA)	11-f0-04	7 August 2012
2. <i>Duties Act 2008</i> (WA)	02-b0-02	1 December 2013
3. <i>Interpretation Act 1984</i> (WA)	07-a0-02	1 December 2013
4. <i>Partnership Act 1895</i> (WA)	05-d0-07	12 February 2011 1 December 2013
5. <i>Stamp Act 1921</i> (WA)	17-f0-02	30 June 2008
6. <i>Stamp Duties Act 1923</i> (SA)	4.11.2004	23 December 2004