

**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

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RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION FOR INTERNET PUBLICATION

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

PART II: OUTLINE OF PROPOSITIONS TO BE ADVANCED ORALLY

20 2. **CRITICAL ISSUE:** The critical issue is whether Maria could and did declare a new trust over the Partnership lands under the 2013 Deeds constituting a dutiable transaction under the *Duties Act*. Because the former partners already held an undivided equitable or beneficial interest as tenants in common in the Partnership lands, by force of the lands being partnership property, Maria could not and did not declare a trust over dutiable property within s 11(1)(c). The former partners held the self-same undivided equitable interest as tenants in common in the lands before and after the 2013 Deeds: R[3]-[6], [9], [15]-[19], [24]-[37], [60], [66]-[82]; R Reply[4]-[13], [17].

30 3. **DUTIES ACT:** The *Duties Act*, ss 10, 11, 15, 26 and 27, make it plain that *ad valorem* duty is payable only if an interest in land is transferred, agreed to be transferred or created. No new interest in land was created by the 2013 Deeds, cl 3: R[2], [13], [20]-[24], [27], [33], [58], [60]-[62]; R Reply[6]; *DKLR (No 2) v CSD (NSW)* (1982) 149 CLR 431.

4. By ss 72-77, it is plain that there is a dutiable "partnership acquisition" only if there is a change in a partnership interest of land *held* by the partnership. The provisions are premised on *holding* an interest in partnership property (as is the case by force of the *Partnership Act* and partnership law). By s 78, no duty is payable if there is no change in the proportionate partnership interest of partners on dissolution: R[8], [43], [114]-[122], R Reply[18].

5. By s 119(3)(a), if a new trustee is appointed and no change in beneficial interest, *ad valorem* duty is not payable. By s 139(2), if there is a distribution of a deceased's estate, *ad valorem* duty is not payable: R[12]; R Reply[17], [18].

6. *PARTNERSHIP ACT 1895*: The *Partnership Act* recognises that partnership property is held for the partners (i.e. for all of the partners) and is held on a true trust: ss 27, 29, 30, 31 and 32; *Carter Bros. v Renouf* (1962) 111 CLR 140; *Chan v Zacharia* (1984) 154 CLR 178; see para 2 above; also R[28]-[32], [46], [71].

7. The constraint (imposed by s 30(1)) on a partner's ability to deal individually and personally with partnership property does not mean that partnership property is not held
10 for the partnership, with each of the partners having an undivided interest in that property as tenants in common. The *Partnership Act* separately provides that each partner only has a right to the surplus, after liabilities are discharged: ss 33, 42, 50 and 57(3). The two perspectives should not be confused or elided, and both apply. It is incorrect to reason from the perspective that, as between themselves, an individual partner only has a right to the surplus to draw the (incorrect) conclusion that partners do not have any interest in partnership property until liquidation: para 2 above; also R[28]-[32], [46], [71].

8. EXPRESS TRUSTS: 1318 Hay St and 9 Colin St were held on express trusts: R[11].

9. 2013 DEEDS: Under the 2013 Deeds, the parties agreed that the Partnership lands were always held on trust and beneficially by the former partners and, on dissolution, the
20 lands would not be sold (as required by ss 50 and 57(3)) but instead would continue to be held on trust but freed of the constraint imposed by s 30(1). Maria *confirmed* that she held on trust; she did not create any new trust: R[7], [59], [102]-[113]; R Reply[14]-[17].

10. AUTHORITIES: PARTNERS HOLD INTEREST IN PARTNERSHIP PROPERTY: The Court has always recognised that partners together have a beneficial interest in partnership property: R[14], [28]-[32], [36]-[41], [45], [49]-[51], [64]-[78]; R Reply[6], [8]-[12]; *Seymour Bros* (1918) 25 CLR 303; *Thomas' Case [No 2]* (1955) 94 CLR 1; *Hendry v Perpetual* (1961) 106 CLR 256; *Haque [No 2]* (1965) 114 CLR 98; *Canny Gabriel v Volume Sales* (1974) 131 CLR 321; *Henschke* (2010) 242 CLR 508; see also *IRC v Gray* [1994] STC 360.

11. *HENSCHKE*: The Court in *Henschke* focussed on the nature of a partner's share
30 because, in that case, Mrs Doris Henschke had purported to retire from the partnership but apparently without conveying her partnership share to the remaining partners. The Court held that there was a conveyance of Mrs Henschke's equitable chose in action (being her

partner share) to the remaining partners. The Court was not concerned to consider the beneficial interest held by each and every partner in each item of partnership property: R[47]-[51]; R Reply[2]-[3], [7].

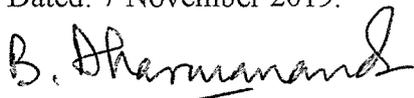
12. WA COURT OF APPEAL'S REASONING: It was unnecessary for the WA Court of Appeal to conclude that, unless each partner's interest in the Partnership lands could be ascertained, cll 3 involved a declaration of a new trust. This is because at all times each partner already had an interest in each item of partnership property, regardless of whether a specific interest could be ascertained: R[83]; R Reply[13]. That meant that there could be no declaration of trust over dutiable property.

10 13. In any event, the WA Court of Appeal was correct to conclude that, where the two partnerships were solvent, each of the partners had an ascertainable interest in the Partnership lands (even before the partnerships' liquidation), and equity would recognise their interests: R[83]-[92]; R Reply[13]. The authorities, including *Cameron v Murdoch* [1983] WAR 321; (1986) 60 ALJR 280, support this analysis.

14. There is no point of different principle between *Henschke* and *Cameron v Murdoch*. Whilst *Henschke* focussed on the nature of a partner's share, in deciding that Mrs Henschke had conveyed her partner share to the remaining partners, *Cameron* focussed on the accepted view that a testator's desire to dispose of his partnership interest would be given effect if the partnership was solvent and this was possible. *Hendry* (1961) 20 106 CLR 256 was to the same effect in upholding the testator's will.

15. SECTION 78: If Rojoda's primary point is correct, s 78 was not engaged because there was no transfer or agreement to transfer dutiable property within s 78(1). At all times, the partners held an interest in each item of partnership property. If that is not accepted, the 2013 Deeds involved an agreement for the transfer of partnership property to the former partners and successors, instead of permitting a sale of the Partnership lands. The partners had to make this agreement (*Partnership Act*, s 29), such that no duty is payable by force of s 78(1): R[114]-[122]; R Reply[18].

Dated: 7 November 2019.



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