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



# APPELLANT'S SUBMISSIONS IN REPLY AND RESPONSE TO NOTICE OF CONTENTION

*(The appellant adopts the abbreviations used in her submissions dated 12 July 2019 in these submissions.)*

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**Part I: Certification for Internet Publication**

1. We certify that this submission is in a form suitable for publication on the internet.

**Part II: Outline of Argument in Reply and Response to Notice of Contention**

***Minute of Proposed Notice of Contention ("NC")***

2. The appellant ("**Commissioner**") does not object to the amendments in the NC.

***Rojoda's Primary Submission ("First Part" of Ground 1, Grounds 2(b) and (c), NC)***

3. Rojoda's primary submission, stated in paragraph [27] of the Respondent's Submissions dated 26 August 2019 ("**RS**"), is that: "... 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." See also RS [6], [51], [77]. Rojoda relies upon the "first part" of ground 1 of the NC, read disjunctively from the remainder of ground 1: RS [93]. The consequence of this submission is said to be expressed in grounds 2(b) and 2(c) of the NC: RS [6], [95].

4. Rojoda's primary submission was not advanced before, and hence was not decided by, the Tribunal or the Court of Appeal: SAT Reasons [52]-[55], [104]; CA [89]-[93]; CAB pp 24-25, 45-46, 107-108.

5. The substantial reasons why Rojoda's primary submission should not be accepted are set out in Appellant's Submissions, dated 12 July 2019 ("**AS**") [47]-[59]. Rojoda's submissions are inconsistent with ***Commissioner of State Taxation v Cyril Henschke Pty Ltd*** (2010) 242 CLR 508 at 517, [25]. They also do not acknowledge the effect of the reasoning of Aickin J in ***DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)*** (1982) 149 CLR 431 at 463.

6. Rojoda goes too far in RS [56], by suggesting that the Commissioner's position "reflects an assumption that partners do not have proprietary interests in partnership property prior to completion of winding up". See also RS [109]. Consistently with ***Henschke*** at [24], AS [54] states that "each partner has, in equity, an undivided interest in the whole of the property, which is non-specific and of a unique kind." The Commissioner also submits that: "It is unnecessary for equity to create any specific estates in the former partnership property": AS [55]. AS [56]-[57] specifically identifies that the *sui generis* interests of a partner may be transmitted or charged as property in certain circumstances.

7. Rojoda does not seek leave to re-open ***Henschke***. Rojoda says that it should be distinguished as it "did not relate to a partner's equitable title to partnership property, as against the holder of the legal title or the rest of the world": RS [48].

8. This distinction is said to reflect a difference between an "internal perspective" and an "external perspective". These perspectives are described at RS [14]. 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."

9. The difference between the internal and external perspective upon which Rojoda relies is largely based upon ***Lindley & Banks on Partnership*** (20th ed, 2017) at [19-03], and the observations of Hoffman LJ (as he then was) in ***Inland Revenue Commissioners v Gray*** [1994] STC 360 at 377. See RS [14], [32], [35]. However, Lord Hoffman's distinction was in the context of valuing land, in respect of which a partnership held a tenancy. He considered that it was within the jurisdiction of the Lands Tribunal to value the whole tenancy as "land", and that the value of an individual partner's interest could be calculated as a proportion of the value of the whole tenancy. It was wrong to say that the Tribunal could not value a partner's individual interest as property, because it was not "land". From an external perspective, the whole tenancy as partnership property could be valued as "land", because each partner had an undivided share in the whole tenancy. Lord Hoffman said at 377: "The partners are collectively entitled to each and every asset of the partnership, in which each of them therefore has an undivided share. It is this outside view which identifies the nature of the property falling to be valued for the purpose of capital transfer tax … ".

10. This reasoning does not establish that partners or former partners should be regarded, for any purpose (internal or external), as having an interest in partnership land which is equivalent to the interest of a beneficiary under a bare trust. Nor does it suggest a substantive difference in legal rights, viewed internally or externally. The perspective may change, but not the character of the substantive rights. The equitable rights of partners in partnership property are not, in substance, different for one legal purpose compared to another legal purpose.

11. The other case upon which Rojoda relies, at RS [31], for the distinction between an internal and external perspective is ***Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd*** (1974) 131 CLR 321. That case specifically says that

partners should be regarded as having a *sui generis* proprietary interest in the whole of partnership assets. It does not say that, from an external perspective, partners are regarded as having fixed and separate equitable interests in partnership property equivalent to a beneficiary under a bare trust.

12. Rojoda's distinction between the internal and external perspectives of the interests of partners or former partners in partnership assets is inapposite here. The position stated by the High Court in ***Henschke*** applies and cannot be distinguished.

13. On the basis of its primary submission, Rojoda repeatedly submits that Maria, as trustee of the Partnership land, did not have any beneficial interest in the Partnership land, as this beneficial interest was wholly vested in the partners. Consequently, Rojoda contends that Maria did not have any ability to declare any new trusts of the Partnership land, and that the 2013 Deeds could not attract duty as declarations of trust. See RS [13], [18], [33], [36], [58], [60], [61], [78], [82], [93]. This argument must fail if Rojoda's primary submission is unsuccessful.

***Court of Appeal's Decision (Appeal Grounds 2 and 3, "Second Part" of Ground 1, NC)***

14. Rojoda supports the Court of Appeal's decision separately from its primary submission, by the "second part" of ground 1 of the NC: RS [92], [94].

15. Rojoda does not unequivocally support the new principle developed by the Court of Appeal, which is addressed in paragraphs 2 and 3 of the Notice of Appeal. It's first submission is that "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 ...": RS [83]. See also RS [62].

16. Rojoda's submission at RS [84] that the Commissioner's submissions at AS [33] impliedly "misstate" the effect of the Court of Appeal's decision should not be accepted. The matters stated at AS [33] are largely quotes of the Court of Appeal's decision.

17. Ultimately, Rojoda's submissions about the Court of Appeal's reasoning are substantially based upon repeating its primary submission. For example, in RS [86], Rojoda refers to the "confusion of concepts of partnership property" in the Commissioner's submissions. The so-called confusion is, in effect, the primary submission which Rojoda now advances. Likewise, at the end of the discussion of the Court of Appeal's reasoning, Rojoda's submissions again return to its primary point,

with the submission that "partners who are entitled to share any surplus already own the partnership property": RS [92].

18. Rojoda's submissions about the Court of Appeal's decision do not effectively say anything substantially different to the primary submission which Rojoda advances. To the extent that Rojoda's submissions assert that the Court of Appeal's reasoning was correct: RS [84], [85], [91], the detailed reasoning of the Court of Appeal has been addressed in AS [33]-[46].

***The Conversion Agreement (Ground 2(a), NC)***

19. In ground 2(a) of the NC, Rojoda contends that: (a) the 2013 Deeds "constituted or evidenced" agreements by which the former partners or their successors provided for conversion into specific equitable interests in the Partnership land; (b) the specific equitable interests which were obtained by the former partners or their successors from this conversion, and then transmitted to the former partners or their successors, occurred independently of clause 3 of the 2013 Deeds; and (c) by clause 3, Maria merely confirmed the conversion and transmission which had occurred by the conversion agreements which the 2013 Deeds otherwise "constituted or evidenced".

20. This ground alleges an inferred conversion agreement (either outside of, or implicitly within, the 2013 Deeds) which operated antecedently to clause 3: RS [103]-[112]. Clause 3 is said to have simply confirmed what had been achieved by the antecedent conversion agreement. In other words, Rojoda submits that clause 3 is mere surplusage, and had no operative or substantive effect. Its effect was simply confirmatory, and if clause 3 had been omitted nothing would be altered.

21. The allegation of an antecedent conversion agreement is new. It was not the basis of the initial objection, where Rojoda stated: "In clause 3 in each Deed, Mrs Maria Scolaro simply confirms the existence of the trusts that have always existed over the properties since they were acquired, with the exception of the interest of the deceased partners ...": AFM 159-160. Before the Tribunal and the Court of Appeal, Rojoda argued that the former partners, or their successors, obtained fixed and specific equitable interests in the Partnership land by operation of law when it was ascertained that there were sufficient other current assets to pay Partnership liabilities: SAT Reasons [73], [77]; CA [89]; CAB 38-39, 107.

22. An attempt was made before the Court of Appeal to argue that if the former partners and their successors did not obtain fixed equitable interests in the Partnership properties on dissolution by operation of law, clause 1(d) of the 2013 Deeds constituted or evidenced an agreement whereby the former partners and their successors provided for conversion of their partnership interests into fixed equitable interests in the properties. See amended appeal ground 1(2): CA [85]; CAB 106. In response to ground 1(2), by way of notice of contention, the Commissioner contended that any conversion agreements which were established were themselves separate dutiable transactions within s.11(1)(c) of the *Duties Act 2008* (WA): CA [99]; CAB 110. The Court of Appeal did not determine these issues: CA [40], [141]; CAB 90, 126.

23. The failure to object to the assessment upon the basis of an antecedent agreement is fatal to any attempt by Rojoda to now claim that such an agreement independently existed outside the terms of the 2013 Deeds. If that objection had been taken, the Commissioner could have exercised investigative powers to obtain evidence of such an agreement. These factual issues cannot now be investigated, and no attempt to raise an antecedent agreement before the 2013 Deeds should be allowed.

24. The suggestion at RS [102] that the Commissioner found, in determining the objection to the assessment, that there was an antecedent agreement should not be accepted. As explained, that was never advanced by Rojoda. As well, all the Commissioner said was that it "also appears that the partners agreed that the properties would not be sold based on their intention as reflected in the 2013 Deeds to retain the properties under a trust arrangement.": AFM 173. This is not a finding of any antecedent agreement beyond the terms of the 2013 Deeds, or that there was an antecedent agreement operative outside the terms of clause 3 of the 2013 Deeds.

25. To the extent that Rojoda contends that a conversion agreement is contained in the 2013 Deeds, Rojoda accepts that the agreement is not stated expressly but says it should be inferred from various recitals and from clauses 1(c) and (d): RS [103]-[112]. That submission should not be accepted.

26. Due to the materially identical nature of both of the 2013 Deeds, the proper construction of the AMS Partnership 2013 Deed will be the same as the SIC Partnership 2013 Deed.

27. The SIC Partnership 2013 Deed identifies the point at which the SIC Partnership dissolved as 15 March 2012: see Recital I; AFM 97. That is about 20 months prior to

the execution of the SIC Partnership 2013 Deed in December 2013. Recitals J and L provide that, at the point of dissolution of the Partnership, i.e. on 15 March 2012, the former partners each beneficially owned the assets of the former Partnership in specified percentages: AFM 97-98.

28. Clauses 1(c) and (d) are to the same effect. They state that the parties "acknowledge and agree" that, upon dissolution of the SIC Partnership on 15 March 2012, the Partnership properties and other assets that were previously held by the Partnership were then beneficially owned in specified percentages: AFM 100.

29. Clause 1(d) does not, in its terms, contain any indication that it was intended to have any other effect apart from acknowledging and agreeing what the parties to the SIC Partnership 2013 Deed appear to have assumed had occurred upon the dissolution of the Partnership on 15 March 2012. There are no words contained in clause 1(d) which suggest that, by that clause, the parties agree that the clause converted property from Partnership property into separate property of the former partners or their successors. There is no reference to any conversion, and there is no reference to any separation of proprietary interests.

30. The effect of Recitals I, J and L is that the parties have acknowledged that, some 20 months prior to the execution of the SIC Partnership 2013 Deed, the former partners were each beneficial owners of the assets of the former Partnership in specified percentages. That may or may not correctly reflect an assumption about the legal effect of the Partnership dissolution. That depends upon Rojoda's primary submission. There is no separate promissory agreement which operates in December 2013, which itself brings about a conversion of Partnership assets into the separate property of former partners or their successors. Nor is it an agreement that the specified percentages reflect fixed and separate equitable interests in the Partnership land.

31. In substance, the effect of clauses 1(c) and (d) was that the parties agreed that their affairs should be governed by the acknowledgements made in the Recitals and the percentages specified in clause 1(d). This avoids any confusion as to the entitlements of the various former partners or their estates.

32. Clause 1(d) cannot have had the effect of separating property of the former Partnership into fixed parts to be held by the ultimate beneficiaries specified in clause 3 (as it appears for the second time): AFM 100-101. The ultimate beneficiaries of the property, who are

particularly mentioned in clause 3 (as it appears for the second time), are not referred to in clause 1(d). Instead, clause 1(d) refers to the estate of the late Anthony Scolaro, and to John Scolaro (who had died by the time the SIC Partnership 2013 Deed was executed), not the beneficiaries of those estates. This indicates that clause 1(d) cannot by itself create the trusts which all parties accept existed after the SIC Partnership 2013 Deed was entered. Therefore, clause 3 had work to do, contrary to RS [112].

33. In any event, if this contention ground is considered, it means Rojoda's primary submission has been rejected. Hence, the particular conversion agreement, if it existed in the present case, changed the equitable obligation of the trustee holding the property on account of the Partnership to an equitable obligation of the trustee to hold the property on a bare trust for different beneficiaries. That change in the equitable obligation represents a declaration of trust. The new bare trust is not equivalent in any sense to the previous obligations binding a trustee holding property on account of a partnership. Any conversion agreement of the type which Rojoda now says existed by reason of clause 1(d) of the SIC Partnership 2013 Deed would be subject to duty by reason of s.11(1)(c).

***Section 78 Argument (Ground 4, NC)***

34. Rojoda effectively argues that if its primary submission, the Court of Appeal's decision, or the conversion agreement submission are correct, the legal effect of the 2013 Deeds was not to enlarge the interests of the former partners and their successors in the Partnership land. It says that the 2013 Deeds were an agreement to transfer existing beneficial interests in the Partnership land, rather than to re-settle the equitable interests in that land: RS [118]-[119]. Rojoda says that the "fundamental point" is that "the Partnership lands were always partnership property which always belonged in equity to the partners": RS [120].

35. The Commissioner accepts that if Rojoda's primary submission, the Court of Appeal's reasoning or the conversion agreement submission are correct, ground 4 of the NC would also be established.

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# Annexure A

**Constitutional provisions, statutes and statutory instruments referred to.**

| | Statute | Version | Relevant Date(s) |
|---|---|---|---|
| 1. | *Duties Act 2008* (WA) | 02-b0-02 | 1 December 2013 |