**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 AUSTRAIA**

BETWEEN:

**COMMISSIONER OF STATE REVENUE**

Appellant

and

**ROJODA PTY LTD**

Respondent



# RESPONDENT'S REPLY SUBMISSIONS

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

## PART I: CERTIFICATION FOR INTERNET PUBLICATION

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

## PART II: ARGUMENT IN REPLY TO APPELLANT'S SUBMISSIONS OF 16 SEPT 2019

**2.** Re Appellant's Submissions in Reply and Response (**AR**) [5], [12]: ***Henschke*** 242 CLR 517 [25] did not overturn the Court's authoritative recognition that partners always have a beneficial proprietary interest in all partnership property (even though, as between themselves, that proprietary interest is subject to the property being held as required by the partnership agreement), as submitted in the Respondent's Submissions (**RS**) [47]-[50].

**3.** Rojoda's submissions are not inconsistent with ***Henschke***. There, the issue was whether there was a conveyance on sale of property, which included *personal property* (516 [20]), within s 60 of the *Stamp Duties Act 1923*, when a partner retired, dissolving the old partnership and forming a new one with the former partner's equitable chose in action (i.e. her personal property) vesting in the new partners. This equitable chose in action was the focus: [28]. The Court did not need to consider the proprietary interest held by each partner in the partnership property. The ruling ([25]) that the interest of each individual partner in the property cannot be ascertained until after the end of the partnership's liquidation does not deny that each individual partner always held a proprietary interest.

**4.** Rojoda accepts that if a person has both the legal estate and the *entire* beneficial interest in land, they hold an entire and unqualified legal interest, not two separate interests, as explained in ***DKLR*** 149 CLR 463. But, this principle is irrelevant where one partner has title to partnership property and, from the start, each partner holds a proprietary interest in each item of partnership property. The assertion that Maria must have *created* a new proprietary land interest in the former partners/successors by cll 3 (because she held legal title) *begs the question* about whether (and *assumes* that) Maria held the entire and unqualified legal estate in the partnership property. Maria did not hold an entire and *unqualified* legal estate at any relevant time.

**5.** Re AR [6]: If the Commissioner accepts that "each partner has, in equity, an undivided interest in the whole of the [partnership] property", regardless of whether this is "non-specific" and "unique", the Commissioner must recognise the external perspective.

**6.** Once the external perspective is accepted, it follows there was no dutiable transaction under the *Duties Act* effected by cll 3. Duty is imposed on "dutiable

transactions" (s 10); and a "dutiable transaction" includes a "declaration of trust over dutiable property" (s 11(1)(c)). But, to qualify relevantly as "dutiable property", the property must be *land* in WA (s 15(a)) or an *interest* in land (*Interpretation Act 1984* (WA), s 5 ["land"]). For there to be a dutiable "declaration of trust", Maria had to declare that "identified property vested or to be vested" in her was or was to be held in trust for others (see s 9 ["declaration of trust"]). Yet, because the Partnership lands were already held on trust for the former partners (***Carter Bros v Renouf*** 111 CLR 163-164), she could not, and did not, declare a dutiable trust, as made plain by Mason J in ***DKLR*** 149 CLR 459.7 (RS [61]). Adopting Mason J's words in ***DKLR***, no beneficial interest in land was "brought into existence" by the confirmation in cll 3.

**7.** Re AR [7]: It is unnecessary to re-open ***Henschke***. The Court focussed on the internal perspective in deciding a different issue about whether there was a conveyance of *personal* property under different legislation. The external perspective was not rejected.

**8.** Re AR [8]-[10]: Once it is recognised that, before and after the 2013 Deeds, the former partners/successors were "collectively entitled to each and every asset of the partnership" (***IRC v Gray*** [1994] STC 377 d), the Commissioner's assertion that there was a declaration of trust over "dutiable property" must fail. Rojoda accepts that both perspectives (internal and external) apply. But, importantly, once the external perspective is applied, it cannot be said that Maria declared a trust. The former partners/successors always held a beneficial proprietary interest in the Partnership lands. ***Gray*** cannot be dismissed as a valuation case. At issue in ***Gray*** was the hypothetical sale value of the deceased's freehold reversion held by her in land tenanted to a partnership in which she held a 92.5% interest. Applying the external perspective, the CA (UK) held that she had a 92.5% interest in the tenancy (371 c-f, 377 b-e).

**9.** The Commissioner's characterisation of cll 3 as giving the former partners/successors an interest as "beneficiary under a bare trust" puts a gloss on what cll 3 effected. If "bare trust" is used to suggest the former partners/successors (somehow) obtained a more complete proprietary interest in land (by force of cll 3) than the former partners had before, that involves a misconception.[1]

[1] As an incident of Maria/Rojoda's office as trustee (effected by 2013 Deeds, cll 4 (AFM 101,113)), each had/has a beneficial interest in the lands to the extent of the trust right to an indemnity from liabilities incurred for the benefit of the trust: ***Carter Hold Harvey Woodproducts Australia v Cth*** (2019) 93 ALJR 807, 817-825 [24], [28]-[44], [50]-[55], [57]; 828-834 [80]-[98]; 838-841, 845 [129]-[145], [173]. So, at all

**10.** The former partners always held the same *proprietary* interest in the Partnership lands (affected by relevantly the obligations under the Partnership deeds or Rojoda's right of indemnity as trustee). The *Duties Act* imposes duty on a transaction over "dutiable property" relevantly as to an interest in land. No new proprietary interest in land was created or agreed to be transferred by cll 3. Clause 3 confirmed that Maria held the Partnership lands in the stated proportions for the former partners/successors, as tenants in common. They did not obtain (new) separate and divisible rights to the Partnership lands.

**11.** Re AR [11]: In ***Canny Gabriel***, the Court described a partner's interest as "sui generis" (131 CLR 328.5) when considering the analogy with a residuary legatee's interest in an unadministered estate. The Court's view that each partner has a "beneficial interest in real estate belonging to the partnership" (328.3) was not disturbed. It was critical to the Court's reasoning that this "equitable interest" (328.5) in partnership property prevailed over Canny Gabriel's later equitable charge. The external perspective was necessarily *applied.* Also, in ***Carter Bros v Renouf*** 111 CLR 163-164, the Court *applied* the external perspective enshrined in the Qld equivalent of the WA *Partnership Act*, s 30(1). As submitted, the Commissioner's contrast between a partner's proprietary interest in partnership property and a beneficiary's proprietary interest under a so-called "bare trust" is mistaken when the issue is whether a dutiable transaction arose as to dutiable property (i.e. a land interest). No new interest in land was transferred or created by cll 3.

**12.** Re AR [8]-[12]: The Court has always accepted the external perspective. In ***Seymour Bros v Deputy Fed Comm'r of Land Tax (SA)*** (1918) 25 CLR 303, 316-7, it was held that partners who were separately registered proprietors of partnership lands were yet "jointly the equitable owners" of the lands, and treated as "joint owners" for land tax purposes. The recognition of this joint ownership whilst the partnership subsisted was an application of the external perspective. In ***Haque v Haque [No 2]*** (1965) 114 CLR 98, an issue was whether a deceased's partnership share, in a partnership that held land, was a moveable or immovable for succession law purposes. Kitto J[2] recognised (130) that the

times, the former partners (or, on dissolution, successors as well) held a beneficial proprietary interest in the lands and, following the confirmation of the trusts, they continue to hold a beneficial proprietary interest in the lands but this interest became subject to Maria/Rojoda's proprietary interest in the lands indemnifying from trust liabilities. In ***Henschke***, in the first sentence of [25], the Court recognised that a beneficiary under a trust and a partner (equally and alike) do not have the full "beneficial interest" in the relevant trust or partnership property.

[2] Barwick CJ agreeing (122); see also Menzies J (132), Windeyer J (147-8). See also ***Maslen v Perpetual Executors Trustees &Agency Company (WA)*** (1950) 82 CLR 101, 129; ***H R Munro v CSD*** [1934] AC 61.

deceased partner had in each partnership "rights of two kinds", one "with respect to each individual item of partnership property, constituting an interest in each such item, which he was entitled to assert as against all the world"; and another being a "share in the partnership as a whole" as against co-partners.

**13.** Re AR [14]-[18]: Whether cll 3 declared a trust in an interest in land is the relevant question for the *Duties Act*, s 11(1)(c). To answer that, it was unnecessary for the Court of Appeal to hold that *specific* Partnership land interests could be *ascertained* before liquidation of the Partnerships. No proprietary interest in land was declared for the former partners/successors by cll 3 even if no specific land interest was ascertainable before liquidation. Yet, the Court of Appeal was correct to conclude that equity recognises specific interests when ultimately ascertainable: equity should so protect (see RS [92]).

**14.** Re AR [19]-[23]: Rojoda's contention 2(a) is that the 2013 Deeds, on their *proper construction*, were agreements by which the former partners/successors agreed to convert their proprietary interest in the Partnership lands into equitable interests in the lands, and no declaration of trust gave them any new land interest. The contention is not founded on any antecedent agreement. The contention is unnecessary if the first part of Rojoda's contention 1 succeeds. Even when, as a matter of law, the former partners always held a beneficial proprietary interest in the Partnership lands, they could yet agree that such interests would continue post dissolution rather than having the lands realised as contemplated by the *Partnership Act 1895*, ss 50, 57(3). The fact of this agreement is apparent when the 2013 Deeds are considered in full: see RS [96], [97], [100]-[113].

**15.** Re AR [22]-[24]: As submitted, neither the conversion agreement nor any declaration of trust was subject to duty because no transfer, agreement for transfer, or declaration of trust was effected or made as regards *dutiable property* (namely, as to a land interest). Rojoda does not rely on any *antecedent* agreement requiring investigation. The Commissioner accepted that the partners "agreed" in the 2013 Deeds that the Partnership lands would not be sold (and any implied trust for sale ended): AFM 173.1. Rojoda relies on the Commissioner's acceptance of what the partners agreed under the 2013 Deeds.

**16.** Re AR [25]-[32]: It is unnecessary to repeat RS [96], [97], [100]-[113]. The Commissioner's argument that cll 1(d) reflect only an acknowledgement of what had occurred by operation of law does not give meaning and effect to the fact that the parties also "*agree[d]*" matters in cll 1. They *agreed* the Partnership lands need not be sold but

would continue to be held on trust outside the Partnerships - this is the "conversion" in contention 2(a). Meaning and effect also has to be given to the fact that in cll 3 Maria only "*confirms*" she held on trust. It is not that cll 3 has no work to do; rather, it is a matter of determining what work it does. Pursuant to cll 3, Maria did not declare that dutiable property vested in her was held under *new* trusts.

**17.** Re AR [33]: There is nothing in the Commissioner's point that there were different beneficiaries under the alleged "new bare trust". By *Duties Act*, s 139(2)(b), nominal duty is chargeable if there is a declaration of trust over "dutiable property" to the extent it gives effect to a distribution in the estate of a deceased person. The fact that the successors obtained a proprietary interest in the Partnership lands did not trigger an obligation to pay full duty. In any event, as submitted, if, contrary to Rojoda's primary position under the first part of contention 1, Maria could (somehow) and did declare a new trust, there was no declaration of trust "over dutiable property" (i.e. over an interest in land) as required by s 11(1)(c). The former partners and successors always held the same beneficial proprietary interest in the Partnership lands before and after cll 3.

**18.** Re AR [34], [35]: The Commissioner accepts that if Rojoda is correct in its contention 1 (either or both the first[3] and second part) or in its contention 2(a), s 78 of the *Duties Act* would apply (so that no duty was payable). This means that the logic and statutory intent reflected in s 78 is now common ground. Section 78 makes plain that if on a partnership's dissolution, there is a transfer or agreement to transfer dutiable property which results in no actual change in the proportion of partnership property formerly held by the partners, no duty is payable. No duty was payable when successors obtained a beneficial proprietary interest in the lands: s 139(2)(b). The combined effect of partnership law, s 78 (if engaged[4]) and s 139(2)(b) results in no duty being payable.

Dated: 14 October 2019.

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[3] If the first part of contention 1 is accepted, there was no transfer or agreement to transfer any dutiable property. This means that the conclusion that no duty is payable is reached even before s 78 is engaged.

[4] See RS [118]-[120], [122] and footnote 3 above.