

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

10

and

Rojoda Pty Ltd
Respondent

APPELLANT'S ORAL OUTLINE OF SUBMISSIONS

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1. These submissions are in a form suitable for publication on the internet.

Critical Question and Three Different Answers

2. What is the nature of a former partner's interest in land previously owned by the partnership, after dissolution and prior to a winding up; particularly where the current assets of the partnership are sufficient to discharge all of the partnership's liabilities without selling the partnership land?
3. **Appellant's Answer:** A former partner does not have title to any specific property which may be properly described as a "beneficial interest", but instead has a right to a proportion of the surplus after the realization of assets and the payment of debts and liabilities: *Canny Gabriel* (Tab 3/15, p 463), *Henschke* [24]-[25] (Tab 3/19, p 552).
 10 Where it is necessary to do justice, equity recognises this right is an inchoate proprietary right: *Henschke* [25], eg the right may be transmitted by will: *Hendry* (Tab 3/22, pp 671-672), *Haque* (Tab 3/21, p 130), and the right may win a priority competition: *Canny Gabriel, Henschke* [26].
4. **Court of Appeal's Answer:** If and when the surplus of partnership assets, after payment and discharge of debts and other liabilities, has been *sufficiently ascertained* and provided for from other available assets, each partner will, at least ordinarily, thereupon have a specific and fixed beneficial interest in the remaining assets comprising the surplus: CA [27], [137] (CAB, pp 86, 124-125).
- 20 5. **Respondent's Answer:** Before the dissolution of the partnership, by operation of law, the legal owner of partnership property holds this upon trust for the respective partners, who together own the whole equitable estate in the trust property as beneficiaries, subject only to the trustee's right of indemnity. Any subsequent dissolution does not alter the beneficial interests of the former partners in the partnership property, including in partnership land. See RS [27], [51], [77]; RRS [9]-[10].

Factual Matters

6. There were two investment partnerships which owned land. Anthony was a partner of both. He died on 12 February 2011. Each partnership then dissolved, after rights of pre-emption were not exercised. There was no agreement to carry on the investment
 30 business by remaining partners. Legal title to the partnership land was transferred to Maria.
7. John died intestate on 7 August 2012. His wife was entitled to a 1/3rd share, and each of his four children were entitled to a 1/6th share, of his estate.
8. On 1 December 2013, Maria, the remaining partners and their legal representatives executed the 2013 Deeds by which the representatives of deceased former partners "transmitted" their interests to beneficiaries of the estates; and Maria "confirmed" that she held the legal title on trust for various former partners and the beneficiaries of their

estates, based upon the proportions of the former partners. These deeds were assessed to duty upon the basis that the "confirmation" of trusts was actually a declaration of trusts.

9. Two factual matters require clarification. First, the agreed position is that Anthony and Maria did not own their interest in the SICP as trustees for the AMSP, contrary to Recital B of the SICP 2013 Deed: Agreed Facts [4]-[5] (AFM, pp 184-185). It makes no difference, in any event. Secondly, two of six properties owned by the SICP (1318 Hay St, 9 Colin St) were expressly held on trust for named beneficiaries as tenants in common. However, the agreed position was that the trust was for these beneficiaries in their capacity as partners. See Recital C of SICP 2013 Deed and Agreed Facts [11] (AFM, p 186).

The ratio of the decision in *Henschke* (Tab 3/19, JBA)

10. It is inappropriate to describe the interest of a former partner in partnership assets prior to a winding up as a "beneficial interest". This interest is analogous to the rights of a beneficiary under a discretionary or unit trust. There is no full "beneficial interest" in the assets because it is unnecessary for equity to bring into existence such an interest to protect the rights and interests of former partners. See *Henschke* [25].
11. The interest of a former partner in partnership assets prior to winding up upon a general dissolution may be regarded as an equitable proprietary interest, but it is an equitable proprietary interest in the whole of the partnership assets, and not in any of the assets individually. See *Henschke* [26]-[28], and the analysis of *Canny Gabriel* and *United Builders*.
12. These matters would need to be overruled in principle if the answers of either the Court of Appeal or the respondent were to be adopted.

Alleged Errors in Court of Appeal Decision (Appeal Notice, paras 2 and 3)

13. First, the Court of Appeal considered that equity would require that the liabilities be paid from current assets, rather than upon a winding up, when there was no agreement to this effect and it was contrary to the partnership agreement which required payment of liabilities upon a winding up. This makes equity do more than what was agreed.
14. Secondly, even if liabilities have to be paid from current assets, that does not give the former partners any fixed equitable interest in the land prior to the liabilities being paid. The trustee's right of indemnity cannot be allocated in that fashion.
15. Thirdly, there is no need for equity to recognise any fixed proprietary interest of former partners in the partnership land to achieve justice. The possibility of taxation is not a reason in itself to do so.

16. Fourthly *Cameron v Murdoch* (Tabs 4/28-29, JBA) does not expressly state or impliedly support the proposition which the Court of Appeal recognised.

The Respondent's Answer (Notice of Contention, para 1)

17. The respondent's answer depends upon a "perspective argument". The respondent says that, from an external perspective, partners and former partners own the whole beneficial estate in equity, whereas from an internal perspective they may only have inchoate proprietary rights against each other, ie the nature of the interest of a former partner in partnership property may differ according to the perspective.
18. The perspective argument is not supported by any of the cases referred to by the respondent. No case says that: (a) partners collectively have an equitable interest in partnership assets equivalent to a bare trustee. Their interest is a right to see the assets used for the partnership business, to derive profits from this business and to receive any surplus upon winding up; (b) individually partners have a fixed and specific interest in partnership assets equivalent to a beneficiary under a bare trust.
19. *Gray's* case (Tab 4/32, p 956) specifically acknowledges that partners have an undivided share in every asset, as does *Canny Gabriel. Seymour* (Tab 3/25, JBA) is irrelevant, as the statutory definition of "joint owners" specifically included partners. *Haque* simply accepted that the rights of a former partner could be transmitted by will. That is not contentious since *Hendry*.

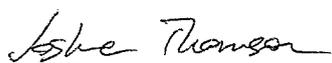
Conversion Agreement (Notice of Contention, para 2)

20. The conversion agreement is a new ground, not contained in the objection or decided by the Tribunal or Court of Appeal. Had it been raised previously, clause 1(d) may have been separately assessed to duty as an agreement to transfer property or a declaration of trust. This cannot be raised now.
21. In any event, there was no express agreement to convert the partnership property into separate, divisible interests. There was an acknowledgement and agreement by clause 1(d) of the 2013 Deeds about what the parties assumed the legal position to be.

Section 78 (Notice of Contention, Ground 4)

22. This ground does not separately arise if the perspective or conversion arguments succeed. The respondent does not rely upon this ground alone if these arguments fail.

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