IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY No. P 26 of 2019

BETWEEN: **Commissioner of State Revenue**
Appellant

and

Rojoda Pty Ltd
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification for Internet Publication

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

Part II: Concise Statement of Issues

2. There are three critical legal questions which underpin this appeal. Each question only arises if the previous one is answered against Rojoda. They each concern the situation after dissolution of a partnership owning land, but prior to its winding-up.

3. The first question is whether former partners (or their successors) immediately have a vested beneficial interest in partnership land, which is the same as the interest of a beneficiary under a bare trust, if and when it is ascertained that the current assets of the partnership are sufficient to pay all of the partnership liabilities. The Court of Appeal so found, based upon the position adopted by the Respondent **("Rojoda")** below: Court of Appeal Reasons **("CA"),** [23], [139]; Core Appeal Book **("CAB"),** pp 85, 125. This question raises the issues stated in the grounds of appeal: CAB, p 143.

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4. The second question is whether the legal owner of the former partnership land holds legal title to that land upon a bare trust for the former partners (or their successors), who together hold and entirely exhaust the beneficial interest in the land indivisibly, until either:

   (a) the separate beneficial interests of the former partners (or their successors) are regarded by equity as divisible, which happens when it is ascertained that current assets of the partnership are sufficient to pay all of the partnership liabilities; or

   (b) the former partners (or their successors) agree that their indivisible equitable interests should be converted into separate equitable interests.

   This question reflects a new approach now adopted by Rojoda in grounds 1-3 of the Notice of Contention: CAB, pp 147-148.

5. The third question is, where the legal owner of partnership land declares new trusts, by which the legal owner is constituted a bare trustee of the land in favour of the former partners (or their successors) in separate shares equal to the interests of the former partners, does the exemption from duty in s.78 of the *Duties Act 2008* (WA) apply upon the declarations of trust? This is ground 4 of the Notice of Contention: CAB, p 148.

Part III: Certification in respect of Section 78B Notice

6. The Appellant (the "**Commissioner**") certifies that it considers that notice is not required pursuant to s.78B of the *Judiciary Act 1903* (Cth).

Part IV: Citation of Decisions Below

7. The first instance decision of the State Administrative Tribunal ("**Tribunal**") is: [2017] WASAT 35; (2017) 91 SR (WA) 76.

8. The Court of Appeal judgment is: [2018] WASCA 224. It is not yet reported.

Part V: Narrative Statement of Relevant Facts

9. Prior to 12 February 2011, the Scolaro family relevantly consisted of Anthony and Maria Scolaro and their three children (Rosana, John and David). John was married

to Bianca, and they had four children (Diana, Loretta, Christine and Emily). See CA, [46], [65]; CAB, pp 91, 95.

10. Anthony died on 12 February 2011, and John died on 7 August 2012: CA, [54], [64]; CAB, pp 92, 95; Appellant's Further Materials ("**AFM**"), pp 187-188. Anthony left his estate to be divided equally between three testamentary trusts in favour of each of his children (Rosana, John and David): CA, [55]; CAB, p 92; AFM, pp 57-76, 187. John died intestate, meaning that one-third of his estate was left to his wife (Bianca) and one-sixth of his estate was left to each of his four children (Diana, Loretta, Christine and Emily): CA, [65]; CAB, p 95; AFM, p 188.

11. These relationships and matters are depicted diagrammatically in Annexure A.

12. Prior to the deaths of Anthony and John, there were two family partnerships which carried on the business of property ownership and investment. These were the Scolaro Investment Company Partnership ("**SIC Partnership**") and the A&MMR Scolaro Partnership ("**AMS Partnership**") (together the "**Partnerships**"); CA, [46]-[49]; CAB, pp 91-92; AFM, pp 5-32, 184-185.

13. The SIC Partnership had five equal partners, consisting of Anthony and Maria, and their three children. The AMS Partnership had two equal partners, namely Anthony and Maria: CA, [46], [48]; CAB, p 91; AFM, pp 8, 21, 185.

14. Each Partnership owned real property in Western Australia. Anthony and Maria Scolaro were the registered proprietors of these properties as joint tenants: CA, [51]-[52]; CAB, p 92; AFM, pp 185-186. They held these properties on behalf of the partners of each Partnership.

15. Upon the death of Anthony, the remaining partners had certain pre-emptive rights for the purchase of Partnership shares. These rights were not exercised within the specified periods, and the Partnerships were dissolved by the terms of the partnership agreements. The date of dissolution for the SIC Partnership was 15 March 2012, and for the AMS Partnership was 12 May 2011: CA, [13] (incorrect reference to "March" as opposed to "May"), [57]-[59], [61]; CAB, pp 80-81, 93-95; AFM pp 13, 28, 187-188.

16. At the date when each Partnership was dissolved, the value of cash or other current assets of the Partnership exceeded the liabilities of the Partnership: CA, [16], [60], [62]; CAB, pp 83, 95; AFM, pp 187-188.

17. The properties of each Partnership were not sold in accordance with the winding-up provisions of the Partnership: CA, [63]; CAB, p 95; AFM, p 189. Instead, in September 2011, Maria became the registered proprietor of all the Partnership properties by reason of her joint tenant's right of survivorship: CA, [56]; CAB, p 93; AFM, pp 77-89, 187-188. However, that did not alter the interests of the former partners (or their successors) in the properties of each Partnership.

10 18. Subsequently, and prior to the completion of the winding-up of the Partnerships, the former partners of each Partnership, or the legal representatives of their estates, executed two deeds on 1 December 2013. These were the SIC Partnership 2013 Deed and the AMS Partnership 2013 Deed (together the "**2013 Deeds**"): AFM, pp 91-116, 189, 191. Until then, the Partnership properties were accounted for as assets in the balance sheets of the Partnerships: State Administrative Tribunal Reasons ("**SAT Reasons**"), [21]; CAB, p 14.

19. The 2013 Deeds relevantly provided as follows:

(a) the legal personal representatives of the estates of Anthony and John "hereby transmit" that estate's beneficial share of the Partnership properties to the
20 beneficiaries of the estate: clauses 2 and 3 (first numbered) {which was referred to as clause 3A by Murphy JA: CA, [69]; CAB, p 96} of the SIC Partnership 2013 Deed (AFM, pp 100, 191); clause 2 of the AMS Partnership 2013 Deed (AFM, pp 113, 189);

(b) Maria, as trustee of the Partnership properties, then declared that she "confirms" that she held the legal title for the benefit of the surviving partners according to their previous Partnership proportion and for each of the beneficiaries who had received a "transmission" of property: clause 3 (second numbered) {which was referred to as clause 3 by Murphy JA: CA, [69] CAB, p 96} of the SIC Partnership 2013 Deed (AFM, pp 100-101, 191-192); clause
30 3 of the AMS Partnership 2013 Deed (AFM, pp 113, 189-190); and

(c) after the transmissions and confirmations described above, Maria "resigns" as the trustee of the former Partnership properties and Rojoda is appointed as replacement trustee of the former Partnership properties: clause 4 of the SIC Partnership 2013 Deed (AFM, pp 101, 194); clause 4 of the AMS Partnership 2013 Deed (AFM, pp 113, 190-191).

20. On 13 March 2015, title to the Partnership properties was transferred to Rojoda: SAT Reasons, [43]; CA, [77]; CAB, pp 22, 102; AFM, pp 117-122, 194.

21. There was no agreed fact or evidence that, at the time when the 2013 Deeds were executed, the liabilities of the Partnerships had been discharged out of the current assets. The Court of Appeal proceeded on the basis that they had not been discharged, but that the value of the cash or other current assets exceeded the amount of the liabilities: CA, [16]; CAB, p 83. The Court did not, nor could not, make any finding that, prior to the execution of the 2013 Deeds, the former partners or their legal representatives had made any specific agreement or allocation providing that cash or other current assets would be used to discharge Partnership liabilities.

22. The Commissioner imposed duty on each of the 2013 Deeds pursuant to ss.10 and 11(1)(c) of the *Duties Act*: AFM, pp 127-137, 163-179, 195-196. Section 10 provides that duty is imposed on dutiable transactions. Section 11(1)(c) provides that a dutiable transaction includes a "declaration of trust over dutiable property". Land in WA is "dutiable property": s.15. A "declaration of trust" relevantly means "any declaration that any identified property vested or to be vested in the person making the declaration is or is to be held in trust for the person or persons… mentioned in the declaration…": s.9.

23. The Commissioner's position below was that, before the 2013 Deeds were executed, the Partnership properties were not held by Maria upon a bare trust for the former partners or the beneficiaries of their estates, and that after the 2013 Deeds were executed they were held by Maria (and then Rojoda) upon a bare trust. Consequently, the legal effect of clause 3 of each of the 2013 Deeds was to declare a new trust. See SAT Reasons, [71]; CA, [34]; CAB, pp 37, 88.

24. Rojoda accepted that, after the 2013 Deeds were executed, the Partnership properties were held upon a bare trust for the former partners or the beneficiaries of their estates.

However, Rojoda argued below that this was also the position, by operation of law, prior to the 2013 Deeds. On that basis, Rojoda claimed that the 2013 Deeds merely acknowledged or recorded an existing obligation of Maria that had arisen under the general law and did not declare any new trusts. See SAT Reasons, [104], [123]-[124]; CA, [89]-[91]; CAB, pp 45-46, 50-51, 107.

State Administrative Tribunal's Decision

25. The Tribunal held that:

(a) "all that the partners …. had during the existence of [the partnership] was a right, upon dissolution of the partnership, to see the partnership assets distributed in accordance with the partnership agreement after payment of partnership debts": SAT Reasons, [113]; CAB, p 48;

(b) "it follows from the nature of this right that the right will continue to exist upon and after dissolution of the partnership, until the realisation of assets, the payment of debts and liabilities and the distribution of assets (*in specie* or by way of the net proceeds of sale)", or unless the partners "by agreement, alter the status of partnership property": SAT Reasons, [116], [120]; CAB, pp 49-50;

(c) the 2013 Deeds "did not confirm the pre-existing beneficial ownership of the partnership properties. Rather, the 2013 Deeds represent an arrangement between the former partners and the estates of the deceased partners which had the effect of altering the status of partnership property from property which was to be used to satisfy their contractual rights of due administration of the partnership, to property held upon new trusts for them": SAT Reasons, [126]; CAB, p 51. See also SAT Reasons, [128]-[129]; CAB, p 51.

26. The Tribunal rejected a submission that the Privy Council in ***Cameron v Murdoch*** (1986) 60 ALJR 280 (which affirmed ***Cameron v Murdoch*** [1983] WAR 321), supported the proposition that, where on dissolution of a partnership, land which is partnership property is not required to be sold in order to pay partnership debts, the former partners have an identifiable beneficial interest in the land, commensurate with their partnership interest, and not a *sui generis* right to share the proceeds of the sale of the land. The Tribunal considered that this interpretation of the Privy

Council's decision was inconsistent with the Privy Council's approval of ***Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd*** [1974] HCA 22; (1974) 131 CLR 321 at 327-328. See SAT Reasons, [110]; CAB, p 48.

27. There was a further issue litigated before the Tribunal. This was whether the 2013 Deeds were transfers of, or agreements for the transfer of, the Partnership properties to the former partners and the estates of the former partners. If so, by virtue of an exemption contained in s.78 of the *Duties Act*, the duty payable upon the transfers, or agreements for the transfer, would be reduced by the unencumbered value of the dutiable property immediately before dissolution, ie the duty would be reduced to zero.

28. The Tribunal applied ***DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)*** [1982] HCA 14; (1982) 149 CLR 431 at 463 and held that when Maria declared that she held the Partnership properties upon bare trusts for the former partners and the beneficiaries of deceased estates of former partners, she created new equitable interests in the Partnership properties, and she did not transfer any pre-existing equitable ownership of the Partnership properties to the former partners or the beneficiaries of the deceased estates: SAT Reasons, [138]; CAB, p 53.

Court of Appeal's Decision

29. Buss P and Beech JA delivered separate reasons from Murphy JA. Their reasons substantially overlapped with the analysis of Murphy JA: CA, [17]; CAB, p 83.

30. Buss P and Beech JA acknowledged that, after dissolution of the Partnerships but prior to the completion of their winding-up, there was no legal requirement that the surplus cash and other current assets be used, in preference to the relevant Partnership properties, to pay the debts and liabilities of the Partnerships. However, they also said that there was nothing in the agreed facts or before the Court which suggested any reasonable basis on which a court might order the discharge of the Partnership debts and liabilities by selling the relevant Partnership properties, rather than using the cash and other current assets: CA, [21]; CAB, p 84. Similarly, Murphy JA considered that "as a matter of practical certainty" the debts and liabilities of the

Partnerships would be paid out of cash and current assets: CA, [137]; CAB, pp 124-125.

31. On this basis, the Court concluded that:

(a) equity would require the partners to use the cash and other current assets to pay or discharge the Partnership debts and other liabilities: CA, [21], [137]; CAB, pp 84, 124-125;

(b) equity would regard as done that which ought to be done, with the consequence that, prior to completion of the winding-up of the Partnerships, equity would regard the cash and other current assets as allocated to payment of the Partnership debts and liabilities: CA, [22], [130], [137]; CAB, pp 85, 122, 124-125;

(c) this allocation meant that there was a *sufficient* ascertainment and provision for the payment of the Partnership debts and liabilities so that equity would recognise that former partners had a specific and fixed proprietary interest in the surplus assets which were not required for payment of the Partnership debts and liabilities: CA, [17], [27], [130], [137]; CAB, pp 83, 86, 122, 124-125;

(d) this conclusion was supported by the Privy Council decision in ***Cameron v Murdoch*** and the decision of Brinsden J in the same case at first instance: CA, [23]-[28], [116]-[131]; CAB, pp 85-86, 115-123;

(e) immediately prior to the execution of the 2013 Deeds, the partners or their legal representatives had specific and fixed beneficial or equitable interests in the Partnership properties, reflecting their proportionate shares in the Partnerships: CA, [29], [138]-[139]; CAB, pp 86-87, 125; and

(f) the 2013 Deeds merely acknowledged or recorded an existing obligation of Maria that had arisen under the general law, and did not create new trusts in relation to the Partnership properties conferring on the partners or their representatives a proprietary equitable interest in the properties that had not previously been held by the partners or their representatives: CA, [5], [31], [140]; CAB, pp 78, 87, 125-126.

32. Having resolved that there was no declaration of any new trusts, the Court of Appeal did not consider the exemption in s.78 of the *Duties Act*. Nor did the Court consider a new ground of appeal raised at the oral hearing of the case, and the related notice of contention: CA, [36]-[40], [141]; CAB, pp 88-90, 126. The new ground was the opposite of Rojoda's primary position that the 2013 Deeds confirmed what had already occurred by operation of law. It was to the effect that the 2013 Deeds, properly construed, were express agreements by which the former partners and their successors provided for the conversion of their partnership interests into fixed equitable interests in the properties, but this was not a dutiable declaration of trust.

10 **Part VI: Argument**

Court of Appeal's Position (First Critical Question, Appellant's Appeal Grounds)

33. Buss P and Beech JA said that the Court would have enforced by order "the obligations of the partners by the use of the cash and other current assets to pay or discharge the Partnership debts and other liabilities": CA, [21]; CAB, pp 84-85. However, Buss P and Beech JA did not identify the legal basis of these obligations. They accepted that "there is no legal requirement that the cash and other assets be used": CA, [21]; CAB, pp 84-85. They deduced the equitable obligations of the partners from the way that a court would have acted, if asked to make an order: "nothing in the agreed facts suggests any reasonable basis on which a court might
20 order the discharge of the Partnership debts and liabilities by selling the relevant Partnership Properties rather than using the cash and other current assets immediately available": CA, [21]; CAB, pp 84-85.

34. By contrast, Murphy JA did not state that there was any legal obligation of the type identified by Buss P and Beech JA. He did not put the matter higher than the "practical certainty" that the debts and liabilities of the Partnerships would be paid out of cash and other current assets: CA, [135], [137]; CAB, pp 124-125.

35. The legal obligation, or the practical certainty, which the members of the Court of Appeal identified, formed the basis for their application of the maxim "equity regards as done that which ought to be done". As they considered that equity would regard
30 it as a matter of legal obligation or practical certainty that the Partnership debts and liabilities would be paid from cash or current assets, they considered that equity

would also regard the former partners as having a vested and fixed interest in the real property of the Partnerships.

36. The legal analysis which the Court of Appeal undertook, and the conclusion which it reached, is not directly supported by any authority. As Buss P and Beech JA accepted at CA, [28]; CAB, p 86, it is inconsistent with unqualified statements in a number of High Court cases. In particular, in ***Commissioner of State Taxation v Cyril Henschke Pty Ltd*** [2010] HCA 43; (2010) 242 CLR 508 at 517 at [25], French CJ, Gummow, Hayne, Heydon and Kiefel JJ said: "The critical point … is that the interest of each partner can be ascertained finally only upon completion of the liquidation and the identification of any surplus share." See also ***Livingston v Commissioner of Stamp Duties (Qld)*** [1960] HCA 94; (1960) 107 CLR 411 at 453 (Kitto J) which was specifically adopted in ***Henschke*** at [25], and ***Hendry v The Perpetual Executors and Trustees Association of Australia Ltd*** [1961] HCA 44; (1961) 106 CLR 256 at 265-266 (Taylor and Menzies JJ).

37. The Court of Appeal should have applied ***Henschke*** and ***Livingston***: ***Farah Constructions Pty Ltd v Say Dee Pty Ltd*** [2007] HCA 22; (2007) 230 CLR 89 at [134] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), even if the Court of Appeal considered that the Privy Council in ***Cameron v Murdoch*** had reached a different and inconsistent view.

38. In any event, it is respectfully submitted that the Court of Appeal's analysis involves the following errors of legal principle.

39. First, the legal obligations of the partners in the winding-up of the Partnerships were defined by the Partnership agreements: AFM, pp 5-32. These agreements are consistent with the standard provisions of partnership legislation, such as s.50 of the *Partnership Act 1895* (WA). The former partners were legally obliged to sell all the assets of the Partnerships, then apply the proceeds to pay the debts and liabilities of the Partnerships. They were then obliged to divide the remaining proceeds amongst themselves according to their partnership interests. It was an error of law for Buss P and Beech JA to say that the legal obligations of the partners only required them to use the cash and other current assets to pay or discharge the Partnership debts and other liabilities.

40. Secondly, the Court did not find that, prior to the execution of the 2013 Deeds, the former partners or their legal representatives had made any specific agreement or allocation providing that cash or other current assets would be used to discharge Partnership liabilities. The maxim that "equity regards as done that which ought to be done" did not require the partners to do anything other than what was legally required under the Partnership agreements. What ought to have been done upon a dissolution of the Partnerships was a sale of all the Partnership properties in accordance with the legal obligations of the partners, and the distribution of the net proceeds. It was an error of law to apply the maxim to require the former partners to do something which they were not legally obliged to do. See ***Meagher, Gummow and Lehane's Equity, Doctrines & Remedies*** (5th ed, Lexis Nexis, 2015) at [3-185], [3-225]; ***Snell's Equity*** (33rd ed, Sweet & Maxwell, 2015) at [5-015].

41. Thirdly, it does not follow that, even if the partners had an obligation to use excess cash and current assets to pay the liabilities of the Partnership, they consequently obtained a fixed and vested equitable interest in the other assets (equivalent to a beneficiary under a bare trust) prior to a winding-up being completed. Prior to the completion of the winding-up, the former partners still only had a right to require the Partnership assets to be applied in accordance with their contractual and statutory rights. That may have given them a sufficient proprietary interest to dispose of by will, but that does not make their interest in surplus Partnership assets equivalent to the interest of a beneficiary under a bare trust.

42. Equity only calls into existence full proprietary interests where this is necessary to give effect to its doctrines: ***Henschke*** at [25]. Where there is a right of due administration which exists prior to the completion of winding-up, it is unnecessary for equity to call into existence a full proprietary interest. Buss P and Beech JA considered, at CA, [32]-[33]; CAB, pp 87-88, that the assessment of taxation itself provided the occasion for equity to call into existence a full proprietary interest. However, in ***Livingston***, the assessment of taxation occurred by reference to rights which existed separately from the question of taxation.

43. This question of when, precisely, equity recognises that former partners (or their successors) obtain a fixed and vested equitable interest in partnership land is

developed more specifically in respect of grounds 1-3 of the Notice of Contention at paragraphs [47]-[59] below.

44. Nothing in ***Cameron v Murdoch*** supports recognition of an exception to ***Henschke***. There are no statements that former partners have a specific and vested interest (equivalent to a beneficiary of a bare trust) in partnership land, if and when it is ascertained that current assets exceed liabilities.

45. The factual background of ***Cameron v Murdoch*** is set out at CA, [116]-[120]; CAB, pp 115-117. The Commissioner submits that:

(a) The decision of Brinsden J was not about whether Jack had obtained a vested interest, *in specie*, in particular partnership land. It was about whether Jack had a sufficient proprietary interest as a former partner to transmit this interest by will. It was entirely orthodox to conclude that Jack had such an interest. The prior decision of the High Court in ***Hendry*** required this result.

(b) Brinsden J treated the interest which Jack had as a former partner (ie a share of $9/27^{th}$) as equivalent to the interest which Jack had as a beneficiary in an unadministered estate (a share of $1/27^{th}$). That is consistent with a conclusion that Brinsden J did not treat Jack's interest as a former partner as vested *in specie*, which gave Jack a particular interest in ML 1659. It has not been suggested since ***Livingston*** that a beneficiary of an unadministered estate has anything more than a right of due administration.

(c) Brinsden J did not say that Jack had a particular interest in ML 1659, which had vested *in specie* at the point of Jack's death, by reason of Jack being a former partner. He said that, at the point of Jack's death, his interest in the partnership was "then no longer an indefinite and fluctuating interest", but had become "one third of the value of the total assets on taking final accounts there being no debts of which I am aware other than debts necessarily incurred in the taking of the final accounts". There had been no final accounts taken at the time, as Brinsden J ordered this to occur in Order 2: [1983] WAR 321 at 362. By making the interest of Jack contingent upon the taking of final accounts, which had not occurred, Brinsden J did not suggest that Jack had any immediately vested interest in ML 1659.

(d) The declaration which Brinsden J made in relation to ML 1659 emphasised that the interest which Jack devised to his legatees was in the whole of the land, and not a specific interest in the land. In Order 8, at [1983] WAR 321 at 363, he declared that "the devise of ML 1659 in the will of John Evander James Cameron deceased to the second plaintiffs is effective to pass to them the interest of the said deceased in the said land, namely, 10/27 of the entirety" (underlining added).

(e) The Privy Council specifically approved the High Court's decision in ***Canny Gabriel*** at 327-328, that a partner had an interest in every partnership asset and that such interest was an equitable interest and not a mere equity: ***Cameron v Murdoch*** (1986) 60 ALJR 280 at 293, and did not suggest any exception to that decision was applicable.

46. At the most, ***Cameron v Murdoch*** did not directly decide the issue raised in the present case. If it did so indirectly, it should not be followed having regard to the matters of principle referred to above. See also ***Parker v Parker*** [2017] TASSC 37 at [92]-[95].

Notice of Contention, Grounds 1 - 3 (Second Critical Question)

47. The first three grounds in the Notice of Contention all proceed upon the basis that Maria, as trustee of the former Partnership land, held only the legal estate in that land, and that there existed a separate beneficial freehold estate in that land which was exhausted and held indivisibly by the former partners (or their successors).

48. These contention grounds then claim that the indivisible beneficial freehold estate was divided into individual freehold estates held separately by the former partners or their successors. The first contention ground effectively claims the division occurred by operation of equity (without any declaration of trust) when it was ascertained that the current assets of the Partnership were sufficient to pay all of the Partnership liabilities. The second contention ground alternatively claims that the division occurred by the 2013 Deeds converting the indivisible estate into separate individual estates (again without any declaration of trust). The third contention ground claims that if there was a declaration of trust, all that happened was that this declaration converted an indivisible estate held by all former partners (or their successors) into

equivalent divided estates, and that there was no substantial change in dutiable value of the interests held by the former partners (or their successors).

49. The starting point involves the proposition that there are always two parallel estates in the land, and that upon dissolution of the Partnerships the legal freehold estate vested in Maria, whereas the beneficial freehold estate vested indivisibly in all of the former partners (or their successors).

50. The fallacy in such a starting point is that there are not always two separate estates in land, one legal and the other beneficial, at every point in time. As Aickin J pointed out in ***DKLR Holding Co (No 2)*** at 463, if one person has both the legal estate and the entire beneficial interest in the land, that person holds an entire and unqualified legal interest, and not two separate interests, one legal and the other equitable.

51. Equity may impose upon a legal owner of land the obligation to deal with it in a certain way. That obligation may be to require the legal owner of the land to deal with the land as if another person is the freehold owner of the land. If that is the nature of the obligation, this creates a bare trust and the beneficiary may be regarded as holding a beneficial freehold estate in the land. See the observations of Hope JA in the New South Wales Court of Appeal in ***DKLR Holding (No 2) v Commissioner of Stamp Duties*** [1980] 1 NSWLR 510 at [16].

52. However, equity may impose a range of different obligations upon the legal owner, which are less than an obligation to deal with the land as if someone else was the owner of that land. It may lead to confusion to describe all obligations within this range as "trust" obligations: ***Sze Tu v Lowe*** [2014] NSWCA 462; (2014) 89 NSWLR 317 at [123]-[124].

53. It is orthodox that the extent of the obligation which equity will impose in any situation depends upon what is necessary to give effect to and protect its doctrines: ***Commissioner of Stamp Duties (Qld) v Livingston*** [1965] AC 694; (1964) 112 CLR 12 at 22; ***Barns v Barns*** [2003] HCA 9; (2003) 214 CLR 169 at [78] (Gummow and Hayne JJ); ***Henschke*** at [25].

54. During the existence of a partnership, it is well established that all that is necessary to protect equity's doctrines is to recognise that each partner has, in equity, an undivided interest in the whole of the property, which is non-specific and of a unique

kind. Each partner has a right to see that this property is duly administered in accordance with the partnership agreement. Likewise, the traditional view is that upon a dissolution, each partner only has a right to see that the property is applied to payment of the partnership's debts, and that any surplus remaining after this is distributed to the partners in accordance with their respective shares. It is only after the completion of a liquidation that the particular interest of each partner in any remaining surplus can be identified. See ***Livingston*** at 453; ***Canny Gabriel*** at 328; ***Henschke*** at [25]; ***Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd*** [2012] WASCA 216; (2012) 45 WAR 29 at [42]; ***Sze Tu*** at [122].

55. Between the time when a partnership is dissolved and its winding-up, the only right of former partners which it is necessary for equity to protect is the right of due administration of the partnership assets. That is, equity protects the position of former partners to an entitlement until after the winding-up process can be completed. It is unnecessary for equity to create any specific estates in the former partnership property.

56. Equity acknowledges that it is possible for a former partner to transmit by will an entitlement to participate in a winding-up process: ***Hendry*** at 265-266. This is necessary to ensure that a former partner, and his or her estate, is not deprived of rights simply by the happenstance of supervening death. However, it is not necessary for equity to accept that any specific interest in property has been transmitted in such a case.

57. Likewise, equity accepts the possibility of a partner charging his or her right to receive a surplus after participating in the winding-up process, without it being necessary to conclude that the charge relates to any particular partnership assets: ***United Builders Pty Ltd v Mutual Acceptance Ltd*** [1980] HCA 43; (1980) 144 CLR 673 at 687.

58. Once it is appreciated that the only obligation which equity imposes upon the legal owner of former partnership property is an obligation to duly administer it in accordance with the terms of the partnership agreement and to distribute a surplus, there is no basis for the starting point adopted by Rojoda in respect of its first three grounds of contention. Put another way, these grounds assume that the former partners (or their successors) were the owners of a beneficial freehold estate in the

Partnership properties, and reason from that proposition. That is also an assumption that underpins the 2013 Deeds themselves.

59. The Court of Appeal did not base its analysis upon the starting point which is adopted by the first three grounds of contention. As it is wrong in law, none of these grounds should be upheld.

Section 78 of the Duties Act (Notice of Contention, Ground 4; Third Critical Question)

60. The operation of s.78 of the *Duties Act* depends upon there being a transfer or agreement to transfer dutiable property of a partnership: s.78(1).

61. The dutiable property must be the "property of the partnership". In the present case, the dutiable property of the Partnerships consists of the Partnership land. These properties are "land in Western Australia" within the meaning of the definition of "dutiable property" contained in s.15(a) of the *Duties Act*. See also the definition of "land" in s.3, which includes any estate or interest in land.

62. Effectively, Rojoda contends that there will be a transfer of partnership property where there is an agreement to re-settle the existing equitable interest enjoyed by the partnership as a whole. However, it is incorrect to say that, during the existence of a partnership or after dissolution, the partners owned a full beneficial estate in the land, which corresponded to the full legal estate in the land, and that the 2013 Deeds were agreements to re-settle the full beneficial estate which were agreements to transfer property. As explained, the 2013 Deeds created new equitable interests, rather than being agreements to transfer any pre-existing interests.

63. There is another point. The *Duties Act* distinguishes between transfers of property and declarations of trust in various places. For example, this distinction appears in the definitions of "declaration" and "transfer" in s.9, and the separate heads of duty in ss.11(1)(a) and (c) of the *Duties Act*. There is also a distinction about the liability to pay duty within Schedule 1, which imposes duty upon the transferee of a transfer of property, whereas it imposes duty upon the person declaring a trust (not the person receiving the equitable interest).

64. Conceptually, it is right to draw this distinction, as a declaration of trust creates new equitable interests, even if the declaration of trust replaces existing equitable interests or estates.

65. This emphasises that a limited operation of s.78(2) was intended. By its terms, it only applies to transfers of property, not declarations of trust. Consequently, on a proper construction of s. 78(2), it does not apply to this case, where the effect of the 2013 Deeds was to declare new trusts.

Part VII: Orders Sought

64. The Appellant seeks the following orders:

(a) The appeal be allowed.

(b) The orders of the Court of Appeal of the Supreme Court of Western Australia made on 21 December 2018 be set aside.

10 (c) The appeal to the Court of Appeal of the Supreme Court of Western Australia be dismissed with costs.

(d) The Respondent pay the costs of the appeal to be taxed if not agreed, including the costs of special leave.

Part VIII: Estimate of Time

65. The estimate of hours required for the presentation of the Appellant's oral argument (including reply) is 2.5 hours.

Dated: 12 July 2019

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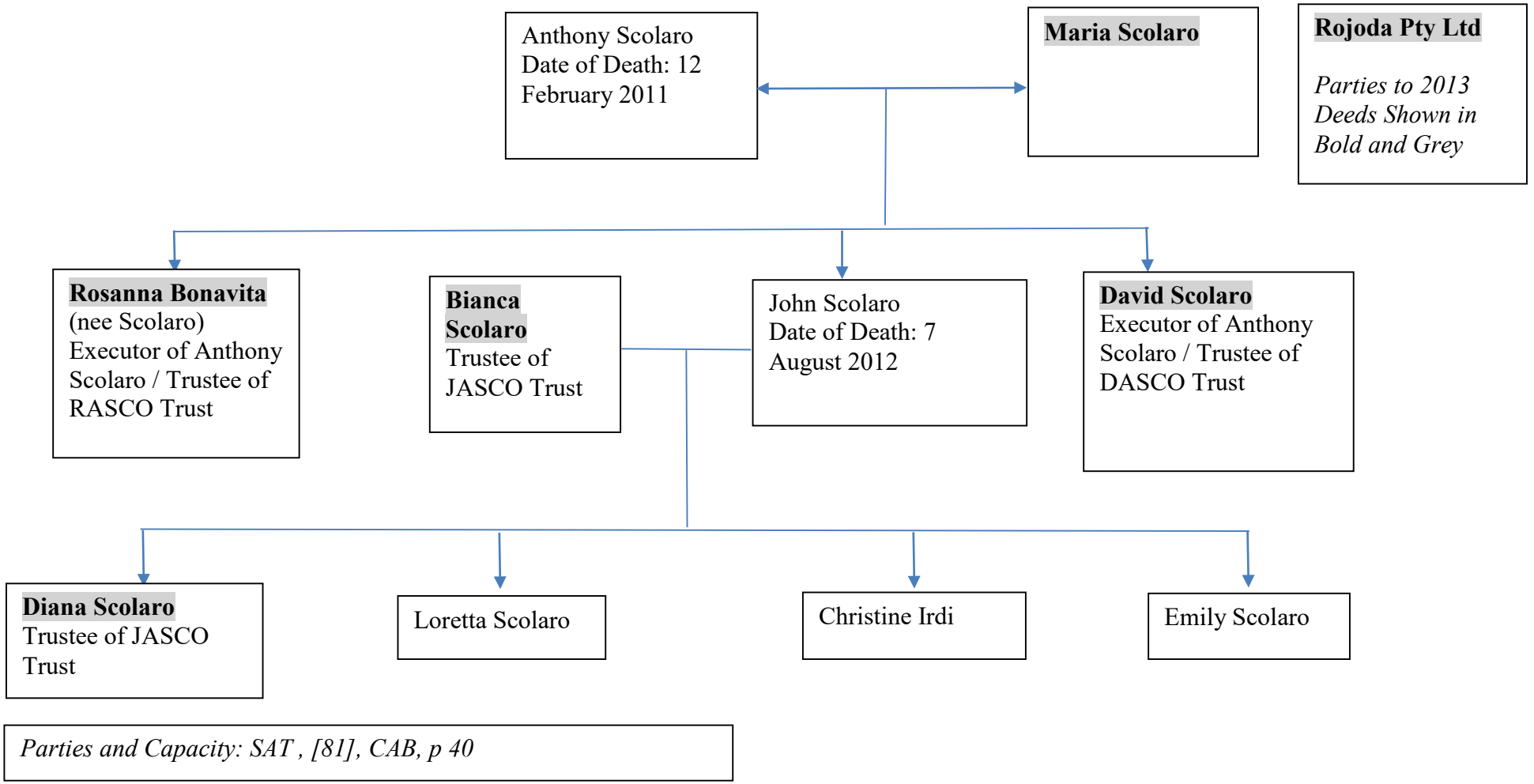
ANNEXURE A

DIAGRAM OF PARTIES



Parties and Capacity: SAT , [81], CAB, p 40