HIGH COURT OF AUSTRALIA

BELL, GAGELER, KEANE, NETTLE AND EDELMAN JJ

COMMISSIONER OF STATE REVENUE APPELLANT

AND

ROJODA PTY LTD RESPONDENT

Commissioner of State Revenue v Rojoda Pty Ltd
[2020] HCA 7
Date of Hearing: 6 & 7 November 2019
Date of Judgment: 18 March 2020
P26/2019

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of Western Australia made on 21 December 2018 and in their place order that the appeal be dismissed with costs.*

On appeal from the Supreme Court of Western Australia

Representation

J A Thomson SC, Solicitor-General for the State of Western Australia, with E C Salsano for the appellant (instructed by State Solicitor's Office (WA))

B Dharmananda SC with S K Grimley for the respondent (instructed by Ernst & Young Law Pty Ltd)

CATCHWORDS

Commissioner of State Revenue v Rojoda Pty Ltd

Stamp duties – Declaration of trust – Partnership – Dissolution – Partnership assets – Nature of partners' rights in relation to partnership assets – Where freehold titles to land held by two partners as joint tenants – Where other partners not registered title holders – Where partnerships dissolved but not wound up upon death of one partner holding titles – Where surviving partner declared trusts over freehold titles for benefit of other partners in proportion to partnership interests – Where Commissioner assessed declaration of trust as "dutiable transaction" within meaning of *Duties Act 2008* (WA), s 11(1) – Whether partner holding freehold titles trustee for other partners – Whether declaration of trust by surviving partner holding freehold titles created new interests in land – Whether declaration of trust dutiable transaction.

Words and phrases – "beneficial interest", "conveyance", "declaration of trust", "dissolution", "dutiable transaction", "equitable interest", "non-specific interest", "partners' interest", "partnership property", "right to account and distribution", "transfer", "trust for partnership", "winding up".

Partnership Act 1895 (WA), ss 30, 32, 33, 50, 57.
Duties Act 2008 (WA), ss 11(1)(c), 78.

BELL, KEANE, NETTLE AND EDELMAN JJ.

Introduction

1 What is the nature of the interest of partners in partnership property? This is the question at the heart of this appeal. The appeal concerns declarations made in two deeds in 2013 between the partners and their successors in title of two dissolved partnerships that had not yet been wound up. The deeds provided that freehold titles registered in the names of two partners, which were part of the partnership property of the two dissolved partnerships, be held on trust for the former partners or their representatives in fixed shares according to their partnership shares. The appellant, the Commissioner of State Revenue, imposed duty upon the declarations of trust that were made in each of the two deeds. The central submission of the respondent, Rojoda Pty Ltd, is that the deeds merely confirmed the existing position in relation to the partnership property of the dissolved partnerships: the property had been held on trust for the partners in fixed shares and this position continued.

2 The State Administrative Tribunal dismissed Rojoda's application for review of the Commissioner's decision on the basis that the deeds involved declarations of new trusts that were dutiable under the *Duties Act 2008* (WA). However, the Court of Appeal of the Supreme Court of Western Australia held that the deeds did not involve any dutiable transaction because after the dissolution of the partnerships the practical reality that liabilities would be discharged from current assets meant that the freehold titles were then held on fixed trust for the partners according to their partnership shares.

3 Rojoda's submission in this Court is that, subject to the partnership agreement, a partner's legal title to partnership property is held on trust for all the partners. That submission should be accepted. However, the nature of the partners' rights under that trust is unique. They differ significantly from the rights under a fixed trust and their nature does not change before winding up is complete. The creation of fixed trusts by the two deeds in 2013 involved the extinguishment of these unique equitable rights and the dutiable event of the creation of new fixed trusts. Rojoda's further contentions that the two deeds involved conversion agreements rather than declarations of trust and that they involved agreements to transfer partnership property to the former partners and their successors under s 78 of the *Duties Act* should also be dismissed. The appeal should be allowed.

Background

4 The background to this appeal concerns the business affairs of the Scolaro family. For clarity, and with no disrespect intended, reference is made in these reasons to the family members by their first names.

5 The Scolaro family ran a business of property ownership and investment. The business was conducted through two partnerships. The first was the Scolaro Investment Company Partnership ("the SIC Partnership"). The SIC Partnership was established by a Deed of Partnership in 1972 with five equal partners. The partners were Anthony and Maria Scolaro and their three children, Rosana, John, and David. The second partnership was the A&MMR Scolaro Partnership ("the AMS Partnership"). The AMS Partnership was established by a Deed of Partnership in 1986 with two equal partners. Those partners were Anthony and Maria.

6 Anthony died on 12 February 2011, leaving his estate to be divided equally between three testamentary trusts for his children: (i) the JASCO Testamentary Trust (with John as the primary beneficiary); (ii) the RASCO Testamentary Trust (with Rosana as the primary beneficiary); and (iii) the DASCO Testamentary Trust (with David as the primary beneficiary).

7 Upon Anthony's death, each of the partnerships dissolved. The partnership deeds had provided a mechanism for this dissolution to be "technical" or "notional" with the other partners to continue the business of the partnership. But this did not occur. Instead, on 12 May 2011 and 15 March 2012, respectively, each of the AMS Partnership and the SIC Partnership was subject to a general dissolution in accordance with the respective partnership deeds. The combined value of the properties of the AMS Partnership at dissolution was $14.2 million and, in relation to the SIC Partnership, $11.65 million. For each partnership, the value of cash and other current assets exceeded the value of the liabilities.

8 Anthony and Maria had been registered as joint tenants of six freehold titles (four of which as to a half-share) which were partnership property of the SIC Partnership. They were also registered as joint tenants of five freehold titles (one of which as to a half-share) which were partnership property of the AMS Partnership. Following Anthony's death, Maria, as the surviving joint tenant, became registered as proprietor of the freehold titles. None of the properties was sold.

9 John died intestate on 7 August 2012. By operation of s 14 of the *Administration Act 1903* (WA), one-third of his estate passed to his wife and

two-thirds passed to his children. John's wife, Bianca, and his daughter, Diana, became the trustees of the JASCO Testamentary Trust. Diana became the administrator of John's estate.

10 Until December 2013, the partnership freehold titles were accounted for as assets in the balance sheets of the partnerships. None of the partnership freehold titles had been sold and this litigation proceeded on the basis that the partnership liabilities had not been discharged. On 1 December 2013, Maria, her two surviving children (Rosana and David), Diana and Bianca, and Rojoda entered into two deeds concerning, respectively, the SIC Partnership ("the SIC Deed") and the AMS Partnership ("the AMS Deed") (together "the 2013 Deeds"). Each of the 2013 Deeds takes the same approach in relation to the freehold titles of each partnership. The relevant recitals to the SIC Deed are replicated in the AMS Deed with relevant changes to reflect the different freehold titles of each partnership and the half-shares of each of Anthony and Maria in that partnership.

11 The 2013 Deeds each recite, in Recital C, the detail of the freehold titles that were held by "Anthony Scolaro and Maria Scolaro ... jointly as joint trustees for the Partnership". Those freehold titles are referred to as "the Properties" in each deed. In Recital E, the 2013 Deeds each recite that "[o]n the passing away of Anthony Scolaro, Maria Scolaro became the sole surviving trustee of the Properties. The Properties continued to be held on trust for the Partnership as before." Recital F describes the properties as to which the legal title was transferred "into the sole name of Maria Scolaro as the sole surviving trustee" and states that the "beneficial ownership ... remained unchanged". Recital J of the SIC Deed and Recital I of the AMS Deed reiterate that on dissolution of the partnerships the "beneficial interest in the assets" was held by the former partners or their estates. Recital W of the SIC Deed and Recital Q of the AMS Deed recite that the parties "consider it prudent to appoint a new trustee ... to replace Maria Scolaro as trustee of the Properties". That new trustee was Rojoda.

12 The operative clauses of the 2013 Deeds are as follows:

(1) Clause 1: the parties "acknowledge and agree" various matters, including that on dissolution of the partnerships the "Properties and other assets that were previously held by the Partnership were beneficially owned" as to shares of 20 per cent for each of the partners (in the SIC Deed) and 50 per cent for each of the partners (in the AMS Deed).

(2) Clauses 2 and 3 in the SIC Deed and cl 2 in the AMS Deed: the executors of Anthony's estate and the administrator of John's estate, and in the case of the AMS Deed Anthony's estate, "hereby transmit" the deceased's beneficial shares of "the Properties" according to the terms of Anthony's

will (with respect to Anthony) and the *Administration Act 1903* (WA) (with respect to John).

(3) Two final clauses (misnumbered in the SIC Deed): (i) Maria "confirms" that she holds the Properties on trust for the partners and the legatees of Anthony and John in their respective shares; and (ii) Maria resigns as trustee of the Properties and the parties agree that Rojoda be appointed as the new trustee with transfers of the legal title to the Properties to be made to Rojoda.

13 The Commissioner imposed duty upon the declarations of trust in each of the 2013 Deeds. Objections were lodged by the former partners on two bases. First, it was submitted that no duty was payable because the 2013 Deeds had not created new trusts. The partnership freehold titles had always been held on trust and the 2013 Deeds had merely confirmed this trust. Secondly, it was submitted that only nominal duty should have been payable to the extent to which the 2013 Deeds gave effect to distributions of both Anthony's estate and John's estate. The first submission was rejected by the Commissioner but the second was accepted. Duty was re-assessed in the total amount of $707,285.

The imposition of duties by the *Duties Act 2008* (WA)

14 The *Duties Act* imposes duty on dutiable transactions[1] with the duty to be charged "by reference to the dutiable value of a dutiable transaction"[2]. One type of dutiable transaction is "a declaration of trust over dutiable property"[3]. Dutiable property includes "land in Western Australia"[4] and "a right"[5]. A "declaration of trust" is defined as[6]:

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1 *Duties Act 2008* (WA), s 10.

2 *Duties Act*, s 26(1)(a).

3 *Duties Act*, s 11(1)(c).

4 *Duties Act*, s 15(a).

5 *Duties Act*, s 15(b).

6 *Duties Act*, s 9, definition of "declaration of trust".

> "any declaration (other than by a will) 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, or the purpose or purposes, mentioned in the declaration although the beneficial owner of the property, or the person entitled to appoint the property, may not have joined in or assented to the declaration".

15 Another type of dutiable transaction is a "partnership acquisition"[7]. A partnership acquisition is defined as including "a person acquiring a partnership interest in a partnership that holds ... land in Western Australia"[8]. In turn, the *Duties Act* provides that a partnership interest is acquired upon the formation of a partnership or if the person's partnership interest increases[9]. The value of the acquired partnership interest is calculated by reference to capital contributions made by or required of the partner and losses that must be borne by the partner[10]. The dutiable value of the partnership acquisition is calculated by reference to dutiable property held by the partnership or an entity linked to the partnership[11].

16 Section 78(1) of the *Duties Act* provides for a reduction in the duty payable in circumstances of a transfer or agreement to transfer property of the partnership to a "retiring partner" where the person is a retiring partner due to their retirement from the partnership or its dissolution. Section 78(2) provides:

> "The dutiable value of a transfer of, or an agreement for the transfer of, dutiable property to the retiring partner must be reduced by an amount calculated by applying the retiring partner's partnership interest in the partnership to the unencumbered value of the dutiable property immediately before the retirement or dissolution."

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7 *Duties Act*, s 11(1)(i).

8 *Duties Act*, s 72(a).

9 *Duties Act*, s 75(1).

10 *Duties Act*, s 74.

11 *Duties Act*, ss 76, 77.

The central issue

17 The Commissioner's consistent case throughout this litigation was that the 2013 Deeds created a new trust due to the change in character of the rights of the former partners or their estates from a unique equitable interest in partnership property to a new equitable interest under a fixed trust. Rojoda's consistent primary position was that the 2013 Deeds did not involve a declaration of trust, and hence they were not a dutiable transaction on that basis, because they merely confirmed the existence of the trust upon which partners held the partnership property.

18 At no stage in this litigation was any issue raised arising from the agreed fact that two of the six freehold titles of the SIC Partnership, at Hay Street and Colin Street in West Perth, were the subject of declarations of trust by Anthony and Maria. Those declarations of trust were made in 1976 and 1988 respectively, as to a one-fifth share in favour of each of Anthony, Maria, Rosana, John, and David. Although reference was made in this Court to the fact of those declarations, Rojoda properly did not seek to rely upon a ground of contention, not referable to any issue raised in the Tribunal or the Court of Appeal, to allege that these declarations of fixed trust meant that the declarations of trust in the 2013 Deeds were not dutiable transactions. Nor was it submitted that these declarations of trust were inconsistent with the agreed fact that the Hay Street and Colin Street freehold titles were partnership property of the SIC Partnership.

The Tribunal and Court of Appeal decisions

19 Rojoda applied to the Tribunal for review of the Commissioner's decision to levy duty on the transactions arising from the 2013 Deeds. In a decision given by the Deputy President (Judge Sharp), the Tribunal dismissed the application. The Tribunal held that after dissolution of the partnerships, but before the 2013 Deeds, the partners had only a right to their respective proportion of the surplus after realisation of assets and payment of debts and liabilities. The Tribunal therefore held that since the effect of the 2013 Deeds was to declare a bare trust over the legal title to the properties held by Maria in favour of each of the former partners and the legatees of the deceased estates, the transactions in the 2013 Deeds were dutiable because the 2013 Deeds thus altered the status of the partnership property. The alteration was said to be "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"[12].

20 The Tribunal also held that the declaration of the bare trusts by the 2013 Deeds involved the creation of new equitable interests rather than the "transfer" of existing equitable interests. Hence, the Tribunal rejected an alternative submission by Rojoda that the 2013 Deeds were agreements to transfer legal title to the partnership properties which were said by Rojoda to have enlivened s 78 of the *Duties Act*, requiring a reduction in the amount of duty[13].

21 An appeal to the Court of Appeal of the Supreme Court of Western Australia was allowed. A similar and complementary approach was taken between the joint reasons of Buss P and Beech JA and the reasons of Murphy JA. The starting point of their Honours' reasoning was orthodox. As each judgment correctly observed, the interest of partners in relation to partnership assets is not an interest in any particular asset but is an indefinite and fluctuating interest in relation to the assets, being the right to a proportion of the surplus after the realisation of the assets and payment of the debts and liabilities of the partnership[14]. Further, as each judgment also correctly observed[15], and as Taylor and Menzies JJ had explained in *Hendry v The Perpetual Executors and Trustees Association of Australia Ltd*[16], this remains the position after the "general"[17] dissolution of the partnership following death or retirement of a partner but before completion of the winding up. The consequence of this reasoning would have been that duty would have been payable on the transactions under the

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12 *Rojoda Pty Ltd v Commissioner of State Revenue* (2017) 91 SR (WA) 76 at 104 [126].

13 *Rojoda Pty Ltd v Commissioner of State Revenue* (2017) 91 SR (WA) 76 at 105-106 [135]-[139].

14 *Rojoda Pty Ltd v Commissioner of State Revenue* (2018) 368 ALR 734 at 737 [10], 760 [108].

15 *Rojoda Pty Ltd v Commissioner of State Revenue* (2018) 368 ALR 734 at 738-739 [14], 761 [110].

16 (1961) 106 CLR 256 at 265-266.

17 *Commissioner of State Taxation (SA) v Cyril Henschke Pty Ltd* (2010) 242 CLR 508 at 513-514 [11]-[14], 516-517 [23].

2013 Deeds due to their creation of trusts of the freehold titles held by the partnerships, in fixed shares according to the interests of the former partners.

22 However, in both judgments their Honours considered that the character of the partners' equitable rights had changed on dissolution to be a fixed interest in the partnership freehold titles with the consequence that no duty was payable. The reasoning in each judgment was broadly similar, and was as follows[18]: (i) after dissolution the practical reality was that a court would order the discharge of partnership debts in winding up by the use of cash or other current assets; (ii) equity would regard as done that which ought to be done and would allocate current assets to the payment of liabilities; (iii) if current assets were assumed to be allocated to payment of all partnership liabilities then the surplus of partnership assets after discharge of liabilities would be sufficiently ascertained and each partner would have a specific and fixed beneficial or equitable interest in the assets comprising that surplus; (iv) this conclusion was supported by the decisions in *Cameron v Murdoch*[19], *In re Ritson*[20], and *In re Holland*[21]; and (v) since the declaration of trust merely replicated the existing trust of partnership property it was not dutiable, it being unnecessary to decide whether this was because there was no declaration of trust under s 11(1)(c) or whether the duty was reduced to a nominal duty under s 78 of the *Duties Act*.

23 In light of the conclusions that the Court of Appeal reached, further issues raised by the parties were not addressed. Rojoda had sought, and was granted, leave to add an alternative ground of appeal alleging that the 2013 Deeds were agreements by the former partners and their successors to "convert" their partnership interests into "fixed equitable interests in the Properties". The Commissioner had resisted this ground of appeal with a notice of contention alleging, in effect, that if there were such an agreement to convert interests as Rojoda alleged then that agreement involved a declaration of trust to create the new, fixed equitable interests. Rojoda had also submitted that any duty payable under the 2013 Deeds was reduced to a nominal amount by s 78 of the *Duties Act*.

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18 *Rojoda Pty Ltd v Commissioner of State Revenue* (2018) 368 ALR 734 at 739-744 [17]-[40], 762-770 [116]-[141].

19 [1983] WAR 321; on appeal (1986) 60 ALJR 280; 63 ALR 575.

20 *In re Ritson; Ritson v Ritson* [1899] 1 Ch 128.

21 *In re Holland; Brettell v Holland* [1907] 2 Ch 88.

The appeal grounds and Rojoda's notice of contention in this Court

24 In this Court, the Commissioner's ground of appeal maintained her consistent stance that both before and after the dissolution of each partnership, but before winding up, the partners had only a non-specific, fluctuating interest in all the partnership freehold titles so that the 2013 Deeds created new trusts of those titles by a transaction that was liable for duty under s 11(1)(c) of the *Duties Act*.

25 Rojoda supported the reasoning of the Court of Appeal, although submitting that the partnership freehold titles were always held on trust. By leave of this Court, save for a reference to one factual matter which was said only to be relevant as background[22], Rojoda's amended notice of contention effectively involves three grounds: first, that the partnership freehold titles were always held on trust for the partners and that the partners' interests under the trust became ascertainable upon dissolution of the partnership; secondly, and alternatively, that Maria had no power to declare any trust and, instead, the 2013 Deeds had only confirmed a separate agreement of the partners to convert their partnership interests under a trust into specific equitable interests in the freehold titles; and thirdly, and in the further alternative, that if the 2013 Deeds did involve declarations of trust then the declarations of trust were agreements to transfer partnership property, namely the freehold titles, to the former partners and their successors according to their respective partnership interests and were not dutiable due to the operation of s 78 of the *Duties Act*. Each of these grounds can be considered in turn.

Partners' rights after dissolution and the 2013 Deeds

26 Rojoda's primary submission began with the proposition that, in the absence of provision otherwise in the partnership agreement, partnership property is held on trust for the partners. For the reasons below, that proposition should be accepted. However, the equitable rights of partners under a trust of partnership property differ substantially from the equitable rights created by the declarations of trust in the 2013 Deeds. Contrary to the reasoning of the Court of Appeal, those rights did not change after dissolution due to the equitable maxim that equity regards as done that which ought to be done. The Tribunal was therefore correct to conclude that the 2013 Deeds involved dutiable transactions, being the declaration of new trusts.

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22 See above at [18], reference to the Hay Street and Colin Street properties.

Partners' rights in equity before the Partnership Act 1895 (WA)

27 Insofar as it concerned partnership property, like the partnership legislation in other parts of Australia[23], the *Partnership Act 1895* (WA) was an "exact counterpart"[24] of the United Kingdom legislation that was introduced in 1890[25]. Perhaps unsurprisingly, given that the Bill for the *Partnership Act 1890* in the United Kingdom was "carefully examined" by Lindley LJ, who was the author of the leading work on partnership at the time[26], the legislation was said to have "introduced no great change in the law"[27].

28 Two decades before the 1890 legislation, different views had been expressed in *Knox v Gye*[28] concerning whether partnership property was held on trust for a deceased partner's estate. Lord Westbury said that a surviving partner is sometimes described, inaccurately, as a trustee for the deceased partner. He said that the surviving partner was not a trustee and that although the surviving partner "may be called" a trustee so far as his obligations extend to the estate of the deceased partner, "when these obligations have been fulfilled, or are discharged, or terminate by law, the supposed trust is at an end"[29]. Lord Westbury compared the description of the surviving partner as a trustee with the metaphorical and improper description, which continues to be regarded as inaccurate[30], of a vendor of land under a specifically enforceable contract of

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23 *Partnership Act 1891* (Qld); *Partnership Act 1891* (SA); *Partnership Act 1891* (Tas); *Partnership Act 1891* (Vic); *Partnership Act 1892* (NSW).

24 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 July 1895 at 315.

25 *Partnership Act 1890* (53 & 54 Vict c 39), see, relevantly, ss 20(1), 20(2), 22, 39.

26 United Kingdom, *Parliamentary Debates*, House of Commons, 18 July 1890, vol 347, col 227. See Lindley, *A Treatise on the Law of Partnership* (1860).

27 *Sandhu v Gill* [2006] Ch 456 at 464 [25], quoting Banks, *Lindley & Banks on Partnership*, 18th ed (2002) at 4 [1-06].

28 (1872) LR 5 HL 656.

29 *Knox v Gye* (1872) LR 5 HL 656 at 675.

30 See *Haque v Haque [No 2]* (1965) 114 CLR 98 at 124-125; *Chang v Registrar of Titles* (1976) 137 CLR 177 at 190; *Kern Corporation Ltd v Walter Reid Trading*

Footnote continues

sale as a trustee. Lord Westbury then said that there is "nothing fiduciary" about the relationship between the surviving partner and the representative of the deceased partner[31]. Shortly before the enactment of the United Kingdom *Partnership Act* in 1890, Frederick Pollock referred to Lord Westbury's remarks and said that the description sometimes given of a surviving partner as a trustee of partnership property was "at least doubtful"[32].

29 In contrast, Lord Hatherley LC expressed "very strongly" his dissent from the view that there was no fiduciary relationship between the surviving partner and the representative of the deceased partner. The Lord Chancellor said that title to the partnership assets might be vested in the surviving partner at common law but in equity a tenancy in common arose so that the assets were held subject to the interests of the estate of the deceased partner and the surviving partner was accountable to the representatives of the deceased partner for the use of the assets[33].

30 The view of Lord Hatherley prevailed. That view is principled. It accords with the fundamental obligation of each partner to render an account of dealings with partnership property, which had long been enforced at law[34], then in equity[35], and now under statute[36]. The relationship of partners was designated as

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Pty Ltd (1987) 163 CLR 164 at 192; *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 332 [53].

31 *Knox v Gye* (1872) LR 5 HL 656 at 675-676.

32 Pollock, *A Digest of the Law of Partnership*, 4th ed (1888) at 82 fn 3.

33 *Knox v Gye* (1872) LR 5 HL 656 at 678-679.

34 *Clerk v Winterbourne* (1289) in Brand (ed), *The Earliest English Law Reports* (2007), vol 4 at 430. See Brand, "Merchants and Their Use of the Action of Account in Thirteenth- and Early Fourteenth-Century England", in Allen and Davies (eds), *Medieval Merchants and Money: Essays in Honour of James L Bolton* (2016) 293 at 298, 303.

35 *Lumley v Garret* (1636-37) Toth 2 [21 ER 105]. See Spence, *The Equitable Jurisdiction of The Court of Chancery* (1846), vol 1 at 649-650, 665-666.

36 See, eg, *Partnership Act 1895* (WA), s 39.

"fiduciary" around the time that term became commonplace[37]. A basal fiduciary obligation, as moulded by agreement[38], is that each partner will hold, and will deal with, legal rights to partnership property for the benefit of all the partners, whose interest lies in their right to a share of the net proceeds of partnership property after winding up.

31 Lord Hatherley's view that partnership property is held on trust also reflected the acceptance of the existence of a trust in earlier cases[39] as well as the approach that had been expressed in successive editions of Sir Nathaniel Lindley's treatise on partnership since 1860[40]. It was also consistent with a line of cases that had limited the application in equity of rights of survivorship between partners, so that upon the death of a partner who was a joint tenant at common law, the other joint tenant would continue to hold the interest of the deceased partner on trust for the persons entitled to the deceased estate[41].

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37 *Lees v Laforest* (1851) 14 Beav 250 at 257 [51 ER 283 at 285]; cf Sealy, "Fiduciary Relationships" [1962] *Cambridge Law Journal* 69 at 72 fn 11.

38 See *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 97; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 206; *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd [No 4]* (2007) 160 FCR 35 at 77 [281]; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 36 [91]-[92].

39 *West v Skip* (1749) 1 Ves Sen 239 at 242 [27 ER 1006 at 1008]; *Crawshay v Collins* (1808) 15 Ves Jun 218 at 229 [33 ER 736 at 741] ("equitable title"); *Broom v Broom* (1834) 3 My & K 443 at 444 [40 ER 169 at 169].

40 Lindley, *A Treatise on the Law of Partnership* (1860), vol 1 at 546-547, 564; 2nd ed (1867), vol 1 at 644-645, 664-665; 3rd ed (1873), vol 1 at 663-664, 684-685; 4th ed (1878), vol 1 at 643-644, 664-665; 5th ed (1888) at 323-324, 341. See now Banks, *Lindley & Banks on Partnership*, 20th ed (2017) at 666 [18-07], 692-696 [18-63]-[18-66].

41 *Lake v Gibson* (1729) 1 Eq Ca Abr 290 at 291 [21 ER 1052 at 1053]; *Lake v Craddock* (1732) 3 P Wms 158 at 159 [24 ER 1011 at 1012]; *Lyster v Dolland* (1792) 1 Ves Jun 431 at 434-435 [30 ER 422 at 423-424]; *Jackson v Jackson* (1804) 9 Ves Jun 591 at 596-597, 603-604 [32 ER 732 at 734, 736-737].

32 Some of the features of a partner's equitable rights under the trust were shared with those of a fixed trust: the interests of the partners were in fixed shares or proportions; the partners owed to each other the common duty of a trustee to apply the partnership property exclusively for the benefit of the partnership in accordance with the partnership deed[42]; and, like those beneficiaries who are entitled to "wind up" a trust[43], a partner could dissolve the partnership, requiring a winding up and consequential distribution of the proceeds of the partnership assets[44].

33 However, unlike a beneficiary of a fixed trust, it was well established that a partner's interest was not an interest in, or in relation to, any specific asset other than an entitlement to the partner's share of the net proceeds from the sale of each asset at the completion of winding up. In other words, the only right that the partners have, both before and after dissolution, in relation to each asset is a right to the account and distribution after sale of the proceeds of that asset – "not to an individual proportion of a specific article, but to an account: the property to be made the most of, and divided"[45]. Hence, a partner's equitable interest is not accurately expressed as a "beneficial interest"[46], at least in the sense of being a

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42 *Crawshay v Collins* (1808) 15 Ves Jun 218 at 226 [33 ER 736 at 740]; *Gardner v M'Cutcheon* (1842) 4 Beav 534 at 542-543 [49 ER 446 at 449]; *Clegg v Fishwick* (1849) 1 Mac & G 294 at 298-299 [41 ER 1278 at 1280].

43 Compare *Saunders v Vautier* (1841) 4 Beav 115 [49 ER 282]; affirmed (1841) Cr & Ph 240 [41 ER 482], discussed in *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98 at 119 [47].

44 *Featherstonhaugh v Fenwick* (1810) 17 Ves Jun 298 at 310 [34 ER 115 at 120]; *Darby v Darby* (1856) 3 Drew 495 at 504 [61 ER 992 at 995].

45 *Crawshay v Collins* (1808) 15 Ves Jun 218 at 229 [33 ER 736 at 741]. See also *West v Skip* (1749) 1 Ves Sen 239 at 242 [27 ER 1006 at 1008]; *Doddington v Hallet* (1750) 1 Ves Sen 497 at 499 [27 ER 1165 at 1166]; *Taylor v Fields* (1799) 4 Ves Jun 396 at 396 [31 ER 201 at 202]; *Featherstonhaugh v Fenwick* (1810) 17 Ves Jun 298 at 309-310 [34 ER 115 at 120]; *Lingen v Simpson* (1824) 1 Sim & St 600 at 603 [57 ER 236 at 238]; *Cockle v Whiting* (1829) Tamlyn 55 at 61-62 [48 ER 23 at 26]; *Darby v Darby* (1856) 3 Drew 495 at 503-504 [61 ER 992 at 995]; *Wild v Milne* (1859) 26 Beav 504 at 505 [53 ER 993 at 993].

46 *Commissioner of State Taxation (SA) v Cyril Henschke Pty Ltd* (2010) 242 CLR 508 at 517 [25]. See also *MSP Nominees Pty Ltd v Commissioner of Stamps (SA)* (1999) 198 CLR 494 at 509 [34].

right to any proportion of, or for the personal use of, or for the benefit from, any particular asset.

34 In a famous description that encapsulated the equitable principles, Lindley described a partner's interest as "his proportion of the partnership assets after they have been all realised and converted into money, and all the debts and liabilities have been paid and discharged"[47]. Lindley added that "[t]his it is, and this only, which on the death of a partner passes to his representatives". Lindley's famous description was copied from the third edition of his text, with attribution, by Pollock[48], who acknowledged Lindley's work as "the guide and foundation of my own", and directed a "reader desiring fuller information" to Lindley's work[49].

35 The description by Lindley emphasised that although the partners have an existing equitable interest in relation to each and every asset for the payment of their share after winding up is complete, that interest can fluctuate during trading and is not ascertained until the assets are realised in a fund upon winding up. Hence, despite some contrary authority[50], where the partnership property was land the equitable interest was described as a "personal estate" in relation to the land to signify that there was no vested or ascertainable right in relation to the particular legal estate in the land[51].

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47 Lindley, *A Treatise on the Law of Partnership* (1860), vol 1 at 561.

48 Pollock, *A Digest of the Law of Partnership* (1877) at 49-50, citing Lindley, *A Treatise on the Law of Partnership*, 3rd ed (1873) at 681.

49 Pollock, *A Digest of the Law of Partnership* (1877) at xxi-xxii.

50 *Bell v Phyn* (1802) 7 Ves Jun 453 at 458 [32 ER 183 at 185]; *Randall v Randall* (1835) 7 Sim 271 at 287-288 [58 ER 841 at 847]; *Cookson v Cookson* (1837) 8 Sim 529 at 548 [59 ER 210 at 217].

51 *Ripley v Waterworth* (1802) 7 Ves Jun 425 at 451-452 [32 ER 172 at 182-183]; *Townsend v Devaynes* (1808) in Montagu, *A Digest of The Law of Partnership* (1815), vol 1, appendix at 97, 101; *Crawshay v Maule* (1818) 1 Swans 495 at 508, 521 [36 ER 479 at 484, 485-486]; *Phillips v Phillips* (1832) 1 My & K 649 at 663 [39 ER 826 at 832]; *Houghton v Houghton* (1841) 11 Sim 491 at 506 [59 ER 963 at 969]; *Essex v Essex* (1855) 20 Beav 442 at 450 [52 ER 674 at 677]; *Darby v Darby* (1856) 3 Drew 495 at 506 [61 ER 992 at 996]; *Holroyd v Holroyd* (1859) 7 WR 426 at 427.

The Partnership Act 1895 (WA)

36 The Western Australian *Partnership Act*, like its 1890 United Kingdom counterpart, reflects the equitable principle that, subject to the terms of the partnership deed, partners hold legal rights to the partnership property on trust for all the partners. Section 30(1) requires partnership property to be held and applied by the partners "exclusively for the purposes of the partnership, and in accordance with the partnership agreement" so that if property is acquired as partnership property in the name only of one partner it will be held "upon trust for the partnership"[52]. Section 30(2) provides that the legal estate or interest in land which is partnership property devolves according to the general rules of law but "in trust so far as necessary for the persons beneficially interested in the land under this section".

37 Section 30(2) does not create any new trust in relation to land. It gives "statutory recognition" to the equitable principle that legal title to partnership property is held on trust for all partners[53]. The reason for the specific provision that estates in land devolve on trust is to ensure that "no distinction can be drawn between the nature of a partner's interest in real estate and his interest in personal estate"[54]. Whatever the nature of the partnership property and "wherever the legal estate may be"[55], it is held on trust for the partners, whose interests are as tenants in common[56]. As Deane J said in *Chan v Zacharia*[57], "there is neither metaphor nor inaccuracy" in the description of a partner as a trustee for the partnership.

38 The *Partnership Act* also preserved equity's unique treatment of the interest of partners under the trust. The partner's unascertained interest in relation

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52 *Carter Bros v Renouf* (1962) 111 CLR 140 at 163.

53 *Re George Livanos, Deceased* [1955] St R Qd 362 at 367. See also *In re Bourne; Bourne v Bourne* [1906] 2 Ch 427 at 432-433.

54 *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321 at 328. See also *Watson v Ralph* (1982) 148 CLR 646 at 650.

55 *In re Bourne; Bourne v Bourne* [1906] 2 Ch 427 at 432.

56 *Spence v Federal Commissioner of Taxation* (1967) 121 CLR 273 at 280.

57 (1984) 154 CLR 178 at 194.

to all of the partnership property is an equitable interest, not a mere equity[58], but the "partner's share" is defined in s 33 as being only "the proportion of the then existing partnership assets to which he would be entitled if the whole were realised and converted into money, and after all the then existing debts and liabilities of the firm had been discharged". Hence, as Lindley MR explained, a "deceased partner could only dispose of his interest in the surplus which would remain after payment of the joint debts out of the joint assets"[59]. Until then, a partner's interest under the trust is unascertained and, although it is a non-specific interest that concerns all partnership assets[60], it is not a right to any particular partnership asset[61]. Indeed, in order that "all doubt upon the point [be] removed"[62], s 32 makes certain that, in the absence of agreement, partners will lack a vested interest in any land that is partnership property. It provides that unless the contrary intention appears, where land has become partnership property it is treated between partners, and the heirs, executors or administrators of partners, as personal and not real estate.

39 Although the peculiar nature of the fluctuating, unascertained, non-specific interest of partners in relation to partnership assets may have led Fullagar J, in dissent in *Maslen v Perpetual Executors Trustees & Agency Co (WA) Ltd*[63], to doubt whether partners had an interest in partnership assets that

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58 *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321 at 325, 328; *Cameron v Murdoch* (1986) 60 ALJR 280 at 293; 63 ALR 575 at 597-598.

59 *In re Ritson; Ritson v Ritson* [1899] 1 Ch 128 at 130-131.

60 *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321 at 327-328; *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440 at 446; *United Builders Pty Ltd v Mutual Acceptance Ltd* (1980) 144 CLR 673 at 687.

61 *Rodriguez v Speyer Brothers* [1919] AC 59 at 68; *Wolfson v Registrar-General (NSW)* (1934) 51 CLR 300 at 312-313; *Bakewell v Deputy Federal Commissioner of Taxation (SA)* (1937) 58 CLR 743 at 770; *Livingston v Commissioner of Stamp Duties (Q)* (1960) 107 CLR 411 at 453; *Commissioner of State Taxation (SA) v Cyril Henschke Pty Ltd* (2010) 242 CLR 508 at 517 [25].

62 Lindley, *A Treatise on the Law of Partnership*, 6th ed (1893) at 352.

63 (1950) 82 CLR 101 at 119-120.

was capable of assignment, s 33 of the *Partnership Act* reflects the position, long established in equity, that partners do have an interest in relation to partnership property although, as this Court has constantly reiterated, the interest "can be finally ascertained only when the liquidation has been completed"[64] and until then it is a non-specific interest[65]. That is all that could have been meant by Rich J when he said, in dissent in *Sharp v The Union Trustee Co of Australia Ltd*[66], that the unascertained interest of a partner "is in proportion to his share in the ultimate surplus coming to him if at that moment the partnership were wound up and its accounts taken". As Dixon and Evatt JJ said in *Bakewell v Deputy Federal Commissioner of Taxation (SA)*[67], a partner's share in a partnership consists "not of a *title* to *specific property*, but of a right to his proportion of the surplus after the realization of the assets and payment of the debts and liabilities of the partnership".

40 Upon dissolution, but before the partnership is wound up, the partnership property will continue to be held by the legal owner on trust with a duty to sell[68]. Once winding up is complete, and the interest of each partner in the share of the

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64 *Livingston v Commissioner of Stamp Duties (Q)* (1960) 107 CLR 411 at 453, quoting *Rodriguez v Speyer Brothers* [1919] AC 59 at 68; *Watson v Ralph* (1982) 148 CLR 646 at 650; *Commissioner of State Taxation (SA) v Cyril Henschke Pty Ltd* (2010) 242 CLR 508 at 517 [25]. See also *Sharp v The Union Trustee Co of Australia Ltd* (1944) 69 CLR 539 at 551; *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440 at 446-447; *United Builders Pty Ltd v Mutual Acceptance Ltd* (1980) 144 CLR 673 at 688.

65 *Livingston v Commissioner of Stamp Duties (Q)* (1960) 107 CLR 411 at 453; *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321 at 327; *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440 at 446; *United Builders Pty Ltd v Mutual Acceptance Ltd* (1980) 144 CLR 673 at 687; *Watson v Ralph* (1982) 148 CLR 646 at 650.

66 (1944) 69 CLR 539 at 551. See also *Hendry v The Perpetual Executors and Trustees Association of Australia Ltd* (1961) 106 CLR 256 at 266.

67 (1937) 58 CLR 743 at 770 (emphasis added).

68 *In re Bourne; Bourne v Bourne* [1906] 2 Ch 427 at 432-433; *McCaughey v Commissioner of Stamp Duties (NSW)* (1914) 18 CLR 475 at 488-489.

surplus can be identified[69], then, like the rights of legatees of a wholly administered estate[70], s 50 of the *Partnership Act* recognises the partners' right to the transfer of the net value of their entitlements from the person holding the surplus.

The creation of a new trust by the 2013 Deeds

41 Prior to the 2013 Deeds, the legal position of the partners of each of the AMS Partnership and the SIC Partnership was as follows. Since there was no provision to the contrary in either of the partnership deeds, Maria held the freehold titles of each partnership on trust for the partners. The rights of the partners under that trust were unique. Each partner had a non-specific interest in relation to all of the partnership freehold titles (as well as all of the current assets of each partnership) with a right, upon dissolution, to compel the sale of the freehold titles in order to realise a fund from which at the conclusion of the winding up a vested share could then be claimed.

42 Although the relevant operative clause of each of the 2013 Deeds provided that Maria "confirms" that she held the freehold titles of each partnership on trust in the relevant proportions for each former partner or their successors, those "confirmations" of fixed trust had a substantive effect. They extinguished the unique equitable rights of the partners under the partnership trusts and created new fixed trusts. The 2013 Deeds effectively removed all the freehold titles from the property of each partnership available to create a fund for the payment of partnership debts, including for payment to external creditors. The fund for each partnership became limited to the current assets of the partnership. No partner could individually compel the sale of any of the freehold titles in the process of winding up the partnership. And each partner had new ascertained equitable rights in relation to the freehold titles held on fixed trust.

43 Rojoda submitted that the lack of a new trust was supported by a distinction between the internal and the external perspectives of partnership

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69 *Commissioner of State Taxation (SA) v Cyril Henschke Pty Ltd* (2010) 242 CLR 508 at 517 [25].

70 *Commissioner of Stamp Duties (Q) v Livingston* (1964) 112 CLR 12 at 21; [1965] AC 694 at 711, quoting *Barnardo's Homes v Special Income Tax Commissioners* [1921] 2 AC 1 at 8, 10.

property. But the distinction between these perspectives does not change the nature of the rights held by partners. The distinction merely contrasts the contractual restrictions within the partnership deed with the partners' rights in relation to partnership assets[71]. The contractual restrictions apply only between the partners but the legal rights to, or equitable rights of partners in relation to, partnership property can be the basis for a claim against third parties such as those who receive partnership property as volunteers[72]. As Hoffmann LJ said in *Inland Revenue Commissioners v Gray*[73], it is the "outside view which identifies the nature of the property falling to be valued for the purpose of capital transfer tax". So too, the nature of the equitable rights is the basis for the assessment of duty under the *Duties Act*.

44 Rojoda also submitted that the 2013 Deeds created no new trust within s 11(1)(c) of the *Duties Act* because no dutiable property "moved". This submission is contrary to equitable principle and contrary to the operation of the *Duties Act.* As to equitable principle, it is fundamental that the creation of a trust involves the creation of new equitable obligations[74], which are "annexed to the trust property"[75] or "engrafted"[76] or "impressed upon it"[77]. The creation of a

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71 Law Commission and Scottish Law Commission, *Partnership Law*, Law Com No 283, Scot Law Com No 192 (2003) at 161-162 [9.67]. See also *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321 at 327-328, quoting *In re Fuller's Contract* [1933] Ch 652 at 656.

72 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 564, quoting *Hudson v Robinson* (1816) 4 M & S 475 at 478 [105 ER 910 at 911].

73 [1994] STC 360 at 377.

74 *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 242-243 [38]. See also *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)* (2005) 220 CLR 592 at 606 [30].

75 *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510 at 519. See also Maitland, *Equity: also The Forms of Action at Common Law* (1929) at 17-18; Maitland, *Equity: A Course of Lectures*, 2nd ed (rev) (1936) at 17.

76 *Re Transphere Pty Ltd* (1986) 5 NSWLR 309 at 311.

77 *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431 at 474.

trust never involves "movement" of property in the sense of a conveyance of title from one person to another.

45 The *Duties Act* does not presuppose any different principle in its reference to a "declaration of trust over dutiable property" in s 11(1)(c) as a dutiable transaction. Indeed, as Rojoda accepted, there may be duty payable if a discretionary trust were extinguished and replaced by a trust for the same persons in fixed shares. No property would have "moved" but the creation of new equitable rights under a fixed trust is sufficient to attract duty. The *Duties Act* does not contemplate any different operation where the equitable rights extinguished are those sui generis rights of partners in relation to partnership property.

The maxim that equity regards as done that which ought to be done

46 As mentioned above, the Court of Appeal avoided the conclusion that the 2013 Deeds had created new trusts by reasoning that as a consequence of the general dissolution of each of the AMS Partnership and the SIC Partnership, in circumstances in which the "practical certainty" was that liabilities would be discharged from current assets, equity would regard as done that which ought to be done and would treat the freehold titles as held on fixed trusts according to the shares of each partner.

47 This reasoning involves a misapplication of the equitable maxim. As Professor McFarlane has observed, the maxim "bites not on moral obligations ... but only on duties recognised in equity independently of the maxim"[78]. Equity creates and protects equitable rights and interests in property "only where their recognition has been found to be required in order to give effect to its doctrines"[79]. Indeed, in the context of partnership property, the maxim has been applied to the opposite effect to that adopted by the Court of Appeal. Rather than treating each partner as having a fixed share in the partnership property upon

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78 McFarlane, "The Maxims of Equity", in McGhee and Elliott (eds), *Snell's Equity*, 34th ed (2020) 91 at 105 [5-015].

79 *Commissioner of Stamp Duties (Q) v Livingston* (1964) 112 CLR 12 at 22; [1965] AC 694 at 712, quoted with approval in *Commissioner of State Taxation (SA) v Cyril Henschke Pty Ltd* (2010) 242 CLR 508 at 517 [25].

dissolution, the maxim was applied by Bowen LJ to recognise that the interest of a partner was personal property, namely, a right to money upon the winding up[80].

48 The use of the equitable maxim in the manner in which it was deployed by the Court of Appeal was unnecessary to give effect to any right or duty recognised by equity. Instead, by creating rights under a fixed trust it was (i) inconsistent with equitable principles incorporated in the *Partnership Act* which concern the position of external creditors and (ii) contrary to the respective partnership agreements.

49 The creation of a fixed trust is inconsistent with the equitable principles incorporated in the *Partnership Act* and the position of external creditors because an implication arising from the entitlement of each partner under s 50 of the *Partnership Act* to have the property of the partnership applied after dissolution "in payment of the debts and liabilities of the firm" is that each partner has a right to insist upon sale of partnership property for cash to be used to pay those debts and liabilities[81]. Further, s 57(1) of the *Partnership Act* provides for the rules to be observed, subject to agreement, "[i]n settling accounts between the partners after a dissolution of partnership". Section 57(3) provides as follows, with the first priority given to external creditors of the firm:

> "The assets of the firm, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order –
>
> (a) in paying the debts and liabilities of the firm to persons who are not partners therein;
>
> (b) in paying to each partner rateably what is due from the firm to him for advances as distinguished from capital;
>
> (c) in paying to each partner rateably what is due from the firm to him in respect of capital;

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80 *Attorney-General v Hubbuck* (1884) 13 QBD 275 at 289. See also *McCaughey v Commissioner of Stamp Duties (NSW)* (1914) 18 CLR 475 at 488-489.

81 *Ex parte Ruffin* (1801) 6 Ves Jun 119 [31 ER 970]; *Ex parte Peake, In re Lightoller* (1816) 1 Madd 346 [56 ER 128].

(d) the ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible."

50 The use of the equitable maxim to create a fixed trust is also inconsistent with cl 19 of the Deed of Partnership in respect of the AMS Partnership and cl 18 of the Deed of Partnership in respect of the SIC Partnership. Those clauses, in similar terms, make provision for the consequences of dissolution consistently with ss 50 and 57 of the *Partnership Act*. Both clauses provide for a full account to be taken of all transactions and, in the words of cl 19 of the AMS Deed of Partnership, that "such assets and credits shall with all convenient speed be sold realised and got in" with each partner being required to do all necessary acts "for effecting or facilitating the sale realisation and getting in of the partnership assets and credits and the due application and division of the profits thereof".

51 The Court of Appeal relied upon three decisions in support of the application of the equitable maxim upon dissolution to create a fixed trust of the freehold titles with current assets to be used to discharge partnership liabilities. Although the language in each of those decisions is not precise, and with great respect for the detailed reasoning of the Court of Appeal, none of the decisions supports the application of the maxim in this way. Each is considered in turn below.

(1) *Cameron v Murdoch*

52 In *Cameron v Murdoch*[82], a testator devised and bequeathed all of his real and personal property to his trustee upon trust to pay his debts and testamentary and other expenses and to stand possessed of the balance remaining upon trust for the testator's brother for life and upon his death upon trust to pay a specified sum to a named beneficiary; as to a specified real property upon trust for such of two specified nephews and two specified nieces as should survive him and attain the age of 21 years; and, as to the residue, upon trust for such of several other specified nieces as might survive him. Although it appeared as if the testator believed that he owned the real property in his own right, after his death it was found that it had been property of a partnership in which he had a 10/27 partnership share. The residuary legatees disputed the efficacy of the devise of the testator's share in relation to the real property on the ground that, because the partnership had not been wound up, the testator's interest in the real property had not been fully ascertained and it was not possible to construe the devise as

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82 [1983] WAR 321; on appeal (1986) 60 ALJR 280; 63 ALR 575.

passing an unascertained interest in the real property. In the Supreme Court of Western Australia, Brinsden J held that the devise was effective "to the extent of the totality of [the testator's] interest in the land ... the totality of that interest being 10/27"[83]. As to the share that the testator had held as a partner, Brinsden J described that interest in the conventional terms of an "indefinite and fluctuating interest" and, upon dissolution and in the absence of partnership debts, as a share of "the value of the total assets on taking final accounts"[84]. After proposing possible orders, subject to submissions from the parties, for the winding up of the original partnership and the taking of accounts, Brinsden J proposed an order (order 8) declaring that the devise of the real property was effective to pass the testator's interest, "namely, 10/27 of the entirety"[85]. Brinsden J was not suggesting that, prior to taking of accounts and completion of winding up, the testator had any vested or ascertained interest in or in relation to the real property. Rather, the testator had devised that unascertained, non-specific interest in the real property the value of which could be ascertained finally upon the taking of accounts.

53 The Privy Council dismissed an appeal and cross-appeal from the decision of Brinsden J. The reasoning of the Privy Council concerning the testator's interest was not materially different. Delivering the advice of the Board, Lord Brandon of Oakbrook applied the decision of this Court in *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd*[86], which had recognised the nature of a partner's interest in each item of partnership property as unascertained and non-specific. Although his Lordship referred to the interest of the testator as an equitable interest "in every part of the original partnership assets, including [the real property]"[87] and referred to the interest in the real property as 10/27, this could not have been intended to contradict his reliance upon the decision in *Canny Gabriel Castle Jackson Advertising Pty Ltd*. It could only have been to suggest that the value of what was devised, upon winding up and assuming the discharge of all partnership debts, was in the proportion 10/27.

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83 *Cameron v Murdoch* [1983] WAR 321 at 343.

84 *Sharp v The Union Trustee Co of Australia Ltd* (1944) 69 CLR 539 at 551.

85 *Cameron v Murdoch* [1983] WAR 321 at 363.

86 (1974) 131 CLR 321.

87 *Cameron v Murdoch* (1986) 60 ALJR 280 at 293; 63 ALR 575 at 597-598.

54 That is not to deny that the testator had an interest in every single asset of the former partnership proportionate to his share in the totality of the surplus assets of the partnership. Nor is it to suggest that the testator was incapable by his will of passing that interest to his trustees[88]. It is simply to say that as between the beneficiaries of the testator's will, the beneficiaries were bound to do what they could to achieve the testator's wish that his interest in the real property be held on separate trust from his interest in other assets. In that sense only, the devise was effective to pass the described 10/27 interest in the specified real property to be held on trust for the specified nephews and nieces.

(2) *In re Holland*

55 *In re Holland*[89] involved a deceased partner who left his share of the partnership on trusts in his will but had sought separately to make a devise of a share in four freeholds in the proportion of his partnership share. In a dispute between the legatees, Neville J held that the legatees "as between themselves are bound to give effect as best they can to the wishes the testator has expressed"[90]. The question in that case was simply whether the disposition was valid. Since the partnership was solvent and other partnership property was sufficient to clear the debts, Neville J held that the disposition was valid. There was no finding, and there could have been no finding, that the effect of the partner's will had been to dispose specifically of a share in the freehold titles. All that the partner was capable of disposing of, and, as a matter of interpretation of the will, all that he could have disposed of, was the partner's interest in relation to the freehold titles, being the relevant proportion of the proceeds of sale from the ultimate sale of those freehold titles upon the winding up of the partnership.

56 *In re Holland* says nothing about a partner having a specific identifiable interest in any of the assets of the partnership. To the contrary, it emphasises that the position as between partners – being the contractual relationship which is determinative of the nature of each partner's interest in partnership assets – is that

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88 *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1954) 88 CLR 434 at 444; [1954] AC 114 at 130; *Burdett-Coutts v Inland Revenue Commissioners* [1960] 1 WLR 1027 at 1035; [1960] 3 All ER 153 at 159; *Hendry v The Perpetual Executors and Trustees Association of Australia Ltd* (1961) 106 CLR 256 at 266-267.

89 *In re Holland; Brettell v Holland* [1907] 2 Ch 88.

90 *In re Holland; Brettell v Holland* [1907] 2 Ch 88 at 91.

each partner has no more than the right to have partnership assets applied in satisfaction of partnership debts and liabilities and the surplus distributed among partners in accordance with their shares. If, however, a partner makes sufficiently clear by the terms of their will that they wish for their estate to be applied as if they were able to treat their interest in a specified partnership asset as capable of separation from their interest in the rest of the partnership assets, and to give it in a different direction from their interest in the rest of the partnership assets, the testator's beneficiaries will be bound as between themselves to give effect to the testator's wishes to the extent that they are able to do so.

57 In *Livingston v Commissioner of Stamp Duties (Q)*[91], Kitto J referred to *In re Holland*[92] as establishing that a partner has an interest in "every piece of property which belongs to the partnership". This interest in every piece of property is the fluctuating, unascertained interest in relation to the entire partnership property. As his Honour continued, that interest "consists not of a title to specific property but of a right to a proportion of the surplus after the realization of the assets and payment of the debts and liabilities of the partnership". His Honour reiterated that the interest was not a "'definite' share or interest in a particular asset" nor a "'right to any part' of it"[93].

(3) *In re Ritson*

58 The final authority relied upon by the Court of Appeal was *In re Ritson*[94]. In that case, a partner had charged real estate that he owned to secure a debt of the partnership. After the partner died, his executors and trustees took out a summons asking whether the secured partnership debt should be paid from the charged real estate or from the partnership assets. The Court of Appeal held that it should be paid from the partnership assets first. The only right of the executors of a deceased partner was to have paid over to them the testator's share of the surplus assets of the partnership[95]. Therefore, just as the deceased partner was

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91 (1960) 107 CLR 411 at 453.

92 *In re Holland; Brettell v Holland* [1907] 2 Ch 88.

93 (1960) 107 CLR 411 at 453, quoting *Rodriguez v Speyer Brothers* [1919] AC 59 at 68.

94 *In re Ritson; Ritson v Ritson* [1899] 1 Ch 128.

95 *In re Ritson; Ritson v Ritson* [1899] 1 Ch 128 at 130-131.

entitled to insist as against other partners that upon the dissolution of the partnership its assets be applied in discharge of the partnership liabilities with the balance to be distributed among the partners according to their shares, so too, after death, the executors of the deceased partner were entitled to insist that the partnership liabilities be discharged out of partnership assets and not out of real property of the deceased partner. Because the deceased partner devised his interest in the partnership to his trustees on one set of trusts and his interest in the charged land which he owned beneficially on other trusts, the testator was to be taken by his will as signifying that he wished the partnership debts to be discharged out of partnership assets in the same way as he might have insisted if he had remained alive. As between them, his beneficiaries and trustees were bound to observe the testator's wishes and to do the best they could to achieve them. That meant that they were not to use the land for the discharge of the partnership debts. But contrary to the way in which the case was interpreted by the Court of Appeal, it does not follow that the estate of a deceased partner may dictate to other partners that personal property partnership assets alone be used to discharge partnership debts in order that the real property assets of the partnership may be preserved and distributed in specie as between the partners and the deceased estate.

The conversion agreement

59 In this Court, there was dispute about Rojoda's ability to make a submission that the 2013 Deeds constituted an agreement by the partners to "convert" their "partnership interests into specific equitable interests". The Commissioner asserted that this was a new argument that had not been raised below and as to which the Commissioner would be prejudiced because she had assessed the 2013 Deeds as transactions which created trusts rather than as agreements to transfer rights.

60 It is unnecessary to consider whether the point was squarely raised below or whether there could be any prejudice to the Commissioner if it is raised now. The short point is that the submission that the 2013 Deeds involve an agreement rather than a declaration of trust involves a simple category error. Rojoda's purported contrast is between, on the one hand, a trust and, on the other hand, an agreement in the 2013 Deeds to "convert" partnership interests to specific equitable interests. This is a false contrast because trusts can be created by agreement as well as by unilateral declaration. Any so-called "conversion agreement" in the 2013 Deeds involved extinguishing the existing rights held by the former partners or their representatives and the creation of new equitable rights annexed to the partnership freehold titles. This was the declaration of fixed trusts.

61 Rojoda's submission that Maria had no power to declare such trusts without the agreement of the other partners or their representatives is correct. But the 2013 Deeds were an agreement between all of the former partners or their representatives to extinguish their existing, unascertained partnership interests and to create new trusts of the freehold titles held by Maria.

Section 78 of the *Duties Act*

62 The final ground of Rojoda's notice of contention asserted that the 2013 Deeds involved agreements to transfer partnership property to the former partners and their successors and were not dutiable due to the operation of s 78 of the *Duties Act*.

63 The purpose of s 78 of the *Duties Act* is to ensure that duty is not levied on both a conveyance or agreement to convey property to a partnership and, upon dissolution, a conveyance or agreement to convey the same property to partners in their partnership share. It treats the conveyance of property out of a partnership according to the partner's share upon dissolution as not being a separate dutiable event from the conveyance into a partnership. For instance, if land is acquired by a partnership of A, B and C, the acquisition will be a dutiable transaction. The value of the partnership interest of A, B and C will be reduced by the incidence of that duty. Section 78 ensures that A, B and C are not again subjected to duty if the property is conveyed to them after dissolution according to their same partnership shares. The example in the *Duties Act* at the conclusion of s 78 illustrates this[96]:

> "A, B and C are in partnership in equal shares. B had a one-third partnership interest immediately before retiring. On B ceasing to be a partner, A and C transfer land to B. The dutiable value of the land acquired by B will be reduced by one-third."

64 Rojoda accepted that if the 2013 Deeds did not embody agreements to transfer rights to the partners upon dissolution then it would not be entitled to rely upon s 78 of the *Duties Act*. However, Rojoda submitted that s 78 of the *Duties Act* used the concept of "transfer" in a loose sense that extended to the creation of new rights. Rojoda pointed to the provision for nominal duty in s 139(2)(b) of the *Duties Act* for "a declaration of trust over dutiable property to the extent that it gives effect to a distribution in the estate of a deceased person".

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96 See *Interpretation Act 1984* (WA), ss 19(1), 19(2)(a).

Rojoda submitted that this provision involves recognition that a declaration of trust can effect a "distribution" even though, strictly, the creation of equitable rights involves no distribution. So too, Rojoda submitted, although the declaration of trust creates new equitable rights and does not "transfer" them, the reference to "transfer" in s 78(2) should be applied to extend to the creation of new equitable rights. In other words, s 78 should be interpreted with the loose use of "transfer" as though it included the words "a declaration of trust over dutiable property to the extent that it gives effect to a transfer to any former partner".

65 This submission should not be accepted. As explained above, a declaration of trust does not transfer rights. Whether or not there is any looseness in the use of "distribution" in s 139(2)(b) of the *Duties Act*, s 78 refers to a "transfer" rather than to a "distribution". "Transfer" is not used in a sense that could capture the creation of new equitable rights. The definition of "transfer" in s 9 includes an "assignment" or "exchange". It does not include a "declaration of trust", which is separately defined in the same section. Further, s 11(1) recognises the distinction between a transfer and the creation of new rights by providing separately for, on the one hand, a "transfer of dutiable property" and an "agreement for the transfer of dutiable property" (ss 11(1)(a) and 11(1)(b)), and, on the other hand, "a declaration of trust over dutiable property" (s 11(1)(c)). Like ss 11(1)(a) and 11(1)(b), s 78 is concerned with true transfers of rights or agreements for such transfers.

66 Rojoda also submitted that the decision of this Court in *Commissioner of State Taxation (SA) v Cyril Henschke Pty Ltd*[97] recognised that a declaration of trust involved an agreement to transfer rights in this loose sense. The terms of the legislation being considered in *Henschke* were significantly different but, in any event, this is not an accurate characterisation of the reasoning in that decision.

67 *Henschke* concerned a deed between the four partners of a partnership that purported to continue the partnership without dissolution following the retirement of one partner, Mrs Henschke. The deed provided that Mrs Henschke's interest had ceased upon the payment to her of an amount equivalent to her proportionate share in relation to the partnership assets. The question was whether the deed was a "conveyance on sale" within the meaning of s 60 of the *Stamp Duties Act 1923* (SA). This Court held that it was.

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97 (2010) 242 CLR 508.

68 As this Court explained, the term "conveyance" was defined in s 60 of the *Stamp Duties Act* as including every instrument "by which or by virtue of which or by the operation of which ... any ... personal property or any estate or interest in any such property is assured to, or vested in, any person"[98]. The deed in that case met that definition[99]. It extinguished the partnership interests, including Mrs Henschke's interest, and then re-vested in the new partnership the enlarged interests of the other partners. In other words, it discharged the previous partnership agreement by accord and satisfaction[100] and "vested in the members of the second partnership the equitable choses in action representing their present partnership interests"[101], which were "enlarge[d]" following the "release" of Mrs Henschke's interest[102]. Nothing in *Henschke* suggests that this process involved any "transfer".

Conclusion and orders

69 The appeal should be allowed. Orders should be made as follows:

(1) Appeal allowed with costs.

(2) Set aside the orders of the Court of Appeal of the Supreme Court of Western Australia made on 21 December 2018 and in their place order that the appeal be dismissed with costs.

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98 *Commissioner of State Taxation (SA) v Cyril Henschke Pty Ltd* (2010) 242 CLR 508 at 515 [17].

99 *Commissioner of State Taxation (SA) v Cyril Henschke Pty Ltd* (2010) 242 CLR 508 at 516 [20].

100 *Commissioner of State Taxation (SA) v Cyril Henschke Pty Ltd* (2010) 242 CLR 508 at 515 [19], citing *McDermott v Black* (1940) 63 CLR 161 at 183-184.

101 *Commissioner of State Taxation (SA) v Cyril Henschke Pty Ltd* (2010) 242 CLR 508 at 519 [28].

102 *Commissioner of State Taxation (SA) v Cyril Henschke Pty Ltd* (2010) 242 CLR 508 at 519 [29].

70 GAGELER J. The majority identifies the question at the heart of this appeal as being as to the nature of the interests of partners in partnership property. My understanding of the better answer to that question is different. The difference between us illustrates the observation that the "peculiar"[103] or "special"[104] nature of the interests of partners in partnership property is "conceptually somewhat opaque"[105].

71 A partnership, of course, is not a legal entity. In the language of the *Partnership Act 1895* (WA) ("the *Western Australian Partnership Act*"), it is a "relation which subsists between persons carrying on a business in common with a view of profit"[106], whose mutual rights and obligations are governed by their partnership agreement[107], each of whom is bound by acts and instruments relating to the partnership business done or executed by another in the name of the partnership[108], each of whom is jointly and severally liable with the others for loss or injury caused by the wrongful act or omission of any one of them in the ordinary course of the partnership business[109], and each of whom is liable jointly with the others for all debts and liabilities incurred in carrying on the partnership business[110].

72 Partnership property comprises all property brought into the partnership or acquired on account of the partnership or for the purposes of and in the course of

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103 *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321 at 327.

104 *United Builders Pty Ltd v Mutual Acceptance Ltd* (1980) 144 CLR 673 at 687.

105 *Commissioner of State Taxation (SA) v Cyril Henschke Pty Ltd* (2010) 242 CLR 508 at 517 [23], quoting *Sandhu v Gill* [2006] Ch 456 at 462 [18].

106 Section 7(1) of the *Western Australian Partnership Act*.

107 Section 29 of the *Western Australian Partnership Act*; cf s 34(1A).

108 Section 13(1) of the *Western Australian Partnership Act*.

109 Sections 17(1) and 19 of the *Western Australian Partnership Act*.

110 Section 16 of the *Western Australian Partnership Act*.

the partnership[111]. In respect of partnership property, each partner has two kinds of rights which it is important to keep conceptually distinct[112].

73 Unless varied by the partnership agreement or otherwise by the consent of all partners[113], each partner has a right against all other partners to have all of the partnership property held and applied exclusively for the purposes of the partnership in accordance with the partnership agreement[114] and, on dissolution of the partnership, to have the debts and liabilities of the partnership paid out of the partnership property and then to have the surplus applied in payment of what is due to the partners respectively under the partnership agreement[115]. That right which a partner has against the other partners is itself property of the partner: it is an equitable chose in action[116].

74 Against the rest of the world, each partner has rights of a different nature. The partners collectively have the beneficial interest in each item of partnership property. Each partner individually has a share in that beneficial interest in each item of partnership property[117]. "No doubt, as between himself and his partners, his interest in individual items is subject to their right to have all the assets of the

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111 Section 30(1) of the *Western Australian Partnership Act*.

112 *Haque v Haque [No 2]* (1965) 114 CLR 98 at 130.

113 Section 29 of the *Western Australian Partnership Act*.

114 Section 30(1) of the *Western Australian Partnership Act*.

115 Section 50 of the *Western Australian Partnership Act*.

116 *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440 at 446-447; *United Builders Pty Ltd v Mutual Acceptance Ltd* (1980) 144 CLR 673 at 688.

117 *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321 at 327. See also *Sharp v The Union Trustee Co of Australia Ltd* (1944) 69 CLR 539 at 551; *Maslen v Perpetual Executors Trustees & Agency Co (WA) Ltd* (1950) 82 CLR 101 at 129; *Hendry v The Perpetual Executors and Trustees Association of Australia Ltd* (1961) 106 CLR 256 at 266, quoting *Burdett-Coutts v Inland Revenue Commissioners* [1960] 1 WLR 1027 at 1034-1035; [1960] 3 All ER 153 at 158-159; *Watson v Ralph* (1982) 148 CLR 646 at 650; *Chan v Zacharia* (1984) 154 CLR 178 at 194.

partnership for the time being dealt with in accordance with the partnership agreement, but his interest in them is none the less real for that"[118].

75 From the perspective of the partnership as an organisation for the carrying on of a common business, the practical result of that overlay of legal and equitable rights is highly functional. The result is that[119]:

> "as between the partners, the partnership property must be dealt with in a particular way, but so far as all the rest of the world is concerned, there is no limitation on the interests of the partners; the partners have the beneficial interest in the partnership assets, which are held together as an undivided whole, but they respectively have undivided interests in them".

That description is true of the whole of the partnership property, and it is true of each item of partnership property. Those trading with the partnership are able to have confidence that the partners collectively have capacity to acquire and to convey legal title to and beneficial ownership of real and personal property in the course of carrying on the partnership business without need to concern themselves about the respective proprietary interests of the individual partners.

76 Though partnership property that is an interest in land is treated as personal property as between the partners[120], partnership property can comprise any real or personal property legal title to which is acquired on account of the partnership by all or any of the partners. Partnership property legal title to which is acquired by all of the partners, such as trading stock purchased on partnership account, is co-owned in law by all of the partners, and no occasion may arise for equity to require a distinction to be drawn between the legal title and the beneficial interest[121]. Partnership property that is an interest in

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118 *Sharp v The Union Trustee Co of Australia Ltd* (1944) 69 CLR 539 at 551, citing *In re Holland; Brettell v Holland* [1907] 2 Ch 88 at 91 and *In re Fuller's Contract* [1933] Ch 652 at 656.

119 *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321 at 327-328, quoting *In re Fuller's Contract* [1933] Ch 652 at 656. See also *Inland Revenue Commissioners v Gray (surviving executor of Lady Fox deceased)* [1994] STC 360 at 377.

120 Section 32 of the *Western Australian Partnership Act*.

121 *Commissioner of State Taxation (SA) v Cyril Henschke Pty Ltd* (2010) 242 CLR 508 at 517 [25], referring to *Livingston v Commissioner of Stamp Duties (Q)* (1960) 107 CLR 411 at 453 and *Commissioner of Stamp Duties (Q) v Livingston* (1964) 112 CLR 12 at 22; [1965] AC 694 at 712.

land[122] or that is other real or personal property legal title to which is held by only one partner or by only some of the partners[123] is held and devolves according to the incidents of the legal title by which it is held but on trust for all of the partners as co-owners in equity.

77 The nature of the undivided interest that each partner has as a co-owner (whether in law or in equity) of each item of partnership property (whether real or personal) is that of a tenant in common with all of the other partners[124]. The critical question is as to how and when the share of each partner in that tenancy in common in each item of partnership property is to be ascertained.

78 Unlike under the prototypical *Partnership Act 1890* (UK) and cognate legislation elsewhere in Australia, the *Western Australian Partnership Act* speaks directly to that question. Under the heading "Meaning of 'partner's share'", it provides[125]:

> "The share of a partner in the partnership property at any time is the proportion of the then existing partnership assets to which he would be entitled if the whole were realised and converted into money, and after all the then existing debts and liabilities of the firm had been discharged."

A provision in those terms in a modern statute might easily be read as doing no more than giving meaning to references to partnership shares in other operative provisions of the statute. In the context of the statute in which it appears, it is apparent that the provision has independent operation.

79 The statutory language is drawn almost word for word from Sir Frederick Pollock's *Digest of the Law of Partnership*. In the year of enactment of the *Western Australian Partnership Act*, the *Digest* was in its sixth edition. The *Digest* recorded Pollock's view that "[i]t is not quite clear whether the interest of partners in the partnership property is more correctly described as a tenancy in common or a joint tenancy without benefit of survivorship", to which Pollock added that "the difference appears to be merely verbal"[126]. Against the marginal

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122 Section 30(2) of the *Western Australian Partnership Act*.

123 *Carter Bros v Renouf* (1962) 111 CLR 140 at 162-163.

124 *Knox v Gye* (1872) LR 5 HL 656 at 679; *Chan v Zacharia* (1984) 154 CLR 178 at 194. See also Morse, *Partnership Law*, 6th ed (2006) at 209 [6.05].

125 Section 33 of the *Western Australian Partnership Act*.

126 Pollock, *A Digest of the Law of Partnership*, 6th ed (1895) at 67.

note "What is a partner's share", Pollock included in the *Digest* the following definition[127]:

> "The share of a partner in the partnership property at any given time may be defined as the proportion of the then existing partnership assets to which he would be entitled if the whole were realized and converted into money, and after all the then existing debts and liabilities of the firm had been discharged."

80 In support of that definition, Pollock referenced the contemporaneous edition of Sir Nathaniel Lindley's *Treatise on the Law of Partnership*[128] and went on to give the following illustration with reference to *Farquhar v Hadden*[129]:

> "F and L are partners and joint tenants of offices used by them for their business. F dies, having made his will, containing the following bequest: 'I bequeath all my share of the leasehold premises ... in which my business is carried on ... to my partner, L.' Here, since the tenancy is joint at law, 'my share' can mean only the interest in the property which F had as a partner at the date of his death – namely, a right to a moiety, subject to the payment of the debts of the firm; and if the debts of the firm exceed the assets, L takes nothing by the bequest."

The illustration employed the language of joint tenancy to describe the beneficial interests of partners in partnership property rather than the language of tenancy in common, but that was against the background of its author having earlier made clear that he did not think it significant in the context of the law of partnership to draw any substantive distinction between those two forms of co-ownership.

81 Each subsequent edition of the *Digest* retained the definition and the illustration. However, each edition published after 1907 added an important qualification in a footnote: "But if the other partnership assets exceed the debts, the beneficiaries under the will are bound, as between themselves, to give effect to the disposition"[130]. That qualification was added with reference to *In re*

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127 Pollock, *A Digest of the Law of Partnership*, 6th ed (1895) at 69.

128 Lindley, *A Treatise on the Law of Partnership*, 6th ed (1893) at 348.

129 (1871) LR 7 Ch App 1.

130 eg, Gower, *Pollock on the Law of Partnership*, 15th ed (1952) at 67, footnote 71.

Holland; Brettell v Holland ("*Re Holland*")[131], to which it will be necessary to return.

82 The present significance of the *Western Australian Partnership Act's* statutory adoption of Pollock's definition of a partnership share is that it resolves an ambiguity inherent in the frequently cited statement of Lindley in the passage in his *Treatise on the Law of Partnership* which Pollock referenced in the *Digest*. Lindley's statement was that "[w]hat is meant by the *share* of a partner is his proportion of the partnership assets after they have been all realised and converted into money, and all the debts and liabilities have been paid and discharged"[132]. The statement has been echoed judicially[133].

83 The ambiguity inherent in the statement lies in its temporal dimension. Does it mean that the share of a partner is capable of being ascertained only at such time as all of the partnership property has in fact been liquidated and all of the partnership debts and liabilities have in fact been paid so that the only remaining partnership property is a pool of money constituting the net proceeds of the liquidation which are available for distribution? Or does it merely provide a formula by which the existing share of a partner in an existing item of partnership property can be ascertained at an earlier time?

84 There have been dicta in subsequent cases, including in this Court[134], which have suggested the former position. That position is preferred in the current edition of *Lindley & Banks on Partnership*[135]. Equally, there have been

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131 [1907] 2 Ch 88.

132 Lindley, *A Treatise on the Law of Partnership*, 6th ed (1893) at 348-349 (original emphasis).

133 eg, *Bakewell v Deputy Federal Commissioner of Taxation (SA)* (1937) 58 CLR 743 at 770.

134 *Livingston v Commissioner of Stamp Duties (Q)* (1960) 107 CLR 411 at 453, quoting *Rodriguez v Speyer Brothers* [1919] AC 59 at 68; *Watson v Ralph* (1982) 148 CLR 646 at 650, quoting *Livingston v Commissioner of Stamp Duties (Q)* (1960) 107 CLR 411 at 453; *Commissioner of State Taxation (SA) v Cyril Henschke Pty Ltd* (2010) 242 CLR 508 at 517 [25], referring to *Livingston v Commissioner of Stamp Duties (Q)* (1960) 107 CLR 411 at 453. See also *Popat v Shonchhatra* [1997] 1 WLR 1367 at 1372; [1997] 3 All ER 800 at 804; *Sandhu v Gill* [2006] Ch 456 at 462-463 [18].

135 Banks, *Lindley & Banks on Partnership*, 20th ed (2017) at 703-705 [19-07]-[19-09].

dicta, including in this Court[136], which have suggested the latter position. The tension between the two positions was noticed by Fullagar J in *Maslen v Perpetual Executors Trustees & Agency Co (WA) Ltd*[137].

85 In the same case, which was an appeal from the Supreme Court of Western Australia, Kitto J recognised that the *Western Australian Partnership Act's* adoption of Pollock's definition indicates the latter position[138]. The definition says "at any time is" and "would be entitled if"; it does not say "will be entitled when". His Honour stated that the definition did "no more than give statutory effect to the view always maintained by the courts"[139]. That was an overstatement in so far as it made no allowance for those dicta which had suggested the former position. Nevertheless, the statement was accurate in so far as it indicated that authority favoured Pollock's definition independently of its specific statutory adoption.

86 The precise share that each partner at any time has in each item of partnership property is required by the definition to be ascertained by hypothesising the immediate liquidation of all partnership property and the immediate payment of all partnership debts and liabilities. The proportionate share that the partner at that time has in the partnership property and in each item of partnership property is equivalent to the proportionate share of the surplus to which each partner would be entitled under the partnership agreement in that hypothesised scenario.

87 For so long as the partnership is carrying on business, or at least for so long as assets or liabilities of the partnership are turning over or are in prospect of turning over, the legal or beneficial interest of each partner in each item of partnership property necessarily remains unascertained. The share of each partner

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136 *Sharp v The Union Trustee Co of Australia Ltd* (1944) 69 CLR 539 at 551; *Maslen v Perpetual Executors Trustees & Agency Co (WA) Ltd* (1950) 82 CLR 101 at 129, quoting *Manley v Sartori* [1927] 1 Ch 157 at 163-164; *Hendry v The Perpetual Executors and Trustees Association of Australia Ltd* (1961) 106 CLR 256 at 266, quoting *Burdett-Coutts v Inland Revenue Commissioners* [1960] 1 WLR 1027 at 1035; [1960] 3 All ER 153 at 159.

137 (1950) 82 CLR 101 at 119-120. The decision in *Maslen v Perpetual Executors Trustees & Agency Co (WA) Ltd* was reversed on appeal to the Privy Council in *Perpetual Executors Trustees & Agency Co (WA) Ltd v Maslen* (1951) 88 CLR 401; [1952] AC 215.

138 (1950) 82 CLR 101 at 129. See also at 112.

139 (1950) 82 CLR 101 at 129.

is not "a fixed proportion" that is "immediately ascertainable" but is rather "an indefinite and fluctuating interest, which at any given moment is in proportion to his share in the ultimate surplus coming to him if at that moment the partnership were wound up and its accounts taken"[140] and which might change from moment to moment. But even then, the share of each partner is "'an unascertained interest in every single asset of the partnership, and it is not right to regard him as being merely entitled to a particular sum of cash ascertained from the balance-sheet of the partnership as drawn up at the date of' dissolution"[141].

88 Once the partnership is dissolved, however, the reckoning required to fix the proportionate legal or beneficial interest of each partner in each item of partnership property can occur without actual liquidation of the partnership property and without actual payment of the partnership debts and liabilities. For the share of each partner in each item of partnership property then to be ascertained, it is sufficient that the liquidated value of the partnership property as a whole be certain to exceed the value of the partnership debts and liabilities as a whole. It is sufficient, in other words, that the partnership be solvent on dissolution.

89 Provided a partnership is solvent, the result is that "when a dissolved partnership is to be, or is in course of being, wound up, each partner or his estate retains an interest in every single asset of the former partnership which remains unrealised or unappropriated, and that that interest is proportionate to his share in the totality of the surplus assets of the partnership"[142]. Though a particular item of partnership property might remain unrealised and unappropriated until the completion of the winding up, the partner's proportionate share in that item is by that time fixed.

90 Support for that position is to be found in the outcomes of and the reasoning contained in the two decisions of which I am aware that come closest to squarely confronting the question. The first is the decision of the Chancery Division of the English High Court of Judicature in *Re Holland*, which was referenced in later editions of the *Digest*, and which has been repeatedly cited

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140 *Sharp v The Union Trustee Co of Australia Ltd* (1944) 69 CLR 539 at 551; *Perpetual Executors & Trustees Association of Australia Ltd v Federal Commissioner of Taxation (Thomas' Case No 2)* (1955) 94 CLR 1 at 27-28.

141 *Maslen v Perpetual Executors Trustees & Agency Co (WA) Ltd* (1950) 82 CLR 101 at 129, quoting *Manley v Sartori* [1927] 1 Ch 157 at 163-164.

142 *Hendry v The Perpetual Executors and Trustees Association of Australia Ltd* (1961) 106 CLR 256 at 266, quoting *Burdett-Coutts v Inland Revenue Commissioners* [1960] 1 WLR 1027 at 1035; [1960] 3 All ER 153 at 159.

with approval in this Court[143]. The second is the decision of the Privy Council, on appeal from the Supreme Court of Western Australia[144], in *Cameron v Murdoch*[145].

91 The material facts of *Re Holland* and *Cameron v Murdoch* were identical. There had been a will in which a deceased partner had made a specific disposition of the partner's share in specified property which happened to be partnership property. The winding up of the partnership had commenced following the dissolution of the partnership on the death of the partner but was not complete. The other assets of the partnership upon dissolution were found to be sufficient to discharge the debts and liabilities of the partnership.

92 In both cases an argument was put to the effect that the testamentary disposition was ineffective because the partner's share necessarily remained unascertained until winding up of the partnership was complete[146]. In both cases, the argument was rejected. In both cases, the disposition was held to be effective to pass the partner's interest in the property to the beneficiaries under the will. And in both cases the interest was determined to be a proportionate share of the specified property that was fixed by reference to the proportionate share to which the partner was entitled in the totality of the surplus assets of the partnership[147].

93 The reasoning in *Re Holland* expressly distinguished *Farquhar v Hadden* on the basis that the partnership in *Farquhar v Hadden* had been insolvent on dissolution whereas the partnership in *Re Holland* was solvent on dissolution[148]. The reasoning in *Cameron v Murdoch* similarly proceeded on the express basis that the fact that the assets of the partnership were adequate to discharge the debts and liabilities of the partnership was sufficient to allow the interest to be

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143 *Sharp v The Union Trustee Co of Australia Ltd* (1944) 69 CLR 539 at 551, cited in *Maslen v Perpetual Executors Trustees & Agency Co (WA) Ltd* (1950) 82 CLR 101 at 129 (cf at 120); *Livingston v Commissioner of Stamp Duties (Q)* (1960) 107 CLR 411 at 453; *Haque v Haque [No 2]* (1965) 114 CLR 98 at 130.

144 *Cameron v Murdoch* [1983] WAR 321.

145 (1986) 60 ALJR 280; 63 ALR 575.

146 [1907] 2 Ch 88 at 90; (1986) 60 ALJR 280 at 293; 63 ALR 575 at 597.

147 [1907] 2 Ch 88 at 91; (1986) 60 ALJR 280 at 293; 63 ALR 575 at 597-598.

148 [1907] 2 Ch 88 at 91.

ascertained at the date of the court order declaring the entitlement of the beneficiary[149].

94 Turning to the circumstances of the present case, two facts are critical. The first is that, at the time of execution of the SIC Deed and the AMS Deed, the SIC Partnership and the AMS Partnership had been dissolved. The second is that the value of the partnership property of each of those partnerships was sufficient to discharge the debts and liabilities. That is to say, the partnerships were solvent.

95 In those circumstances, the proportionate share of each partner in the totality of the surplus assets of the SIC Partnership and the AMS Partnership was calculable in accordance with the SIC Deed of Partnership and the AMS Deed of Partnership. The proportionate share of each partner in the totality of the surplus assets of each partnership as then so calculable was also the proportionate share of each partner in each item of partnership property, which included the totality of the beneficial interest in each parcel of land held on trust for the partnerships by Maria Scolaro.

96 The proportionate share of each partner in the beneficial interest in the real property as in fact so calculated was correctly stated in cl 1 of each of the SIC Deed and the AMS Deed. The proportionate shares thereafter specified in respect of former partners and testamentary beneficiaries of former partners in cl 3 of each of the SIC Deed and the AMS Deed did no more than reflect the proportionate share of each partner as subjected to the testamentary dispositions effected by cl 2 and cl 3A[150].

97 By "confirm[ing]" the respective shares of the former partners and testamentary beneficiaries of former partners in the land held on trust by Maria Scolaro for the SIC Partnership and the AMS Partnership respectively, cl 3 of each of the SIC Deed and the AMS Deed did no more than acknowledge the legal position that had then come to exist: that Maria Scolaro held the land in trust for the former partners and beneficiaries in the specified shares by operation of law. She did not declare a new trust. She therefore did not by that confirmation engage in a dutiable transaction.

98 The continuation of each trust implicit in the replacement by cl 4 of each of the SIC Deed and the AMS Deed of Maria Scolaro with Rojoda as trustee indicated the agreement of all of the former partners and testamentary beneficiaries that the lands would not be liquidated. The agreement necessarily

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149 (1986) 60 ALJR 280 at 293; 63 ALR 575 at 597-598.

150 See *Rojoda Pty Ltd v Commissioner of State Revenue* (2018) 368 ALR 734 at 748 [69].

released the parties from the obligations arising from the AMS Deed of Partnership and the SIC Deed of Partnership to sell those assets. There is no suggestion that the releases were sufficient to render the SIC Deed and the AMS Deed dutiable.

99 The conclusion that the critical clause in each of the SIC Deed and the AMS Deed did no more than acknowledge the legal position that had come to exist on dissolution of the SIC Partnership and the AMS Partnership does not depend on anticipation of steps yet to occur in the course of the winding up. It does not depend on a distorted application of the maxim that equity regards as done that which ought to be done. It relevantly involves nothing more than recognising, as ascertainable and as ascertained, the fixed share that each partner on dissolution of each solvent partnership had as a tenant in common in the beneficial interest in the land held on trust for the partnership determined in accordance with the statutorily prescribed hypothesis, all of the integers required for the application of which were then known.

100 For these reasons, I would uphold the notice of contention and dismiss the appeal with costs.