Privy Council Appeal No. 29 of 1985

Edith Mary Maud Cameron and Others — *Appellants*

v.

Lady Barbara Marshall Murdoch and Others — *Respondents*

(and Cross-Appeal)

FROM

THE SUPREME COURT OF WESTERN AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH FEBRUARY 1986

Present at the Hearing:

LORD KEITH OF KINKEL
LORD ROSKILL
LORD BRANDON OF OAKBROOK
LORD MACKAY OF CLASHFERN
SIR ROBERT MEGARRY

*[Delivered by **Lord Brandon of Oakbrook**]*

The Board has before it an appeal and cross-appeal from a judgment dated 22nd April 1983 and an order as to costs dated 2nd May 1983 of the Supreme Court of Western Australia (Brinsden J.), both brought with the leave of that Court.

The action in which the appeal arises ("the action") is concerned with the rights and liabilities of various persons, suing or sued in either a representative or a personal capacity, in respect of the estate of James Cameron deceased ("James"), who died a widower and intestate on 15th April 1940, and with certain other incidental matters.

The necessity for such an action having to be brought more than 40 years after the death of James arises from the failure of his eldest son, Dougald Cameron, to whom letters of administration of his father's estate were granted on 3rd September 1941, and who himself died in 1980, to administer that estate according to law during his life-time.

[9] James had four sons and five daughters, born between 1887 and 1909. These were, in order of birth: Dougald Cameron ("Dougald"), who died on 8th

May 1980; Catherine Anne Lockhead ("Catherine"), who died on 17th May 1968; Jessie Delena Ellen Petroff ("Jessie"), who died on 28th January 1963; John Evander James Cameron ("Jack"), who died on 21st September 1974; Mary Jane Isabella Cameron ("May"), who died on 1st May 1978; Lilian Effie Thompson ("Lilian"), who died on 28th November 1962; Lady Barbara Marshall Murdoch ("Barbara"), who alone of the nine children is still living; Alexander Donald Robert Gordon Cameron ("Alex"), who died on 19th September 1975; and Charles Leslie Edward Keith Cameron ("Charles"), who died on 5th November 1949.

Dougald had two daughters: Alexandra Jane Stanton ("Lexie"), who married Kim Stanton ("Kim"); and Catherine Anne Cameron ("Anne"). Jessie had three daughters: Dolina Mary Featherby ("Dolina"); Olga Morrison Lindon ("Olga"); and Neonela Barbara Clark ("Neonela"). Lilian had one son: Martin Cameron Thompson ("Martin"). Alex married Edith Mary Maud Cameron ("Edith"), by whom he had five children: James Cameron ("young James"); Charles McKenzie Cameron ("young Charles"); Evan Thomas Cameron ("Evan"); Barbara Mary Cameron ("young Barbara"); and Christine Elizabeth Powell ("Christine").

All the above grandchildren of James are still living, except for young James who was killed in a road accident.

None of Catherine, Jack, May, Barbara or Charles had any children.

The situation with regard to representation of the estates of the eight children of James who are dead, in the order of their deaths, is as follows. Charles left a will by which he appointed his sister, Barbara, his executrix and gave his whole estate to his other sister, May; Barbara was granted probate of the will on 10th July 1963. Lilian left a will by which she appointed her only son, Martin, her executor and gave her whole estate to him; Martin was granted probate of the will on 1st May 1963. Jessie died intestate; for many years no steps were taken to obtain representation of her estate, but on 4th October 1976 letters of administration were granted to two of her daughters, Dolina and Olga; they, together with their sister, Neonela, are the beneficiaries in equal shares of the whole estate. Catherine left a will by which she appointed her brother, Alex, her executor and gave the whole of her estate to her sister, May; Alex did not prove her will during his life-time, but on 27th July 1981, after the commencement of the action, letters of administration with the will annexed were granted to two of Alex's sons, young Charles and Evan. Jack left a will by which he appointed his brother, Dougald, his executor; left a life interest in his

whole estate to Dougald; and, subject to that, devised, or purported to devise (for there is a dispute about the matter), certain land (Melbourne Location 1659) to his nephews and nieces, young Charles, Evan, young Barbara and Christine, and gave the residue to his other nieces, Dolina, Olga and Neonela. Probate of the will was granted to Dougald on 1st July 1975. Alex left a will by which he appointed his wife, Edith, his executrix and gave the whole of his estate to her; probate of the will was granted to Edith on 13th March 1976. May left a will by which she appointed her niece, Lexie, and her nephew-in-law, Kim, her executrix and executor and made her nephews and nieces, Lexie, Anne, young Charles, Evan, young Barbara and Christine, her residuary beneficiaries; no steps to prove the will were at first taken, but on 17th July 1981, after the commencement of the action, probate of it was granted to Lexie, with leave to Kim to come in and prove later. Dougald left a will by which he appointed his daughter, Lexie, and his son-in-law, Kim, his executrix and executor, and left the whole of his estate in equal shares to his two daughters, Lexie and Anne; probate was granted to Lexie and Kim on 25th June 1980, after the commencement of the action.

Finally, so far as representation of James' unadministered estate is concerned, on 12th August 1981, after the commencement of the action, letters of administration *de bonis non* were granted to Barbara.

A diagrammatic representation of most of the facts set out in the proceeding six paragraphs is to be found in the First Schedule to the Reasons for Judgment of Brinsden J.

The story leading to the bringing of the action centres round two farming areas in the State of Western Australia, one called Watheroo, and the other, about 20 miles further east, called Miling. Before James' death in 1940 he was the sole legal and beneficial owner of certain lands, mainly urban lots at Watheroo and another lot at a place called Guildford. Particulars of these lands are set out as Items 1 to 7 in the First Part of the Second Schedule to the Reasons for Judgment. James further farmed, in partnership with two of his sons, Dougald and Jack, certain other lands, at both Watheroo and Miling. These lands were variously in the legal ownership of one or more of the three partners, but were all held by whichever partner or partners had such legal ownership for the benefit of the partnership, and were accordingly partnership property. Particulars of these lands are set out as Items 8 to 40 in the Second Part of the Second Schedule to the Reasons for Judgment. The three partners carried on the business of the partnership in the name of James Cameron & Sons.

The agreement of partnership between James, Dougald and Jack ("the original partnership") was an oral agreement only, under which each of the three partners had a one-third share in the partnership property and profits. The agreement made no provision for what was to happen in the event of the death of one of the partners. That being so, the situation on James' death in 1940 was governed by sections 44 and 50 of the Partnership Act 1895 of Western Australia ("the Act of 1895"). The effect of section 44 was to bring about an immediate dissolution of the original partnership. The effect of section 50 was to entitle Dougald and Jack in their personal capacities as surviving partners, and Dougald in his representative capacity as the administrator of the estate of James, to have the original partnership wound up and the surplus assets distributed equally between Dougald, Jack and the estate of James.

As administrator to be of the estate of James, Dougald in 1941, filed a statement of assets and liabilities and later paid the duty payable on the net value of the estate which was assessed at £5,677.19.7. This amount comprised the value of James's own lands, put at £1,050.0.0 and the value of his one-third share in the property of the original partnership, including the partnership lands, put at £4,627.19.7. Having dealt with these matters, Dougald took no further steps to administer James's estate at any time before his death in 1980.

Following the death of James in 1940, Dougald and Jack did not treat the original partnership as having been dissolved, but instead carried on the same farming business which the original partnership had previously carried on pursuant to what must in law be regarded as a new partnership between the two of them ("the second partnership"). In so carrying on the same business, they made use of all the property of the original partnership, including the one-third share to which the estate of James was entitled. This went on until Jack's death in 1974, as a result of which the second partnership was also dissolved. After Jack's death Dougald continued to farm the same lands, first on his own and then in a third partnership with his two daughters, Lexie and Anne.

During the period of the original partnership and the early part at least of the second partnership, the lands at Watheroo constituted the main farm, and the house built on part of them and known as Watheroo Park, was the home of the Cameron family. The lands at Miling fell into two parts, one of which was acquired first and has been described as Old Edawa, and the other of which, being contiguous to Old Edawa, was acquired later and has been described as New Edawa. The only habitation at Miling available

at that time was an inadequate house built on Old Edawa and known as a humpy.

Until 1945 the only persons who actively farmed the lands at Watheroo and Miling were James, Dougald and Jack before the death of James in 1940, and Dougald and Jack after it. Alex served in the army during the Second World War, but was specially released in early 1945, on Dougald's application, in order to enable him to assist in the farming work. Alex came to Watheroo Park with his wife, Edith, and the two children whom they then had, and worked on the farm, but was never introduced into the second partnership. There were various other members of the Cameron family living at Watheroo Park, and Edith with two children to look after found the situation of over-crowding which existed intolerable to her. This led to a temporary separation between Alex and Edith in about 1948, when Edith went with her two children to live in Sydney. The difficulty was, however, surmounted soon after when Alex left Watheroo Park and moved to live with Edith and their children in the humpy at Miling. The arrangement under which this move was made provided that Alex should have the cropping rights to the Miling lands, while Dougald and Jack retained the right to pasture stock on them. In 1952 the humpy at Old Edawa burnt down and in 1956 Alex built a new house there. Alex and Edith then made a permanent home at that house, bringing up the five children which they ultimately had, until the death of Alex in 1975. After that Edith continued to live there and still does so.

There remain some further matters of which it is necessary to give an account. The first matter is that, at various times after 1950, the second partnership of Dougald and Jack acquired in the name of one or other of them three lots of land contiguous to the existing lands farmed by them at Watheroo, and one urban property known as Kinninmont Avenue. The three new lots of farming land, which were acquired in 1951 and 1952, were Melbourne Locations 2123, 2113 and 3156 ("the after-acquired farming lands"). Kinninmont Avenue was acquired in 1964.

The second matter is that Dougald and Jack carried out various improvements on the lands belonging to the original partnership at various times after the death of James in 1940.

The third matter is that in 1966 and 1972 the second partnership sold certain of the lands at Watheroo of which James had, before his death, been the sole legal and beneficial owner. These were Lots 19 and 20, sold in 1966, and Portion of Swan Location W being lot 1 in Plan 1920, known as the Guildford Land, sold in 1972.

The fourth matter is that in 1975 Dougald granted two leases of the Miling lands to Alex. The first lease was dated 20th May 1975. By it Dougald let the lands comprised in New Edawa, together with all the buildings and other fixed improvements on them, to Alex for a term of 5 years commencing on 1st May 1975 at an annual rent of $1,000 payable in two half-yearly instalments of $500 each. The lease further contained two options for the tenant: first, an option to renew the lease for a further five years at a rent to be agreed, or, if not agreed, to be settled by arbitration; and, secondly, a purported option to purchase the lands let at any time during the original term for the price of $84,000.

The second lease was dated 9th July 1975. By it Dougald let the lands comprised in Old Edawa, together with all the buildings and fixed improvements on them, to Alex for a term of 5 years commencing on 1st July 1975 at an annual rent of $1,000 payable in two half-yearly instalments of $500 each. The lease further contained a purported option for the tenant to purchase the lands let for $65,452 less $14,000 for improvements made by Alex, making a net price of $51,452.

In proceedings in the Supreme Court commenced by Dolina, Olga and Neonela in 1975 and concluded in 1979, it was decided that the purported options to purchase contained in the two leases just referred to were void for uncertainty. No appeal was brought against that decision.

The action was begun in 1980. The parties to it, as finally constituted, were as follows. The first plaintiff (now the first appellant) was Edith, suing as executrix of the will of her deceased husband, Alex. The second plaintiffs (now the second appellants) were young Charles, Evan, young Barbara and Christine, suing in their personal capacities as beneficiaries under the wills of their aunt, May, and their uncle, Jack. The first defendant (now the first respondent) was Barbara, sued as administratrix *de bonis non* of the estate of her father, James. The second defendants (now the second respondents) were Lexie and Kim, sued as executrix and executor by succession of the will of Lexie's uncle, Jack. The third defendants (now the third respondents) were Lexie and Kim, sued as the executrix and executor of the will of Lexie's father, Dougald. The fourth defendants (now the fourth respondents) were Lexie and Kim, sued as the executrix and executor of the will of Lexie's aunt, May. The fifth defendant (now the fifth respondent) was Barbara, sued in her personal capacity as a beneficiary of the estate of her father, James. The sixth defendant (now the sixth respondent) was Barbara, sued as executrix of the will of her brother, Charles. The seventh

defendant (now the seventh respondent) was Martin, sued as executor of the will of his mother, Lilian. The eighth defendants (now the eighth respondents) were Dolina and Olga, sued as administratrices of the estate of their aunt, Jessie. The ninth defendants (now the ninth respondents) were young Charles and Evan, sued as administrators with the will annexed of the estate of their aunt, Catherine.

By the formal judgment of Brinsden J. dated 22nd April 1983 it was declared, adjudged and ordered that:-

"1. All the land comprising Items 1 to 7 (inclusive) in the Schedule to this judgment is or was an asset of the estate of JAMES CAMERON deceased.

2. The said estate of JAMES CAMERON deceased has or had a one-third interest in each and all of the lands comprising Items 8 to 40 (inclusive) in the Schedule to this judgment.

3. The partnership of JAMES CAMERON & SONS as formerly carried on by JAMES CAMERON, DOUGALD CAMERON and JOHN EVANDER JAMES CAMERON was dissolved on the 15th day of April, 1940.

4. The said partnership of JAMES CAMERON & SONS be forthwith wound up and that all freehold properties belonging to the partnership and all improvements thereon, subject to the further provisions of this judgment, be sold out of Court either by private treaty or by auction. All parties hereto be at liberty to bid for and become purchaser or purchasers at such sale of the said properties or any part thereof. In the event of any one of the said parties being unwilling to agree as to any matter arising out of the sale of all or any of the said freehold properties there be liberty to apply to the Court in respect of the same upon seven days' notice, and without limiting the generality of the foregoing, there be liberty to apply for the appointment of a receiver to conduct the said sale or sales.

5. The share in the assets of the said partnership of JAMES CAMERON & SONS which passed to the estate of JAMES CAMERON deceased was valued at the date of his death on the 15th day of April, 1940 at £4,627.19.7d and the date at which the assets of the partnership as yet not the

subject of an account be valued for the purpose of finalising accounts be as at the date of finalisation.

6. In valuing the assets of the partnership of JAMES CAMERON & SONS as yet not the subject of an account there be no charge in respect of any improvements effected to the said assets since the date of death except as follows:-

(i) The estate of DOUGALD CAMERON be entitled to a charge for a house erected by DOUGALD CAMERON on Melbourne Location 2117 in respect of its present value or cost whichever is the less, but in calculating the amount of the said charge there be deducted the amount outstanding to the Defence Services Homes Corporation pursuant to a mortgage registered against the said land.

(ii) A charge in favour of the estate of DOUGALD CAMERON and the estate of JOHN EVANDER JAMES CAMERON in respect of any of the assets upon which improvements have been effected since the 21st day of September 1974, of the value of such improvements or their cost whichever is the less.

7. In the event of there being any dispute among the parties as to any matter arising under paragraph 6(i) or 6(ii) aforesaid any party may refer the said dispute to a Registrar for enquiry and determination on seven days' notice.

8. The Third Defendants on behalf of the estate of DOUGALD CAMERON deceased and the Second Defendants on behalf of the estate of JOHN EVANDER JAMES CAMERON deceased do account to the First Defendant on behalf of the estate of JAMES CAMERON deceased for the sum of $800.00 in respect of the sale of Watheroo Lots 19 and 20 being Items 6 and 7 in the Schedule to this judgment together with simple interest thereon as from the 30th day of August, 1966 until payment at the rate of 10 per centum per annum.

9. The Third Defendants on behalf of the estate of DOUGALD CAMERON deceased and the Second Defendants on behalf of the estate of JOHN EVANDER JAMES CAMERON deceased do account to the First Defendant on behalf of

the estate of JAMES CAMERON deceased for the sum of $3,200.00 in respect of the sale of Swan Location W and being Lot 1 on Plan 1920 and being Item 1 in the Schedule to this judgment together with simple interest thereon as from the 13th day of June, 1972 until payment at the rate of 10 per centum per annum.

10. The Second Defendants on behalf of the estate of JOHN EVANDER JAMES CAMERON deceased do account to the First Defendant on behalf of the estate of JAMES CAMERON deceased and failing such an account the Third Defendants on behalf of the estate of DOUGALD CAMERON deceased do so account for one third of the purchase price in respect of Melbourne Locations 2124 and 2447 sold pursuant to an Agreement for Sale dated the 25th day of March, 1977 together with simple interest thereon as from the 25th day of March, 1977 until payment at the rate of 10 per centum per annum. For the purpose of this account the amount carrying interest as aforesaid and constituting the principal as at the 25th day of March, 1977 be fixed at $19,359.40.

11. The First Defendant do administer the estate of JAMES CAMERON deceased according to law.

12. The Second Defendants do administer the estate of JOHN EVANDER JAMES CAMERON according to law.

13. The devise of Melbourne Location 1659 in the last Will of JOHN EVANDER JAMES CAMERON deceased to the Second Plaintiffs be effective to pass to them the whole of the interest of the said deceased in the said land namely, 10/27ths of the entirety.

14. The First Plaintiff be entitled to acquire the freehold of the whole of the Miling lands (being the lands comprising Items 8 to 18 inclusive, 21 and 27 to 29 inclusive referred to in the Schedule hereto) upon payment to the Administrator for the time being of the estate of JAMES CAMERON deceased, the Executors of the Will of DOUGALD CAMERON deceased and the Executors by succession of the Will of JOHN EVANDER JAMES CAMERON deceased the sum of $524,000.00. In respect thereof the First Plaintiff do have a period of three months from the date of this order, or such further period as may hereafter be allowed,

to complete the purchase of the said lands and pay the said price to the vendors thereof against delivery of the duplicate Certificates of Title and proper registrable transfers for each of the said lands.

15. The First Plaintiff has validly exercised the Option to Renew contained in the Indenture of Lease made the 20th day of May, 1975 in respect of Melbourne Locations 2004, 2006 and 1340 and being the Lease referred to in paragraph 24 of the Statement of Claim.

16. The First Defendant on behalf of the estate of JAMES CAMERON deceased be at liberty to elect (and such election be made within a period of 30 days from the date of this order) either:-

(a) The Third Defendants do as Executors of the Will of DOUGALD CAMERON deceased and the Second Defendants as Executors of the Will of JOHN EVANDER JAMES CAMERON deceased do jointly and severally pay interest to the estate of JAMES CAMERON deceased at the rate of 6 per centum per annum simple interest as from the 15th day of April, 1940 until the realisation of the assets of the partnership of JAMES CAMERON deceased on the sum of £4,627.19.7d; or

(b) The Third Defendants as Executors of the Will of DOUGALD CAMERON deceased and the Second Defendants as Executors of the Will of JOHN EVANDER JAMES CAMERON deceased do jointly and severally account to the First Defendant as Administratrix of the estate of JAMES CAMERON deceased for such share of the profits made since the dissolution of the partnership which are attributable to the use of the share of James Cameron deceased in the partnership assets as from the 15th day of April 1940 to the date of the realisation of the remaining assets of that partnership. There be liberty to apply as to the manner of the taking of the said account and what special enquiries to be made.

17. There be general liberty to apply to any party."

The costs of the action were dealt with by Brinsden J. in a separate order dated 2nd May 1985. That order contains many detailed directions with regard to the basis on which the costs ordered to be paid, borne or recovered should be taxed. For present purposes, however, it is sufficient to summarise the substantial effect of the order which was as follows:-

(1) That the costs of the first and second plaintiffs (now the first and second appellants) should be paid jointly and severally as to three quarters by the third defendants (now the third respondents) on behalf of the estate of Dougald Cameron deceased and by the second defendants (now the second respondents) on behalf of the estate of John Evander James Cameron deceased and as to the remaining one quarter by the eighth defendants (now the eighth respondents).

(2) That the costs of the first, fifth and sixth defendants (now the first, fifth and sixth respondents) should be paid out of the estate of James Cameron deceased.

(3) That the second and third defendants (now the second and third respondents) should each bear their own costs but should be entitled to have these paid out of the estate of James Cameron deceased and Dougald Cameron deceased respectively.

(4) That the costs of the eighth defendants (now the eighth respondents) should as to one quarter be paid out of the estate of Dougald Cameron deceased and as to the remaining three quarters should be borne by themselves but that they should be entitled to have the latter paid out of the estate of Jessie Delena Ellen Petroff deceased.

While all the parties to the action are named as parties to the appeal only six of them took any active part in it. These were the first and second appellants (the first and second plaintiffs in the action), whose interests coincided and who therefore had common representation; the first respondent (the first defendant in the action); the second and third respondents (the second and third defendants in the action), whose interests also coincided and who therefore also had common representation; and the eighth respondents (the eighth defendants in the action). All these parties lodged written cases and appeared by counsel on the hearing of the appeal. Their Lordships were, however, informed by counsel for the first respondent that it was now apparent

from the written case lodged on behalf of the second and third respondents that the interests of the first respondent would be sufficiently protected by the argument for them. Counsel for the first respondent therefore asked their Lordships at the commencement of the hearing of this appeal for leave to withdraw and such leave was duly given. In the result their Lordships heard three cases argued, the first on behalf of the first and second appellants, the second on behalf of the second and third respondents, and the third on behalf of the eighth respondents.

As appears from the terms of the formal judgment of Brinsden J. dated 22nd April 1983 set out earlier, that order contained 17 separate paragraphs dealing with various aspects of the claims raised before him. Many of these paragraphs gave relief which the parties either did not dispute in the action or now accept as rightly given. The appellants by way of appeal, however, and the eighth respondents by way of cross-appeal, challenge certain specified parts of the judgment.

The appellants challenge the judgment in three respects as follows:-

(1) Brinsden J. failed to hold, as he ought to have done, that the estate of James Cameron had a one third interest in (a) the after-acquired farming lands and (b) Kinninmont Avenue, and that the second and third respondents held that interest on trust for that estate.

(2) Brinsden J. wrongly held that the estate of Dougald was entitled to a charge for the value of a house built by him on Melbourne Location 2117 at Watheroo, and that the estates of Dougald and Jack were entitled to a charge for the value of improvements effected on the Watheroo and Miling lands since 21st September 1974.

(3) The order entitling the first appellant to purchase the Miling lands at a price of $524,000.00 failed to recognise the extent of the interest which the first appellant had acquired in those lands, and Brinsden J. should instead have held either that the first appellant was entitled to those lands absolutely, or alternatively, that she was entitled to purchase them at a substantially lower price.

The eighth respondents as cross-appellants challenge the judgment in three respects as follows:-

(1) Brinsden J. was wrong in holding that the devise of Melbourne Location 1659 to the second appellants contained in Jack's will was effective to pass to them his 10/27ths interest in that land.

(2) Brinsden J. was wrong in holding that the first appellant was entitled to purchase the Miling lands at a price of $524,000.00 and should have held, either that she had no entitlement to purchase those lands at all or, alternatively, that she was only entitled to purchase them at a substantially higher price than $524,000.00.

(3) The order for costs made by Brinsden J. was wrong and should be varied.

The second and third respondents resisted the appellants' appeal and the eighth respondents' cross-appeal in so far as they were affected by them.

In the result their Lordships are concerned with the following issues:-

(1) The issue raised by the appellants with regard to the after-acquired farming lands.

(2) The issue raised by the appellants with regard to Kinninmont Avenue.

(3) The issue raised by the appellants with regard to charges for improvements made after Jack's death.

(4) The issue raised by both the first appellant and the eighth respondents as cross-appellants with regard to the right of the first appellant to acquire the Miling lands for nothing or alternatively for substantially less than the market value.

(5) The issue raised by the eighth respondents as cross-appellants with regard to Jack's devise to the second appellants of Melbourne Location 1659.

(6) The issue raised by the eighth respondents as cross-appellants with regard to costs.

Their Lordships will in due course consider each of these issues in the sequence in which they are set out above. Before they do so, however, it will be convenient to set out such sections of the Act of 1895 as are, or may be, relevant to certain of those issues, including sections 44 and 50 already referred to earlier. Those sections are as follows:-

"6. The rules of Equity and Common Law applicable to partnership shall continue in force, except so far as they are inconsistent with the express provisions of this Act.

31. Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.

33. 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.

40.(1) Every partner must account to the firm for any benefit derived by him, without the consent of the other partners, from any transaction concerning the partnership or from any use by him of the partnership property, name or business connection.

(2) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.

44.(1) Subject to any agreement between the parties every partnership is ... dissolved by the death ... of any partner.

(2) ...

(3) The dissolution shall take effect from the date of the death ...

50. On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively, after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may, on the termination of the partnership, apply to the Court to wind up the business and affairs of the firm.

55.(1) Where any member of a firm has died or otherwise ceased to be a partner, and the

surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlements of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner, or his estate, is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of 6 per cent. per annum on the amount of his share of the partnership assets.

(2) ...

(3) In determining how far the profits made since the dissolution are attributable to the outgoing partner's capital, the Court shall have regard to the nature of the business, the amount of capital from time to time employed in it, the skill and industry of each partner taking part in it, and the conduct of the parties generally. And the Court may allow to any such continuing partners such remuneration as to the Court seems meet for carrying on the partnership business.

56. Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner, or the representatives of a deceased partner, in respect of the outgoing or deceased partner's share, is a debt accruing at the date of the dissolution or death."

There are certain preliminary observations of a general character which their Lordships would make about the Act of 1895. The Act is described in its title as "AN ACT to consolidate and amend the Law of Partnership". The purpose and effect of the Act were largely to codify the law of partnership as at the date of its passing. Their Lordships use the expression "largely to codify" because of the inclusion in the Act of section 6. That section is in the nature of a sweeping-up provision designed to ensure that the rules of equity and common law applicable to partnership, which were in existence at the time when the Act was passed, should remain in force except in so far as they might be inconsistent with the express provisions of the Act. It is to be stressed that the rules of equity and common law so preserved are the rules of equity and common law relating to partnership, and to partnership only. The result of these matters is, in their Lordships' view, that, when a question of partnership law arises, it is the express provisions of the Act to which regard should first be had, and that it is only after such regard has been had that consideration

should be given to the effect, if any, of the sweeping-up provision in section 6.

There is one other matter to which their Lordships would refer before turning to consider the six issues in the appeal. Paragraph 16 of the judgment of Brinsden J. dated 22nd April 1983 conferred on the first defendant (now the first respondent) an option between two rights as provided for in section 55 of the Act of 1895. It is necessary to record the fact that the first respondent has, since the judgment of Brinsden J., chosen the option given to her in sub-paragraph (b) of paragraph 16, namely, the right to an account of profits attributable to the use by Dougald and Jack of the share of James in the assets of the original partnership.

Issue (1): the after-acquired farming lands

Brinsden J. found as a fact that the after-acquired farming lands had been purchased out of the profits made by Dougald and Jack in carrying on, by means of the second partnership, the business which had, before the death of James, been carried on by the original partnership. This finding of fact is accepted by all parties as correct. Having made that finding, Brinsden J. proceeded on the basis that the full extent of the obligation of surviving partners, who carry on the business of a partnership dissolved by the death of a former partner, is either to account for part of the profits thereby made, or to pay interest, as provided in section 55 of the Act of 1895. On this approach any use which surviving partners may make of profits earned after dissolution is irrelevant, even if, as in this case, such profits are applied to the acquisition of capital assets which, before any final settlement of accounts, appreciate substantially in value.

Counsel for the appellants contended that, in adopting this approach, Brinsden J. had erred in law. His primary argument comprised three steps as follows: first, that the relationship in a case like the present between the surviving partners and the estate of a deceased partner was fiduciary in nature; secondly, that, since the relationship was fiduciary, the surviving partners who carried on the business of the original partnership became constructive trustees of the profits thereby made which were attributable to the use of the deceased partner's share of the original partnership assets; and, thirdly, if the surviving partners used such part of the profits to purchase new capital assets, the surviving partners held the appropriate proportion of such assets in trust for the estate of the deceased partner.

The proposition that the relationship between partners, or between surviving partners and the

estate of a deceased former partner, is fiduciary in nature is the subject-matter of conflicting authority. In *Knox v. Gye* (1872) L.R. 5 H.L. 656 a majority of the House of Lords (Lords Westbury, Colonsay and Chelmsford, Lord Hatherley L.C. dissenting) expressed the view that the relationship between a surviving partner and the estate of a deceased former partner was not fiduciary in nature. Later authority, however, particularly in Australia, supports the contrary view, that the relationship is fiduciary in nature. *Birtchnell v. Equity Trustees Executors and Agency Co. Ltd.* (1929) 42 C.L.R. 384; *Chan v. Zacharia* (1984) 58 A.L.J.R. 353. Their Lordships do not question the decisions in the latter cases, but it remains necessary to consider what is involved in categorising the relationship as fiduciary, and, in particular, to what extent it has the effect of making surviving partners trustees for the estate of a deceased former partner.

There can be no doubt that there is between existing partners, and between surviving partners and the estate of a deceased former partner, a general duty of utmost good faith: see Lindley on Partnership 15th Edition 1984 at page 480. That general duty is recognised and given effect to by, in particular, section 40 of the Act of 1895 (which is the equivalent of section 29 of the English Partnership Act 1890). In their Lordships' opinion, it is wholly or mainly this obligation of utmost good faith, which gives to the relationships between existing partners, and between surviving partners and the estate of a deceased former partner, the fiduciary nature which they have been held to have. The existence of such fiduciary relationship is not, however, in their Lordships' view, equivalent for all purposes to a relationship of trustee and *cestui que trust*.

Counsel for the appellants contended that the rights of the estate of a deceased former partner, in relation to such part of the profits made by the carrying on of the partnership business by the surviving partners as was attributable to the use by them of the share of the deceased partner in the partnership assets, were not limited to the alternative remedies expressly conferred by section 55 of the Act of 1895, but extended in appropriate cases, of which the present case was one, to additional relief by virtue of section 6. As appears from the terms of that section, which has been set out earlier, it preserves existing rules of equity and common law applicable to partnership, except so far as they are inconsistent with the express provisions of the Act. In their Lordships' opinion, there never has been a rule of equity under which surviving partners, who carry on the business of a partnership after its dissolution by reason of the death of a former partner, become trustees for the

estate of that former partner of such part of the profits of the business thereby made as is attributable to the use of the latter's share of the original partnership's assets. The absence of any such rule gains strong confirmation from the inability of counsel for the appellants to cite a single decision, either in England or in Australia, in which such a rule has been recognised and applied.

Their Lordships would, however, go further and hold that this suggested rule, even if it existed, would be inconsistent with the express provisions of section 55 of the Act of 1895. Under that section, as appears from its terms set out earlier, where surviving partners carry on the business of a partnership after it has been dissolved by the death of a deceased former partner, the representatives of the latter's estate are entitled, at their option, to one or other of two remedies. These remedies are either an account of so much of the profits made by the carrying on of the business as are attributable to the use of the deceased former partner's share of the capital assets of the original partnership, or interest at 6 per cent on the value of that share. To hold that, where surviving partners use profits made by the carrying on of the business of the original partnership for the acquisition of new capital assets, the representatives of the estate of the deceased former partner are entitled, not to an appropriate share of such profits themselves, but to a like share in the new capital assets into which they have been converted, would not be consistent with the express provisions of section 55. Further, section 56 makes it clear that the obligation to pay any sum due from surviving or continuing partners to an outgoing partner or a deceased partner's estate is an obligation which sounds in debt and not in trust.

Counsel for the appellants contended in the alternative that, even if Dougald and Jack did not, in their capacity as surviving partners, become trustees for the estate of James of an appropriate proportion of the after-acquired farming lands, Dougald became such trustee in his capacity of administrator of that estate, and Jack, knowing of Dougald's position in this respect, was affected by the same trust as Dougald himself. Their Lordships do not accept this alternative contention either. In carrying on with Jack the business of the original partnership Dougald was acting in his capacity as surviving partner and not in his capacity as administrator. It is, therefore, his obligations to the estate of James in his capacity as surviving partner, and not in his capacity as administrator, which are relevant. There is moreover no good reason why, where surviving partners carry on the business of a partnership after the death of a deceased former partner, the rights of that estate should differ

according to whether it is represented by a stranger to the original partnership on the one hand, or a surviving partner on the other hand. On the contrary, the rights of the estate of the deceased former partner should logically be the same in either case.

Counsel for the appellants put forward a secondary contention, on which he relied in case his primary contention failed. This was that the estate of James was entitled to a share in the after-acquired farming lands by virtue of the express provisions of section 40(2) of the Act of 1895.

It is not altogether easy to apply section 40(1), which deals with benefits derived during the continuation of a partnership, to the situation dealt with in section 40(2), namely, that which exists after a partnership has been dissolved by the death of one of the members of it, and there is a delay, for whatever reason, before the affairs of the partnership are wound up and the accounts finally settled. The duty to account under both section 40(1) and (2) relates, and relates only, to any benefit derived from any transaction concerning the partnership, or from any use of the partnership property, name or business connection. Where, after a partnership has been dissolved by the death of one partner, and the surviving partners, instead of winding up the partnership, carry on its business and make profits by doing so, and they then apply such profits, or part of them, in acquiring new or additional capital assets, the benefit which they thereby derive is not, in their Lordships' view, a benefit derived from any transaction concerning the partnership, or from any use of the partnership property, name or business connection, within the meaning of those expressions as used in section 40(1) and applied *mutatis mutandis* by section 40(2). So to hold would involve an overlap and inconsistency between section 40(2) on the one hand and section 55 on the other, and a construction of the Act which does not involve any such overlap or inconsistency between two sections of it should, in their Lordships' view, be preferred to one which does so.

For these reasons their Lordships are of the opinion that the approach adopted by Brinsden J. to the issue of the after-acquired farming lands was correct in law, and that the challenge to it made on behalf of the appellants fails.

Issue (2): Kinninmont Avenue

Brinsden J. found that Kinninmont Avenue was bought by Dougald for his own account, and not for the benefit of the second partnership, with monies borrowed by that partnership from lenders called

Elders Goldsborough. He reached that conclusion, not on the basis of any direct evidence on the matter (for there was none), but by drawing inferences from certain entries in the accounts of the second partnership. The earliest accounts available were those for the year ended 30th June 1964, all earlier accounts having apparently been lost or destroyed. It had by then become the practice of the accountants who prepared the accounts, for no apparent good reasons, to exclude from the annual balance sheets of the partnership any reference to the shares of the partners in the lands owned by the partnership. The share of capital belonging to the partners related therefore only to assets other than land.

The balance sheet for the year ended 30th June 1964 showed three things: first, that the partnership owed an amount of £5,837 to Elders Goldsborough; secondly, that Dougald's capital account was in surplus in the amount of £6,325; and, thirdly, that Jack's capital account was in surplus in the amount of £5,996. The balance sheet for the next year, that is to say, the year ended 30th June 1965, showed the following changes: first, that the loan from Elders Goldsborough had increased by £8,209 to £14,046; secondly, that Dougald's capital account had sustained a deduction "on account of purchase of house £6,574", and was now in deficit in the amount of £1,734; and, thirdly, that Jack's capital account remained in surplus in the amount of £4,510. These figures indicated that the capital of both partners had been reduced by about £1,486, but that Dougald's had been reduced by a further £6,574, stated to be in respect of the purchase of a house. Later balance sheets showed that the relative difference between the capital accounts of Dougald and Jack remained much the same until Jack's death in September 1974.

Brinsden J. recognised that, while the figures in the accounts taken by themselves supported a conclusion that the house was Dougald's own property and not that of the partnership, there were two matters pointing the other way. The first matter was that from 1965 onwards the interest on the whole of the loan from Elders Goldsborough, including the additional amount borrowed during the year 1964/65, was shown in the profit and loss accounts as having been paid by the partnership. The second matter was the provision contained in section 31 of the Act of 1895.

Brinsden J. considered, however, after a careful examination of all the surrounding circumstances, including in particular the impact of certain family considerations, that the manner in which the interest had been paid was not of great significance, and that, on the whole of the evidence the "contrary intention" referred to in section 31 had been sufficiently shown.

In their Lordships' opinion there was evidence from which Brinsden J. was entitled to draw the inference that Kinninmont Avenue was purchased by Dougald for his own account and not for the account of the partnership. On that basis the estate of James was not, on any view of the rights of that estate in respect of after-acquired property of the second partnership, entitled to any share in Kinninmont Avenue. It follows that the appellants fail on issue (2).

Issue (3): charges for improvements made after Jack's death

This issue arises out of paragraph 6(i) and (ii) of the judgment of Brinsden J. dated 22nd April 1983. In relation to it Brinsden J. adopted the following statement of law contained in Lindley on Partnership 14th Edition, at pages 452-3:-

> " Sometimes a firm lays out money on property which belongs exclusively to one partner; or some of the partners lay out their own moneys on the property of the firm; and in such cases the question arises whether the money laid out can be considered as a charge on the property on which it has been expended, or whether the owners of the property obtained the benefit of the outlay. The agreement of the partners, if it can be ascertained, determines the right in such cases. But when, as often happens, it is extremely difficult, if not impossible, to ascertain what was agreed, the only guide is that afforded by the burden of proof. It is for those claiming an allowance in respect of the outlay to establish their claims. In this connection, however, the purpose for which any expenditure upon the property was made is material and may go far towards discharging the burden of proof."

Brinsden J. dealt first with improvements made by Dougald and Jack before Jack's death in September 1974. With regard to these improvements he found or held as follows. First, that the cost of all improvements, to whatever property they were made, were debited to Dougald and Jack equally in their respective capital accounts. Secondly, that there was no evidence of any agreement reached between Dougald as administrator of the estate of James on the one hand, and Dougald and Jack as surviving partners on the other hand, that the surviving partners would have a charge on the interest of the estate of James in land in respect of improvements made. Thirdly, that the purpose of the improvements made was to render more effective the utilisation of the farming lands for the purpose of earning income. Fourthly, that Dougald and Jack must be taken to have known at the date of the death of James that his

estate had a one-third interest in all the lands which had been the property of the original partnership. Fifthly, that Dougald and Jack chose to ignore the interest of the estate of James, and treated the lands as if they owned jointly lands which were in the name of James alone, or in the names of two of them jointly, or in the names of all three jointly, and as if each owned individually the lands in their separate names. Sixthly, that that view was entirely erroneous and did not assist them to rebut the inference that they made the improvements on land in which they knew that a third party had an interest. Seventhly, that in these circumstances, Dougald and Jack were not entitled to any charge in respect of the improvements made by them during their joint lives on any of the lands in which the learned judge had held that the estate of James had an interest. That decision, though stated by the second and third respondents in their written case to have been incorrect, was not challenged in any cross-appeal by them.

Brinsden J. dealt next with improvements made by Dougald after Jack's death in September 1974. With regard to these improvements he expressed the view that different considerations applied. He examined separately an improvement made by Dougald on Melbourne Location 2117, which was in his own name, in the form of the building of a new house on it in about 1976, and other improvements made to the farming lands generally.

With regard to the house, Brinsden J. found as follows. Firstly, that the house was built by Dougald with the assistance of a loan, made to him under the Defence Services Home Scheme and secured by a mortgage on it. Secondly, that it was necessary that the house should be built on land in the sole name of Dougald in order to enable the mortgage to be taken. Thirdly, that after the house was built until his death in 1980 Dougald made it his main place of residence, instead of Watheroo Park which was by then old and in poor condition. Brinsden J. decided that, having regard to all these circumstances, it was equitable that there should be a charge on the land for the value of the house or its cost, whichever was the lesser, in favour of Dougald's estate, subject to that estate accepting sole responsibility for the loan granted by the Defence Services Homes Corporation.

The basis on which Brinsden J. thought it right to allow the charge on the house appears to have been that the purpose for which the house was built and used, with the knowledge of all the members of the Cameron family, and the manner in which the building of it was financed, were sufficient circumstances to discharge the burden of proof referred to in the

passage from Lindley on Partnership set out above, and to establish a good claim by Dougald, and through him by his estate, to a charge on the land in respect of his outlay.

With regard to other improvements Brinsden J. said this:-

> " I think a different situation applies in respect of all improvements effected after Jack's death for the cost of all improvements must have come either from Dougald, Dougald's estate, or from the partnership carried on by Dougald and those he introduced into the partnership subsequent to the departure of Jack's estate. By the time these improvements were effected Dougald had become fully aware of the implications arising from the terms of Jack's will and he became, unreasonably perhaps, concerned about being put off the land by reason of the need to meet the claims of the Petroff girls through Jack's will, and in turn through Jack's and their mother's entitlement as beneficiaries of the estate of James. Though at times he seems to have been engaged in actions motivated with the intention of defeating or restricting these claims, I think in the interest of justice it is reasonable to look upon him more as in the nature of a trustee of the whole of the lands for those entitled spending money on improvements. It is well known that a trustee spending money on permanent improvements is entitled to a lien: *Snell's Principles of Equity* 28th Edition 255. Furthermore a joint owner in certain circumstances who improves the common property may be entitled to compensation on the sale of the jointly owned property: *Re Cook's Mortgage* (1896) 1 Ch. 93. On the other hand the joint owners ought not to have foisted on them improvements which may not be of as much value as the cost. I therefore think that it would be appropriate for the estate of Dougald to have a charge in respect of these improvements for their cost or their value whichever is the lesser."

It is to be observed that, whereas in this passage Brinsden J. said that he thought it right that Dougald's estate should have a charge in respect of the improvements made after Jack's death other than the house, paragraph 6(ii) of his formal judgment dated 22nd April 1983 provided that such charge should be allowed in favour of both Dougald's and Jack's estates. Their Lordships have been unable to establish with any degree of certainty the explanation for this discrepancy.

The question of charges for improvements made to the lands which were the property of the original

partnership must, in their Lordships' view, be determined by a consideration of the equitable principles applicable to expenditure by one or more persons, of money on the improvement of property in which a third party has a beneficial interest.

While their Lordships do not accept, for the reasons given by them when dealing with issue (1), that Dougald and Jack were trustees for the estate of James of that part of the profits made by the two former carrying on the business of the original partnership which was attributable to the use by them of the latter's share of the partnership property, they do accept that Dougald and Jack were such trustees in respect of that share itself. As such trustees, Jack and Dougald, by expending their own monies on improvements to the original partnership lands, including the share of the estate of James in those lands, would, in accordance with established equitable principles, be entitled to equitable charges or liens on that share in respect of so much of such expenditure as was incurred in relation to it: see Snell's Principles of Equity 28th edition 1982 pp 460-461.

The main argument for the appellants against the entitlement of Dougald and Jack to such equitable charges was that the improvements were all made in the course of a continuing breach of trust by Dougald, of which Jack must have been aware, in failing to administer the estate of James according to law, and that persons who are in breach of trust are not entitled to charges in respect of expenditure made by them on improving the trust assets.

With regard to that contention, their Lordships would agree that, if it were right to treat Dougald's breach of trust as continuing, neither his estate nor Jack's would be entitled to the charges claimed. The effect, however, of other parts of the formal judgment of Brinsden J. is to compel the administration of the estate of James according to law and, as part of that process, the winding up of the original partnership and the distribution of its surplus assets to those entitled to share in them. That being so, it would not be right, in their Lordships' view, to treat Dougald's estate as if Dougald's breach of trust in failing to administer the estate of James according to law was still continuing, and on that ground to deprive his estate, or Jack's, of such equitable charges for improvements as they would otherwise be entitled to have. In this connection it is to be borne in mind that, under paragraph 5 of the formal order of Brinsden J. dated 22nd April 1983, the date on which the assets of the original partnership are to be valued for the purpose of finalising accounts is to be the date of finalisation. It follows that, when the share of the

estate of James in the surplus assets of the original partnership is valued, the value will include the enhancement in the value of the original partnership lands created by the improvements to those lands made by Dougald and Jack after the death of James. That being so, it cannot be said that there is anything inequitable, as between Dougald's and Jack's estates on the one hand and the estate of James on the other, in allowing charges in respect of those improvements.

On the basis of the reasoning set out above their Lordships are of the opinion that Brinsden J. was right to allow firstly, a charge in favour of Dougald's estate in respect of the house built by him on Melbourne Location 2117 in about 1976, and, secondly, charges in favour of Dougald's and Jack's estates in respect of the other improvements made to the original partnership lands after Jack's death in 1974. In this connection it is unclear, as already stated, why Brinsden J. allowed the latter charges in favour not only of Dougald's estate but of Jack's as well. The only reasonable explanation appears to be that, although he made no express finding to that effect, he took the view that the improvements (other than the house) made after Jack's death were paid for partly by Dougald and partly out of Jack's estate. In any case the allowance of charges in favour of both estates does not increase the total of charges allowed altogether and their Lordships are not prepared to say that a sufficiently strong case for varying paragraph 6(ii) of the formal judgment of Brinsden J. dated 22nd April 1983 in this respect has been made out.

Since there is no cross-appeal by the second and third respondents against the disallowance by Brinsden J. of the claim for charges in respect of improvements made to the original partnership lands by Dougald and Jack before the latter's death in 1974, it is not necessary for their Lordships to express a concluded view on the question whether such charges should also have been allowed or not. It suffices to say that their Lordships, as at present advised, find difficulty in agreeing with the distinction which Brinsden J. made, so far as the allowance or disallowance of charges are concerned, between improvements made before Jack's death on the one hand and those made after such death on the other.

In the result the appellants fail on issue (3).

Issue (4): the right of the first appellant to acquire the Miling lands

This issue arises out of a case put forward on behalf of the first plaintiff (now the first appellant) at the trial that by reason of a

proprietary estoppel Alex had been entitled before his death to acquire the Miling lands either for no payment at all, or alternatively, for the payment of a sum substantially lower than their market value. Brinsden J. accepted the alternative case so put forward, and, by paragraph 14 of his formal judgment dated 22nd April 1983, gave the first plaintiff the right to acquire the Miling lands as therein described on payment of the sum of $524,000, which was two-thirds of what he had found to be their market value at the date of the trial.

In the appellants' written case it was contended that Brinsden J. should have held that the first plaintiff was entitled to acquire the Miling lands either for no payment at all, or alternatively, on payment of a substantially smaller fraction of the market value than the two-thirds assessed by him. In the written case of the eighth respondents it was contended that Brinsden J. should have held that the first appellant had no right to acquire the Miling lands at all, or alternatively, that she only had a right to acquire them on payment of a substantially larger fraction of the market value than that assessed by him.

At the hearing before their Lordships counsel for the first appellant wisely abandoned his client's extreme case that she had a right to acquire the Miling lands for no payment at all. Subsequently counsel for the eighth respondents, acting with equal wisdom, abandoned his clients' extreme case that the first appellant had no right to acquire the Miling lands at all. In the result, the question for determination by their Lordships, is whether the fraction of the market price of the Miling lands payable by the first appellant for their acquisition should stand at the two-thirds assessed by Brinsden J. or should be varied downwards to one half, as submitted by counsel for the first appellant, or upwards to some larger fraction such as three quarters, as submitted for the eighth respondents.

The nature of the first appellant's case on proprietary estoppel can be described in this way. Firstly, certain representations were made to Alex during his life-time by Dougald and Jack, with the knowledge and approval of the rest of the Cameron family with interests in the estate of James. These representations were pleaded as follows: (a) that Alex and his family would always reside on the Miling lands and farm them for his or their own benefit; (b) that he and they might proceed to develop and improve the Miling lands with confidence that he and they would always have the use and occupation of them and that eventually, they would succeed to ownership in a manner unspecified, whether by gift, inheritance or purchase at a price which would reflect his role of

improving, developing and farming the lands and having regard to the sense of family obligation and justice between himself and his brothers. Secondly, in reliance on those representations, Alex remained, for his life-time, in exclusive possession of the Miling lands and progressively improved and developed them and in so doing, forebore to purchase or take up other farming lands in the vicinity or elsewhere, and also forebore any opportunity to establish his sons (two of the second plaintiffs) on other lands elsewhere for their long avowed intention of continuing the family farming operation.

Brinsden J., in his Reasons for Judgment, made a detailed analysis of all the matters which he considered to be material to this case of the first plaintiff on proprietary estoppel. Having done so, he expressed his conclusion as follows:-

> "I am then in the end persuaded that there was a representation made to Alex that he would in some way be enabled to acquire the Miling lands and that he acted and abstained from acting upon that footing i.e. he improved the lands and did not establish himself and family on other lands and that his estate and his beneficiaries thereof would suffer a detriment if the estate is not now allowed to purchase the lands at a discount."

Later he turned to the question of what concessional price, if any, the Court should assess as the price at which, in order to give effect to the proprietary estoppel which he held existed, the first plaintiff should be entitled to acquire the Miling lands. With regard to this he said:-

> "It was contended by the plaintiffs that they should be able to purchase the lands at the option prices even though the options have been held void. It is my duty sitting now as a Court of equity to do equity and no more than equity and to give relief and no more relief than is necessary to satisfy the equity created by the representation. I do not believe I would be doing that if I accepted any other figure as a starting point than the contemporary value of the lands which is evidenced by the valuations of Mr. Chartres. Alternatively it is said, not only by the plaintiffs, but also by Lady Murdoch through counsel, that the purchase price should be the contemporary values for the land as unimproved. I am unable to accept that contention for these reasons. The Edawa land was improved to some extent at any rate in 1948 and a lot of the improvements effected thereafter to the other lands, namely M.Ls. 2005 and 2006 were effected by or on behalf of Dougald and Jack. I have already stressed that it is a futile exercise to try to work out the value of these improvements

> on the basis of what each specific party contributed towards their cost or to attribute to each party who provided the cost of the improvements, the current value, for to do so seems to me to overlook altogether the greater value that the lands obtain from being under the continuous guidance and care of Alex and family. I would be prepared therefore to grant a decree that the estate of Alex be entitled to purchase the Miling lands (excluding of course M.L. 1659) for two thirds of the value as assessed by Mr. Chartres ... According to the evidence ... the amount payable would be $524,000 ..."

On the footing, now accepted by the eighth respondents, that Alex had an equity in the Miling lands arising out of a proprietary estoppel, and that such equity could most appropriately be satisfied by giving the first appellant the right to purchase those lands at a discount on the market price of them prevailing at the date of the trial, the task facing Brinsden J. was fairly and justly to quantify that discount.

For the first appellant it was not contended that there were any material which justified a precise mathematical quantification of the discount. Rather, it was argued forcibly that, when all the material facts in evidence at the trial were taken into account and proper weight was given to them, the discount of one third arrived at by Brinsden J. was wholly inadequate, and a larger discount of at least one half should be substituted.

For the eighth respondents it was contended that there was material which would have enabled Brinsden J. to quantify the discount with some degree of mathematical precision, and that he was wrong in failing to do so. The material relied on for this purpose was the two leases of the Miling lands granted by Dougald to Alex in 1975. As stated earlier, both these leases contained options to purchase at specified prices, which were later held to be void, and, in the case of the lease of Old Edawa, a quantification of the cost of improvements made by Alex, which was deducted from what would otherwise have been the purchase price. By up-dating these figures to take account of inflation between 1975 and the date of the trial, an up-dated price for the Miling lands, which would still incorporate a limited discount, could readily be calculated. Alternatively, Brinsden J. could have started from the market value of the Miling lands at the date of the trial, and deducted from it an up-dated figure for the improvements. If calculations of this kind were not acceptable, a discount of not more than one quarter would have been sufficient to satisfy the equity concerned.

In their Lordships' opinion this is not a case in which it was possible for Brinsden J. to quantify the discount on any precise mathematical basis. The 1975 leases are no doubt evidence of the best terms which Alex could then obtain from Dougald by agreement. It does not, however, follow from this that the terms agreed were sufficiently favourable to Alex to satisfy the equity which he had in those lands. In their Lordships' view, Brinsden J. was right to look at all the relevant circumstances in the round and to arrive at a figure for the discount which, in the light of those circumstances, appeared to him to be fair and just. The discount of one-third at which he arrived on this basis was one at which their Lordships consider that he was entitled, in the exercise of his equitable jurisdiction, to arrive, and they can see no sufficient ground to justify them in varying that discount, either upwards as the first appellant seeks or downwards as the eighth respondents seek.

It follows that both the first appellant and the eighth respondents fail on issue (4).

Issue (5): Jack's devise of Melbourne Location 1659

Clause 3 of Jack's will dated 20th November 1965 provided:-

> "3. I GIVE DEVISE AND BEQUEATH all my property of whatsoever nature and wheresoever situate both real and personal unto my Trustee UPON TRUST to pay my just debts funeral and testamentary expenses and all probate estate and other duties payable in respect of the whole of my estate and to stand possessed of the balance then remaining UPON TRUST for the use and enjoyment of my brother DOUGALD CAMERON during his lifetime and upon his death UPON THE FOLLOWING TRUST:-
>
> (a) to pay the sum of TWO THOUSAND POUNDS (£2,000) unto JILLIAN HOPPER of Watheroo aforesaid;
>
> (b) as to Melbourne Location 1659 comprising 1,727 acres 2 roods 29 perches or thereabouts UPON TRUST for such of my nephew EVAN THOMAS CAMERON my nephew CHARLES CAMERON my niece BARBARA CAMERON and my niece CHRISTINE CAMERON as shall survive me and shall have attained or shall live to attain the age of twenty-one (21) years and if more than one as tenants in common in equal shares;

> (c) as to the residue UPON TRUST for such of my nieces MARY FEATHERBY of City Beach in the said State ADA LINDIN of Geraldton in the said State and NELA CLARK of 2 Pritchard Street Swan Hill in the State of Victoria as shall survive me and if more than one as tenants in common in equal shares."

For clarification only it should be said that the references in clause 3(c) to "the said State" are references to the State of Western Australia mentioned at the beginning of the will.

Issue (5) raises the question whether the devise of Melbourne Location 1659 (ML 1659) to Evan, young Charles, young Barbara and Christine contained in clause 3(b) of Jack's will set out above was effective to pass to them any, and if any, what interest of Jack in the land concerned.

Before Brinsden J. there was a dispute as to whether ML 1659 was owned by Jack alone or was partnership property of the original partnership. The land was registered in the name of Jack alone, and it appears clear that, when Jack made his will, he believed it to be owned by him alone. Brinsden J. however, resolved the dispute by finding that ML 1659 was not owned by Jack alone, but was partnership property of the original partnership. No appeal has been brought against that part of the judgment of Brinsden J. and issue (5) therefore falls to be decided on the basis of that finding by him.

On the footing that ML 1659 was partnership property of the original partnership, Brinsden J. held that Jack had a beneficial interest of 10/27ths in it. This proportion was a combination of an interest of 1/3rd or 9/27ths as Jack's share in the original partnership property, and a further interest of 1/27ths to which Jack was entitled as his 1/9th share under the intestacy of James in the 1/3rd share of the estate of James in the same partnership property. Brinsden J. further held that the devise in clause 3(b) of Jack's will was effective to pass to the beneficiaries named in it the interest of 10/27ths in ML 1659 which Jack had in it.

The contention of the eighth respondents on their cross-appeal was that the devise contained in clause 3(b) of Jack's will was ineffective to pass any interest in ML 1659 to the beneficiaries named in it. The grounds of this contention were that neither the interest of Jack, nor that of the estate of James, in the original partnership property, and therefore in any particular part of it, had been ascertained at the date of Jack's will, because the original partnership had not yet been wound up and the

accounts relating to it finally settled; and that it was not possible to construe clause 3(b) of Jack's will as passing what was as yet an unascertained interest of Jack in the land concerned.

Various authorities were cited to their Lordships by counsel for the eighth respondents which were said to support their contention. In their Lordships' view, however, none of these authorities was determinative of the present case. The general principle to be applied in construing the provisions of a will or other legal instrument is to construe them, if possible, in such a way as to make them have some effect rather than no effect. The ground of this principle is that it is reasonable to presume that the maker of the will, or other legal instrument, would not include a provision in it unless he intended it to have at least some effect.

In their Lordships' view, it would be wrong to say that, because the precise share which first Jack and secondly the estate of James had in ML 1659 had not been finally ascertained at the date of Jack's will, therefore Jack had no interest in ML 1659 which clause 3(b) of his will was capable of passing to the beneficiaries named in it. It was held by the High Court of Australia in *Canny Gabriel Castle Jackson Pty. Ltd. v. Volume Sales (Finance) Ltd.* [1974] 131 C.L.R. 321 that a partner had an interest in every partnership asset and that such interest was an equitable interest and not a mere equity. Their Lordships respectfully agree with that decision, which leads to the conclusion that, when Jack made his will, both he and the estate of James had equitable interests in every part of the original partnership assets, including ML 1659. There was no suggestion that, on the winding up of the original partnership it would be necessary to sell ML 1659, or any part of it, in order to pay off partnership debts. That being so, their Lordships consider that there is no difficulty in supporting the finding of Brinsden J. that the amount of Jack's equitable interest in ML 1659 at the date of his will was 10/27ths.

Applying the general principle of construction referred to above their Lordships agree with the conclusion of Brinsden J. that, on the true construction of clause 3(b) of Jack's will, that clause was effective to pass to the beneficiaries named in it Jack's 10/27ths equitable interest in ML 1659.

It follows that the eighth respondents fail on issue (5).

Issue (6): the judge's order as to costs

It was contended for the eighth respondents that the order for costs of Brinsden J. dated 2nd May 1983 was unjust to them in several respects and should be varied in such a way as to remove the injustices contained in it. The grounds of that contention, and the variations of the order proposed, are fully set out in the eighth respondents' written case and more shortly in the outline argument which their counsel conveniently placed before their Lordships during the hearing of the cross-appeal. Their Lordships have read the whole of those grounds and given careful consideration to each of them. They have given similar consideration to the points made in counsel's oral argument.

The difficulty from the point of view of the eighth respondents is that the order for costs, subject to certain considerations, was entirely a matter for the discretion of the trial judge. He was, moreover, exercising his discretion in a case which had a long history, involved multiple parties, raised numerous issues and lasted some twenty-two days. The considerations referred to are that, if the trial judge, in making his order as to costs, erred in law, or took into account irrelevant matters, or failed to take into account relevant matters, good reason for interfering with the exercise of his discretion might exist.

On the material before their Lordships, however, they are not persuaded that Brinsden J. erred in law, or took into account irrelevant matters, or failed to take into account relevant matters. In those circumstances their Lordships, acting in accordance with long-established principles, do not consider that this is a case in which they would be justified in interfering with the exercise by Brinsden J. of his discretion with regard to costs.

It follows that the eighth respondents fail on issue (6).

For the reasons which their Lordships have given they will humbly advise Her Majesty that both the appeal and the cross-appeal should be dismissed. The appellants must pay the respondents' costs of the appeal in so far as any particular respondent has incurred such costs. The eighth respondents must pay the appellants' and the second and third respondents' costs of the cross-appeal.