VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP244/2015

CATCHWORDS

Co-owned property – land purchased in the names of three persons – whether purchase money was provided by only one of them – whether resulting trust in favour of the applicant –evidence concerning the source of the funds

APPLICANT	James Edward Miller
FIRST RESPONDENT	Ian Donald Martin
SECOND RESPONDENT	Teresa Martin
THIRD RESPONDENT	Ross Harold Brabham
FOURTH RESPONDENT	Margaret Brabham
FIFTH RESPONDENT	John David Stodgell
SIXTH RESPONDENT	The Estate of Judy Lorraine Stodgell
SEVENTH RESPONDENT	Robin Gaye Lambert
EIGHTH RESPONDENT	Craig William Lambert
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	22 – 26 February 2016 Submissions 15 April 2016
DATE OF AMENDED ORDER	3 June 2016
CITATION	Miller v Martin (Building and Property) [2016] VCAT 854 (3 June 2016)

AMENDED ORDER

Pursuant to s.119 of the *Victorian Civil and Administrative Tribunal Act* 1998 and in order to correct a number of typographical errors in the original order as handed down, the Order of 26 May 2016 is corrected to read as follows:

1. The application is dismissed.
2. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr A.G. Schlicht of Counsel
For the First, Second, Third, Fourth and Eighth Respondents	Mr R.G. Squirrell of Counsel
For the Seventh Respondent	In person

REASONS

Background

1. The parties are the registered proprietors of a beach house and land situated in Moggs Creek, Victoria, being the land comprised in Certificate of Title Volume 7528 Folio 135 ("the Beach House").

2. By this proceeding the Applicant, Mr Miller, seeks a declaration that the Respondents hold their respective interests in the Beach House for him on a resulting or constructive trust. In the alternative he seeks an order that the Beach House be sold and, after the deduction of the selling costs, the whole of the net proceeds be distributed to him.

3. In each case the ground of the claim is that, on Mr Miller's evidence, he provided all of the money to purchase the Beach House and has also paid all insurance, rates, outgoings and other expenses in respect of it since its purchase.

4. The first, second, third and fourth Respondents deny these allegations and say that the whole of the purchase price for the Beach House was derived from funds held by a partnership, the members of which are said to have been Mr Miller, the first Respondent, Mr Martin, and the second Respondent, Mr Brabham. They also say that the financial contributions made towards the Beach House by Mr Miller were from money belonging to the partnership and came either from a partnership bank account in their joint names or from surplus funds derived from the sale of other partnership assets, in particular, a residential unit in Surfers Paradise ("Imperial Surf") and vacant land at Merrijig ("Merrijig"), both of which Mr Miller sold and retained all of the proceeds of sale.

5. Mr Miller's claims against the 5th to 8th Respondents both inclusive have been resolved by agreement. It appears that the 5th Respondent, who became entitled to the share of the 6th Respondent upon her death, has transferred or agreed to transfer his interest to Mr Miller. The terms upon which the claim against the 7th and 8th Respondents has been resolved are not known but the resolution occurred during the hearing.

The hearing

6. The proceeding came before me for hearing on 22 February 2016 with five days allocated. Mr A. Schlicht of Counsel appeared on behalf of Mr Miller and Mr R. Squirrell of Counsel appeared on behalf of the first, second, third and fourth Respondents. The 8th Respondent appeared in person and the 5th Respondent did not appear.

7. The hearing proceeded from 22 until 26 February 2016 and was then adjourned part heard until 21 March 2016 when the rest of the evidence was given. The matter was then adjourned until 15 April 2016 for the making of oral submissions, with written submissions to be filed and served in the meantime.

The witnesses

8. I heard evidence from Mr Miller, Mr and Mrs Martin, Mr Brabham and a Mr Robert Parker.

9. The passage of time has been a major problem for the parties. It is unsurprising that memories, of what occurred and what was said, were incomplete or inaccurate given that the events occurred up to 35 years ago.

10. When first Mr Brabham and then Mr Martin left Australia to work overseas, such documents as there were relating to the financial dealings between the parties were left with Mr Miller. Mr Miller also appears to have retained other documents. According to Mr Martin, Mr Miller is a meticulous keeper of records. By contrast, Mr Brabham and Mr Martin do not appear to have retained anything of consequence.

11. As a result, most of the documents that have been produced are annexed to Mr Miller's witness statements. They were available to prompt his memory but not that of the other witnesses until Mr Miller's witness statements were filed.

12. None of the witnesses was particularly impressive although Mrs Martin gave clear evidence about one matter that had not been agitated by the other parties in the material that was filed. I have had some difficulty reconciling much of the oral evidence with the documentary evidence.

The law

13. There was no dispute as to the legal principles to be applied. I was referred to the following statements from *Calverley v. Green* [1984] HCA 81. In that case Gibbs CJ said (at para 3 of his judgment):

> "3. Where a person purchases property in the name of another, or in the name of himself and another jointly, the question whether the other person, who provided none of the purchase money, acquires a beneficial interest in the property depends on the intention of the purchaser. However, in such a case, unless there is such a relationship between the purchaser and the other person as gives rise to a presumption of advancement, i.e., a presumption that the purchaser intended to give the other a beneficial interest, it is presumed that the purchaser did not intend the other person to take beneficially. In the absence of evidence to rebut that presumption, there arises a resulting trust in favour of the purchaser."

14. In the same case Mason and Brendan JJ said (at para 8 of the joint judgment):

> "Equity presumes a trust in favour of the person who contributes the whole of the purchase price when the property is conveyed into the joint names of himself and another (*Benger v. Drew* [1721] 24 ER 613; *Rider v. Kidder* [1805] 32 ER 884) though the strength of the presumption varies from case to case (*Fowkes v. Pascoe* (1875) 10 ChApp 343, at p 352) and may be confirmed, rebutted or qualified by evidence of his intention (*Russell v. Scott* (1936) 55 CLR 440, at pp 449, 451-453; *Marshal v. Crutwell* (1875) LR 20 Eq 328)."

and at paragraph 8:

> "When two or more purchasers contribute to the purchase of property and the property is conveyed to them as joint tenants the equitable presumption is that they

> hold the legal estate in trust for themselves as tenants in common in shares proportionate to the contributions unless their contributions are equal."

15. Whether or not there is a presumption depends upon the source of the funds used to purchase the property. In the present case that requires a careful examination of the ultimate source of the funds used to finance the purchase.

16. Even where the contributions are unequal, the presumption that there is a resulting trust may be rebutted by evidence to the effect that the person to whom the property was transferred was intended to take his interest beneficially. The relevant intention would be that which existed at the time the property was purchased (see C*harles Marshall Pty Ltd v Grimsley* [1956] HCA 28 at para 10).

The relationship between Mr Miller, Mr Martin and Mr Brabham

17. Mr Miller was a senior executive at Kmart, G.J. Coles Ltd ("Coles") and then Coles Myer Ltd ("Coles Myer"). He said that in 1980 he became Assistant Finance Director of Coles, assigned to the Managing Director's department. In 1982 he became General Manager of Finance of Coles, heading up its finance department. Mr Martin said that, as General Manager of Finance, Mr Miller headed a very small team involving himself, the Seventh Respondent, Mrs Lambert and the Fifth Respondent, Mr Stodgell.

18. Mr Martin and Mr Brabham were also employed by Coles and then by Coles Myer and they worked with Mr Miller. He was their superior. According to Mr Martin they worked in a newly created department headed by Mr Miller. According to Mr Miller they, the fifth respondent Mr Stodgell and Mrs Lambert were all members of his staff in the Managing Director's department of Coles. Mr Miller variously described Mrs Lambert as being his personal assistant and his secretary.

19. Mr Miller said that he was an alternate director of Coles representing Kmart Corporation, which was a U.S.-based shareholder in Coles. Mr Martin said that he (Mr Martin) was the money market manager with responsibilities for all short-term money market and foreign currency exchange hedging transactions. He said that, following the merger, he became Corporate Finance Manager at Coles Myer Finance Limited and then Executive Assistant to the Corporate Managing Director. Mr Brabham said that, following the restructure, he became Chief Accountant.

20. It appears that Mr Miller, Mr Martin and Mr Brabham worked closely together until 1989 when Mr Brabham moved to New Zealand to take up a position with Coles Myer's New Zealand operations. In 1993, Mr Martin left the company and subsequently went overseas, working in Hong Kong, Singapore and London. He did not return to live in Melbourne until 2012.

21. Apart from their common employment and the partnership relationship, it is clear that the three men were close friends. They socialised frequently and Mr Miller was the godfather of one of Mr Martin's daughters.

The partnership

22. A key issue in the case was whether a partnership existed between Mr Miller, Mr Martin and Mr Brabham. The existence of a partnership between the three men was sworn to by Mr Martin, Mr Brabham and their respective former wives but it was denied by Mr Miller, who said in his witness statement that at no time had he seen or executed a partnership deed with Mr Brabham or Mr Martin. He said that if he used the words "the partnership", which he did over the years, it was in relation to an entitlement to use certain assets.

23. At the time the partnership is said to have been entered into, a joint bank account was opened by the three men with the Commonwealth Bank. The first cheque stub of this bank account has the words "Partnership deed" written on it in Mr Martin's handwriting. Mr Martin said that the cheque was written to reimburse Mr Brabham for the purchase of a form of partnership deed from a legal stationer. Mr Miller, who had been given the cheque butts and other records of the three men when Mr Martin left for overseas, has blacked out the works "Partnership deed" on the cheque stub.

24. I accept, that the cheque stub, which is dated 31 October 1980, recorded a cheque drawn for one dollar to repay Mr Brabham for the purchase of a form of partnership agreement from a stationer. Although the words "Partnership deed" on the cheque stub were blackened out by Mr Miller they can still be read in a good light. Mr Miller did not provide any satisfactorily explanation for blacking out these words. In the absence of any other explanation, I infer that Mr Miller blacked out the words on the cheque stub for 10 March 1981 because he wanted to conceal evidence that a partnership deed had been purchased.

25. The joint cheque account was operated by the partners up to November 2002 when the last substantial deposit was made. Thereafter only very small amounts were deposited until 29 April 2004 when the account was closed by Mr Miller.

26. According to Mr Miller, the cheque-book was held by Mr Martin until March 1988 when he went overseas, at which time it was handed over to Mr Miller.

27. Apart from the cheque stub on the joint cheque account the evidence of the existence of a partnership is overwhelming. Mr Miller acknowledged its existence several times and Mrs Martin gave evidence that the partnership was often discussed and that both the partnership and what she described as the "lifestyle assets" that it purchased were spoken about openly.

28. I am satisfied that on or about 31 October 1980 the parties entered into a partnership with a view to buying and selling shares at a profit. I am satisfied that the joint cheque account was opened for the purposes of the partnership and that a form of partnership deed was purchased at the time and signed by the parties although the whereabouts of that document are now unknown.

29. The joint cheque account ("the Partnership Account") was at the Commonwealth Bank. Mr Martin and Mr Brabham said that it was used for the purposes of the partnership. Mr Miller contended that it was simply a joint account in the three names. However, in his email to Mr Brabham on 26 November 1992, he described it as being "…the partnership's bank account" and I think that the

weight of the evidence is that it was a bank account opened for the purpose of the partnership and that it was operated as such.

30. Mr Miller has prepared what he says is a reconciliation of the Partnership Account but a number of the cheque butts and the first 26 pages of bank statements are missing and so it is impossible to know if there was any further information in the missing documents that is not recorded in Mr Miller's reconciliation. Mr Miller denies that he ever had the first 26 pages of bank statements.

31. The missing bank statements cover the period up to 22 July 1987. During this period the Beach House was purchased and the funds that were ultimately used to purchase it had, prior to purchase, been invested and reinvested in bank bills in the names of the three men.

What were the partnership assets?

32. The partnership was formed for the purpose of buying and selling shares. It is unclear whether other investments were contemplated at the time. The initial shares purchased were in a company called Buddha Gold Mines NL ("Buddha Gold") which were later sold at a profit. According to Mr Miller it was only a very small profit but Mr Martin and Mr Brabham said that it was very large.

33. As stated, the Partnership Account was used for some years. To start with, Mr Martin operated the account and then when he went overseas Mr Miller took over. From its commencement in October 1980, numerous assets were bought in the names of the three partners including the Beach House and a great many payments passed through the Partnership Account.

34. Mrs Martin said that the partnership invested in what she described as "quality-of-life investments". She said that these included racehorses, a campervan, overseas holidays, a 48 foot boat called "the Lansa", the Beach House, Imperial Surf and Merrijig.

35. Over the years, Mr Miller made various lists of assets held by the three partners and also acknowledged in writing several times that various assets were held beneficially by the other partners.

36. On 14 October 1992 Mrs Brabham wrote to Mr Miller asking for details of the entitlements that she and Mr Brabham had in the partnership. In response to her letter, Mr Miller sent an email dated 26 November 1992 addressed to Mr Brabham *(Tribunal book p. 885)*, providing the following list:

    1. Mogg's Street beach house (80% owned by members of partnership).
    2. Lancer 48' motor cruiser (1/3 interest).
    3. Shares (at market) - $50,000.
    4. Cash reserve - $30,000.
    5. Land - Mansfield, Vic. (housing block).

6. Horses: -
   RAPAVAN - 6 y.o. gelding – near end of career (has bleed).
   KALAHAWK - unraced 4 y.o. gelding – no prospects.
   WINNING STRIKE - well performed 4 y.o. gelding (recently broken down)
   COLOUR ME PROUD - disappointing 3 y.o. gelding.

37. Beneath this list of assets that he made, Mr Miller provided the following notes:

"NOTE:

(a) Unit 30b at Imperial Surf (Gold Coast) is owned by J.E. Miller. The partners (Brabham, Martin and Miller) have been given rights to use the unit at no charge. Rental receipts and operating expenses are credited/charged to the partnership's bank account.

(a) The assets of the partnership were intended to represent quality-of-life investments, rather than commercial investments for profits. The majority of the funding has been provided by JE Miller. The partners entitlement, as agreed by the partners, is to the use of assets for recreational purposes. The partners have agreed that no sale of any partners entitlement, or distribution of funds can be made without the agreement of all partners, except for certain situations in respect of JE Miller."(sic.)

38. As to Note (a), if Mr Miller is right and he was the sole owner of Imperial Surf, it would have been unnecessary for him to be given the right to use that unit at no charge. That would have been his right as owner. Further, the rental derived from leasing the unit would have belonged to him and not to the partnership. Despite that, the rental was paid into the Partnership Account.

39. As to note (b), the only way that cash or shares could be used for recreational purposes would be by using the cash, or using the proceeds of the sale of shares, to purchase assets that were able to be used for such purposes.

40. Mr Martin and Mr Brabham contended that Imperial Surf, was an asset of the partnership, despite the fact that it was registered in the sole name of Mr Miller.

41. There was never any explanation from Mr Miller about the cash reserve that he listed as being $30,000. Mr Martin said that the partnership bought gold coins as an investment but this was not explored in the evidence. Mr Miller acknowledged in his witness statement that he bought gold coins but said that he did so out of his own funds.

42. In a deed of property settlement dated 12 November 1999 filed on his behalf in the family Court, Mr Miller said that he had a:

(a) 27% interest in the Beach House together with his former wife;

(b) 27% interest in the Merrijig land together with his former wife; and

(c) 33% interest in Imperial Surf.

43. Under cross-examination, Mr Miller said that the interests the other partners, namely Mr Martin Mr Brabham, had in these properties was subject to them

making contributions. This was his explanation for each of the written acknowledgements that he has made of the interests of the other parties in the three properties, namely, the Beach House, Imperial Surf and Merrijig. Mr Miller said that the horses were put into the names of Mr Martin and Mr Brabham so that they would be able to gain entrance to racecourses as owners. Neither of these explanations fits the shares and the cash which he has listed as being partnership assets. He did not assert that, in fact the cash and the shares belonged to him alone.

44. In a memorandum sent to Mr Martin on 13 June 2000, Mr Miller acknowledged that the beneficial interest in Imperial Surf was held for himself, Mr Martin and Mr Brabham in equal one third shares *(Tribunal book p. 1257)*. When asked to explain this during cross-examination, Mr Miller said that, at the time he signed this memorandum, he had not fully considered the contents as he was leaving on an overseas trip to Rome on 16 June, which was three days later. He said that he assumed that the memorandum referred to the entitlement Mr Brabham and Mr Martin to use Imperial Surf. He said that he provided the document to allow Mr Martin to borrow money. Mr Martin said that he had his solicitor prepare the document so that he would have something in writing to prove that he owned his one third share in Imperial Surf.

45. Mr Miller is and was at the time an experienced businessman and he would have understood the meaning of the document which is short and unequivocal. If he believed that Mr Martin was intending to use the document in order to secure some borrowing he must have known that the document would have been worthless for that purpose if it was only intended to refer to a right to use the unit.

46. In a letter dated 2 July 2014 to the Delegate of the Commissioner of State Revenue, Mr Miller acknowledged and asserted to the Delegate of the Commissioner that the Respondents, including the partners, were the owners of their respective registered interests in the Beach House. Indeed, as to the various assessment notices issued with respect to the years 2010 to 2014, he said:

> "To my knowledge, no joint owner has greater than 13.33% of the Property ($89,333), and therefore less than the threshold of $250,000 for individual assessment."

47. In the last paragraph he states:

> "I presume that now that the records of the SRO have been updated to record 10 owners of the Property rather than 3, I was improperly charged in 2011 and 2012 as the SRO records had not been updated for title changes dating back to 1990."

48. He goes on to say that he proposed to, but had not at that time, issue proceedings against the other joint owners claiming a resulting and/or constructive trust. That would suggest that, at the time that he wrote the letter, he maintained that the interests of the other owners were held in trust for him. This position seems inconsistent with the earlier parts of the letter and also his earlier letter to the delegate.

Claims by the partners

49. On 10 August 2005 Mr and Mrs Martin wrote to Mr Miller enclosing two valuations of the Beach House and offering to sell their share to Mr Miller for a percentage of the lower valuation. Mr Miller said that, following receipt of this email he telephoned Mr Martin. There is a conflict in the evidence as to what was said during this conversation. Mr Martin said that Mr Miller was upset and did not want to sell the Beach House but did not have the money to buy their interest and so they agreed not to sell. Mr Miller's account of the conversation grew somewhat during cross-examination and finally he alleged that he told Mr Martin that he (Mr Martin) had no interest in the Beach House because he had made no contribution. There was no written response by Mr Miller to Mr and Mrs Martin's letter.

50. It must have been quite clear to Mr Miller, from the email that Mr and Mrs Martin sent to him, that they were asserting that they had a one third interest in the Beach House that was theirs to sell and yet there was no written response from Mr Miller setting out what he now says the ownership arrangement was. His explanation for that was that the claim was not pursued by Mr and Mrs Martin. However he would not have known that immediately and one would have expected someone in Mr Miller's position to have sought advice or at least to have put something in writing in order to protect his position.

51. Mr Squirrell submitted that the making of this claim by Mr and Mrs Martin was entirely consistent with them believing that they had an interest in the Beach House. That is so but I do not think that it takes the matter much further. It was beyond argument that they had a registered interest.

The purchase of the Beach House

52. The Beach House was purchased in 1986. According to Mr Miller he, Mr Martin and Mr Brabham travelled in a campervan down the great Ocean Road, staying at various campsites, including Lorne from 1984 to 1986. He said that they discussed acquiring a Beach House and looked at a number of properties including the Beach House. He said that neither Mr Martin nor Mr Brabham was financially well enough off to purchase the Beach House but he was older and so was able to afford it.

53. Mr Martin said that he and Mr Miller found the Beach House on a day trip that he had with Mr Miller. Mr Brabham denied that he ever made such a trip with Mr Miller.

54. An initial deposit of $1,000 for the purchase of the Beach House was paid by Mr Miller by a cheque drawn on his personal joint bank account that he had with his then wife. The balance of the purchase price came from the Partnership Account. On 20 February 1987, Mr Miller and the first and third Respondents were registered as tenants in common in equal shares of an estate in fee simple in the Beach House.

Subsequent changes in ownership

55. On 22 April 1991 Mr Miller and the first and third Respondents, who were then the sole registered proprietors, transferred the title to the Beach House to

themselves, their respective wives and also to the fifth, sixth, seventh and eighth Respondents, for a consideration expressed in the instrument of transfer of $30,000.

56. As a result of this transfer Mr Miller became registered as the joint proprietor together with his then wife of eight undivided 30th parts, the first and second Respondents were similarly registered as joint proprietors of eight undivided 30th parts and the third and fourth Respondents were registered as joint proprietors of eight undivided 30th parts. The fifth and sixth Respondents were registered as joint proprietors of three undivided 30th parts and the seventh and eighth Respondents were registered as joint proprietors of the three remaining undivided 30th parts. As between each joint holding, the interests were held in common.

The terms of the initial purchase

57. Mr Miller alleged that, when the Beach House was purchased, it was agreed between himself, Mr Martin and Mr Brabham that:

    (a) Mr Miller would provide the funds for the purchase from the sale of his Coles Myer shares;

    (b) the Beach House was acquired for recreational use rather than as a commercial investment and the Respondents were only entitled to use it for recreation;

    (c) Mr Miller had the sole right to sell the Beach House; and

    (d) upon the sale of the Beach House any distribution of the proceeds of sale would be based on the financial contributions that the three of them had made.

58. This agreement was said by Mr Miller to have been made orally between the three parties during various face to face meetings in late 1986 before the purchase of Beach House. The substance of various alleged conversations are set out in his witness statement in paragraphs 35 to 39. Both Mr Martin and Mr Brabham denied that any such discussions occurred.

59. I asked Mr Miller why he put the Beach House in all three names if it was intended that Mr Martin and Mr Brabham would not contribute to the purchase price. Mr Miller's explanation was that he wanted assistance to maintain the Beach House and that he thought that, if they were to earn an interest in the Beach House by a later contribution, it would not be necessary to transfer a share to them at that time if they were already registered as owners.

60. I find this explanation difficult to understand. It is possible to lend one's beach house to one's friends or work colleagues or allow people to use it in exchange for maintenance without putting them on title. Both Mr Martin and Mr Brabham denied having been asked to make any contribution towards the rates or outgoings on the Beach House and said that the costs of acquisition and subsequent maintenance were paid from partnership funds. In all the years that followed there is nothing in writing and no evidence of any conversation to the

effects that the shares of Mr Martin and Mr Brabham were not held beneficially because they had contributed nothing to the purchase price, outgoings or upkeep of the Beach House.

61. In his email to Mr Brabham of 14 October 1992 referred to above, Mr Miller claims sole ownership of Imperial Surf but he makes no such claim with respect to the Beach House. He said that he made the assertion in his conversation with Mr Martin in 2004. That is disputed by Mr Martin and there appears to have been nothing in writing to a similar effect until the claims that he made that led to this proceeding and his letter to the delegate for the Commissioner for land tax in 2014 foreshadowing such claims.

Mrs Miller's share in the Beach House

62. A transfer of land was produced, executed by Mr Miller and his deceased wife, whereby the latter transferred her interest in the Beach House to Mr Miller (*Exhibit 5*). The document is undated and the consideration expressed in it is: "Transfer in equity pursuant to resulting and/or constructive trust". It was never lodged at the titles office. Instead, Mr Miller's deceased wife's interest in the Beach House was transferred to Mr Miller as the surviving joint tenant when she died. Since there had in the meantime been a financial settlement between the parties which dealt with their respective shares in the Beach House, it appears likely that the joint tenancy had been severed but no point was taken in regard to that.

Where did the money come from?

63. Apart from the deposit, the immediate source of funds to purchase the Beach House was the Partnership Account.

64. An amount of $282,820 was deposited into the Partnership Account shortly before December 1986. This sum represented the proceeds of sale of shares in Coles Myer that were in the name of New Kapital Investments, a business name used by Mr Miller.

65. The notation on the cheque stub recording this deposit is in the handwriting of Mr Martin. Mr Miller said that he arranged for the proceeds of the sale of the shares to be paid into the Partnership Account for the purpose of funding the purchase of the Beach House. He said that he did this because the Partnership Account appeared ideal to manage payments and contributions relating to the Beach House, thereby providing a single record for determining distributions when it was sold.

66. If Mr Miller is right, paying this money into this account seems an unlikely thing for someone to do because the account was in the three names and it was used by the partners for other purposes. Indeed, according to documents attached to his witness statement, the funds paid in by Mr Miller were then invested in the names of all three partners.

67. On 5 December 1986 the sum of $96,273.05 was withdrawn from the Partnership Account to purchase a bank bill from the Commonwealth Bank to

mature on 5 March 1987. The bank bill was in the name of the three partners. The transaction was conducted by Mr Martin.

68. On 11 December 1986 the three partners purchased another bank bill for $149,555.48 which was due on 15 January 1987. The source of this money does not appear in the cheque stub of the Partnership Account but there was that much money in the account at the time. The letter from the bank acknowledging the transaction identifies the reference as Mr Martin.

69. When the second bank bill fell due on 15 January 1987, $125,000 from the proceeds was put on deposit with Australian European Finance Corporation Limited in the names of all three partners. What happened to the balance of the proceeds of the second bill does not appear from these documents. The amount deposited with Australian European Finance Corporation Limited was repaid to the Partnership Account on 30 January 1987.

70. On 6 March 1987 a further bank bill was purchased for $50,283.97, due on 8 April 1987. Again, this was in the name of all three partners. In each case, the bank bill was in the name of all three partners and the person who handled the transaction appears to have been Mr Martin.

71. Mr Miller said that he paid income tax on all of the interest earned by these bank bill transactions and in support of this contention he exhibited a copy of part of his income tax return for the relevant year. The extract from the income tax return shows that he declared gross interest of $45,072 for the year in question but it does not contain a breakdown of that figure.

72. The paperwork for the purchase of the Beach House was also done by Mr Martin. He corresponded with the agent and the solicitors and he gave detailed instructions to Mr Miller as to how to conduct the settlement because he (Mr Martin) was away at the time and unable to attend to it himself. The settlement money was drawn from the Partnership Account. Mr Miller said that he paid the stamp duty and titles office fees, totalling $2,570, but he does not identify the account that came from.

Why was the Beach House purchased in the name of the three partners?

73. Mr Miller said that he wanted Mr Martin and Mr Brabham to share in the maintenance and upkeep of the Beach House. He said that although they would be entitled to use the Beach House, they would only be entitled to a beneficial interest if they made a contribution towards the purchase price and maintenance costs.

74. When asked in cross examination why they were put on title before they had made any contribution Mr Miller said that it was easier that way because it would mean that he would not then have to transfer it to them after they made their contribution. He said that he entered into the same arrangement with them in regard to Imperial Surf but he did not put them on the title of that property, because he did not believe that they would contribute to the cost of the unit.

Was the Beach House a partnership asset?

75. Mr Squirrel submitted that the Beach House is an asset of the partnership and that the appropriate remedy for Mr Miller is to apply for the dissolution of the partnership and the taking of accounts. Land held as partnership property is considered to be personal property (see *Partnership Act* 1958 s.26). It was not suggested by Mr Squirrel that the registered proprietors of the Beach House apart from Mr Miller, Mr Martin and Mr Brabham, were members of the partnership. If the property was initially a partnership asset it probably ceased to be so when the other registered proprietors were introduced.

The racehorses

76. On 10 January 1988 a racehorse named Rapavan was purchased by Mr Miller for a price of $62,000 by a cheque drawn on his personal account. On the day before the amount of the cheque was debited to the personal account there is a credit to that account of $62,000. There was no evidence of where that money came from.

77. Mr Miller said that Rapavan was purchased from his winnings of $101,107.80 at the Melbourne Cup on 10 November 1987. Mr Martin and Mr Brabham acknowledged that he did have a win of this magnitude. However the arrival in Mr Miller's personal account of exactly $62,000 just before the cheque for Rapavan was presented suggests the existence of another account elsewhere in which sums were held.

78. Mr Miller said that the other horses were purchased using funds from Tegal Pty Ltd , a company in which the shares were owned by the three partners.

79. Whatever the source of the $62,000 was, Rapavan and the other horses were registered in the names of all three partners. When Mr Miller was asked why he did this if the horses were not purchased from partnership funds. He said that it was in order that Mr Martin and Mr Brabham could enjoy free access to race meetings as owners. He did not say whether they attended race meetings and according to Mr Martin's evidence he was not interested in horseracing. Expenses with respect to the horses appear to have been met, at least partially, from the Partnership Account.

80. Overall it appears that substantial losses were made on the racehorses. Mr Miller says that he made net losses totalling $222,738.90 in relation to the horses and the amount of this figure does not appear to be disputed.

The holidays

81. Mr Martin and Mr Brabham claimed that the partnership funds paid for holidays for them all. He said that the three partners and their wives travelled to Hong Kong twice in the late 1980s or early 1990s and that Mr Miller and Mr Brabham travelled to Egypt together. He said that all airline tickets for these trips were arranged by Mr Miller and were purchased with partnership funds.

82. Mr Miller denied that any overseas holidays were paid for from the Partnership Account. He said that these were paid from his personal account but he does not say why he paid for these holidays nor does he provide any details of what the holidays cost or dispute where the partners went.

The spa baths

83. On 20 May 1987 Mr Miller purchased a spa bath for the Beach House, the money coming from his personal account.

84. On 23 November 1988 four spa baths were purchased at a home show for a little over $7,500 each. Mr Miller said that he paid for them. One was installed in each of their homes and, according to Mr Miller, the fourth was for Mr and Mrs Lambert. The cheque in payment for the spa baths was drawn on Mr Miller's Personal Account. Although Mr Martin and Mr Brabham agree that the spa baths were purchased and that they each received one, they contend that they were paid for from partnership funds.

Imperial Surf - The Surfers Paradise flat

85. On 3 April 1987 Mr Miller paid a deposit of $16,000 for the purchase of Imperial Surf, which is a residential unit in Surfers Paradise. Although the cheque for the deposit was drawn on Mr Miller's personal account, Mr Martin and Mr Brabham claim that the funds that were used to purchase Imperial Surf came from the partnership.

86. The balance of the purchase price for Imperial Surf was paid from the Partnership Account. The direction to the bank, which is dated 6 May 1987, to transfer the money to the vendor of Imperial Surf was signed by Mr Miller and Mr Brabham. Mr Miller said that the money that was transferred to the vendor came from funds that he held in the Partnership Account. This appears to have been the balance of the funds that had been invested in the bank bills referred to above. He does not explain why, if the money was his, it was still in the Partnership Account.

87. Both Mr Martin and Mr Brabham said that they believed that Imperial Surf was registered in Mr Miller's sole name because there was some legal difficulty about registering a title in Queensland in the name of a partnership but there would seem to be no reason why it could not have been registered in their three names. Mr Miller said that it was put into his sole name because he did not believe that Mr Martin or Mr Brabham would be contributing any money towards the purchase.

88. When the property was not used by any of the partners it was rented. Rental statements up to June 1993 were in the name of Mr Miller. After that they were in the names of the three partners. On 5 December 1995 they were in the name of Mr Miller, Mr Martin and Mr Stodgell and then, from 31 January 1996 they reverted to the names of the three partners. The rentals were deposited in the Partnership Account.

89. When asked to explain why, if he were the sole owner of Imperial Surf, the rental was credited to the Partnership Account, Mr Miller said that it was because the account was in debit. He said that he wanted there to be one account that recorded all transactions relating to contributions and expenses. I do not understand this explanation because he also said that, at the time that he bought

Imperial Surf, he did not believe that Mr Martin and Mr Brabham would be making any contributions towards its acquisition.

90. Mr Miller exhibited to his witness statement what he said were copies of parts of his tax returns between 1987 and 2005 which appear to show that he declared substantial amounts of rental as part of his income for each of those financial years. Whether this was all of the rental received for Imperial Surf or only part of it, or whether it was from other sources, is impossible for me to verify from the document exhibited.

91. In June 2000 Mr Miller signed the acknowledgement referred to previously, addressed to Mr Martin, confirming that Imperial Surf was owned beneficially for himself, Mr Martin and Mr Brabham in equal one third shares. Mr Martin said that this memorandum was prepared by his solicitors in order to record the correct and actual ownership of Imperial Surf and that it was signed by Mr Miller "after various discussions". I found Mr Miller's explanation for having signed this document unconvincing.

92. Although Mr Martin and Mr Brabham each claim that they were entitled to a one third interest in Imperial Surf, neither of them demanded a share of the proceeds of sale when Mr Miller sold it and kept all the money for himself. Mr Martin said that he agreed to this was because Mr Miller told him that he needed the money for his property settlement with his wife. He said that he and Mr Miller initially argued about the matter but that he and his wife finally agreed to allow Mr Miller to sell it. He said that he did not know what happened to the funds.

93. Mr Brabham said that he was not consulted about the sale of Imperial Surf. He said that he only became aware that it had been sold when his relatives arrived to stay in the unit and they were informed by someone there that it had been sold. He telephoned Mr Miller who told him that he needed the proceeds of sale to pay debts and that there was no surplus left. Mr Brabham said that he was very upset over the sale but believed that he could do nothing about it because he was not on title.

94. Mr Miller said that he received all of the money because he was the sole owner of Imperial Surf.

The Merrijig land

95. Mr Miller had a friend with a holiday house at Merrijig in north-eastern Victoria and he purchased a vacant allotment next door. The purchase took place on 18 August 1989 and was settled in October 1989. Both the deposit and the balance of purchase money came from Mr Miller's personal account. The land was registered in the names of Mr Miller and the Respondents. It appears that Mr Miller had the Respondents' power of attorney.

96. Although it was contemplated by Mr Miller and some of the respondents at the time of purchase that a cabin would be built on Merrijig, this never occurred and it was eventually sold by Mr Miller in April 2000.

97. According to Mr Miller, he made a loss of $14,925.75 after allowing for rates, outgoings and maintenance. He signed the transfer of land to the purchaser on behalf of all of the registered owners under a power of attorney dated 1 December 1998 and he retained all of the proceeds of sale.

98. According to Mr Miller's evidence Merrijig was purchased on the same terms as the Beach House namely, that he would provide all the purchase money, that he would have complete authority in respect to the land until others made contributions and that, until then, he would determine who was to be involved and when to sell. He said that the proceeds of sale would then be distributed on a pro rata basis in accordance with contributions that had been made.

99. Mr Miller said that he discussed these terms with Mrs Lambert and Mr Stodgell although he does not specifically say that he had a similar conversation with Mr Martin and Mr Brabham. He said that he simply told them that he was going to put Mrs Lambert and Mr Stodgell on the title to the Beach House together with the spouses of all parties and that the reduction of their interest in the Beach House was offset by the interest they received in Merrijig.

100. In that regard, at the time Merrijig was purchased, the second, third and fifth to eighth Respondents had transferred to them their present registered interests in the Beach House. Mr Martin said that the purpose of transferring an interest in the Beach House to the fifth, sixth, seventh and eighth respondents was so that they would assist in the maintenance of the house and the garden. Mr Brabham, who was then living in New Zealand, said that he agreed to the transfer on that basis.

101. According to Mr Miller, he transferred 1,000 Coles Myer shares to the Stodgells and the Lamberts in order for them to use the proceeds of sale of those shares as a purchase price for the Beach House so that Mr Martin would believe that they had paid some money for their interest. Mr Martin denied that Mr Miller had told him that any purchase price been paid.

102. If Mr Miller had absolute control over both properties, as he alleges, this seems to have been a pointless exercise. Mr Miller said in his first witness statement that he had transferred other Coles Myer shares to Mr and Mrs Stodgell and to Mr and Mrs Lambert from time to time although he provides no details. It seems unusual that someone would give valuable parcels of shares to other people for no apparent reason. However, since the dispute between those parties has been resolved I need not and cannot determine whether or not they paid anything for their respective interests.

103. According to the transfer of land document that gave effect to this transaction, the consideration for the transfer to Mr and Mrs Lambert and Mr and Mrs Stodgell for their respective interests in the Beach House was $30,000. Mr Miller said that he calculated this figure on the basis of it being 20% of the cost of the Property, which he said was "approximately $150,000". Mr Miller, Mr Martin and Mr Brabham transferred to each of the Stodgells and the Lamberts a 10% interest in the Beach House.

104. Mr Miller said that the consideration that Mr Martin and Mr Brabham received for the transfer was their interest in the Merrijig land. If they had no interest in the Beach House until they made a contribution as Mr Miller claims, it is unclear why they would have been entitled to receive anything at all.

105. Again, as with Imperial Surf, although Mr Miller retained all the proceeds when Merrijig was sold, there is no evidence of any complaint by Mr Martin or Mr Brabham that they did not receive any of the money.

The Hawthorn property.

106. In early March 1993 Mr Miller and Mr Martin purchased a house in East Hawthorn. They contributed equally towards the purchase and the balance was financed through a bank loan. Mr Martin purchased Mr Miller's interest in July 1999 by which time the property had increased in value. Since Mr Brabham was not involved this was not a partnership asset but rather, a joint venture of Mr Miller and Mr Martin on their own. It does not appear to have any relevance to this proceeding.

The Lansa boat and the campervan

107. Although reference was made to these in the points of defence, the summaries and in Mrs Martin's evidence, no claim was made in this proceeding that these were partnership assets.

The shares

108. It is common ground that the partners bought and sold shares. The dispute concerns the extent of the dealings and the scale of the profits earned.

109. Mr Miller relied upon an investment portfolio in Mr Martin's handwriting setting out share purchases that had been made in various companies between 1980 and 1982. On the basis of the shares listed it was suggested on behalf of Mr Miller that the investments made were modest and could not have generated significant profits.

110. Mr Martin said in his evidence that the document was not, and did not purport to be, a complete record of all the share investments that were made but was simply a list of the shares with respect to which certificates were held at the time that he prepared the document. I do not regard this document as being a complete list of all share transactions made by the partners.

111. Mr Miller claims that the shares in Buddha Gold were purchased by him from his own funds. He said that he bought 6,000 shares and 2,000 options at a cost of $3,100 on 22 October 1980. He said that he sold the shares in two stages, realising $4,857.25 for the first stage and $519.70 for the second. He said that the total proceeds of sale $5,376.95 were deposited into the Partnership Account. If these shares were his as he claims, I do not understand why he deposited the money in the Partnership Account.

112. In contrast, Mr Martin and Mr Brabham said in their witness statements that very substantial profits were made from an investment that they all made in Buddha Gold. They said that they and Mr Miller each invested $5,000 to acquire shares

and options in that company and that the shares and options were subsequently sold at a substantially higher price. They produced no documentation to substantiate their allegations and the figures stated by each of them in their respective witness statements turned out to be incorrect. The shares subscribed for were not five cent shares but rather, $0.20 shares issued at a premium of $0.30 each. For each three shares subscribed for they were entitled to acquire one option for a further five cents. That would have meant that, for an investment of $15,000 the parties would have received 30,000 ordinary shares and 10,000 options. That is, assuming that the numbers of shares and options purchased were as alleged.

113. If these shares and options were sold, it is uncertain what they were sold for. If, as Mr Martin suggested I should find that they were sold for a price of $1.10 per share and $.85 per option, that would have resulted in the parties receiving $41,500 less brokerage, assuming that they bought and sold the number of shares and options that Mr Martin and Mr Brabham claimed.

114. Following the investment in Buddha Gold, further shares were bought and sold but I do not have sufficient evidence to find what these were. Mr Miller said that the only share purchases that were traded "in this arrangement" were in the following companies:

    Oakwood International petroleum;

    Uranium and Nickel Exploration NL:

    Kia Ora Gold Corporation;

    Victor Petroleum and Resources;

    G.J. Coles Ltd;

    Minoil;

    Astron.

115. Documentation of trading in these shares is exhibited to Mr Miller's witness statement. The amount in each case is modest and the documentation is in his name only.

116. Mr Miller said that all partnership share trading ceased in 1983 and that, taking into account the losses made there was an overall loss of $287.46. In arriving at this figure he said that he allowed for the profit made on the Buddha Gold shares and options as belonging to the partnership, notwithstanding his contention that he paid for them.

117. The shares admitted to by Mr Miller are listed in Exhibit 3, save for the investments in Minoil and Astron.

118. An unclaimed money search was tendered by Mr Squirrell, showing what appear to be unclaimed dividends in the names of Mr Miller, Mr Martin and Mr Brabham. There are three sets of identical amounts of money, namely, $999.84, $589.63 and $900.00, which are said to be unclaimed by each of the three partners. The periods that the amounts relate to are not stated. The address given

for each of the three is 5 Wahiwe Court, Templestowe, which appears to be a misspelling of Mr Miller's residential address. The form describes the money as being money "From Patrick Corporation Limited". If these are unclaimed dividends, that would suggest that there was, at the time those dividends were declared, a number of shares in that company in the names of these three individuals. Mr Miller suggested that he did not believe that they were dividends but had no satisfactory explanation of what else they would be.

119. If they were dividends and if the receipts were at six monthly intervals as is commonly the case that would suggest an annual dividend for all three men of perhaps as much is $4,768.41. If the shares had a yield of 5% that would represent a capital value for the underlying investment of over $95,000.

120. The yield may well have been less but, on any view, it would suggest that the value of the investment was substantial. Yet none of the parties gave evidence of any shareholdings in Patrick Corporation Limited and that company is not mentioned in Exhibit 3.

121. Mr Miller took over the documentation relating to the partnership when Mr Martin went overseas in the late 1980s and he has produced meticulous and complete records of the matters that he seeks to rely upon. That he has not produced any documentation at all of what was probably a substantial investment in the names of all three partners causes me to doubt the completeness of what he has produced.

122. I do not accept Mr Miller's evidence that the trading in shares by the partnership was as limited as he claims. I accept the evidence of Mr Martin and Mr Brabham that substantial profits were made but I am quite unable to assess what they were.

123. Further, according to the list of assets of the partnership that he sent to Mr Brabham on 26 November 1992, Mr Miller said that, at that time, the partnership held shares having a market value of $50,000 as well as substantial cash.

Tegal Pty Ltd

124. On 29 April 1988 the partners acquired a shelf company called Tegal Pty Ltd ("Tegal"). All three partners held shares and it seems to have been acknowledged that they owned the shares equally although a document from ASIC suggests that Mr Miller had 16 shares and the other two partners had eight each.

125. Mr Martin described Tegal as being the incorporation of the partnership. In his matrimonial property settlement agreement, Mr Miller described the company as being a "partnership" in which he held a one third interest. That is consistent with Mr Martin's description.

126. According to Mr Miller, money was transferred to Tegal from monies that he held in a bank account in America in his own name. The funds passed through two further banks, one in San Francisco and another in Hong Kong, in the name of Baxter Ltd that Mr Miller controlled. Baxter Ltd then used the money to

purchase securities in Coles on 23 September 1987. I cannot find from the evidence what happened to these securities.

127. By 31 January 1989 the name of the bank accounts in New York had been changed to Tegal Pty Ltd. and on 31 August 1990 the account had a credit balance of $341,553.32. There was no evidence of the source. The accounts continued to hold a substantial amount of money. A bank account was opened at the National Bank in Melbourne in the name of Tegald Inc. and according to the bank statement, the secretary of that company was Mr Martin.

128. According to the minutes of a meeting held on 10 September 1993 of the directors of Tegal, who were the three partners, the capital of the company was increased by $308,151.47 as a result of a distribution of capital "…from a sister company".

129. Ultimately, according to Mr Miller $290,000 of the money from America was deposited in Tegal's bank account. The work involved in moving this money about appears to have been done by Mr Martin who ultimately obtained some benefit from the money in terms of an investment in the company, Bizane Pty Ltd ("Bizane") which was a company set up by Mr Miller, Mr Martin and Mr Parker.

130. As stated, in his property settlement deed dated 12 November 1999, Mr Miller described Tegal as a partnership in which he held a one third interest. He said in that document that the partnership owned the following assets:

    (a) a 60% interest in a company, Bizane Pty Ltd, trading as Imports of France, his interest in the same being valued at approximately $150,000;

    (b) a racehorse valued at $2,500;

    (c) a 90% interest in a Lansa 48 motor both, his interest being worth approximately $112,500;

    (d) an interest in a restaurant, his interest being worth approximately $50,000;

    (e) an apartment in Hawthorn, his interest being worth approximately $65,000.

    Since he states in the deed that he only has a one third interest in the "partnership" then presumably the interests of the other partners are the same.

131. Apart from the assets listed above, Tegal lent $300,000 to Bizane and the interest on this loan was paid into the Partnership Account.

132. According to Mr Miller, Mr Martin transferred all his shares in Tegal to him between 2002 and 2004 and he then deregistered it. The company statement for 2005 shows Mr Miller holding 16 shares and Mr Brabham holding 8 shares at that time.

133. The thing to note about the money paid into it is that it came from a bank account in America that was initially in the name of Mr Miller and was then in the name of Tegal. Yet Tegal appears to have been regarded as an equal partnership between them. That raises the possibility that although the account in

America was initially in the name of Mr Miller, the money in the account might have been regarded by the partners as belonging to the partnership.

134. If the shares in Tegal were really the property of Mr Miller, why did the other two partners have equal shareholdings in the first place? On the other hand, if it was partnership property, why did the others not object when he apparently kept all the assets?

Bizane Pty Ltd

135. The company Bizane was a venture between Mr Miller, Mr Martin and Mr Robert Parker. The company operated an importing business that was managed by Mr Parker. According to Mr Parker, he owned 40% of the shares, another 40% were held by Mr Miller and the remaining 20% were held by Mr Martin. On 1 July 1993 Mr Miller transferred his shares in Bizane to Mr Martin for one dollar. The purpose of this transaction was never explained, although an audit note to the accountant states that Mr Martin held these transferred shares upon trust for Mr Miller.

136. The interest in Bizane was an investment separate from the partnership in that Mr Brabham was not involved. Litigation against the vendors of the business to Bizane resulted in the award of substantial damages. Mr Parker gave evidence as to an amount of $572,000, apparently the fruits of the litigation, that was placed on term deposit by Mr Miller. It appears that the majority of this was ultimately paid to Mr Miller by way of consultancy fees for work that he did in preparing the litigation and in repayment of his loan accounts.

137. Mr Miller and Mr Martin sold their shares in the company to Mr Parker, who paid Mr Miller $140,000 and Mr Martin $75,000. The amount of $300,000 that had been borrowed by Bizane from Tegal was ultimately paid to Mr Miller. Mr Martin described this loan to Bizane as being a loan by the partnership. He said that when it was repaid, Mr Miller was only entitled to $200,000 and that he should have received the other $100,000. He said that Mr Miller diverted this to himself without his knowledge. However, he does not suggest that he has made any claim for this money from Mr Miller. He said that the accounts of Bizane show that $14,822 in interest was paid to Tegal on 26 February 1999, confirming that the debt was owed to the partnership.

138. What all this shows is that there was yet another source of large sums of money that were apparently handled by these men without any clear paper trails or explanation of why substantial sums were paid without any apparent consideration or record of whose money it was or its sources.

Outgoings maintenance and upkeep

139. Mr Miller said that he has paid a total of $75,960.17 for renovation, maintenance and rates and other expenses of the Beach House. These are detailed in exhibit "JEM7" to his witness statement.

140. Some of these were by cheque, drawn on either his personal account or the Partnership Account, some were by credit card but most appear to have been made in cash. Since these payments go back to 1987 it appears likely that there would have been some contemporaneous record kept by Mr Miller of the amounts paid, the dates of payment and how payment was made that support the statement that has been tendered. Some banking records and various invoices and receipts are exhibited to his witness statement but no general source document has been produced. Mr Miller gave as his reason for paying the purchase money into the partnership account that he wished to keep contributions relating to the Beach House in the one account. That was not followed in regard to many of these additional payments and substantial amounts were paid in cash.

141. The essence of the dispute is whether the money that was paid by Mr Miller was his own money or that of the partnership. The contention of Mr Martin and Mr Brabham is that it was partnership money and that the payments were made by Mr Miller because he was in charge of the partnership finances. Indeed, he held their power of attorney.

142. Mrs Martin said that she was told by both Mr Miller and Mr Martin that all outgoings of the Beach House were paid by the partnership.

143. Most of the invoices that have been produced are addressed to Mr Miller although some are addressed to one or other of the respondents and another to "J. Miller syndicate".

144. The most unusual of these payments are:

    (a) a cheque for $5,000 to John Stodgell on 14 May 1995. Mr Miller said that this was for Judy Stodgell's brother for "painting/balcony/swing".

    (b) a cheque for $3,000 to Judy Stodgell on the same date. Mr Miller said this was also for Judy Stodgell's brother for "painting/balcony/swing". Since both payments were by consecutive cheques drawn on the same day, if it was intended for the same person, it seems strange that a single cheque for $8,000 to the one payee was not drawn.

    (c) a further cheque for $7,000 to John Stodgell on 15 May 1996 which again, Mr Miller said was for Judy Stodgell's brother for "painting /balcony/ swing";

    (d) a further cheque for $3,000 to John Stodgell on 15 May 1996 which again, Mr Miller said was for Judy Stodgell's brother for "painting".

145. All of these are said by Mr Miller in his witness statement to be for work of the same or a similar description and by the same person and they are all in large round figures paid on similar dates in consecutive years. There is no invoice from the brother to support these payments and they were not made directly to him but to the fifth respondent.

146. Nevertheless, Mr Martin agrees that substantial renovations were done by Mr Stodgell's brother-in-law although he said that money paid to him would have been partnership funds.

147. On 21 January 2009 Mr Miller paid $1,500 to the eighth respondent which he said was for work that he did in repairing the guttering at the Beach House. Again it is a very round figure paid to one of the respondents and without any supporting invoice. If the purpose of transferring an interest in the Beach House to Mr and Mrs Lambert was that they would share in the maintenance and upkeep, I do not understand why they were paid for any work they did.

148. In fairness to Mr Miller, he was not questioned about any of these payments.

149. All these payments were made by Mr Miller and he does not suggest that he sought contribution towards any of them from any of the other parties. In some instances the funds came from the Partnership Account but he says nonetheless that it was all his money.

150. Since all parties appear to have been sharing the use of the Beach House it seems odd that none of the other parties contributed and that no requests for contributions were made by Mr Miller. Indeed, it is apparent that the other parties expected that all payments would be made by Mr Miller. For example, on 10 January 2001, Mrs Brabham requested reimbursement from Mr Miller of $90 for an amount that she had paid with respect to parts for the washing machine. According to her note to Mr Miller she said that she had requested the repairer to send the bill for the repair to him. That was not the only such claim by one or other of the respondents. This would suggest either that Mr Miller was particularly generous or that payments were being made from a fund upon which they all felt entitled to draw.

Other payments

151. On 23 September 1989 Mr Miller paid $2,800 into the Partnership Account and then drew a cheque for $2,800 from the Partnership Account on the same day. I do not understand why, if the money deposited was his, he used the Partnership Account and not his own personal account.

Other payments to the partners and other people

152. According to Mr Miller he lent Mr Martin from his own money:

    (a) an amount of $20,000 on 18 May 1987 to assist in the purchase of a house in Camberwell;

    (b) a further $34,176.82 on 8 July 1987 for the same purpose;

    (c) amounts totalling $22,336.58 for construction works on Mr Martin's house.

    (d) a further $13,000 in April or May 1989;

    He said that none of these amounts were repaid.

153. Mr Martin said that he repaid the first two amounts but said that the other two amounts were drawings from the partnership.

154. Mr Miller said that on 23 October 1987, he lent $40,000 to Mrs Martin's brother for the purchase of a car which he claimed was not repaid. The loan is not denied by Mr Martin although he says that it was for a house, not a car, and that it has been repaid. Mr Miller has not suggested any reason why he would want to benefit Mrs Martin's brother and he has not sought to recover the amount from him.

155. On 18 January 1988 Mr Martin and Mr Brabham were each paid $20,000 from the Partnership Account by consecutive cheques. Mr Miller said that the payment to Mr Martin, which went to his builder, was a loan that he made to Mr Martin. He said that the payment to Mr Brabham in an identical amount was financial assistance to Mr Brabham "…consistent with the payment of $20,000 to Martin also on 15 January 1988". If these were loans by Mr Miller, I do not understand why they were not made from his personal account.

156. According to both Mr Martin and Mr Brabham, these were repayments of capital from the partnership. Certainly, the payment of the identical amount to the two men on the same day would suggest either an equal entitlement or a desire to benefit them both equally. If it is the latter, as Mr Miller says, it is extraordinarily generous since it is common ground that he has not received these two amounts back. The fact that the payments were made from the Partnership Account is also more consistent with their version. The evidence given about these two payments by Mr Martin and Mr Brabham is more credible than that given by Mr Miller.

157. Mr Miller said that he provided the following payments to Mr Brabham:

    (a) the $20,000 on 18 January 1988;

    (b) $5,810 on 21 March 1988;

    (c) $25,000 on 17 March 1993.

    Mr Miller said that the $25,000 was to assist Mr Brabham following his divorce. He did not say what the purpose of the other two payments was.

158. Mr Brabham said that the payments of $20,000 to himself and Mr Martin were returns of capital from the partnership. He said that the payment of $5,810 "would have been" for travel expenses reimbursed to him for the trip to Egypt. He said that the $25,000 could not have been related to his divorce, which occurred in 2001, but he does not say what it was for.

The alleged misappropriation

159. According to Mr Miller, he made loans to Mr Martin totalling $266,000 which he forgave. That level of generosity seems extraordinary given that there was a business relationship as well as a personal relationship between the two men. Mr Miller was paid by Mr Martin for his share in the Hawthorn property and that involved a much lesser sum.

160. Mr Miller said that on 20 October 1992, Mr Martin withdrew $210,662.44 from the bank account of an American company that he (Mr Miller) controlled called Tegald Inc. He said that Mr Martin lodged $110,000 on term deposit with the

National Australia Bank in Mr Martin's own name and the balance of $662.44 was transferred into his bank account. Mr Miller said that on 26 October 1992 Mr Martin withdrew a further $40,000.

161. He exhibits the documentation supporting these transactions. They are all in the name of Mr Martin and the relevant correspondence is addressed to Mr Martin's home address. It appears in this correspondence that it involved a foreign exchange contract and that the proceeds were ultimately paid, as follows:

    (a) $280,000 was transferred to Mr Miller;

    (b) $70,000 was placed in corporate call account in the name of Tegald;

    (c) $40,000 was rolled over for 30 days in a term deposit in Mr Martin's name; and

    (d) the balance was deposited in the partnership account.

162. Mr Martin says that he does not have any specific recollection of the transactions but says that they were partnership related and they all took place with Mr Miller's knowledge and approval. He said that Tegald Inc was a partnership "tax driven" company based in Delaware USA, that he was a director of the company and that both its registered office and mailing address were his (Mr Martin's) personal residence. He said that he was a signatory to the company's bank account.

163. Mr Miller asserted in his witness statement:

> "To date none of these funds have been repaid by Martin".

164. Although Mr Miller does not say in his witness statement directly that these transactions occurred without his knowledge and consent, that is the clear implication. I prefer Mr Martin's direct evidence and, considering the nature and context of the transactions and the fact that Mr Miller appears to have received the bulk of the proceeds, this must have been at his direction or at least with his knowledge and consent. It also appears to have been related to the partnership. It is quite clear where the money referred to above went and it is quite wrong of Mr Miller to suggest, even by implication, that it has been misappropriated by Mr Martin.

Further transactions

165. Mr Miller tendered a term deposit receipt dated 11 June 1998 from the Hongkong Bank in the name of Mr and Mrs Martin in the sum of $321,278.41 in Australian currency, maturing on 11 December 1998 (Exhibit C) and $15,000 in another foreign currency account. (TB 1396).

166. Mr Miller said that Mr Martin produced these documents when he asked him if he could contribute to the Beach House, Imperial surf and Merrijig. In his evidence, Mr Miller suggested that this money, which was in excess of $336,000, belonged to Mr Martin. Mr Martin denied that the money was his and said that it belonged to Mr Miller and that he was moving it around for Mr Miller for tax reasons.

167. If Mr Miller's version is correct, he does not say what purpose would have achieved by giving him these documents. Having all this money available would be a reason for Mr Martin to be able to contribute to the three properties. They would not support any allegation by Mr Martin that he was unable to afford to make a contribution.

168. If Mr Martin's version is correct, there is no explanation of why he is carrying out these transactions involving such very large sums of money on Mr Miller's behalf in his own name or what the underlying arrangement between them was. Nevertheless, there are similarities with what occurred with the money drawn from Tegald Inc.

What is the source of all this money?

169. Apart from the size of the amounts involved, the most striking thing about all this evidence is the absence of any comprehensive set of accounts for these very large sums of money passing back and forth. Mr Miller, Mr Martin and Mr Brabham are all trained accountants and one would have expected that they would want a proper set of accounts to be kept recording their financial dealings. As a result I have to determine where all this money is likely to have come from on very inadequate evidence.

170. Mr Miller suggested that he had received very large sums of money as a result of the sale of shares and bonuses and payments that he received from Coles Myer. He said that he received substantial sums of money in the course of his employment. He said that, in 1982 he received $107,444 from the proceeds of sale of Coles shares and the following year he received a further $102,197 from the proceeds of sale of Coles shares. He says that in 1984 he signed a restraint agreement with Coles pursuant to which he received $525,000, payable in instalments at five yearly intervals starting that year.

171. Mr Miller said that, in 1985 and 1986, he sold shares to the value of $1,944,199.77. Of this, the main trade of $1,589,311.77 was in the name of a company called Invia Custodian Pty Ltd and from those proceeds he says he received $995,888. He does not specifically say that this was his own money although that seems to be implied. He does not disclose in his witness statement how, given that he was an employee of Coles, he came to receive the proceeds of sale of shares worth over $1 million which, at that time, must have been a very substantial sum indeed. He said that he received substantial sums from the sale of Coles' shares from 1989 up to 1994.

172. From this evidence it seems that Mr Miller had substantial money at his disposal that might have been the source of the large sums that appear to have passed back and forth between the parties. His explanation for the source of the funds the partners used is that the money was his, that he was a wealthy man and that he was generous to his friends.

173. However much money he had, he did not adequately explain, and I do not understand, why he would spend such substantial sums on other people and buy substantial assets and put them into other people's names. Certainly the parties

were friends but the scale of the spending seems to me to have gone well beyond what one would have expected. Further, the sorts of things the money was spent on also seem odd. All parties have described them as Lifestyle assets. They appear to have been luxuries and although one might understand Mr Miller being concerned to assist friends in need one might also wonder why he would want to assist them in the purchase of luxuries.

174. On the other hand, although Mr Martin, Mr Brabham and their respective wives insist that the money spent on these "quality-of-life" assets was partnership funds the only sources of funds they have identified in their witness statements are proceeds of share trading and dealings in bank bills and other investments. Although I am satisfied that substantial profits might well have been made from those sources, the large sums of money spent by the parties seem to have amounted to a great deal more than that.

Mrs Martin's evidence

175. In the course of her cross-examination, Mrs Martin said that she was told by Mr Miller where the money came from. I asked her what he had said to her and she said that he told her that he had invested some of "the company's funds" without approval and when he sought the approval it was denied. By that time, he had already made the investment and made a very large profit but as it was unauthorised could not risk the company hierarchy finding out what he had done so he kept the profits.

176. This statement was made in the course of her cross examination. Mr Schlicht asked her why it was not in her witness statement and she said that it had been but that the lawyers had taken it out. An email that she sent to her lawyers was referred to and its production was called for. The document was produced and tendered as Exhibit 7. The operative part reads as follows:

> "In my original witness statement I said when I asked Miller where the partnership money was coming from he said he invested some Coles funds without approval and when he sought the approval he was categorically denied it. The investment made a very large profit but as it was unauthorised he couldn't then risk the Coles hierarchy finding out what he had done so he kept the profits. The witness statement also says I was particularly close to Miller's wife Pam, we were close but I would say I was closer and shared more interests with Miller, consequently he shared many very private and personal things with me." (sic.)

177. In cross examination she said that she believed that Mr Miller had put the money into the partnership and that as a result the partnership was able to buy all the assets.

178. It was not put to Mrs Martin during cross-examination that this conversation did not take place nor was it suggested to her that her evidence about it was wrong. During re-examination I pointed that out it was not put to Mr Miller in cross examination that this conversation occurred.

179. In his submissions, Mr Schlicht submitted that, because it was not put to Mr Miller in cross examination, no credibility could be ascribed to it because of the

rule in *Browne v. Dunne* (1893) 6R 67. He referred to the summary of the rule in *Browne v. Dunne* by the High Court of Australia in *MWJ v. R* [2005] HCA 74 where it is stated in the joint judgement (at para 38):

> "We should next say something about the rule in *Browne v Dunn*, which, in substance, both the trial judge and the Chief Justice thought should be applied here against the appellant, its application in criminal cases generally, and his Honour, the Chief Justice's reference to the appellant's counsel's failure to seek to have the complainant recalled for further cross-examination. The rule is essentially that a party is obliged to give appropriate notice to the other party, and any of that person's witnesses, of any imputation that the former intends to make against either of the latter about his or her conduct relevant to the case, or a party's or a witness' credit".

180. The rule is essentially about procedural fairness. A party should be given the opportunity to answer the case brought against him. In the present case if Mr Schlicht had wished to re-call Mr Miller to give evidence in response to the allegation that Mrs Martin had made he could have made application to do so and leave would certainly have been granted. There was no application to call him which perhaps explains why her evidence was not challenged during cross-examination. Since there is no reason to disbelieve what she said I accept that the conversation occurred and that Mrs Martin's evidence about it is correct.

181. When Mr Martin was cross-examined, Mr Schlicht put this evidence from his former wife to him and Mr Martin said that he did not believe that Mr Miller would do anything unauthorised. However he did not specifically deny the truth of what his former wife said.

182. If the source of the funds was questionable that might explain the poor state of the evidence concerning where the money came from. If the transaction that Mr Miller referred to in his conversation with Mrs Martin occurred, it is unlikely to have been unlawful, otherwise he would not have sought approval for it from the board of a respected public company. It might have been something as simple as moving a large sum of money overseas just before the March 1983 devaluation and then moving it back afterwards. It might have been something entirely different. It might not have occurred at all.

183. If it did occur, whatever it was, it is impossible to say whether the activity involved the other people in Mr Miller's "very small team", which comprised Mr Martin, Mr Brabham, Mr Stodgell and his personal assistant, Mrs Lambert. I am only able to make findings on the evidence before me and I cannot speculate.

184. In particular, I am not prepared to make any finding of unlawful conduct on behalf of anyone without firm evidence that it has occurred and there is no such evidence. However the statement Mr Miller made to Mrs Martin amounts to an admission by him that the money came from an unknown source and not from his own resources.

185. Whatever the source of the money was, Mrs Martin said that she believed that Mr Miller put it into the partnership and it appears more probable than not from

the evidence that it was treated by these three men as being a common fund to be spent on their lifestyles.

186. It would seem to have been spent liberally. The evidence is that the money was spent on the Beach House, a unit in Surfers Paradise, land at Merrijig intended to be used for a skiing cabin, boats, racehorses, gambling, spa baths and holidays as well as drawings from time to time for unknown purposes. It is not the way many people would spend savings from their own earnings.

The nature of the critical deposit

187. As the applicant, Mr Miller bears the initial burden of proving that the Beach House was purchased with his money. He has proven that the amount of $282,820 that was deposited into the Partnership Account shortly before December 1986 was the proceeds of the sale of shares in Coles Myer that were in the name of New Kapital Investments, a business name that he used.

188. When those shares became registered in Mr Miller's business name is unknown. In paragraph 16 of his first witness statement, he includes the sale of these shares with numerous other transactions and does not say where these particular shares came from or who paid for them. The business name was not registered until 15 October 1986 and the shares were sold on 3 December 1986, less than six weeks later.

189. Mr Brabham said that he thought that the shares were Mr Miller's and that the money paid into the Partnership Account was his but he said that he could not recall how the money was paid. He said it could have been bank bills and other investments but he had no way of disputing what Mr Miller said.

190. He accepted that the $282,820 paid into the account was used to pay for the Beach House but said there was an adjustment later on. He said that he could not remember what the adjustment was as he had no records going back that far.

191. Mr Martin agreed that the source of funds to buy the Beach House was the proceeds of the sale of the shares but he said that it was paid into the Partnership Account in repayment of money that Mr Miller owed to the partnership. He said that the shares were purchased well before the business name New Kapital Investments was registered and he said that Mr Brabham was mistaken in believing that they had been given to Mr Miller by Coles Myer.

192. If the money paid into the partnership account was partnership money or in repayment of a debt owed by Mr Miller to the partnership then it must follow that, at the moment the Beach House was purchased, that money belonged to the partners equally and not just to Mr Miller. The question is, who is to be believed?

193. Although they provided no supporting documentation, the accounts given by the respondents were generally consistent in regard to the existence of the partnership and the acknowledgment by Mr Miller that these various assets were partnership property. However, their evidence as to where the money came from does not add up to a sufficient amount to account for what was spent. Quite

clearly, the money has come from somewhere and although they deny that it came from Mr Miller they have not identified an alternate source for at least some of it.

194. As to the suggestion by Mr Miller that he provided all of the money, I have a number of concerns about his evidence. If he is to be believed, he has made the following payments to benefit the following people:

(a) He paid $282,820 of his own money into a bank account in the names of himself and two other people.

(b) He allowed large amounts of his own money to be used to purchase bank bills in the names of the three partners.

(c) Although he paid the whole of the purchase price for the Beach House, he allowed it to be put it into the names of people who contributed no money.

(d) Although he paid the whole of the purchase price for Merrijig, he allowed it to be put it into the names of people who contributed no money.

(e) He allowed horses that were purchased with his money to be registered in the names of the three partners.

(f) He paid for overseas holidays for the other two partners and their families with his own money.

(g) He spent $22,500 of his own money on spa baths for the other two partners and for his personal assistant, Mrs Lambert.

(h) He paid the rental that was received from letting Imperial Surf into the Partnership Account, notwithstanding that he claims he was solely entitled to it.

(i) He paid a total of $75,960.17 in maintenance costs and outgoings in relation to the Beach House without seeking any contribution from any of the other owners, notwithstanding that four of them had received their shares free of charge with the expectation that they would contribute to the upkeep and maintenance of the Beach House. Further, when these people spent even small amounts of money on the Beach House, he reimbursed them with his own money.

(j) Between May 1987 and May 1989 he lent amounts totalling $89,513.40 to Mr Martin, none of which has been repaid.

(k) In October 1987 he lent $40,000 to Mrs Martin's brother to buy a car and that amount has never been repaid.

(l) Between January 1988 and March 1993 he lent Mr Brabham amounts totalling $50,810, none of which has been repaid.

(m) He made further loans on some unspecified date or dates totalling $266,000 to Mr Martin, none of which has been repaid. From the context it appears that these arose from a series of transactions commencing in October 1992 which Mr Miller says were unauthorised.

(n) Notwithstanding that Mr Martin owes him the substantial sums referred to, Mr Miller appears to have authorised Mr Martin to operate his bank accounts and move very large sums of money for him overseas.

195. Any one of these allegations on its own might be true but when they are all taken together they appear unlikely. No matter how wealthy or how generous Mr Miller was it is difficult to believe that anyone would have acted in this way.

196. The categorical denial by Mr Miller of the existence of any partnership and the statement that he never saw or had in his possession a written partnership deed coupled with his deliberate blacking out of the words "partnership deed" on the cheque stub also raise concerns about his credit.

197. The evidence given by Mr and Mrs Martin and Mr and Mrs Brabham about the existence of the partnership and the discussions involving the partnership was consistent, not only between themselves but also with the available documentation.

198. The vast amount of written material that Mr Miller produced supports Mr Martin's evidence that he is a meticulous record keeper. However despite the wealth of documents the story that he presented does not seem to add up to a complete picture.

199. For example, the bank statement showing the debiting of the cheque for the price paid for the horse Rapavan was relied upon by Mr Miller as proof that he paid for it and yet the source of the $62,000 credit entry in the same bank statement immediately beforehand was never identified although I referred to it during the hearing.

200. The written acknowledgements of the entitlements of the other parties that Mr Miller provided at various times were never satisfactorily explained. I can understand him saying that the interests of the other two partners would need to be earned by payment of money, although that seems an unusual arrangement, but he makes no reference to that in the acknowledgements. His explanation for signing the acknowledgement in regard to Imperial Surf is difficult to accept, given his level of business sophistication.

201. Mr Miller never explained why he acknowledged that cash and shares were partnership property if in fact they were not. Indeed, he did not satisfactorily explain why he referred on a number of occasions to assets as partnership assets when he now claims they were his. The explanation that they would have to earn their interests does not seem to suit assets other than the three properties.

202. I think on the balance of probabilities that there was a pool of partnership funds derived partly from investments but principally from an unknown source that involved Mr Miller and possibly the other members of his very small team as well. I am satisfied that this pool was regarded by Mr Miller and the other two partners as belonging to the three of them.

203. No partnership accounts were ever kept and at least some of the bank accounts that held partnership funds appear to have been in the name of Mr Miller. Mr

Miller appears to have been in charge of the disbursement of the funds of the partnership but they and the assets purchased with them were nonetheless referred to by him and by the other partners as belonging to the partnership.

204. I accept Mr Brabham's evidence that Mr Miller acknowledged to him that he mixed these partnership funds with his own money because that seems likely from the documents. Certainly money held in the accounts referred to in America appear to have been brought back and used for partnership purposes and those accounts were initially in Mr Miller's name.

205. The amount of $282,820 was paid into the Partnership Account. In view of the admixture of Mr Miller's funds with those of the partnership, the fact that the amount was paid into the Partnership Account and not into Mr Miller's personal account, the fact that Mr Miller acknowledged that the Beach House belonged beneficially to the three partners equally and the fact that after the money was paid in it was used in the purchase of bank bills in the names of all three partners, all lead me to think that it is more probable than not that it was paid in with the intention that it would belong to the three partners. It was then used to purchase investments in the way of bank bills in the names of all three partners and when those bank bills matured the proceeds were paid, not to Mr Miller, but back into the Partnership Account and were ultimately used to pay first for the Beach House and then for Imperial Surf. At the time of those purchases I think that it was partnership money as the respondents contended.

Conclusion

206. Since I am not satisfied on the balance of probabilities that the money used to purchase the Beach House belonged solely to Mr Miller no resulting trust arises and so the application will be dismissed.

SENIOR MEMBER R. WALKER