

# SUPREME COURT OF QUEENSLAND

CITATION: *Wu & Anor v Yu; Yu v Wu* [2019] QCA 175

PARTIES: **In Appeal No 9479 of 2018:**

**XINGANG WU**  
(first appellant)  
**YANYAN GAO**  
(second appellant)

v  
**HONGBO YU**  
(respondent)

**In Appeal No 10252 of 2018:**

**HONGBO YU**  
(appellant)

v  
**XINGANG WU**  
(respondent)

FILE NO/S: Appeal No 9479 of 2018  
Appeal No 10252 of 2018  
DC No 826 of 2017

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: District Court at Brisbane – [2018] QDC 169 (Richards DCJ)

DELIVERED ON: 6 September 2019

DELIVERED AT: Brisbane

HEARING DATE: 22 February 2019

JUDGES: Morrison and McMurdo JJA and Burns J

ORDERS: **In Appeal No 9479 of 2018:**

- 1. Appeal dismissed.**
- 2. Order that the appellants pay to the respondent his costs of the appeal.**

**In Appeal No 10252 of 2018:**

- 1. Appeal allowed.**
- 2. Set aside the order made in paragraph 1 of the orders made on 24 August 2018.**
- 3. Set aside the order made in paragraph 1 of the orders made on 17 October 2018.**

4. **Order that the disputed amount held from the sale of the house at 14 Gagarra Street, Eight Mile Plains, together with accretions, be paid to the appellant.**
5. **Set aside order number 1 of the orders made on 9 November 2018.**
6. **Order that the respondent pay to the appellant his costs of the claim.**
7. **Order that the respondent pay to the appellant his costs of the appeal.**

**CATCHWORDS:** REAL PROPERTY – TORRENS TITLE – UNREGISTERED INTERESTS – EQUITABLE ESTATES AND INTERESTS – OTHER MATTERS – where the respondent successfully claimed at first instance an unregistered equitable interest in a property of which the appellant was the registered owner – where the funds used to purchase the property came from a foreign company of which the parties were the exclusive shareholders – where the respondent submits that those funds belonged to him in a 60 per cent share and therefore he has the same percentage interest in the property on the basis of an express trust, proprietary estoppel, or a constructive trust – where the appellant submits that those funds belonged to him exclusively and therefore the respondent has no interest in the property – where there was fault or lack of disclosure on both sides, and neither side’s witnesses were assessed as clearly more credible than the other side’s witnesses – where there was some evidence about the acquisition, occupation and mortgaging of the property, and the distribution of funds by the company – whether there was sufficient evidence to overcome the presumption that the appellant had an exclusive interest in the property, as its registered owner – whether the trial judge’s decision to accept the respondent’s claim for a share of the property lacked a proper evidentiary foundation

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE’S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – WHERE CONFLICT OF EVIDENCE – where the respondent successfully claimed at first instance that he lent money to the appellants, with the whole amount remaining unpaid – where the appellants submit that the amount paid to them was the repayment of a loan owing to them by the respondent – where there was independent evidence to support the respondent’s case, but not the appellants’ case – whether the trial judge’s decision to prefer the respondent’s case to the appellants’ case was unsupported by the evidence

**COUNSEL:**

In Appeal No 9479 of 2018:  
N H Ferrett QC, with J P Hastie, for the appellants

P J Roney QC, with C Templeton, for the respondent

In Appeal No 10252 of 2018:

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N H Ferrett QC, with J P Hastie, for the respondent

SOLICITORS:

In Appeal No 9479 of 2018:

Johnson Solicitors & Attorneys for the appellants

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In Appeal No 10252 of 2018:

ACLG Lawyers for the appellant

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- [1] **MORRISON JA:** I have read the reasons of McMurdo JA and agree with those reasons and the order his Honour proposes.
- [2] **McMURDO JA:** These appeals involve a dispute between two couples, who were once friends and conducted businesses together. They are Chinese nationals, who lived in the city of Qingdao before moving to Australia in 2010. There has been litigation between them in China, but the events the subject of these proceedings involve transactions in Queensland.
- [3] This case was commenced in the District Court by Mr Wu against Mr Yu and his wife, Ms Zhao. Mr Wu made two claims. The first was that a house at 14 Gagarra Street, Eight Mile Plains, of which Mr Yu was the registered owner, was held by Mr Yu on trust for Mr Wu as to a 60 per cent interest. The second was a claim that Mr Wu had lent monies to Mr Yu and Ms Zhao, of which an amount of \$158,468.16 remained unpaid.
- [4] That first claim was successful. The house has been sold, but 60 per cent of the proceeds of sale were held pending the outcome of the case, and the trial judge ordered that they be paid to Mr Wu. The second of those claims was dismissed by the trial judge. There is an appeal against the judgment affecting the proceeds of sale of the house, in which Mr Yu says that the judge should have decided that he was in all respects the owner. There is no appeal against the dismissal of Mr Wu's debt claim.
- [5] There was a counterclaim by Mr Yu against Mr Wu and his wife, Ms Gao, for the repayment of monies lent. The trial judge upheld that counterclaim to the extent of \$392,676.13, plus interest. Mr Wu and Ms Gao appeal against that judgment.
- [6] This case was tried over five days in August 2017 and a further five days in December 2017. The evidence of Mr Wu occupied most of four days and that of Ms Gao some of the fifth and sixth days of the trial. Mr Yu's evidence was given over three days in the December hearing, with evidence from Ms Zhao on the ninth day of the trial.
- [7] The evidence of each of these witnesses was given through an interpreter. The trial judge observed that this meant that an assessment of credibility by the demeanour of the witnesses was "significantly diminished",<sup>1</sup> and that there were likely to have been "cultural and linguistic nuances that have affected the understanding of

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<sup>1</sup> *Wu v Yu & Ors* [2018] QDC 169 ["Reasons"] at [15].

questions and giving of answers.”<sup>2</sup> The difficulties for the trial judge were compounded by what her Honour described as a lack of disclosure of pertinent documents, such as bank records, minutes of meetings, declarations of dividends and tax returns. The judge said that there was “fault or the lack of disclosure” on both sides.<sup>3</sup> The absence of those documents not only made more difficult the judge’s task of determining whose evidence was to be accepted, it would also have made it difficult for witnesses who were endeavouring to recall the relevant events and conversations which had occurred, or were said to have occurred, a decade before the trial.

- [8] As the outcome of the claims and counterclaim should indicate, the witnesses from neither side, most importantly Mr Wu and Mr Yu, were assessed as clearly more credible than the others. The trial judge said this about the credibility of all four of these witnesses:<sup>4</sup>

“However, there are significant problems with the credibility of all the parties in this case. Yu and Zhao are not reliable witnesses. However, the same can be said for Wu and Gao. Their answers at times make little sense and when they do they are not supported by the documentary evidence. They also had a tendency to deny admitted documents when they didn’t suit their case. Both of the main litigants in this case have not made available relevant documents, in particular bank records and company records. It has been impossible to rely on the testimony of any of the parties without support of external sources or agreed facts.”

Yet as the judge said, there was little by way of “external sources”, at least in the form of documents.

- [9] Apart from the parties, there were two witnesses, one of whom was Mr Lam, a real estate agent in Brisbane who had been involved in Mr Yu’s purchase of the house. The other was Mr Fung, an immigration agent who had had discussions with Mr Wu and Mr Yu in China in 2007, and when they came to Queensland in 2010, and recalled things said by them as to their intentions for buying property here. The judge found Mr Lam and Mr Fung to be independent witnesses who were doing their best to give an accurate recollection of events. In her Honour’s view, Mr Lam’s evidence did not “advance any particular case [but] was consistent with the evidence of Mr Yu”.<sup>5</sup> She said that Mr Fung’s evidence did support Mr Yu’s case about the intended ownership of the house, but that this did not preclude a finding for Mr Wu, and that the passage of time must have affected the accuracy of Mr Fung’s recollection.<sup>6</sup>
- [10] Consequently, the trial judge had to assess these claims and counterclaims by considering, in the context of some facts which were or ought to have been uncontroversial, which version of events was the more probable. I go then to those facts, before considering the claim in respect of the house and then the counterclaim for monies owing.

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<sup>2</sup> Ibid at [16].

<sup>3</sup> Ibid at [14].

<sup>4</sup> Ibid at [64].

<sup>5</sup> Ibid at [32].

<sup>6</sup> Ibid.

### Uncontroversial facts

- [11] Mr Wu and Mr Yu met when they worked together in the mid 1990's for a state-owned company in China. In 2000, they and others established a company which became known as Qingdao Lianchuan Shipping Services Company Pty Ltd ("Bright Shipping"), but to which the parties referred as Pan Union. By 2004, Mr Wu and Mr Yu had become the only shareholders of Pan Union, Mr Yu holding an 80 per cent interest and Mr Wu holding the balance of the shares. Mr Yu was then the "legal representative" and the chairman of the board, and Mr Wu was the general manager of the company.
- [12] In December 2006, the two men bought a company called Bright Shipping. They became its only directors and shareholders. Mr Yu held 40 per cent of the shares and Mr Wu held the remaining 60 per cent.
- [13] In April 2008, Pan Union sold its 25 per cent interest in a company called Qingdao Hailufeng International Logistics Co Ltd to a Korean company which already held the other shares, for which the Korean company paid Pan Union USD 2 million. There was in evidence a contemporaneous record of the payment of USD 1,199,995 by the purchaser to Pan Union, as reported to a relevant agency in China on 7 July 2008.
- [14] It was part of Mr Yu's case that his 80 per cent interest in these funds (through his shareholding in Pan Union) was the ultimate source of the funds which he used to purchase the property at Gagarra Street in 2010. The evidence contained some documents which were contemporaneous records of payments between Pan Union and Bright Shipping in late 2008, but they did not present a complete picture. The documents evidenced the following payments:
- USD 670,000 transferred by Pan Union to Bright Shipping on 6 November 2008;
  - USD 610,000 transferred by Pan Union to Bright Shipping on 11 November 2008;
  - USD 2 million transferred by Bright Shipping to Pan Union on 18 December 2008;
  - USD 851,000 transferred by Pan Union to Bright Shipping on 23 December 2008;
  - USD 674,000 transferred by Pan Union to Bright Shipping on 25 December 2008.
- [15] There was evidence of property dealings in China in which the parties had been involved. But again the picture was incomplete, and it could not be concluded that any of the funds used to purchase Gagarra Street had been derived from these dealings. They included the purchase of houses in 2006, which were next or near to each other, one of which was purchased by Ms Zhao and the other by Ms Gao. Both properties were mortgaged. The trial judge found that by the time the two men became the sole shareholders of Pan Union, it appeared that their lives and the lives of their families were "enmeshed" and that there was evidently "a high degree of trust between the two men."<sup>7</sup>
- [16] From about 2007, Mr Wu and Mr Yu were each interested in moving to Australia. In that year they met with Mr Fung in China to discuss applying for business visas. Each applied for business visas in December 2007. In January 2010, each received correspondence from the Department of Immigration and Citizenship advising that

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<sup>7</sup> Ibid at [8].

he and his family had been granted visas, valid until September 2014. The correspondence referred to the prospect that they could apply for permanent residence in Australia within that period.

- [17] In March 2010 the two men visited Brisbane together. Mr Wu was here for 10 days and Mr Yu for about a month. They inspected houses together, but it was only after Mr Wu had returned to China that Mr Yu was shown the house at Gagarra Street on 2 April 2010.
- [18] On 19 March 2010, before he had seen this house, an amount of AUD 919,985 was transferred from an account of Bright Shipping to an Australian bank account held by Mr Yu. The contract for the purchase of Gagarra Street was dated 5 April 2010 and was settled a month later. The price, which was AUD 770,000, was paid from the money which Mr Yu had received from Bright Shipping. A firm of solicitors, Tay Lawyers, acted in the transaction for Mr Yu. No one from that firm was called as a witness.
- [19] Ms Gao and Ms Zhao moved with their respective sons to Australia in August 2010 and took up residence at Gagarra Street.<sup>8</sup>
- [20] In or about September 2010, Mr Yu purchased a car, which was registered in his name, but which was insured with the names of all four parties as listed drivers.<sup>9</sup> The price of the car, which was AUD 32,100, was withdrawn from Mr Yu's Australian bank account. The source of those funds was unclear, save that they came from an amount of AUD 50,000 which had been deposited to Mr Yu's account about 10 days earlier.<sup>10</sup>
- [21] On or about 22 February 2011, AUD 549,985<sup>11</sup> was paid by Bright Shipping to Mr Yu's Australian account. On or about 8 March 2011, an amount of AUD 415,085<sup>12</sup> was paid by Bright Shipping to the same account. As I will discuss, those payments are relevant to the dispute about the house, as well as to the counterclaim for the repayment of money said to have been lent to Mr Wu and Ms Gao. There were payments also between Mr Yu and Ms Gao which are relevant to the counterclaim, to which I will return.
- [22] In June 2011, Mr Yu mortgaged Gagarra Street, to secure a credit facility of AUD 528,000 from Westpac. The facility was for a term of five years, interest only with monthly payments. It seems that the finance was first sought in February 2011,<sup>13</sup> and its purpose was recorded as "Personal Investment Purposes."
- [23] By 2014, the parties had fallen out. In May 2014, Mr Yu appointed a real estate agent to sell Gagarra Street and demanded that Mr Wu and Ms Gao vacate the house and remove their furniture. In October 2014, Peter Lyons J appointed a trustee for sale of Gagarra Street, under s 38 of the *Property Law Act 1974* (Qld), on terms that the proceeds of sale, after payment of the costs and expenses of sale, be distributed as to 40 per cent to Mr Yu (less any amount drawn down against the mortgage) and as to 60 per cent to be paid into court pending further order.

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<sup>8</sup> Ibid at [10].

<sup>9</sup> AR 312.

<sup>10</sup> AR 422.

<sup>11</sup> The amount paid being AUD 550,000 less bank fees.

<sup>12</sup> The amount transferred being AUD 415,100 less a fee.

<sup>13</sup> From the first page of the Westpac Loan Offer: AR 336.

### The respective cases about Gagarra Street

- [24] Mr Wu's pleaded case was as follows. Whilst living in China and working together, he and Mr Yu would often discuss moving with their families to Australia, in the course of which they agreed that if they did so, they would live together in a house to be purchased from "drawings to which they were entitled from Bright Shipping".<sup>14</sup> It was alleged that about one to two months before funds were transferred to Mr Yu's account in March 2010, the two men agreed, in a conversation between them, that the money which would be sent to Mr Yu would be used, amongst other things, to purchase a house to be held as to 60 per cent for Mr Wu and 40 per cent for Mr Yu.<sup>15</sup>
- [25] Mr Wu pleaded that the conduct of Mr Yu, in mortgaging the house in 2011 and appointing a real estate agent to sell the house in 2014, in each case without his consent, was wrongful.
- [26] The alternative legal bases for the relief claimed were set out in this part of the pleading:
- "13. In the premises:
- (a) it was the common intention of the plaintiff and the first defendant at the time of the alleged purchase that the House would be held on trust by the defendant in shares for himself and the plaintiff reflecting their relative shareholdings in Bright Shipping Co;
- (aa) in the alternative to (a), the first defendant is estopped from denying that the plaintiff was entitled to a 60% interest in the house;
- (b) further and alternatively, by their conduct, the plaintiff and the first defendant engaged in a joint endeavour, that being to provide for their respective families (materially) by the purchaser of the House;
- (c) by the conduct alleged in paragraphs 11 – 12 above, the first defendant:
- (i) indicated an intention unconscionably to depart from the common intention identified above;
- (ii) further and alternatively, brought the joint endeavour to an end".
- [27] The first of those bases, as pleaded in paragraph 13(a), was that there was an express trust, which required Mr Wu to establish the agreement between the parties in which their common intention had been expressed. The second basis, as pleaded in paragraph 13(aa), was that there was a proprietary estoppel, in that Mr Wu had an equity of expectation, having been led by Mr Yu to expect that he would be given a 60 per cent interest in the property and having been encouraged by Mr Yu to act to his detriment on that representation.<sup>16</sup> The third basis, as pleaded in paragraph 13(c), was for the imposition of a constructive trust on the basis that there was a joint endeavour between the parties, the substratum of which was removed by

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<sup>14</sup> Second further amended statement of claim ("SOC") paragraph 3(b).

<sup>15</sup> SOC paragraph 5A.

<sup>16</sup> See, for example, *Riches v Hogben* [1985] 2 Qd R 292, and (on appeal) *Riches v Hogben* [1986] 1 Qd R 315.

Mr Yu's conduct and where the benefit of money contributed by Mr Wu (being his drawings from Bright Shipping for this endeavour) should not be enjoyed by Mr Yu in circumstances in which it was not specifically intended that he should do so.<sup>17</sup>

- [28] An essential element of each of those causes of action was that the funds which were used to purchase the property, although paid from Mr Yu's bank account, belonged to Mr Wu as to 60 per cent.
- [29] Mr Yu's pleaded case was as follows. In September 2008, Pan Union declared a "shareholders dividend", pursuant to which the amount of about USD 2 million which Pan Union had received from the sale to the Korean company was paid to its shareholders. Mr Yu's dividend was USD 1,599,996, which (with other monies held by Pan Union belonging to him) he caused to be paid by Pan Union to Bright Shipping in or about November and December 2008.<sup>18</sup> Mr Yu then caused AUD 920,000 of the money so paid to Bright Shipping, which the pleading described as the "First Defendants Money", to be transferred by Bright Shipping to his bank account in Australia, such that the amount transferred to him in March 2010 was his money to deal with as he saw fit.<sup>19</sup>
- [30] In that way the case for Mr Yu went as far as alleging that, in the hands of Bright Shipping, there were funds to which he was entitled and that the money used to purchase Gagarra Street could be seen to have been derived from those funds. Part of that case was that Bright Shipping really had no business of its own, and was used by its owners simply to hold monies, in various accounts, for each of them. That last mentioned element in Mr Yu's case was disputed by Mr Wu, by reference to the documents which appeared to evidence some business undertaking by that company.

### **The evidence about the acquisition and occupation of the property**

- [31] Mr Wu and Mr Yu gave evidence which, in each case, was broadly consistent with their pleaded cases. The trial judge had to consider the relative probabilities of the two versions against the evidence of Mr Lam and Mr Fung and some limited evidence as to the circumstances in which the two families lived in this property from 2010 until 2014.
- [32] Mr Lam was a real estate agent conducting business from an office at Sunnybank. He testified that both men came to his office in March 2010, indicating "that they ... decide[d] to acquire a house either in Robertson, Sunnybank or Eight Mile Plains", and that "they have acquired a temporary visa which enabled them to purchase existing house." He showed them a list of properties which they could inspect. Mr Lam gave this evidence, which the trial judge quoted in the Reasons:<sup>20</sup>

"[T]hey indicate that they desired a house to a three minimum, or of four bedrooms within two levels and that it would be ... a brick ... construction or masonry construction, and the size of the ... land would be 600 square metres or above and also – it must be a standalone building – house.

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<sup>17</sup> *Muschinski v Dodds* (1985) 160 CLR 583 at 620 per Deane J; *Baumgartner v Baumgartner* [1987] HCA 59; (1987) 164 CLR 137 at 148 per Mason CJ, Wilson and Deane JJ.

<sup>18</sup> Further further amended defence and counterclaim ("DAC") paragraph 10A(d)-(f).

<sup>19</sup> DAC paragraph 10A(h).

<sup>20</sup> Reasons at [29].

...

I'm very sure from my point of view, they walk in and ask me to show them a number of houses or a number of properties, and also they indicate a number of suburbs in the conversation. So I'm very sure they were looking at more than one."

Mr Lam said that at no stage did either of them say something to the effect that they were looking to buy a house in which both families were to live.<sup>21</sup>

- [33] After Mr Wu returned to China, Mr Yu inspected Gagarra Street and signed the contract to purchase the house. Mr Lam recalled then receiving a telephone call from Mr Wu from China, in which he was asked to provide a floor plan for Gagarra Street. This was after the contract had been signed but before it had been settled.<sup>22</sup> Mr Lam said that Mr Wu then told him that "the two families intend to stay in that property together because they are friends."<sup>23</sup> Mr Yu said that Mr Wu had asked for the floor plan because Mr Wu and Ms Gao planned to bring their own furniture and wanted to see how it could be located.
- [34] The evidence was an English version of an email sent by Mr Lam to Mr Yu, dated 21 April 2010, attaching a hand drawn floorplan for the property, which was forwarded on to Mr Wu on 26 April 2010.<sup>24</sup> There was also an English version of an email dated 30 April 2010, from Mr Lam to Mr Yu's email address, but addressed to both men, attaching another floorplan and describing the rooms by reference to what items could be placed within them. Mr Lam there wrote that the ground floor office was big enough for a double bed, all rooms on the first floor could accommodate double beds, the laundry had room for more than one washing machine, a sofa in the lounge room was "best to be angular, near the dining and the supporting wall in the family room", there was room for a 50 inch television along a certain wall, and the kitchen had particular dimensions such that it could accommodate certain appliances. This email was sent only a few days before the date for settlement, when the contract was unconditional. The content of the email supported Mr Yu's testimony that Mr Wu was wanting to see a floorplan, so that he would know what furniture and appliances could be accommodated within the house, rather than to consider whether the house should be purchased.
- [35] Later that year, Mr Lam said, he took Mr Wu to inspect some rural properties and a number of pieces of vacant land. In January 2013, Mr Wu rang him and asked for his assistance in purchasing a residence in Spring Hill because Mr Wu was about to send his son to a school in the area. In February 2013, Mr Lam arranged for Mr Wu to inspect another house at Eight Mile Plains. Mr Wu said that this house would "suit him in a very nice way",<sup>25</sup> and in December 2013 Mr Lam took Ms Gao to inspect a house at Sunnybank.
- [36] Mr Lam said that he assisted Ms Gao and Ms Zhao, in August 2010, by going with them to a local primary school to assist in the enrolment of their sons.

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<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> T5-43.

<sup>24</sup> AR 229.

<sup>25</sup> T5-48.

- [37] Mr Lam's evidence was given through an interpreter. It is evident from the transcript that there were difficulties in ensuring that the questions of Mr Lam were understood by him. To some extent, the evidence of Mr Lam favoured Mr Yu's case, because there was nothing in that evidence to indicate that Mr Wu had been influential in Mr Yu's decision to buy the house. An unconditional contract was entered into by Mr Yu, without by then Mr Wu seeing the property or apparently being told anything about it, at least by Mr Lam.
- [38] Mr Fung's evidence was not given through an interpreter. He is a registered migration agent, working from Brisbane. Through Mr Fung, Mr Wu and Mr Yu each obtained a Business Skills – Provisional (Class UR) visa, in January 2010. Visas were also issued to their families. The visas were valid until September 2014. In each case, they were advised that it may be necessary to obtain the approval of the Foreign Investment Review Board for the purchase of Australian residential real estate. (The evidence did not appear to disclose whether that was obtained in this case.) Importantly, they were issued with identical visas, so that it could not be said that Mr Yu's visa was more beneficial and thereby explained why the property was purchased for both of them but in his name alone.
- [39] Mr Fung recalled meeting Mr Wu and Mr Yu in his office in Brisbane, in February or March of 2010, when they inquired about purchasing properties in Queensland. In a passage which was quoted in the Reasons,<sup>26</sup> this evidence was given:
- “Do you remember what Mr Yu said? – ... they both want to purchase a property of their own and then Mr Yu sort of prefer to live on the south side, near the Chinese community, and Mr Wu seems ... would like to live somewhere else.
- Did Mr Yu say something about why he liked the south side? He said because it's convenient to get access to the Chinese groceries and facilities, mainly, because their family – well – his wife and himself did not speak English.
- At any stage during that meeting did either Mr Yu or Mr Wu say they intended to purchase a house together, that is, as joint owners? – No. They never discussed.”
- [40] I agree with the trial judge's observation that Mr Fung's evidence did support Mr Yu's contention that the intention of the parties was to buy their own houses.<sup>27</sup> It must also be accepted, as her Honour said, that the passage of time is likely to have affected the accuracy of Mr Fung's recollection. Nevertheless, the evidence had some weight.
- [41] There was no obvious explanation for the house being purchased in the name of Mr Yu, if the intention was that it would belong to both men. In cross-examination, Mr Wu offered an explanation, which was that “we didn't want to take out a loan, and we didn't know how to take out a loan.”<sup>28</sup> That might have explained why two houses were not purchased, but it did not explain why the house which was purchased was not in both names. In cross-examination, it was suggested to Mr Wu that there would have been nothing to prevent a transfer of his share of the purchase

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<sup>26</sup> Reasons at [31].

<sup>27</sup> Ibid at [32].

<sup>28</sup> T2-47.

price for the house to an account in his name, to which he responded that he did not have an Australian bank account at the time “or I don’t know how to use the bank account.”<sup>29</sup> The first part of that response was disproved by the admission into evidence of an account statement for a bank account in Mr Wu’s name with Suncorp Bank, which he had opened on 12 March 2010. And the second part of the answer was unpersuasive.

- [42] The trial judge recorded certain other facts as being not in doubt, namely that no rent was paid to Mr Yu for the use by Mr Wu’s family of the house, expenses such as electricity, rates and groceries were shared between the parties, Mr Gao and Ms Zhao had joint bank accounts (in which there were small amounts for household expenses), Ms Gao was a signatory to an account of Mr Yu and was free to use it, and Ms Gao was given the master bedroom and Ms Zhao and her child had smaller bedrooms upstairs in the house.<sup>30</sup> In my opinion, none of those facts, either considered individually or in combination, significantly advanced Mr Wu’s case. The fact that no rental was paid might indicate that both men had paid for and owned the house; but it could also be explained by the friendship between the two families and the fact that the two men were still in business together.
- [43] At one stage, the local primary school questioned the entitlement of Ms Gao’s child to attend on the basis that he resided within the school’s catchment area. Ms Gao obtained the assistance of Mr Fung in responding. He wrote a letter confirming that Ms Gao and her son were living at Gagarra Street and said that “the owner of the property is Mr Hongbo [Yu].” When Ms Gao applied for her own Business Skills visa in 2014, she did not include an interest in the house as part of her assets. But of course it is Mr Wu’s case that he was the part owner of the house, not Ms Gao.

#### **The reasoning of the trial judge about the house**

- [44] The trial judge considered whether, as Mr Yu appeared to maintain, Bright Shipping was merely “a holding company for funds” which did not transact any business of its own. Her Honour noted that it was accepted that Bright Shipping received significant amounts of money from Pan Union and identified the four payments to which I have referred above at [14], before saying that it was Mr Yu’s claim that “these transactions represented the transfer of the share sale [proceeds] into Bright Shipping.”<sup>31</sup> Her Honour noted the suggestion for Mr Yu that a further USD 720,000 had been paid by Pan Union to Bright Shipping between 6 and 11 November 2008 and that an amount of USD 425,000 had been paid from Pan Union to Bright Shipping between 23 and 25 December 2008. If those payments had been made, a total of USD 2 million would have been paid to Bright Shipping in November 2008, followed by a repayment of that sum on 18 December 2008, and then further payments totalling USD 1,950,000 paid to Bright Shipping about a week later. But there were no documents evidencing those other payments.
- [45] Her Honour noted that Mr Yu had provided a somewhat different version in an affidavit filed in September 2014, where he said that USD 1,954,000 was ultimately paid to Bright Shipping by Pan Union, but by the two November payments<sup>32</sup> and the

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<sup>29</sup> T2-58.

<sup>30</sup> Reasons at [42].

<sup>31</sup> Ibid at [19].

<sup>32</sup> Being the payment of USD 670,000 on 6 November 2018 and the payment of USD 610,000 on 11 November 2018.

payment of USD 674,000 on 25 December 2008. That analysis did not explain the USD 2 million repayment to Pan Union on 18 December 2008 or the transfer of USD 851,000 to Bright Shipping on 23 December 2008.

- [46] Her Honour noted that there was evidence that Bright Shipping did conduct a business of its own, in the form of bank statements for accounts of the company for a period ending in May 2009, and also documents called “fixture notes”, which evidenced charges made for the shipping of cargo.<sup>33</sup> But the bank statements were not obviously inconsistent with Mr Yu’s claim that, at least for the most part, Bright Shipping was effectively used as a bank. The fixture notes had more weight. Mr Yu said in evidence, at one stage, that he did not think that the documents were genuine, but at a later stage he indicated that the money had come to Bright Shipping from a business which it had of the rental and sale of refrigerated containers. The trial judge found that the fixture notes were genuine, and that Bright Shipping was “more than a holding company for money from the sale of the shares by Pan Union.”<sup>34</sup>
- [47] The trial judge then considered whether the money paid by Bright Shipping to Mr Yu, in the amount of AUD 919,985 on 19 March 2010, was part of his share of the proceeds of the sale of shares by Pan Union. Her Honour reasoned as follows:

“[25] The first defendant gave evidence that he received payments from Bright shipping that were the dividend payments representing his share of the 2 million USD namely 1.6 million USD. Those payments were in Australian dollars and were made as follows: \$919,985.00 on 19/3/10, \$549,900.85 on 22/02/11 and \$415,085.00 on 8/3/11. This represents a total sum of \$1,884,970.85. It was accepted by the parties that the conversion rate from US dollars to Australian dollars at the time was 1.47. It is unclear why the money, if it was payment of a dividend, was paid in such odd sums over such an extended period. In any event, Mr Yu says that the money represented the total of the dividend less the sum of 50,000 USD that he had already received. This proposition does not make sense. The remaining dividend if paid out should have resulted in a sum of \$2,278,500.00 being transferred to the first defendant.

[26] For the reasons above, I do not accept that the money transferred from Bright Shipping was the dividend from Pan Union.”

- [48] After discussing other evidence and the facts which I have summarised, her Honour reasoned as follows. She accepted that as the property was in Mr Yu’s name, “there is a presumption that it is his property [because o]rdinarily, a person would not allow a property for which he or she had contributed a substantial amount of money to be transferred without their name being on the title.” But her Honour observed that “this is no ordinary case.” The two men had been in Australia “looking for properties together” and “[w]hen Mr Wu left the country he was obviously no longer in a position to easily sign a contract [so that p]ractically speaking the

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<sup>33</sup> Reasons at [20].

<sup>34</sup> Ibid at [22].

purchase was made easier if Mr Yu handled the sale.”<sup>35</sup> Her Honour said that this was similar to a transaction, not clearly evidenced but suggested by Mr Yu in his evidence, in which the men had decided that a commercial property purchased in China would be placed in Mr Wu’s name even though the capital and payments for the property were being provided by Pan Union.<sup>36</sup>

[49] In her Honour’s view, the fact that floor plans, dimensions and photographs of the house were sent by Mr Yu to Mr Wu demonstrated that Mr Wu was “very much involved in the planning and purchase of the property.”<sup>37</sup> Her Honour found it difficult to understand that it would be important for the Wu family to buy appropriate furniture for this particular house “[i]f the idea was for the house to be temporary accommodation for [them]”.<sup>38</sup> Her Honour rejected evidence by Ms Zhao that all of this furniture had been bought by Mr Yu, not by Mr Wu, which was inconsistent with Mr Yu’s own evidence and with his conduct, in 2014, in demanding that the Wu family remove their furniture.

[50] Her Honour considered an alternative submission for Mr Yu that, even if the money transferred by Bright Shipping “was not the Pan Union dividend”, the money was property of Bright Shipping and that Mr Wu could not have relief because he had not contributed at all to the purchase of the property.<sup>39</sup> Her Honour said that this seemed to be “a little artificial given that the company’s directors and shareholders were Wu and Yu but nonetheless given that the company is a separate entity, I accept that if the money was Bright Shipping’s money and there was no transfer of the ownership of the money then this argument has merit.”<sup>40</sup>

[51] Her Honour’s reasoning concluded as follows:

“[48] However, in my view, there is evidence from which it can and should be found that the money from Bright Shipping was a distribution paid as a dividend into Yu’s account on behalf of both men for the purchase of the property. Mr Wu says that there was a conversation about buying a house together and his reason for this, namely that they were unsure whether they would stay in Australia and whether they could get a loan are sound. He said in cross-examination that the money was a distribution to buy the house. The fact that there is no documentation is not surprising given the way in which the parties seem to have conducted their business. The defendant says that the detail of the conversations are so sparse that they shouldn’t be accepted and that his recollection should be rejected for that reason, however, given the passage of time it’s not unusual for the discussions to be lacking in detail and in any event this is not the only piece of evidence which the plaintiff relies on as proving a joint endeavour.

[49] The conduct of the parties after the purchase of the property support a case of joint endeavour. The fact that Mr Wu looked

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<sup>35</sup> Ibid at [45].

<sup>36</sup> Ibid.

<sup>37</sup> Ibid at [46].

<sup>38</sup> Ibid.

<sup>39</sup> Ibid at [47].

<sup>40</sup> Ibid.

at other properties in Queensland does not mean that this particular house was not owned jointly. The evidence of Mr Fung is not necessarily consistent with the joint endeavour case however, given the passage of time between the conversation and his evidence in court, I do not place a lot of weight on his recollection.

- [50] In my view the objective evidence favours the plaintiff's case and I find that the property was held as a joint endeavour in accord with the respective shareholdings in Bright Shipping."

### **Consideration of the trial judge's reasons**

- [52] The submissions for Mr Wu support the reasoning of the trial judge, and need not be detailed here. The submissions for Mr Yu are that the trial judge upheld a case which had not been pleaded and which lacked a proper evidentiary foundation.
- [53] It is submitted that there was no pleading that the amount of AUD 920,000 transferred from Bright Shipping to Mr Yu's account was, in part, the money of Mr Wu. That submission cannot be accepted. In paragraph 5A of the statement of claim, it was pleaded that the two men agreed that money would be transferred by Bright Shipping to an account held by Mr Yu, to be used for, amongst other things, the purchase of a house to be held in the shares of 60/40 in Mr Wu's favour. The submission seems to be that the case was not pleaded as one in which there was a formal resolution to pay that amount to Mr Yu's account, by way of the distribution of dividends to the two shareholders. Be that as it may, Mr Wu's case was sufficiently clear: the parties had agreed that this amount would be paid by Bright Shipping to Mr Yu's account for the purpose of buying a house that would belong to both of them. On that basis, there was a trust attaching to the money in Mr Yu's account and in turn to the house. The critical question raised on the pleadings was whether the parties had so agreed, or instead had agreed that this would exclusively be Mr Yu's money.
- [54] As the trial judge said, this question had to be answered by reference to the facts and circumstances, as they were established by what her Honour described as the objective evidence.
- [55] Yet despite the trial judge's criticisms of Mr Wu as a witness, her Honour seems to have been persuaded by his evidence, as appears from paragraph 48 of the Reasons, without a substantial body of objective evidence which supported it. The objective evidence which her Honour had in mind seems to have been Mr Wu's request for the floorplans, the use by the Wu family of their own furniture and the way in which the parties shared the expenditures of the household. I agree that they were relevant facts and circumstances to be considered. But in my respectful opinion, there were other matters which were important and which, it appears, were not considered.
- [56] It must be accepted that Mr Yu failed to establish a clear path of funds from Pan Union through Bright Shipping to his account, which would have demonstrated that this money was at all times distinctly his property. But Mr Yu's case did not have to go that far: it was sufficient if, on the balance of probabilities, the two men intended that Mr Yu would receive this money out of Bright Shipping as his own funds. In his favour were the facts that undoubtedly Pan Union had received USD 2 million, and that he was an 80 per cent shareholder in that company. And

although the documentary evidence was incomplete, it sufficiently appeared that Pan Union had transferred that amount (or something near to it) to Bright Shipping in late 2008. There were two payments in November 2008 which were evidenced by contemporaneous bank documents. Then there was the payment by Bright Shipping back to Pan Union on 18 December 2008 in the sum of USD 2 million. The only explanation for this payment came from Mr Yu. He said that this was a repayment of USD 2 million which had been paid to Bright Shipping, because the funds needed to be in the hands of Pan Union at the time it was seeking approval from what he described as the Qingdao Industry and Commerce Bureau for the change in shareholding in the company whose shares were sold.<sup>41</sup>

- [57] There was nothing unlikely in that explanation. The fact that the money paid by Bright Shipping was exactly USD 2 million indicated that, as Mr Yu testified, all of that sum had been paid by Pan Union to Bright Shipping. In turn, that explanation made more persuasive Mr Yu's evidence that the monies paid in December 2008 to Bright Shipping were derived from Pan Union's sale to the Korean company. The credibility of Mr Yu was criticised by the judge, but his explanation of the payment of USD 2 million to Bright Shipping was not unlikely and it was uncontradicted by other evidence.
- [58] Consequently there was substantial support in the objective evidence for a finding that, by the end of 2008, Bright Shipping had received almost all of the funds which Pan Union had derived from its sale. Because of the proportions in which Pan Union was owned by the two men, they could well have decided that, at some point, Mr Yu should receive from Bright Shipping some of what could have been regarded as his share of those funds.
- [59] Importantly, it was not only the purchase price of the Gagarra Street property which was transferred by Bright Shipping to Mr Yu. The amount transferred was AUD 920,000, and the purchase price was AUD 770,000. On Mr Wu's case, most of the balance must have belonged to him; yet Mr Yu seems to have been allowed to deal with it as he pleased.
- [60] Moreover, the evidence established that Mr Yu was paid further amounts by Bright Shipping in early 2011. I will discuss these payments below, in considering the appeal against the judgment in the counterclaim. One of them was the amount of AUD 415,085, for which the evidence did not indicate any commensurate payment to Mr Wu. This supported the proposition that the parties sometimes agreed that one or the other would receive a particular distribution from Bright Shipping, without a commensurate dividend being paid to the other.<sup>42</sup>
- [61] The fact that Mr Yu saw fit to borrow from Westpac by mortgaging the house in 2011 is significant, because the parties had not fallen out by this stage; rather, this appears to have occurred during the period of mutual trust, as the judge described. Mr Yu's evidence was that, when he was looking to borrow this money, he had discussions with finance brokers at the Gagarra Street property. He said that Mr Wu was present and raised no objection to the idea of the mortgage.<sup>43</sup> When Mr Wu was asked about this in cross-examination, he agreed that there was an occasion

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<sup>41</sup> T6-55-58.

<sup>42</sup> As is discussed below, on the judge's findings in Mr Yu's favour on his counterclaim, this was in all respects Mr Wu's money which he received from Bright Shipping.

<sup>43</sup> T7-10-12.

when a finance broker came to the property in 2011, about a loan from Westpac. Without clearly recalling the discussion, Mr Wu appeared to suggest that the intention was to raise money for a joint business venture. Yet in his pleading, he alleged that the house had been mortgaged without his consent, and was an unconscionable departure from the parties' common intention. No finding was made by the trial judge about the mortgage. However, if the Westpac facility was obtained by Mr Yu for his benefit only (there being no evidence of what might have been the joint business venture as claimed by Mr Wu and Mr Wu not having been a party to the transaction with Westpac), the fact that Mr Yu felt free to mortgage Gagarra Street, and to not keep the transaction from Mr Wu, is telling. The fact that Mr Wu had not seen the house when it was purchased is also telling. If he was to have been the majority owner of the house, it is extraordinary that he would not be consulted about the purchase before an unconditional contract was made.

- [62] The onus was upon Mr Wu to establish that he was entitled to the part ownership of a house of which Mr Yu was the registered owner. He sought to discharge that onus with scant documentary evidence, most particularly as to the affairs of Bright Shipping, notwithstanding that he was its chairman. He offered no satisfactory explanation for why the house would be in the registered ownership of Mr Yu, if the intention of the parties was that they should be co-owners. Mr Wu was in China when Mr Yu inspected the house and contracted to buy it. However a purchaser, under the standard REIQ form of contract which was used in this case, has the right to nominate another as the transferee,<sup>44</sup> and in that way the two men could have become registered as the owners, had that been their intention. A solicitor was acting on Mr Yu's instructions for this transaction.
- [63] In this case this Court is as well placed as the trial judge to assess whether Mr Wu proved his case. No party was a reliable witness or more reliable than any other. The events occurred many years prior to the trial and it is evident from the transcript that there were often occasions, during the testimony of Mr Wu and Mr Yu, where there was something of a disconnect between the question and the answer. Ultimately the case for Mr Wu relied upon the fact that the money had come from Bright Shipping, from which it was not argued that the property belonged to that company, but that the parties were likely to have agreed that a house purchased with that money would belong to them in the respective proportions of their shareholdings. But that was not a persuasive argument when the evidence established that Bright Shipping held a large sum which it had received from Pan Union, most of which effectively belonged to Mr Yu, and where there was money which was paid by Bright Shipping to Mr Yu (including some of that paid in March 2010), which Mr Yu was allowed to deal with as his own money.
- [64] In my conclusion the evidence did not establish Mr Wu's case upon any of the alternative legal bases which were pleaded. In my respectful opinion, the trial judge should have dismissed Mr Wu's claim for a share of the proceeds of sale of the property.

### **The appeal by Mr Wu and Ms Gao**

- [65] One of the counterclaims by Mr Yu (and Ms Zhao) was that he had lent an amount of AUD 274,000, which he transferred to accounts operated by Ms Gao on

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<sup>44</sup> See *Re Davies* [1989] 1 Qd R 48 at 53 per McPherson J; *Trust Co of Australia Ltd v Commissioner of Stamp Duties* (2001) 47 ATR 418 at 420 [1], [7] and 425 [22]; [2001] QCA 278 at [1], [7] and [22].

25 February 2011. This amount was paid by Mr Yu from AUD 549,900.85 which was transferred to him by Bright Shipping three days earlier. It was paid by transfers to Ms Gao's accounts of AUD 100,000, AUD 84,000 and AUD 90,000. This counterclaim was dismissed, and there is no challenge to the trial judge's finding that these payments to Ms Gao's account were not by way of a loan, but instead were monies which had been transferred from Bright Shipping "for the purpose of immigration paperwork and living expenses",<sup>45</sup> so that Ms Gao could show that she had substantial monies invested in Australia. That finding had support in the evidence that, at the same time, Mr Wu paid AUD 100,000 into an account of Ms Zhao, with the consequence that both women were able to invest AUD 100,000 in a company called Auschina Investments to prove that they had a business interest in Australia. The correctness of that finding is not challenged, but it may be noted that the amount transferred to Ms Gao's accounts was approximately one half, rather than 60 per cent, of the monies which were transferred by Bright Shipping.

- [66] Mr Yu and Ms Zhao's other counterclaim was that an amount of AUD 392,676.13, transferred by him through several accounts to an account held by Ms Gao on 31 July 2012, was a loan to her and Mr Wu. That counterclaim was successful and there is an appeal against the judgment in that sum which was given to Mr Yu.
- [67] Undoubtedly the amount was transferred by Mr Yu to Ms Gao. There is no suggestion that this was a transaction only between them, not involving Mr Wu. Rather, the case advanced by Mr Wu and Ms Gao was that this payment was, in truth, the repayment of a loan which they had made to Mr Yu. The trial judge said that there was no evidence to support a case that this was the repayment of an amount loaned by them.<sup>46</sup> There was no corresponding transfer from Bright Shipping around the time of the transfer of this property and the trial judge said that it was clear that this money came from Mr Yu's account.<sup>47</sup>
- [68] Further, there was independent evidence to support Mr Yu's case that this was not the repayment of an amount which had been owing by him. Mr Fung, the immigration agent, said that, for the visa for which she was applying, Ms Gao needed to demonstrate that she had more than AUD 400,000 in personal assets. Her Honour found that this payment to Ms Gao, which she placed on a term deposit, was "part of the money that was used to show the Department of Immigration that she had substantial assets in this country."<sup>48</sup> Her Honour also found that the interests of Mr Wu and Ms Gao were "interchangeable" and that "[i]t is clear that Wu and Gao were acting together in relation to their financial dealings."<sup>49</sup> In her Honour's view, Mr Wu's explanation for this money made "no sense", whereas the explanation for the transfer of this money by Mr Yu and Ms Zhao was consistent with the evidence of Mr Fung about the visa requirements.<sup>50</sup>
- [69] It is argued that Mr Fung was incorrect in saying that an amount of AUD 400,000 was required for the type of visa for which Ms Gao had applied, because by law the required amount was AUD 250,000. That is a point which was not made at the trial: in particular it was not taken up with Mr Fung in cross-examination. But it is submitted

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<sup>45</sup> Reasons at [61].

<sup>46</sup> Ibid at [65], meaning that there was no independent evidence of this fact.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid at [66].

that this is a legal question, and that indisputably the requirement under the *Migration Regulations* 1994 (Cth) at the relevant time was an amount of AUD 250,000.<sup>51</sup> As it was a matter of law, it could not have been the subject of evidence so that, it is said, there is no injustice in raising it for the first time on appeal.<sup>52</sup>

- [70] However Mr Fung’s evidence went further than saying that the required amount was AUD 400,000. Importantly, his recollection was that he advised Ms Gao that this was the limit.<sup>53</sup> The fact of that advice provided an explanation for an amount of nearly AUD 400,000 being paid by Mr Yu when it was paid. It tended to support Mr Yu’s version that it was paid because he was asked to lend it, rather than, as Mr Wu and Ms Gao argued, because he was repaying money which he had borrowed.
- [71] The relevant pleadings were as follows. Paragraph 50 of the counterclaim alleged that Mr Yu agreed with Mr Wu and Ms Gao to lend them the sum of AUD 415,000, on or about 11 March 2011, and that, pursuant to that agreement, Mr Yu transferred that sum on that date.<sup>54</sup> In response, Mr Wu and Ms Gao denied that such an agreement was made, admitted that the sum of AUD 415,000 was paid by Mr Yu as alleged, but alleged that “the purpose of that transfer was to repay money which had been advanced by [Mr Wu] to [Mr Yu].”<sup>55</sup> However there was no documentary evidence of any earlier payment of AUD 415,000 (or any similar amount) by Mr Wu to Mr Yu and the pleading did not identify an occasion when such a loan had been made. Nor was the evidence of Mr Wu likely to have been persuasive on this point. His evidence-in-chief did not deal with the question, and in cross-examination, Mr Wu said of the payment of AUD 392,676.13 in July 2012, “[t]his is his loan repayment to me.”<sup>56</sup>
- [72] Of course, the sum of AUD 415,085, which was paid by Mr Yu on 11 March 2011, had been paid by Bright Shipping to Mr Yu a few days earlier. But Mr Yu did not say that the payment by Bright Shipping was in some way a loan by Mr Wu to Mr Yu. Rather, his case appeared to be that this was an amount which Mr Yu had drawn from Bright Shipping in order to repay an existing loan.
- [73] Paragraph 52 of the counterclaim pleaded that, on 12 March 2012, the amount of AUD 415,100 was repaid to Mr Yu together with AUD 22,139.29 in interest. The pleading in response was that this was a new loan by them to Mr Yu which, coincidentally, was in the amount of AUD 415,100 together with the interest which was earned on the money during the 12 months in which it had been held in an account of Ms Gao.<sup>57</sup> Mr Yu’s version was the much more likely one.
- [74] Paragraph 55 of the counterclaim alleged that in July 2012, AUD 392,676.13 was transferred by Mr Yu to Mr Wu and Ms Gao. The pleading in response was that this was a “repayment of the sum advanced [in March 2012] less living expenses for the two families and legal expenses incurred on behalf of both families.”<sup>58</sup>

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<sup>51</sup> *Migration Regulations* 1994 (Cth), reg 890.215.

<sup>52</sup> Citing *Water Board v Moustakas* [1988] HCA 12; (1988) 180 CLR 491 at 497.

<sup>53</sup> T9-35.

<sup>54</sup> Counterclaim paragraphs 50 and 51.

<sup>55</sup> Reply and Answer paragraph 36(b).

<sup>56</sup> T3-61.

<sup>57</sup> Reply and Answer paragraph 37.

<sup>58</sup> *Ibid* paragraph 40.

- [75] It can be seen then that the case for Mr Wu and Ms Gao depended upon their allegation that there had been a loan by Mr Wu to Mr Yu, for which Mr Yu's payment, on 11 March 2011, was a repayment. There being no documentary evidence in support of that allegation, and given the unlikelihood that the payment of 12 March 2012 was a fresh advance, I agree with the conclusion of the trial judge that their case was to be rejected. Consequently, when Mr Yu made the payment of AUD 392,676.13, he was not indebted to Mr Wu and Ms Gao; rather, he was lending this money to them.
- [76] Much of the argument for Mr Wu and Ms Gao emphasised weaknesses in the credibility of the evidence of Mr Yu and Ms Zhao. From this it was submitted that the judge ought not to have accepted Mr Yu's testimony on this part of the case. But the judge was strongly critical of all four witnesses, and it was from the course of discussing this counterclaim that her Honour made the comments in the passage which I have set out above at [8].
- [77] For these reasons the appeal against the counterclaim should be dismissed.

### **Orders**

- [78] In CA 10252/18, I would order as follows:
1. Appeal allowed.
  2. Set aside the order made in paragraph 1 of the orders made on 24 August 2018.
  3. Set aside the order made in paragraph 1 of the orders made on 17 October 2018.
  4. Order that the disputed amount held from the sale of the house at 14 Gagarra Street, Eight Mile Plains, together with accretions, be paid to the appellant.
  5. Set aside order number 1 of the orders made on 9 November 2018.
  6. Order that the respondent pay to the appellant his costs of the claim.
  7. Order that the respondent pay to the appellant his costs of the appeal.
- [79] In CA 9479/18, I would order as follows:
1. Dismiss the appeal.
  2. Order that the appellants pay to the respondent his costs of the appeal.
- [80] **BURNS J:** I agree with the reasons of, and the orders proposed by, McMurdo JA.