SUPREME COURT OF QUEENSLAND

CITATION:	*Atia v Nusbaum* [2011] QSC 44
PARTIES:	**AARON ATIA** (Plaintiff) **v** **VIOLET NUSBAUM** (Defendant)
FILE NO/S:	7194 of 2009
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	25 March 2011
DELIVERED AT:	Brisbane
HEARING DATE:	23 August 2010, 31 January 2011, 1 – 4 February 2011, 7 – 8 February 2011
JUDGE:	Boddice J
ORDER:	**The claim is dismissed**
CATCHWORDS:	MORTGAGES – MORTGAGE CONTRACT – WHAT AMOUNTS TO A MORTGAGE – INTENTION OF THE PARTIES – Relevant factors – Where the mother (defendant) lent son (plaintiff) various sums of money over an extended period of time by way of financial assistance –Where the defendant made demand for repayment of moneys owing under a Deed of Mortgage executed in 2003 and registered against real property in the plaintiff's name – Where the plaintiff denies any moneys owing under that mortgage – Where the plaintiff seeks declarations that the mortgage is void, invalid or otherwise unenforceable – Where the defendant counterclaims seeking to enforce the mortgage - Whether the mortgage a sham transaction not legally enforceable between the parties *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524 *Beil v Pacific View (Qld) Pty Ltd* [2006] QSC 199 *Gurfinkel v Bentley Pty Ltd* (1966) 116 CLR 98 *Heydon v The Perpetual Executors, Trustees and Agency*

Company (WA) Ltd (1930) 45 CLR 111

Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451

Ring Row Pty Ltd v BP Australia Pty Ltd & Ors [2005] 224 CLR 656

Sharrment Pty Ltd & Ors v Official Trustee in Bankruptcy (1988) 18 FCR 449

COUNSEL: Sweeney for the plaintiff
Davis, SC and Crawford for the defendant

SOLICITORS: HW Litigation for the plaintiff

ABKJ Lawyers for the defendant

[1] Violet Nusbaum ("the defendant") is an elderly lady. She has one child, Aaron Atia ("the plaintiff") who she raised on her own. Their previous close relationship is no more. They became estranged in 2005. In 2006 the defendant made demand for repayment of moneys owing under a Deed of Mortgage executed in 2003, and registered against real property in the plaintiff's name. The plaintiff denies that any moneys are owing under that mortgage. He seeks declarations that the 2003 mortgage, and a notice of exercise of power of sale issued on 10 June 2009, are void, invalid or otherwise unenforceable. The defendant counterclaims seeking to enforce the mortgage entered into between the plaintiff and herself in 2003.

[2] The proceeding arises out of a history of financial transactions between the plaintiff and the defendant. Both the circumstances in which moneys were provided, and the extent, are in dispute. The plaintiff asserts any financial support was by way of gift, and that the mortgage, and an earlier mortgage executed in 1990, were sham transactions not intended to give rise to enforceable rights. He also relies on misrepresentation and estoppel. The defendant contends all moneys advanced by her to the plaintiff were loans, and the subject of specific agreement by the plaintiff to repay those sums "with interest".

[3] The issues for determination are:

(a) Was the 2003 mortgage a sham transaction not legally enforceable between the parties?
(b) Did the defendant represent she would not enforce that mortgage?
(c) Is the defendant estopped from enforcing the 2003 mortgage?
(d) Is the 2003 mortgage supported by a genuine underlying debt between the plaintiff and the defendant?

Background

[4] The plaintiff was born in Israel in 1963. His parents divorced in 1965. In 1980, the plaintiff and defendant emigrated to Australia. The plaintiff commenced studying medicine at Monash University. He graduated in 1987. In 1990, he moved to the Gold Coast to set up practice as a medical practitioner. He has lived on the Gold Coast since then, apart from extended periods between 1997 and 2002 when he lived in the United States of America for approximately nine months a year.

[5] The defendant is 73 years of age. She married the plaintiff's father in Israel in 1956. Correspondence tendered during the trial indicates substantial ill feeling on the defendant's part towards the plaintiff's father. A subsequent marriage also resulted in divorce. During this time the defendant, although of very limited means, provided well for the plaintiff.

[6] In the late 1970s, the defendant arranged to marry an Australian man, Joseph Wendka. She did not want the plaintiff to undergo compulsory military service in Israel and this marriage protected the plaintiff from such service. By 1980, the plaintiff and defendant were living in Melbourne with Joseph Wendka. He passed away a few months after that marriage, leaving a modest estate to the defendant. The defendant remained of modest means, living as a pensioner in housing accommodation in Melbourne, until the late 1980s. Throughout this time she maintained the plaintiff whilst he completed his university degree. Although of limited means, the defendant assisted the plaintiff financially to purchase two properties in his own name in Victoria in 1988 and 1989. The defendant sold a flat she had inherited from her family in Israel to assist the plaintiff in these purchases.

[7] In the late 1980s, the plaintiff decided to move to Queensland. By that time the defendant had met Jacob Nusbaum. The plaintiff moved to the Gold Coast in 1990. The defendant and Mr Nusbaum followed shortly thereafter. They purchased a residence at 10 Cleland Crescent, Florida Gardens. In May 1990, they married. This marriage was also of short duration as Mr Nusbaum passed away in June 1990. He, too, left his estate to the defendant. His estate was sizeable. It included real property and cash. The total assets exceeded $1.8 million.

[8] On 11 July 1990, the plaintiff entered into a contract to purchase a residential property at 8 Kilkenny Court, Sorrento ("Kilkenny Court"). That purchase was completed on 8 August 1990. The purchase price was $270,000. The plaintiff obtained a loan from Citibank Savings Limited. This loan was insufficient to meet the purchase price and the defendant borrowed $70,000 which she provided to the plaintiff to allow him to complete the purchase. On 2 November 1990, the plaintiff executed a mortgage over Kilkenny Court in favour of the defendant ("the 1990 mortgage"). Around the time of its execution, the defendant caused $190,000 to $195,000 to be paid to Citibank to discharge its mortgage. That mortgage was released on 19 November 1990. On the same day, the 1990 mortgage, which was stated to have a consideration of $500,000, was registered on Kilkenny Court.

[9] Shortly after registration of the 1990 mortgage, the plaintiff and defendant fell into dispute. On 4 January 1991, the plaintiff signed correspondence indicating a wish to relinquish all rights of ownership to Kilkenny Court and to be released from the 1990 mortgage. However, the parties reconciled and no further action was taken.

[10] In April 1991, the defendant purchased a vacant block of land at Robina. It was to be used to construct a medical clinic to be operated by the plaintiff. To fund the purchase, the defendant sold commercial premises in Victoria she had inherited from Mr Nusbaum. No medical clinic was constructed at Robina. Instead, the plaintiff opened a medical clinic in West Burleigh in about 1991 or 1992.

[11] The plaintiff and defendant remained on good terms until 1995. They again fell into dispute. The defendant instructed her solicitors to take action to enforce the 1990 mortgage. A letter of demand was sent to the plaintiff as was a subsequent notice of

repayment. Shortly after service of the notice of repayment, the plaintiff advised he intended to comply with the defendant's request. There was subsequent correspondence. On 21 June 1996, the defendant filed a plaint in the District Court of Queensland at Southport seeking recovery of possession of Kilkenny Court pursuant to the 1990 mortgage. Further correspondence ensued. On 10 November 1996 the plaintiff indicated he wished to discuss the steps necessary to pay out the 1990 mortgage. Before that request was actioned, the parties reconciled. No further action was taken in those court proceedings.

[12] In late 1997, the plaintiff decided to travel to the United States of America to further his medical training. He remained there for extended periods between 1998 and late 2002. He then returned to Australia to establish a cosmetic medical practice. Whilst in America, the plaintiff developed an interest in share trading. He traded actively throughout his time in America. In 1998, the defendant transferred large sums of money to the plaintiff in America.

[13] After the plaintiff returned to Australia he applied to the Bank of Queensland for finance. It requested a first mortgage over Kilkenny Court. On 5 June 2003, the plaintiff and defendant entered into a new mortgage ("the 2003 mortgage"), with a consideration of $1,000,000. The plaintiff also executed a document headed "Particulars of Loan" in that amount. The Bank of Queensland mortgage was registered on 27 June 2003. At that time, the 1990 mortgage was released. The 2003 mortgage was registered on 23 July 2003. It was a second mortgage.

[14] On 15 October 2005, the plaintiff married in Hawaii. Whilst the defendant had travelled to Hawaii with the plaintiff and his fiancé, she did not attend the wedding. A dispute had arisen on the eve of that wedding. The plaintiff and defendant have remained estranged ever since.

[15] In April 2006, the defendant made demand for repayment of the 2003 mortgage. The plaintiff asserted the defendant was not entitled to rely upon the 2003 mortgage due to the existence of collateral agreements. The defendant subsequently issued further notices, including a Notice of Exercise of Power of sale on 10 June 2009. The plaintiff commenced these proceedings on 7 July 2009.

Pleadings

[16] The pleadings are voluminous. There have been numerous amendments. In essence, the plaintiff alleges any moneys advanced by the defendant had been "a gift" and that she said she would never seek repayment. Further, whilst he signed a number of loan and other documents purporting to give the defendant rights over Kilkenny Court, prior to execution of those documents, the defendant indicated the signing of the documents was to protect his assets and she would never use the documents in the future. The plaintiff says he relied upon these statements, and the defendant is estopped from enforcing the 2003 mortgage. He denies the defendant has at any time lent him moneys to the value of $1,000,000.

[17] The defendant denies ever making the statements attributed to her. She alleges all moneys advanced by her to the plaintiff were subject to a specific agreement that the plaintiff was required to repay them, and the plaintiff agreed to do so. She alleges she advanced the following sums:

(a) Between 1982 and 1990, $128,277.64.

(b) In 1988, $12,539.07 for a property at Moorabbin, Victoria.

(c) In 1989, $90,930.76 for a property at Glen Waverley, Victoria.

(d) In or about August 1990, $70,000 for the purchase of Kilkenny Court.

(e) In October 1990, $1,652.50.

(f) In or about November 1990, $190,000 - $195,000 to payout the Citibank mortgage on Kilkenny Court.

(g) Between November 1990 and February 1998, sums totalling $9,074.41.

(h) In February and April 1991, $8,300.

(i) Between November 1990 and 1994, sums totalling $70,000.

(j) Between August 1994 and 2003, furniture and other goods worth $29,790.

(k) In about 1997, $170,000 cash.

(l) In 1998, $134, 914.75 whilst the plaintiff was living in America.

Evidence

[18] The plaintiff gave evidence that the defendant was a loving, dedicated mother who willingly gave financial assistance to him. That assistance was never provided on the basis of an agreement he would repay those sums. His mother "gave happily" and was very proud of him.[1] The defendant had given him $12,539.07 in 1988 to assist in the purchase of a property in his name at Moorabbin in Victoria, $90,930.76 in 1989 to assist in the purchase of a property in his name at Glen Waverley in Victoria and $70,000 to assist with the purchase of Kilkenny Court. She had subsequently paid $190,000 to discharge Citibank's mortgage. She also gave him other sums. All these sums were gifts. The plaintiff did not request the defendant pay out the Citibank mortgage. The defendant had constantly raised the issue with him.[2]

[19] The plaintiff said he executed the 1990 mortgage in the following circumstances. He had formed a relationship with Evelyn Thompson. The defendant was unhappy with that relationship. She considered Evelyn to be "trash" as she was not Jewish, and to be a "gentile gold digger".[3] The defendant raised concerns with his then solicitor friend, Myles Kehoe, as to the need to protect the plaintiff's assets from claims by "gold digging" females and disgruntled patients.[4] Mr Kehoe suggested a "pretend" mortgage over Kilkenny Court, for a sum higher than its value.[5] Advice about asset protection was sought from other professionals before again meeting Mr Kehoe to arrange the mortgage. Prior to signing the 1990 mortgage, the defendant

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1 T2-51/52.
2 T2-60.
3 T2-63/55.
4 T2-65/50.
5 T2-66/35; 2-68/30.

said "I will never use it against you. … It's only for your protection".[6] The plaintiff signed the document on the understanding it was a sham mortgage registered for asset protection purposes.

[20] The plaintiff said the defendant sought recovery of Kilkenny Court in early 1991. An argument arose as the defendant discovered he had been communicating with his father.[7] The plaintiff signed a letter dated 4 January 1991 stating he wished to relinquish all rights of ownership of Kilkenny Court and wanted to give the defendant full possession to that property.[8] A friend of the defendant, Mr Hartman, asked him to sign the document. Mr Hartman dictated its terms.[9] Shortly after signing it, the plaintiff and defendant reconciled their differences.

[21] Later that year, the defendant agreed to buy land in Robina. A clinic was to be built on that land. The defendant sold commercial properties in Victoria to fund its purchase. At the same time the plaintiff sold his two Victorian properties. He gave the surplus funds to his mother.[10] He did not build the clinic in Robina. Instead, he opened a clinic at leased premises in West Burleigh. He financed it himself.[11]

[22] The plaintiff said there had been a falling out with the defendant in late 1994 which resulted in the defendant again seeking recovery of Kilkenny Court. He had told the defendant he was engaged to Evelyn.[12] He sent a letter dated 13 October 1995 indicating an intention to comply with the defendant's request to surrender Kilkenny Court.[13] The defendant ultimately filed a plaint seeking recovery of possession of Kilkenny Court. Subsequently, he sent a facsimile on 10 November 1996 stating he would like to discuss the steps required to pay out the mortgage.[14] These actions were taken as he did not believe it would progress and thought "that madness will have to stop".[15] Shortly thereafter, the parties reconciled and Kilkenny Court was not transferred to the defendant.

[23] The plaintiff said that after he travelled to America the defendant transferred sums totalling $134,959 to his bank account in that country. He had started to engage in share trading and the defendant wished him to purchase shares on her behalf. These sums were ultimately lost.[16]

[24] The plaintiff said that upon his return to Australia in 2003, he sought finance from the Bank of Queensland. It requested a first mortgage over Kilkenny Court. The defendant arranged for her solicitor, Mr Kolsky, to prepare the 2003 mortgage. This mortgage, like the 1990 mortgage, was for asset protection purposes only. He told Mr Kolsky of that arrangement. He executed the mortgage and a document headed "Particular of Loan". At no stage did his mother advance him $1,000,000. Prior to

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6 T2-70/42.
7 T4-52/20.
8 Exhibit 54.
9 T4-55/45.
10 T4-59/20.
11 T4-60/40.
12 T4-88/30.
13 Exhibit 60.
14 Exhibit 108.
15 T4-92/30.
16 T5-12/30-50.

executing these documents, the defendant said she would "never use it" and it was "only for your protection".[17]

[25] The plaintiff said that in early 2005 he had discussions about asset protection with Grants Lawyers on the defendant's behalf.[18] He had formed a new relationship with Alison, a divorcee who was not Jewish. The defendant said "she looks like a gold digger".[19] The defendant was worried about her Will, and about the fact Alison was pregnant.[20] In October 2005, the plaintiff, Alison and the defendant travelled to Hawaii. The plaintiff and Alison were married there. Prior to the wedding, a dispute arose between Alison and the defendant. The plaintiff told the defendant not to attend the wedding.[21] They have been estranged ever since.

[26] The plaintiff said that between the purchase of the property in Robina and the cessation of any relationship with the defendant in 2005, he regularly made payments on her behalf, for expenses, including vitamins. The defendant had sold commercial properties in Victoria in order to purchase the land at Robina, and had lost income. The plaintiff agreed to compensate the defendant for that loss of income by assisting in her living expenses.[22]

[27] The plaintiff said that when he received a letter of demand from the defendant in April 2006, seeking to enforce the 2003 mortgage, he instructed Grants Lawyers to deny liability under the 2003 mortgage. Reference was made to the defendant having agreed to execute a Will establishing a testamentary trust which gifted her interest in the 2003 mortgage to the trustee of that trust.[23] That reference related to earlier advice received from Grants Lawyers as to asset protection.[24]

[28] The plaintiff's evidence in relation to the circumstances surrounding the signing of the 1990 mortgage was supported by Myles Kehoe. He gave evidence he had been approached by the defendant expressing concern that the plaintiff's then girlfriend, Evelyn, was "only after Aaron for his money" and requesting he find another girlfriend for the plaintiff. The defendant was also concerned about recent newspaper articles concerning doctors being sued by disgruntled clients.[25] At a second meeting, the defendant expressed concern about the hours the plaintiff was working and the pressure of the Citibank mortgage and wanted to pay out that mortgage. Mr Kehoe asked if the defendant required a mortgage over the plaintiff's property. The defendant responded "I didn't need a mortgage, I love my son and I want to help him out and I am gifting the money to him. I don't need a mortgage to protect it".[26] The defendant again expressed concerns about claims from disgruntled clients. Mr Kehoe suggested a "pretend mortgage" be put on Kilkenny Court. The defendant was prepared "to sign a document saying she wouldn't use the mortgage for any purpose, that she only wanted it for asset protection reasons".[27] The plaintiff said that was not necessary.[28] Mr Kehoe suggested "an

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17 T5-18/20-40.
18 T5-20/50.
19 T5-19/25.
20 T5-21/5.
21 T5-28/40.
22 T4-87/15.
23 Exhibit 81.
24 T5-31/5.
25 T4-63/45.
26 T4-64/30-50.
27 T4-65/10.

arbitrary figure of $500,000 that would take away any equity … for a few years in the future".[29] The defendant also raised de facto claims. As he had no experience of family law, Mr Kehoe recommended they seek advice from Hopgood & Ganim Lawyers.

[29] Mr Kehoe organised to pay out the Citibank mortgage. He prepared the 1990 mortgage.[30] It was always designed as an asset protection measure.[31] He knew there was no money owing.[32] It was his general practice to send mortgages to independent solicitors "to have things witnessed".[33] Handwritten changes which appeared in cl 8 of the 1990 mortgage, changing payable "on demand" to "payable within six months of demand in writing", were made by him "maybe to give the appearance of a valid mortgage".[34] The release of the Citibank mortgage and the 1990 mortgage were both lodged for registration on the same day.[35]

[30] Peter Hickey, an accountant, first met the plaintiff in 1990. He assisted in his application for finance from Citibank. The defendant made up a shortfall in the purchase price.[36] The plaintiff introduced the defendant to him in 1991. Mr Hickey had numerous conversations with the defendant where she expressed concern as to the relationships the plaintiff was forming and risks to his finances. The defendant's major concern was protecting the plaintiff.[37] Both the plaintiff and the defendant were concerned about asset protection.[38] The defendant was concerned about protecting the plaintiff from his then partner, Evelyn.[39] Mr Hickey did not remember the plaintiff ever expressing any concern about keeping his assets from Evelyn. He did not know the defendant had a registered mortgage over Kilkenny Court.[40] In all his discussions with the defendant, he understood moneys advanced by the defendant to assist the plaintiff with the purchase of Kilkenny Court were in the nature of a gift with no intention to repay.[41]

[31] Evelyn Thompson first met the plaintiff in 1990. She was aged 18. She met the defendant in late 1990. The defendant expressed a wish that any partner of the plaintiff be Jewish. She was prepared to make a substantial donation to the synagogue if Ms Thompson agreed to have a speedy conversion to Judaism.[42] The defendant had "given up a lot" for the plaintiff and expected him "to reciprocate" . She expected him to be at her "beck and call".[43] The defendant was very unhappy when the plaintiff and Ms Thompson became engaged and left a message that the plaintiff and her "rotted in hell with my God".[44]

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28 T4-81/35.
29 T4-65/15.
30 T4-70/5.
31 T4-66/40.
32 T4-73/20.
33 T4-66/45.
34 T4-68/45.
35 T4-79/5.
36 T6-57/25.
37 T6-63/35-5; 6-64/30.
38 T6-67/15.
39 T6-68/30.
40 T6-69/50.
41 T6-66/20.
42 T6-31/5.
43 T6-31/40.
44 T6-37/20.

[32] Ms Thompson, who acted as the plaintiff's practice manager, said the defendant did not contribute to the initial set up of the medical practice. However, the practice paid many of the defendant's expenses from 1992 to 1998.[45] She was not privy to all of the plaintiff's financial affairs.[46] She did not know if the plaintiff sought advice as to their de facto relationship. There was a general discussion with the plaintiff about a prenuptial agreement.[47] The plaintiff had showed her a magazine article about a movie star who had a prenuptial agreement.[48]

[33] Gad Kolsky, a solicitor, was retained by the defendant to prepare the 2003 mortgage. He was told Kilkenny Court was worth $400,000 or $500,000, that the plaintiff was obtaining funds of $300,000 and the defendant had "given her son $330,000".[49] He advised it was not in the defendant's interest to agree to forgo her existing security as first mortgagee and accept a second mortgage on Kilkenny Court. Notwithstanding that advice, he was instructed to prepare the 2003 mortgage with the consideration being $1,000,000. The defendant nominated the amount.[50] It was never suggested it was for asset protection. He was drawing a valid mortgage, although he could not see any commercial reason for the transaction. He recalled differing dynamics between the defendant, a seasoned commercial mind "who seemed to be very concerned in plotting her way through life", and the plaintiff, who he considered to be "a very commercially naïve person".[51]

[34] The defendant gave evidence she decided to emigrate to Australia as the plaintiff approached adulthood. Prior to doing so she married Joseph Wendka. He died a few months later. Mr Wendka left her his estate. It included cash, jewellery, superannuation and a car. The defendant also found $60,000 cash secreted in the floor area of the car. That sum was not declared on the inventory for the estate. It was found after that inventory had been executed by her. She also made a dependency claim in relation to his death. She received $150,000 to $200,000.[52]

[35] The defendant advanced money to the plaintiff throughout his university education and beyond. As she had come from a poor family and knew "what every cent means" she told the plaintiff any money advanced had to be given back to her. The plaintiff responded he would do so, with interest.[53] In 1988 and 1989, the defendant advanced money to the plaintiff to assist in the purchase of two properties in Victoria. The defendant sold a property in Israel to fund it. She had inherited that property from her mother.[54] The defendant told the plaintiff "whatever I give to you, you have to give back to me". He agreed to do so.[55] When the plaintiff sold his two Victorian properties, she never received any money back from them.

[36] In 1990, the defendant married Jacob Nusbaum. They had met some years earlier when the defendant was undertaking cleaning work. Prior to their marriage, they purchased a property in Cleland Crescent, Southport. Mr Nusbaum died "a few

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45 T6-38/25.
46 T6-43/30; 6-47/10.
47 T6-44/20.
48 T6-45/10.
49 T 2-45/5.
50 T2-46/40.
51 T2-47/5.
52 T8-5/30.
53 T8-8/30.
54 T8-12/40-50.
55 T8-14/15.

months" after their marriage.[56] He left her several properties and other assets, including cash. She also found $150,000 cash and $50,000 US dollars secreted in his flat. In mid 1990, the plaintiff decided to purchase Kilkenny Court. He told the defendant he needed $70,000 to assist in that purchase. The defendant agreed to help. She borrowed money to do so, as Mr Nusbaum's estate was still being finalised at the time. The defendant also provided the plaintiff with furniture and other moneys.[57] She paid for some repairs on Kilkenny Court.[58]

[37] Later in 1990, the plaintiff told the defendant he was very exhausted working two jobs. He asked if she could pay out the Citibank mortgage on Kilkenny Court.[59] The defendant went to see a solicitor, Robert Kennedy of Robinson & Robinson, Solicitors. She told Mr Kennedy she had lent the plaintiff "a lot of money" and that he now wants her to pay out the mortgage. Mr Kennedy advised that if she wished to protect the money, she should "make registered mortgage".[60] The defendant spoke to the plaintiff. They added up all the moneys she had advanced him and "it came to $500,000".[61] The plaintiff agreed to a mortgage.[62]

[38] A second meeting was held with Mr Kennedy. The plaintiff attended this meeting. The plaintiff suggested the defendant and he become joint proprietors of Kilkenny Court. Mr Kennedy recommended against that course. The plaintiff and the defendant again discussed the moneys advanced to the plaintiff. The plaintiff was asked if this is right, and replied "more or less".[63] A mortgage was prepared by Robinson & Robinson and registered on Kilkenny Court. The defendant paid the mortgage costs.[64] The plaintiff asked that the mortgage not have any interest. The defendant agreed.[65] The defendant signed a document directing the payment of $190,000 to discharge the Citibank mortgage.[66] The defendant believed she paid out the Citibank loan after the defendant had signed the mortgage.

[39] The defendant denied the 1990 mortgage was a sham transaction. It was a genuine security. The figure of $500,000 was an estimate of the moneys advanced by her over her son's education and following years. That sum was agreed to by the plaintiff. The defendant said Evelyn was too young for the plaintiff but denied saying other unpleasant things about Evelyn. She denied ever raising the issue of asset protection with the plaintiff.[67] She denied contacting Myles Kehoe or ever discussing asset protection with him. She also denied seeing other legal practitioners in respect of asset protection.

[40] The defendant said her relationship with the plaintiff became strained after she found letters from his former girlfriend. They argued and her finger was broken. The police were called. The breakdown in their relationship was not because the plaintiff had been in contact with his father. The defendant contacted Mr Hartman.

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56 T8-17/20.
57 T8-19/40.
58 See exhibits 133-138, exhibits 140-149.
59 T8-30/5.
60 T8-30/40.
61 T8-31/5.
62 T8-31/20.
63 T8-32/55.
64 Exhibit 139.
65 T8-34/20.
66 Exhibit 207.
67 T8-36/10.

She told him she wanted her money back. He said he would speak to the plaintiff. The plaintiff then signed the letter dated 4 January 1991.[68] A few weeks later, the plaintiff and defendant reconciled. At that time, the plaintiff asked the defendant to pay an outstanding debt. The defendant gave him a cheque for $7,000.[69] She later gave him a further $1,000.[70] At the time of giving the plaintiff these moneys, the defendant told him he had to give the money back to her. The plaintiff agreed.[71]

[41] The defendant said after this incident, the plaintiff indicated an ambition to open his own medical clinic. A property at Robina was located and she agreed to purchase it. She sold commercial properties she had inherited from Mr Nusbaum to fund that purchase. She suffered a loss of income as a result. The plaintiff agreed to pay her future expenses to compensate for that loss. The plaintiff also signed various loan agreements acknowledging moneys advanced by her. The plaintiff subsequently established a clinic at West Burleigh. During this time and subsequent to the establishment of the clinic, the defendant paid various sums on the plaintiff's behalf. The plaintiff agreed to repay those sums.

[42] The defendant accepted her relationship with the plaintiff had had difficulties from time to time, but denied those difficulties stemmed from her inability to accept a non-Jewish partner and anger that the plaintiff had sought to keep in contact with his father. The defendant and plaintiff fell out in the mid 1990s because the plaintiff had been abusive, not because of Evelyn. The defendant instructed solicitors to make demand under the 1990 mortgage as she wanted her money back.[72]

[43] The defendant said the plaintiff travelled to America in the late 1990s. Prior to leaving she advanced him $170,000 in cash. The plaintiff agreed to pay her back. The cash moneys were derived from the moneys the defendant found secreted in Mr Nusbaum's flat after his death.[73] These moneys were not declared on his estate's inventory. They were located after the inventory was completed and she provided the moneys to the solicitor handling the estate. She later loaned the plaintiff a further $134,959.00. She did not ask him to buy shares.[74] These moneys, together with other sums advanced by her in the period from 1998 to 2003, were included in the sum of $1,000,000 secured by the 2003 mortgage.

[44] The defendant said the 2003 mortgage had been entered into after the plaintiff requested she allow Bank of Queensland to become first mortgagee on Kilkenny Court. This placed her at significant risk in relation to recovery of her funds. She went to see Mr Kolsky. She said the $330,000 referred to in Mr Kolsky's letter related to the further moneys advanced to the plaintiff in relation to America.[75] She only agreed to the second mortgage on the basis the amount of the mortgage be increased to reflect the additional moneys advanced by her to the plaintiff since the 1990 mortgage. The plaintiff agreed to the figure of $1,000,000.[76]

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68 Exhibit 54.
69 Exhibit 150.
70 Exhibit 151.
71 T8-57/15.
72 T9-4/50.
73 T9-11/35.
74 T9-12/50.
75 T9-61/45; T11-50/30.
76 T9-66/40.

[45] The defendant said she engaged solicitors to prepare the 1990 and 2003 mortgages to protect her financial interests. She denied ever seeking advice from Grants Lawyers.[77] She also denied caring whether the plaintiff's partner was of Jewish faith, or about protecting the plaintiff's assets.[78] The defendant agreed she had executed a Will in 2005 in which she referred to having "given" the plaintiff large sums of money. The word "given" did not mean the money was a gift.[79] The various loan agreements were prepared by her. She did not say "these are for your protection".[80]

[46] Robert Kennedy, a solicitor, gave evidence he prepared the 1990 mortgage. Whilst he could not recall the circumstances of the transaction, his usual practice was to prepare the mortgage documentation. He could not recall an instance where a mortgage had been prepared by the mortgagor's solicitors. He accepted that correspondence from Shatin Bernstein in Victoria suggested he was acting in an agency situation. The amount of $500,000 was specified by Shatin Bernstein. The clauses of the mortgage were consistent with clauses prepared by him in such circumstances. To his knowledge, the mortgage represented a genuine security for the advance of $500,000.

[47] Murray Hartman, a retired art collector and dealer, gave evidence he has had both social and commercial dealings with the defendant. He assisted with maintenance around Kilkenny Court. He paid tradesmen on behalf of the defendant. He did not ever see the plaintiff pay tradespersons.[81] Mr Hartman witnessed the plaintiff's signature on the handwritten document dated 4 January 1991.[82] He did not dictate that document. He was working on the grounds of Kilkenny Court when he was asked by the plaintiff to witness a document.[83] Some years later he was asked by a solicitor to take documents to the defendant.[84] Mr Hartman, on occasions, saw the plaintiff and defendant argue heatedly. He did not understand the words as they were in Hebrew. He recalls on one occasion the plaintiff making a statement, in English, to the effect "you should be in the asylum" or "you should be committed".[85] He has never been privy to any conversations between the plaintiff and the defendant about money owed by the plaintiff to the defendant. He was once asked by the defendant to value some assets. He provided a written valuation.[86] It was for insurance purposes, and on a replacement value in case of fire or theft.[87]

[48] Mr Hartman said he was asked to witness documents on occasions.[88] He also witnessed occasions when the defendant gave the plaintiff money. This was after the plaintiff had commenced practice as a doctor. He was present when the defendant and plaintiff discussed the plaintiff's move from one part of the shopping centre to another. The defendant said she would help the plaintiff.[89] He thought

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77 T9-79/25.
78 T10-9/30-50.
79 T10-54/40.
80 T10-96/35.
81 T9-17/40.
82 Exhibit 54.
83 T9-18/20-50.
84 Exhibit 126.
85 T9-20/10.
86 Exhibit 127.
87 T9-32/30.
88 See exhibits 128 and 132.
89 T9-26/20-40.

Kilkenny Court had been owned by the defendant and she had sold it to her son. Mr Hartman heard the defendant say words to the effect that Evelyn was not Jewish and that the plaintiff was doing the wrong thing living with her. The defendant started screaming. He had never observed the plaintiff demand his own way.[90]

Findings

Generally

[49] Neither the plaintiff nor the defendant impressed me as reliable witnesses. Both left me with the impression they were tailoring their evidence so as to present the other in the worst possible light whilst seeking to portray themselves as being loving and caring to the other.

[50] The plaintiff was keen to portray himself as naïve in commercial matters, and under the control of a dominant mother. Whilst I accept Mr Kolsky found the plaintiff commercially naïve, I did not. I am satisfied he is commercially astute and well aware of the nature and effect of agreements entered into with the defendant.

[51] The defendant also sought to portray herself as commercially naïve. However, I am satisfied she is a commercially sophisticated person who was keen to both nurture and control her only child's future. That said, she impressed me as conscious of the limited means in her earlier life. Notwithstanding the relatively comfortable financial position she found herself in after the death of Mr Nusbaum, I am satisfied she remained acutely aware of the need to retain control of her assets. Her desire to do so is supported by the terms of her 1993 Will, wherein she gave the plaintiff an initial seven year life interest in her estate.

[52] Mr Kehoe did not impress me as either credible or reliable. Contrary to the plaintiff's submissions, this was not a situation where a solicitor was involved in drawing a mortgage on the basis there would be a bona fide indebtedness in the future. On Mr Kehoe's evidence, the mortgage was drafted with the intention of dissuading potential creditors from making a claim on the basis that its registration would falsely evidence a genuine debt underlying a genuine mortgage. By contrast, Mr Kennedy and Mr Kolsky impressed me as careful, methodical, ethical legal practitioners. Mr Hickey also impressed me as a careful and honest professional. I found Mr Hartman and Ms Thompson reliable witnesses.

[53] The plaintiff contended adverse inferences should be drawn against the defendant due to the dilatory way she met her disclosure obligations in the proceeding.[91] Whilst disclosure was not addressed promptly and in accordance with her obligation as required by UCPR and court orders, I am satisfied this was not a deliberate act on her part and that the now disclosed documents were not withheld for forensic purposes.

[54] The plaintiff also contends that adverse inferences should be drawn from the defendant's failure to call Mr Bernstein. I decline to draw any adverse inference from these matters. Mr Bernstein did not draw the 1990 mortgage. Whilst he confirmed to Mr Kennedy the figure for the mortgage ($500,000), his letter specifically stated this was his "instructions". It is now over 20 years since those

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90 T9-29/30.

91 See *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 514.

events and the death of Mr Nusbaum. Mr Kennedy drew the mortgage and gave evidence. His evidence was, naturally, of limited scope having regard to the length of time that had elapsed since those events. Against that background, I am not prepared to draw any adverse inference from a failure to call Mr Bernstein to give evidence.

[55] It is also unsurprising that Mr Whitehead and Michelle Fraser were not called to give evidence. Mr Whitehead's correspondence speaks for itself. Ms Fraser's alleged involvement was very limited, and it is clear from Mr Kolsky's correspondence that the taking of a second mortgage was an issue at the time of execution of the 2003 mortgage. I am not prepared to draw adverse inferences in relation to any failure to call these witnesses.

[56] Similarly, I am not prepared to draw adverse inferences from the plaintiff's failure to call Mr Prescott or other legal practitioners.

[57] The plaintiff also contends the defendant's evidence is inconsistent with the contents of her affidavit filed in this proceeding.[92] I do not accept that contention. It is to be expected that paragraphs in an affidavit filed in interlocutory proceedings will give a truncated version of what occurred compared to that given in evidence over several days, including extensive cross-examination. The differences identified are not of such magnitude as to question the veracity of the defendant's version as to the circumstances of the execution of the 2003 mortgage.

The claim

[58] The plaintiff contends the 2003 mortgage was a sham, not supported by any underlying debt. The term "sham" is used to connote the transaction being a cloak, giving the appearance of one transaction when it masks a different transaction.[93] The plaintiff contends the true transaction was one which the parties intended not to create legal rights and obligations. If that be true, a court will give effect to the true intent of the parties, and not the form thereof.[94]

[59] The plaintiff accepts he executed the 2003 mortgage and the 1990 mortgage. His case is that both mortgages were executed as part of an arrangement first suggested by Mr Kehoe, the genesis being the defendant's concern to protect the plaintiff's assets from claims by future partners or disgruntled patients. The plaintiff says all moneys advanced by the defendant were gifts, and the defendant expressly said she would not enforce either mortgage. The defendant contends both mortgages were genuine transactions, intended by both the plaintiff and defendant to have binding legal effect, and supported by underlying loans from the defendant to the plaintiff.

[60] Resolution of whether the 2003 mortgage was a sham involves a consideration of whether the 1990 mortgage was a sham. Having considered all of the evidence, I am satisfied it was not a sham. I do not accept the plaintiff's evidence, or that of Mr Kehoe's, in relation to the circumstances surrounding the execution of the 1990 mortgage. I accept and prefer the evidence of the defendant. I find the 1990 mortgage represented a legitimate transaction prepared by her solicitor to provide security for debts owed by the plaintiff.

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92 Exhibit 268.

93 See generally *Sharrment Pty Ltd & Ors v Official Trustee in Bankruptcy* (1988) 18 FCR 449.

94 *Gurfinkel v Bentley Pty Ltd* (1966) 116 CLR 98 per Barwick CJ at 108; Windeyer J at 114.

[61] If the 1990 mortgage was a sham, the plaintiff's conduct soon after execution of that mortgage is inexplicable. The mortgage was registered in November 1990. On 4 January 1991, the plaintiff executed the handwritten document witnessed by Mr Hartman. I do not accept the plaintiff's evidence that Mr Hartmann dictated the terms of the document to him. The plaintiff's response to the defendant's demand, as indicated by this letter, is similar to the plaintiff's response to demand being made in 1995. There is no suggestion those responses were dictated to the plaintiff. I accept Mr Hartman's evidence that this document was witnessed by him when the plaintiff called him in from the garden area of Kilkenny Court and asked him to witness a prepared document. I find the plaintiff wrote that letter freely, and of his own volition.

[62] That document did not merely contain a wish by the plaintiff to "relinquish all rights of ownership" over Kilkenny Court to the defendant. It contained a wish "to relinquish the mortgage held by my mother (for $500,000) and to be released from his mortgage free from all incumbrances (sic) …".[95] By its very terms, this document acknowledged the existence and legal effect of the 1990 mortgage. If that mortgage had been a sham, it is inconceivable the plaintiff would have executed a document in this form. I do not accept the plaintiff's explanation for doing so.

[63] Similarly, when the defendant took steps in 1995 to enforce the 1990 mortgage, the plaintiff executed documentation consistent with a bona fide obligation to repay the debt secured by the mortgage. Having initially indicated he would comply with the defendant's request,[96] the plaintiff, after the defendant had instituted proceedings some nine months later, wrote to the defendant's solicitors inquiring as to the steps necessary to "pay" out the 1990 mortgage.[97] This conduct is explicable if the 1990 mortgage was a genuine, enforceable security. It is entirely inconsistent with the plaintiff's contention it was a sham. I do not accept the plaintiff's explanation for sending this correspondence. By now, formal legal proceedings had been commenced by the defendant to enforce the 1990 mortgage. If the mortgage was a sham, it would be expected he would say so. He did not at any time contend it was a sham.

[64] Mr Kehoe's evidence in relation to this transaction is also inconsistent with the contemporaneous documentation. That documentation supports a finding that the 1990 mortgage was prepared by Mr Kennedy, not Mr Kehoe. I do not accept Mr Kehoe drafted the 1990 mortgage. Whilst it is contended the cross-examination of Mr Kehoe was unfair as at that time, the letter from Mr Bernstein's firm to Robinson & Robinson[98] had not been disclosed by the defendant, Mr Kehoe's evidence was clear as to who prepared the mortgage. He gave explanations as to why Robinson & Robinson was involved, namely, that it was his practice to send a mortgagee to an independent solicitor for witnessing of signatures,[99] and reasons for his handwritten amendment to cl 8 of the 1990 mortgage, namely, to give an appearance of legitimacy. I do not accept that evidence.

[65] The suggestion the amendment to cl 8 gave an appearance of legitimacy was specious. Mr Kehoe accepted he had seen many mortgages which were simply

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95 Exhibit 54.
96 Exhibit 60.
97 Exhibit 108.
98 Exhibit 281.
99 T4-66/45.

repayable "on demand". The only reasonable explanation for the handwritten amendment is that Mr Kennedy prepared the mortgage, not Mr Kehoe, and that Mr Kehoe made the amendment so as to provide time for his client to arrange repayment should demand be made by the defendant. If the mortgage had been a sham, there would be no need for time to be given to the plaintiff. However, if the mortgage was a genuine security document, there was good reason to provide time. The making of that amendment is consistent with the mortgage being a genuine security document. It is inconsistent with it being a sham. I reject Mr Kehoe's evidence to the contrary.

[66] I accept Mr Kennedy's evidence that he prepared the 1990 mortgage. Such a finding is consistent with the terms of the mortgage itself, with Mr Kennedy's stated practice, and with the letter from Shatin Bernstein. That letter stated:[100]

> "We are instructed that Mrs Nusbaum has contacted you with relation to the preparation of Mortgage documentation over the Title to the home owned by her son Dr A Atia. According to our instructions the principal sum is to be $500,000.00 and Mrs Nusbaum will instruct you in relation to other terms. Please ensure that the Mortgage documentation is done without delay."
>
> (my emphasis)

By its terms, Mr Kennedy had already been engaged directly by the defendant to prepare the mortgage. Whilst it specified that on "our instructions" the principal sum was to be $500,000, Mr Kennedy was to be responsible for preparation of the mortgage. That documentation is entirely consistent with the defendant's evidence that she instructed Mr Kennedy to prepare the mortgage.

[67] Further, the mortgage was prepared and registered around the time the Citibank mortgage was released from Kilkenny Court. That release occurred after the defendant advanced a large sum of money to discharge the Citibank mortgage. The defendant's letter of instruction to Westpac Bank to pay was dated 13 September 1990. The letter from Shatin Bernstein to Robinson & Robinson was dated 17 October 1990. By that date, Mr Kennedy had already been instructed by the defendant to prepare the mortgage. The mortgage was dated 2 November 1990. The defendant paid Robinson & Robinson on 7 November 1990.[101] The mortgage was registered on 19 November 1990. That the defendant would require preparation and registration of a mortgage in her favour at that time is consistent with the mortgage evidencing a genuine indebtedness by the plaintiff to the defendant.

[68] I find the 1990 mortgage was a genuine mortgage entered into by the parties with the intention it be enforceable in the event of proper demand being made by the defendant. I accept the defendant's evidence that at no stage did she state she would not enforce the mortgage. Her actions in 1990, and in 1995, are consistent with there being no agreement by her not to enforce the mortgage. I reject the plaintiff's evidence, and that of Mr Kehoe, to the contrary. That evidence is inconsistent with the plaintiff's subsequent conduct. It is also inconsistent with the defendant having engaged her own solicitor to prepare the mortgage, and with the handwritten changes made by Mr Kehoe to cl 8 of that mortgage.

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100 Exhibit 281.

101 Exhibit 139.

[69] It is admitted by the plaintiff that the defendant had, as at the execution of the 1990 mortgage, advanced to him the following amounts:

(a) $12,539.10 for the property at Moorabbin, Victoria;
(b) $90,930.76 for the property at Glen Waverley, Victoria;
(c) $260,000 for Kilkenny Court;
(d) a sum up to $30,000 in relation to expenses whilst at university.

Accordingly, as at the date of the 1990 mortgage, the plaintiff accepts the defendant had advanced to him amounts in the order of $400,000.

[70] The plaintiff contends each of these amounts were gifts, and that the defendant expressed that there was no requirement to repay those sums. I do not accept the plaintiff's evidence. At the time the defendant advanced the moneys in 1988 and 1989 for the two Victorian properties, the defendant was of very limited means. Having regard to the defendant's concerns to retain her property, I find it inconceivable she would advance such sums without requiring repayment. The defendant did not at that time seek to register mortgages over those properties. However, the situation was entirely different at the execution of the 1990 mortgage. By that time, the defendant had advanced a further $70,000 for Kilkenny Court (obtaining a bank loan in her own name to do so),[102] and had agreed to pay $190,000 to discharge the Citibank mortgage. It is not surprising that the defendant sought the advice of solicitors at that time.

[71] The plaintiff contends the defendant's limited means at that time rendered it difficult for her to have advanced the further $128,277.64 alleged by her to have been advanced between 1982 and 1990. I do not accept that contention. Whilst I do not accept the defendant's evidence that she found $60,000 secreted in the floor of a motor vehicle in 1980 (the existence of those sums is inconsistent with the inventory prepared and executed by the defendant in respect of Mr Wendka's estate), the defendant had access to other funds in that time period, including a significant sum following her successful dependency claim. I am satisfied the defendant advanced funds to the plaintiff throughout this period of at least $100,000. That she would have advanced such an amount over a nine year period is not at all surprising having regard to her previous generous financial assistance.

[72] The plaintiff contends that having regard to the nature of their relationship it is inconceivable the defendant would have specifically requested repayment of those additional sums by the plaintiff. I do not agree. The defendant had come from limited means, and was aware of the consequences of not having money. I am satisfied she required the plaintiff to repay those sums.

[73] I am satisfied the consideration of $500,000, expressed in the 1990 mortgage, represented what the plaintiff and defendant agreed was the amount advanced by the defendant to the plaintiff. That it specified an agreed figure of $500,000 is not surprising, having regard to its terms. It is consistent with the defendant having made an estimate of the amounts she had provided to the plaintiff. I accept the defendant's evidence in that respect.

[74] The 2003 mortgage was entered into after the plaintiff sought finance from Bank of Queensland, leading to a request it hold a first mortgage over Kilkenny Court. It was against that background that the defendant sought advice from Mr Kolsky. The

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[102] Exhibit 103.

defendant's actions in seeking independent legal advice, and in arranging to have that mortgage registered on Kilkenny Court, is consistent with the defendant's stated intention that any moneys advanced to the plaintiff were to be repaid by him on demand. I accept the defendant's evidence that the mortgage was prepared as a genuine document evidencing a binding agreement to repay moneys loaned by the defendant to the plaintiff. I reject the plaintiff's evidence to the contrary and, in particular, his evidence that the mortgage was another sham transaction. I do not accept he told Mr Kolsky the mortgage was for asset protection. Mr Kolsky impressed me as an honest, ethical solicitor who would have refused to prepare a mortgage in those circumstances. Further, there would have been no need for Mr Kolsky to have given advice that the transaction was against the defendant's interests if he knew the mortgage was a sham transaction.[103]

[75] That the plaintiff was prepared to execute the particulars of loan and 2003 mortgage in circumstances where the defendant had sought, on two occasions, to enforce the 1990 mortgage is also significant in a determination of whether the 2003 mortgage was a sham. The plaintiff sought to explain his conduct on the basis he trusted his mother. I do not accept that explanation. That he could have such trust having regard to what he said was his mother's unjustifiable attempts at enforcing a previous sham mortgage defies logic. The only reasonable explanation for the plaintiff's conduct in signing the 2003 mortgage is that it represented a legitimate transaction agreed to by the plaintiff and the defendant as part of the agreement that the defendant would release her existing first mortgage so that the plaintiff could secure additional funding from Bank of Queensland.

[76] I do not accept the plaintiff's contention that Mr Hickey's evidence supports a finding the 2003 mortgage was a sham transaction. Whilst Mr Hickey gave evidence as to the defendant's concern in relation to protecting the plaintiff's assets, Mr Hickey was not aware of all of the previous transactions entered into between the plaintiff and the defendant. He could not recall being told of the existence of the 1990 mortgage. He was unaware the defendant held a registered mortgage over Kilkenny Court. If Mr Hickey was intimately aware as to the past dealings between the plaintiff and the defendant, it is surprising he was unaware of that fact.

[77] I also do not accept the plaintiff's contention that support for the 2003 mortgage being a sham can be found in the defendant's concern about protection of the plaintiff's assets from future partners and disgruntled clients. The defendant denied having such concerns. I do not accept the defendant's denials. Mr Hickey gave evidence that the defendant raised those concerns with him in 1991. I accept Mr Hickey's evidence in that respect. However, I do not accept that that was a concern only of the defendant. I am satisfied the plaintiff had similar concerns. This funding is supported by Mr Hickey's evidence.[104] It is also supported by the contents of various correspondence with Hopgood & Ganim.

[78] Hopgood & Ganim wrote to the plaintiff on 17 September 1993[105] in relation to "de facto relationships". It recommended that if the plaintiff sought to protect his financial position, an appropriate cohabitation agreement should be prepared in

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103 Exhibits 71 and 72.
104 T6-67/15.
105 Exhibit 228.

relation to assets brought into the relationship.[106] Hopgood & Ganim wrote a further letter to the plaintiff dated 15 December 1993[107] in relation to "reappointment of new trustee". That letter dealt with advice as to the procedure for, and consequences of, the removal of Evelyn from a trustee company. Both those letters were addressed to the plaintiff alone. Each indicates a concern on the plaintiff's behalf in relation to protecting his assets from Ms Thompson.

[79] Hopgood & Ganim wrote a further letter addressed to both the plaintiff and defendant on 16 December 1993.[108] It was headed "Re: General Matters". If the advice in relation to de facto relationships and the removal of Ms Thompson related to advices sought by the defendant, it is surprising those letters were not addressed to both the plaintiff and defendant as was the letter in respect of "General Matters". That those earlier files were opened on the instructions of the plaintiff only appears to be confirmed by correspondence from Hopgood Ganim dated 25 January 2011.[109]

[80] Hopgood & Ganim also prepared a Charge over Assets and Undertakings in or about 1994. That document granted a charge in favour of the defendant over the assets of A Atia (Medical) Pty Ltd, the plaintiff's service company, in relation to debts owed by the plaintiff. Whilst it would appear to be a document prepared for the purposes of providing the defendant with security in relation to assets of the plaintiff's service company, the circumstances of the preparation of that document are unclear. I give no weight to its contents in any determination as to the issues in dispute in this proceeding.

[81] Documentation prepared by Sambrook Grant Lawyers in or about 2005 was also relied upon in relation to this issue. A letter, dated 15 February 2005, addressed to the defendant and headed "Re: Family Protection – Beta Strategy TM Patent No 2003100074",[110] stated:

> "We refer to your son, Aaron's meeting with Steve Grant in relation to your need for asset protection.
>
> We note that you currently own your home and other valuable property.
>
> Whilst you are not faced with any claims at this stage, it is possible that a claim may be made against you in your capacity as proprietor of real estate for example.
>
> Insurance could cover certain claims made against you. You should endeavour to maintain whatever cover you can.
>
> However, because of recent events such as the failure of insurance companies and the enormous compensation payments which have been given by the courts, you should take further measures to protect your family against loss. …" (my emphasis)

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106 Exhibit 228.
107 Exhibit 229.
108 Exhibit 230.
109 Exhibit 279, affidavit of Jonathon George Webber, annexure JGW-2.
110 Exhibit 243.

[82] The asset protection being referred to in that letter was the protection of the defendant's assets from claims as the owner of real property. It had nothing to do with the protection of the plaintiff's assets from disgruntled clients or "gold digging" partners. It was in this context that Grants also recommended a further asset protection strategy of a contractual will.[111] This correspondence does not support a contention the defendant was concerned to protect the plaintiff's assets.

[83] I do not accept the plaintiff's evidence as to the reasons why Sambrook Grant Lawyers were approached to prepare a new Will for his mother. The plaintiff said this approach occurred because his mother was worried "that Allison is now pregnant, she knows I am not going to leave her and she was worried about the Will …".[112] This evidence is inconsistent with the letter from Sambrook Grant Lawyers.

[84] The plaintiff's assertion that the 2003 mortgage was a sham transaction is also inconsistent with the terms of the plaintiff's response to the defendant's demand in 2006. Relevantly, that response stated:[113]

> "Our client instructs the mortgage documents were executed for asset protection purposes. Your client only advanced $265,000.
>
> There was a collateral agreement between our clients that no demand would be made by your client during her lifetime. …
>
> Further, your client was to execute a Will, establishing a testamentary trust, which gifted your client's interest in the abovementioned mortgage to the trustees of the Nusbaum Finance Trust. The trustees of the Nusbaum Finance Trust was to be our client. Documentation in this respect was submitted to your client in 2004 and again in 2005 and our client has acted on the basis it was executed by your client. …"
>
> (my emphasis)

[85] Whilst that response asserts the mortgage was prepared for asset protection purposes, it concedes advances were made by the defendant ($265,000). Further, it states the defendant's interest in the mortgage was to be gifted to the trustees of the trust. If the 2003 mortgage was a sham there would be no need for the interest in the mortgage to be gifted by way of Will. There would be no interest to gift in those circumstances.

[86] The plaintiff also submits that Mr Kolsky's letter of advice to the defendant is inconsistent with the defendant's evidence as that letter refers to the defendant having lent $330,000. The defendant gave evidence that the $330,000 therein referred to related to moneys lent by her to the plaintiff after execution of the 1990 mortgage, that is, moneys in addition to the 1990 mortgage. I accept the defendant's evidence that the reference to $330,000 related to loans over and above the $500,000 secured by the 1990 mortgage.

[87] At the time she consulted Mr Kolsky, the defendant had lent the plaintiff $70,000 in or around 1994, as evidenced by the loan agreement executed by the plaintiff and

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111 See Exhibit 243.
112 T5-21/1.
113 Exhibit 81.

witnessed by Mr Hartman.[114] I accept that agreement evidenced a genuine loan made by the defendant to the plaintiff. She had also advanced considerable sums whilst he was in America. The plaintiff admits the defendant transferred a further sum of $134,914.75 whilst living in America. He contends those moneys were advanced to be invested on her behalf. I do not accept that contention. The documentation tendered into evidence indicates those sums were paid into the plaintiff's account. The defendant did not receive any shares for her money. Any shares bought by him were bought in his name. I accept the defendant's evidence that those sums were loans to the plaintiff which were repayable by him.

[88] I also accept the defendant advanced further sums to the plaintiff totalling $17,374.41[115] and furniture and other goods valued by Mr Hartman at $39, 050.00.[116] The evidence establishes that between 1990 and 2003 the defendant paid various expenses associated with Kilkenny Court or the plaintiff. The plaintiff denied the defendant paid these expenses at his request. I do not accept that evidence. I accept and prefer the defendant's evidence that these moneys were paid by her on the express basis the plaintiff would repay her. Whilst Ms Thompson gave evidence that she, as Practice Manager, was not aware the defendant was paying expenses, she conceded she was not privy to all the plaintiff's financial affairs.[117] Various cheque butts were produced by the defendant to support her evidence. In addition, Mr Hartman paid trades people for work performed on Kilkenny Court, such moneys being provided by the defendant. He did not at any time see the plaintiff pay for such expenses.[118] I accept that evidence. I find these advances were also loans, repayable by the plaintiff.

[89] In reaching this conclusion, I have had regard to the evidence that the plaintiff, from the time of purchase of the land at Robina by the defendant, paid expenses on behalf of the defendant. The plaintiff accepts this was an arrangement entered into to compensate the defendant for the loss of income when she sold her commercial premises in Victoria in order to fund the purchase of the land. It is not contended by the plaintiff that those payments were made in repayment of loans made by the defendant to the plaintiff. Whilst it may seem surprising the defendant would be paying expenses on behalf of the plaintiff, whilst the plaintiff was paying expenses on behalf of the defendant, this must be viewed in context. The evidence discloses the expenses paid by the plaintiff on behalf of the defendant were largely claimed as deductions in the plaintiff's medical practice. The expenses paid by the defendant on behalf of the plaintiff were largely personal expenses. Having regard to Ms Thompson's evidence that the plaintiff kept his personal affairs separate, this scenario is understandable. That the plaintiff agreed to pay expenses on behalf of the defendant to compensate her for the loss of income from the sale of the Victorian properties indicates the financial relationships between the plaintiff and the defendant were commercial in nature. This conduct is consistent with other advances made by the defendant to the plaintiff being on a commercial basis, namely, as loans not gifts.

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114 Exhibit 128, 132.
115 Exhibits 140-184.
116 Exhibit 127.
117 T6-43/30; 6-47/10.
118 T9-17/40.

[90] The defendant said she also advanced a total of $170,000 in cash to the plaintiff prior to his leaving for America. That sum was said to be paid out of moneys found by the defendant secreted in Mr Nusbaum's flat. Cash of that magnitude was not declared on the estate inventory. In those circumstances, I am not prepared to accept the defendant's evidence that this cash was located. However, I do accept that the defendant gave the plaintiff further moneys prior to travelling to America. Such conduct is consistent with the defendant's instructions to Mr Kolsky that a total of $330,000 had been lent to the plaintiff. As previously stated, I accept that that figure represented the amount lent since execution of the 1990 mortgage. It is also consistent with the defendant's previous actions in respect of assisting the plaintiff in his travel overseas, and with sending funds subsequently whilst the plaintiff was living in America.

[91] Whilst Mr Kolsky's letter suggests he believed the $330,000 referred to was itself secured by the 1990 mortgage, it is apparent from Mr Kolsky's letter that he did not have full instructions. Relevantly, Mr Kolsky said:

> "We note that you say you lent your son Dr Aaron Atia about $330,000. <u>You did not say how much he still owes you</u> but we gather it is the full amount. Your debt (plus interest) is secured by a first mortgage over his property in Queensland (Certificate of Title Volume 5603 Folio 43). That property you say is currently worth $500,000 to $600,000, and you hold the title and mortgage. …"[119]
>
> (my emphasis)

Further, the letter is inaccurate as to the amount as by the time the defendant saw Mr Kolsky, she had already lent the plaintiff $500,000, to November 1990, as secured by the 1990 mortgage. That letter does not represent an inconsistent version of events to that advanced by the defendant in evidence.

[92] Mr Kolsky was aware there was an existing registered mortgage. He was asked to prepare a new mortgage which would be registered as a second mortgage to Bank of Queensland. Mr Kolsky's evidence that he could see no commercial basis for the transaction was a reference to the defendant being prepared, against his written advice, to accept being a second mortgagee in real property where there was insufficient equity to pay both the first and second mortgages in the event of default. His concern was that the defendant would thereby be "disadvantaged for no reason that I would see, no commercial reason I could see".[120] This concern was not as to the figure of $1,000,000.

[93] At the time of preparation of the mortgage, Mr Kolsky also prepared the particulars of loan document in the sum of $1,000,000. That document was executed by the plaintiff at the same time as the mortgage, all documents being sent under cover of the same letter.[121] I accept Mr Kolsky's evidence as to how that figure was set. I do not accept the plaintiff's evidence as to his conversation with Mr Kolsky. The plaintiff did not nominate $1,000,000.

[94] The plaintiff gave evidence that after the sale of his Victorian properties, he returned the surplus funds to the defendant. The defendant denied ever receiving

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119 Exhibit 71

120 T2-44/20

121 Exhibit 118.

those funds. I do not accept the plaintiff's evidence. There is no documentary material to support his contentions. Such conduct would also be inconsistent with these advances having been gifts. Whilst the plaintiff suggests those funds must have been used to make up the purchase price of the land at Robina, there is no evidence to support that contention.

[95] The plaintiff also contends the defendant's evidence that the moneys were advanced by way of loan rather than gift is inconsistent with the terms of the defendant's 2005 Will. That Will provided reasons why the defendant did not provide for the plaintiff.[122] Those reasons were:

> "(a) that my son has married out of the Jewish faith;
>
> (b) that my son and his wife precluded me from attending his wedding;
>
> (c) that my son has treated me with disrespect for many years;
>
> (d) that my son has borrowed large amounts of money from me over many years and not be paid any of the loans to me;
>
> (e) that I have given to my son large sums of money to assist him in establishing his medical practice in Queensland and purchasing a home and for enabling him to maintain a high standard of living."

[96] The plaintiff contends the differing words used in (d) ("borrowed") and (e) ("given") are consistent with the moneys advanced by the defendant in respect of the purchase of Kilkenny Court being gifts not loans. The defendant contends the Will draws no such distinction. Rather, (d) deals with the general and (e) the specific with the word "given" being used not in the legal context of a gift, but in the context of the physical exchange of moneys. The defendant relies upon similar terms in Wills executed after the institution of these proceedings to support that contention. There is substance in the defendant's contention. Mr Kolsky's evidence is also significant in this respect. He said the defendant instructed him she had loaned her son $330,000. His note of the conversation records "given her son $330,000".[123] This suggests the defendant uses the words gave/given in the context of having advanced funds, not as a legal gift. I am satisfied the defendant was not, in her Will, making a concession she had made gifts to her son in respect of the purchase of Kilkenny Court.

[97] I find the 2003 mortgage represented a genuine agreement intended by both the plaintiff and the defendant to create enforceable rights for the repayment of $1,000,000 agreed to be due and owing by the plaintiff to the defendant. I accept moneys were lent by the defendant to plaintiff. I also accept that the defendant did not ever represent that she would not enforce the 2003 mortgage.

Counterclaim

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122 Exhibit 244, para 18.

123 T2-45/5.

[98] It is for the defendant to establish that any funds advanced by her to the plaintiff were loans and not gifts.[124] The defendant has discharged that onus.

[99] The defendant is entitled to recover the sum secured by the mortgage. What that mortgage secures, involves a question of construction. That is to be determined having regard to not only the terms of the mortgage, but also the surrounding circumstances and the purpose and object of the transaction.[125]

[100] At the time of execution of the 2003 mortgage, the defendant had advanced the following moneys to the plaintiff:

(a) $500,000, the subject of the 1990 mortgage.
(b) $70,000 on or about 1994, as evidenced by the particulars of loan executed by the plaintiff and witnessed by Mr Hartman.[126]
(c) $134,959 sent by the defendant to the plaintiff whilst he was overseas.
(d) Further payments of at least $17,374.41 as evidenced by various cheques presented in relation to expenses paid for by the defendant.
(e) Other sums from time to time and possessions, including furniture.

The defendant assessed the further advances (after the 1990 mortgage) totalled $330,000, at the time of her meeting with Mr Kolsky. I accept that this represented her best assessment at the time. I accept that all of these sums were advanced by the defendant as loans, with a requirement that they be repaid by the plaintiff. At the time of the 2003 mortgage the defendant was the holder of a registered first mortgage. She was giving up that security for a second mortgage, over a property with insufficient equity. The defendant was concerned at the loss of a first security. This is confirmed by Mr Kolsky's letter. He specifically advised of this issue. The loss of that security represents a genuine consideration.[127] It is a relevant factor to consider in the surrounding circumstances and the purpose and object of the transaction.

[101] Having considered the term of the 2003 mortgage, the surrounding circumstances, and its purpose and object, I am satisfied it secures an agreed debt of $1,000,000. On their proper construction, the words "this day lent" refers to the amount agreed that day by the defendant and the plaintiff as being due and owing by the plaintiff to the defendant.I accept the defendant's evidence that the figure of $1, 000, 000 was agreed between the plaintiff and the defendant in discussions at the time of the 2003 mortgage.[128] I reject the plaintiff's evidence to the contrary. The plaintiff agreed to repay that sum in full within six months of receiving written demand.[129]

Conclusions

[102] The 2003 mortgage represents a genuine agreement reached between the parties. It is not a sham. The defendant did not ever represent or agree she would not enforce the terms of that mortgage, or that she would not seek repayment of that agreed sum. There is no basis to the claims of misrepresentation or estoppel. The claim is dismissed.

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124 *Heydon v Perpetual Executors Trustees and Agency Co (WA) Ltd* (1930) 45 CLR 111.
125 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 462.
126 Exhibit 128.
127 Exhibit 267.
128 T9-66/40 – T9-67/10, T11-37/20
129 Exhibit 7, cl 2.

[103] I am also satisfied the defendant has established the 2003 mortgage secured a genuine debt, agreed to between the plaintiff and defendant in the sum of $1,000,000. The counterclaim is allowed.

[104] The defendant also claims interest on that sum at 10% per annum from 1 October 2006. The plaintiff opposes interest being awarded on the basis the interest clause represents a penalty. The mortgage provided there was to be no interest, but that 10% per annum would apply in the event of default from the date of default. The plaintiff submits such a clause is unenforceable as a penalty as it imposes "an exorbitant increase in the obligation to pay interest" which is not explicable by a greater risk to the defendant in recovery of the loan by reason of default.

[105] A term in a loan agreement imposing a higher interest rate on default is not a penalty merely because it stipulates that higher interest rate. However, if the increase is other than modest and could not be explained by the greater risk to the lender in recovering the loan or the cost of administering the loan in default, the increase would not be justifiable and an obligation to pay it would constitute a penalty and be unenforceable.[130]

[106] I do not accept that the interest clause is a penalty. The mortgage must be viewed against the background that it was an agreement entered into between a mother and son. The agreement was that interest would not be payable except in default. The interest rate set by way of default is not exorbitant. It represents a reasonable rate for interest payable in the event of default. There is a greater risk to the defendant, on default, as she is the holder of a second mortgage over the property. The mortgage is distinguishable from the mortgage considered in *Beil* where the loan agreement provided for the payment of interest at the rate of 16% per annum, but in the event of default the rate would increase to 25% per annum. It is understandable, in those circumstances, that an explanation is required for the significant increase in interest in the event of default. That is not the case here. The defendant is entitled to interest on the outstanding sum.

[107] I shall hear the parties as to the form of orders, and as to costs.

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[130] *Beil v Pacific View (Qld) Pty Ltd* [2006] QSC 199; *Ring Row Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656, 667.