SUPREME COURT OF QUEENSLAND

CITATION:	*Robson v Robson* [2011] QSC 234
PARTIES:	**GARY FRANCIS ROBSON** (Plaintiff) v **CHARLES WILLIAM ROBSON** (First Defendant) **SANDRA LEIGH ROBSON** (Second Defendant) and **HANNOVER INTERNATIONAL LIMITED** (Plaintiff) v **CHARLES WILLIAM ROBSON** (Defendant) and **MINE & QUARRY EQUIPMENT INTERNATIONAL LTD** **ARBN 079 139 683** (Plaintiff) v **CHARLES WILLIAM ROBSON** (Defendant)
FILE NO/S:	BS 10177 of 2004; BS 7342 of 2000; BS 8937 of 2000
DIVISION:	Trial Division
PROCEEDING:	Claims
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	12 August 2011
DELIVERED AT:	Brisbane
HEARING DATE:	22-26 February, 1 March, 1-3, 6-7, 9-10 December 2010, 22-24 February and 9 May 2011
JUDGE:	McMurdo J
ORDER:	**1. In proceedings numbered BS 10177 of 2004: A declaration that the defendants hold half of their shares in Yalgold Pty Ltd (in liquidation) on trust for the plaintiff.**

2. In proceedings numbered BS 7342 and 8937 of 2000: Judgment for the defendant.

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – EXPRESS TRUSTS CONSTITUED INTER VIVOS – GENERALLY – where the plaintiff and first defendant were brothers and in business together from 1985 to 1999 – where the first defendant and his wife, the second defendant, were the shareholders of a company which held assets of the business – where the defendants signed declarations of trust in favour of the plaintiff – where the company is now in liquidation – whether there should be a declaration that the defendants hold half of their shares on trust for the plaintiff – whether the shares held in trust should be vested in the plaintiff

BANKING AND FINANCE – INSTRUMENTS – LOAN FACILITIES – where the defendant and his brother were in business together from 1985 to 1999 – where companies under the brother's control made loans to the defendant between 1992 and 1994 – where the loans were assigned to the plaintiff companies which are also under the brother's control – whether the plaintiffs can recover the monies – whether the loans and assignments were shams

Corporations Act 2001 (Cth), s 468, s 468A

Duties Act 2001 (Qld), s 487
Stamp Act 1894 (Qld), s 4A, s 51E, s 56FA-56FO
Trusts Act 1973 (Qld), s 82

Burnitt & Anor v Pacific Paradise Resort Pty Ltd [2004] QDC 218, cited
Carantinos v Magafas [2008] NSWCA 304, cited
Caxton Street Agencies v Korkidas & Anor [2002] QSC 210, applied
Cheang Thye Phin v Lam Kin Sang [1929] AC 670, cited
Commercial Bank of Australia Ltd v Amadio & Anor (1983) 151 CLR 447, cited
Deputy Commissioner of Taxation v Moorebank Pty Ltd [1987] 1 Qd R 414, cited
Elder v Northcott [1930] 2 Ch 422, cited
Equus Financial Services Ltd v Glengallan Investments Pty Ltd [1994] QCA 157, cited
Hoggett v O'Rourke [2002] 1 Qd R 490, considered
Hollis v Palmer (1936) 2 Bing NC 713, cited
Jones v Lock (1865) LR 1 Ch App 25, applied
J W Broomhead (Vic) Pty Ltd (in liq) v J W Broomhead Pty Ltd [1985] VR 891, cited
Meyers v Casey (1913) 17 CLR 90, cited
Nelson v Nelson (1995) 184 CLR 538, cited
Official Trustee in Bankruptcy v D-Jamirze (1999) 48 NSWLR 416, applied
Sharrment Pty Ltd v Official Trustee (1988) 18 FCR 449,

considered
Shepherd v Felt and Textiles of Australia Ltd (1931) 45 CLR 359, applied
Thomas v National Australia Bank Limited [2000] 2 Qd R 448, cited
William Brandt's Sons & Co v Dunlop Rubber Co Ltd [1905] AC 454, cited

COUNSEL: 22-26 February and 1 March 2010: R Douglas SC with D de Jersey for the plaintiffs
1-3, 6-7 and 9-10 December 2010: The plaintiff, Gary Robson, appeared on his own behalf and on behalf of the plaintiff companies
22-24 February and 9 May 2011: D de Jersey for the plaintiffs
A Morris QC with J Peden for the defendants

SOLICITORS: 22-26 February and 1 March 2010: Hopgood Ganim for the plaintiffs
1-3, 6-7 and 9-10 December 2010: The plaintiff, Gary Robson, appeared on his own behalf and on behalf of the plaintiff companies
22-24 February and 9 May 2011: Derek Norquay Solicitor for the plaintiffs
Russell & Company Solicitors for the defendants

The cases in outline

[1] These three actions, which were heard together, arise from a long and bitter dispute between brothers. I will refer to them, as did their counsel, as Gary and Bill. They were in business together from about 1985 through to about 1999 when they fell out. Their business, through several companies, was the trading and hiring of mining equipment.

[2] The legal relationship between the brothers from about 1989 is the subject of dispute in many respects. But in essence, the disputes surround the acquisition and development of lands at Tile Street, Wacol. In 1989 the brothers caused those properties to be purchased by Yalgold Pty Ltd ('Yalgold'), which still owns them. Yalgold has been wound up but it has a substantial surplus to go to its shareholders. To a large extent, that surplus effectively represents the Tile Street properties, which are worth more than eight million dollars. The shareholders are Bill and his wife, Sandra Robson.

[3] Gary claims that Bill and Sandra hold one half of their shares in Yalgold upon trust for him. His case is brought upon declarations of trust, dated in 1989 and 1995, which Bill and Sandra admit signing. He seeks to enforce that trust by action 10177 of 2004 in which he is the plaintiff and Bill and Sandra are the defendants, and which I will call the 'trust claim'.

[4] The trust claim is resisted on many grounds. Bill and Sandra say that they were tricked by Gary into executing the declarations of trust and did not know what they were signing. They say that Gary's case is inconsistent with an agreement between Gary and Bill in 1989, by which they would go their separate ways in different businesses and by which the Tile Street properties were to belong only to Bill and Sandra through Yalgold. In the defendants' case, this is referred to as the separation agreement. It is also argued that at least the 1995 declarations of trust were never intended by any party, including Gary, to take effect according to their terms and are shams. A further defence is that Gary has disclaimed his interest under the declarations of trust. There is also the argument that there has been a purported revocation by Bill and Sandra of the declarations of trust. Related to that argument, is the submission that none of the declarations of trust has been duly stamped and is said to be revocable and in any case unenforceable upon that basis. Lastly, there is a defence that Gary should be refused equitable relief, because of what is said to have been his illegal tax evasion and money laundering activities. Ultimately however, the defendants abandoned any attempt to identify any contribution to the value of the shares in Yalgold from those activities.

[5] The other cases are brought against Bill by companies under Gary's control. They are claims to recover moneys said to have been advanced to Bill between 1992 and 1994. He is said to have borrowed, in total, $1,243,992. In one proceeding, Hannover International Limited ('Hannover') claims that principal sum together with interest, but only from March 2000. In the other proceeding, Mine & Quarry Equipment International Ltd ('MQEI') claims as the purported assignee of the interest which had accrued upon that principal sum until February 2000, which is said to have been an amount of $412,842.17.

[6] As I will discuss, the moneys said to have been advanced to Bill were used to improve Yalgold's property at 47 Tile Street. Bill's case is that he was not the borrower of any of these moneys and that, in any case, the claims by the companies in each case brought as an assignee from the company or companies which are said to have been the lenders, would fail for other reasons such as the plaintiffs' failure to prove their titles to the debts for which they sue.

[7] There is an apparent tension between the trust claim and the debt claims, in that Gary is seeking half of Yalgold's net assets, and in particular the Tile Street properties, whilst at the same time claiming (through his companies) that Bill pay for much of the cost of the improvement of those properties from which their present values derive. Nevertheless the claims are not made in the alternative.

[8] Before discussing the particular claims and defences, it is necessary to relate the extensive history.

Before 1989

[9] For some years prior to 1985, Gary conducted a business of dealing in second hand mining equipment and machinery. He carried on business with a Mr Walden.

[10] From about 1972, Bill was a policeman. In his oral evidence, he said that he rose to the rank of Detective Senior Constable. In an affidavit which Bill swore in the Family Court of Australia in proceedings brought by Gary's former wife, Bill said he ultimately qualified for the rank of Detective Sergeant, second class.[1]

[11] Sandra Robson worked as a legal secretary. She was employed by Keith H Henley & Co, solicitors, for about 12 years until the end of 1984 when she gave up work on the birth of her child.

[12] In early 1985, Bill took six months leave from the police force and worked in what was then the business of Gary and Mr Walden. Later that year, Bill decided that he would retire from the force and he resigned in January 1986 with effect from April 1986. He became a director of the company which was then called Machinery World Australia Pty Ltd and later renamed MWA Brisbane Pty Ltd ('MWA'). At first Bill was not a shareholder of MWA. When he became a director its shares were held by Gary, a company called Nosbor Pty Ltd ('Nosbor') which was a trustee for Gary's family trust, and Mr Walden. Bill became a shareholder in 1987 when he acquired Mr Walden's shares and with the issue of additional shares, the company became owned equally by Gary and Bill.[2]

[13] The property at 47 Tile Street was purchased at the end of 1985. It was purchased by Gary, Bill and Mr Walden as tenants in common in equal shares. The price was $57,000. In another affidavit in those Family Court proceedings, Bill said that it was Gary who organised the purchase and decided that the property should be held in those shares. Bill made no contribution to the purchase price. In that affidavit, Bill recalled Gary saying: "I will finance the purchase, because it is for our business and the business will pay me back over time".[3]

[14] The property was then about four acres of vacant land. The brothers and Mr Walden soon caused some of the land to be cleared and a demountable office to be placed upon it, from which MWA then conducted its business.

[15] In 1988, when Mr Walden had left the business and disposed of his shares, he transferred his one-third interest in 47 Tile Street to Bill and Gary, who became tenants in common in equal shares. This remained the ownership of the shares in MWA and 47 Tile Street until 1989.

[16] Again according to Bill's evidence in the Family Court, Gary, through a company of his called Calmseas Pty Ltd, purchased other land in 1987. It purchased lot 22 Tile Street, Wacol for $80,000, by an initial payment of $30,000 with the balance of $50,000 to be paid by three one yearly instalments of $16,666. The purchase price came from the accumulated profits of MWA. It also purchased land at Jandakot in Western Australia. Its price was $77,000 and it was used for the business of a related company, in which Gary but not Bill was interested, called MWA Perth Pty

---

1 Exhibit 68, paragraph 18.
2 Exhibit 70, paragraphs 25 and 26.
3 Exhibit 70, paragraph 105.

Ltd. Over the next two years or so, an office was constructed upon it at a cost of about $30,000, paid for by MWA Perth.

1989: The Yalgold dealings and others

[17] Yalgold was incorporated on 22 March 1989. It was a shelf company, the shares of which were acquired by Bill and Sandra, it would appear, on about 3 April 1989 because that is the date upon which they became Yalgold's directors and on which its registered office and principal place of business became 47 Tile Street.[4] There were and are 48 issued shares, Bill and Sandra holding 24 each. Sandra remained a director until 22 October 1997. Since then Bill has been the sole director.

[18] Shortly after their acquisition of Yalgold, and before it had acquired any property, Bill and Sandra executed the first of the declarations of trust. It is dated 28 April 1989. It recited that Yalgold had been recently incorporated, that its paid up capital was $48.00, made up of 48 shares of $1.00 each, that Bill and Sandra each held 24 shares and that:

> "(d) The Trustees acknowledge that they each hold twelve of the said shares on account of Garry Francis Robson and;
>
> (e) The Trustees have agreed to accept the Trust hereby created upon the terms and conditions more particularly set out hereunder."[5]

The deed was in these terms:

> "NOW THIS DEED WITNESSETH
>
> 1. The Trustees declare that they have received and will hold the sum of 24 shares in Trust for Garry Francis Robson (hereinafter together with his executors, administrators and assigns called 'the beneficiary'), and;
>
> 2. The Trustees further declare that they hold all dividends, distributions or profit or other emoluments and any return of capital that may arise by reason of the holding by the trustees of such shares in trust, upon trust for the beneficiary and;
>
> 3. The Trustees further agree and declare that they will at the request of the beneficiary transfer or in any other lawful way deal with the said shares or any of them in such manner as the beneficiary shall from time to time legally require or direct."[6]

---

4 Exhibit 2.
5 Exhibit 3.
6 Ibid.

[19] The deed was witnessed by Mr Peter Henley, who was then a solicitor at Keith H Henley & Co. Sandra had been his secretary for a number of years until she left the firm. Mr Henley had met Bill through Sandra. He cannot recall when he first met Gary but it was through Bill and Sandra. Gary does not appear to have been a client of Mr Henley before 1989.

[20] Mr Henley also initialled two handwritten changes to the document. In both recital (d) and cl 1, Gary's name was misspelt as "Garry". Someone crossed through that name and correctly wrote "Gary". Mr Henley cannot recall who did so but he placed his initials next to each alteration. I accept his evidence that it was never his practice to witness a document which had not been signed in his presence. I accept then that this declaration of trust was executed in his presence. I infer that so too were the handwritten changes correcting the spelling of Gary's name.

[21] Mr Henley prepared a form of agreement in relation to MWA, expressed to be a deed, which was signed by Gary and Bill and dated 19 June 1989.[7] It provided that Bill would sell to Gary his 50 percent shareholding in MWA for a price of $200,000, to be paid "on completion". It was expressed to be subject to a contemporaneous settlement of another contract, which was for the sale by Gary to Yalgold of Gary's half share in 47 Tile Street. It provided that completion was to take place on 17 July 1989 or on such other date as mutually agreed in writing. Mr Henley witnessed each of the signatures of Gary and Bill upon this document.

[22] The contract of sale for Gary's interest in 47 Tile Street was also for the sale to Yalgold of Bill's half interest in that property.[8] It was in the standard REIQ form and dated 19 June 1989. Gary and Bill agreed to sell the property for $400,000 with completion to occur on 17 July 1989. Mr Henley's firm was shown as the solicitor for each side of the transaction. Bill and Sandra signed through the seal of Yalgold. Mr Henley witnessed the signatures.

[23] There was no reference in either of the contracts of 19 June 1989 to the state of the beneficial ownership in Yalgold's shares. More particularly, there was no reference to the declaration of trust which had been executed less than two months earlier.

[24] At about this time, Yalgold acquired 22 Tile Street and the Jandakot land. According to Bill's evidence in the Family Court, Yalgold purchased 22 Tile Street for about $80,000 in or about June 1989, and the Jandakot land for $71,000 in August 1989.

[25] Again in his evidence in the Family Court, Bill referred to a "round robin" series of transactions which Gary organised for the settlement of Yalgold's purchase of 47 Tile Street but without explaining the transactions to Bill.[9] But there was an explanation in a letter from Mr Henley to Bill dated 16 May 1991, which was as follows:

---

7 Exhibit 7.
8 Exhibit 8.
9 Exhibit 70, paragraph 122.

> "RE: TAXATION DEPARTMENT
>
> Following our discussion of the 14th of May we wish to confirm that the following is a breakdown of the various transactions that have occurred between yourself, Gary, Yalgold and Nosbor.
>
> 1. Gary and yourself sold your interest in 47 Tile Street to Yalgold for $400,000.00.
>
> 2. Yalgold borrowed the $400,000.00 from the ANZ Bank on a temporary overdraft facility to fund that purchase.
>
> 3. Gary received the sum of $200,000.00 from the sale and you received the sum of $200,000.00 from the sale.
>
> 4. You lent the $200,000.00 received by you from the sale to Yalgold under a Deed of Loan.
>
> 5. You sold your half interest in M.W.A. to Gary for the sum of $200,000.00 and Gary paid you the $200,000.00 for those shares.
>
> 6. You then lent the $200,000.00 you received for the shares to Yalgold pursuant to a Deed of Loan.
>
> 7. Yalgold repaid the $400,000.00 it borrowed from the ANZ Bank."[10]

[26] There are further pieces in the puzzle. The first is from other affidavit evidence of Bill in the Family Court, as follows:

> "123. At [Gary's] direction, I contacted ANZ to arrange for a cash withdrawal of $200,000 from MWA Brisbane's account.
>
> 124. The First Respondent had requested me to withdraw the cash on that day. ANZ was not prepared to meet the request for immediate cash as it required 24 hours notice of prepayment.
>
> 125. The funds were subsequently deposited into the account of Nosbor Pty Ltd the following day."[11]

As already noted, Nosbor was the trustee of Gary's family trust and was under his control.

[27] Next, there was evidence by Mr Henley in this trial of a withdrawal of $200,000 in cash from the ANZ Bank. Counsel for the defendants, in cross-examining

---

10 Exhibit 66.

11 Exhibit 70.

Mr Henley, suggested that Gary had withdrawn the $200,000 in cash and delivered it to Mr Henley. But he rejected that, recalling that he (Mr Henley) went to the bank with Bill and withdrew the cash. He remembered that they withdrew it too late in the day to bank it to his trust account so that it remained in Mr Henley's safe overnight.

[28] Mr Henley's letter in 1991 referred to a deed of loan, evidencing loans of $400,000 from Bill to Yalgold. As I will discuss, in 2000 Bill caused a deed of loan to be executed by him and Yalgold, which purported to record that he had advanced to Yalgold a total of $1,846,376.20. According to one of Bill's affidavits in the Family Court, that sum included an amount described as "amount gifted by Gary to Bill and on-lent to Yalgold" in "1989/90" in the sum of $200,954.20.[12]

[29] Then there are two documents signed by Gary in 1989 and addressed to Bill, each headed "Deed of Gift" and stating simply:

> "In consideration of the natural love and affection that I bear for you, I Gary Francis Robson do hereby give to you the sum of one hundred thousand dollars ($100,000)."

Gary's signature in each case was witnessed by Mr Henley. One of these documents is dated 7 April 1989 and the other 5 July 1989.[13]

[30] There is a document dated 4 April 1989 headed "Deed of Loan" between Bill and a company called Bylass Pty Ltd, which was owned and directed by Bill and Sandra. It recited that Bill was lending Bylass $100,000 which would be repayable upon demand. The execution of this deed was apparently witnessed by Mr Henley. So too was another deed of loan, this time dated 7 July 1989, between Bylass Pty Ltd and Yalgold, recording an advance to Yalgold by that company of $100,000, repayable upon demand. There is a third document, again headed "Deed of Loan" and dated 7 July 1989, which purports to record a loan by Bill to Yalgold in the sum of $200,000, again repayable upon demand. This was also witnessed by Mr Henley.[14]

[31] Overall these documents are not entirely consistent with Mr Henley's summary in his 1991 letter. But they seem to have been part of or related to a scheme which had the purpose of transferring 47 Tile Street to Yalgold and transferring Bill's shares in MWA to Gary. Those purposes were achieved. The extent to which the cash positions of Gary, Bill and Sandra or of any of their entities were altered by this scheme remains unclear. Complete bank statements are not available. Gary's evidence was that he gave $200,000 to Bill at this time. And as I will discuss, there is some support for that in an affidavit by Bill.

---

12 Exhibit 68, paragraphs 11 and 12 and exhibits CWR7 and CWR8 to that affidavit.

13 The documents were admitted as part of a collection of documents tendered by the defendants which is Exhibit 140.

14 These documents are within Exhibit 140.

[32] The evidence as to the transfers of 22 Tile Street and the Jandakot properties to Yalgold is scant. But I accept that those properties were transferred to Yalgold as Bill related in his evidence in the Family Court. The property at 22 Tile Street is still owned by Yalgold. The Jandakot property has been sold by its liquidator.

[33] Bill and Sandra contend that the transactions involving the Tile Street properties and the shares in MWA were pursuant to what is said to have been the brothers' "separation agreement". The object of this agreement, it is said, was to sever the interests of the brothers, so that Bill would conduct a business of the same kind as they had conducted, still from one or other of the Tile Street properties, whilst Gary would have his own business. In January 1990, the company Mine & Quarry Equipment Pty Ltd ('MQE') was incorporated. It had two directors; Bill was one and the other was a Mr Freiburg, who was shown as holding 20 of its 100 issued shares. The other 80 percent of the shares in MQE were held by Bylass Pty Ltd. In 1992, Mr Freiburg ceased to be a director and was replaced by Mr Henley until 1997. Gary was at first a director but resigned almost immediately.

[34] There are two further circumstances of 1989 or early 1990 which should now be mentioned. One was an investigation by the Australian Customs Service into some transactions of the business conducted by the brothers through MWA. Again, this was the subject of evidence by Bill in one of his affidavits in the Family Court. I set out that evidence:

> "34. Between 1987 and 1991 the business continued in operation. The business started making and selling crushing plants and stock was built up during this time.
>
> 35. The company MWA Brisbane Pty Ltd, in or around this time, was defending an action against the Australian Custom Services (sic). This was in relation to transactions entered into by [Gary].
>
> 36. I recall that the company MWA Brisbane Pty Ltd had few assets and from my recollection, no assets from MWA Brisbane Pty Ltd were transferred to Mine & Quarry Equipment Pty Ltd upon its incorporation."[15]

There is other evidence of this action taken by the Australian Customs Service, and in particular of the litigation which it commenced against MWA in 1990. Customs had seized some equipment from 47 Tile Street in 1988.[16] The investigation and litigation by Customs would provide an explanation for the brothers to cease to conduct the business through MWA and to conduct it instead through the newly incorporated MQE.

[35] The other circumstance is that Gary was undergoing an acrimonious separation from his then wife. Bill and Sandra gave evidence that Gary's wife had been caught

---

15 Exhibit 70.

16 According to an affidavit by Gary's wife in the Family Court which is Exhibit 69 in these proceedings.

stealing money from the business. They say that this was the cause of their desire to sever their business relationship with Gary, which they did by the (alleged) separation agreement. The discord in Gary's marriage is likely to have been well advanced by 1989. Gary's wife commenced proceedings in the Family Court which were numbered BR72/1990. It seems that there were some interim applications made by her, the result of which was simply that she received the transfer of a car worth about $20,000. After then, her proceedings were not prosecuted for several years. The apparent explanation was that the Family Court case was put on hold during the litigation brought by the Australian Customs Service, which was not finalised until 1997.[17] Gary always maintained in the Family Court that he had no substantial assets and that, indeed, when the couple finally separated in about the beginning of 1990, his liabilities had exceeded his assets to the extent of about $45,000.[18]

[36] Sandra gave evidence about altercations between Gary and his then wife which she had witnessed first hand. It is unnecessary to detail them here. What plainly appears is that by 1989, Gary's marriage was likely to end and that he must have expected a claim by his wife to at least a good part his property. That provides a logical explanation for Gary taking steps to put his assets beyond his wife's reach. One of those assets was his half share in 47 Tile Street. That, together with 22 Tile Street and the Western Australian property, were the assets particularly at risk. Of course there were also the shares in MWA. But at least according to Bill, MWA had no significant assets. And MWA was under investigation by Customs.

1990-1999

[37] In the years 1990 and 1991, both brothers continued to work from 47 Tile Street. The submissions for the defendants suggest that they went their separate ways from 1990, Bill trading through MQE and Gary through MQEI. However, MQEI was not incorporated until 3 February 1994.[19]

[38] In the defendants' case, evidence was given by Ms Linda Mulcahy. She has worked for the business at 47 Tile Street in its various forms since the late 1980s. At first, she worked for MWA. She remains employed by Bill's business at those premises, and in effect has been his personal assistant since the brothers truly parted company in late 1999. Until then, she said, about 90 to 95 percent of her work was done for Gary and the rest of the time she worked for Bill. So throughout the 1990s she continued to work at Tile Street essentially as Gary's personal assistant, doing typing work, answering the phone, accounting, banking and other office work. She said that "occasionally I did some outside things for Gary personally".[20] And throughout this time she regarded Gary as "the boss".[21] As I will discuss, Gary did leave Australia for some of the 1990s but regularly visited Brisbane and worked at 47 Tile Street. But throughout she continued to act under his instructions. And

---

17 According to what was said to the Family Court in May 1998 in the transcript which is Exhibit 103 in these proceedings.

18 Exhibit 103, page 2.

19 Exhibit 15.

20 T 15-64.

21 Ibid.

until he left Australia, the position as she described it was one where the day to day conduct of the business, involving both brothers, continued after the incorporation and use of MQE as it had when conducted through MWA.

[39] There is evidence to the same effect in one of Bill's affidavits in the Family Court, in which he said that even after Gary began to live overseas, Gary "continued to control the finances of MQE" and "continually interfered in the MQE and Yalgold businesses". He said that Gary would write letters for Bill to sign, but tell Bill what to say to clients and at times would hire and dismiss staff without telling or discussing the matter with him.[22]

[40] Again according to an affidavit by Bill in the Family Court, what had been Gary's matrimonial home (a house at Chapel Hill) was mortgaged to and subsequently owned by Yalgold.[23] Bill there said it was mortgaged in May 1990 to secure an advance of $200,000 said to have been made by Yalgold to Nosbor, which was the registered owner. He also said that Nosbor transferred the ownership to Yalgold in August 1993, supposedly on the occasion of a default in making repayment to Yalgold. He said that the transfer was organised by Gary. The house remained owned by Yalgold until its liquidation. Again according to Bill's evidence in the Family Court, Gary lived in the house when he was in Australia, until Yalgold went into liquidation.[24] The liquidator has sold the house and the proceeds of sale were applied in the costs and expenses of Yalgold's liquidation. These transactions have the appearance of an attempt by Gary, apparently with success, to put the former matrimonial home beyond the reach of his wife.

[41] There was a written agreement, dated simply March 1991, which provided for a sale by Gary and Nosbor to MQE of their shares in MWA. The purchase price was $27,000, payable upon completion which was to occur on 2 April 1991. Gary signed through the company seal of Nosbor and, of course for himself. The seal of MQE was applied with the apparent signatures of Bill and Mr Freiberg. It does not appear to have been witnessed by Mr Henley or anyone else. But there is a back sheet showing that it was prepared by his firm.[25]

[42] In May 1991, Bill and Gary sought tax advice in respect of the 1989 transactions involving 47 Tile Street and the shares in MWA. With Mr Henley, on 9 May they conferred with Mr Thompson of Morris Fletcher & Cross. Their concern was in relation to their liability for capital gains tax by these transactions. Mr Thompson wrote a letter of advice of 14 May 1991 together with a draft submission to the Australian Taxation Office. There is no reason to doubt the accuracy of the correspondence from Mr Thompson's firm in so far as it set out his clients' instructions. Whether those instructions were factually correct is another matter.

---

22 Exhibit 70, paragraphs 52 and 59.

23 Exhibit 70, paragraphs 88 to 91.

24 Exhibit 68, paragraph 156 agreeing with Exhibit 69, paragraph 95.

25 The document was not separately tendered but is within the bundle of documents tendered by the defendants as Exhibit 140.

[43] In the letter from Morris Fletcher & Cross of 14 May 1991, these instructions were recorded:

> "That the sale of the property to Yalgold Pty Ltd for $400,000 was over valued. The sale took place between [Bill] and Gary Robson as a settlement of all rights which they may have had against each other following the termination of their partnership. The agreement on the termination of the partnership was that [Bill] would acquire the property (through his ownership of Yalgold Pty Ltd) and Gary would acquire all of the shares in MWA Brisbane Pty Ltd. These transfers were the simplest way of transferring partnership assets to the individual partners on the determination of the partnership."[26]

In the draft submission to the ATO, this was written (no doubt upon instructions):

> "After Michael Walden left the partnership [Bill] and Gary continued to operate the business conducted through MWA Brisbane Pty Ltd as equal partners. Unfortunately, the brothers had a major disagreement after [Bill] discovered that Gary's wife was embezzling funds from the company. This caused a large rift between the brothers and on 19 June 1989 the brothers decided that they could not continue to operate the business as partners. Accordingly, on that date Gary and [Bill] dissolved the partnership. It was agreed that [Bill] would acquire the property and Gary would acquire the shares in MWA Brisbane Pty Ltd. This settlement was not documented by the parties. However, the brothers agreed that the transfer of the property and the shares was in full and final satisfaction of any claims, demands, actions or suits whatsoever which either may have had against the other.
>
> On 19 June 1989, Yalgold Pty Ltd (a company controlled by [Bill]) purchased Gary Robson's interest in the property. …"[27]

[44] Clearly enough it appears that Morris Fletcher & Cross were not told of the declarations of trust in respect of half the shares in Yalgold. Nor were they told that the brothers had continued to conduct a business from 47 Tile Street in the same way as they had prior to June 1989. And there was no mention of the sale by Gary and Nosbor to MQE of the MWA shares.

[45] It appears that there were recent valuations of 47 Tile Street and the MWA shares, which had been obtained for the purpose of this submission. A firm of registered valuers valued 47 Tile Street, as at June 1989, at $200,000. A firm of public accountants valued the shares in MWA at the same time at $100,000. On those figures, the shares in MWA which Gary acquired were worth only half as much as his share in 47 Tile Street. If that was so, and the 1989 transactions were intended to have the effect of the separation agreement for which Bill and Sandra contend,

---

[26] Exhibit 107.
[27] Exhibit 108.

the result was very much in their favour, and to the disadvantage of Gary. That is very unlikely to have been Gary's intention.

[46] In cross-examination, Gary said that he would have been honest in his instructions to Morris Fletcher & Cross. Counsel for the defendants say that I should accept that statement, and conclude that there was, in truth, a separation agreement between the brothers.

[47] At the end of 1991, Gary left Australia intending that he not be an Australian resident for tax purposes. He successfully applied for a ruling from the ATO that he be regarded as a non-resident, for a period commencing 26 December 1991. The ruling was sought on 22 June 1994, and when granted on 14 October 1994, it covered the period from December 1991 to 30 June 1994.[28] Nevertheless, he continued to spend much of his time in Australia. In the six months or so to 30 June 1992 he was here for 94 days. In the 1992/93 year he was here for 183 days and in the 1993/94 year (at least until 22 June 1994) he was here for 111 days.[29] With the evidence of Ms Mulcahy, it is clear that he remained actively involved in a business or businesses conducted from 47 Tile Street. It is also clear that he was carrying on business overseas, using a number of foreign companies. Part of the defendants' case is that he was using overseas companies to implement transfer pricing schemes, to the aim of shifting what would have been the profits of an Australian business to overseas companies. But if so, that is further support for a conclusion that Gary continued to actively carry on business from 47 Tile Street and by effectively controlling MWA and, in turn, MQE.

[48] It is during these years, 1992-1994, that the alleged loans to Bill were made. In each of the debt actions, the plaintiff pleads that the following advances were made "to the defendant or alternatively to Yalgold on behalf of the defendant":[30]

5 November 1992		$50,000.00
21 May 1993		$10,000.00
27 August 1993		$699,992.00
7 September 1993		$100,000.00
4 November 1993		$70,000.00
16 November 1993		$60,000.00
24 November 1993		$300,000.00
February 1994		$29,600.00
		$1,319,592.00
less amounts repaid		
7 October 1993	$70,000.00	

28 Exhibits 99 and 100.

29 According to his passport as detailed in the application for the ruling which is exhibit 99.

30 Third Amended Statement of Claim filed 24 August 2010, paragraph 1C.

13 October 1993	$5,600.00	
		($75,600.00)
		$1,243.992.00

[49] The final submissions for the defendants concede that those eight payments were made by deposits to the bank account of Yalgold. The last of those payments appears in the Yalgold bank statement as made on 15 March 1994. The bank statements also show payments by Yalgold in October 1993 corresponding with the alleged repayments.[31]

[50] Bill's pleading admits that he received into his own bank account an amount of $70,000 on 8 October 1993 and pleads that this sum was paid out of his account on or about 19 October 1993 to a person or entity associated with Gary.[32] Similarly, he admits that he received into his account a sum of $5,600 on 13 October 1993 but says that he transferred this to a person or entity associated with Gary on or about 27 October 1993.[33]

[51] The case pleaded by Hannover and MQEI is that these payments were advances made to Bill pursuant to a written agreement between Bill and a company incorporated in Fiji called Mine & Quarry Equipment South Pacific Limited ('MQESP'). At the commencement of the trial, it was said in the plaintiffs' case that this agreement could not be found. Subsequently, it was located and at a point in the trial when Gary was without legal representation, he sought to tender it. This was objected to by counsel for the defendants, upon the basis that it had not been duly stamped. Gary then agreed that the document would have to go to the Office of State Revenue and it was marked for identification. But it never became part of the evidence.

[52] It is common ground that these funds deposited to the account of Yalgold were used by Yalgold to improve 47 Tile Street. It is also common ground that the improvements were made effectively as directed by Gary. Again, that is inconsistent with the notion of a separation agreement. Rather, it strongly indicates that Gary did have, indirectly through Yalgold, a proprietary interest in the property.

[53] There was a written agreement dated 2 November 1993 entitled Loan Facility Agreement.[34] The parties were Bill and a company called Pacific Ventures Limited, the address of which was given as a post office box in Port Vila. It recited that Bill had made an application to Pacific Ventures for a finance facility of $2,500,000 which it had agreed to provide. Bill there agreed that he would use the moneys "for a loan to Yalgold Pty Ltd for purposes directly related to that company's normal business and for the purpose of construction of Showrooms and Warehouses upon land owned by the company at 47 Tile Street, Wacol". The facility was to be provided over a period of two years expiring on 9 November 1995, when the debt

---

31 Exhibit 19.
32 Third Amended Defence filed 7 September 2010, paragraphs 4(b)-(c).
33 Ibid, paragraphs 4(d)-(e).
34 Exhibit 17.

was to be repaid. Bill's signature was witnessed by Linda Mulcahy. For Pacific Ventures Limited, it was said that its common seal was affixed by a resolution of its directors. But the seal does not appear to have been affixed. The directors were there stated to be two companies, Global Nominees Limited and Credit Facilities Limited. Individuals signed above their names as, in each case, "its duly authorised representative". This agreement, described in the plaintiffs' case as the Second Loan Agreement, was admittedly signed by Bill. By cl 12 of this agreement, it was provided that Pacific Ventures Ltd would not be obliged to advance any moneys until security documents in the form of a lien on the shares of Bill in Yalgold had been deposited with it. Apparently, no such documents were ever provided.

[54] Bill's pleading admits his receipt of a handwritten letter from Gary dated 1 November 1993, which was as follows:

> "As per my previous discussions with you I have decided to give up on getting into production in Fiji and I will now establish in Vanuatu. I will shut down Mine & Quarry Equipment South Pacific PL so you will have to sign a new loan agreement to replace the current agreement with Mine & Quarry Equipment South Pacific. The new company that will sign an agreement with you is Pacific Ventures Ltd – Port Vila Vanuatu as all the funds you have borrowed to date (we transferred to Yalgold at your request) are being assigned to Pacific Ventures. The balance of funds that Mine & Quarry Equipment South Pacific are holding for you will also be assigned to Pacific Ventures Ltd once they have been transferred to you. All funds loaned to you will then come under the terms of the new loan agreement once signed."[35]

[55] Of course by the date of that agreement with Pacific Ventures Ltd, most of the alleged loans to Bill had already been made. Yet the agreement was in entirely prospective terms. It made no reference to previous advances by MQESP. But then there was a purported deed of assignment, dated 9 March 1994, to the effect that MQESP assigned to Pacific Ventures Ltd the debt from its loans to Bill.[36] It recited that Bill was indebted to MQESP in the sum of $1,243,992. As appears from paragraph 48 above, that is the amount claimed by the plaintiffs to have been advanced, net of repayments. The last of those advances (at least as a deposit to the account of Yalgold) was made on 15 March 1994, some six days after this assignment.

[56] There was a notice of assignment, also dated 9 March 1994, to which the common seals of Pacific Ventures Ltd and MQESP were affixed.[37] It was addressed to Bill, advising that his debt due to MQESP in the amount of $1,243,992 had been assigned to Pacific Ventures Ltd. Bill's pleading denies the receipt of this document. Yet curiously, it is listed in the chronology within his final written submissions.[38]

---

35 Exhibit 41.
36 Exhibit 42.
37 Exhibit 43.
38 Page 98 referring to exhibit 43.

[57] At about the same time, more precisely 1 March 1994, Gary executed another so-called Deed of Gift, which was addressed to Bill in these terms:

> "In consideration of the natural love and affection that I bear for you, I GARY FRANCIS ROBSON DO HEREBY GIVE to you all of my entitlement to receipt of payments, rights and benefits and other consideration contained in a deed of sale from me to Pacific Ventures Pty Ltd dated the 1st March 1994 a copy of which is attached hereto."[39]

The document was witnessed by Linda Mulcahy.

[58] In the cross-examination of Gary, this gift was referred to as a purported gift of $40 million. Exhibit 45 is an apparent written agreement for the sale by Gary to Pacific Ventures Pty Ltd of all of the issued shares in MQEI for a price of $40 million. But that agreement is dated 1 March 1996. Gary's evidence was that it was never completed. The deed of gift apparently referred to another document, which became exhibit 44, which was a deed of agreement for the sale by Gary to Pacific Ventures Pty Ltd of his shares in both MQEI and MQESP for a total of $20 million. That document is dated 1 March 1994 but is unsigned. At one point in the cross-examination of Gary, he conceded that the $40 million agreement, made in 1996, was a signed version of the $20 million document. Clearly that is not so. The 1996 document at least shows that the 1994 document, if it was ever signed, was not given effect. I accept also that the 1996 document was not given effect. And there is no reason to believe that the prices of either $20 million or $40 million had some realistic basis.

[59] In 1995, Gary was looking to return to live in Australia. That is evidenced at least by his correspondence with an accountant in Fiji, asking him to finalise any necessary tax returns for his period of residence there, including returns for MQESP.[40] Those letters were written by Gary on the letterhead of MQEI, but stamped with a request that the reply be to 47 Tile Street.

[60] In October 1995, further declarations of trust were executed by Bill and Sandra in favour of Gary. They claim to have no recollection of signing them but they admit that they did so. Linda Mulcahy's signature appears on each as the witness. The circumstances in which these documents were executed are indicated by later documents, and in particular documents recording instructions to Hopgood Ganim in 1999, which are discussed below. They are each dated 23 October 1995. One of them is executed by both Bill and Sandra; the other by Sandra alone.

[61] The one executed by Bill and Sandra was as follows:

> "We CHARLES WILLIAM ROBSON and SANDRA LEIGH ROBSON of 8 Sandringham Street, Mansfield in the State of Queensland, do HEREBY ACKNOWLEDGE AND DECLARE that

---

39 Exhibit 51.

40 Exhibit 101.

> one-half of our shareholding in YALGOLD PTY LTD, MINE & QUARRY EQUIPMENT PTY LTD, MINE & QUARRY INTERNATIONAL PTY LTD, MINE & QUARRY ELECTRICAL PTY LTD together with one half of those monies received or to be received from MINE & QUARRY EQUIPMENT INTERNATIONAL LIMITED and PACIFIC VENTURES LIMITED is held by us for and on behalf of GARY FRANCIS ROBSON AND DECLARE that such one-half part or share of those companies or incomes is held in trust by us and WE FURTHER DECLARE that we hold one-half of all dividends distributions interests or profits or other emoluments and any return of capital that may arise by reason of such holding for the said GARY FRANCIS ROBSON and WE FURTHER AGREE AND DECLARE that we will at the request of GARY FPANCIS ROBSON transfer or in any other way deal with the said share or shares in such manner as GARY FRANCIS ROBSON shall from time to time legally require or direct."[41]

[62] The one executed by Sandra was as follows:

> "I, SANDRA LEIGH ROBSON of 8 Sandringham Street, Mansfield in the State of Queensland, do HEREBY ACKNOWLEDGE AND DECLARE that one-half of holding of my husband CHARLES WILLIAM ROBSON and myself in the following:
>
> 1. YALGOLD PTY LTD
> 2. MINE & QUARRY EQUIPMENT PTY LTD
> 3. MINE & QUARRY INTERNATIONAL PTY LTD
> 4. MINE & QUARRY ELECTRICAL PTY LTD
> 5. Those monies received or to be received from MINE & QUARRY EQUIPMENT INTERNATIONAL LIMITED
> 6. Those monies received or to be received from PACIFIC VENTURES LIMITED
>
> upon trust for GARY FRANCIS ROBSON and I DECLARE that I hold all dividends distributions interests or profits or other emoluments and any return of capital attaching to such half part or interest for the said GARY FRANCIS ROBSON and I FURTHER AGREE AND DECLARE that I will at the request of GARY FRANCIS ROBSON transfer or in any other way deal with the said share shares profits or otherwise in such manner as GARY FRANCIS ROBSON shall from time to time legally require or direct."[42]

[63] Each document had a back sheet, carrying the name of Mr Henley's firm. I infer that they were prepared by that firm but that someone took delivery of the drafts from the firm before they were executed. Linda Mulcahy says that although her signature appears as the witness on each document, she did not believe that she saw

---

41 Exhibit 10.

42 Exhibit 11.

Sandra execute either document. She said it was possible that Bill signed in her presence. I find that Sandra did not sign in Ms Mulcahy's presence and I infer that she signed the document at somewhere other than 47 Tile Street, most probably at her house with the documents being brought home by Bill.

[64] A couple of weeks later, another loan agreement was signed by Bill with Pacific Ventures Limited.[43] It also had a back sheet indicating that it was prepared by Mr Henley's firm. It recited that Bill had applied to Pacific Ventures for finance of $3,500,000 which he agreed to use for a loan to Yalgold "for purposes directly related to that company's normal business and for the purpose of construction of Showrooms and Warehouses upon land owned by the company at 47 Tile Street, Wacol". The term of this agreement was for five years, expiring on 9 November 2000. It contained the same provision for security, in the form of a lien upon the shares of Bill in Yalgold, as had the 1993 agreement. Bill's signature was shown to have been witnessed by Linda Mulcahy. The common seal of Pacific Ventures Limited was affixed, purportedly on behalf of its directors which were said to have been the companies Global Nominees Limited and Credit Facilities Limited.

[65] In February 1998, Bill received a letter from McKays Solicitors.[44] That firm had acquired Mr Henley's practice. The letter simply enclosed "documents which were held in our safe custody on your behalf". One of them was a will made by Gary, said to have been dated 1 December 1989. That will is not in evidence. The documents enclosed were listed under subheadings such as Bill's name or Sandra's name. Under Bill's name, they included "Declaration of Trust dated 28 April 1989". Clearly this was the declaration of trust executed by both Bill and Sandra upon which Gary sues. Also enclosed were transfers of shares in MWA to Gary, but said to have been dated 25 August 1992, as well as a sale agreement between Bill and Gary dated 19 June 1989. There were several subheadings under which the solicitors wrote "no packet held in securities register". I infer that Bill had asked McKays for any documents relating to those entities, which were Mine & Quarry Electrical Pty Ltd, MQEI, MWA, Nosbor and Bylass. Bill signed a receipt for the enclosed documents on 17 February 1998. I infer that the 1995 declarations of trust had not been held by the solicitors because they were not executed in Mr Henley's presence or sent to him after execution.

[66] In 1998, the proceedings between Gary and his former wife returned to the Family Court. The transcript of a hearing on 7 May 1998 shows that Gary had filed a statement of financial circumstances, an application to dismiss his former wife's proceedings and an affidavit on 10 March 1998 which was to the effect that Gary had assets of only $1,000.[45] The Court was told that he was employed by MQEI. Bell J asked Gary's solicitor whether MQEI was "his company" to which Gary's solicitor said that it was not, Gary having sworn that he had "no interest, directorship, shareholding or interest in any company or trust". The proceedings against Gary were then dismissed.

---

43 Exhibit 18.

44 Exhibit 13.

45 Exhibit 103.

[67] On 20 November 1998, Mr Hopgood's firm wrote to Gary a letter which began:

> "As you are aware, we have recently been contacted by your brother who has requested that we report to you in relation to the following issues relating to your matrimonial dispute:
>
> - The ability of your Wife to apply to the Family Court to set aside the Order of the Honourable Justice Bell of the 7th of May 1998 (and the subsequent amended Order).
>
> - The ability of your Wife to make an application to the Court (assuming that you (sic) Wife succeeds in setting aside the Order) to set aside certain transactions with respect to assets which are now in the ownership and/or control of other persons and/or entities."[46]

[68] The letter advised about the power of the Family Court under s 79A of the *Family Law Act 1975* (Cth) to set aside an order for a property settlement on the grounds of a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other relevant circumstance. But the letter referred to no facts by which such an order could have been made against Gary. Mr Hopgood wrote that the solicitors had been asked to "look at this question on a preliminary basis only" without a detailed statement from Gary or any other relevant witness.

[69] On 21 January 1999, Mr Hopgood and a solicitor employed by his firm, Ms Wigan, conferred with Gary and Bill. Ms Wigan's diary note of that conference is in evidence.[47] She was called in the plaintiffs' case and was extensively cross-examined, although not to the end of challenging her credibility. I see no reason not to accept her evidence and the accuracy of this note and other documents which record instructions given by or in the presence of Bill or Gary. For this work, the solicitors' file was opened in Bill's name. The reason for that was explained by Mr Hopgood in a letter of 27 January 1999 addressed to Bill, in which Mr Hopgood wrote:

> "We advise at the outset that we have opened a new file in your name as opposed to your brother's name to ensure your file relating to your and your brother's restructure will not be the subject of any subpoena which Gary's former Wife may bring for the inspection of any relevant information which may indirectly relate to her matrimonial matter. Furthermore, we will also ensure that all correspondence forwarded will be marked to your attention and we will accordingly leave it to you to ensure that your brother, Gary is completely briefed in relation to our advices and is provided with copies of all correspondence for his own records."[48]

---

46 Exhibit 54.
47 Exhibit 75.
48 Exhibit 55.

In the same letter, Mr Hopgood wrote that the purpose of the retainer was for the firm to provide "advices as to a possible restructure of your and your Brother's corporate and trust interests". The letter was headed "Estate planning".

[70] Mr Wigan's diary note of 21 January 1999 recorded instructions which included the following. With respect to Yalgold, Bill was said to be the sole director and shareholder and the company's assets were said to be real properties located in Queensland and Western Australia worth "net $4.25 million". There was no reference to Sandra's shareholding.

[71] Under the heading "Bylass Pty Ltd", it was noted that this company had borrowed $1.4 million from Pacific Ventures Limited. The note recorded instructions to the effect that the shareholders of Pacific Ventures "…are a group of companies in Vanuatu and neither Gary Robson or his brother, Bill Robson are involved in the company Pacific Ventures Pty Ltd". They noted that it appeared (to the solicitors) "…that the loan by Bylass from Pacific Ventures was completely 'arms length'". It was recorded that Bylass had "…on-lent the sum borrowed to Yalgold…". It was then noted that Mr Hopgood had questioned the brothers as to "…why a company which is allegedly unconnected to Bill and Gary Robson would lend the sum of $1.4 million" and Ms Wigan noted that "[p]rima facie therefore, there was some suspicion associated with the borrowing".[49]

[72] This appeared under the heading "Mine and Quarry Equipment International Limited":

> "• It appears that Gary Robson started this company after the maintenance settlement with his Wife some time ago.
>
> • The director and shareholder of this company is Gary Robson solely.
>
> • The company is registered in Vanuatu.
>
> • The company owns interests in equipment and interests in manufacturing basins/plants all over the world.
>
> • The Husband estimates the worth of the company to be approximately $2 million however the company has potential to generate each year millions of dollars in profits.
>
> • In Vanuatu, the law is such that a company is not required to lodge returns or financial statements. Each company has its own ledgers and are not required pursuant to the Secrecy Act of Vanuatu to produce the information. Accordingly, Gary Robson is not in a position to produce any financial statements."[50]

---

49 Exhibit 75.

50 Ibid.

[73] Most importantly, the file note recorded these instructions given by or in the presence of each of the brothers:

> "THE AGREEMENT BETWEEN GARY AND BILL ROBSON
>
> - It appears that the Agreement between the 2 brothers is that all capital and income is to be shared between the brothers equally. It appears that Bill Robson's Wife is fully aware of this agreement and further a Trust Deed was settled wherein Bill Robson's Wife has agreed to ensure Gary Robson receives 50% of the capital and income should Bill Robson die.
>
> - The Will of Bill Robson leaves everything to his Wife.
>
> - PFH noted to Bill and Gary Robson that all of the assets and income would be tied up in the company trust structures in any event so upon the death of Bill Robson the Wife really would not own anything but would be able to control the structure.
>
> - Gary Robson indicated his intention that he wishes to make capital gifts to his brother which will be given by him but sourced from his international company. PFH highlighted to Gary Robson's attention that notwithstanding his description of the gift as 'capital' the gift would probably be income and taxation issues then arise as to whether taxation consequences follow from the gift.
>
> - Gary Robson has a Will in place which really is of no effect particularly in view of the fact that he does not have a direct interest in any of the aforementioned companies except for the international company and that there is only a Trust Deed between himself and Bill Robson's Wife that he will receive 50% of the assets."[51]

[74] Lastly under the heading of "Bill and Gary Robson's instructions", Ms Wigan noted:

> "1. We are to assess what is the present effect of the Trust Deeds and the respective Wills of Bill and Gary Robson at the moment.
> 2. We are to assess how we are able to change the structure so that upon the death of either Bill or Gary Robson the other will receive 50% of the assets and particularly upon the death of Bill Robson how we can ensure that the Wife will give to Gary Robson 50% of the assets.

---

51 Ibid.

> 3. What taxation effects there are in relation to the payments to be made by Gary Robson to his brother Bill Robson by way of gift from the income/capital of the international company.
>
> 4. How we are able to structure Gary Robson to ensure that he will be protected from attack from any former spouse or present spouse and creditors etc."[52]

[75] Another diary note of Ms Wigan records that Gary Robson delivered to her on 1 February 1999 a number of documents, although there was one document which Gary said was not to be photocopied "which related to Pacific Ventures and himself".[53] With the benefit of those documents, Ms Wigan wrote a memorandum to Mr Hopgood dated 11 March 1999.[54] It referred to the declaration of trust of 28 April 1989 and to the wills of each of the brothers. That of Bill was dated 20 October 1995 and appointed as executors Sandra, Gary and Mr Henley. His estate was to be left to Sandra, or if she did not survive him, their children. Gary's will was dated 28 January 1999, appointing as executors Bill, Sandra and Mr Henley, and leaving $1,000 to each of Gary's children and the residue to Bill.

[76] Ms Wigan's memorandum referred to documents including what was described as a bill of sale, dated 28 May 1990, between Gary as the grantor and Bill as the grantee. According to Ms Wigan's memorandum, this recited that Yalgold had advanced $200,000 to Nosbor and that Gary had agreed to give a bill of sale to Bill "as third party security for such advance" over a car and what had been Gary's matrimonial home at Chapel Hill.[55] Just why this property would be assigned to Bill, rather than to the creditor, is not at all explained. Nor is it explained how a bill of sale could have been granted over real property. The document appears to have been part of a plan to put Gary's property beyond the reach of his wife.

[77] Hopgood Ganim wrote to Bill on 19 May 1999 after a conference attended by Bill and Gary a couple of weeks earlier. The letter included the following:

> "We confirm however, that in relation to the company, Yalgold Pty Ltd, pursuant to the Deed of Trust dated 28th April 1999, 12 of your shares in Yalgold Pty Ltd and 12 of the shares held by your Wife in the company are held beneficially for Gary. Therefore, upon your death, 12 of your shares will remain with Gary but the remaining 12 will go to your Wife, Sandra. The result will be that both your brother, Gary and your Wife, Sandra will be equal shareholders in the company."[56]

(The "Deed of Trust dated 28th April 1999" was clearly a reference to the declaration of trust dated 28 April 1989)

---

52 Ibid.
53 Exhibit 76.
54 Exhibit 77.
55 This seems to have been a reference to a bill of sale which was amongst the documents which became exhibit 140 which was signed by Gary but not by Bill.
56 Exhibit 72.

The letter added that Mr Hopgood had advised that "…generally, the structure adopted [was] … a good structure from Gary's point of view in order to protect him from attack from any future creditors and/or spouses". The letter was consistent with Ms Wigan's diary note of that conference of 6 May 1999, which was attended by Bill and Gary, where she noted:

> "Pursuant to a Deed of Trust, Gary currently holds 24 shares in Yalgold Pty Ltd as 12 of the shares held by Bill and 12 shares held by Sandra are held beneficially for Gary. In the event of Bill's death, Gary will own the 24 shares in Yalgold Pty Ltd. Gary was happy with this as the company, Yalgold owns most of the unencumbered assets which will escalate in value."[57]

[78] Bill said that he could not recall receiving the letter of 19 May 1999 and he believed that it probably went instead to Gary. But that was inconsistent with the summary of his proposed evidence, provided on his behalf pursuant to the pre-trial directions. According to the summary, Bill did recall receiving the letter but decided that he would do nothing about it.[58] In cross-examination he was asked whether he meant by the summary that the letter went directly to Gary or through Bill's hands to which he answered: "I don't know. To be honest, I don't know. It could have come into my basket and gone to his, it could have come from him. He could have shown me. I honestly can't say, but I – if I've said that previously, that I got it and took no notice of it and disregarded it, well, that's what I've done".[59] I find that he did receive it, and that he also received the letter from Hopgood Ganim addressed to him dated 27 January 1999. The letters were addressed to him at his place of work and there is no suggested reason why he would not have seen them.

[79] On 28 June 1999, Hopgood Ganim wrote a letter to Bill headed "Gift from Gary Francis Robson".[60] I find that he received it; it was addressed to him at his house. It discussed the particular subject of the taxation implications for Bill of what was said to have been a gift by Gary to Bill of his entitlements to receive payments arising from the sale of shares held by him in MQEI, a sale which was said to have been made in March 1996. As already discussed at paragraph 58, Gary's evidence here was that that sale was not completed. It is unnecessary to discuss the content of this advice. Its relevance is that it is further evidence that Bill was not a mere bystander in the context of the advice which was being sought from Hopgood Ganim.

1999: The brothers fall out

[80] In late 1999, Ms Mulcahy noticed a change in the relationship between Gary and Bill. Indeed she recalled that there was a physical fight between them in the office, for which the police had to be called. She recalls that when Gary went overseas towards the end of 1999, "…we had the locks changed and he was no longer able to

---

57 Exhibit 74.
58 T 14-77.
59 T 14-77.
60 Exhibit 73.

come back to the office" after which the brothers "…didn't deal with each other anymore…".[61]

[81] She also recalled that in late 1999, after that physical altercation, she went into Gary's office and saw that a door to the safe was open. Gary had some documents which he asked her to send to an accountant, Mr Charlton, for safekeeping. Bill was not present and Gary said that Bill was not to know the documents were going to Mr Charlton. She did not send the documents and believed that Gary took them to Mr Charlton himself. Subsequently, she said, she felt uneasy about this matter and told Bill (this was probably after Gary's departure).[62]

[82] That evidence corresponds with another diary note of Ms Wigan, which records a conference between Mr Hopgood, Ms Wigan, Gary and Mr Charlton (but not Bill) on 26 October 1999. The notes included:

> "Gary is generally not happy with the structure as recently his brother Bill had utilised one of the assets and provided a security over them without the consent of Gary. …
>
> The issue was left on the basis that the preferable approach would be for Gary to trust his brother. The accountant Bill Charlton suggested that there be a charge over the assets in Yalgold Pty Ltd – Mortgage Debenture and collateral security over the properties for all of the assets from time to time up to say $4m. This was a consideration given by [Mr Hopgood] and Gary and his accountant Bill Charlton in order to provide to Gary some protection against his brother."[63]

As to the moneys said to have been advanced for the improvements at Tile Street, Ms Wigan noted:

> "It was noted by Gary that there is a loan by Pacific Ventures *to Yalgold* in the amount of about $1.6m which Bill is receiving the benefit of. Gary thought of repaying that loan."[64]
>
> (my emphasis)

[83] It appears that both Gary and Bill then saw Mr Charlton on 29 November 1999, because Mr Charlton referred to such a meeting in his letter faxed to both of them dated 3 December 1999.[65] Mr Charlton purported to summarise that meeting which had covered many topics including the shares in Yalgold. Mr Charlton wrote that "[a]ny attempt to transfer the 24 shares in Yalgold Pty Ltd from Bill and/or Sandra to Gary (or to Gary's discretionary trust) will result in a capital gain". He wrote that "[t]herefore, we are left with the current, and unsatisfactory, arrangement. That is, half of the dividends are paid to Gary; one quarter of the dividends is paid to Bill; and one quarter of the dividends is paid to Sandra. … The current position does not

---

61 T 15-69.
62 T 15-80.
63 Exhibit 79.
64 My emphasis.
65 Exhibit 128.

cater for income splitting; it does not handle changes in either of your financial or health positions; and it does not handle security of tenure in the event of a rift between either of you".

[84] In his evidence in this trial, Bill said that he had no recollection of receiving this letter from Mr Charlton or attending the meeting to which it referred. However, when he was cross-examined on the hearing of Gary's summary judgment application in these proceedings, he seemed to accept that he had received this letter at least some time prior to July 2003 and that he had attended the meeting and had not objected to the statement that half of the shares were held for Gary.[66] More probably than not, Bill did receive the letter at the time and did attend the meeting as Mr Charlton recorded. It is unlikely that Mr Charlton was so mistaken about Bill's attendance when writing his letter only a few days after a meeting with Gary only. The position, it appears, was that Gary and Bill were then looking to find a way to restructure their affairs, but from an agreed premise that Gary was a half owner in Yalgold.

[85] Bill and Sandra each gave evidence that after the falling out with Gary, they went to Mr Charlton's office and obtained a bundle of documents, which they photocopied, marking the copies with a green "X" before returning the originals to Mr Charlton. The copies as marked by them became exhibit 140. They include the three declarations of trust.

Early 2000

[86] Gary caused a deed of assignment, dated 2 February 2000, to be executed purportedly on behalf of Pacific Ventures Limited and another company controlled by him which was called Credit Facilities Limited.[67] It recited that Bill was indebted to Pacific Ventures Limited for the sum of $A1,243,992 and it was in terms of an immediate assignment of that debt. The common seals of the companies were apparently applied to the deed. Also dated 2 February 2000 was a notice of that assignment, again with those seals affixed. Bill denies receiving this notice. I am satisfied that it was signed, as was the deed of assignment executed, on 2 February 2000. The documents were kept amongst files of accountants called Barrett & Partners in Vanuatu. The files were proved by the firm's principal, Mr Barrett. But I am not persuaded that the notice was sent to Bill.

[87] On 3 February 2000, Pacific Ventures Limited purported to assign to MQEI what a deed of assignment between them of that date described as "…all interest outstanding under the loan agreement between [Pacific Ventures Limited and Bill dated 9 November 1995]".[68] The seals of each company were applied to that deed as they were to a document of the same date in the form of a notice of that assignment which, curiously, was dated 2 February 2000. I am persuaded that those documents were executed on or about 2 February 2000 but not that Bill received the notice.

---

66 Page 15 of the transcript of the hearing of 21 December 2005, being exhibit 125 here.

67 Exhibit 116.

68 Exhibit 117.

[88] On 10 February 2000, by a deed of assignment apparently made by Credit Facilities Limited and the plaintiff Hannover, there was a purported assignment of the debt said to be owing by Bill, in the sum of $A1,243,992.[69] Again the corporate seals were affixed to this document as they were to one of the same date in the form of a notice of assignment addressed to Bill. Again I am satisfied that the documents were executed on this date but not that notice was given to Bill.

Gary makes demands

[89] On 5 May 2000, Gary wrote to Bill and Sandra, calling upon them to transfer "…shares held on my behalf in Mine & Quarry Equipment Pty Ltd and Yalgold Pty Ltd to me personally and, as directors of the company, to formally record the transfer in the register of each of the companies".[70] That demand was made "[i]n accordance with the Declaration of Trust dated 23 October 1995 prepared by Keith H. Henley & Co, Solicitors…".

[90] At this stage clearly the business relationship had broken down. According to an affidavit by Bill in the Family Court, after unsuccessful settlement discussions in February 2000, and whilst Gary was overseas, Bill removed Gary's authority to operate bank accounts of MQE. His evidence there was that:

> "Whilst [Gary] was neither a director of Yalgold Pty Ltd or MQE and spent most of his time overseas, [Gary] was still exercising total control over the management and day to day affairs of the business and would ignore me in making decisions. I was also disgruntled at the level of financial remuneration that I was receiving from the business notwithstanding I was working extremely hard for the business. During the entire period of 15 years that I had been involved in the business, I had received $30,000 per annum wages for the first twelve (12) years and $40,000 per annum wages for the last three (3) years".[71]

[91] On 13 June 2000, MQEI served a statutory demand upon MQE in the sum of $630,243.98.[72] Bill's evidence in the Family Court was that he was not aware of the circumstances which gave rise to that claim because all of the business between the two companies had been handled by Gary. There was a further statutory demand from MQEI to MQE served on the same day, claiming $623,238.53 as moneys lent by it to MQE in December 1999.[73] And again on 13 June 2000, there was a third statutory demand by MQEI, this time addressed to Yalgold and in the sum of $448,103.23.[74]

[92] Bill's response was swift. On behalf of MQE he instructed solicitors to apply for its own winding up, and a provisional liquidator was thereby appointed on 15 June

---

69 Exhibit 118.
70 Exhibit 12.
71 Exhibit 70, paragraph 183.
72 Ibid, paragraph 193.
73 Ibid, paragraph 195.
74 Ibid, paragraph 196.

2000. At the same time, Bill sought to shore up his position vis a vis Yalgold. A number of securities were signed by Bill and Yalgold, each dated 13 June 2000. There was a document in the form of a deed of loan, which recited that Yalgold had requested Bill to lend to it the sum of $1,846,376.20 which he had agreed to do.[75] That sum was agreed to be repayable within three months of the deed, with interest. There was also a mortgage debenture, by which Yalgold gave a charge over all of its assets to Bill.[76] And there were mortgages by Yalgold to Bill over each of its real properties, including the Tile Street properties and the Jandakot land.[77]

[93] Yalgold was wound up in this Court by an order of 13 September 2000, on an application filed on 15 August 2000. Mr Clout was appointed its liquidator. By then he was also the liquidator of MQE.

[94] Hannover commenced its case against Bill on 24 August 2000. MQEI commenced its case against Bill on 13 October 2000. But despite his demand for a transfer of shares in Yalgold and MQE, Gary brought no proceedings at that stage to enforce the alleged trusts. His action in that respect was not commenced until 2004. The apparent explanation for that delay is in the further proceedings brought against him in the Family Court.

More proceedings in the Family Court

[95] At some stage about then, perhaps in 2001, Gary's former wife brought proceedings in the Family Court, seeking to re-open her property claims against Gary, pursuant to s 79A of the *Family Law Act 1975* (Cth). She joined as respondents Bill, Mr Clout as the liquidator of MQE and Yalgold, MQEI and Pacific Ventures Pty Ltd. In her affidavit sworn on 20 August 2001 in that case, she referred to what she had discovered about her former husband's business interests, from the publicly available records of the litigation between MQEI, MQE and Yalgold.[78] She asserted that now that the brothers had fallen out, Bill was "trying his hardest to keep all of the family assets which in the first instance were assets owned by [Gary] and myself and that such assets rightly belonged to the pool of assets that we had at the time of our final separation".[79]

[96] It was in response to that affidavit that Bill swore an affidavit on 17 September 2001.[80] I have referred to some of it already, but other important parts must now be discussed. In particular there was Bill's evidence as to the monies provided to Yalgold for the improvement of 47 Tile Street. He referred to the securities which he caused Yalgold to provide to him dated 13 June 2000 and said that the monies secured "were, in fact, a series of loans which I made to Yalgold between 1989 and 1997."[81] In that respect, he exhibited a copy of a letter from Mr Charlton dated 31

---

75 Exhibit 120.
76 Exhibit 121.
77 Exhibits 122-124.
78 Exhibit 69.
79 Ibid, paragraph 93.
80 Exhibit 68 here.
81 Ibid, paragraph 12.

August 2000 which he said provided "a breakdown of these loans". That letter specified the eight payments and the two repayments to which I have referred above at paragraph 48. It also included three other amounts. One was $200,954.20 as an amount "gifted by Gary to Bill and on-lent to Yalgold" in "1989/1990", another amount described as "loan from Bill to Yalgold re Perrett & Warlow matter" on 19 December 1997 in the sum of $24,600 and a credit of $56,000 for "transfer of Mercedes to CWR". That first item corresponds with Gary's evidence that in 1989 he gave $200,000 to Bill, to which I have referred at paragraph 31. The last item was an apparent reference to the car which Gary had purportedly assigned to Bill under the bill of sale. Importantly, the eight payments to Yalgold upon which the present debt actions are based were, according to that affidavit by Bill, amounts which he had lent to Yalgold. And he adopted the contents of Mr Charlton's letter, which when itemising each of the eight payments to Yalgold, described it as a "Loan from MQE South Pacific to Bill to Yalgold". Accordingly, there was a clear admission that Bill had borrowed the amount of these eight payments from MQESP. In the same affidavit he explained that the balance of the monies secured by the Yalgold securities of 13 June 2000 was interest, the calculation of which was according to another letter from Mr Charlton which was exhibited to his affidavit.[82]

[97] However, in Bill's evidence in chief in this trial, he disavowed that evidence. He said that he had simply adopted what Mr Charlton had written, which in turn was a reconstruction from "a network of paperwork in the office" created by Gary to falsely represent that Bill was a borrower and in turn a lender to Yalgold.[83] If that is true, there has never been a basis for his being or remaining a secured creditor of Yalgold. Yet as Bill's evidence confirmed, the mortgage he caused to be registered over 47 Tile Street in his favour remained registered. Bill's evidence here was unable to explain why that is so.[84]

[98] In that same affidavit, Bill swore that he had "…no precise recollection, when Yalgold was incorporated by [Gary]" and that he was not consulted about that matter.[85] That evidence was part of a body of evidence within this affidavit which is quite inconsistent with the defendants' present case that there was a separation agreement in 1989. For example, in paragraph 158 of the affidavit, Bill swore that all of the transactions concerning 47 Tile Street were brought about by Gary, who did not explain them to him or consult him before doing so, and that Bill did not understand the transactions and had no knowledge of Gary's reasons for bringing them about. Referring to the use of the two companies, MWA and MQE, Bill swore that "[a]t the time of separation" (a reference to the separation of Gary and his wife), he did not know "why we continued to use MWA Brisbane Pty Ltd and, as I have said earlier, I believe that Mine & Quarry Equipment Pty Ltd was created in order to facilitate Mr Freiberg's entry into the business." He added that "these were matters outside my area of responsibility and expertise and handled exclusively by [Gary]".[86] Bill also swore that for many years, Gary was the controlling mind behind not only MQEI but also MQE.

---

82 Exhibit CWR9 to Bill's Affidavit in the Family Court which is Exhibit 68 in these proceedings.
83 T 12-43, 44.
84 T 12-45.
85 Exhibit 68, paragraph 100.
86 Ibid, paragraph 94.

[99] Bill swore a further affidavit in the Family Court proceedings.[87] It was sworn on 12 May 2004. I have referred to it in several places already. In this affidavit also, Bill swore that the same eight payments to Yalgold had been loans by him to it. In paragraph 80 of that affidavit he repeated the description of each payment as a "loan from MQE South Pacific to me and on-lent to Yalgold". At paragraph 82, he confirmed that "the loans from MQESP referred to above" were as pleaded in MQEI's amended statement of claim in the present proceedings filed in July 2002. In that same affidavit, he responded to evidence from Gary's former wife, which had exhibited copies of the three declarations of trust. At paragraph 221 of his affidavit, Bill swore that he had "…absolutely no recollection whatsoever of signing those documents nor at any time did I ever obtain advice concerning those documents. After the dissolution of our business I located the documents at the office of our accountant, Bill Charlton."

[100] The Family Court proceedings concluded on 23 July 2004, by consent orders under which Gary's former wife was to receive from the liquidators of MQE initially sums totalling $107,100, other monies totalling in excess of $400,000 to be paid from distributions due to MQEI in the liquidations of MQE and Yalgold and $150,000 from Gary.[88]

Some observations about the parties

[101] Before discussing the plaintiffs' claims and the numerous defences which were argued, it is convenient to say something about the principal witnesses.

[102] Gary's evidence here was subjected to a cross-examination which was, on any view, extensive. His personal and business life, over more than a quarter of a century, was the subject of every inquiry which might have been suggested by the available documents and other information (and perhaps other inquiries). This trial began in February 2010, when Gary's evidence in chief was given and he underwent some hours of cross-examination. The trial then had to be adjourned because, as was rightly conceded by his counsel, there were serious deficiencies in Gary's disclosure of documents. In particular, until that point he had resisted the notion that he was in control of a number of foreign companies and was thereby bound to disclose relevant documents of those companies. After several interlocutory skirmishes, the trial resumed in December 2010. At that stage Gary was without legal representation. His cross-examination resumed and occupied several days. But ultimately it is unnecessary for me to revisit every nook or cranny explored by the cross-examiner. The reliability and credibility of Gary Robson can be seen to be seriously deficient by a more limited reference to the facts.

[103] In particular, it is abundantly clear that throughout the various Family Court proceedings, Gary falsely pretended that he was a man of no assets whatsoever, whilst in truth, he was conducting successful businesses and controlled several companies which, as should already appear and even putting Yalgold on one side,

---

87 Exhibit 70.

88 Exhibit 106.

had substantial assets. In particular, within a period of a little over a year, he was able to provide $1,300,000 for the improvement of 47 Tile Street.

[104] The extensive improvement of the Tile Street properties was apparently well completed by the time the brothers fell out. As at February 2010, 47 Tile Street was worth $4,725,000[89] and 22 Tile Street was worth $3,600,000.[90] Had Gary remained a registered half owner of these properties, the course of the Family Court proceedings would have been quite different, as he must always have realised. The prospect of those proceedings provides a compelling explanation for the 1989 transactions. It is telling that Gary did not commence this trust claim until November 2004, not long after the Family Court case had been settled.

[105] Gary said that he first became aware of the declarations of trust only in late January 1999. He said that he was then in his office at 47 Tile Street when Bill came in and placed a bundle of documents in the safe (in Gary's room) and left. The safe door was left open and out of curiosity, Gary looked at the documents. After he read them, at first he did nothing but then some days later, he said to Bill that they best go to see Hopgood Ganim "…about getting the shares transferred to my name".[91] He claimed that in 1989, because of the discord involving Gary's wife, Bill had not wanted to be a co-owner with Gary of the real property. So, said Gary, he gave Bill $200,000 "to go and buy the land in Perth at Jandakot and the land at Tile Street" simply upon Bill's assurance that "I'll look after you ... if you haven't trust in your brother, who can you trust?"[92] This is very difficult to accept. The strong probability is that they each intended to put the land beyond the reach of Gary's wife. It is unlikely that Gary was unaware of how his interests were to be protected. Most probably, he was aware of the 1989 declaration of trust, as part of an agreed understanding between the brothers as to the underlying ownership of the real properties which they intended to put into Yalgold's name.

[106] According to Bill and Sandra, Gary was a bully who spent much of the time intimidating Bill. According to Ms Mulcahy, Gary was sometimes overbearing and rude. I would accept that he was a dominating personality and that, as Ms Mulcahy related, he was effectively "the boss". That might be relevant to one of the defences, which is that Bill and Sandra were simply overborne by Gary and did not know what they were signing either in 1989 or 1995 (or in Bill's case also when he signed documents relating to the alleged loans). However, neither Bill nor Sandra impress as people likely to be dominated or bullied into signing documents which, on their face, were meant to have some important legal effect, but which they did not understand.

[107] Bill's evidence was given in an apparently considered and measured fashion. But as a former detective, no doubt he was used to giving evidence. He impressed as an intelligent and quietly confident man, and not at all as someone likely to be easily tricked or manipulated. Again that is not surprising given his apparently successful careers as a policeman and then as a businessman.

---

89 Exhibit 81.
90 Exhibit 82.
91 T 1-29.
92 T 1-39.

[108] Sandra Robson also impressed as someone unlikely to be tricked or manipulated. In the way her evidence was given, she appeared to be confident and alert. According to Mr Henley, she served him well as a legal secretary for many years. All of this made it very difficult to accept that she had not understood the documents she was signing or that she was not intending them to have their apparent effect.

THE TRUST CLAIM

The separation agreement case

[109] I go first to the defendants' case of a separation agreement, which is that Gary and Bill decided to end their business relations in 1989. This argument seems to have two limbs. First, it was said to be relevant to whether Bill and Sandra did intend to be bound by the 1989 declaration of trust when they executed it. Secondly, it was argued that the separation agreement superseded whatever had been the position, including the trust over half of the Yalgold shares.

[110] The argument has an evidentiary basis in the instructions given to Morris Fletcher & Cross, for the purposes of obtaining advice as to capital gains tax on the 1989 transactions.[93] It is also supported by evidence given by Gary in the Magistrates Court in 2001, in a claim brought by MQEI against Bill and Sandra. Gary gave sworn evidence then that in the late 80s the brothers "…decided that we would split our business interests in the companies and the assets, where he would take the land and I would take the company", the land being 47 Tile Street.[94] But these matters are of little weight when put against the other evidence, and the suggestion of a separation agreement seems fanciful when it is seen what actually happened from 1989 onwards. Gary remained in command of any business conducted from Tile Street. The evidence of Ms Mulcahy as to the way Gary exercised control throughout until 1999 is telling.

[111] MQE was not incorporated until 1990 so that upon any view, MWA continued to conduct the business until at least then. It is not claimed that Bill had some other entity in the second half of 1989 through which he was conducting a business of his own. The circumstances of the investigation and likely litigation by the Australian Customs Service well explain why MQE was incorporated and used as the vehicle for the business conducted from Tile Street.

[112] There is the evidence of Bill in the Family Court, referred to above at paragraphs 39 and 98, which is quite inconsistent with the notion of a separation between the brothers.

[113] The 1989 declaration of trust and the documents in 1989 relating to the MWA shares and the sale of 47 Tile Street were drawn by Mr Henley. Yet no document was prepared by him to evidence this so-called separation agreement. If the

---

93 Exhibits 107 and 108.

94 Exhibit 62.

intention had been to put paid to the trusts over the Yalgold shares, it is likely that a document would have been prepared by the solicitor to record it. The declaration of trust had been executed only weeks before the contracts for 47 Tile Street and the MWA shares. Bill, Sandra and Mr Henley are unlikely to have forgotten it.

[114] And then there was also the execution of the 1995 declarations of trust, which Bill and Sandra simply could not explain, consistently with the notion of this separation agreement (unless they did not know what they were signing and Gary had thought better of their separation).

[115] In the circumstances of 1989, and in particular those of Gary's marriage and the actions of the Australian Customs Service, the declaration of trust and the other transactions are easily explained. Gary wanted to put assets which he owned or controlled beyond the reach of his wife. The property at 47 Tile Street was the place where the brothers conducted their business. If Gary had had to provide even a share of that land to his wife, there would have been consequences for the business as well as for Gary's personal financial position. Therefore Bill and Sandra had ample reason to assist Gary in this respect. On Gary's pleaded case, the 1989 land transactions and the sale of Bill's shares in MWA were at Bill's request because of his concern about claims by Gary's wife. As Gary would have it, he simply acceded to this request, and at the same time, gave $200,000 to his brother without knowing of the declaration of trust. I accept that Bill was concerned about claims by Gary's wife; but so too was Gary.

[116] To the same end, Gary and Bill effected a transfer to Yalgold of what had been Gary's matrimonial home. It is absurd to consider that, at arms length, Yalgold lent money to Nosbor, obtained a mortgage over the house and then effectively foreclosed in consequence of a default by Nosbor. In truth, the house remained effectively Gary's house. He continued to live there throughout the 1990s.

[117] The apparent quid pro quo for Gary's parting with his interest in 47 Tile Street was his acquisition of half of the shares in MWA. But MWA's future was under the heavy cloud of the Customs investigation and, as was demonstrated, it was easy to substitute for MWA a new company for effectively the same business. Gary promptly removed himself from the board of the new company so as to make it appear that he had no interest in it.

[118] In truth there was no agreed separation between the brothers. The defendants' case in this respect is simply their reconstruction from the correspondence from Morris Fletcher & Cross.[95] Gary's evidence that he gave accurate instructions to that firm cannot be accepted. Rather, the brothers gave these instructions to Morris Fletcher and Cross because they thought they would assist their case which was to be put to the ATO.

[119] There is also Bill's participation in the conferences with and advice from Hopgood Ganim, referred to above at paragraphs 67 to 79. Bill's apparent concurrence in

---

95 And, perhaps, Gary's evidence in the Magistrates Court.

those instructions, particularly concerning the ownership of Yalgold, cannot be sensibly explained consistently with the defendants' case. It is inconceivable that Bill could have been present at the conferences recorded by Ms Wigan without understanding that it was being said that he and Sandra were only half owners of the real properties.

Non est factum

[120] Similarly, the defence by Bill and Sandra that they were tricked into executing each of the declarations of trust and did not understand the effect of the documents, must be rejected. Bill and Sandra said that Gary would often require them to sign documents without their understanding the contents. It is said that this must have happened when they signed the declarations of trust. They must rely on inferences being made to that effect because, consistently with their claims that they have no recollection of signing these documents, they are unable to say what they were thinking when they did so.

[121] But at least in relation to the 1989 declaration of trust, they signed in the presence of a solicitor, Mr Henley. He can be rightly described as their solicitor. It was through their contact with Mr Henley over the years, and in particular through Sandra's long working association with him, that he was retained. There was no suggestion within the cross-examination of Mr Henley, or ultimately any argument, to the effect that Mr Henley was collaborating with Gary to trick Bill and Sandra.

[122] The 1989 declaration of trust was a short and clear document. It is impossible to accept that Bill, the former detective, and Sandra, the former legal secretary, did not understand it, even without the advice about it which they would likely have received from Mr Henley.

[123] The 1995 declarations of trust were not witnessed by Mr Henley. As I have discussed, they were purportedly witnessed by Ms Mulcahy. But again the documents are not lengthy and I cannot accept that Bill and Sandra did not know the effect of what they were signing. The apparent purpose of these documents was to record the intended arrangement between the three of them about the true ownership of several entities. The 1989 document, of course, dealt only with Yalgold. Precisely why these 1995 declarations of trust were then executed remains unknown. By claiming that they have no recollection of signing them, Bill and Sandra could cast no light upon the matter. And nor could Gary, consistently with his claim that he was unaware of the trust or trusts until some years later. At the time, there must have been a perception that there should be some document which recorded the intention of the parties that Gary on the one hand and Bill and Sandra on the other, meant to be effectively equal partners in the business conducted from Tile Street.

[124] As already noted, Bill's income, throughout the period of 15 years in which he was in business with Gary, was limited by Gary's control of the purse strings.[96] It was

---

[96] See paragraph 90 above.

not as if Bill and Sandra, through Bylass or personally, were enjoying all of the profits of MQE's business. Rather MQE's affairs were intertwined with those of the foreign companies which Gary had put in place. The notion then that Bill and Sandra would be equal partners with Gary in his businesses would not have surprised or disturbed them.

[125] In February 1998, Bill received a number of documents from McKays Solicitors which included the first declaration of trust. Yet he did not protest. By 1998, 47 Tile Street had been very substantially improved. Then in 1999 he attended meetings at Hopgood Ganim, at which the trust over the Yalgold shares was discussed. He received correspondence from Hopgood Ganim which referred to it. Again he did not protest. The same goes for his meetings with Mr Charlton, and the letter from Mr Charlton, in November and December 1999.

Shams

[126] A further defence is to the effect that all of the documents relied upon by the plaintiffs are shams. At this point I will consider that submission in relation to the declarations of trust. The defendants' argument uses the term "sham" in the sense of a deliberate artifice, that is to say a document which is not intended to have its apparent effect. The argument cited, amongst other cases, *Sharrment Pty Ltd v Official Trustee in Bankruptcy*, where Lockhart J said:

> "A 'sham' is therefore, for the purposes of Australian law, something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not. It is something which is false or deceptive."[97]

Thus the argument seems to be that the declarations of trust were shams, because someone intended that they not take effect according to their terms. But if that someone was Gary, the argument would be nonsensical because Gary had no reason to represent that half of the shares in Yalgold were his if that was not the case. The alternative would be that the makers of the documents, Bill and Sandra, intended that the documents should disguise the true position. But on their case, they had no intention at all because they did not understand what they were doing. It is sufficient to say that, as already found, Bill and Sandra did understand that they were creating or confirming a proprietary entitlement in Gary, and that they meant to do so.

Unconscionable conduct

[127] Next Bill and Sandra complain of what they say is unconscionable conduct. They say it would be unconscionable for Gary to enforce any rights under the declarations

---

97 (1988) 18 FCR 449 at 454.

of trust in the following circumstances. Some of them have been discussed already and can be immediately dismissed in this context also: the alleged "sham nature of the transactions", the allegation of *non est factum* and the alleged separation agreement. Another circumstance is, so it is alleged, the way in which Gary was able to intimidate Bill into doing what Gary demanded of him. As I have found, Bill and Sandra well knew what they were doing with the declarations of trust. And I would not accept that Bill felt physically intimated by Gary. They are both heavily built men, Bill being the younger brother. Bill was, after all, a policeman for 13 years. Ms Mulcahy's evidence described Gary as "an angry man" who "scared me".[98] But she also recalled that Bill "would yell back [at Gary] at times".[99]

[128] A further circumstance relied upon for this unconscionability argument is described in the written submissions of the defendants as "the tax avoidance practised by Gary, unashamedly, with the repatriation of the fruits of the profits generated offshore – albeit using the efforts and opportunities of the Australian companies, MWA and MQE – under the guise of loans to Bill, when in fact the funds went directly to Yalgold." That argument covers a fair amount of ground, but it suggests that the purported loans by the offshore entities, resulting in the debt claims here, were in some way part of a tax avoidance scheme. Whether there were, in truth, loans to Bill coinciding with the payments that were made to Yalgold is considered below, in relation to the debt claims. But for the present point, this allegation provides no basis for a finding of unconscionability on the part of Gary in seeking to enforce his entitlement to trust property.

[129] Another circumstance relied upon is that described in the defendants' written submissions as follows:

> "The absolute lack of merit of Gary, by virtue of his lies and deception practised wherever he felt it to his advantage, including lies to Courts about his now claimed interests so as to avoid scrutiny of the Family Court, and indeed Justice Atkinson in this Court."

In 2001, Atkinson J heard an appeal by MQEI against a partial rejection of a proof of debt lodged in the liquidation of MQE. Atkinson J then asked Gary, during the course of his evidence, whether he was "effectively in control of MQE" to which he answered "no".[100] Then in re-examination in that case, Gary told his counsel that Bill was the "controller of Yalgold" and when asked then whether Gary had any interest in Yalgold, he answered "No, I have got no interest in Yalgold".[101] That last answer was false, but it is not said to have had any impact upon the outcome. It is simply an example of the way Gary has seen fit in other proceedings to deny the existence of any interest in Yalgold, or through Yalgold in the real properties, because it then suited him to do so.

[130] Gary's denials of any interest in the Yalgold shares, and in particular his false evidence in the Family Court and before Atkinson J, constitutes conduct warranting

---

98 T 15-68.

99 Ibid.

100 The transcript being Exhibit 48 in these proceedings at p 46.

101 Exhibit 48, p 51.

strong criticism. However it is not conduct from which a defence of unconscionability could be raised by Bill and Sandra. It is not unconscionable for Gary, as against Bill and Sandra, to claim from them his property. Rather it is unconscionable for them to withhold it. This misconduct by Gary is relevant, if at all, to whether Gary should be denied equitable relief, to which I will return.

Stamp duty and revocation

[131] A further factor relied upon for this unconscionability argument is what is described as "Gary's demonstrated willingness to seek to avoid State revenue obligations, by understamping the Trust declarations." There is a related argument for Bill and Sandra which is that the 1995 declarations of trust are not duly stamped and therefore cannot be relied upon at all because of s 487(1)(a) of the *Duties Act 2001* (Qld) which provides that unless an instrument is properly stamped, "it is not available for use in law or equity or for any purpose".

[132] Originally, the 1989 declaration of trust was stamped adhesively. As now appears from the first page of the document, on 19 January 2009 it was assessed for duty of $2.40 by the application of s 51E of the now repealed *Stamp Act 1894* (Qld). By s 51E, shares comprising the capital of a company which was not listed on a stock exchange were deemed to have an aggregate minimum value of $800. The assessment of $2.40 was by applying the then prescribed duty of 60 cents for every $100 (for a conveyance of unlisted shares) to an amount of $400 as 50 per cent of that minimum value.[102] As at 28 April 1989, Yalgold had no assets. It cannot be said that the 1989 declaration of trust has not by now been duly stamped.

[133] However the defendants argue that it was not an effective instrument until it was duly stamped. They say it was not duly stamped until 2009, by which time they had revoked the instrument by a deed poll which they executed in 2008.[103] The adhesive duty paid, apparently in April 1989, was in the sum of $4 and therefore exceeded the duty which was properly payable. But the defendants argue that it was not duly stamped because it was not an instrument which could be stamped adhesively.

[134] Under s 4A(1) of the *Stamp Act*, an instrument chargeable with stamp duty was not, except in criminal proceedings, to be given in evidence, or to be available for any purpose whatever, unless duly stamped. In *Hoggett v O'Rourke*,[104] Holmes J (as she then was) struck out a statement of claim which was pleaded in reliance upon an unstamped dutiable instrument, upon the basis of s 4A. However that was not a judgment which concerned the present question, which is the effect or otherwise of a duly stamped document before it became so. That was considered by Holmes J in *Caxton Street Agencies v Korkidas & Anor*,[105] where a defendant sought summary judgment upon an argument that the contract upon which the plaintiff sued had not

---

102 *Stamp Act 1894* (Qld), Schedule 1.
103 Exhibit 126.
104 [2002] 1 Qd R 490.
105 [2002] QSC 210.

been stamped. After the hearing and whilst the decision was reserved, the plaintiff caused the document to be duly stamped. Holmes J concluded:

> "[16] But the document has now been assessed and stamped. Once stamped it becomes 'pleadable, receivable in evidence and admissible as good, useful and available [and] its validity and operation as from the beginning [are] to be construed as unaffected by the enactment."

Her Honour was quoting from the judgment of Dixon J in *Shepherd v Felt and Textiles of Australia Ltd*.[106] Dixon J there said, in relation to relevantly identical legislation, that:

> "[I]t is impossible to doubt that instruments which may legally be stamped after execution, upon due stamping ... become in contemplation of law as efficacious from their execution as if they had never fallen within the operation of [the equivalent of s 4A]."[107]

[135] In *Official Trustee in Bankruptcy v D-Jamirze*, speaking of a relevantly equivalent provision Hodgson CJ in Equity said:

> "Plainly, this means that an unstamped instrument is not of absolutely no effect *until* stamped: the use of the word 'until' in some of the cases noted earlier is obiter, and contrary to the ratio of *Shepherd*. Until stamped, an instrument has whatever effect is consistent with the proposition that, *if* stamped, it will be fully effective *ab initio*. To put this another way, *Shepherd* must mean that an instrument is effective from the start conditionally upon being stamped before relied on in Court, or alternatively, from the start carries the potentiality of being so effective."[108]

[136] Counsel for the defendants referred to these cases, including *Shepherd*, but nevertheless submitted that the 1989 declaration (as well as the 1995 declarations which, they argue, are still not duly stamped) was susceptible to revocation in 2008. As they concede, ordinarily a declaration of trust of property is irrevocable. It is presumed to be irrevocable absent some express reservation in the declaration of a power of revocation.[109] Clearly there was no reservation of a right to revoke this trust. It was irrevocable. Section 4A of the *Stamp Act* did not make it revocable. For as long as the document was not duly stamped, s 4A prevented it from being available for any purpose. But having been stamped, this 1989 declaration of trust must now be treated as having been fully effective, and irrevocable, from the date of its execution. To hold otherwise would be inconsistent with *Shepherd* and the many cases which have applied it.

---

106 (1931) 45 CLR 359 at 383.

107 Ibid.

108 (1999) 48 NSWLR 416 at 427. See also the analysis of McGill DCJ in *Burnitt & Anor v Pacific Paradise Resort Pty Ltd* [2004] QDC 218.

109 Underhill and Hayton, *Law relating to Trusts and Trustees* (15th ed, 1995)at p 129.

[137] During the course of the trial, the defendants objected to the tendering of the 1995 declarations of trust, on the basis that they had not been duly stamped. Of course by 1995, Yalgold had substantial property. It is unnecessary to set out here the detailed argument to the effect that duty had been underpaid on these instruments. In essence, the argument was that ss 56FA to 56FO of the *Stamp Act* had applied and the ultimate consequence, so far as the amount of duty was concerned, was that the duty payable on the 1995 declarations was $24,592.50, rather than $64.80 as assessed by the Commissioner of State Revenue in 2008. That assessment was said to have been the result of misrepresentations made by Gary to the Commissioner as to the value of the shares in Yalgold. The submission for the defendants was that I might admit the documents, but I should only do so upon an undertaking by a solicitor to pay any further duty and any penalty, an undertaking which would have been in the terms for which s 4A of the *Stamp Act* had provided. At that stage, Gary had no solicitor. I admitted the documents, concluding that their admissibility was now to be determined under s 487 of the *Duties Act*. I said that if the declarations of trust were ultimately held to be valid instruments (contrary to the defendants' submissions) and liable for duty, then the revenue could be protected by arrangements approved by the Court under s 487(2).

[138] The defendants' argument then was upon the premise that it was by the 1995 declarations, rather than the 1989 declaration, that Gary became entitled to half of the Yalgold shares. That is not the case, because the trust of the Yalgold shares was in place from the 1989 instrument. The ownership of the Yalgold shares was unaffected by the 1995 declarations. The fact that the value of the Yalgold shares was far more in 1995 is irrelevant.

[139] There was other property the subject of the 1995 declarations of trust. The defendants submitted that the reference to "monies received or to be received from [MQEI] and Pacific Ventures Limited"[110] was, in some way, a reference to the moneys which the plaintiffs in the debt actions say were on-lent to Yalgold and, more particularly, to the debt thereby owed by Yalgold. I do not accept that interpretation. Those words appear in the declaration of trust executed by both Bill and Sandra. On the plaintiffs' case in the debt actions, the moneys were lent only to Bill before being passed on to Yalgold. In the declaration of trust executed by Sandra only, again there is a similar reference to property in the nature of moneys received or to be received from those companies. Yet no-one suggests that she was entitled to funds from Yalgold. More generally, the reference to these moneys in each of the 1995 declarations is not in terms which could be understood as property constituted by a debt owing by Yalgold. Instead, those words are a reference to moneys (if any) which Bill or Sandra either then held as funds received from MQEI or Pacific Ventures Limited or which they might thereafter receive from either entity. If money had been lent by Pacific Ventures Limited to Bill as the plaintiffs allege in the debt actions, that money had been on-lent and was no longer property, in the form of money, held by Bill. Therefore I do not accept the argument that the 1995 declarations of trust should have been stamped as if they were conveyances of the debt said to have been owing by Yalgold to Bill.

---

110 Exhibits 10 and 11.

[140] Otherwise there was no argument which addressed the value of other property the subject of the 1995 declarations of trust, to show that they were not duly stamped. The result is that it is unnecessary to make any arrangement to have the documents given again to the Commissioner.

[141] However, it must be said that the argument for the defendants about understamping is a bold one, coming as it does from the persons who executed those documents. By s 26 of the *Stamp Act*, whatever amount was the appropriate duty was an amount payable by them as the persons who had executed the instruments. Once the defendants' claims to have been ignorant of the documents or of their effect are rejected, it is the defendants who were bound to have the documents duly stamped and there is no assertion that they were in some way prevented by Gary from doing so. It cannot be accepted then that the defendants could rely upon their own default in stamping their documents as a reason for the not performing the trust.

More (alleged) unconscionability

[142] A further part of the defendants' unconscionability argument relates to the debt claims by Hannover and MQEI. It is said that the trust claim, taken together with those debt claims, involves an element of double recovery. Through the plaintiff companies, Gary seeks the repayment of money which it is said that he contributed to the improvement of 47 Tile Street but he also seeks to recover half of the Yalgold shares. As I have noted, there is some apparent tension between the trust claim and the debt claims.[111] That is relevant to whether the true legal relationships were in all respects as Gary and his companies allege. In particular, it is relevant to the question, considered below, of whether Bill really did become a borrower from Gary's companies. But if in truth Gary was the beneficial owner of half of the Yalgold shares and Bill did borrow from Gary's companies as alleged, the coincidence of those causes of action, and in turn their enforcement by these proceedings, would involve no unconscionability.

[143] For the reasons set out below, the debt actions will be dismissed. Accordingly, there will be no recovery which is the "double recovery" described in the defendants' submissions. And it could not be suggested that simply by causing the companies to bring and prosecute the debt claims, it is in some way unconscionable for Gary to enforce the trusts over the Yalgold shares.

Undue influence

[144] The defendants also say that they should be given relief according to the doctrine of undue influence. They submit that their relationship with Gary had the necessary ingredients of ascendancy, power or domination by him over them and that the quality of their consent to the declarations of trust was affected. But that was not their relationship, as should be clear from my findings thus far. Gary was a strong personality and undoubtedly, upon occasions, could have been persuasive. But equitable intervention upon this basis is granted where the relationship is such as to

---

111 At paragraph 7 above.

make the will of the innocent party not independent and voluntary because it is overborne.[112] That was not this case.

Tax fraud defence

[145] I come now to the submissions made by the defendants which they describe as "the tax fraud defence". I will refer here to its impact or otherwise upon the trust claim.

[146] The first part of this argument involves Gary's alleged use of transfer pricing in order to divert what would otherwise have been the profits of MWA and MQE to various overseas companies controlled by him. It is said that this was done with the aim of defrauding the Commissioner of Taxation. It is said that some of these profits was "repatriated" to Australia and in particular found its way into the hands of Yalgold and MQE, although Bill claims that he was unaware of those receipts.

[147] The argument relies upon Gary's evidence in which he conceded that he used a company called Cubon Company Limited, which was incorporated in the British Virgin Islands and another company called Facetwin Limited, which was incorporated in Hong Kong, to acquire the equipment or business opportunities from MWA and MQE and to receive the profits which would otherwise have been derived from those assets and business opportunities by the Australian companies. Counsel for the defendants seek to make much of some of the circumstances affecting these companies and Gary's control of them, as indicators of a fraud upon the Commissioner. For example, there was a series of transactions involving the purchase of items called ball mills. They were purchased by MWA from a business in Canada. I accept that Gary then "interposed" Facetwin between MWA and the ultimate purchaser of the goods with the intended result that the profit on the resale was derived by Facetwin and not MWA. Counsel for the defendants seem to have been particularly encouraged in this argument by a letter dated 18 April 1988, apparently from someone on behalf of Facetwin to the Canadian supplier.[113] The letter was signed by Facetwin by someone describing himself as "I.M. Atrik". The argument also points to Gary's pleaded denials of his control over MQEI, Facetwin and Hannover. Gary's control of MQEI and Hannover is obvious even from the prosecution of these claims. I would accept also that he controlled Facetwin and Cubon. In respect of this transaction involving the ball mills, I accept that Gary did engineer a result whereby the profits were derived by Facetwin. I am prepared to infer that he did something similar in other transactions and that the consequence was the diminution or elimination of what would have been the taxable income of MWA or MQE. But then there are at least two questions. The first is whether this constituted a fraud upon the Commissioner. The second is whether any of it matters in the defence of the trust claim.

[148] One difficulty in answering that first question is that this activity occurred at various times in the 1980s and 1990s and I was not assisted by an argument which descended to the detail of relevant revenue laws at the time. The submissions do not lack colour, by their references to tax havens and "washing of funds overseas".

---

112 *Commercial Bank of Australia Ltd v Amadio & Anor* (1983) 151 CLR 447 at 461.

113 Exhibit 56.

But they do lack the substance by which reasoned and fair findings could be made about what are so generally asserted to have been contraventions of Australian laws.

[149] As to the second of those questions, although a discrete part of the defendants' written argument was devoted to this so-called tax fraud defence, there was no explanation there of why, in law, this should matter for the trust claim. It is distinctly relied upon as a ground for refusing equitable relief upon the "clean hands" doctrine. I deal with that submission below.

[150] Another part of this tax fraud defence is said to involve the instructions given to Hopgood Ganim in 1999. Gary sought advice from the firm, which included advice about some taxation questions. I confess to having some difficulty in identifying the significance which the defendants' argument would attribute to these events. I accept that advice was sought upon subjects which included the possible taxation consequences of a repayment of what Hopgood Ganim described was a loan from Pacific Ventures Limited to Yalgold. Again, no findings were sought as to any specific fraud upon the Commissioner and no reference was made to the relevant law.

[151] In none of this is it demonstrated that there is a discrete defence to the trust claim.

Unclean hands

[152] It is convenient to go now to the arguments that Gary should be denied equitable relief for his misconduct in several respects. The first is his sworn denials of any interest in Yalgold "for nefarious purposes: most obviously, to conceal his beneficial interest from (his former wife) and the Family Court". I have found that Gary did just that. However, that misconduct should not deny him equitable relief in the circumstances of this case. One of those circumstances is that the defendants were parties to this concealment of his interest in Yalgold. By this argument, they would hope to gain a large windfall from a scheme in which they were active participants. Moreover, it can be seen that Bill also gave false testimony in the Family Court.

[153] Secondly, as it happens, Gary's former wife became aware of the true ownership of Yalgold and was able to successfully reopen her case against him. She may not have discovered all of the facts and the settlement of her case in 2004 may have been affected by some uncertainty as to whether she could prove Gary's ownership of part of Yalgold. But that would have been in no small part due to Bill's affidavit evidence which did not disclose the true position, in particular, as to the Yalgold shares. The point here is that Gary's endeavours to hide his property from his former wife were ultimately unsuccessful. I am not persuaded that he has obtained the intended fruits of his deception by the settlement in 2004. This is not a case then where the grant of equitable relief would facilitate a fraud.

[154] If Gary's former wife was induced to settle by some substantial gap in her knowledge of Gary's ownership in Yalgold, then she has her rights against him

upon the facts found within this judgment. In that event, she would be assisted by the equitable relief which Gary seeks. The defendants would have that property kept from her reach by an unmeritorious appeal to notions of equity and conscience.

[155] There is a further submission for the defendants that Gary should be denied equitable relief upon "all manner of other bases … including his unclean hands" with respect to six subjects. I have dealt with these already. The matters relied upon are the alleged misstamping of the declarations of trust, the alleged tax fraud, what is said to have been "the trickery practised on Bill and Sandra", Gary's "engaging in sham transactions", Gary's alleged unconscionable conduct and his alleged undue influence. As I have found, most of those matters are not established as facts. The possible exception is in the reference, in the broadest way, to "sham transactions", because as I will discuss, there was some artifice in Gary's purported recording of loans to Bill. But especially as the debt claims will be dismissed, there is no basis for a denial of equitable relief in relation to the trust claim. If Gary was making it appear that the funds for the improvement of Tile Street did not come from him or an entity controlled by him, in order to keep the truth from his former wife, then for the same reasons this does not provide an equitable defence.

[156] As to the so-called tax fraud, the defendants' ultimate argument did not seek to prove that there were particular moneys, which were the fruits of a tax fraud, which were amongst the funds that went to Yalgold.[114] This is not a case where the shares in Yalgold are said to have a value which is in any way attributable to the misconduct which is alleged.

[157] The defendants' clean hands argument disregards therefore two principles. The first is that the misconduct which is relied upon must have an immediate and necessary relation to the equity which is sued for.[115] Secondly, this is an equitable defence, which is discretionary and is therefore to be applied or otherwise according to the circumstances of the case.[116] The defendants' argument gives the impression that equitable relief must always be denied where the evidence admitted at the trial of an equitable claim reveals some misconduct by the plaintiff.

[158] Then the defendants argue that when seeking equitable relief, Gary should be prepared to do equity. But the argument does not suggest what it is that Gary should do. It asserts that Gary's claim makes no allowance for what are said to have been Bill's "personal exertions which also contributed to the enrichment of Yalgold" or "for the assets of MWA and MQE which were sold (at a time when those companies were jointly owned by Bill and Gary) all business opportunities belonging to those companies which were utilised, in order to generate the funds which went towards the enrichment of Yalgold". Interestingly, that submission was made on the basis that MQE was owned by both brothers, which is markedly at odds with the alleged separation agreement. But beyond that, these general assertions do not identify the facts to be found, let alone the conditions which should be imposed upon the grant of equitable relief. No doubt there was much

---

114 As conceded by the defendants in their submissions at T 17-35.

115 *Meyers v Casey* (1913) 17 CLR 90.

116 *Nelson v Nelson* (1995) 184 CLR 538; *Carantinos v Magafas* [2008] NSWCA 304 at [61]; GE Dal Pont and DRC Chalmers, *Equity and Trusts in Australia* (4th ed, 2007) at 814.

work done by Bill which ultimately contributed to Yalgold's position. So too was there work done by Gary and it far from appears that Bill's exertions were the more extensive or valuable.

Disclaimer

[159] A particularly ambitious argument by the defendants was that Gary had disclaimed his property in the Yalgold shares, that is to say he had shown unequivocally an intention to reject his equitable interest.[117] It was argued that what Gary had disclaimed by his evidence in and conduct of various proceedings was inconsistent with the trust upon which he now claims. Instances are his evidence before Atkinson J and his sworn statements in the Family Court. There was also his evidence in the Magistrates Court to which I have referred above at paragraph 110. The argument also referred to a suggested failure by Gary to mention the declarations of trust when instructing Hopgood Ganim in 1999. But contrary to that submission, Hopgood Ganim were instructed that there was an agreement between the brothers that everything would be shared equally, which was hardly a disclaimer of the trust. And more particularly, Hopgood Ganim were provided with the first declaration of trust. The defendants also refer to an alleged delay by Gary in bringing proceedings until 2004 and to his failure to plead the 1995 declarations of trust until an amendment in 2008.

[160] The defendants must prove that Gary intended to disclaim this property. They have failed to do so. Gary's denials of any interest in Yalgold were not in terms of a disclaimer of an interest but rather a denial of any interest in the first place. Gary gave that false evidence to further his deception as to his financial position rather than with the intention of changing that position. It is absurd for Bill and Sandra to suggest that he was meaning to give up the benefit of what the three of them had put in place in 1989.

[161] It may also be noted that the action or inaction by Gary which is relied upon as a disclaimer occurred a long time after 1989. Even absent any positive conduct accepting the benefit of the trust, the beneficiary is presumed to have accepted and thereby have lost the rights disclaimed after the time when he would be expected to decline the gift.[118]

[162] The disclaimer argument also has no regard to everything which Gary did towards the improvement of the Tile Street properties, including the provision of funds. Once it is seen that they were not truly the subject of loans, either to Bill or to Yalgold, they were consistent only with an intention on the part of Gary to improve the value of his shares in Yalgold.

---

117 Ford and Lee, *The Law of Trusts*, vol 1 at [3.192].

118 *J W Broomhead (Vic) Pty Ltd (in liq) v J W Broomhead Pty Ltd* [1985] VR 891 at 933-934.

Attestation

[163] There remains the argument that the 1995 declarations of trust have no force because the signatures of Bill and Sandra were not witnessed. This point was not pleaded, but was apparently inspired by the evidence of Ms Mulcahy. Her evidence was that she could not recall whether she witnessed Bill's signature but that she did not witness Sandra's signature.

[164] Without reference to authority, the defendants' counsel submitted that the execution of the documents was therefore "defective", that the documents could not take effect as deeds and that the documents could have had effect only as deeds because Gary gave no valuable consideration and was a mere volunteer.

[165] It is unnecessary for Gary to prove the efficacy of the 1995 declarations of trust because the trust was established, insofar as the Yalgold shares were concerned, by the 1989 declaration. But it should be noted that a trust of a legal interest in personalty need not be created by a written declaration of trust and valuable consideration is not required for a declaration of trust.[119] In *Jones v Lock*, Lord Cranworth LC said:

> "If I give any chattel that, of course, passes by delivery, and if I say, expressly or impliedly, that I constitute myself a trustee of personalty, that is a trust executed, and capable of being enforced without consideration. I do think it necessary to go into any of the authorities cited before me; they all turn upon the question, whether what has been said was a declaration of trust or an imperfect gift. In the latter case the parties would receive no aid from a Court of equity if they claimed as volunteers. But when there has been a declaration of trust, then it will be enforced, whether there has been consideration or not."[120]

Conclusion on the trust claim

[166] In the trust claim the plaintiff has proved his case and none of the defences is made out. The defendants hold half of their shares in Yalgold Pty Ltd on trust for the plaintiff. There will be a declaration to that effect.

[167] Gary seeks relief pursuant to s 82 of the *Trusts Act 1973* (Qld) vesting in him 12 of the shares in Yalgold held by each of the defendants. He also seeks an order under s 468 of the *Corporations Act 2001* (Cth) authorising that transfer of shares. But that provision deals with the disposition of the property of the company in liquidation. The impediment to a transfer of its shares is from s 468A. That requires the consent of the liquidator, or if the liquidator refuses to give consent, of

---

119 KS Jacobs, *Law of Trusts in Australia* (6th ed, 1996) at [704]; Ford and Lee, *The Law of Trusts*, vol 1 at [3.210].

120 (1865) LR 1 Ch App 25 at 28.

the Court. There is no reason why the liquidator would refuse to consent to the transfer of these shares. But I will not make an order at this point vesting the shares in Gary until that consent is given. I apprehend that given the history of this matter, and the willingness of Bill and Sandra to advance any argument in the way of Gary enforcing this trust, there may be some further need for the Court's intervention. But that could be promptly given.

THE DEBT ACTIONS

[168] The determination of these cases, as with the trust claim, must be made without the benefit of reliable evidence from Gary, Bill or Sandra. Sandra gave effectively no evidence directly bearing upon these claims. Of course, there is evidence that Gary was completely overbearing to the point of causing Sandra and Bill to sign documents which they did not understand, but which I have rejected.

[169] The critical issue of fact here is the basis upon which the relevant eight payments were made to Yalgold's account, as I have set them out above at paragraph 48. At that time, Bill and Sandra were the directors of Yalgold and, of course, its shareholders. These funds enabled Yalgold to substantially improve its property. Yet Bill and Sandra were unable to explain the agreement or arrangement by which the funds were procured. For example, they did not claim that that it was Yalgold which borrowed the funds from Gary or one of his entities. On the other hand, Gary's evidence on these matters, as it is generally, was often vague and self-contradictory and generally unreliable.

[170] The starting point is that, as Bill ultimately conceded, the eight payments which are relied upon by the plaintiffs were in fact made to the account of Yalgold and on or about the dates alleged by them. Clearly also, Bill paid from his account the sums of $70,000 and $5,600, on the dates alleged by the plaintiffs, which the plaintiffs say were part repayments. The questions are whether the payments to Yalgold were loans and, if so, who were the parties to those loans.

[171] As noted already, the evidence referred to a loan agreement between MQESP and Bill, but it did not become part of the evidence. But there is also the document referred to above at paragraph 54, which was Gary's handwritten letter to Bill of 1 November 1993 which Bill admitted he received. Plainly enough, it referred to an agreement between Bill and MQESP and to "funds loaned to you" under that agreement. It referred to the proposal that the creditor would become Pacific Ventures under the terms of a new agreement. Then there was the loan facility agreement, between Pacific Ventures and Bill, which was signed and dated 2 November 1993.[121] It was in terms of an agreement to provide finance up to an amount of $2,500,000. And there was the 1995 agreement with Pacific Ventures, providing for finance of $3,500,000 over a five year term.[122]

---

121 Exhibit 17.

122 Exhibit 18.

[172] Bill was unable to satisfactorily explain these documents. It was not his case, for example, that he signed the November 1993 document upon Gary's assurance that it was an artifice which would never be enforced. At one stage in his cross-examination, when asked where the moneys came from to build the buildings on Tile Street, he answered "I believe they were moneys that Gary repatriated back to Australia from shams that he conducted in the sale of equipment".[123] In his evidence here, he offered no further explanation of what he thought was happening at the time such substantial amounts were being deposited to Yalgold's bank account. Whether he and Sandra were the owners of all or a half of Yalgold, it is inconceivable that he had no understanding, correctly or otherwise, of whether these were moneys being lent by somebody to Yalgold or otherwise. Of course, consistently with his denial of the trusts over the Yalgold shares, and his false assertion of a separation agreement, he could not say that these deposits to Yalgold's account were simply the application of the profits of the brothers' joint enterprise.

[173] Accordingly, the plaintiffs have the advantage of documents signed by Bill, recording that he was a borrower of funds for the development of Tile Street. They also have Bill's testimony in the Family Court, which he sought to disown here, that he was a borrower of these funds and they have his conduct in shoring up his position ahead of the winding up of Yalgold in 2000. All of that, together with the absence of any satisfactory explanation within Bill's evidence here, might tend to make the plaintiffs' case an apparently strong one.

[174] However, the terms of loan agreements with Pacific Ventures do not sit easily with the plaintiffs' case. At paragraph 53 I have discussed the 1993 Loan Facility Agreement. It provided for a facility of $2,500,000. But the evidence does not reveal how that amount was fixed. For example, there is no evidence that this was the expected cost of the Tile Street improvements. By the date of this document, on the plaintiffs' case, $859,992 had been already paid, which was more than half of the total said to have been advanced.

[175] Further, the 1993 agreement makes no reference to the funds which had been advanced by MQESP. It might be said that it is not inconsistent with that position, in that by referring to prospective finance of $2,500,000, the agreement might have been including a component required to pay out MQESP. Still it seems unusual that no reference was made in this document, or it would appear in any other document signed by Bill at the time, to record the payout of MQESP.

[176] The 1993 agreement provided for repayment of the facility by November 1995. Again the evidence does not indicate how that period was considered to be appropriate. Nor does it at all indicate how Bill or Yalgold was to be able to repay the loan within that time. Conceivably, the loan could have been repaid by refinance from an external source, i.e. from someone unconnected with Gary. But there is no suggestion in any of the evidence that this is what the parties had in mind. Gary was unlikely to have agreed to a repayment from an external financier

---

123 T 14-29.

because, almost inevitably, that would have required a mortgage over Yalgold's property.

[177] The 1993 agreement provided that Pacific Ventures would not be obliged to advance money until the necessary security had been provided. As discussed, no such documents were provided. Yet it is said that Pacific Ventures (through MQESP) did proceed to make advances, with an amount of $70,000 advanced on the day after this agreement followed by further amounts constituting another $360,000 within the next few weeks.

[178] The 1995 loan agreement provided for a facility of $3,500,000 which I have discussed at paragraph 64. Again this was stated to be for the same purposes as was specified in the 1993 agreement. But the "construction of showrooms and warehouses upon land owned by [Yalgold] at 47 Tile Street, Wacol" had been achieved by then. The evidence does not suggest that there was other work which was shortly to commence and which required this finance. And again the agreed amount of the finance is unexplained by the evidence. It is more difficult to reconcile the prospective nature of this loan agreement with the circumstances which then existed than with the 1993 agreement. That is because in 1995 there was no change of financier. So rather than the agreement providing simply for the rollover of an existing loan, it was in terms which would have suggested to the uninformed reader that prior to then there had been no debtor/creditor relationship between the parties. It contained preconditions as to a drawdown, again by reference to security to be provided. That security was not provided. In any case, as this was simply to roll over an existing facility, that term as to a precondition to the drawdown would not have been apt. The term of this loan was five years. Again the evidence does not suggest any reason for an agreement for that term or any discussion between the brothers as to how Bill might have repaid such a loan.

[179] There was some evidence from Gary in which he appeared to say that the first payment was of $50,000 on 5 November 1992, which came from his own funds, not from MQESP. Of course, this is not fatal to the claim that it was an advance by MQESP. Contrary to the plaintiffs' pleadings, which allege that the last four of the eight advances were made by MQESP on behalf of Pacific Ventures, the seventh and eighth payments did come from an account in the name of Pacific Ventures. The evidence indicates that $300,000 was transferred into an account of Pacific Ventures on about 22 November 1993, i.e. two days prior to its being paid from that account to Yalgold. Curiously, the eighth payment, which was $29,600 made in March 1994, was in fact made from funds which had come to Pacific Ventures a week previously from Yalgold. That transaction is certainly difficult to understand, given that the purpose of the suggested loans being made to Bill was to have them on-lent to Yalgold.

[180] The evidence, such as it is, as to the payment of interest supports the defendant's case that this was not in truth a loan. In February 2010 Hopgood Ganim, who were then acting for the plaintiffs, sent to the defendant's solicitors what purported to be a schedule of the loans, accrued interest and interest paid, from November 1993.[124]

---

[124] Exhibit 86.

As to interest, the schedule was calculated by compounding the interest each day. The total interest said to have accrued up to 2 February 2000 was $713,454.66. Of that sum, there were said to have been payments of $285,963.14, leaving Bill in arrears as at 2 February 2000 in an amount of $427,491.52. According to the schedule, during no period was Bill consistently paying interest. It shows him as paying no interest until 10 October 1994 when there was an amount of $95,217.70 paid. Remarkably, that is said to have reduced the balance to $1,243,179.07, which is less than the amount of the outstanding principal as pleaded by the plaintiffs (which is $1,243,992). The interest payments said to have been made thereafter, according to the schedule, are as follows:

14.06.96	$11,010.00
18.12.96	$11,010.00
18.02.97	$9,000.00
13.03.97	$11,000.00
17.04.97	$10,000.00
05.10.97	$33,000.00
10.10.97	$17,622.00
05.11.97	$13,200.00
19.12.97	$35,890.89
20.05.98	$7,826.88
29.06.98	$31,185.67

[181] At the Tile Street office, Linda Mulcahy kept some records of this purported loan, from which she sent some documents to Gary on 9 May 2000.[125] There were some nine invoices said to have been for interest and another ten "invoices for interest on [interest] paid on behalf of Yalgold". There are also two pages headed "Statement of Loan Funds" and a page headed "Summary of Loans and when Funds Received". On the two page document,[126] the payments and repayments according to the plaintiffs' pleaded case were listed as well as several transactions in 1999, involving what were said to have been loans by MQEI to Bill, and on-lent to Yalgold together with some repayments by Bill. A total of $518,664 was shown as lent by MQEI from which $101,642 had been repaid. This document said nothing about interest.

[182] Some of those invoices for interest are in evidence.[127] They are invoices from Pacific Ventures to Bill in various dates in 1996, the last being dated 30 November 1996. Each has a handwritten note, it seems made by Ms Mulcahy, that it was paid on 29 June 1998 (except for one which was noted as paid on 20 May 1998). On the face of this evidence, Bill was substantially in default in paying interest. A large payment said to have been made on 29 June 1998 gives the impression that it was

---

125 Exhibit 150.

126 Exhibit 143.

127 Exhibits 144 through 147.

thought to be of assistance to someone that this payment be seen to have been made by the end of the financial year to expire the next day.

[183] Thus some records were kept at Tile Street which purported to be records of the state of the account between Bill and Pacific Ventures and in turn between Bill and Yalgold. But it does not appear that these records were kept with any precision, and with what would be expected for an arms length loan. The history of payment, or more appropriately non-payment, of interest suggests that the intention of the parties was to give the appearance of a loan or loans, but not to be truly bound by them.

[184] When Gary and Bill retained Hopgood Ganim in 1999, their initial instructions were inconsistent with the plaintiffs' case. As I have discussed,[128] Ms Wigan's note of 21 January 1999 recorded instructions that it was Bylass Pty Ltd which had borrowed $1.4 million from Pacific Ventures Limited and that Pacific Ventures was a company unrelated to Gary or Bill. She recorded that Bylass had "on-lent to Yalgold". Again as I have noted, there was on the part of the solicitors "some suspicion" about the truth of those instructions. Those instructions were untrue, at least as to the association with Pacific Ventures. Importantly, Gary and Bill were then trying to make it appear that the funds used by Yalgold to improve the Tile Street properties had been provided by an unrelated lender.

[185] Gary subsequently delivered to Ms Wigan some documents including one which related to Pacific Ventures which he said was not to be photocopied. As appears from Ms Wigan's memorandum of 11 March 1999,[129] those documents included the 1995 loan facility agreement. But in the letter from Hopgood Ganim to Bill dated 19 May 1999, following a conference with Gary and Bill on 6 May 1999, there is no reference to this purported loan.[130] That was unusual in the context of advice as to what would happen in the event of Bill's death.

[186] Then there is the evidence as to what the plaintiffs say were repayments made by Bill. One is the alleged repayment of $70,000 on 7 October 1993. The statements for the bank account of Bill and Sandra at the time show a deposit to their account of that amount on 8 October 1993.[131] That came from Yalgold's bank account, as is shown by its bank statement.[132] Similarly, it was from Yalgold's account that $5,600 was deposited to the account of Bill and Sandra on 13 October 1993. In turn, those funds were paid out by cheques in the same amounts, which were debited to their account on 19 and 27 October 1993. The cheque for $70,000 was paid to Cubon.[133] On the face of this evidence, there is no necessary inconsistency with the plaintiffs' case. The payments by Yalgold to Bill are consistent with the notion that Yalgold was making payments of its debt to him. The payment by Bill to Cubon could have been at the creditor's direction. But it was also consistent with Bill's case, that the funds were passed through Bill's hands to make it appear that he was Yalgold's lender.

---

128 At paragraph 71 above.
129 Exhibit 77.
130 Exhibit 72.
131 Exhibit 20.
132 Exhibit 19.
133 Exhibit 138.

[187] The interposition of Bill between Yalgold and the lender is difficult to understand by reference to purely commercial considerations. The express purpose of the loan, according to the agreements, was to fund the development of the Tile Street properties. The expected borrower would have been Yalgold and on the security of Yalgold's land. I am left with the impression that the interposition of Bill was part of the plan to distance Gary from the apparent ownership of the Tile Street properties. Pacific Ventures was a company having as its directors two companies maintained by a firm of accountants in Vanuatu. More probably than not, the intention was to make it appear, should Gary's wife enquire about the matter, that the money to improve Tile Street was borrowed by Bill from an unrelated lender at arms length.

[188] From the perspective of the supposed lender, it is telling that there was no apparent concern as to Bill's serious defaults in the payment of interest. There is nothing in the nature of, for example, a demand for payment at any time prior to 2000 (after the brothers fell out).

[189] Then when Gary was about to make a demand for payment, he caused the debt to be assigned, in different parts, to the plaintiffs. There is a document in the form of a minute of a meeting of the directors of Pacific Ventures dated 2 February 2000.[134] It records the presence of "Global Nominees Limited represented by its duly authorised representative" and "Credit Facilities Limited represented by its duly authorised representative". The minute records three resolutions. The first was for the execution of the deed of assignment in favour of MQEI of the interest due. The second was for the assignment in favour of Credit Facilities Limited of the principal debt. The third was to convene an extraordinary meeting of members of Pacific Ventures, to be held on the following day, to consider whether the company should apply to be struck off the Register of Companies (in Vanuatu), for the reason that upon those assignments, Pacific Ventures would no longer have any assets or liabilities. This is difficult to reconcile with the notion that it had received some hundreds of thousands of dollars in interest payments. It indicates that Pacific Ventures was merely a shell and not, in truth, a lender.

[190] A fundamental problem with the debt claims is in reconciling the existence of these loans with the agreed beneficial ownership of Yalgold. The brothers had agreed that, through Yalgold, they would continue to hold the real properties in equal shares, as they had done for some time prior to their transfer to Yalgold. Yet it is claimed that the improvement of Tile Street was a different matter. The imbalance which the loans would have caused is unlikely to have been intended.

[191] The purported loan or loans to Bill were, I am satisfied, an artifice. They were set up to disguise Gary's participation in Yalgold. And in my conclusion this was the intention of both brothers. As I have held, Bill's evidence that he signed the relevant documents without reading or understanding them cannot be accepted.

---

134 Exhibit LDB14 to the Affidavit of LD Barrett sworn 5 November 2010 which is Exhibit 110 to these proceedings.

[192] There is the handwritten letter from Gary to Bill of November 1993.[135] If considered alone, it would have the appearance of a letter by someone who believed that there was a genuine loan. But read with all of the evidence, the letter can be seen as referring to loans in the sense of apparent loans.

[193] When the brothers fell out, each of them sought to exploit the opportunity presented by these loan agreements and such records as had been kept of the state of the loan account. Bill seized upon the apparent position between him and Yalgold by making himself a secured creditor immediately before it was wound up. Then in the Family Court, he maintained the same stance, because he saw that this was a means of resisting the claim against him upon his joinder in those proceedings by Gary's former wife. As he now has to concede, his evidence in the Family Court, at least as to these alleged loans, was quite false. I cannot accept that he has an innocent explanation for that falsity.

[194] In the same way, Gary seized upon the appearance of these loans in order to bring pressure to bear upon Bill and ultimately by the prosecution of these debt claims.

[195] Gary has failed to prove that there were loans to Bill; indeed the contrary is proved. It follows that the debt proceedings will be dismissed. There will be judgment for the defendant in each of those proceedings.

[196] It is unnecessary then to consider other arguments advanced by Bill on the debt claims. There was an extensive challenge to the efficacy of the various assignments from which the plaintiffs claimed their entitlement to sue. The purported assignments are evidenced by documents tendered through Mr Barrett, an accountant from Vanuatu. I am satisfied that those persons who applied the company seals of Pacific Ventures and MQESP to the purported deed of assignment of 9 March 1994 were authorised to do so. I make the same finding for the application of the seals of Pacific Ventures, Credit Facilities Limited, Hannover and MQEI upon the deeds of assignment of 2, 3 and 10 February 2000. Those persons were authorised by the directors of those companies, which in turn were companies wholly owned and controlled by Mr Barrett's firm. Mr Barrett was able to instruct them to sign as they did when affixing the corporate seals. Mr Barrett acted in those respects on Gary's instructions. Ultimately then, the execution of the documents was by the authority of Gary. It is his intention which is relevant to their efficacy. Just as the loans were shams, so were these assignments.

[197] It is unnecessary to discuss the arguments that these assignments involved some "splitting" of the alleged debt with the consequence, it was said, that the plaintiffs had no entitlement to sue for any part of it. The argument had merit insofar as it contended that by one or more of these transactions, there was a purported assignment of but part of a debt. Although the interest had not been capitalised, the defendant's submissions that there was but one chose in action, for the principal and interest, appeared to be correct. For example, for the operation of limitation periods, there is but a single cause of action where there is both outstanding

---

135 Exhibit 41.

principal and interest.[136] The end point of this argument would have been, however, that the plaintiffs were equitable assignees who still might have been permitted to recover, in the proceedings as presently constituted, had they proved their case.[137]

CONCLUSION

[198] The trust claim succeeds. The debt claims fail. I will hear the parties as to costs and in the trust claim, any further order.

---

136 *Hollis v Palmer* (1936) 2 Bing NC 713; *Elder v Northcott* [1930] 2 Ch 422; *Cheang Thye Phin v Lam Kin Sang* [1929] AC 670 and *Deputy Commissioner of Taxation v Moorebank Pty Ltd* [1987] 1 Qd R 414 at 415.

137 *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 462; *Equus Financial Services Ltd v Glengallan Investments Pty Ltd* [1994] QCA 157 and *Thomas v National Australia Bank Limited* [2000] 2 Qd R 448.