SUPREME COURT OF QUEENSLAND

CITATION:	*Robson & Anor v Robson* [2012] QCA 119
PARTIES:	**CHARLES WILLIAM ROBSON** (first appellant) **SANDRA LEIGH ROBSON** (second appellant) **v** **GARY FRANCIS ROBSON** (respondent)
FILE NO/S:	Appeal No 8047 of 2011 SC No 10177 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 May 2012
DELIVERED AT:	Brisbane
HEARING DATE:	16 February 2012
JUDGES:	Muir, Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	EQUITY – TRUSTS AND TRUSTEES – GENERALLY – OTHER MATTERS – where the appellants and respondent had entered into trust declaration requiring appellants to hold 50 per cent of shares in company on account of respondent – where appellants were the directors of the company – where first appellant and respondent are brothers – where brothers had falling out – where appellants argued that a separation agreement existed – where appellants argued that trust declaration was superseded by separation agreement – where appellants argued that trust declarations were shams – where appellants argued that the trust declarations were revoked – whether the trust declarations were shams – whether the trust declarations were revoked – whether the trust declarations were superseded by a separation agreement EQUITY – GENERAL PRINCIPLES – RULES AND MAXIMS OF EQUITY – CLEAN HANDS – where the respondent had previously denied in other proceedings that he held an interest in the shares of the company – where the respondent is alleged to have done so to put the shares

beyond the reach of his former spouse upon the termination of their marriage – where the subject matter of the trust was not the result of, or augmented by, the alleged misconduct – where the appellants argued that the alleged misconduct disentitled the respondent to equitable relief – whether the alleged misconduct disentitled the respondent to equitable relief

Kettles & Gas Appliances Ltd v Anthony Hordern & Sons Ltd (1934) 35 SR (NSW) 108, considered
*Meyers v Cas*ey (1913) 17 CLR 90; [1913] HCA 50, cited
Nelson v Nelson (1995) 184 CLR 538; [1995] HCA 25, considered
Robson v Robson & Anor [2007] QSC 217, cited
Robson v Robson & Anor [2008] QSC 238, cited
Robson v Robson [2011] QSC 234, approved
Sang Lee Investment Co Ltd v Wing Kwai Investment Co Ltd & Anor [1983] HKLR 197 (PC); [1983] UKPC 11, considered
Shepherd v Felt & Textiles of Australia Ltd (1931) 45 CLR 359; [1931] HCA 21, considered

COUNSEL: A J H Morris QC, with J Peden, for the appellants
R J Douglas SC, with D de Jersey, for the respondent

SOLICITORS: Russells for the appellants
Flower and Hart Lawyers for the respondent

[1] **MUIR JA:** I agree that the appeal should be dismissed with costs for the reasons given by Fraser JA.

[2] **FRASER JA:** Since the parties to this appeal share the same last name, I will adopt the trial judge's and counsel's approach of referring to the first appellant as Bill, the second appellant (Bill's wife) as Sandra, and the respondent (Bill's brother) as Gary.

[3] Bill and Sandra are the shareholders in Yalgold Pty Ltd (in Liquidation) ("Yalgold"). There is a surplus in Yalgold's liquidation. The surplus largely represents lands at Tile Street, Wacol. Those Tile Street properties, which the brothers caused Yalgold to purchase many years ago, are now worth more than $8,000,000. Following a trial, a judge in the Trial Division made a declaration that Bill and Sandra hold half of their shares in Yalgold on trust for Gary.[1] That declaration reflected the terms of written declarations of trust made in 1989 and 1995 which were admittedly signed by Bill and Sandra.

[4] Bill and Sandra rely upon eight grounds of appeal, but they emphasise their challenges to the trial judge's rejection of their arguments that the 1989 trust declaration was superseded by a so-called "separation agreement" made between Gary and Bill, the 1995 trust declarations were shams, and Gary had engaged in discreditable conduct which disentitled him to equitable relief.

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1 *Robson v Robson* [2011] QSC 234.

[5] In order to appreciate the parties' arguments about these and the other issues, it is necessary to outline the complex circumstances in which Yalgold came to own and develop the Tile Street properties. Most of the following summary is derived from the trial judge's reasons. With the very few exceptions I will mention, there was no challenge to the findings of fact.

Background

[6] Gary conducted a second hand mining equipment and machinery business with Mr Walden. In 1985, Bill took some leave from the police force, in which he had risen to the rank of Detective Senior Constable, and in January 1986 he resigned with effect from April that year. He became a director of a company which later came to be named MWA Brisbane Pty Ltd ("MWA"), of which the shareholders were Nosbor Pty Ltd (a trustee for Gary's family trust) and Mr Walden. Bill, Gary, and Mr Walden purchased 47 Tile Street as tenants in common in equal shares at the end of 1985 for $57,000. In an affidavit sworn by Bill in the proceeding brought by Gary's former wife in the Family Court of Australia, Bill swore that: Gary organised the purchase and decided that the property should be held as tenants in common in equal shares; Bill made no contribution to the purchase price; and Gary said that he would finance the purchase because it was for their business, which would pay Gary back.

[7] In 1987, Bill acquired Mr Walden's shares in MWA. Gary and Bill ultimately became equal owners of that company. 47 Tile Street was cleared and MWA conducted its business from a demountable office that was placed on the land. Also in 1987, Gary caused his company Calm Seas Pty Ltd to purchase 22 Tile Street for $80,000, by an initial payment of $30,000, with the balance to be paid by three, one yearly instalments of $16,666. The purchase price was derived from profits of MWA. It also purchased land in Western Australia, at Jandakot, for $77,000, which was used for the business of a company (MWA Perth Pty Ltd) in which Gary, but not Bill, was interested. In 1988, Mr Walden transferred his one-third interest in 47 Tile Street to Bill and Gary, who became tenants in common in equal shares.

[8] Yalgold was a shelf company incorporated on 22 March 1989. Bill and Sandra acquired the shares in it on about 3 April 1989, when they became its directors and its registered office and principal place of business became 47 Tile Street. Bill has been the sole director since 22 October 1997, when Sandra resigned. Before Yalgold acquired any property, Bill and Sandra executed the 1989 trust declaration, which was dated 28 April 1989. In that deed, Bill and Sandra, as the "Trustees", recited that each held 24 of the total 48 shares in Yalgold "on account of Garry Francis Robson" and that they had "agreed to accept the Trust hereby created upon the terms and conditions more particularly set out hereunder". The deed provided:

> "NOW THIS DEED WITNESSETH
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> 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;
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> 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."

[9] The recital and cl 1 misspelt Gary's name as "Garry". That was crossed through and corrected in handwriting. The witness to the deed was Mr Henley, a solicitor for whom Sandra previously worked as a secretary. Mr Henley gave evidence that he had placed his initials next to each alteration, that he could not recall who had made the alteration, and that it was never his practice to witness a document which had not been signed in his presence. The trial judge accepted his evidence, finding that the declaration of trust and the handwritten corrections were executed in his presence.[2]

[10] Some three weeks later, Mr Henley prepared, and he witnessed the signatures of Gary and Bill upon, a "Memorandum of agreement by way of deed" dated 19 June 1989. It provided for the sale to Gary of Bill's 50 per cent shareholding in MWA for $200,000, payable "on completion". It was expressed to be conditional upon the contemporaneous settlement of a contract dated 19 June 1989 for the sale of 47 Tile Street by Gary to Yalgold. Completion was to occur on 17 July 1989, or on such other dates as might be mutually agreed upon in writing. The contract for the sale of 47 Tile Street in fact provided for the sale of that property by Gary and Bill to Yalgold. The sale price was $400,000, with completion on 17 July 1989. Mr Henley's firm was the solicitor for the vendors and the purchaser. He witnessed the execution of the contract by Yalgold, which was effected by Bill and Sandra signing through its common seal. Valuations by a registered valuer and a firm of public accountants, as at June 1989, valued 47 Tile Street at $200,000 and the shares in MWA at $100,000 respectively.

[11] At about the same time, according to Bill's evidence in the Family Court, Yalgold acquired 22 Tile Street and the Jandakot land. Bill's evidence was that Yalgold purchased 22 Tile Street for about $80,000 in or about June 1989 and the Jandakot land for $71,000 in August 1989. The trial judge found that those properties were transferred to Yalgold.[3]

[12] Bill's evidence in the Family Court referred to a "round robin" series of transactions. He said that Gary organised to settle Yalgold's purchase of 47 Tile Street without explaining the transactions to Bill. The trial judge noted, however, that there was an explanation in the following letter dated 16 May 1991 from Mr Henley to Bill:[4]

"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.

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2 [2011] QSC 234 at [20].
3 [2011] QSC 234 at [32].
4 [2011] QSC 234 at [25].

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."

(Gary controlled Nosbor. As I earlier mentioned, it was the trustee of his family trust.)

[13] The trial judge referred to some conflicting evidence concerning the withdrawal of $200,000 from MWA's account with the ANZ Bank and in relation to the deed of loan evidencing loans of $400,000 mentioned in Mr Henley's letter of 16 May 1991,[5] and to the following documents witnessed by Mr Henley:[6]

(a) Two deeds of gift dated 7 April 1989 and 5 July 1989, each recording a gift by Gary to Bill of $100,000.

(b) A deed of loan dated 4 April 1989 between Bill and Bylass Pty Ltd (a company owned and directed by Bill and Sandra) which recited that Bill was lending Bylass $100,000, repayable on demand.

(c) A deed of loan dated 7 July 1989 between Bylass Pty Ltd and Yalgold, recording an advance by Bylass Pty Ltd to Yalgold of $100,000, repayable on demand.

(d) A deed of loan dated 7 July 1989, recording a loan by Bill to Yalgold of $200,000, repayable on demand.

[14] As the trial judge observed, those documents were not entirely consistent with Mr Henley's letter of 16 May 1991, but they seemed to relate to a scheme for the transfer of 47 Tile Street to Yalgold and the transfer of Bill's shares in MWA to Gary.[7] The evidence about changes in the cash positions of Gary, Bill and Sandra was unclear, complete bank statements not being available, but the trial judge noted that there was some support in an affidavit by Bill for Gary's evidence that he gave $200,000 to Bill at that time.[8]

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5 [2011] QSC 234 at [26] – [28].
6 [2011] QSC 234 at [29] – [30].
7 [2011] QSC 234 at [31].
8 [2011] QSC 234 at [31].

[15] Mine & Quarry Equipment Pty Ltd ("MQE") was incorporated in January 1990. Its directors were Bill and a Mr Freiburg. Mr Freiburg was recorded as holding 20 of the 100 issued shares, the balance being held by Bylass Pty Ltd. Mr Freiburg ceased to be a director in 1992, when he was replaced by Mr Henley until 1997. Gary was a director initially but he resigned almost immediately.

[16] In 1990 and 1991 the brothers continued to work from 47 Tile Street. The trial judge referred to evidence of one of the office staff, Ms Mulcahy, that up until the brothers fell out in late 1999, she continued working, essentially as Gary's personal assistant, regarding him as the boss.[9] Ms Mulcahy gave evidence that she continued to act under Gary's instructions. The trial judge recorded that until Gary left Australia for some of the 1990s (when he regularly visited Brisbane and worked at 47 Tile Street), the position as Ms Mulcahy 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."[10] The trial judge referred also to evidence in one of Bill's affidavits in the Family Court that after Gary began to live overseas he "continued to control the finances of MQE" and "continually interfered in the MQE and Yalgold businesses".[11]

[17] According to one of Bill's affidavits in the Family Court, the house at Chapel Hill which had been Gary's matrimonial home was mortgaged to and subsequently became owned by Yalgold. Bill's evidence was that it was mortgaged in May 1990 to secure an advance of $200,000 made by Yalgold to the registered owner, Nosbor; Nosbor transferred ownership to Yalgold in August 1993 on the footing of a default in repayment of that advance, the transfer being organised by Gary. (This was plainly a device to shield Gary's interest in the matrimonial home from a claim by his wife.)

[18] On 14 May 1991, Mr Thompson of Morris Fletcher & Cross gave advice to Bill and Gary concerning their liability for capital gains tax by the 1989 transactions involving 47 Tile Street and the shares in MWA. The trial judge accepted that the correspondence accurately set out the instructions given to Mr Thompson's firm. The 14 May 1991 letter recorded:[12]

> "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."

[19] The letter enclosed a draft submission to the Australian Taxation Office:[13]

> "After Michael Walden left the partnership [Bill] and Gary continued to operate the business conducted through MWA Brisbane Pty Ltd as

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9 [2011] QSC 234 at [38].
10 [2011] QSC 234 at [38].
11 [2011] QSC 234 at [39].
12 [2011] QSC 234 at [43].
13 [2011] QSC 234 at [43].

> 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.
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> On 19 June 1989, Yalgold Pty Ltd (a company controlled by [Bill]) purchased Gary Robson's interest in the property. …"

[20] The trial judge observed that Morris Fletcher & Cross were not told of the declarations of trust and 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. His Honour added:[14]

> "And there was no mention of the sale by Gary and Nosbor to MQE of the MWA shares."

[21] Between 1992 and 1994 companies controlled by Gary made payments totalling $1,319,592 which were deposited to the account of Yalgold and used by it to improve 47 Tile Street.[15]

[22] The 1995 declarations of trust were each dated 23 October 1995, one being executed by both Bill and Sandra and the other being executed only by Sandra. It is sufficient to say of their terms that they included acknowledgements and declarations that one half of Bill and Sandra's shareholding in Yalgold (and other companies) was held by them in trust for Gary.

[23] The trial judge found that in February 1998, in response to Bill's request of McKays Solicitors (the firm which had acquired Mr Henley's practice), that firm sent a letter enclosing documents held in its safe custody on Bill's behalf. One such document, which was specified in a list under Bill's name, was the declaration of trust dated 20 April 1989 executed by both Bill and Sandra, upon which Gary sued. Bill signed a receipt for the documents on 17 February 1998.[16]

[24] The complex commercial arrangements which the brothers made may have been influenced by the circumstances that the Australian Customs Service commenced an investigation into some transactions which the brothers conducted through MWA and that Gary was involved in an acrimonious separation from his then wife. As to the Australian Customs Service matter, it is sufficient to note that it seized some equipment from 47 Tile Street in 1988 and it commenced litigation against MWA in 1990. As the trial judge observed, that would provide an explanation for why the brothers ceased to conduct the business through MWA and conducted it instead

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14 [2011] QSC 234 at [44].
15 [2011] QSC 234 at [47] – [52].
16 [2011] QSC 234 at [65].

thorough the newly incorporated MQE.[17] As to the breakdown in Gary's marital relationship, Bill and Sandra gave evidence that Gary's wife was caught stealing money from the business, which caused them to wish to sever their business relationship with Gary. The trial judge found that by 1989 Gary's marriage was likely to end, he must have expected a claim by his wife to at least a good part of his property, and that provided a logical explanation for Gary taking steps to put his assets (including his half share in 47 Tile Street) beyond his wife's reach.[18]

[25] Gary's wife's matrimonial proceedings against him were dismissed in 1998, after Gary swore an affidavit on 10 March 1998 to the effect that he had assets of only $1,000 and that he had no directorships, shareholdings or interests in any company or trust. Subsequently, Gary and Bill obtained advice in conference from Mr Hopgood, and a solicitor employed by his firm, Ms Wigan, on 21 January 1999. Mr Hopgood had apparently been contacted by Bill and requested to report to Gary about the ability of Gary's wife to apply to the Family Court to set aside the order dismissing the proceedings against Gary and about the ability of Gary's wife to apply to set aside certain transactions.

[26] In a letter dated 27 January 1999 addressed to Bill, Mr Hopgood explained that his firm had opened a new file in Bill's name, as opposed to Gary'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."[19] Ms Wigan's evidence and the accuracy of her notes and other documents recording instructions given by, or in the presence of, Bill or Gary were accepted by the trial judge and not challenged in the appeal. Amongst other matters, her file note of the conference on 21 January 1999 referred to the "Agreement between the 2 brothers … that all capital and income is to be shared between the brothers equally", that Sandra was "fully aware of this agreement", and that "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."[20] The diary note went on to refer to Bill and Gary's instructions to assess "…the present effect of the Trust Deeds and the respective Wills of Bill and Gary Robson at the moment", that the solicitors were to assess how the structure might be changed in particular respects, to advise on taxation effects in other respects, and how they were able "to structure Gary Robson to ensure that he will be protected from attack from any former spouse or present spouse and creditors etc."[21]

[27] Ms Wigan made another diary note which recorded that Gary delivered a number of documents to her on 1 February 1999. She subsequently wrote a memorandum to Mr Hopgood dated 11 March 1999 which referred to and accurately described the contents of the 1989 declaration of trust made by Bill and Sandra (amongst other documents).

[28] Ms Wigan's diary note of a conference of 6 May 1999 attended by Bill and Gary included the following entries:

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17 [2011] QSC 234 at [34].
18 [2011] QSC 234 at [35] – [36].
19 [2011] QSC 234 at [69].
20 [2011] QSC 234 at [73].
21 [2011] QSC 234 at [74].

> "3. Gary indicated that if he were to come back to Australia, he would want to buy a house, however the house would be registered in either the name of Pacific Ventures Limited or some other company or trust. PFH indicated to the client that it would be more prudent for him to not register the house in his name and if it was purchased in the name of a trust, then this could be linked back to Bill.
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> 4. Gary requested advices from PFH that if he were to come back to Australia and earn income, what impact this would have on any claim by a spouse. PFH advised Gary that any income earned after separation would be 90% safe as it would be earned well after separation. We would need to show this to the court if any application for attack was made."

[29] On 19 May 1999 Hopgood Ganim wrote a letter to Bill which included the following statements:[22]

> "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."

[30] The trial judge referred to Bill's evidence that he could not recall receiving that letter and that he believed that it probably went to Gary, but noted that this was inconsistent with the summary of Bill's proposed evidence provided pursuant to pre-trial directions. The summary recorded Bill's recollection that he received the letter but decided to do nothing about it. In cross-examination Bill acknowledged that he might have received the letter. The trial judge found that he did receive it and that he also received the 27 January 1999 letter from Hopgood Ganim.[23]

[31] In late 1999, the brothers had a falling out and ceased to deal with each other. However, both Gary and Bill saw Mr Charlton on 29 November 1999. That meeting was referred to in Mr Charlton's letter faxed to both of them on 3 December 1999. Mr Charlton's summary of the meeting included the statements 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", and that "[t]herefore, we are left with a current, and unsatisfactory, arrangement … 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".[24] The trial judge referred to Bill's evidence that he did not recall receiving that letter or attending the meeting, but noted that in cross-examination at the hearing of Gary's summary judgment application Bill seemed to accept that he had received the letter before July 2003, that he had attended the meeting, and that he had not objected to the statement that

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22 [2011] QSC 234 at [77].
23 [2011] QSC 234 at [78].
24 [2011] QSC 234 at [83].

half of the shares were held for Gary. The trial judge found that it was probable that Bill did receive the letter and attend the meeting as Mr Charlton recorded.[25]

[32] Subsequently, Gary's former wife brought proceedings in the Family Court in an attempt to reopen her property claims against Gary under s 79A of the *Family Law Act* 1975 (Cth). The respondents also included Bill, the liquidator of MQE, and Yalgold. Gary's former wife swore an affidavit on 20 August 2001 in which she described what she had discovered about Gary's business interests from publicly available records of the litigation between MQEI, MQE and Yalgold. She asserted that 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".[26]

[33] Bill's affidavit in response included the statements that he had "…no precise recollection, when Yalgold was incorporated by [Gary]" and that he was not consulted about it. The trial judge remarked that this was part of a body of evidence within the affidavit which was inconsistent with Bill and Sandra's case about the separation agreement in 1989. The trial judge referred to the following examples:[27]

> "…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]'. Bill also swore that for many years, Gary was the controlling mind behind not only MQEI but also MQE."

[34] In a further affidavit, sworn 12 May 2004, 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."[28]

[35] The Family Court proceedings were resolved by consent orders on 23 July 2004. Gary's former wife was to receive from the liquidators of MQE initial payments totalling $107,100, other monies totalling in excess of $400,000 from distributions due to MQEI in the liquidations of MQE and Yalgold, and $150,000 from Gary.

The alleged separation agreement

[36] Bill and Sandra's argument about the alleged separation agreement focussed upon their contentions under appeal grounds (c) and (e):

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25 [2011] QSC 234 at [84].
26 [2011] QSC 234 at [95].
27 [2011] QSC 234 at [98].
28 [2011] QSC 234 at [99].

> "(c) The learned primary judge erred in fact and/or in law in finding that there was no separation between Bill and Gary after 1989 such as to supersede the 1989 declaration of trust and constitute a disclaimer by Gary of any interest in Yalgold thereafter;
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> …
>
> (e) The learned primary judge erred in fact and/or in law, in failing to find that any interest that the Respondent had in shares in Yalgold Pty Ltd under the declaration of trust dated 28 April, 1989 was surrendered under the separation agreement, pleaded in Part E of the Defence;"

[37] In addition, appeal ground (a)(i) (which is set out in [48] of the reasons) contends that it was not pleaded or submitted that Bill and Gary had conducted a business together after 1989.

[38] The trial judge described Bill and Sandra's case of a separation agreement as being that Gary and Bill decided to end their business relations in 1989, that this was relevant to whether Bill and Sandra intended to be bound by the 1989 declaration of trusts, and that the separation agreement superseded whatever had previously been the position, including the trust.[29] The trial judge considered that there was an evidentiary basis for the argument in the instructions given to Morris Fletcher & Cross (see [18] of these reasons) and in evidence given by Gary in the Magistrates Court in 2001 in a claim by MQEI against Bill and Sandra. Gary's evidence then was that in the late 1980s 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 trial judge found, however, that those matters had little weight when put against the other evidence, and that the suggestion of the separation agreement seemed fanciful in the context of Gary having remained in command of any business conducted from Tile Street from 1989 onwards. The trial judge observed that the evidence of Ms Mulcahy as to the way Gary exercised control until 1989 was quite telling.[30]

[39] Bill and Sandra argued that the trial judge mistakenly overstated their case about the separation agreement and then rejected that overstated case, rather than the narrower case actually advanced. The case they pleaded was that the brothers decided to divide up their commercial interests as at mid-1999 such that Bill acquired the land and Gary acquired all the shares in the business. Bill and Sandra argued that the trial judge wrongly assumed that their case was that "Gary and Bill decided to end their business relations in 1989".[31] They argued that the trial judge's reliance upon Gary having remained in command of the business, and particularly the emphasis upon the evidence of Ms Mulcahy, was misplaced because the separation agreement case itself involved Gary continuing to use the services of the Brisbane office staff of MQE (specifically including Ms Mulcahy's services), the change only being from that of co-ownership to a separate ownership of discrete parts of the business.

[40] Some of the expressions used by the trial judge did put the separation agreement case in broad and general terms, but the trial judge also put it in the terms advocated for Bill and Sandra. The trial judge quoted the evidence given by Gary in the

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29 [2011] QSC 234 at [109].
30 [2011] QSC 234 at [110].
31 [2011] QSC 234 at [109].

Magistrates Court in 2001 that in the late 1980s 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".[32] That was an accurate rendition of the pleaded separation agreement case. The trial judge rejected that case, despite Gary's evidence.

[41] Bill and Sandra argued that the trial judge's rejection of the separation agreement case could not stand with evidence of Gary at the trial to which the trial judge did not refer. The effect of the submission was that Gary admitted the alleged separation agreement, the making of which superseded the 1989 declaration of trust or constituted a disclaimer by Gary of any interest in Yalgold.

[42] The relevant passage of Gary's evidence is rather lengthy but it is appropriate to set it out in full:[33]

> "Just think it through and then answer my question?-- Well, I think that's right and that's what happened. The property was sold to Yalgold. So I had no more interest in that property. Yalgold now owned the property, and I took the shares of MWA.
>
> And the effect of the break-up of the relationship was that Charles acquired the property through his ownership of Yalgold, and you acquired the shares in MWA? That was the split that you agreed upon?-- That - yes, that's right, Yalgold obtained the property. Bill owned the property.
>
> Yes?-- And Bill owned Yalgold.
>
> Yes?-- And I took the shares of MWA.
>
> And that's as you believed the situation to be in May 1991?-- Yes.
>
> I tender that letter.
>
> HIS HONOUR: That will be Exhibit 107.
>
> ADMITTED AND MARKED 'EXHIBIT 107'
>
> WITNESS: And really I can't see anything else. Yalgold took the ---
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> MR MORRIS: No, you've answered my question, please?-- Well, I'm just trying to recheck and see that I've answered as I believe it is.
>
> Now, if you look at the next document, you'll see that's a letter from Morris Fletcher and Cross dated 26 June 1991?-- Yes.
>
> And you'll see that it encloses draft copy of submission to the Australian Taxation Office?-- Yes.
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> I want you then to go to that submission to the Australian Taxation Office and begin with the first page, about two-thirds of the way down the page, do you see a paragraph commencing, 'After Michael Waldon left the partnership ... ?'-- Yes.
>
> It then states that when he left, you and your brother continued to conduct business through MWA as equal partners. Is that true?-- Yes.

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32 [2011] QSC 234 at [110].

33 Transcript 9-67 to 9-70.

You had a major disagreement after Charles discovered that your first wife was embezzling funds from the company; is that true?-- Yes.

This caused a large rift between the brothers; is that true?-- Yes. Well, it caused some arguments, yep.

And on 19 June 1989, the brothers decided they would not continue to operate the business as partners; is that correct? That's right.

On that date, Gary and Charles, referred to here as 'Charles', dissolved the partnership; is that correct?-- Yes.

It was agreed that Charles would acquire the property and Gary would acquire the shares in MWA Brisbane?-- Yes.

All right. So there's no question in your mind, is there, that the split up agreement in June of 1989 was that your brother, Bill, referred to in this document as 'Charles' would end up with sole ownership and control of the property through Yalgold?-- Yes.

Right?-- He'd have ownership through Yalgold, that's right.

Sole ownership was what I put to you?-- I don't think he did.

HIS HONOUR: Control, you said.

MR MORRIS: I said sole ownership and control through Yalgold?-- He wouldn't have had sole ownership.

Why not?-- Because his wife was a partner.

He had ownership and control to the exclusion of yourself?-- Yes.

Thank you.

HIS HONOUR: I think Mr Morris is suggesting that you didn't have any interest at all in Yalgold or its property. Do you agree with that?-- In one sense that's correct. But prior to that, I had gifted my brother moneys to go and buy the other two properties on the basis that he would look after me, and that's when he executed his trust deeds. There was never any separation. My brother continued to work with me.

MR MORRIS: When you went to see Mr Thompson in 1991, you didn't tell him that that was the understanding, did you?-- What, that I'd gifted my brother money?

No, that he was going to look after you in respect of the properties in the name of Yalgold?-- Well, my brother didn't specify that he was going to look after me in the properties of Yalgold. Probably that's a presumption of mine when I gifted him money to go and buy two more properties equal to the value of the one property he had in Yalgold.

Look, Mr Robson, take another look at the submission to the ATO, furnished to you under cover of the letter of 26 June 1991?-- Yes.

There's no suggestion there, is there, that you in fact retained some expectation of benefiting from Yalgold, or any property in which

> Yalgold had an interest?-- No, there's nothing in there to - that states that. That was just an understanding, and I think it's fair to say that the trust deed he executed at the time I gifted him $200,000 substantiates that.
>
> It was an understanding. I see. Understanding. And how did you arrive at that understanding?-- Well, my brother didn't want to have any further involvement in business together with me whilst ever I was married to Jan. It started over that embezzlement thing, and, for our businesses we wanted - we wanted land in Western Australia and the land across the road. So what he and I agreed upon was that I'd gift him the money to go and buy the land, and he'd look after me, and that was it, and I told him, 'I do not want to know what you do. If I get questioned, I do not want to know.'
>
> HIS HONOUR: The land across the road being what land?-- 22 Tile Street. There was a block there equivalent."

[43] This cross-examination on the Morris Fletcher & Cross documents occurred after a searching and lengthy cross-examination of Gary, which occupies about 180 pages of transcript. Some of Gary's earlier answers in the passage support Bill and Sandra's submission that Gary admitted the alleged separation agreement. The later answers convey, however, that Gary did not intend to suggest by his earlier answers that he had made any agreement to abandon whatever rights were given to him under the 1989 declaration of trust. In assessing the overall effect of this evidence, it is necessary to bear in mind that it would be unsurprising if the precise character of the rights created by the declaration of trust, and how they qualified Bill and Sandra's rights conferred by their shares, were not readily apparent to Gary. Gary's evidence suggests as much. In these circumstances, it is not necessarily significant that Gary failed to qualify his earlier answers by reference to the effect of the 1989 declaration of trust. In any event, there is no basis for thinking that the trial judge overlooked the evidence.

[44] Furthermore, as the trial judge pointed out, the evidence in support of the separation agreement had little weight when it was put against other evidence. There was a great deal of support for the view that there was in fact no agreed separation between the brothers. The evidence as a whole justified the trial judge's conclusion that they gave the instructions to Morris Fletcher & Cross upon which Bill and Sandra's case was based merely because they thought that those instructions would assist an argument to be put to the ATO.[34] As the trial judge found,[35] Bill and Sandra's separation agreement case was inconsistent with Bill's failure to object to:

> (a) The instructions given by or in the presence of him and Gary at the 21 January 1999 conference that their agreement was that "all capital and income is to be shared between the brothers equally", that "…a Trust Deed was settled wherein Bill Robson's Wife has agreed to ensure Gary Robson receive 50% of the capital and income should Bill Robson die", and that the solicitors were instructed to assess "…the present effect of the Trust Deeds …".

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34 [2011] QSC 234 at [118].

35 [2011] QSC 234 at [119].

(b) The 1989 declaration of trust enclosed with the letter from McKay's Solicitors, the receipt of which Bill acknowledged by his signature on 17 February 1998.

(c) The statement in the 6 May 1999 conference attended by Bill and Gary, in which Ms Wigan noted that "…12 of the shares held by Bill and 12 shares held by Sandra are held beneficially for Gary."[36]

(d) The statement in the letter from Hopgood Ganim to Bill dated 19 May 1999 that "…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."[37]

(e) Mr Charlton's statement in the meeting on 29 November 1999, attended by both Gary and Bill, to the effect that half of the shares in Yalgold were held for Gary. (Bill's evidence was that he did not attend, or had no recollection of attending, this meeting, although he agreed that he did not say anything to the effect that he did not intend Gary to have the benefit of the shares. There is no challenge to the trial judge's finding that Bill did attend the meeting.[38])

(f) The statement in Mr Charlton's letter dated 3 December 1999 faxed to both Gary and Bill that their half of the dividends in the 24 shares in Yalgold were being paid to Bill. (As the trial judge recorded, it appeared that Gary and Bill were seeking to restructure their affairs "but from an agreed premise that Gary was a half owner in Yalgold".[39])

[45] It was submitted for Bill and Sandra that this evidence did not give rise to a necessary inference arising from Bill's silence that there was no such separation agreement as he had alleged. That is not the test. The inference drawn by the trial judge was certainly available.

[46] I would also respectfully endorse the trial judge's further findings:

(a) Since the 1989 declaration of trust was executed only weeks before the contracts for 47 Tile Street and the MWA shares, Bill, Sandra and Mr Henley were unlikely to have forgotten it, yet Mr Henley did not prepare any document to reflect the alleged separation agreement.[40] Bill and Sandra's argument that only some of the brothers' dealings were documented by solicitors does not take into account the importance and contemporaneity with the 1989 declaration of trust of the alleged separation agreement.

(b) Bill's evidence in the Family Court, referred to in [33] and [34] of these reasons, was inconsistent with the separation agreement case.[41] Bill and Sandra argued that there was no conflict, but it is not easy to reconcile Bill's evidence that all of the transactions concerning

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36 [2011] QSC 234 at [77].
37 [2011] QSC 234 at [77].
38 [2011] QSC 234 at [83]-[84].
39 [2011] QSC 234 at [84].
40 [2011] QSC 234 at [113].
41 [2011] QSC 234 at [98].

47 Tile Street were brought about by Gary, without any input by Bill, with Bill's evidence that Gary expressly agreed to the alleged separation agreement.

(c) Bill and Sandra's case was inconsistent with the execution of the 1995 declaration of trust (unless, which the trial judge did not accept, they did not know what they were signing and Gary had thought better of their separation).[42]

[47] For these reasons appeal grounds (a)(i), (c) and (e) have not been made out.

[48] Appeal grounds (a)(ii) and (iii) and (b) also related to the alleged separation agreement:

> "(a) The learned primary judge erred in law and/or in fact, in finding that the First Appellant ("Bill") and the Respondent ("Gary") had continued to conduct a business together, after 1989; and that Gary and Nosbor Pty Ltd had transferred their shares in Machinery World Australia Pty Ltd ("MWA") to Mine & Quarry Equipment Pty Ltd ("MQE"), whereas:-
>
> (i) neither party pleaded or submitted that Bill and Gary had conducted a business together after 1989;
>
> (ii) neither party pleaded or submitted that any such transfer of shares had occurred; and
>
> (iii) Gary admitted in his Reply that, prior to November of 1989, he and Nosbor Pty Ltd held 51 and 49 shares respectively in MWA (being half its capital), and that, after November of 1989, he and Nosbor Pty Ltd held all of the shares in MWA;
>
> (b) The learned primary judge erred in fact by finding that Bill was complicit in Gary's intention that the 1989 trust declaration would put the Tile street land beyond the reach of Gary's wife;".

[49] In relation to ground (b), Bill and Sandra argued that the trial judge was wrong in finding that Bill intended to put the land beyond the reach of Gary's wife because that case was not advanced by either party and was not put to any witness. Contrary to the submission for Bill and Sandra, that case was put to Bill and it was addressed in the trial submissions. In any event, as was rightly conceded on behalf of Bill and Sandra, this alleged error was not determinative of the appeal.

[50] The same is true of the contentions in appeal ground (a)(ii) and (iii). They concern the trial judge's reference to a written agreement dated March 1991, which provided for a sale by Gary and Nosbor to MQE of their shares in MWA for the purchase price of $27,000, payable upon completion on 2 April 1991. His Honour observed that Gary signed the agreement through the company seal of Nosbor, and for himself, and that the seal of MQE was applied with the apparent signatures of Bill and Mr Freiburg.[43]

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42 [2011] QSC 234 at [114], [123]-[125].

43 [2011] QSC 234 at [41].

[51] As was submitted for Bill: it was common ground on the pleadings that Gary and Nosbor retained their shareholding in MWA; this agreement was not referred to by any witness as an agreement that had been made or carried into effect, but was identified only as one of many documents which came from the office of Mr Charlton, a chartered accountant who had acted for the brothers; the agreement was expressed to be subject to the vendors procuring discharges from creditors of the company, which was not proved to be satisfied; and there was no evidence that the agreement was completed. However, the trial judge did not find that the agreement had been carried into effect. Bill and Sandra argued that there was no basis for the trial judge's remark quoted in [20] of these reasons, but the remark was accurate; the trial judge did not find that the sale was completed. In any case, this ground of appeal alleges, at best for Bill and Sandra, an inconsequential error in a finding of no particular significance.

Sham transactions

[52] The only ground of appeal which contends for "shams" is ground (g):

> "(g) The learned primary judge erred in fact and in law, having found (rightly) that the loan agreements and assignments were shams, in failing to find that the 1995 trust declarations were also shams;…"

[53] There was no equivalent ground of appeal which contended that the 1989 trust declaration was a sham. Since the trust enforced by the trial judge's orders was created by the 1989 trust declaration, this ground does not seem to go anywhere. As was also pointed out in Gary's submissions, sham was not pleaded in the defence upon which Bill and Sandra went to trial, the earlier allegations having been struck out in repeated versions of the pleading.[44] Nevertheless, I will consider the merits of the argument.

[54] The trial judge dealt with the defence in the following passage of the reasons:[45]

> "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.'

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44 *Robson v Robson & Anor* [2007] QSC 217 at [12], [16]; *Robson v Robson & Anor* [2008] QSC 238 at [19].

45 [2011] QSC 234 at [126].

> 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."

[55] In order to appreciate the basis of Bill and Sandra's challenge to the trial judge's rejection of their defence that the declarations of trust were shams, it is necessary to refer to some evidence which I have not so far mentioned.

[56] In addition to Gary's claim to enforce the 1989 and 1995 declarations of trust, he caused companies under his control to sue Bill for alleged debts. The companies claimed to own the debts as assignees from Pacific Ventures Ltd. Hannover International Ltd ("Hannover") claimed as assignee of a debt of $1,243,992 and interest accruing after February 2000. Mine & Quarry Equipment International Ltd ("MQEI") claimed as the assignee of the interest on the principal under the first loan which had accrued until February 2000, in the amount of $412,842.17. Those claims were dismissed on the ground that there were in fact no loans to Bill.[46] There is no appeal from those orders.

[57] There was evidence of the alleged loans, including: a letter from Gary to Bill which stated that at 1 November 1993 he would have to sign a new loan agreement to replace the current agreement with Mine & Quarry Equipment South Pacific Ltd ("MQESP") with a new agreement with Pacific Ventures Ltd (a Port Vila company); a written agreement dated 2 November 1993 between Bill and Pacific Ventures Ltd for a finance facility of $2,500,000 (although the Seal of Pacific Ventures Ltd was not affixed); a deed of assignment dated 9 March 1994 under which MQESP assigned to Pacific Ventures the debt from its loans to Bill (although the original loan agreement was itself not in evidence); the notice of assignment dated 9 March 1994 to which the common seals of Pacific Ventures and MQESP were affixed and which notified Bill that his debt due to MQESP in the amount $1,243,992 had been assigned to Pacific Ventures; and evidence which Bill gave in the Family Court, but disowned at this trial, that he was the borrower.[47]

[58] It was common ground that eight payments totalling $1,319,592 were made by deposits to the bank account of Yalgold between November 1992 and March 1994, and that Bill paid from his account payments of $70,000 and $5,600 in October 1993. It was also common ground that the money was used by Yalgold to improve 47 Tile Street as directed by Gary.

[59] Bill and Sandra argued that, apart from concealing assets from Gary's ex-wife, the real purpose of the declarations of trust and the loan agreements was to provide a mechanism for repatriating to Australia money which represented the proceeds of

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46 [2011] QSC 234 at [195].

47 [2011] QSC 234 at [53]-[56], [171]-[173].

tax avoidance. The trust documents, on their face, demonstrated that Gary had a 50 per cent interest in Yalgold and the loan agreements, on their face, showed that there were loans to Bill which he had on-lent to Yalgold: if the tax authorities made any enquiry, documents could therefore be produced which would suggest that the money held by Yalgold did not represent taxable profits but rather money lent by the overseas companies to Bill which he had lent to Yalgold to enable it to buy assets. In Bill and Sandra's submission, this connection between the trust declarations and the loan agreements suggested that both were shams. It was submitted that, having regard also to the absence of direct evidence by Gary or Bill that the trust declarations were intended to take effect according to their terms, there was an insufficient basis in the evidence for finding that the loan agreements were shams but that the trust declarations were genuine. It was submitted that, on the face of the documents, Gary had given himself the option either of enforcing his rights under the trust declarations or advice enforcing his rights under the loan agreements and that there was no basis for concluding that only the latter were shams. It was also submitted that the fact that the 1995 trust declaration covered largely the same property as the 1989 declaration, but contained different terms and comprehended some different property, suggested that the declarations were not intended to take effect.

[60] Contrary to that argument, there was a solid evidentiary basis for finding that the declarations of trust were genuine. The oral evidence of Bill and Gary was not found to be reliable, but the documentary evidence and the probabilities of the case support the trial judge's findings. The trust declarations were straightforward and properly executed instruments, they reflected the pre-existing interests of Gary and Bill, and the evidence referred to in [44] – [46] of these reasons strongly suggests that that they were intended to take effect according to their terms.

[61] On the other hand, the trial judge identified many considerations which supported the view that the loan agreements and assignments were not genuine: [48]

(a) The provision in the 1993 loan facility agreement between Bill and Pacific Ventures for a finance facility of $2,500,000 (to be used by Bill to lend money to Yalgold for its business and for the construction of improvements upon its land at 47 Tile Street) was unexplained, there was no evidence that this was the expected cost of the Tile Street improvements and, by the date of the document, Gary's case was that $859,992 had already been paid.

(b) The 1993 agreement also made no reference to advances in very substantial amounts alleged to have been made to Bill under an agreement between him and MQESP and no reference to MQESP being paid out (if it was intended to use a component of the loan to pay out MQESP).

(c) There was no evidence to indicate why the period for repayment of the facility was thought to be appropriate or how Bill or Yalgold would be able to repay the loan at that time, there being no evidence of any external financier and it being unlikely that Gary would have agreed to grant any security over Yalgold's property to secure the loan.

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48 [2011] QSC 234 at [174] – [190].

(d) The 1993 agreement provided that Pacific Ventures was not obliged to advance money until security was provided, no such security was provided, yet Pacific Ventures (through MQESP) advanced $70,000 on the day of the agreement and further amounts totalling $360,000 within the next few weeks.

(e) The 1995 loan agreement with Pacific Ventures provided for a facility of $3,500,000 and recited that it had the same purpose as specified in the 1993 agreement, but the construction of the improvements upon Yalgold's land at 47 Tile Street had by then been completed, there was no evidence that any other work was shortly to commence or required finance, the amount of the finance was unexplained by the evidence, the agreement did not simply provide for the rollover of the existing loan but suggested that there had been no prior debtor/creditor relationship between the parties, the pre-condition of security for the drawdown again was not satisfied, and again there was no explanation for a five year loan.

(f) One of the payments which was made by Pacific Ventures was paid out of funds which came to it a week previously from Yalgold, a transaction which was difficult to understand if the purpose of the loans to Bill was for him to on-lend them to Yalgold.

(g) Bill did not consistently pay interest during any period of the alleged loans and the payments which he did make could not be reconciled with the alleged balances of the loan agreement.

(h) Purported records of the state of the account between Bill and Pacific Ventures and, in turn, between Bill and Yalgold, were not kept with any precision or in a way which would be expected from an arm's length loan and the history of non-payment of interests suggested that the parties wished to give the appearance of a loan, or loans, rather than being bound by them.

(i) Inconsistently with the alleged loans to Bill, Gary and Bill's initial instructions to Hopgood Ganim recorded in Ms Wigan's 21 January 1999 diary note were that Bylass Pty Ltd had borrowed $1,400,000 from Pacific Ventures and that Bylass had "on-lent to Yalgold".

(j) There was no reference to the purported loan from Pacific Ventures under the 1995 loan facility agreement in the letter from Hopgood Ganim to Bill dated 16 May 1999 even though, as appeared from Ms Wigan's memorandum of 11 March 1999, Gary had delivered the 1995 loan facility agreement to Ms Wigan and it was referred to in Ms Wigan's memorandum of 11 March 1999.

(k) The alleged repayments of $5,600 and $70,000 by Bill were replaced by payments on those amounts from Yalgold's account to Bill and Sandra's account, which was consistent with Bill's case that the funds were passed through his hands merely to make it appear that he was Yalgold's lender.

(l) Notwithstanding the supposedly serious defaults by Bill in the payment of interest, there was no demand for payment at any time before the brothers fell out.

(m) When Gary was about to make a demand for payment he caused the alleged debt to be assigned in different parts to the corporate plaintiffs and for there to be an extraordinary meeting of members of Pacific Ventures to consider whether it should be struck off the register of companies in Vanuatu because, upon the assignments, it would no longer have any assets or liabilities. That indicated that Pacific Ventures was merely a shell.

(n) There was no commercial consideration which justified the interposition of Bill between Yalgold, the express purpose of the loan according to the loan agreement being to fund the development of Yalgold's Tile Street properties. The probable intention was to make it appear to Gary's wife that Bill had borrowed the money to improve Tile Street from an unrelated lender at arm's length.

[62] That evidence distinguished the alleged loans from the trust declarations. Furthermore, as the trial judge held, it was unlikely that the brothers intended the alleged loans to be genuine since that would create an imbalance in their agreement that, through Yalgold, they would continue to hold the real properties in equal shares as they had done prior to their transfer to Yalgold.[49]

[63] The trial judge identified Gary and Bill's motivations for creating and relying upon the sham transactions, in terms which are also consistent with the genuineness of the trust declarations:[50]

> "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.
>
> …
>
> 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.
>
> 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."

[64] Ground (g) in the notice of appeal is not made out.

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49 [2011] QSC 234 at [190].

50 [2011] QSC 234 at [191], [193], [194].

Revocation

[65] Ground (h) in the notice of appeal states:

> "(h) The learned primary judge ought to have found that the declaration of trust dated 28 April 1989 was effectively revoked by the Deed dated 17 March, 2008."

[66] At the trial, Bill and Sandra argued that they had revoked the 1989 declaration of trust by a deed poll they executed in 2008. They argued that, although the declaration of trust was expressed to be irrevocable, they could unilaterally revoke it because it was not an effective instrument until it was duly stamped in 2009. The 1989 declaration was stamped adhesively for duty of $4.00, an amount which exceeded the amount of duty which was properly payable, but Bill and Sandra argued that the declaration was not an instrument which could be stamped adhesively. They argued that the subsequent payment of duty in January 2009 was ineffective to undo the 2008 revocation.

[67] The trial judge applied Dixon J's judgment in *Shepherd v Felt & Textiles of Australia Ltd*[51] in holding that, since the 1989 and 1995 declarations of trust were ultimately duly stamped, they must be treated as having being fully effective and irrevocable from the dates of their execution.[52] Although appeal ground (h) implicitly challenged that conclusion in relation to the 1989 declaration of trust, it was not submitted that there was any error in the trial judge's reasoning. Nor did the notice of appeal challenge the trial judge's same reasoning in relation to the 1995 declarations.[53] Nor was there any submission that the trial judge erred in his Honour's further conclusion that Bill and Sandra, as the persons who executed the declarations and therefore the persons liable to pay the duty under s 26 of the *Stamp Act* 1894 (Qld), could not rely upon their own alleged default in stamping the documents as a reason for not performing the trust.[54]

[68] There being no criticism of the trial judge's reasons on any of these points, it is sufficient to express my own conclusion that this ground of appeal fails for the reasons given by the trial judge.

[69] For completeness I should mention that Bill and Sandra also argued that the case that the trust declarations were revoked derived force from the separation agreement, conduct by Gary which amounted to vitiating conduct or unclean hands, that the declarations were shams, and that Gary specifically disavowed any interest in Yalgold in the course of rebutting proceedings brought against him in the Family Court by his former wife. The logic of this submission was not developed in argument. As to the last point, Gary's disavowal in the Family Court of any interest in Yalgold, it must be borne in mind that the effect of the trial judge's findings is that Bill appreciated throughout that he and Sandra held a total of 24 shares in Yalgold beneficially for Gary. As the trial judge pointed out, Gary's denials that he held an interest in Yalgold were not disclaimers of an interest but rather denials that

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51 (1931) 45 CLR 359 at 383, and subsequent decisions applying it: *Caxton Street Agencies Pty Ltd v Korkidas & Anor* [2002] QSC 210 at [16], per Holmes J (as her Honour then was) and *Official Trustee in Bankruptcy v D'Jamirze* (1999) 48 NSWLR 416 at 427 per Hodgson CJ in *Equity*, and *Burnitt & Anor v Pacific Paradise Resort Pty Ltd* [2004] QDC 218, per McGill DCJ.

52 [2011] QSC 234 at [134]-[136].

53 [2011] QSC 234 at [160].

54 [2011] QSC 234 at [141].

he held any interest in the first place. He gave that false evidence to deceive his former wife about his financial position, rather than with the intention of changing his position. As the trial judge remarked, "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."[55]

[70] Otherwise it is necessary only to endorse the trial judge's conclusion that the conduct relied upon as a disclaimer, having occurred a long time after 1989, could not amount to an effective disclaimer of the benefit of a trust which Gary had earlier accepted.[56]

Unclean hands

[71] The remaining grounds of appeal, grounds (d) and (f), challenge the trial judge's rejection of arguments that relief should be withheld from Gary because of his misconduct:

> "(d) The learned primary judge erred in law, in that, having (rightly) made the findings set out in sub-paragraphs (i) to (v) below as to Gary's conduct, His Honour ought to have held that such conduct disentitled Gary to the equitable relief sought by him; namely -
>
> (i) that Gary has given evidence on many occasions, in the Family Court of Australia, the Supreme Court of Queensland and the Magistrates Court of Queensland, that he held no interest in shares in Yalgold Pty Ltd;
> (ii) that Gary's denials were deliberate, and made "because it then suited him to do so";
> (iii) that, throughout the Family Court proceedings in particular, Gary had falsely pretended that he was a man of no assets whatever, whereas he was conducting several businesses and controlled several companies, including, relevantly, the companies referred to in Part G of the Fourth Further Amended Defence filed on 7 September, 2010 ("the Defence");
> (iv) that Gary's purpose, in transferring to Yalgold Pty Ltd his half interest in land at Tile Street, Wacol, was to defeat the claim of his former wife to that interest in Family Court proceedings;
> (v) that Gary had engaged in artifices (namely purported loan agreements involving his companies, Mine & Quarry Equipment International Limited ("MQEI") and Hannover International Limited) to disguise his participation in Yalgold Pty Ltd;"
>
> …
>
> "(f) The learned primary judge erred in fact and/or in law, in that:-

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55 [2011] QSC 234 at [160].

56 [2011] QSC 234 at [161], with reference *to JW Broomhead (Vic) Pty Ltd v JW Broomhead Pty Ltd* [1985] VR 891 at 933-934.

(i) His Honour held (rightly) that Gary controlled the companies Facetwin, Cubon and MQEI, pleaded in sub-paragraph 60(a) of the Defence;

(ii) His Honour held (rightly) that Gary had engaged in the transactions concerning ball mills pleaded in sub-paragraph 60(c) of the Defence;

(iii) His Honour ought to have found, on the whole of the evidence, that Gary had engaged in the transactions and matters pleaded in sub-paragraphs 60(d) to (l) and otherwise in Part G of the Defence;

(iv) His Honour held (only) that Gary "engineered" a result that profits of MWA were diverted to Facetwin, and that Gary did something similar in other transactions, with the consequence of diminishing or eliminating taxable income of MWA or Mine and Quarry Equipment Pty Ltd ("MQE");

(v) His Honour ought to have held that Gary had engaged in the Tax Avoidance Scheme pleaded in Part G of the Defence; and

(vi) His Honour ought consequently to have withheld from Gary the equitable relief he sought;".

[72] The factual substratum of these grounds of appeal was largely uncontroversial. The relevant conduct was strongly condemned in the oral argument presented for Bill and Sandra in this appeal, but it is sufficient to refer to the summary in their outline of argument:

> "10. The learned primary Judge was, rightly, unimpressed with Gary. His Honour made the following findings:
>
> (a) That Gary gave false evidence both:
>
> (i) in the Family Court of Australia; and
>
> (ii) before Atkinson J in the Trial Division of this Honourable Court, being 'conduct warranting strong criticism'.
>
> (b) That Gary engaged in an 'artifice' in relation to the loans and assignment the subject of the debt proceedings, including an express finding that, 'just as the loans were shams, so were [the] assignments.' On this footing, the two debt actions were dismissed.
>
> (c) That the trial of the proceedings was delayed, indeed having to be adjourned, by reason of Gary's 'serious deficiencies in disclosure['].
>
> (d) That Gary controlled several overseas companies, despite his ongoing denial, including:
>
> (i) Facetwin Limited, incorporated in Hong Kong; and
>
> (ii) Cubon Company Limited, incorporated in the British Virgin Islands.

(e) The findings include engaging in transactions 'the consequence [of which] was the diminution or elimination of what would have been the taxable income of MWA or MQE'." (citations omitted)

[73] In relation to paragraphs (d) and (e), the diminution or elimination of the taxable income of MWA or MQE (appeal ground (f)), the trial judge reasoned as follows:[57]

> "[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. 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

[57] [2011] QSC 234 at [146]-[150].

> 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'. 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.
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> [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."

[74] That passage concerned Bill and Sandra's separate "tax fraud defence". The trial judge returned to consider the clean hands defence, and observed that "the defendants' ultimate argument did not seek to prove that there were particular monies, which were the fruits of a tax fraud, which were amongst the funds that went to Yalgold. [As conceded by the defendants in their submissions at T 17-35]. 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."[58]

[75] Bill and Sandra submitted that the trial judge approached that issue incorrectly because the doctrine of unclean hands requires a lower level of proof than proof of actual contraventions of the criminal law or other illegality.[59] In this respect, they argued that they did not make the concession attributed to them by the trial judge.

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58 [2011] QSC 234 at [156].

59 *Kettles & Gas Appliances Ltd v Anthony Hordern & Sons Ltd* (1934) 35 SR (NSW) 108; *Official Trustee in Bankruptcy v Tooheys Ltd* (1993) 29 NSWLR 641; *In Marriage of Cawthorn* (1998) 144 FLR 255; *Staples v Baker* [1999] 1 Qd R 317 and the further cases and examples cited at paragraph [3-125] of Meagher, Gummow and Lehane's *Equity Doctrines and Remedies* (4th ed).

However the transcript bears out the trial judge's statement. In the course of submissions by senior counsel for Bill and Sandra, the trial judge enquired in relation to the clean hands defence whether Bill and Sandra's argument "…sought to establish that there were particular funds, the result of some tax fraud or being the fruits of a tax fraud, which were amongst those that went to Yalgold for the improvement of Tile Street." Senior counsel responded:

> "No, we don't attempt that sort of tracing exercise. Our case is a more general one; that it was part of the overall tax scam."

[76] It was also submitted that the trial judge found that some monies the subject of the tax fraud were remitted to Yalgold such that there was a direct nexus between the tax fraud and the development by Yalgold of its property with those funds, the benefit of which Gary would acquire by the transfer to him of the one half interest in Yalgold pursuant to the 1989 declaration of trust. That is not correct. In the cited paragraph of the reasons, the trial judge accepted that Gary "'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", that "…Gary did engineer a result whereby the profits were derived by Facetwin" (rather than by MWA), and that Gary "…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".[60] But the trial judge went on to hold that the argument did not descend to the detail of relevant revenue laws at the time and lacked "the substance by which reasoned and fair findings could be made about what are so generally asserted to have been contraventions of Australian laws."[61] There is no basis for any challenge to that conclusion. As the trial judge concluded, Bill and Sandra failed to prove that there were particular monies which were the fruits of a tax fraud which were amongst the funds that went to Yalgold.

[77] Thus the case can not be treated as one where the subject matter of the trust was the result of, or augmented by the alleged misconduct. Accordingly, as the trial judge went on to hold[62], the clean hands argument in this respect disregarded the principle that the misconduct which is relied upon must have an immediate and necessary relation to the equity which is sued for: *Meyers v Cas*ey.[63] The argument must be rejected for that reason.

[78] The same is true in relation to Bill and Sandra's arguments that Gary gave (false) evidence in various proceedings to the effect that he had no interest in Yalgold or in the shares in Yalgold (appeal ground (d)(i)-(iii)) and that Gary had concealed his interest in Yalgold (appeal ground (d)(v)). Bill and Sandra argued that the reason why the trial judge held that this and associated misconduct should not deny Gary equitable relief was that to do so would harm his former wife's prospect of ever enforcing her rights. The trial judge did take that circumstance into account, but it is clear that the trial judge considered that the clean hands argument should be rejected because it disregarded the principle that "…the misconduct which is relied upon must have an immediate and necessary relation to the equity which is sued for."[64] In my respectful opinion that was a proper and sufficient basis upon which

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60 [2011] QSC 234 at [147].
61 [2011] QSC 234 at [148].
62 [2011] QSC 234 at [157].
63 (1913) 17 CLR 90 at 123-124 per Isaacs J, Powers J (at 147) and Rich J (at 148 agreeing).
64 [2011] QSC 234 at [157].

to reject Bill and Sandra's contention that Gary's misconduct should disentitle him to the orders which he sought.

[79] It is therefore not strictly necessary to deal with additional reasons given by the trial judge for that conclusion, but I will discuss the parties' arguments about them. The trial judge held that: one of the circumstances informing the conclusion that Gary's misconduct should not deny him equitable relief was that Bill and Sandra were parties to Gary's concealment of his interest in Yalgold and, by the clean hands argument, hoped to gain a large windfall from a scheme in which they were active participants; Bill gave false testimony in the Family Court as well; Gary's former wife became aware of the true ownership of Yalgold and was able successfully to reopen her case against him; although she might not have discovered all of the facts, and the settlement of her case in 2004 might have been effected by some uncertainty as to whether she could prove Gary's ownership of part of Yalgold, that was in no small part itself due to Bill's affidavit evidence which did not disclose the true position as to the Yalgold shares;[65] and the relevant point was that Gary's endeavours to hide his property from his former wife were ultimately unsuccessful and he had not obtained the intended fruits of his deception. For those reasons the grant of equitable relief would not facilitate a fraud.

[80] The trial judge considered that these additional circumstances were relevant because the equitable defence, being discretionary, was to be applied or otherwise according to the circumstances of the case. The decisions cited by the trial judge[66] support that approach.

[81] One of the challenges made by Bill and Sandra to this reasoning was based on the proposition that it was Bill who provided the Family Court with the truth about the trust. This argument should not be accepted. It was based upon paragraph 149(c) of Bill's affidavit sworn in the Family Court proceedings on 17 September 2001. He swore that three documents he produced were declarations of trusts "which appear to have been signed by Sandra and me". This does not reflect particular credit upon him, since in the same paragraph he denied that Yalgold held any of the property on a secret trust, he stated that he did not recall ever signing the declarations, he stated that he was overborne and intimidated by Gary, and he stated that he did not read the documents and did not know the purpose for which they were to be used. The trial judge rejected that case. Furthermore, Bill disclosed the declarations of trust only in response to the affidavit by Gary's former wife sworn on 20 August 2001 in which she asserted that the property was held upon a secret trust for Gary. Bill, as a party to the Family Court proceedings and a person who had executed the declarations of trust, was obliged to discover the declarations of trust in the Family Court proceedings, but he failed to do so until after Gary's former wife became aware of the trust.

[82] The trial judge did not err by taking into account Bill's own misconduct. In *Sang Lee Investment Co Ltd v Wing Kwai Investment Co Ltd & Anor*,[67] Lord Brightman observed that it was not the proper approach for a court to compare the misconduct on the one side with the misconduct on the other side:[68]

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65 [2011] QSC 234 at [153].

66 [2011] QSC 234 at [157] citing *Nelson v Nelson* (1995) 184 CLR 538, *Carantinos v Magafas* [2008] NSWCA 304 at [61]. The trial judge also referred to *GE Dal Pont and DRC Chalmers, Equity and Trusts in Australia* (4th ed, 2007) at 814.

67 [1983] HKLR 197 (PC).

68 [1983] HKLR 197 (PC) at 209.

> "[T]he court should first decide whether there has been any relevant want of faith, honesty or righteous dealing on the part of the person seeking relief, and the court should then decide whether, as a matter of discretion and in all the circumstances, which may include any relevant misconduct on the part of the person resisting equitable relief, it is right to grant or refuse specific performance. There was no balancing exercise which falls to be performed".

[83] The trial judge followed that approach. His Honour was entitled to take into account that the argument that Gary lacked clean hands was pursued by a man who had himself given false testimony in his own interests about the same matter in the Family Court.

[84] Bill and Sandra submitted that the trial judge should have made an order which required them to hold the 50 per cent interest, the subject of the declarations on trust, subject to any claim that Gary's former wife might successfully establish in the Family Court. The circumstances of this case are very different from those which were found to justify the imposition of conditions upon the enforcement of the resulting trust in the case cited for Bill and Sandra, *Nelson v Nelson*.[69] More importantly, the trial judge was not asked to make any such order; and such an order would not have been justified. The sufficiency of the settlement was not the subject of evidence. It is possible that the settlement might have been affected by some uncertainty as to whether Gary's former wife could prove Gary's ownership of part of Yalgold, but as the trial judge observed,[70] if she was induced to settle by some substantial gap in her knowledge she has her rights against him upon the facts found by the trial judge.

[85] The case which was litigated was not that the order should be moulded to protect the interests of Gary's former wife. Rather, it was that Gary should be refused relief altogether. That would give Bill and Sandra an unmerited windfall and, as the trial judge found, it would also have the property kept from the reach of Gary's former wife "…by an unmeritorious appeal to notions of equity and conscience."[71]

[86] Bill and Sandra have not demonstrated any error in the trial judge's conclusion that Gary's endeavours to hide his property from his former wife were ultimately unsuccessful and that he had not obtained the intended fruits of his deception by the settlement in 2004. It was submitted, however, that the trial judge was wrong to take into account that the deception was ultimately ineffective, since the question was merely whether the person seeking equitable relief was not deserving of relief from a court of conscience. *Kettles & Gas Appliances Ltd v Anthony Hordern & Sons Ltd*[72] was cited. In that case a plaintiff was refused an injunction to restrain passing off of the plaintiff's goods by a rival trader because the plaintiff had misrepresented to the public that its goods were patented. The issue and the facts of that case were so different from those here as to render it of little assistance. I see no error in the trial judge's conclusion that the circumstance that Gary's endeavours to hide his property from his ex-wife were ultimately unsuccessful was one of the circumstances which should be taken into account in deciding whether Gary should be refused equitable relief.

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69 (1995) 184 CLR 538 at 571-572 per Deane and Gummow JJ.
70 [2011] QSC 234 at [154].
71 [2011] QSC 234 at [154].
72 (1934) 35 SR (NSW) 108 at 128-131 per Long Innes J.

[87] Finally, in relation to appeal ground (d)(iv), (set out in [71] of these reasons) Bill and Sandra contended that Gary should have been denied relief on the ground that he had been found to have set up a secret trust for purposes which included the purpose of concealing assets from his then wife in the context of anticipated Family Court proceedings. On that contention, the question would arise whether Gary's alleged conduct in participating in the creation of the trust declarations for the discreditable purpose of concealing his interest in the land from his wife would justify the court in withholding equitable relief. It might be said that such conduct did have an immediate and necessary relation to the equity sued for; that, in the words of Isaacs J in *Meyers v Casey*,[73] the right relied upon, which the court is asked to protect and enforce, "is itself to some extent brought into existence … by some illegal or unconscionable conduct of the plaintiff." It might be questionable, however, whether the maxim should be applied to deny equitable relief altogether, where Gary possessed a pre-existing legal interest, the postulated discreditable conduct was the substitution of an equivalent but secret trust, Gary's former wife ultimately discovered the existence of the trust, and Gary ultimately did not obtain the intended fruits of his deception.[74]

[88] It is not necessary to reach any conclusion upon that issue. In submissions in reply, senior counsel for Bill and Sandra properly acknowledged that this contention was neither pleaded nor pursued at the trial. It is therefore unsurprising that the trial judge did not consider it.

[89] It was nevertheless submitted that the point could be taken on appeal, because the trial judge found that each of the brothers intended to put the land beyond the reach of Gary's former wife.[75] In my opinion, it would not be just to permit such a point to be taken for the first time on appeal. The finding upon which Bill and Sandra rely supported the trial judge's conclusion that the 1989 trust declaration was not a sham, but it was not necessary for that conclusion and neither party had sought such a finding. Bill and Sandra pleaded the facts alleged to support their contention that equitable relief should be denied on discretionary grounds,[76] and this point was neither pleaded nor argued. If it had been agitated at the trial, Gary might well have conducted his case differently. It is too late to raise it now.

Proposed orders

[90] The appeal should be dismissed with costs.

[91] **WHITE JA:** I have read the reasons for judgment of Fraser JA with which I agree and am grateful for his Honour's close analysis of the facts and the decision below. I agree with his Honour's proposed orders.

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73 (1913) 17 CLR 90 at 124.

74 [2011] QSC 234 at [153].

75 [2011] QSC 234 at [36], [105].

76 See *UCPR*, r 149(1)(b), (c), r 150(1)(k), r 150(4).