

SUPREME COURT OF QUEENSLAND

CITATION: *Lee v Chai* [2013] QSC 136

PARTIES: **JONATHAN LEE**

(plaintiff)

v

ANGELA CHAI

(defendant)

FILE NO/S: BS126/04

DIVISION: Trial

PROCEEDING: Civil Trial

DELIVERED ON: 3 May 2013

DELIVERED AT: Brisbane

HEARING DATE: 5–9, 12 November 2012

JUDGE: Peter Lyons J

- ORDER:
- 1. Judgment for the Defendant on the Plaintiff's claim.**
 - 2. The Plaintiff pay the Defendant's costs of and incidental to the claim:**
 - a. on the standard basis until and including 24 May 2009;**
 - b. on the indemnity basis from 25 May 2009**
 - 3. Judgment in the sum of \$110,000 together with interest in the sum of \$101,221.10, a sum of \$211,221.10, on the Defendant's Counterclaim against the Defendants by Counterclaim.**
 - 4. The Defendants by Counterclaim pay the Plaintiff by Counterclaim's costs of and incidental to the Counterclaim on the indemnity basis.**
 - 5. Caveat number 707065799 in respect of the property described as Lot 104 on SP100001 County of Stanley, Parish of South Brisbane, Title Reference 50291020 being Unit 108, 242–260 Vulture Street, South Brisbane in the State of Queensland be removed.**
 - 6. Upon the receipt by the Defendant of the amount owing under paragraph 3 above, the Defendant do all such things and execute all such documents as are reasonably required by the Plaintiff to transfer title in**

and the registration of the Porsche motor vehicle the subject of these proceedings to the Plaintiff or his nominee.

- 7. Subject to paragraph 6, the Defendants by Counterclaim be enjoined from dealing with the Porsche motor vehicle the subject of these proceedings until the receipt by the Defendant of the amounts owing under these orders or further order.**

CATCHWORDS: EVIDENCE – WITNESSES – CROSS-EXAMINATION – AS TO CREDIT – ON FORMER STATEMENTS – TENDERING OR CALLING EVIDENCE AS TO FORMER INCONSISTENT STATEMENT – where witness was cross-examined on a prior affidavit – where it was sought to tender the prior affidavit in re-examination – whether the prior affidavit was admissible as evidence

EQUITY – TRUSTS AND TRUSTEES – IMPLIED TRUSTS – RESULTING TRUSTS – REBUTTAL OF IMPLICATION – where property was purchased in the name of the defendant – where the plaintiff provided the purchase money for the property – where the plaintiff and the defendant were in a sexual relationship – where there was evidence the plaintiff intended the property to be a gift – whether the presumption of a resulting trust was rebutted

EQUITY – GENERAL PRINCIPLES – UNDUE INFLUENCE AND DURESS – PRESUMPTION OF UNDUE INFLUENCE FROM RELATIONSHIP OF PARTIES – OTHER RELATIONSHIPS – where property was purchased in the name of the defendant – where the plaintiff provided the purchase money for the property – where the plaintiff and the defendant were in a sexual relationship – whether the relationship gave rise to a presumption of undue influence

EQUITY – GENERAL PRINCIPLES – UNCONSCIONABILITY, UNCONSCIONABLE DEALINGS AND OTHER FORMS OF EQUITABLE FRAUD – SPECIAL DISABILITY – where property was purchased in the name of the defendant – where the plaintiff provided the purchase money for the property – where the plaintiff suffered from a personality disorder – where the plaintiff suffered from cognitive dysfunction – where the plaintiff suffered from alcohol dependence – where his condition did not have any serious impact on the plaintiff's ability to make a judgment as to his own best interests – whether the plaintiff was at a special disadvantage

EQUITY – GENERAL PRINCIPLES – UNCONSCIONABILITY, UNCONSCIONABLE DEALINGS AND OTHER FORMS OF EQUITABLE

FRAUD – KNOWLEDGE – where property was purchased in the name of the defendant – where the plaintiff provided the purchase money for the property – where the plaintiff suffered from a personality disorder – where the plaintiff suffered from cognitive dysfunction – where the plaintiff suffered from alcohol dependence – where medical evidence was that a person without medical training would have been aware of the presence of a “grandiose and entitled affect” – whether the defendant had knowledge of any special disadvantage of the plaintiff

Evidence Act 1977 (Qld), s19

Black Uhlans Incorporated v New South Wales Crime Commission & Ors [2002] NSWSC 1060

Brusewitz v Brown [1923] NZLR 1106

Calverley v Green (1984) 155 CLR 242

Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447

Fowkes v Pascoe (1875) 10 Ch App 343

Garcia v National Australia Bank Ltd (1998) 194 CLR 395

Goldsworthy v Brickell [1987] 1 Ch 378

Johnson v Buttress (1936) 56 CLR 113

Louth v Diprose (1992) 175 CLR 621

Malayan Credit Ltd v Jack Chia-MPH Ltd [1986] AC 549

Martin v Martin (1959) 110 CLR 297

Meredith v Innes (1930) 31 SR(NSW) 104

Muschinski v Dodds (1985) 160 CLR 583

Nelson v Nelson (1995) 184 CLR 538

Queen’s Case(1820) Brod & Bing 284; 129 ER 976

Paroz v Paroz [2010] QCA 362

R v McGregor [1984] 1 Qd R 256

Royal Bank of Scotland plc v Etridge (No 2) [2002] 2 AC 773

Trustees of Cummins v Cummins (2006) 227 CLR 278

Tulloch (Dec’d) v Braybon (No 2) [2010] NSWSC 650

Union Fidelity Co Ltd v Gibson [1971] VR 573

Yerkey v Jones (1940) 63 CLR 649

COUNSEL:

J Bell QC with J O’Regan for the plaintiff.

D Savage SC for the defendant.

SOLICITORS: Hopgood Ganim for the plaintiff.

McKays Solicitors for the defendant.

- [1] **Peter Lyons J:** In 2000, a unit at South Bank in Brisbane was purchased in the name of the defendant (*Ms Chai*). In 2001, a Porsche motor vehicle was purchased and registered in Ms Chai's name. The plaintiff (*Mr Lee*) claims both items of property, on the basis that he provided the purchase monies, and they are held under a resulting trust by Ms Chai on his behalf. Ms Chai contends in each case that the property was a gift to her. In that event, Mr Lee alleges that the gifts should be set aside, relying on the doctrines of undue influence and unconscionable conduct. Ms Chai has made a counterclaim against Mr Lee and his wife for the conversion of the Porsche. A counter claim for the conversion of other property has been discontinued.

Background

- [2] Mr Lee was born in Taiwan on 23 February 1958. In 1978 he married his present wife, Lillian (to whom I shall refer as *Mrs Lee*). Their children, mentioned in these proceedings, are a daughter, Heidi, a son, Kevin, and another daughter, Julia, now adults.
- [3] Mr Lee's family in Taiwan conducted a business which involved property development and building construction. At times relevant to these proceedings, both Mr Lee's father and his brother were active in the business. Mrs Lee gave evidence that she had an interest in the construction company¹; and that at times she worked in an accounting business of Mr Lee's father². She also managed a company, Lee-Bai Property Management Pty Ltd (*Lee-Bai*), which itself managed properties in Taiwan³.
- [4] In March 1993, Mr Lee migrated to Australia. He did so as a business migrant. He purchased a house at 52 Ingluna Circuit, Eight Mile Plains, in Brisbane. In due course his wife and children came to live with him there. Mr Lee soon became friendly with Mr and Mrs Samaratunga, who lived across the road, in Ingluna Circuit. Both Mr and Mrs Samaratunga are psychiatric nurses.
- [5] While in Australia, Mr Lee, together with some other Taiwanese businessmen, invested money in land at Willawong. The land was developed as a golf driving range.
- [6] In addition to his involvement in business, the evidence indicates that Mr Lee had an excellent knowledge of Chinese literature and was skilled at writing and editing in the Chinese language⁴.

¹ T 4-8/40; 4-11/20 to 4-12/30.

² T 4-10/55; 4-12/40.

³ T 2-51/45; 2-52/35.

⁴ CFI 102 para 5 (documents on the Court File will be identified by their Court File Index number – *CFI*).

- [7] Ms Chai was born on 3 October 1961. She married in 1983, there being three children of this marriage. She migrated from Taiwan to Australia with her family in April 1990. She gave evidence that in about late 1994 or early 1995 the relationship between her husband and herself broke down to the point where they lived separately, though they remained in the same house for the benefit of their children. Ms Chai's husband maintained a business in Taiwan and frequently travelled there.
- [8] Ms Chai was very active in the Taiwan Friendship Association in Queensland (*TFAQ*). In 1999 she became the vice president of this association; and was its president for a year from 1 July 2000. Ms Chai had an interest in a Traveland Travel Agency. This business operated between 1999 and 2002, but was not financially successful. Ms Chai worked in the business.
- [9] Both Mr Lee and Ms Chai gave evidence that they met not long after Mr Lee migrated to Australia, when Mr Lee came to dinner at Ms Chai's home⁵. Thereafter they had virtually no contact for several years.
- [10] About the end of 1999, Mrs Lee returned to live in Taiwan with Julia, the youngest daughter of the family, so that Julia could continue her education in a Chinese-speaking school. Mrs Lee's return to Taiwan was also associated with a request from her father-in-law that she "look after the company" (presumably, the construction company), because he was ill.
- [11] Early in 2000, Mr Lee and Ms Chai on occasion came into contact with each other. In March 2000, Mr Lee and Ms Chai were each in Taiwan. They both identify the commencement of their relationship by reference to an event when occurred at that time. They spent the evening in a karaoke bar with a group of people including Mrs Lee. When they left the karaoke bar, they went to the lift. The rest of the group entered the lift, and, as it was full, Mr Lee and Ms Chai remained behind. They then engaged in a passionate kiss and embrace.
- [12] Each of them returned to Australia shortly afterwards. They commenced going out together frequently. On one occasion, they went to the Hyatt Hotel at Sanctuary Cove. This was the first occasion they had sexual intercourse.
- [13] Thereafter, they dated nearly every day, frequently having sexual intercourse. This occurred in various places, sometimes in a hotel, sometimes in more public locations. They at some point had discussions about finding a place where they could conduct their affair with greater ease and discretion.
- [14] After some searching, Ms Chai identified a unit at South Bank. The selling agent was Ms Diane Kruse. Mr Lee introduced Ms Chai to Ms Kruse as his wife. Mr Lee and Ms Chai then inspected the unit, and a decision was made to buy it.
- [15] Mr Lee subsequently gave Ms Chai a bank cheque for \$50,000, which she deposited into her Westpac account. They went to the real estate agent's office, where a contract was signed. The contract was dated 5 May 2000. It identified Ms Chai as the buyer of the unit. Her nominated solicitor was Barry & Nilsson, the particular solicitor being a Ms Chiang. The purchase price under the contract was \$615,000 with a deposit of \$61,500 payable on 8 May 2000. The settlement date was 31 May

⁵ CFI 107 para 27; CFI 106 para 7. Where an affidavit is a translator's affidavit, exhibiting a translation of an affidavit of another witness, references are to paragraphs in the translated affidavit.

2000. A signature, apparently that of Ms Kruse, appears on the contract on behalf of the real estate agency, as deposit holder.
- [16] Of the deposit, \$50,000 came from Ms Chai's bank account, and \$11,500 was paid by way of bank cheque arranged by Mr Lee from the International Commercial Bank of China (*ICBC*).
- [17] At some point, Mr Lee arranged for Ms Chai to see Ms Chiang. Ms Chiang was a Taiwanese solicitor, known to Mr Lee. Mr Lee did not tell Ms Chiang when he spoke to her that he was providing the purchase money, or that the unit was being purchased for him. Mr Lee did not accompany Ms Chai when she saw Ms Chiang.
- [18] Shortly after the deposit was paid, Mr Lee returned to Taiwan, to arrange for the rest of the purchase money. His evidence was that he did this by selling some shares, and borrowing money from his brother in Taiwan.
- [19] While Mr Lee was in Taiwan, during a telephone conversation, he told Ms Chai that he had found a photo studio where he had made an appointment to have their "wedding photos" taken. Accordingly, on 15 May 2000, Ms Chai went to Taiwan. The day after she arrived in Taiwan, Mr Lee took her to the photo studio to confirm the appointment, and to choose the clothes to be worn in the photographs. While they were there, Mr Lee told the owner of the studio that he and Ms Chai had been married and living in Australia for a number of years, but had come back to have a holiday in Taiwan, and to have their wedding photos taken at the same time. In due course the photographs were taken. Mr Lee also introduced Ms Chai to his parents shortly before 20 May 2000, though he did not tell them of the relationship⁶.
- [20] Ms Chai returned to Australia on about 26 May 2000. At some point she provided Ms Chiang with a cheque for \$1,054 drawn on her Suncorp Metway bank account, for the registration of the title to the unit in her name. She also paid, by cheque drawn on her Westpac bank account, the sum of \$1,143.30 for legal fees.
- [21] Mr Lee provided bank cheques for the settlement, totalling \$574,133.90.
- [22] Settlement occurred on 31 May 2000. At about this time, Mr Lee gave Ms Chai a further sum of \$100,000 to buy furniture, electrical appliances "and anything else you need for the unit"⁷. Ms Chai then set about purchasing furniture and other items for the unit, sometimes accompanied by Mr Lee. She commenced living in the unit when it was substantially furnished, moving her clothing, personal effects, photos, documents, cosmetics and jewellery there. She would nevertheless frequently stay overnight at her former family home at 28 Kardella Street, Stretton, to maintain contact with her children⁸. This home was sold in about February 2002⁹.

⁶ T 3-45/20 to 46/12.

⁷ Ms Chai's evidence to this effect was not disputed by Mr Lee: CFI 106 para 53, with CFI 132 para 10 (q).

⁸ CFI 106 paras 55 and 56; with CFI 132 para 10 (s).

⁹ Affidavit of Zhang sworn 6 November 2012, exhibiting translation of affidavit of Ms Chai sworn the same day (*2 Chai*) para 8, and exhibits AC 1 and AC 2.

- [23] Ms Chai placed in evidence documents demonstrating that she paid rates and body corporate levies for the unit¹⁰. This evidence was not challenged by Mr Lee. The documents cover most, though not all, of the period of the relationship.
- [24] After the purchase of the unit, Mr Lee spent a substantial amount of his time in Taiwan. When he was in Australia, if Mrs Lee was also in Australia, Mr Lee would stay at the family home at Eight Mile Plains. If Mrs Lee was not in Australia, Mr Lee would spend some of his nights with his children at the home at Eight Mile Plains, and some of his time at the unit with Ms Chai. Ms Chai estimates that over the subsequent three years, Mr Lee spent a total of about six months at the unit¹¹. Although Mr Lee commented in some detail on Ms Chai's affidavit evidence, he did not disagree with this estimate.
- [25] Because of his language skills, Mr Lee assisted Ms Chai with the publication of the TFAQ newsletter. Ms Wu was a friend of Mr Lee's son. She also provided tutoring services to Ms Chai's son, then a high school student. She met Mr Lee when she was helping Ms Chai to produce the newsletter of the TFAQ. He subsequently took charge of editing and compiling the newsletter. Ms Wu said that Mr Lee was very good at writing and editing. When Ms Chai became the President of the TFAQ in July 2000, Mr Lee drafted a speech for her. According to Ms Wu, whose evidence was not challenged, Mr Lee drafted a number of other speeches for Ms Chai.
- [26] In November 2000, Mr Lee gave Ms Chai the sum of \$38,000 to assist her in carrying out her duties as the President of the TFAQ.
- [27] Mr Lee gave evidence (denied by Ms Chai) that, at some point, he gave her about \$100,000 in relation to her travel agency business. Mr Lee's evidence was that this occurred in 2000, at some time after the purchase of the unit. However, he also associates it with the closure of the business¹². No documentary evidence was identified in support of Mr Lee's evidence, which, in view of the amount, is a little surprising. He also gave evidence that, in 2002 when he won a lottery, he gave Ms Chai about \$40,000.
- [28] When Mr Lee was in Brisbane, he and Ms Chai would go out regularly, generally with friends of Mr Lee¹³. Mr Lee was a regular patron of the Sunshine Chinese Restaurant (where Ms Wu worked¹⁴), which Mr Lee and Ms Chai sometimes attended every few days, sometimes every few weeks¹⁵, usually with a group of people. At some time after they started to attend the Sunshine Chinese Restaurant together, it became obvious to the proprietor, Mr Hwang, that they were "a couple and having an affair"; and that "they were very much in love with each other"¹⁶.
- [29] Mr Lee and Ms Chai also entertained people at the unit. The wedding photos were on display there.

¹⁰ CFI 106, Ex AC55, AC56.

¹¹ CFI 106 para 57.

¹² CFI 107 para 120.

¹³ CFI 106 para 80.

¹⁴ CFI 102 para 10.

¹⁵ CFI 104 para 6.

¹⁶ CFI 104 para 9 and 10.

- [30] Mr Lee also bought gifts, including jewellery, for Ms Chai. One was a diamond ring inscribed “J & A”¹⁷. He also gave her some other jewellery.
- [31] Early in 2001, there was discussion about the purchase of a motor vehicle. Ms Chai initially considered the purchase of a Mercedes¹⁸. Mr Lee at about this time had purchased his daughter a Mercedes SLK320.
- [32] Mr Lee gave evidence that he had been lending his Pajero motor vehicle to Ms Chai, but felt that this was not suitable, because she had been previously been driving a better vehicle¹⁹. Mr Lee proposed the purchase of a Porsche 911. Mr Lee and Ms Chai went to a Porsche dealership on the Gold Coast. There is some evidence that they were accompanied by Mr Samaratunga, but that evidence is contested by Ms Chai. At the dealership, Mr Lee suggested that Ms Chai test drive some cars. Ms Chai did so, and was impressed by one of them²⁰. A car was then purchased in Ms Chai’s name. Mr Lee gave evidence that Ms Chai “was going to be the one who mainly drove the car”²¹. Ms Chai gave evidence that the car was initially delivered to the unit. Mr Lee said he arranged for this to happen²². It seems, however, that shortly after the delivery, the car was taken to the home of Mr and Mrs Samaratunga for a week, and they were permitted to use it²³.
- [33] At some point, Mrs Lee learned of the relationship between Mr Lee and Ms Chai. Ms Chai gave evidence that this occurred about the middle of 2001²⁴. Mr Lee’s evidence was that Mrs Lee was “aware that something was going on between Ms Chai and me for probably the last year and a half of the relationship”²⁵; which would mean Mrs Lee knew of the relationship from about early 2002. Not surprisingly, Mrs Lee thereafter displayed some hostility both to Mr Lee and Ms Chai.
- [34] About the end of 2001, Ms Chai lost contact with Mr Lee. Early in 2002 she learnt that he had been admitted to hospital. He was in fact in hospital in Taiwan. Ms Chai discussed with Mr Samarantunga the drugs that might be administered to Mr Lee, which resulted in her sending an email on 5 February 2002 to a friend of Mr Lee’s, warning of the effects of taking alcohol with one medication, the potential adverse effects of others, and recommending vitamin B 12²⁶.
- [35] From early 2002, Mr Lee spent most of his time in Taiwan. He told Ms Chai that that was because his uncle had started a construction project on which Mr Lee was to work. Initially they had regular contact by telephone, or over the internet. Mr Lee invited Ms Chai to come to Taiwan to see him, which she did several times.

¹⁷ See CFI 106 para 91.

¹⁸ CFI 106 para 62.

¹⁹ CFI 107 para 106.

²⁰ CFI 106 paras 63-65.

²¹ CF I07 para 114.

²² CFI 132 para 10(v).

²³ CFI 107 para 117, not contested by Ms Chai.

²⁴ This evidence was not contested by Mr Lee; in fact, there is some support for it in his evidence; CFI 107 para 122.

²⁵ CFI 107 para 122.

²⁶ CFI 106 ex AC 7.

- [36] According to Ms Chai, the affair came to an end early in 2003, when she learned that he was involved with another woman (denied by Mr Lee). According to Mr Lee, the relationship came to an end some time after July 2003.
- [37] In September 2003 Mr Lee telephoned Ms Chai. She told him that she was about to leave for a holiday in Asia. A couple of days later, Mr Lee came back to Australia. He, accompanied by Mr Samaratunga, attempted to enter the unit, but his key did not work. He told the manager of the apartment block that he and Ms Chai “were back together again” and that he had nowhere else to stay. The manager agreed to change the locks and to give Mr Lee a key to the unit.
- [38] Mr Lee then hired a removal company to remove the contents of the unit. All of the contents (other than fittings, including curtains) were removed from the unit. Mr Lee gave evidence that Mr Samarantunga and Mrs Lee were present at this time²⁷ (he also gave evidence that it was about this time that Mrs Lee first learnt of the existence of the unit²⁸). In a later affidavit, Mr Lee said that Mrs Lee was present and assisted in the removal of the contents of the unit, but did not refer to the presence of Mr Samaratunga²⁹. Mr Lee also took the Porsche from the unit complex. Some of the property taken from the unit was stored in a storage facility leased in Mrs Lee’s name³⁰.
- [39] On about 1 October 2003, Mr Lee lodged documents to transfer the Porsche’s registration from Ms Chai to himself. He forged Ms Chai’s signature on the transfer document. Shortly prior to this, Mr Samaratunga had obtained a roadworthiness certificate for the Porsche³¹, undoubtedly to facilitate its transfer.
- [40] Mr Lee also attempted to sell the unit, signing documents stating that he was its owner, and authorising real estate agents to act on his behalf. He also saw Ms Chiang at about this time. He gave her three documents on which he had forged Ms Chai’s signature, including a transfer of the unit.
- [41] Mr Lee also approached the ICBC on about 1 October. The ICBC held a mortgage over the unit. Mr Lee stated that he had made an arrangement with Ms Chai to transfer the property into his name; and that he wanted to take out a new mortgage for the same amount.
- [42] Ms Chai learned of these things while she was on her holiday. She returned, and made a complaint to the Dutton Park CIB. Subsequently, Mr Lee was convicted of criminal offences.
- [43] In 2005, after his conviction, Mr Lee made a complaint in Taiwan alleging that Ms Chai had stolen certain of his belongings. In the same year, Mrs Lee made a criminal complaint of adultery against Ms Chai. However, at about that time adultery ceased to be a criminal offence under the law in Taiwan. The theft complaint is outstanding. It is based on an allegation that Ms Chai stole “all the things from my home...”³²; elsewhere described as the curtains and “all the proper

²⁷ CFI 107 para 130.

²⁸ T 3-44/40.

²⁹ CFI 132 paras 12 and 13.

³⁰ CFI 107 paras 131, 132; CFI 132 paras 12-15; CFI 106 para 132 and ex AC 54.

³¹ CFI 107 paras 138, 139.

³² T 2-10/25.

items in ... our apartment”³³. Mr Lee appears to have some involvement in the adultery complaint, as he received a notice from the court about the change in the law³⁴. He stated that his purpose was to make Ms Chai face the law in Taiwan, as he had been made to face the law in Australia³⁵.

- [44] The history which has been set out thus far is generally based on matters which are generally not in dispute. In some cases, it is based on parts of Ms Chai’s evidence which has been the subject of detailed comment by Mr Lee, where Mr Lee has not challenged those parts. As will become apparent, on a number of important factual matters there are major divergences in the evidence called on behalf of the parties, with the credit of most of the witnesses very much in issue.
- [45] Credit issues arise in a number of contexts. It is therefore convenient to make some preliminary observations about the credit of some of the witnesses.
- [46] I also note that some difficulty arises because of the number of years which have intervened between relevant events, and the time when the witnesses gave evidence. For some of the witnesses evidence was given through a translator, adding further difficulty to the assessment of credit.

Mr Lee: some credit issues

- [47] A major factor, adverse to Mr Lee’s credit, is his conduct in September 2003. He then returned to Australia, knowing Ms Chai was in Asia on a holiday. He lied to the manager of the apartment block, to gain entry to the unit. He then removed the contents of the unit, including items in which, on no view, could he claim any interest. He also took the Porsche from the unit complex. In light of this conduct, Mr Lee’s lie to the unit manager was particularly brazen.
- [48] Shortly afterwards, Mr Lee forged Ms Chai’s signature on a document intended to effect a transfer of the Porsche to himself. He also forged Ms Chai’s signature on three documents, for the purpose of effecting a transfer of the unit to himself, including a transfer form. He gave these documents to Ms Chiang, no doubt for the purpose of having the transfer registered. He also lied to the ICBC, by stating that he had made an arrangement with Ms Chai to transfer the unit to his name.
- [49] Mr Lee gave evidence he arranged for some of the property which was taken from the unit, including jewellery, to be transported to Ms Chai’s house at Stretton under the direction of Mr Samaratunga³⁶. His evidence was that the removalists drove off with Mr Samaratunga, and did not return to Ingluna Circuit³⁷.
- [50] Mr Lee knew that Ms Chai did not then live in Stretton, but had been living at the unit; and that at that time she was in Asia on holiday. He also knew by September 2003, that Ms Chai’s husband and daughter lived at 390 Benhiam Road, Calamvale, having himself gone there a short time previously³⁸. There is no satisfactory evidence about what ultimately became of the property said to have been dealt with

³³ T2-37/55.

³⁴ T2-35/55.

³⁵ T2-37/30.

³⁶ CFI 107 paras 132, 135; and CFI 132 paras 12, 13, 14.

³⁷ CFI 132 para 14.

³⁸ See CFI 106 para 119, with CFI 132 para 10(ff).

in this fashion; nor is there independent evidence to corroborate Mr Lee's evidence. Although supported by the evidence of Mr Samaratunga, I consider Mr Lee's evidence that he arrange for the delivery of property to Ms Chai's house to be a concoction.

- [51] There are also some difficulties in Mr Lee's evidence relating to his financial position and financial transactions.
- [52] In the years when he was a resident in Australia, most of the money to which Mr Lee had access in this country was held in bank accounts which were in the name of either his father or his brother. For that reason, on Mr Lee's evidence, only ten percent of the interest earned was required to be withheld for the payment of tax. Mr Lee was cross-examined about these accounts, it being suggested that all of the money in them was his; and that the accounts were in the names of his father and brother so that he could dishonestly avoid paying the tax which would otherwise be payable.
- [53] One of Mr Lee's explanations for his conduct was that his money was in Taiwan, being managed by his father and his brother. That explanation did not directly address the allegation being put to him.
- [54] Mr Lee's second explanation was that "the people who work in the bank" recommended this course, in relation to his father, and accordingly he asked his father to give him authority to take it. That explanation appears to accept that the money in the account in his father's name was in fact Mr Lee's money. Elsewhere, of these accounts, he said that the money was "not all my money"; again accepting that at least some was his³⁹. The evidence leads me to the conclusion that Mr Lee engaged in dishonest conduct, to avoid a tax-related liability. It also has the consequence that I do not accept his evidence that he acted on the recommendation of bank staff.
- [55] Mr Lee was somewhat evasive when cross-examined about his financial position in 2000 and 2001. For example, he was reluctant to answer the question whether he was then a wealthy man⁴⁰. He was similarly evasive when cross-examined as to whether he was then a successful businessman⁴¹. This evidence was contrasted, in my view effectively, by Mr Savage SC who appeared for Ms Chai, with the evidence that Mr Lee gave (through his solicitor) when opposing an application for security for costs⁴². Mr Lee there said that he owned many properties in Taiwan. He identified three, each with a value of over US\$5 million; and they secured a debt of US\$2.5 million⁴³. He also gave evidence that he was the sole director and shareholder of Lee-Bai, which managed around 1,500 apartment and studio properties in Taiwan. He also gave evidence that he had transferred properties to his children, including 52 Ingluna Circuit, Eight Mile Plains.
- [56] In his oral evidence Mr Lee stated the number of units and apartments was approximately 1,000. He said he was not the sole shareholder nor the sole director

³⁹ See T2-18 to 2-20.

⁴⁰ T1-48/30-40.

⁴¹ T2-27/35-50.

⁴² CFI 155, Ex 7.

⁴³ Ex 7 para 4 (q), (r); see also T 3-12/8-11.

of Lee-Bai⁴⁴. Of the three properties which were identified in his solicitor's affidavit, Mr Lee gave evidence that one had been sold, for which he received 12,000,000 Taiwanese dollars (approximately A\$4 million). Since he gave evidence in the trial less than three weeks after the solicitor swore his affidavit, it seems unlikely, notwithstanding his explanation, that Mr Lee was unaware of the sale when he gave instructions to his solicitor. Difficulties associated with communicating through an interpreter are not likely to explain the differences in Mr Lee's evidence. Indeed, one reason given by Mr Lee for his instructions to his solicitor was that his son was acting as interpreter, and Mr Lee could not explain to his son that Mrs Lee conducted the business of Lee-Bai; although, on Mr Lee's oral evidence, his son was a director and shareholder of the company⁴⁵. It might be observed that, in the security for costs application, an explanation given for Mr Lee's residing primarily in Taiwan in the last three years was that Lee-Bai has required more and more of Mr Lee's attention for it to run properly⁴⁶.

- [57] Mr Lee's conduct in the years when he lived in Brisbane strongly suggested that he was a man of considerable wealth. He appears to have had much leisure time, in years when his children were being educated. The evidence indicates that he ate, with a group of people, at restaurants on a frequent basis; and almost always paid the bill for the group. He had little difficulty in obtaining the funds to pay for the unit at Southbank in a short period of time; and the same would appear to have been true in respect of the purchase of the Porsche. His evidence indicates that he had monies in Taiwan which were being managed by his father and his brother; and that his father was managing a building project in which Mr Lee had invested approximately A\$3 million⁴⁷. He also appears to have invested in a construction and real estate business conducted by an uncle⁴⁸. He had made money which was being managed by his father; and he had assets left to him by his grandfather⁴⁹; and a deceased brother⁵⁰. Of the investments which were being managed by his father (and, he said, his brother), these were "not big so will not cause suspicious-suspect of my families"⁵¹. For that reason, most of his assets were "in the form of properties and land instead of cash"⁵². He also gave evidence that, as a wedding present, he gave one of his brothers a unit worth approximately A\$100,000⁵³; and he said that he gave his father "some millions of dollars"⁵⁴.
- [58] Mr Lee gave evidence that if he wanted to get in excess of \$100,000 from his father, he would have to lie to him. He gave evidence, in this context, that he lied to his father and his wife, while his wife was in Taiwan⁵⁵. It seems likely that Mr Lee was here referring to at least some of the funds used for the purchase of the unit and the Porsche.

⁴⁴ See T1-49 to 1-50.

⁴⁵ T 3-8/40 to 3-9/25.

⁴⁶ CFI 155 para 4 (m)-(o).

⁴⁷ CFI 107 para 16; T 2-46.

⁴⁸ T1-47/40-60; see also T 3-46/10-30.

⁴⁹ T2-45/40-60.

⁵⁰ T 1-46/10.

⁵¹ T2-45/12.

⁵² T2-45/20.

⁵³ T 2-47/25.

⁵⁴ T 2-46/55 to 47/10.

⁵⁵ T2-45/30-35.

- [59] It was submitted on behalf of Ms Chai that it was likely that Mr Lee told lies to his family to conceal his relationship with Ms Chai. I accept that submission. Mr Lee was asked questions directed to showing that the children living with him in the house at Inglna Crescent were aware of his affair with Ms Chai. Of his son, he said that he was at boarding school. Of his daughter, he said that she would inquire about the fact he would not come home at nights. He said that she was suspicious, which could only be the case if he were not telling her the truth. In due course, she found out the truth; but was not allowed to tell her mother, which resulted in an attempted suicide⁵⁶. The daughter was obviously made an unwilling party to his deception of Mrs Lee.
- [60] In his affidavit, Mr Lee stated that when they were looking for a unit to purchase, he told Ms Chai that he did not want his wife or family to find out about their affair, and that he therefore did not want the unit to be in his name⁵⁷. He also said that he told Ms Chai that he decided to purchase the Porsche and register it in her name “to distance myself from it”⁵⁸. In his Reply and Answer, in respect of each purchase, he had pleaded that he caused the unit to be registered in Ms Chai’s name, and the Porsche to be registered in her name, *inter alia*, because he did not want the general Taiwanese community or his family to learn of the relationship between him and Ms Chai⁵⁹.
- [61] The evidence demonstrated that before the purchase of the unit in March 2000, the affair between Mr Lee and Ms Chai was conducted in public. After the purchase of the unit, they dined frequently in restaurants, conduct not designed to hide from the Taiwanese community the fact that they were having an affair⁶⁰. They would also go to a casino together, with Ms Chai driving Mr Lee home⁶¹. As the affidavit of Ms Wu shows, on one occasion Mr Lee entertained at his home people with whom he did not have a close connection; in circumstances where it was apparent that Ms Chai had an unusual familiarity with his home. In my view, the pleaded explanation previously referred to for the purchase of the unit and Porsche in Ms Chai’s name is highly improbable, and not to be accepted. Nor do I accept Mr Lee’s evidence about the reason for purchasing the unit in Ms Chai’s name. On occasion, they entertained other people at the unit, with the wedding photos on display. Nor do I accept the explanation given in evidence by Mr Lee for the purchase of the Porsche in Ms Chai’s name. By this time, they had been conducting their affair for approximately 12 months. Moreover, by then Mr Lee had been lending his Pajero to Ms Chai.
- [62] It was submitted that Mr Lee, when giving evidence, exaggerated his mental illness, no doubt in support of his claim to have gifts set aside. When asked a series of questions about whether his recollection was sufficiently reliable to enable him to say whether events occurred in the year 2000 as distinct from the year 2002, he said that he used to live in a psychiatric hospital⁶². Elsewhere he gave evidence that he was in hospital for more than 13 days⁶³. His evidence was contrasted with exhibit

⁵⁶ T 2-43/15-40.

⁵⁷ CFI 107 para 54.

⁵⁸ CFI 107 para 110.

⁵⁹ CFI 133, para 7(f)(i) and para 9(d)(i).

⁶⁰ See CFI 104 (particularly paras 6, 8, 9, 10, 11, 18); CFI 103; and CFI 102.

⁶¹ T 2-43/50.

⁶² T1-61/10-35.

⁶³ T2-21/30-40.

4, which records that he was in a hospital in Taiwan early in 2002 for a period of 13 days. In my view, there was some degree of exaggeration in Mr Lee's evidence on this point.

- [63] It was submitted that Mr Lee made a false allegation that Ms Chai stole property of his in Taiwan. The allegation was said to be demonstrably false, and to have been made solely for the purpose of discrediting and humiliating Ms Chai.
- [64] Mr Lee's evidence of the theft has been referred to earlier in these reasons. The theft was said to have occasioned a telephone call which Mr Lee said he made to Ms Chai just prior to his returning to Australia on 5 July 2003⁶⁴. Mr Lee, in this context, said that he was sure he saw Ms Chai in Taiwan in May 2003⁶⁵. As mentioned, it was in 2005 that Mr Lee made a formal complaint to police in Taiwan about the theft.
- [65] Records of Ms Chai's overseas travel, which I accept as correct, show that she returned to Australia on 7 April 2003, and did not again depart until 21 September 2003⁶⁶. The physical difficulties in removing all of the items from a home, and the fact that there is no suggestion that Ms Chai had a place in Taiwan for which any of the property might be useful, indicates a degree of improbability about the allegation. It is to some extent, however, a mirror of Mr Lee's own conduct in September 2003. Moreover, the fact that no complaint was made until 2005 (the same year that Mrs Lee lodged a complaint about Ms Chai's adultery), adds to the doubt surrounding this allegation.
- [66] Mr Lee gave evidence that in the six month period prior to his return to Australia on 5 July 2003, he saw Ms Chai in Taiwan on many occasions, and that the sexual relationship between them was maintained throughout that period. He also gave evidence that after May 2003, he and Ms Chai continued to speak on the phone, though on occasion she refused to answer his calls, or treated some as a joke.⁶⁷ He also gave evidence that the sexual relationship continued over some days when he returned to Australia in July 2003⁶⁸. This evidence would make the allegation of theft seem highly improbable. However, Mr Lee's evidence that he saw Ms Chai in Taiwan in May 2003 is demonstrably wrong; and, in light of Mr Lee's conduct in September 2003, the evidence that the relationship continued as described by Mr Lee through to July 2003 seems unlikely.
- [67] A consideration of Mr Lee's evidence about the theft, together with his evidence of his relationship with Ms Chai in 2003, leaves me in a position where I am not prepared to accept his evidence on either matter. It also provides a further basis for concern about Mr Lee's credit generally.
- [68] The defendant's submissions referred to conduct by Mr Lee which, in my view, demonstrated that Mr Lee has had for a substantial number of years shown a degree of hostility to Ms Chai. They included the fact that he has insisted on relying on photographs of Ms Chai of little or no relevance to the case, but which she would find embarrassing and humiliating. It is not uncommon in litigation between people

⁶⁴ T 2-10/20-30, and CFI 107 para 125.

⁶⁵ CFI 107 para 124.

⁶⁶ CFI 106 Ex AC 10.

⁶⁷ CFI 107 paras 123, 124.

⁶⁸ T 2-6/55; 2-11/28.

who were formerly in a relationship, that one shows a substantial degree of hostility to the other. This seems to me to be a less significant consideration than some of the other matters relied upon in the defendant's submissions.

- [69] It was submitted that Mr Lee had, in the pleadings, falsely denied having Ms Chai's jewellery, taken from the unit in September 2003. For Mr Lee, it was submitted that the pleadings do not contain such a denial.
- [70] In her counter-claim dated 7 June 2004, Ms Chai alleged that Mr and Mrs Lee converted her property by taking it from the unit. Particulars of the property included a number of items of jewellery. Amended particulars of the counter-claim, in a pleading dated 15 July 2005, more fully identified the jewellery. In an answer to the counter-claim dated 20 December 2005, Mr Lee alleged that the property taken was his, not Ms Chai's. The jewellery was further particularised in an amended defence and counter-claim dated 8 August 2007, with values. In his amended answer dated 10 April 2008, Mr Lee did not admit that all of the items particularised in the counter-claim had been taken from the unit; and alleged that the contents of the unit were his property. However on 24 July 2008, a number of items of jewellery, identified by reference to the particulars of the counter-claim, were delivered by Mr Lee's solicitors to Ms Chai's solicitors⁶⁹. On one view of the answers, it might be said that Mr Lee denied taking the items which he subsequently returned. The alternative view is that he was asserting that the jewellery which he later returned was his. The basis for this is not apparent, and the assertion is wrong. Neither view reflects well on Mr Lee's credit.
- [71] A number of other matters were relied upon by Mr Savage, in respect of Mr Lee's credit. I do not accept that Mr Lee was unwilling to acknowledge that he had been the editor of the TFAQ newsletter⁷⁰. Nor does the submission that at the time of the transfer of the Stretton house to Kevin, gift tax was higher than inheritance tax in Taiwan, accurately reflect Mr Lee's evidence⁷¹. With regard to other matters, I consider the evidence not to be sufficient to enable me to make findings which assist me in relation to Mr Lee's credit.
- [72] For the plaintiff, it was submitted that it was apparent that Mr Lee gave an honest account of his recollections. I did not form that impression of Mr Lee. The plaintiff's submissions also relied on corroboration that came principally from the evidence of Mrs Lee, Mr Samaratunga and Mrs Samaratunga. I shall discuss separately the credit of these witnesses.
- [73] It was also submitted that discrepancies between the evidence given in respect of the application for security for costs, and other evidence relating to Mr Lee's financial position, was explicable by reason of the fact that the evidence was given in a three way telephone conversation, with Mr Lee's son acting as an interpreter; and by the use in that conversation of words which have technical meanings. As previously indicated, it seems to me unlikely that these matters substantially explain the difficulties relating to this evidence.
- [74] Overall it seems to me that I should approach Mr Lee's evidence with considerable caution, particularly in respect of matters central to the determination of the case.

⁶⁹ CFI 107, ex JL1-11.

⁷⁰ See T 2-28/25.

⁷¹ T 3-15/30-60.

Mrs Lee: some credit issues

- [75] Submissions were made on behalf of Ms Chai, attacking the credit of Mrs Lee. It was submitted that Mrs Lee was an evasive witness, who gave dissembling evidence in relation to the financial position of herself, Mr Lee and Mr Lee's family in Taiwan. In my view, the evidence of Mrs Lee on these matters was evasive. I note that her involvement in the business affairs of Mr Lee's family makes it likely that she was well placed to know Mr Lee's financial position.
- [76] Mrs Lee gave evidence that from "in about 1999" she had a close relationship with Ms Chai, and that she and Ms Chai were together often. According to Mrs Lee, Ms Chai was concerned about Mr Lee's consumption of alcohol, and she would come to the Lee home to get Mr Lee and Mrs Lee to walk in the park. The latter evidence is not supported by any other witness, and in my view is unlikely. Mr Lee gave evidence that he and Ms Chai had little contact prior to 2000. Ms Chai's evidence is to similar effect. Mrs Lee's evidence about her relationship with Ms Chai is unlikely, and I do not accept it. It appears to be designed to bolster Mr Lee's alternative case.
- [77] Mrs Lee gave evidence that Ms Chai was "incredibly friendly" to her, was generous to the Lee family, and would spend money on them "without blinking an eye". However, Mrs Lee also gave evidence that Ms Chai said, when she started up the travel agency, that she did so because her husband never gave her money; and that Ms Chai was subject to significant financial constraints imposed by her husband, who had reduced the monthly amount he gave her from \$5,000 to \$2,000⁷². This latter evidence should be compared with Ms Chai's bank statements⁷³, which show substantial deposits which, on Ms Chai's unchallenged evidence⁷⁴, seem likely to have come from her husband. For a time they might be said to reflect monthly payments of \$5,000, around the end of 1999, and up to 3 May 2000, after the affair commenced. After that, and some time after Mrs Lee had moved back to Taiwan, the payments discontinued for some time. As mentioned, Mrs Chai's travel agency was not successful financially. It is unlikely that Mrs Lee and Ms Chai had discussions about Ms Chai's personal financial situation in 1999, when the travel agency commenced; and in any event Ms Chai's bank records support her evidence that her husband was making payments to her at this time. In my view, Mrs Lee's evidence of Ms Chai's generosity to the Lee family while Mrs Lee was still living in Australia is unlikely to be true, and I generally do not accept it; though there is evidence that on one occasion Ms Chai made a gift to Mrs Lee's daughter⁷⁵. Ms Chai's acknowledgment that she was generous⁷⁶, is likely to refer to generosity to the Taiwanese community. I do not accept that Ms Chai told Mrs Lee that her husband had reduced his payments to her. The evidence seems intended to bolster Mrs Lee's evidence of unusual interest shown by Ms Chai in the Lee family before Mrs Lee returned to Taiwan, evidence which I do not accept.
- [78] Mrs Lee also gave evidence that, by the end of 1999, Mr Lee's mental health was poor; that it had been deteriorating; and that she was constantly concerned about his

⁷² CFI 108 paras 12, 19, 20.

⁷³ CFI 106 Ex AC 3.

⁷⁴ CFI 106 para 8.

⁷⁵ T 6-19/20.

⁷⁶ CFI 106 para 144.5.

inappropriate behaviour and his reliance on drugs⁷⁷. This evidence was related to Mrs Lee's evidence that, whenever they met, she discussed Mr Lee's severe depression and other psychological problems with Ms Chai, before Mrs Lee returned to live in Taiwan⁷⁸.

- [79] There is no medical evidence to support the evidence of Mrs Lee that Mr Lee's health had been deteriorating and that he had severe depression at this time. The medical experts agreed that Mr Lee's depressive disorder was not present during the period between March 2000 and March 2001, because of consistent and appropriate treatment, evidenced by his list of medications, with prescriptions on a near-monthly basis⁷⁹. The same list records prescriptions on a similar basis from September 1999. Moreover, in her oral evidence Mrs Lee said that Mr Lee would not be happy if she told other people he suffered from a mental illness⁸⁰. Even if it were to be accepted that Mrs Lee had regular contact with Ms Chai before Mrs Lee returned to Taiwan about the end of 1999, it is improbable that Mrs Lee would have discussed Mr Lee's mental condition with Ms Chai. Again, the evidence seems to be designed to support Mr Lee's alternative case.
- [80] Mrs Lee had obvious reason to be hostile to Ms Chai. That was reflected in her demeanour in the witness box.
- [81] There are, in my view, substantial reasons to treat Mrs Lee's evidence, where it is adverse to Ms Chai, with considerable caution.

Mr Samaratunga: some credit issues

- [82] Mr Samaratunga lives at Ingluna Circuit, across the road from the Lee residence. He became friendly with Mr Lee, shortly after Mr Lee purchased the house at 52 Ingluna Circuit. Mr Samaratunga gave evidence in an affidavit that, as the friendship developed, Mr Lee would invite him and his wife out to dinner with Mr Lee and his Taiwanese friends. Mr Lee always paid for dinner on these occasions⁸¹. In his oral evidence, Mr Samaratunga said that when Mr Lee was in Australia, Mr and Ms Samaratunga went out to dinner with Mr Lee quite regularly, sometimes once a week and sometimes twice a week⁸². It appeared from Mr Samaratunga's evidence that when Mr Lee was absent from Australia, Mr Samaratunga would collect Mr Lee's mail, and pay Mr Lee's bills, from money which he left with Mr Samaratunga⁸³.
- [83] Mr Samaratunga gave evidence that, when he met Ms Chai, she was introduced as the President of the TFAQ⁸⁴. That was an office she came to hold about 1 July 2000. Given Mr Lee's evidence that he and Ms Chai did not socialise until early 2000, and the fact that the affair commenced in March of that year, that evidence seems likely to be correct; and that Mr Samaratunga did not meet Ms Chai until after June 2000.

⁷⁷ CFI 108 para 14.

⁷⁸ CFI 108 paras 13, 14,

⁷⁹ Ex 1 Tab 2 p 1 para 1; and Table B 2.

⁸⁰ T4-16/50 to 4-17/25.

⁸¹ CFI 96 paras 8, 10 and 11.

⁸² T5-30/30.

⁸³ T 5-45/5 to 15.

⁸⁴ CFI 96 para 19.

- [84] Mr Samaratunga gave evidence that after the commencement of the relationship between Mr Lee and Ms Chai, Mr Lee's mental illness seemed to get worse⁸⁵. This evidence is inconsistent with that of the medical experts, discussed later, and I do not accept it. I would view this evidence less critically, were it not for the fact that Mr Samaratunga is a psychiatric nurse.
- [85] Mr Samaratunga also gave evidence that he and his wife went out several times with Mr Lee, Mrs Lee and Ms Chai⁸⁶. By this time, Mrs Lee had returned to live in Taiwan, though she came out to Australia in the middle and at the end of year, during holiday periods. By the time that Mr Samaratunga had been introduced to Ms Chai, the affair between her and Mr Lee was well underway. In my view, this evidence of Mr Samaratunga is improbable, and I do not accept it.
- [86] Mr Samaratunga gave evidence that Ms Chai invited him and his wife to her house on five occasions, the last of which they accepted⁸⁷. These events can only have occurred after 30 June 2000. Given the state of the relationship between Mr Lee and Ms Chai at this time, and the fact that Ms Chai was by then living at the unit and not her former family home, I consider this evidence improbable, and do not accept it.
- [87] Mr Samaratunga gave evidence that Mr Lee "numerous times" offered to let Mr and Mrs Samaratunga have their guests stay in the unit at Southbank. These offers were made after the first occasion on which Mr & Mrs Samaratunga dined at the unit. Mr Samaratunga identifies this as occurring around the middle of 2001⁸⁸. By this time, Ms Chai had been living in the unit for a period well in excess of 12 months; and it was used by Mr Lee and Ms Chai to conduct their affair. Again, this evidence seems to me to be highly improbable, and I do not accept it. It seems to me that it demonstrates a desire by Mr Samaratunga to support Mr Lee's case.
- [88] Mr Samaratunga gave evidence that he realised Mr Lee and Ms Chai were having an affair when he went to the unit at Southbank about the middle of 2001⁸⁹. However, he had earlier given evidence⁹⁰ that, when Mr Lee introduced Ms Chai to him (after 1 July 2000), Ms Chai was behaving in a flirtatious manner towards Mr Lee. He also gave evidence that, after Mrs Lee returned to Taiwan (about the end of 1999), Ms Chai "was present most the time"⁹¹. In his affidavit, after referring to the introduction, he said that he started to see that Ms Chai was frequently coming to Mr Lee's house⁹². In the circumstances, and bearing in mind the relationship between Mr Lee and Mr Samaratunga, I do not accept Mr Samaratunga's evidence that he did not know of the relationship until after the middle of 2001. Given his relationship with Mr Lee, including Mr Lee's confidence in him, and his observations of the presence of Ms Chai at Mr Lee's house, I consider it highly likely that he was aware of the affair from shortly after 1 July 2000.

⁸⁵ CFI 96 para 31.

⁸⁶ CFI 96 para 22.

⁸⁷ CFI 96 para 21.

⁸⁸ CFI 96 para 23.

⁸⁹ CFI 96 paras 23 and 24

⁹⁰ CFI 96 para 19.

⁹¹ T5-24/50.

⁹² CFI 96 para 20.

- [89] Mr Samaratunga also gave evidence of an occasion on which Mrs Samaratunga contacted a medical practitioner by telephone to obtain a prescription for medication for Mr Lee. Ms Chai was said to have been present. There was no suggestion that the medical practitioner had on any occasion seen Mr Lee. I consider this evidence to be improbable, and do not accept it.
- [90] Mr Samaratunga gave evidence that in September 2003, at Mr Lee's request, he accompanied Mr Lee to the unit at Southbank where they spoke to the manager. He said they departed, the manager having promised to arrange a new key to the unit, for Mr Lee⁹³. He also said that the first he knew about goods being taken from the unit was when a removalist's truck came to Ingluna Circuit, and Mr Lee asked him to direct it to Ms Chai's house⁹⁴. He did so, driving his car in front of the removalist's truck to Ms Chai's home at Stretton, where he opened the gate for the removalist⁹⁵.
- [91] Mr Lee's evidence was that in September 2003, he and Mr Samaratunga went to Southbank and spoke with the manager of the apartment block. They told the manager that Ms Chai and Mr Lee were "back together again", and that Mr Lee had nowhere else to stay. That resulted in the manager promising to change the locks and give Mr Lee a new key. Mr Lee then said that Mr Samaratunga and he came back later in the day, and obtained the key. Subsequently, arrangements were made for removalists to come to the unit. He and Mr Samaratunga, and Mrs Lee, were present when they came to remove the contents of the unit⁹⁶. In my view, Mr Lee's evidence on this point is likely to be true. It is likely that Mr Samaratunga was present when the false explanation was given to the manager as to why Mr Lee needed a key to the unit. Mr Lee seems to have relied upon Mr Samaratunga for some assistance in communicating in English⁹⁷. It is also likely that Mr Samaratunga was present when the removalists came. He was conscious that a criminal complaint had been made about the removal of the contents from the unit, as the police had come to his home shortly after this event. I do not accept Mr Samaratunga's evidence about his role in relation to the changing of the locks and the obtaining of a new key for the unit: nor in relation to the removal of the contents of the unit.
- [92] In his affidavit in which he said he guided the removalists to Ms Chai's house at Stretton, he explained his actions by saying that he knew how to get from Ingluna Circuit to Ms Chai's home; but he did not know the street name or house number⁹⁸. When cross-examined about this event, he said that he guided the removalists to Ms Chai's house at Benhiam Street, Calamvale; that he remembered the name of the street because there were only a few houses there; that Ms Chai was residing there, and that he knew this because he had arranged for a friend of his to tutor Ms Chai's daughter there. He also explained his affidavit by saying that there had been a mistake, and someone (unidentified) had put Stretton in the affidavit, instead of Benhiam Street, Calamvale⁹⁹. In my view, Mr Samaratunga's evidence in cross-examination was not a genuine correction of an honest mistake in otherwise truthful

⁹³ CFI 96 para 46-47.

⁹⁴ T5-41/20-45.

⁹⁵ CFI 124 para 8.

⁹⁶ CFI 107 para 129-130 ; see also T 2-14/30-40.

⁹⁷ T 2-14/36.

⁹⁸ CFI 124 para 8.

⁹⁹ T 5-41/15 to 5-43/30.

evidence. Its most likely explanation is as a clumsy attempt to patch up evidence which was demonstrably wrong. I do not accept any of Mr Samaratunga's evidence on this topic. As stated earlier, I consider the evidence about an attempt to deliver to Ms Chai nay property taken from the unit to be a concoction.

- [93] Mr Samaratunga gave evidence that when he first saw Mr Lee and Ms Chai together, he considered them to be close friends. On almost all the occasions when he was with them, he discussed Mr Lee's health, stressing that it was important not to mix alcohol with psychiatric medication¹⁰⁰. These occasions included dinners at various restaurants. The evidence is improbable, both because it seems to me unlikely the matter was discussed on almost every occasion that Mr Samaratunga was with Mr Lee and Ms Chai; and in light of Mrs Lee's evidence, discussed earlier about Mr Lee's likely reaction to a discussion of his health. I also consider it unlikely that Mr Samaratunga discussed Mr Lee's health, and his medication with Ms Chai, before he became aware that they were having an affair.
- [94] Mr Samaratunga gave evidence that he did not know that the Porsche was registered in Ms Chai's name, until he took it to a mechanic to get a roadworthy certificate¹⁰¹. He also gave evidence that he was present when the deposit was paid¹⁰². The receipt for the deposit issued in Ms Chai's name; and there was no suggestion from Mr Lee of any discussion to the effect that the Porsche would be purchased in the name of anyone but Ms Chai. On Ms Chai's uncontested evidence, insurance on the car was effected at Mr Samaratunga's house, shortly after the purchase. Like Mr Samaratunga's evidence about his role in relation to the removal of property from the unit, I do not accept his evidence that he did not know the Porsche was registered in Ms Chai's name until after it was taken from the unit. I consider this evidence to be motivated by a desire to minimise his apparent involvement in the removal of property from the unit, some of which was plainly Ms Chai's; and also to minimise his apparent involvement in an attempt to transfer the Porsche out of Ms Chai's name.
- [95] In giving evidence, Mr Samaratunga did not create the impression of a person attempting to give careful and objective evidence.
- [96] In my view, there are substantial reasons to approach Mr Samaratunga's evidence with considerable caution.

Tender of affidavit of Ms Samaratunga

- [97] Ms Samaratunga swore an affidavit dated 15 May 2009¹⁰³. However, her evidence in chief was given orally, and not by means of this affidavit. In the course of cross-examination, her attention was drawn to the fact that in the affidavit, she made a number of statements relating to the occasion on which she first met Ms Chai, which were inconsistent with her oral evidence. In re-examination, Mr Bell QC who appeared for Mr Lee, sought to tender the affidavit. An objection was taken, which was not ruled on at the time, on the basis that the parties would make subsequent submissions in relation to it.

¹⁰⁰ T5-23/40 to 5-24/10.

¹⁰¹ CFI 96 para 51.

¹⁰² CFI 96 para 42.

¹⁰³ CFI 97.

- [98] In support of the tender, reference was made to a passage from a text on evidence¹⁰⁴, which deals with s 19 of the *Evidence Act 1977 (Qld)*; and to a number of cases.
- [99] Section 19 is the current Queensland provision which modifies the operation of the rule in *Queen's Case*¹⁰⁵. That case is usually accepted as authority for the proposition that a witness can not be cross-examined about the contents of a document unless the document is both shown to the witness, and put in evidence by the cross-examiner as part of the cross-examiner's case¹⁰⁶. Section 19 provides that a witness may be cross-examined as to a previous statement made in writing by the witness, without the witness being shown the writing. Such cross-examination does not have the consequence that the cross-examiner must tender the document¹⁰⁷. However, the document may be tendered in re-examination.
- [100] One of the cases relied upon in support of the tender is *Meredith v Innes*¹⁰⁸. A deposition had been taken from a person who had been seriously injured in a motor vehicle collision. Subsequently that person sued the owner of a motor vehicle involved in the collision for damages. He was cross-examined about some of the statements made to the magistrate, and recorded in the deposition. In re-examination, the deposition was successfully tendered. On appeal, the admission of the whole of the document was held to be erroneous. The right to tender was limited to the parts which had been the subject of cross-examination, together with other parts of the document which might explain or qualify what was already before the court¹⁰⁹. The decision was applied in *Wentworth v Rogers (No 10)*¹¹⁰, another authority referred to in support of the tender.
- [101] Reliance was also placed, in support of the tender, on *R v McGregor*¹¹¹. There, a witness had used a document to refresh his memory in relation to a telephone number. The cross-examiner inspected the document, and cross-examined on other parts of it. It was held that this made the whole of the document admissible. The decision reflects a qualification of the rule that, if a party calls for and inspects a document held by the other party, the inspecting party is bound to put the document in evidence, if required to do so¹¹². The qualification is that it does not apply, if the document has been used by a witness to refresh the witness's memory; unless cross-examination on the document extends beyond those parts used by the witness for that purpose. Since Ms Samaratunga's affidavit was not a document called for by the cross-examiner, and no question of Ms Samaratunga's having used the document to refresh her memory arose, neither the rule nor the case is of present relevance.
- [102] *R v Foggo ex parte Attorney-General*¹¹³ was also relied upon in support of the tender. However, that case dealt only with the question of the time at which a party might require a cross-examiner to tender a document. It assumed that the right to

¹⁰⁴ Forbes, *JRS Evidence Law in Queensland* (7th ed) Thomson Lawbook Co.

¹⁰⁵ (1820) Brod & Bing 284; 129 ER 976.

¹⁰⁶ M H McHugh QC, *Cross-Examination on Documents* (1985) 1 Aust Bar Rev 51; Forbes at [19.5].

¹⁰⁷ Forbes at [19.16].

¹⁰⁸ (1930) 31 SR(NSW) 104.

¹⁰⁹ See *Meredith* especially at 112-113.

¹¹⁰ (1987) 8 NSWLR 399, 409.

¹¹¹ [1984] 1 Qd R 256.

¹¹² Cross on Evidence at [17240].

¹¹³ [1989] 2 Qd R 49.

require the tender had arisen. Reliance was also placed on *Attorney-General for the State of Queensland v Colin Lovitt QC*¹¹⁴. This case contains a discussion of the law relating to the obligation to tender documents used to refresh a witness's memory, and which has been used in cross-examination. It is of no assistance.

- [103] In my view, Mr Bell QC was entitled to tender only that part of Ms Samaratunga's affidavit which was the subject of cross-examination. Accordingly, I propose to admit only paragraph 7 of the affidavit.

Ms Samaratunga: some credit issues

- [104] Ms Samaratunga gave evidence that she met Ms Chai when Ms Chai used to visit Mrs Lee "about probably late 1999"¹¹⁵. She gave evidence that initially Mrs Lee introduced Ms Chai; "and then eventually Jonathan introduced us at some dinner". She also gave evidence that she and Ms Chai were forming a friendship about the end of 1999, or the beginning of 2000¹¹⁶. To that might be added her evidence that in the period up to early 2000, she and Ms Chai were both present when Mr Lee's health was discussed, Mr Samaratunga advising against Mr Lee drinking alcohol with his medication, and Ms Chai saying she had given Mr Lee milk with his medication¹¹⁷. She also gave evidence that around mid or late 1999, Ms Chai was present on an occasion when Mr Lee was acting and dressing bizarrely¹¹⁸.
- [105] In cross-examination, Ms Samaratunga conceded that in her 2009 affidavit, she swore that she first met Ms Chai in 2000; and that Mr Lee had introduced her, when Ms Chai became president of the TFAQ. Consistent with my view about when Mr Samaratunga met Ms Chai, I think it likely that Ms Samaratunga met Ms Chai after June 2000. There are significant significant difficulties with Ms Samaratunga's evidence of events involving Ms Chai before that time.
- [106] Ms Samaratunga also gave evidence of the occasion on which she said that Ms Chai obtained a prescription for medication for Mr Lee from a doctor who had not seen him. I take a similar view of this evidence, to the view expressed in relation to Mr Samaratunga. It is clear that, like her husband, Ms Samaratunga was a recipient of Mr Lee's largesse. I reach a similar conclusion about the approach to be taken to her evidence.

Ms Chai: some credit issues

- [107] For the Lee parties, it was submitted that there a number of reasons why Ms Chai's evidence should not be accepted except to the extent it was corroborated by other, independent, evidence.
- [108] The first matter relied upon was that in October 2003, Ms Chai provided a statement to the police. In it she said that Mr Lee had forged documents for the purpose of selling the unit; and that he had taken the contents of the unit as well as the Porsche. She said that she paid for the unit with funds derived from her business in Taiwan; and that no other person had provided funds for the purchase of the unit. She also

¹¹⁴ [2003] QSC 279.

¹¹⁵ T4-33/45.

¹¹⁶ T4-34/20.

¹¹⁷ T 4-34/55 to 4-35/20.

¹¹⁸ T 4-35/20-30.

said that she purchased all of the furniture and contents of the unit herself. She also said that she purchased the Porsche with her own funds, derived from her business. She also said that Mrs Lee knew of the affair, and consented to it. The statement was made under s 110A(5)(c)(ii) of the *Justices Act 1886 (Qld)*, and included an acknowledgment that, if the statement were admitted as evidence, Ms Chai might be liable for prosecution for stating in it anything she knew to be false.

- [109] It was submitted for Mr Lee that this statement demonstrates that Ms Chai was willing to tell lies to advance her cause. I consider that submission to be correct.
- [110] A number of the matters in Ms Chai's statement were untrue. On 29 October 2003 Ms Chai made a further statement. In it she said that Mr Lee had told her he would purchase the unit for her as a gift, because of his love for her. She also said that Mr Lee paid for most of the furniture; and provided most of the money for the Porsche, save for an initial deposit of \$5,000. However, this statement suggested that Mrs Lee knew of the affair from a very early stage, though it did not say that she consented to it¹¹⁹. It is apparent that Mrs Lee did not know of the affair at an early stage; nor did she consent to it¹²⁰. Notwithstanding the changes in the second statement, a number of the things that Ms Chai said in these statements, in particular the first statement, are significantly troubling.
- [111] On Ms Chai's evidence she and Mr Lee were in a relationship from early 2000 until early 2003. In that time, Mr Lee spent about 12 months in Australia and for about six months, stayed at the unit with Ms Chai¹²¹. From early 2002, he spent most of his time in Taiwan¹²². In her affidavit, she said that throughout their relationship, as far as she was aware, Mr Lee was very healthy; and she did not remember ever seeing or noticing him take any drugs¹²³. It is apparent from her affidavit that this is a reference to the period up to the beginning of 2002. In her oral evidence, Ms Chai said that she did not know that Mr Lee was on medication for his mental health¹²⁴. The medical evidence in the case (discussed below) confirms that Mr Lee was taking medication in the period between March 2000 and March 2001. That he was doing so was apparent to someone who had less contact with Mr Lee than Ms Chai¹²⁵. Mr Lee and Mr Samaratunga give evidence of the obvious presence of medications in the Lee home¹²⁶. Notwithstanding my reservation about their evidence, in view of the other evidence relating to Mr Lee's use of medication, I am prepared to accept their evidence on this point. In the circumstances, I am not prepared to accept Ms Chai's evidence that she did not know that Mr Lee was taking medication. It seems to me that her evidence was directed to defeating Mr Lee's alternative case based on undue influence and unconscionable conduct.
- [112] The submissions made on behalf of Mr Lee focused on a statement in Ms Chai's affidavit that Mr Lee "was not often drunk when he was with me"¹²⁷. It was submitted that this was unbelievable, as was her oral evidence that occasionally he

¹¹⁹ See exhibit 1, tab 34, para 2.

¹²⁰ CFI 106 para 98.

¹²¹ CFI 106 para 57.

¹²² CFI 106 para 92.

¹²³ CFI 106 para 76.

¹²⁴ T6-29/30-50.

¹²⁵ Sunny Chuan, CFI 103 para 10.

¹²⁶ CFI 107 para 81; CFI 96 para 17.

¹²⁷ CFI 106 at para 79.

would be drunk. It seems to me that the statement from Ms Chai's affidavit should be read in context, which is as follows:

“He (Mr Lee) liked drinking. He was not often drunk when he was with me. He went out a lot with his friends and got drunk. Eating out with his friends and consuming a lot of alcohol is normal among Taiwanese males.”

- [113] Read as a whole, this paragraph from Ms Chai's affidavit is generally consistent with the evidence relating to Mr Lee's consumption of alcohol. While Ms Chai's oral evidence might be seen as understating the extent to which Mr Lee consumed excess amounts of alcohol, it does not seem to me to be a particularly significant matter in assessing her credit. Mr Lee's oral evidence suggested that he drank alcohol at dinner time; and that some of his guests drank more than he did¹²⁸. In his affidavit he said that he would regularly drink large amounts of alcohol to help him get to sleep¹²⁹.
- [114] The submissions for Mr Lee relied on changes in Ms Chai's version of events, particularly in relation to the source of the funds for the purchase of the unit and the Porsche, and in relation to the manner in which Mr Lee was said to have indicated his intention to make gifts of this property to Ms Chai.
- [115] Clearly there were significant differences between Ms Chai's two statements to the police in 2003. At least as to the source of funds, the second statement was much closer to the truth. The changes, particularly since they seem to have been volunteered by Ms Chai, tend to repair her credit, rather than to damage it.
- [116] The submissions for Mr Lee referred to specific changes in Ms Chai's account of the circumstances in which Mr Lee provided money for the purchase of the unit and the Porsche. Thus, in her second statement, she said that Mr Lee decided to purchase the unit as a gift for her, without reference to an earlier promise to provide her with a large sum of money. Her trial affidavit, apparently sworn in May 2009, spoke of a promise by Mr Lee to give her \$1 million, on their first night together at the Hyatt Hotel. It might be observed that in particulars dated 17 November 2005, Ms Chai alleged that in about March 2000 and on numerous occasions thereafter, Mr Lee promised to give her a substantial amount of money in order to express his love for her. I do not find these changes of particular assistance in assessing the credit of Ms Chai. It seems to me likely that the second statement to the police was intended to convey clearly that Mr Lee was the source of the funds for the purchase of the unit, and substantially for the purchase of the Porsche, rather than to give a full account of the circumstances which led to his doing so. In the context of the provision by Mr Lee of money to purchase the unit and the Porsche, and his other monetary gifts, the reference in the 2005 particulars to a promise to give a large sum of money does not seem to be different in substance to her 2009 evidence. While these changes make it appropriate to consider Ms Chai's evidence with a little more care than would otherwise be the case, they do not call for more than that.
- [117] The matters to which I have referred lead me, overall, to the view that Ms Chai's evidence should be approached with some caution.

¹²⁸ T2-40/30 to T2-41/20.

¹²⁹ CFI 107 para 23.

Sources of purchase monies

- [118] The purchase price for the unit was \$615,000.00. Some minor reductions of the amount to be paid at settlement were made by reference to release fees, rates adjustment, and body corporate levies adjustments¹³⁰. In addition, stamp duty on the contract amounted to \$20,287.50, and registration fees to \$1,054.00¹³¹. In my view, these two amounts are relevant when determining the contributions made towards the purchase price¹³². Upon the pleadings, it is admitted that Mr Lee provided amounts, totalling \$580,983.66. It is also admitted that he provided a bank cheque payable to a Mr Grant Trevor Oliver. The only evidence of the amount of this cheque indicates that it was for a sum of \$4,650.24¹³³.
- [119] Ms Chai provided a cheque for \$50,000.00 towards the deposit for the unit¹³⁴. However, a few days earlier, Mr Lee had provided her with a bank cheque for \$50,000.00, prior to which the balance of her account was minimal; and another small deposit was made to her account prior to the drawing of the cheque for \$50,000.00¹³⁵. I therefore accept that this amount was provided by Mr Lee. Mr Lee gave evidence¹³⁶ that he provided to Ms Chai an additional \$10,000.00 in cash to meet expenses associated with the purchase. That was not challenged by Ms Chai. Accordingly, I accept that all of the purchase monies for the unit came from funds provided by Mr Lee.
- [120] The purchase price of the Porsche was \$217,500.00. It is common ground that Mr Lee provided \$212,500.00 of the purchase price.
- [121] Mr Lee's evidence is that he paid the deposit of \$5,000.00 on the day when the Porsche was purchased¹³⁷. In support of his evidence, reliance is placed on an ICBC bank record recording the withdrawal of the sum of \$9,000.00¹³⁸. It is difficult to identify the date of the withdrawal, but it appears to be prior to 1 March 2001. In his statement of claim, Mr Lee pleaded that on 9 March 2001 (the date of the payment of the deposit¹³⁹) he gave \$9,000.00 in cash to Ms Chai¹⁴⁰. Ms Chai's evidence was that she took \$5,000.00 in cash to the motor car dealer, which she paid as a deposit¹⁴¹. The car dealer issued a receipt in her name, dated 9 March 2001¹⁴². The submissions made on behalf of Mr Lee pointed out that Ms Chai's bank statements do not record a withdrawal of funds sufficient to provide a sum of \$5,000.00. On Ms Chai's case, Mr Lee had decided to purchase the Porsche for her¹⁴³. I have previously mentioned difficulties relating to the credit of each of the

¹³⁰ Ex 1 tab 12.

¹³¹ Ex 1 tab 12.

¹³² See *Ryan v Dries* [2002] NSWCA 3, *ANZ Conv* 45 at [53]; [1]; [10]; see also Ford & Lee: *The Law of Trusts* Legal Online [21.190]; Heydon & Leeming, *Jacob's Law of Trusts in Australia* (9th ed) [1211].

¹³³ Ex 1 tab 12.

¹³⁴ Ex 1 tab 8.

¹³⁵ CFI 107 Ex AC 3, Statement No 48 and Statement No 49.

¹³⁶ CFI 107 at paras. 57-58.

¹³⁷ CFI 107 at paras. 112, 113

¹³⁸ Ex 1 tab 31.

¹³⁹ Ex 1 tab 22.

¹⁴⁰ Statement of Claim para 9(a).

¹⁴¹ CFI 106 at paras. 67 and 68.

¹⁴² Ex 1 Tab 22.

¹⁴³ CFI 106 at paras. 65 and 68.

principal witnesses in this case. However, I conclude that the deposit for the Porsche was ultimately provided by Mr Lee, to Ms Chai, who then paid it to the motor car dealer.

Gift or resulting trust: some legal principles

- [122] The fundamental principles relating to this topic are not in dispute. Where property is purchased in the name of a person, and the purchase money is provided by another, the law presumes that the first person holds the property on trust for the second person¹⁴⁴. However, the presumption of a resulting trust may be rebutted by evidence of the actual intention of the person providing the purchase money¹⁴⁵. It is the intention of that person alone which is relevant¹⁴⁶. The person providing the purchase monies may testify as to that person's intention¹⁴⁷.
- [123] There are, however, limits on the evidence to which regard might be had for determining (by inference) the intention of the person providing the purchase monies. Regard may be had to the acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction¹⁴⁸. A subsequent declaration by a party is also admissible, if it is an admission against interest¹⁴⁹.
- [124] The present case was conducted on the basis that the relevant acts and declarations are identified by reference to the propositions which I have just set out¹⁵⁰. However, in *Trustees of Cummins v Cummins*¹⁵¹, the following was said:

“However, as *Malayan Credit*¹⁵² illustrates, whilst evidence of subsequent statements of intention, not being admissions against interest, are inadmissible, evidence of facts as to subsequent dealings and of surrounding circumstances of the transaction may be received¹⁵³.”

- [125] In *Malayan Credit*, it was held that lessees who were joint tenants in law held their interests in the lease as tenants in common in equity, in unequal shares. Many of the circumstances relied upon occurred prior to the grant of the lease; though the subsequent payment of unequal amounts of rent and service charges was also taken into account. The Privy Council expressly noted, however, that the rent paid over the course of the lease “is equivalent to the purchase money”¹⁵⁴. It may be arguable that *Malayan Credit* simply reflects a broad view of the transaction, the scope of which identifies the relevant declarations and conduct, from which might be determined the intention of the person providing the purchase money.

¹⁴⁴ See *Calverley v Green* (1984) 155 CLR 242, 246, 266; *Nelson v Nelson* (1995) 184 CLR 538; *Muschinski v Dodds* (1985) 160 CLR 583, 589.

¹⁴⁵ *Calverley* at 251.

¹⁴⁶ *Calverley* at 251.

¹⁴⁷ *Martin v Martin* (1959) 110 CLR 297, 304; *Calverley* at 261; *Nelson* at 547.

¹⁴⁸ *Calverley* at 262; *Shephard v Cartwright* [1955] AC 431; *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353, 364-365.

¹⁴⁹ *Calverley* at 262; *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353, 364-365.

¹⁵⁰ T1 – 39/50 to T1-40/20.

¹⁵¹ (2006) 227 CLR 278 at [65].

¹⁵² *Malayan Credit Ltd v Jack Chia-MPH Ltd* [1986] AC 549, 559-560.

¹⁵³ *White and Tudor's Leading Cases in Equity* 9th ed (1928), vol 2 p.882.

¹⁵⁴ *Malayan Credit* at 560.

[126] As *Cummins* itself shows, a narrow approach is not to be taken to the identification of the relevant transaction. It was there held to be “a composite of the purchase of the Hunters Hill property followed by construction of a dwelling house occupied as the matrimonial home for many years ...”¹⁵⁵.

[127] That a somewhat broad view might be taken of the transaction also appears in a statement by Campbell J in *Black Uhlans Incorporated v New South Wales Crime Commission & Ors*¹⁵⁶, a case where a resulting trust was alleged. His Honour said¹⁵⁷:

“The sort of conduct which could possibly be taken into account in this way could include who took occupation and control of the property, who made improvements to it and in what circumstances, who paid periodical outgoings on the property, who received any rent from the property and who paid income tax on any rent received from the property. To the extent that any of these types of transactions occurred at a time which was not ‘so immediately thereafter as to constitute a part of the transaction’, they could be taken into account only to the extent that they were admissions.”

[128] While the presumption of a resulting trust is a rebuttable presumption, it should not give way to slight circumstances¹⁵⁸. Nevertheless, it was said in *Calverley*¹⁵⁹ that “the strength of the presumption varies from case to case” citing *Fowkes v Pascoe*¹⁶⁰. There, Mellish LJ said:

“Now, the presumption must, beyond all question, be of very different weight in different cases. In some cases it would be very strong indeed ... On the other hand, a man may make an investment of stock in the name of himself and some person, although not a child or wife, yet in such a position to him as to make it extremely probable that the investment was intended as a gift. In such a case, although the rule of law, if there was no evidence at all, would compel the Court to say that the presumption of trust must prevail, even if the Court might not believe that the fact was in accordance with the presumption, yet, if there is evidence to rebut the presumption, then, in my opinion, the Court must go into the actual facts.”

[129] In *Calverley*, in determining whether the presumption had been rebutted, it was said that one relevant fact was “the relationship between the parties at the time”¹⁶¹.

[130] A number of cases have noted that the evidence of the person providing the purchase monies, as to his actual intention, should be treated with caution when that evidence is in support of his own interest¹⁶².

¹⁵⁵ *Cummins* at [67].

¹⁵⁶ [2002] NSWSC 1060.

¹⁵⁷ At [138].

¹⁵⁸ See *Charles Marshall* at 365; see also *Black Uhlans* at [140]; but see *Calverley* at 270 per Deane J.

¹⁵⁹ At p 255.

¹⁶⁰ (1875) 10 Ch App 343, 352.

¹⁶¹ *Calverley* at p. 262; see also 269; see also *Muschinski* at p. 591; see also *Russell v Scott* (1936) 55 CLR 440, 449.

Purchase of unit

- [131] Ms Chai gave evidence that, at a very early point in their relationship, Mr Lee said he would like to give her a million dollars as a gift, a statement he repeated on many occasions¹⁶³. That was the basis on which the unit was purchased in her name¹⁶⁴. They dealt with Ms Dian Kruse, the selling agent. Mr Lee told Ms Kruse that Ms Chai was his wife, and that he was buying her a unit¹⁶⁵. He instructed Ms Kruse that the unit should be put solely in Ms Chai's name¹⁶⁶.
- [132] Mr Lee gave evidence that, on several occasions when they were looking for a unit, he said to Ms Chai that he did not want his wife or family to find out about their affair, and that he did not want the unit to be in his name¹⁶⁷. He also said that it was his understanding that the person who provided the purchase monies would be the true owner of the unit, irrespective of the fact that the title was registered in the name of another person¹⁶⁸. It was never his intention to make the unit a gift to Ms Chai¹⁶⁹.
- [133] The only other person who gave evidence of events at the time of the purchase was Ms Dian Kruse, the selling agent for the unit. She swore an affidavit on 2 November 2012. She was not cross-examined about her affidavit. Her evidence was that Mr Lee did most of the negotiating; though Ms Chai provided a cheque for the deposit. She recalled Mr Lee saying that he wanted to buy the unit for his wife (referring to Ms Chai) and himself; and that he and Ms Chai were going to start a family together.
- [134] Ms Kruse's evidence of the identification by Mr Lee of Ms Chai as his wife is confirmatory of the nature of the relationship which existed between them. However, her evidence that the unit was being purchased both for Mr Lee and Ms Chai is inconsistent with the pleaded case of both parties. There is no other evidence to support it. It is also inconsistent, without explanation, with the fact that only Ms Chai's name appeared on the contract, which Ms Krause signed on behalf of the deposit holder, and as witness to the seller's signature. I do not accept Ms Krause's evidence that Mr Lee said that he wanted to buy the unit for Ms Chai and himself. It seems to me that it is explicable by the length of time which has passed since the purchase, and the limited dealings which Ms Kruse had with Mr Lee and Ms Chai.
- [135] In my view, the circumstances surrounding the purchase support Ms Chai's version of the events. Mr Lee was a wealthy man, and inclined to display his wealth. He was deeply in love with Ms Chai. The strength of the relationship can be seen from the fact that Mr Lee arranged for the taking of the wedding photo at about the time of the purchase; and his introduction of Ms Chai to Ms Kruse as his wife.

¹⁶² *Devoy v Devoy* (1857) 3 Sm & Giff 403, 406; 65 ER 713, 714; *Dumper v Dumper* (1862) 3 Giff 583, 590; 66 ER 540, 543; *Davies v National Trustees Executors and Agency Co of Australia Ltd* [1912] VLR 397, 403; all cited in *Martin v Martin* (1959) 110 CLR 297 at 304.

¹⁶³ CFI 106, at paras 22 and 26.

¹⁶⁴ CFI 106, at para 31.

¹⁶⁵ CFI 106, at para 34.

¹⁶⁶ CFI 106, at para 41.

¹⁶⁷ CFI 107, at para 54.

¹⁶⁸ CFI 107, at para 62.

¹⁶⁹ CFI 107, at para 75.

- [136] Mr Lee was an experienced and successful businessman. Had he intended that the unit not be Mr Chai's property, there are steps he could have taken to achieve that result, without the unit being registered in his name. However, he did not do so; nor did he seek any legal advice about the matter.
- [137] Moreover, I do not accept Mr Lee's explanation for the purchase of the unit in Ms Chai's name. I have previously commented on matters which I regarded as adverse to his credit. His explanation was that he did not want his wife to find out about the affair¹⁷⁰; but how that might result from the fact that the unit was registered in his name was not explained. The risk associated with the unit being registered in his name seems to me to be less than the risk that he and Ms Chai might be seen together at the unit complex; or the risk of discovery from the relatively open way in which the affair was being conducted.
- [138] I do not accept Mr Lee's evidence that he did not intend to make the unit a gift to Ms Chai. In part, that is because of the matters previously mentioned, which are adverse to his credit; and in particular because of my rejection of his explanation for the purchase of the unit in Ms Chai's name. I have also come to the conclusion that Mr Lee had a positive intention to provide money for the purchase the unit so that it would be a gift to Ms Chai.
- [139] Primarily I conclude that Mr Lee intended that the unit be Ms Chai's because of the relationship that then existed between them. He was obviously deeply in love with her, and regarded their relationship as equivalent to a marriage. He was in a position where he was able to demonstrate his love for her by a very generous act. If that were not his intention, I consider it somewhat surprising that, with his commercial background and experience, he took no step to protect his position.
- [140] I am prepared to accept Ms Chai's evidence that Mr Lee told Ms Krause that he was purchasing the unit for Ms Chai. That is consistent with the contract on which Ms Krause's signatures appear; as well as with other matters I have referred to in relation to Mr Lee's intention.
- [141] Further support for these conclusions may be derived from a consideration of the transaction, looked at broadly. In my view, the transaction was not limited simply to the acquisition of the unit in Ms Chai's name. It arose out of their affair, and was intended to provide a place to be used by them. Ms Chai was the person who made the choices about furnishing and fitting out the unit; and once it was available for use, she lived in it. These matters, in my view, show that more was involved than the purchase of the place where the affair might be conducted, and support the view the unit, though purchased with money from Mr Lee, was to be Ms Chai's.
- [142] The submissions made on behalf of Mr Lee focussed on a statement attributed in Mr Lee's evidence to Ms Chai, that Mr Lee purchased the unit¹⁷¹. Because of my view of Mr Lee's evidence, I have some reservation about whether the statement was made. However, if it were, it seems to me to be no more than the acknowledgment of Mr Lee's role in the acquisition of the unit, and not relevant to whether or not it had been given to Ms Chai.

¹⁷⁰ CFI 107 para 54.

¹⁷¹ CFI 107 para 101.

- [143] Reliance was also placed on statements said to have been made in Ms Chai's presence, to the effect that the unit was owned by Mr Lee¹⁷². I do not accept this evidence. Reliance was also placed on evidence from Mr Samaratunga that, whenever they were out with Mr Lee and Ms Chai, Ms Chai always referred to the unit as "Jonathan's city house" (referring to Mr Lee)¹⁷³. The evidence necessarily relates to a time when Ms Chai lived at the unit; and when Mr Lee was there for only some of the time. I consider the evidence to be improbable. For that reason, and because of my previously expressed views about Mr Samaratunga's credit, I do not accept it.
- [144] Reliance was also placed on the evidence from Mr Samaratunga that on numerous occasions, Mr Lee, in the presence of Ms Chai, said that if the Samaratungas ever had guests in Brisbane, they were welcome to stay at the unit¹⁷⁴. I do not accept that evidence for similar reasons.
- [145] I therefore find that, when Mr Lee provided the monies for the purchase of the unit, and when the unit was purchased, he intended the unit to be a gift to Ms Chai.

Purchase of the Porsche

- [146] Mr Lee's evidence was that, prior to the purchase of the Porsche, he had been lending his Pajero motor vehicle to Ms Chai. He felt this was not suitable, because previously she had been driving a better motor vehicle¹⁷⁵. In early 2001 he decided to buy a Mercedes as a gift for his daughter. Ms Chai then asked him to buy a car for their use¹⁷⁶. He decided that he would buy a Porsche 911 "for us to use". His evidence was that he considered that "people were unlikely to recognise us in such a new vehicle"¹⁷⁷. He informed Ms Chai of his decision to buy the Porsche, and of the fact that, as he said in evidence, he "decided to purchase the Porsche and register it in her name to distance myself from it"¹⁷⁸.
- [147] Mr Lee gave evidence that he, Ms Chai and Mr Samaratunga went looking for a car to purchase, and eventually went to a Porsche dealership on the Gold Coast¹⁷⁹. He said he paid the deposit himself. His explanation for the car being purchased in Ms Chai's name has been mentioned previously. He also said that he was content to let Ms Chai be named as the purchaser of the car, as she was to be the one who would mainly drive it¹⁸⁰. However, he denied saying that he gave the car to Ms Chai, or that it was for her¹⁸¹.
- [148] Mr Lee, in his first affidavit, said that after the Porsche was purchased, it was taken to the home of Mr Samaratunga, because Mr Lee could not drive it into the driveway of his own house; and it remained at Mr Samaratunga's for a week, in which time Mr Samaratunga was permitted to use it whenever he wished. Mr Lee also said that he told Mr Samaratunga that if at any time he needed to borrow the

¹⁷² CFI 107 para 103 ; CFI 96 para 26.

¹⁷³ CFI 96 para 28.

¹⁷⁴ CFI 96 para 27.

¹⁷⁵ CFI 107 para 106.

¹⁷⁶ CFI 107 para 108.

¹⁷⁷ CFI 107 para 109.

¹⁷⁸ CFI 107 para 110.

¹⁷⁹ CFI 107 para 112.

¹⁸⁰ CFI 107 paras 113, 114.

¹⁸¹ CFI 107 para 116.

Porsche, he was able to do so; an offer of which Mr Samaratunga took advantage on some occasions¹⁸². However, in a subsequent affidavit, Mr Lee said that he asked the sales person to deliver the Porsche to the unit, his explanation being that it would have avoided a trip to the Gold Coast to collect it. While he did not positively deny telling the manager of the unit complex that the car was Ms Chai's, he did not recall the conversation to that effect, of which Ms Chai gave evidence¹⁸³.

- [149] In cross-examination Mr Lee gave evidence to the effect that the Porsche was normally kept at the unit, that Ms Chai had a key to the car, and that he did not often have a key to the car himself¹⁸⁴.
- [150] Ms Chai's evidence was that about a year after the purchase of the unit, Mr Lee told her that he wished her to have a prestigious car, in order to show the world how special she was; and that he thought a Mercedes was not good enough, and a sports car was more appropriate¹⁸⁵. She gave evidence that they went to a Porsche dealership where, at Mr Lee's suggestion, she test drove a car, which she liked.
- [151] Ms Chai said that she subsequently paid a deposit of \$5,000.00 for the car, Mr Lee arranging for the payment of the balance. Mr Lee then told the salesman that the car was to be registered in her name, as a symbol of his love for her¹⁸⁶.
- [152] Mr Lee arranged for the car to be delivered from the dealership, at the Gold Coast, to the unit¹⁸⁷. When the car arrived, Ms Chai's evidence was that the manager of the unit complex came by and commented on the car; to which Mr Lee responded saying "It is Angela's car, the woman I am deeply in love with".
- [153] Mr Lee also organised the insurance for the car, arranging for the agent to come to Mr Samaratunga's house, where Mr Lee introduced Ms Chai to the agent. The car was then insured¹⁸⁸. The car was insured in Ms Chai's name¹⁸⁹. It might be observed that there has been no suggestion of any attempt to record with the insurer any interest of Mr Lee in the Porsche. Ms Chai gave evidence that she arranged for the Porsche to be serviced, producing a copy of an invoice to that effect¹⁹⁰.
- [154] Documentary evidence demonstrates that (as mentioned) a receipt for the deposit issued in Ms Chai's name on 9 March 2001; the contract for the purchase of the Porsche, dated 15 March 2001, was made out in Ms Chai's name¹⁹¹; and a receipt for the balance of the purchase price, in Ms Chai's name, issued on 16 March 2001.
- [155] Mr Samaratunga gave evidence that it was he who recommended the purchase of the Porsche¹⁹². He and Mr Lee went to the dealership on the Gold Coast. Ms Chai accompanied them, but was not consulted by Mr Lee about the purchase, and had no input into the decision. He was impressed by Mr Lee's negotiating, which was

182 CFI 107 paras 117, 118.

183 CFI 132 para 10(w).

184 C2-33/1 to 25.

185 CFI 106 para 62.

186 CFI 106 para 68.

187 CFI 106 para 69; CFI 132 para 10(v).

188 CFI 106 para 74 (not disputed).

189 CFI 106 para 96; Chai 2 para 9.

190 CFI 106 para 140 and ex AC 58.

191 Exhibit 1, tab 24.

192 CFI 96 para 39.

carried out by writing prices on a piece of paper, and it resulted in a reduction of the price by some tens of thousands of dollars. He saw Mr Lee take cash from his pocket to pay the deposit. At the time, he thought Mr Lee was the purchaser, and did not know that the receipt and other paperwork had been made out in Ms Chai's name¹⁹³.

- [156] Mr Samaratunga also gave evidence that a little while after the trip to the Gold Coast, Mr Lee gave him the use of the Porsche for about a week. He also gave evidence that on a number of occasions, he and his wife borrowed the Porsche, by arrangement with Mr Lee; and he often saw Mr Lee driving the Porsche¹⁹⁴.
- [157] For Mr Lee it was submitted that the Porsche was held for him by Ms Chai, on a resulting trust. He alone had paid the purchase monies. Ms Chai's evidence to the effect that the Porsche was a gift should not be accepted, primarily by reason of the differing versions she had given, and particularly because, in her first statement to the police, she claimed to have herself provided all the purchase monies; and because of the evidence of the use of the Porsche by Mr and Mrs Samaratunga. Reliance was placed on the evidence of Mr Samaratunga, said to corroborate the evidence of Mr Lee.
- [158] For Ms Chai it was submitted that Mr Lee's evidence should not be accepted. Mr Lee intended the car to be a gift to Ms Chai. The car was used openly by Ms Chai to drive Mr Lee to and from restaurants. It was kept at the unit, where Ms Chai lived. When Mrs Lee first learnt of the affair, Mr Lee made no attempt then to claim ownership of the car.
- [159] The purchase occurred when the affair between Mr Lee and Ms Chai had been carried on for about 12 months. In that context, Mr Lee's explanation for the purchase of the Porsche in Ms Chai's name¹⁹⁵ is even less satisfactory than his explanation for the purchase of the unit in her name. His evidence on this point should not be accepted.
- [160] At the time of the purchase of the Porsche, the relationship between Mr Lee and Ms Chai remained strong. A little earlier, Mr Lee had given Ms Chai the sum of \$38,000, in support of her activities as president of the TFAQ.
- [161] Mr Lee gave evidence that, prior to the purchase of the Porsche, he had been lending his Pajero to Ms Chai, but considered this was not suitable for her; and that she was to be the one who was "mainly" drove the car¹⁹⁶. In my view, this evidence is consistent with the view that he intended the Porsche to be a gift to Ms Chai.
- [162] For Mr Lee, reliance was placed on the fact, not challenged, that, shortly after the purchase of the Porsche, Mr and Mrs Samaratunga were allowed to use it for a week. In isolation, that fact provides some support for Mr Lee's case. However, I do not regard this as conclusive. It is consistent with the recipient of a generous gift acceding to the wishes of the donor about its use for a brief period.

¹⁹³ CFI 96 paras 40-43.

¹⁹⁴ CFI 96 paras 44,45.

¹⁹⁵ CFI 107 par 110.

¹⁹⁶ CFI 107 paras 106 and 114.

[163] I have previously commented on Mr Samaratunga's credit. In light of Mr Lee's evidence that the car was to be driven mainly by Ms Chai, I consider it quite improbable that her views were not sought about its purchase. Indeed I accept her evidence that she test drove the car at the dealership. Mr Samaratunga's evidence about the negotiations and the resulting reduction of the purchase price by some tens of thousands of dollars is not supported by the evidence of Mr Lee or Ms Chai. If true, it seems to me likely that Mr Lee would have remembered it and described the negotiations in his evidence. If Mr Samaratunga were present, and Mr Lee produced from his pocket the cash for the deposit, the likely explanation for the issue of a receipt in Ms Chai's name, and the recording of Ms Chai as the purchaser, is that Mr Lee gave oral instructions to that effect. If Mr Samaratunga were present, I find his evidence that he did not know that Ms Chai was identified as the purchaser to be surprising, particularly since he sometimes helped Mr Lee to communicate in English. His evidence that he often saw Mr Lee driving the Porsche is not supported by Mr Lee's evidence. In view of these matters, and my previous discussion of Mr Samaratunga's credit, I do not accept his evidence about the purchase and use of the Porsche, save that he and his wife had the use of it for about a week shortly after it was purchased.

[164] Notwithstanding my previously expressed reservations about Ms Chai's credit, in the circumstances I consider her evidence to be more credible in relation to the purchase of the Porsche, than the evidence of Mr Lee and the witnesses who support him. In particular I accept her evidence that Mr Lee told her that he wanted to purchase a prestigious car for her, to show the world how special she was. I also accept her evidence that, when the Porsche was delivered to the unit, Mr Lee told the unit complex manager that the car was Ms Chai's.

[165] I consider that the conclusion that Mr Lee intended the car to be Ms Chai's is supported by a number of the circumstances associated with its purchase. They include the fact that it was Ms Chai who test drove a car at the dealership; the receipt for the deposit and the receipt for the balance of the purchase price were made out to Ms Chai; the car was insured in Ms Chai's name; the car was initially delivered to the unit where Ms Chai was living; Ms Chai (on Mr Lee's evidence) was to be the person who primarily would drive the car; and she was the person who ordinarily held the keys for it.

[166] Accordingly, I find that when Mr Lee provided the money for the purchase of the Porsche, and at the time of its purchase, he intended it to be a gift to Ms Chai.

Mr Lee's medical condition

[167] There is no issue that Mr Lee has been suffering from a psychiatric illness or disturbance for a relatively long time. Joint reports were prepared by two psychiatrists (Dr Prior and Dr Curtis) and a psychologist (Mr Stoker), to whom I shall refer as the medical experts. The views expressed in the joint reports were not in contention. The parties agreed that factual matters identified in the reports did not need to be proven by other evidence. What follows in relation to Mr Lee's psychiatric condition is derived from those reports.

[168] Mr Lee's condition was of relatively long standing. It was characterised by a number of elements, they being described as a severe mood disorder; an underlying

personality disorder characterised by immature, narcissistic, grandiose and dependent traits; alcohol dependency; and polysubstance abuse¹⁹⁷.

- [169] The mood disorder was said to be “most likely” a major depressive disorder, aggravated by comorbid alcohol dependence, and alcohol and polysubstance abuse¹⁹⁸. However, of considerable significance in the case, this disorder was considered not to be present between March 2000 and March 2001, because, in that period, the condition was treated with appropriate medication¹⁹⁹.
- [170] The personality disorder was said to be likely to have resulted in poor judgment, though not to have resulted in the deprivation of the exercise of free will²⁰⁰. It was elsewhere said that Mr Lee showed some impairment of “psychosocial judgement”²⁰¹. This condition was described as “the main factor that was driving (Mr Lee’s) behaviour”. Over the period from early 2000 to mid 2003²⁰² it was considered that the personality disorder was “likely to have played some role impacting upon (Mr Lee’s) ability to make judgement (*sic*) as to what was in his own best interests”, but the experts were uncertain about the degree of this impact²⁰³. When asked whether Mr Lee’s ability to make a judgment as to what was in his own best interest was affected by his condition, the experts also stated that there was “some negative impairment on Mr Lee’s ability to make psychosocial judgments” stemming from his personality disorder²⁰⁴.
- [171] The medical experts considered that in the period between March 2000 and March 2001, Mr Lee would have displayed symptoms of grandiosity, entitlement, and dependent personality traits; and there would have been evidence of episodic alcohol abuse and possibly episodic cognitive impairment²⁰⁵. When asked whether the symptoms which Mr Lee displayed in this period would have been apparent to a person with no medical training but in a personal or familiar relationship with him, they stated that such a person “would likely have been aware of the intoxicating affects (*sic*) of alcohol and/or drugs and the presence of a grandiose and entitled affect”; but that it was unlikely that such a person would have a sophisticated understanding of the nature of the personality disorder²⁰⁶.
- [172] The polysubstance abuse disorder related to the fact that Mr Lee was over-treated with a multiplicity of medications for his mental condition. He was poorly compliant, at times taking excessive amounts of medications, and at times ignoring the advice of those treating him²⁰⁷. However, when dealing with Mr Lee’s condition between March 2000 and March 2001, the medical experts considered that he received consistent and appropriate treatment²⁰⁸. Their discussion of his treatment in this period does not refer to polysubstance abuse, save for the fact that

¹⁹⁷ Ex 1 tab 1 p 2.

¹⁹⁸ Ex 1 tab 1 p 2.

¹⁹⁹ Ex 1 tab 2 p 1; the medication is in table B2 to that document.

²⁰⁰ Ex 1 tab 1 p 4.

²⁰¹ Ex 1 tab 1 p 5.

²⁰² Ex 1 tab 1 p 5.

²⁰³ Ex 1 tab 2 p 4.

²⁰⁴ Ex 1 tab 2 p 4.

²⁰⁵ Ex 1 tab 2 p 1.

²⁰⁶ Ex 1 tab 2 p 4.

²⁰⁷ Ex 1 tab 1 p 3.

²⁰⁸ Ex 1 tab 2 p 1.

he mixed alcohol and benzodiazepenes²⁰⁹. The mixture of alcohol and benzodiazepines was thought likely to lead to side effects of cognitive dysfunction and disinhibition of behaviour on an “intermittent and variable basis”²¹⁰. It was elsewhere said the mixture of benzodiazepines and alcohol was likely to have resulted in “some episodic cognitive impairment”²¹¹. The cognitive impairment may have contributed to “poor judgment abilities”²¹². When asked whether Mr Lee would have displayed symptoms of his illness, the experts considered there would possibly have been evidence of episodic cognitive impairment²¹³. The experts did not consider that cognitive dysfunction was the primary driver of the factors affecting Mr Lee’s ability to make judgments²¹⁴. Mr Lee also suffered from seizures when he ceased taking medication, including benzodiazepines, and alcohol²¹⁵.

[173] The medical experts considered that mixture of alcohol and benzodiazepines may have resulted in “episodic cognitive confusion”²¹⁶ but there was no evidence of regular mental or cognitive confusion in the period between March 2000 and March 2001²¹⁷. It was likely that the alcohol abuse and dependence would themselves have been obvious to a person without medical training²¹⁸.

[174] It was not thought that a person close to Mr Lee would have been able to determine that he had a mental illness; or that he suffered from the ill effects of polypharmacy (when this occurred)²¹⁹. He may have appeared to have been “a troubled man” at times when he was affected by disturbances; and those close to him would be likely to stay out of his way at these times; but it is unlikely that they would have understood the cause of his behaviour²²⁰. These statements were not limited to the period between March 2000 and March 2001, when the mood disorder/depressive disorder was thought not to be present, because Mr Lee was appropriately medicated.

[175] The medical experts considered that Mr Lee was likely to have been vulnerable (or was possibly vulnerable) to influence by his sexual partner by reason of factors associated with his personality disorder, and the interaction of alcohol abuse and benzodiazepines²²¹. Because the cognitive dysfunction resulting from the mixing of alcohol and benzodiazepines was episodic, the experts were unable to quantify its impact on Mr Lee’s vulnerability to influence by his sexual partner²²².

²⁰⁹ Ex 1 tab 2 p 2; p 3 para 6; in the context of this joint report, it seems to me that the reference to episodic substance abuse in para 5 on p 3 and para 11 (a) on p 4 is a reference to the mixture of alcohol and benzodiazepines.

²¹⁰ Ex 1 tab 1 p 3; see also ex 1 tab 2 p 2.

²¹¹ Ex 1 tab 2 p 2.

²¹² Ex 1 tab 1 p 2.

²¹³ Ex 1 tab 2 p 1.

²¹⁴ Ex 1 tab 2 p 5.

²¹⁵ Ex 1 tab 1 p 3.

²¹⁶ Ex 1 tab 2 p 2.

²¹⁷ Ex 1 tab 2 p 1.

²¹⁸ Ex 1 tab 1 p 5.

²¹⁹ Ex 1 tab 1 p 5.

²²⁰ Ex 1 tab 1 p 5.

²²¹ Ex 1 tab 2 p 3; p 4.

²²² Ex 1 tab 2 p 5.

- [176] Mr Lee was said to be likely to be emotionally dependent on Ms Chai, the dependence being related to the underlying personality disorder²²³. At one point, the experts considered that Ms Chai would have recognised this dependence “to an unquantifiable degree”²²⁴. However, when asked earlier if the symptoms of Mr Lee’s psychiatric illness would have been apparent to a person with no medical training but in a personal or familiar relationship with him, his dependent personality traits were not included in the apparent symptoms²²⁵. When asked to identify the extent to which the effect of his illness on his ability to make a judgment in his own best interests would have been apparent to a person with no medical training but in a personal or familiar relationship with him, emotional dependence was not included in the matters mentioned²²⁶. Indeed, the expert evidence did not directly relate his emotional dependence on Ms Chai to any impairment of Mr Lee’s capacity to make such a judgment.
- [177] Finally, it might be noted that the medical experts were “unanimous in considering that the psychiatric or psychological illness or disorder did not overbear the free exercise of Mr Lee’s will”²²⁷. Substantially the same point was made with reference to each aspect of his condition²²⁸. These findings were explained to mean that, “Mr Lee was able to understand the nature of his actions, was able to control his actions and impulses, had the capacity to make decisions, and was not psychotic”²²⁹. In a slightly different context, with reference to their finding that Mr Lee’s personality disorder “did not impair him or had overridden the free exercise of his will to the degree that would have impaired him of capacity in a legal sense”²³⁰, the experts stated that “he had the ability to know the nature of his actions, understand his actions and control his actions and impulses as meant in the Criminal Code”²³¹.

Undue influence: the contentions

- [178] For Mr Lee it was submitted that the evidence proved a relationship of influence between him and Ms Chai, of the kind which invokes the equitable doctrine. The submission relied primarily on the evidence of the medical experts relating to the dependency of Mr Lee on Ms Chai. It also relied upon his vulnerability to influence, associated with his personality disorder and episodic substance abuse. Reference was also made to the sexual relationship between them. It was also submitted that the “extravagant gift” of the unit, at a very early stage of their relationship, pointed to a relationship of influence. From the relationship, it should be presumed that the gifts of the unit and the Porsche were the result of undue influence, and liable to be set aside, unless Ms Chai rebutted the presumption. It was submitted that she had failed to do so.
- [179] For Ms Chai it was submitted the relationship was not proven to be one of influence. Ms Chai had no ascendancy over Mr Lee. He was not shown to be dependent. The fact that two people are emotionally involved is not of itself a

223 Ex 1 tab 2 p 3.
 224 Ex 1 tab 2 p 3.
 225 Ex 1 tab 2 p 2.
 226 Ex 1 tab 2 p 4.
 227 Ex 1 tab 1 p 4.
 228 Ex 1 tab 1 p 4.
 229 Ex 1 tab 2 p 5.
 230 Ex 1 tab 1 p 5.
 231 Ex 1 tab 2 p 5.

sufficient basis for setting aside transactions between them. The making of the gifts was not the result of anything other than the free act and judgment of Mr Lee.

Undue influence: legal principles

[180] It is well established that a gift may be set aside when it has been procured by undue influence²³². A gift is presumed to have been procured by undue influence where the relationship between the parties is one recognised in law as giving rise to the presumption²³³ (for convenience, I shall refer to such a relationship as a “relationship of influence”). Some classes of relationship, such as parent and child, or solicitor and client, without more, give rise to the presumption²³⁴. However, a relationship not falling within any of the recognised classes may be proven to be a relationship of influence²³⁵. I propose to refer to a relationship of the former kind as a deemed relationship of influence, and of the later kind as a proven relationship of influence.

[181] The authorities to which I have been referred indicate that the courts have not formulated a comprehensive and precise test for determining whether a relationship is a proven relationship of influence²³⁶. Nevertheless, there are statements which assist in determining whether a relationship is a proven relationship of influence. Thus in *Johnson*²³⁷, Latham CJ referred to a:

“...relation between donor and donee (which) is such that the latter is in a position to exercise dominion over the former by reason of the trust and confidence reposed in the latter ...”

[182] His Honour also referred to²³⁸:

“... a relation of what may be called, from one point of view, dominion, and from another point of view, dependence ...”

[183] In the same case, Dixon J referred to the parties as antecedently standing in a relation that²³⁹:

“... gives to one an authority or influence over the other from the abuse of which it is proper that he should be protected.”

[184] His Honour also referred to a situation where²⁴⁰:

“... one party occupies or assumes towards another a position naturally involving an ascendancy or influence over that other, or a dependence or trust on his part .”

[185] In *Etridge*, Lord Nicholls of Birkenhead, described such a relationship as²⁴¹:

²³² *Johnson v Buttress* (1936) 56 CLR 113, 119.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ See *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 at [9]–[11].

²³⁷ At 119.

²³⁸ Ibid.

²³⁹ Page 134.

²⁴⁰ Pages 134-135.

“...a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage.”

[186] Of such a relationship, his Lordship said²⁴²:

“The relationship between two individuals may be such that, without more, one of them is disposed to agree to a course of action proposed by the other.”

[187] His Lordship endorsed a statement that “the question is whether one party has reposed sufficient trust and confidence in the other ...”; though he also observed that, “Even this test is not comprehensive”, the principle not being confined to cases of abuse of trust and confidence, but including cases where a vulnerable person has been exploited²⁴³.

[188] This type of relationship has been discussed in a recent textbook²⁴⁴. The author describes the relationship as one where in fact, one party acquired influence over the other²⁴⁵. He considered that the test most frequently applied is whether one party reposed trust and confidence in the other, particularly in the management of the first party’s financial affairs²⁴⁶.

[189] The author observes:

“Trust and confidence must be of a sufficient degree to warrant the conclusion that influence naturally grew from it and that the relationship between the parties was one in which the alleged wrongdoer had influence over the complainant”²⁴⁷

[190] The author refers to a statement from *Etridge* by Lord Nicholls that the relevant trust and confidence is “in relation to the management of the complainant’s financial affairs”²⁴⁸. However he suggests, by reference to *Goldsworthy v Brickell*²⁴⁹, that trust and confidence could arise because the trust and confidence were reposed in relation to a variety of matters, either because the confidant had become an advisor of the other party, or because he had been entrusted with the management of the other party’s affairs or everyday needs, or for some other reason²⁵⁰.

²⁴¹ At [8].

²⁴² At [9].

²⁴³ *Etridge* at [10]-[11]; see also 22 *Halsbury’s Laws of England* (5th ed 2012) para 296 at n 15.

²⁴⁴ In Enonchong, *Duress, Undue Influence and Conscionable Dealing* London, Sweden and Maxwell 2006.

²⁴⁵ Para 10-027, text at n 17; par 10-031; both the transaction and the relationship of influence are said to be necessary for the presumption to arise: 31 *Halsbury’s Laws of England* (4th ed 2003) para 843; and see *Etridge* at [14].

²⁴⁶ Para 10-033, text at n 51; par 10-030, text at n 35.

²⁴⁷ Para 10-034, text at n 55.

²⁴⁸ Para 10-035, text at n 71.

²⁴⁹ [1987] 1 Ch 378, 401.

²⁵⁰ Para 10-035.

- [191] The author also expresses the view that the relationship of influence must be one that existed before the impugned transaction²⁵¹. He discusses authorities, at least one of which is not consistent with his proposition. However, it seems to me, as a matter of logic, to be correct. If the transaction itself is to be relied upon to prove that the relationship is one of influence, there seems little scope for the operation of the presumption²⁵². An exception may be where a transaction extends over a long period before it becomes binding, and in that period it can be shown that the person who is to take the benefit of the transaction is, as the transaction develops, exercising influence over the other party.
- [192] The submissions for Mr Lee, by reference to *Union Fidelity Co Ltd v Gibson*²⁵³, identified matters regarded as relevant when seeking to prove that a relationship is one of influence. By reference to the judgment in that case, I would adapt the list slightly, and identify matters relevant to the present case, as follows:
- (a) the standard of intelligence and education, and the character and personality of the donor;
 - (b) age, state of health, and experience, or lack of it, in business affairs of the donor;
 - (c) the length of the relationship between the donor and the donee and the intricacy of their business affairs;
 - (d) the relative strength of character and personality of the donee;
 - (e) the opportunity afforded to the donee to influence the donor in his business affairs.
- [193] It seems to me that the nature of the relationship is also relevant. In *Brusewitz v Brown*²⁵⁴, Mr Brusewitz’s administratrix sought to have set aside a disadvantageous transaction he had entered into with Mr Brown, on the grounds that there was between them what I have described as a proven relationship of influence. Salmond J found²⁵⁵:
- “Having regard to the character of Brusewitz, the nature of Brown’s relations with him, and the nature of the transaction which took place between them and is now in question, I think that there is a sufficient basis for the presumption of undue influence ...”
- [194] The reference to the character of Mr Brusewitz may be understood by the description of him in the judgment as a “dying drunkard”²⁵⁶. He was an habitual drinker in very bad health at the time of the transaction, suffering from cirrhosis of the liver due to his chronic alcoholism; and he died four months after the

²⁵¹ Para 10-032.

²⁵² See however 88 *Halsbury’s Laws of England* (5th ed 2012) para 454 at n 10.

²⁵³ [1971] VR 573, 577.

²⁵⁴ [1923] NZLR 1106

²⁵⁵ At p 1115.

²⁵⁶ At p 1115.

transaction²⁵⁷. His only asset and means of livelihood was that with which he parted as a consequence of the transaction. Mr Brown, a retired businessman with a substantial income, was Mr Brusewitz's "most intimate friend and companion"²⁵⁸, whose daily habit it was, notwithstanding Mr Brusewitz's alcoholism, to drink in the hotels of the town with Mr Brusewitz²⁵⁹.

- [195] In *Louth v Diprose*²⁶⁰ a gift was set aside on the ground of unconscionable conduct, on the basis that the plaintiff, Mr Diprose (who was a practicing solicitor), was very deeply in love with Ms Louth. In that context, Brennan J described the effect of the findings at first instance as follows²⁶¹:

"... the relationship between the plaintiff (respondent) and the defendant (appellant) was so different in degree as to be different in kind from the ordinary relationship of a man courting a woman. It was found that the personal relationship between them was such that the plaintiff was extremely susceptible to influence by the defendant, as the defendant knew."

- [196] His Honour considered that that finding made the relationship analogous to that between an engaged couple, as referred to in *Page v Horne*²⁶². That case has been considered in times past as establishing that the relationship between persons engaged to be married is what I have described as a presumed relationship of influence (or at least that in such a relationship, it is presumed that a man has influence over a woman)²⁶³. It is apparent, however, that his Honour was considering the question whether the relationship constituted a special disadvantage for the purposes of the court's equitable jurisdiction to set aside a gift procured by unconscionable conduct.

- [197] In *Tulloch (Dec'd) v Braybon (No 2)*²⁶⁴ Bereton J, as I understand the judgment, used the expression "special relationship of influence" to describe what I have referred to as a proven relationship of influence. After a review of the authorities, his Honour said:

"[51] In my opinion, these authorities show that more than mere confidence and reciprocal influence is required to establish a 'special relationship of influence' from the existence of which undue influence will be presumed unless rebutted; for a relationship to be brought within the doctrine, it must go beyond one of mere confidence and influence, to one involving dominion or ascendancy by one over the will of the other, and correlatively dependence and subjection on the part of the other. It is true that some cases suggest that it is not necessary to establish a relationship of actual dominion by one party over another and that it is enough to show that the party in whom trust and confidence is reposed is in a position to exert

²⁵⁷ At p 1107.

²⁵⁸ At p 1114.

²⁵⁹ At p 1114-1115.

²⁶⁰ (1992) 175 CLR 621.

²⁶¹ At 629-630.

²⁶² (1848) 11 Beav 227, 235 (50 ER 804, 807).

²⁶³ See *Zamet v Hyman* [1961] 1 WLR 1442, 1445-1446.

²⁶⁴ [2010] NSWSC 650.

influence over the party who reposes it²⁶⁵. But more is required than the ‘influence’ that any person might have on another by making an (*sic*) recommendation or giving advice. What is required, as a minimum, is that one have some element of authority or superiority (which may be moral or practical as distinct from legal) over the other. Thus, in the case of a solicitor, and perhaps a doctor, it arises from his or her professional status and expertise in a field in which the client will typically be ignorant, founding an expectation that professional advice would ordinarily be followed; in the case of a spiritual adviser, from the religious imperative to follow spiritual advice; in the case of a parent, from that authority which a parent naturally has over a child. A real estate agent, or a stock and station agent, no doubt has an opportunity to influence a principal, but these are not viewed as necessarily relationships of influence, because such agents do not have the same standing and authority in respect of a client as do those in the traditional categories. A husband and a wife obviously are vis-à-vis each other in positions of trust and confidence and influence, but one does not ordinarily have over the other such authority as to make such relationships a presumed relationship of influence, nor (without more) a special relationship of influence. It is where the relationship is such that one party is seen or supposed to be in some way beholden, obliged, or disadvantaged in relation to the other that such relationships are presumed or can be proved, and dominion or ascendancy is at least usually an important factor.”

- [198] His Honour’s observations point out that there are forms of influence which do not attract the equitable presumption. Moreover, when people are married, the trust, confidence and influence which might exist between them does not inevitably make the relationship a relationship of influence for the purposes of the presumption. This seems to be consistent with the approach taken by Dixon J when deciding whether the transaction in *Yerkey v Jones*²⁶⁶ was the product of undue influence²⁶⁷. It seems to me that these propositions are relevant to other close personal relationships.
- [199] If the relationship is a relationship of influence, then the gift will be set aside unless the donee establishes it was not the product of undue influence. In such cases, the donee must establish that the gift was “the pure, voluntary, well-understood act of the mind” of the donor²⁶⁸; or that “the gift was the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee”²⁶⁹; or that the gift “cannot be ascribed to the inequality between them which must arise from (the donee’s) special position”²⁷⁰.
- [200] Notwithstanding the limitations on his knowledge of the English language, Mr Lee was an intelligent and well-educated man, with a particular knowledge of Chinese literature. Save in respect of matters referred to by the medical experts, neither his

²⁶⁵ See *Goldsworthy v Brickell* [1987] 1 Ch 378 at 403–404; *Stivactas v Michaletos (No 2)* (1993) NSW Conv R 55-683, 59,908 (Sheller JA).

²⁶⁶ (1940) 63 CLR 649.

²⁶⁷ *Yerkey* at 686-687.

²⁶⁸ *Huguenin v Vaseley* (1807) 14 Ves 273; 33 ER 526; cited in *Johnson* at 119.

²⁶⁹ *Johnson* at 134 per Dixon J.

²⁷⁰ *Johnson* at 135 per Dixon J.

character or personality would suggest that his relationship with Ms Chai was likely to be one of influence, at least by her over him. In the witness box he presented as a man of (at least) moderately strong character and personality. He was, in 2000 and 2001, of mature age. He had substantial experience in business affairs, and was actively engaged in a property development venture in Brisbane in those years.

- [201] While Ms Chai did not display any weakness of character or personality in the witness box, she appeared to be less forceful than Mr Lee (and, for that matter, Mrs Lee). Her business experience appears to have been limited to a relatively brief involvement in an unsuccessful travel agency. So far as Mr Lee's business affairs are concerned, it seems to me unlikely that Ms Chai exerted any influence over Mr Lee in respect to them.
- [202] It is a by no means uncommon experience that entry into a relationship brings about changes to a person's life, as a consequence of the influence of the other party to the relationship, for example, in relation to the friends a person sees, recreation and leisure, and social and domestic conduct. The good influence of a partner is sometimes recognised when a person is being sentenced for drug related activities. It seems to me that there are many aspects of domestic life where a person's conduct will be influenced by other members of the household by reason of the emotional relationship between them, without the relationship being one of influence for the purpose of the equitable doctrine.
- [203] The medical experts considered that Mr Lee was emotionally dependent on Ms Chai, the dependence being related to his personality disorder. He was also considered to be likely to be vulnerable, or possibly vulnerable, to influence by Ms Chai as his sexual partner, for reasons associated with his personality disorder and the mixing of alcohol and benzodiazepines. They did not, however, relate this dependence and vulnerability to influence, to Mr Lee's decision making, particularly in relation to his financial affairs and property-related matters. More generally, they considered his personality disorder as being the main factor affecting his behaviour, with some impact on his ability to make judgments in his own best interests; but the degree of that impact was uncertain. Their evidence is obviously of some relevance, but does not of itself establish that there was a relationship of influence.
- [204] The events leading up to the purchase of the unit do not suggest a relationship of influence. Mr Lee gave evidence that the idea of purchasing a place probably was his²⁷¹. He had an obvious interest in having available a suitable place for the conduct of their affair. He also gave evidence that it was his idea to purchase the unit in Ms Chai's name²⁷².
- [205] Ms Chai's evidence that Mr Lee agreed to her suggestion to purchase a property was given in the context of her evidence of his promise to give her \$1 million²⁷³. Whether one focuses on that, or simply on the fact that Mr Lee provided the purchase monies for the unit (assuming either to be relevant to the question whether there was a relationship of influence), neither is conclusive. A substantial amount of money was involved. However, unlike cases such as *Brunewitz, Johnson* and

²⁷¹ CFI 107 para 50.

²⁷² CFI 107 para 54.

²⁷³ CFI 106 para 31.

Louth, the transaction did not involve substantially the whole of Mr Lee's assets. He avoided giving evidence of his true financial position; but he was obviously a man of substantial wealth.

- [206] While these events occurred early in the relationship, the view which Mr Lee then took of Ms Chai's role in his life is apparent from the fact that he arranged for the wedding photos. Moreover the short duration of the relationship meant that by this time there was little opportunity for Ms Chai to develop influence over Mr Lee; and there is no other evidence to suggest that by this time she had done so.
- [207] I have not accepted Mr Lee's evidence that he intended the property to be his property, although purchased in Ms Chai's name. That he gave such evidence might be thought to be explicable by the fact that he knew no question of influence was involved. However, in *Louth* the rejection of similar evidence did not prevent the gift being set aside on the ground of unconscionable conduct, though there was much stronger antecedent evidence of a relationship in which the donor "was extremely susceptible to influence" by the donee²⁷⁴, than there is in the present case. However, my conclusion is independent of this consideration.
- [208] I am therefore of the view that, at the time when the unit was purchased, the relationship between Mr Lee and Ms Chai was not a relationship of influence which would attract the operation of the equitable doctrine.
- [209] To this point, I have focused on the relationship leading up to the purchase of the unit. The evidence does not suggest that it changed materially over the period to the purchase of the Porsche. In this period, Mr Lee gave Ms Chai \$38,000 in connection with her role as president of the TFAQ. There is no suggestion that that was the product of influence by Ms Chai; rather it appears to have been a voluntary act of Mr Lee.
- [210] It is apparent from Mr Lee's evidence that the standard of car to be purchased was determined by him²⁷⁵. On Ms Chai's evidence Mr Lee had decided to purchase a Porsche²⁷⁶. It might be observed that, shortly before the purchase of the Porsche, Mr Lee had purchased a Mercedes SLK320 motor vehicle for his daughter²⁷⁷.
- [211] Mr Lee gave evidence that Ms Chai asked him "to buy a car for our use"²⁷⁸. However, he did not suggest that she played any role in the decision to purchase the Porsche in Ms Chai's name²⁷⁹.
- [212] It seems to me that the purchase of the unit could not be relied upon as evidence of a developing relationship of influence. Mr Lee's case was that it should be set aside because there then existed a relationship of influence, and Ms Chai had failed to rebut the resulting presumption. He did not seek to prove it was the result of actual influence, nor does the evidence demonstrate that.

²⁷⁴ *Louth* at 629-630.

²⁷⁵ CFI 107 para 106.

²⁷⁶ CFI 106 para 62.

²⁷⁷ CFI 107 para 107.

²⁷⁸ CFI 107 para 108.

²⁷⁹ CFI 107 para 110.

- [213] The medical evidence does not suggest a material variation in Mr Lee's condition in the intervening period.
- [214] The amount spent on the Porsche is substantially less than the purchase price of the unit. It does not provide support for the view that a relationship of influence had developed.
- [215] In my view, the evidence demonstrates Mr Lee to have been a wealthy man, who lived rather lavishly, and was inclined to make generous gifts. However, it does not establish that his relationship with Ms Chai placed her in a position of influence over him, so as to attract equitable relief.
- [216] In any event, it seems to me that each of the gifts was a "pure, voluntary, well-understood act of the mind"²⁸⁰ of Mr Lee.
- [217] The purchase of the unit in Ms Chai's name was the result of a series of acts by Mr Lee (or in which he participated) over a period of a number of weeks. They may be summarised as follows: the decision to seek permanent accommodation, to provide privacy or intimate aspects of their relationship; the decision by Mr Lee that he would provide the purchase money; the search for the unit; the decision that the unit be purchased in Ms Chai's name; provision by Mr Lee to Ms Chai of \$50,000 (a source of part of the deposit); the provision by Mr Lee of the balance of the deposit; Mr Lee's contacting a solicitor who had previously acted for him (to ask her to act for Ms Chai); Mr Lee's return (alone) to Taiwan; the sale by Mr Lee of shares to raise part of the balance of the purchase monies; Mr Lee's dealing with his brother, to obtain a loan of the rest of the purchase monies; Mr Lee's arranging the transfer of the purchase money to his ICBC account, and then to an Australian account; and the provision by Mr Lee of a number of separate cheques to enable settlement to take place. To these events may be added the fact that Mr Lee does not suggest any act by Ms Chai which might be regarded as the exerting of influence by her over him.
- [218] Moreover, the purchase of the unit was of some advantage to Mr Lee. It provided a place where aspects of their affair could be conducted in privacy. In my view, the combined effect of this evidence is that it demonstrates that the use of Mr Lee's money to purchase the unit in Ms Chai's name was the product of a pure, voluntary, well-understood act of his mind.
- [219] I should add that Mr Lee gave evidence that at this time he "was infatuated ... and not thinking clearly" and that he believed, "my mental illness played a part, as it hindered my ability to think clearly"²⁸¹.
- [220] Obviously, this evidence is self-serving. However, it derives some support from the evidence of the medical experts. Nevertheless, I do not consider that, either when the decision to purchase the unit in Ms Chai's name was made, or over the period of time to completion of the purchase of the unit, and in all of the circumstances mentioned, Mr Lee was unable to make a voluntary and well-understood decision to provide the purchase monies for the unit. In my view, as an experienced businessman and well educated and intelligent person, Mr Lee understood well what he was doing, and had ample opportunity to make a different decision, but

²⁸⁰ See *Huguenin*, cited earlier.

²⁸¹ CFI 107 para 79.

maintained the decision he had initially made, independently, voluntarily, and well understanding what he was doing, to provide money for the purchase of the unit in Ms Chai's name.

- [221] While the circumstances of the purchase of the Porsche are not the same, they nevertheless have some general similarity. In addition, they occur against the background of the previous generosity of Mr Lee, both to Ms Chai (by providing funds in connection with her presidency of the TFAQ); and to his daughter. In addition, the only sensible explanation for the fact that the Porsche was made available to Mr and Mrs Samaratunga very shortly after its purchase was that that was Mr Lee's wish. It tends to suggest that he was not at that time subject to Ms Chai's influence.
- [222] Accordingly, I would not set aside the gifts on the basis that they were the product of undue influence.

Unconscionable conduct: the contentions

- [223] For Mr Lee it was submitted that he was at a "special disadvantage" in relation to Ms Chai in providing monies for the purchase of the unit and the Porsche. That special disadvantage was said to be a consequence of his personality disorder, resulting in poor judgment by him; which was also contributed to by his cognitive impairment. It was also submitted that he was likely to have been vulnerable to influence by Ms Chai, as his sexual partner; and that he was emotionally, but not sexually, dependant upon Ms Chai, this dependence being related to the underlying personality disorder. It was submitted that Mr Lee's "special disadvantage" must have been, and was, sufficiently evident to Ms Chai, during her relationship with the defendant. Reliance was placed on the fact that his alcohol abuse and dependence have been likely to be obvious to persons with no medical training; and that such a person, in a personal or familiar relationship with Mr Lee, would have been aware of the intoxicating effects of alcohol and/or drugs, and the presence of a grandiose and entitled affect. In addition, reliance was placed on the absence of consideration; the absence of independent advice for Mr Lee; the fact that the relationship itself would not explain the magnitude of the gifts; knowledge Ms Chai was submitted to have had of the difficulties Mr Lee and Mrs Lee were experiencing in relation to their marriage; Ms Chai's knowledge of Mr Lee's wealth; and Ms Chai's knowledge of Mr Lee's mental health issues and medication.
- [224] It was then submitted that Mr Lee's psychiatric illness, and in particular, his personality disorder, caused him to make the gifts.
- [225] For Ms Chai, it was generally submitted that the circumstances of this case were different to circumstances of cases where a disposition had been set aside on the grounds of unconscionable conduct. They included cases where a "special disability" was found to exist, and where the person taking the benefit of the transaction had taken an unconscientious advantage of such disability.

Unconscionable conduct: the legal principles

[226] The submissions made on behalf of Mr Lee identified a number of propositions applied by the Court of Appeal in *Paroz v Paroz*²⁸². Those which, in my view, are of present relevance are as follows:

- (a) It is a condition of the grant of relief that one party to the transaction is at a special disadvantage in relation to the other, in that some condition or circumstance seriously affects the ability of the first party to make a judgment as to his or her own best interests;
- (b) It is not sufficient for the parties seeking relief simply to establish that the transaction is seriously disadvantageous to that party;
- (c) No remedy is available unless it is shown that the other party unconscientiously exploited the special disadvantage to which the first party was subjected;
- (d) Unconscientious exploitation occurs, at least in most cases, if a party procures, accepts or retains a benefit, when it is sufficiently evident that the other party is subject to a special disadvantage, to make it unconscientious to retain the benefit;
- (e) No remedy is available unless it is shown that (in the case of a transaction) the transaction is the product of unconscientious exploitation by the other party.

[227] The submissions for Mr Lee also refer, on the question whether the special disadvantage of one party is sufficiently evident to the other, to a statement made by Mason J in *Commercial Bank of Australia Ltd v Amadio*²⁸³ to the effect that it is sufficient if the latter, instead of having actual knowledge that the first party was in a situation of special disadvantage in relation to the transaction, was “aware of the possibility that that situation may exist (or) is aware of facts that would raise that possibility in the mind of any reasonable person ...”²⁸⁴. In *Garcia v National Australia Bank Ltd*²⁸⁵; it was held to be sufficient for these purposes to show that the party shut his or her eyes to the special disadvantage of the other party.

Were the gifts the result of unconscionable conduct by Ms Chai?

[228] The first question is whether Mr Lee was at a special disadvantage in relation to Ms Chai, because his condition seriously affected his ability to make a judgment as to his own best interests.

[229] In their first report, the medical experts found that the main factor driving Mr Lee’s behaviour over the period of time in which he provided the purchase money for the unit and the Porsche, and made gifts of jewellery and money, was his personality disorder. He was said to show “impairment of psychosocial judgment but not

²⁸² [2010] QCA 362, [7], [10]; see [12].

²⁸³ (1983) 151 CLR 447.

²⁸⁴ *Amadio* at 467.

²⁸⁵ (1998) 194 CLR 395 at [30]; cited in *Lopwell Pty Ltd v Clarke & Ors* [2009] NSWCA 165 at [54].

deprivation of the free exercise of his will”²⁸⁶. The expression “free exercise of his will” might be understood by reference to the explanation for the expression used in the same place “the free exercise of his will to the degree that would have impaired (*sic*) him of capacity in a legal sense”. The latter expression was explained by saying that Mr Lee “had the ability to know the nature of his actions, understand his actions and control his actions and impulses as meant in the Criminal Code”²⁸⁷.

- [230] The view about the personality disorder being the main factor driving Mr Lee’s behaviour was discussed further in the second joint report. The medical experts considered that “... there was some negative impairment on Mr Lee’s ability to make psychosocial judgments stemming from his Personality Disorder”²⁸⁸; but they were uncertain about the degree to which the personality disorder affected his ability to make a judgment as to his own best interests²⁸⁹.
- [231] The medical experts considered that Mr Lee’s cognitive dysfunction was less significant than the personality disorder²⁹⁰. The cognitive dysfunction referred to was the consequence of the mixing of alcohol and benzodiazepenes²⁹¹, an effect elsewhere described as “episodic cognitive impairment”²⁹². Its episodic nature is not further elaborated on. It is therefore difficult to find that it was operative at any time relevant to either of the gifts. Moreover, the cognitive impairment is at times described by the experts as “possible”²⁹³.
- [232] I am conscious that in places, the joint reports contain statements which are not so qualified, and provide firmer support for the submissions made on behalf of Mr Lee. Nevertheless, it seems to me that the reports should be read as a whole; and that when that is done, they do not provide an adequate basis for me positively to conclude that Mr Lee’s mental condition seriously affected his ability to make a judgment as to his own best interest.
- [233] Nor does a broader view of the evidence lead to a different conclusion. I have previously referred to his education, experience, and then-current role in relation to a development project. These matters do not suggest that his illness had any serious impact on his ability to make a judgment as to his own best interests.
- [234] In light of my findings it is difficult to make a finding on the question whether it was sufficiently evident to Ms Chai that Mr Lee was subject to a special disadvantage for the purpose of applying one of the propositions previously referred to. Nevertheless, it is convenient to make some observations about matters which would, or may have been, sufficiently evident to Ms Chai.
- [235] It might first be observed that the submissions for Mr Lee rely upon the fact that Mr Lee’s alcohol abuse and dependence would have been likely to have been obvious to her. It may be accepted that, at least at some time after the commencement of the relationship, his abuse of, and perhaps his dependence on, alcohol would have been

²⁸⁶ Ex 1, tab 1, para 2.1.

²⁸⁷ Ex 1, tab 2, p 5, para 14.

²⁸⁸ Ex 1, tab 2, p 4, para 11(b).

²⁸⁹ Ex 1, tab 2, p 4, para 9.

²⁹⁰ Ex 1, tab 2, p 5, para 12(b).

²⁹¹ Ex 1, tab 1, p 3, para 5.

²⁹² Ex 1, tab 2, para 2(c)F.

²⁹³ Ex 1, tab 1, p 5, para 2.1; tab 2 para 5.

obvious to her. Her own evidence would indicate this. However, there is no suggestion that any relevant decision of Mr Lee was made while he was intoxicated; or indeed was somehow the product of alcohol dependence. Mr Lee's alcohol abuse and dependence are described by the medical experts as episodic.

- [236] The submissions made on Mr Lee's behalf also rely upon the view of the medical experts that a person without medical training, but in a personal and familiar relationship with Mr Lee, would have been aware of the presence of "a grandiose and entitled affect". One matter relied upon in the evidence, apparently as displaying such an affect, was that, on occasion, Mr Lee was said to dress bizarrely in traditional Chinese dress. Mr Chuan (whose evidence I accept) gave evidence that he "caught up with Mr Lee on average every six months"²⁹⁴; and that he would wear traditional Chinese robes²⁹⁵. Mr Samaratunga gave evidence of two occasions on which Mr Lee dressed in "opulent traditional Chinese dress, like a Chinese Emperor"²⁹⁶; for one of which, he said Ms Chai was present²⁹⁷. The submissions for Mr Lee do not identify anything else said to demonstrate the presence of a grandiose and entitled affect. This evidence provides at best a very flimsy basis for concluding that by March 2001, Ms Chai should have been aware of the presence in Mr Lee of a grandiose and entitled affect. Nevertheless, the medical experts considered that in that period, a presence of such an affect is something of which a person in a personal or familiar relationship with Mr Lee would have been aware²⁹⁸.
- [237] The grandiose and entitled affect appears to have been a symptom of Mr Lee's personality disorder²⁹⁹. There is no positive evidence that such an affect was one that would have made it sufficiently evident to Ms Chai that Mr Lee was subject to a "special disadvantage". The most that is said by the medical experts is that it is unlikely that a person in such relationship with Mr Lee would have had "a sophisticated understanding of the nature of a Personality Disorder"³⁰⁰. It seems to me that the evidence is not sufficient to satisfy the test formulated by Mason J in *Amadio*, referred to previously.
- [238] I have previously rejected Ms Chai's evidence that she did not know prior to 2002, that Mr Lee was taking medication. However, I am not prepared to find that she knew this prior to the purchase of the unit. The affair appears to have commenced late in March 2000. Prior to that, such contact as had occurred between Mr Lee and Ms Chai was unlikely to have occurred in circumstance when Mr Lee was obviously taking medication.
- [239] Between the time when the affair commenced, and the completion of the contract for the purchase of the unit, there were periods when Mr Lee was in Taiwan and Ms Chai was not. They did not live together in this period. However, there was at least one occasion in this period when they spent a night together. I would not be prepared to make a positive finding, on this basis, that by the time the purchase of the unit was completed, Ms Chai knew that Mr Lee was taking medication. Mr Lee

²⁹⁴ CFI 103 para 4.

²⁹⁵ CFI 103 para 11.

²⁹⁶ CFI 96 para 13.

²⁹⁷ T5-25/15-35. His oral evidence suggested that he dressed in that fashion at restaurants on more than one occasion.

²⁹⁸ Ex 1, tab 2, p 2, para 3; p 4, para 10.

²⁹⁹ Ex 1, tab 2, para 2(a) and (b); p 2, para 3; p 4, para 10.

³⁰⁰ Ex 1, tab 2, p 2, para 3; p 4, para 10.

gives evidence to the contrary; but for reasons previously given, I am not prepared to act on this evidence.

[240] However I accept that, by the time of the purchase of the Porsche, Ms Chai knew that Mr Lee was on medication. By this time, Ms Chai had been living in the unit for a period of about nine months, and for a substantial part of the time Mr Lee had stayed there with her. It seems to me inherently probable that she knew that the medication was for a mental condition. There is, however, no evidence to show that she then knew that the condition would seriously affect Mr Lee's ability to make a judgment as to his own best interest.

[241] The question remains whether her knowledge Mr Lee was being treated for a mental condition meant that she was aware of the possibility that his condition might seriously affect his ability to make a judgment as to his own best interests; or that the fact that she knew he was taking medication for a mental condition would raise that possibility in the mind of any reasonable person.

[242] On these findings, Ms Chai knew that Mr Lee was being treated for a mental condition. She was therefore not in the position of knowing that he had a mental condition, which was not being treated. The evidence does not indicate that the treatment was ineffective or inadequate; rather the contrary. There was no evidence to show that Ms Chai knew, or had reason to suspect, that Mr Lee suffered additionally from a personality disorder, not subject to treatment, and which affected his ability to make a judgment in his own best interest. No fact has been identified which might be said to have raised that possibility in the mind of any reasonable person. The surrounding circumstances, as demonstrated by the evidence, do not seem to support it. Mr Lee was in this period, engaged in a development project. Although he was generous to Ms Chai, he had also been generous to his daughter. An analysis by reference to the position of a reasonable person does not lead to a different result.

[243] I would not, therefore, be prepared to find that, if Mr Lee were subject to a special disadvantage, that was sufficiently evident to Ms Chai to make it unconscientious for her to retain the Porsche.

Conclusion

[244] I would dismiss the Plaintiff's claim. To the extent necessary, I would give judgment for the defendant on the counter-claim. I shall hear submissions on the orders to be made, and on costs (orders were made after further submissions).