

SUPREME COURT OF QUEENSLAND

CITATION: *Australia Yinmore Holding Pty Ltd & Ors v Liu* [2018]
QSC 76

PARTIES: **AUSTRALIA YINMORE HOLDING PTY LTD**
ABN 137 721 870
(first applicant)
YUNNAN YINMORE GROUP CO LTD
(second applicant)
JINQUAN LI
(third applicant)
v
CHUNQING LIU
(respondent)

FILE NO: BS6500 of 2016

DIVISION: Trial Division

PROCEEDING: Trial

DELIVERED ON: 20 April 2018

DELIVERED AT: Brisbane

HEARING
DATES: 16-20 October 2017

JUDGE: Mullins J

ORDER:

- 1. It is declared that the respondent holds 150,000 shares in the first applicant on a resulting trust for the second applicant.**
- 2. The respondent must forthwith cause the shares referred to in the preceding order to be transferred to the second applicant.**
- 3. It is declared that the respondent holds the real property described as Lot 306 on Survey Plan 136028 in the County of Canning, Parish of Maroochy and situated at 9 Mizzen Place, Twin Waters in the State of Queensland on a resulting trust for the first applicant.**
- 4. The respondent must forthwith deliver the certificate of title for and transfer the real property referred to in the preceding order to the first applicant.**
- 5. It is declared that the respondent holds the Toyota Camry motor vehicle registration number 684RSV on a resulting trust for the third applicant.**

6. **The respondent must forthwith deliver possession and transfer the registration of the Toyota Camry motor vehicle to the third applicant.**
7. **Any stamp duty and other expenses associated with the respective transfers in the preceding orders must be borne by the respective transferees.**
8. **The counterclaim is dismissed.**
9. **Liberty to apply on two days' notice in writing to the other party.**

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – IMPLIED TRUSTS – RESULTING TRUSTS – REBUTTAL OF IMPLICATION – INTENTION TO BENEFIT – where the respondent was sent by the Chinese parent company from China to work on a project in Queensland in which the Chinese company invested – where the Chinese company set up an Australian company as a vehicle for conducting its investment in the project – where the respondent was employed by and allotted shares in the Australian company – where the respondent did not pay the allotment price for the shares – where the Chinese company provided the funds held by the Australian company – where the Chinese company claimed the respondent held his shares in the Australian company on trust for the Chinese company – whether the respondent can displace the presumption that he holds the shares in the Australian company on a resulting trust for the Chinese company

EQUITY – TRUSTS AND TRUSTEES – IMPLIED TRUSTS – RESULTING TRUSTS – REBUTTAL OF IMPLICATION – INTENTION TO BENEFIT – where real property was purchased with funds provided to the Australian company by the Chinese company – where the real property registered in the respondent's name – where the respondent asserts the intention of a director of the Australian company was to confer the ownership of the real property on the respondent as part of his compensation for relocating from China to Australia to work for the Australian company – whether the respondent can rebut the presumption that he holds the real property on a resulting trust for Australian company

EQUITY – TRUSTS AND TRUSTEES – IMPLIED TRUSTS – RESULTING TRUSTS – REBUTTAL OF IMPLICATION – INTENTION TO BENEFIT – where funds were deposited into the respondent's bank account by the third applicant to purchase real property – where the third applicant instructed the respondent to use the remaining funds to purchase a motor vehicle – where the respondent registered

the vehicle in his name – where the respondent was in possession of and used the vehicle – where four years later the relationship between the third applicant and the respondent broke down – whether the third applicant intended to give the vehicle to the respondent – whether the respondent can displace the presumption that he holds the vehicle on a resulting trust for the third applicant

Foreign Acquisitions and Takeovers Act 1975 (Cth), s 26A, s 38

Calverley v Green (1984) 155 CLR 242; [1984] HCA 81, followed

Huang v Fu [2011] NSWSC 316, considered

Ikeuchi v Liu [2001] QSC 054, followed

Nelson v Nelson (1995) 184 CLR 538; [1995] HCA 25, considered

COUNSEL: R J Douglas QC for the applicants
D A Savage QC and I A Erskine for the respondent

SOLICITORS: HopgoodGanim Lawyers for the applicants
Creagh Weightman for the respondent

- [1] The third applicant Mr Li is a citizen of the People’s Republic of China (PRC) and was a founder and director of the first and second applicants to which I will refer respectively as AYH and YYG. Mr Li’s wife (whose name is Yinghua Liu, but to whom I will refer as Mrs Li) is the older sister of the wife of the respondent Mr Liu. Mr Li and Mr Liu describe themselves as brothers-in-law. YYG was incorporated in the PRC in 1997.
- [2] As at September 2008, Mr and Mrs Li and Mr and Mrs Liu lived and worked in Kunming in Yunnan Province in the PRC. Mr and Mrs Liu lived with their son who was born in 1995. Mr Li on behalf of YYG inquired of Mr Liu in September 2008 whether he was willing to go to Australia to work in the business known as the Cow Candy project in which YYG was investing. It is common ground that Mr Liu travelled to Australia on 16 October 2008 as a result of the request made by Mr Li. Mr and Mrs Liu’s son came to live in Australia in 2012. Mrs Liu came to live permanently in Australia in July 2015.
- [3] It is also common ground that a house property at Mizzen Place, Twin Waters was registered in Mr Liu’s name in August 2009, but he did not use his own funds for the purchase. AYH was incorporated in Australia on 17 June 2009 and Mr Liu was allotted 110,000 shares in June 2009 and a further 40,000 shares on 1 December 2009 for which he made no payment. A Camry motor vehicle was registered in Mr Liu’s name on 4 November 2011, when it was purchased by him using funds of Mr Li.

- [4] AYH seeks a declaration that Mr Liu holds the Mizzen Place property as trustee for it and an order in its favour for the transfer of the property. YYG seeks a declaration that Mr Liu holds the shares in AYH as trustee for YYG and an order in its favour for the transfer of those shares. Mr Li seeks a declaration that Mr Liu holds the Camry car as trustee for Mr Li and an order that Mr Liu hand over possession and transfer the registration of the Camry to Mr Li.
- [5] Mr Li counterclaims for declarations that he is the legal and beneficial owner of the Mizzen Place property, the 150,000 ordinary shares in his name in AYH and the Camry car.
- [6] Mr Liu seeks to rebut the presumption of a resulting trust in respect of the Mizzen Place property and the shares in AYH on the basis that he travelled to Australia to work on the Cow Candy project as a result of promises or representations by Mr Li that in the event Mr Liu and his family left Kunming altogether to go and live on the Sunshine Coast in Australia to assist Mr Li with the Cow Candy project, Mr Li would provide a home absolutely for Mr Liu and his family, as well as shares in AYH and other companies in the YYG group to alleviate the Liu family financial security concerns and induce Mr Liu to accept the proposal to migrate to Australia. Mr Liu's pleaded case to rebut the presumption of the resulting trust in respect of the Camry car is that at the time of the purchase of the car Mr Li gave it absolutely to Mr Liu or, alternatively, as part of Mr Li's compensation for remaining in Australia with his family.
- [7] Mr Liu also seeks to rely on discretionary considerations to persuade the court not to grant the equitable relief sought by the applicants.
- [8] The issues in the trial are:
- (a) was AYH the source of the funds for the purchase of the Mizzen Place property?
 - (b) was YYG the source of the payment for the shares in AYH allotted to Mr Liu?
 - (c) if AYH provided the funds for the purchase of the Mizzen Place property, can Mr Liu rebut the presumption that he holds the Mizzen Place property on a resulting trust for AYH, ie was there a gift of this property to Mr Liu?
 - (d) if YYG paid for the shares in AYH allotted to Mr Liu, can Mr Liu rebut the presumption that he holds those shares on a resulting trust for YYG?
 - (e) can Mr Liu rebut the presumption that he holds the Camry car on a resulting trust for Mr Li?
 - (f) if the applicants succeed in establishing the respective entitlements they claim, is there any impediment to the granting of the relief sought?

The pleadings

- [9] Witnesses were cross-examined by reference to the contents of the pleadings and submissions were made ultimately about the nature of the respective parties' cases by reference to how the allegations were pleaded.

- [10] The pleadings that were current at the time of the trial were the amended statement of claim filed on 9 January 2017 (the statement of claim), the amended defence and counterclaim filed on 6 March 2017 (the defence and counterclaim) and the amended reply filed on 29 March 2017 (the reply).
- [11] The original statement of claim did not include the claim in respect of the Camry car. The amendments to the statement of claim that included the allegations in respect of the Camry car were made at the same time as the amendments that joined Mr Li as the third applicant.

The witnesses

- [12] The evidence-in-chief of the witnesses was by affidavit, subject to one exception. The evidence of each of Mr Li and Mr Liu was directed to be given by affidavit, but for issues of contention which could be given orally. At the outset there were many objections to parts of the affidavits. The parties ultimately resolved those objections by agreement and the affidavits have been marked accordingly to reflect those parts struck out by agreement. Most of the witnesses were Mandarin speakers. Interpreters were required for the evidence of Mr and Mrs Li, Mr Wu and Mrs Liu. There are issues of credit to be decided in respect of some aspects of the evidence. Even where a witness gave evidence with the assistance of an interpreter, there were opportunities to observe the witness' reaction to the cross-examination. Rather than make general comments about each of the witnesses, I will refer to the various considerations that have assisted in my resolution of matters of credit, as I deal with the areas of contentious evidence.

The Cow Candy project

- [13] YYG in 2007 became interested in a project under construction by Biocane Limited which was a pilot plant for processing sugarcane into animal fodder. In July 2008 YYG decided to invest in the project and purchased shares in Biocane. YYG's initial investment was AUD\$2m. Mr Suming Yuan (who for convenience is referred to in the affidavits and was referred to throughout the trial as Suming) had been involved in researching the Cow Candy project and was one of YYG's employees who travelled to Australia in late 2008 to work on it.
- [14] In March 2009 YYG applied to the Department of Commerce of Yunnan Province to establish AYH in Australia. On 28 April 2009 YYG obtained the approval from the Yunnan branch of the State Administration of Foreign Exchange for establishing AYH and approving the purchase of USD\$10m in foreign exchange for the cash investment in AYH.
- [15] After the plant was constructed at Bli, the project had financial difficulties in 2010 and the Australian personnel left. The Cow Candy project ultimately was unsuccessful in Australia, Biocane was liquidated commencing from January 2013 and the liquidation took about a year. The project is ongoing in China.

The relationship between Mr Li and Mr Liu before this project

- [16] Mr Liu considered that he and Mr Li had a close family relationship developed since the 1980s which involved mutual trust and confidence. Mr Liu commenced working in the YYG group in 1999 at the invitation of Mr Li. Mr Li believed that Mr Liu respected him. Mr Li was older than Mr Liu, more successful in business than him, and occupied a higher position in YYG than him (at Transcript 2-70).

The meetings between Mr Li and Mr Liu before Mr Liu came to Australia

- [17] No record was made by Mr Li of the conversation he had in his office with Mr Liu in which he raised the prospect of Mr Liu going to Australia. In fact, it was not until Mr Li saw Mr Liu's affidavit in 2016 that he was reminded about the occasion (at Transcript 2-62). Suming had been unsuccessful in finding another staff member to work in Australia with him on short notice, so Mr Li suggested they ask Mr Liu. According to Mr Li, he met with Mr Liu in the presence of Suming in about September 2008 and said to him (at Transcript 1-33):

“The group company has already invested in Australia. We need to send a person to this project to work. This project is to process sugarcane ... to the fodder for cattle and I think this project is very prospective. Are you willing to come to work in this project?”

- [18] Mr Li said that Mr Liu responded that he was willing to go to work in Australia. Mr Li told him that he did not need to respond immediately, but he should discuss it with his wife. Mr Liu and Suming left Mr Li's office together.
- [19] About one or two weeks later, Mr and Mrs Liu visited the home of Mr and Mrs Li one evening unannounced. They sat around the dining table and for about half an hour discussed Mr Liu going to work in Australia. Mr Li said (at Transcript 1-35) that Mr and Mrs Liu said they were willing for Mr Liu to go to Australia to work. Mr Li explained the project to them, Mrs Liu inquired whether there was a family reunion holiday, and Mr Li responded that there would be a holiday which would be five days, according to Chinese law. Mr Li said the possibility of Mrs Liu or their son moving to Australia was not raised.
- [20] According to Mr Li, in both the meeting he had in his office with Mr Liu in the presence of Suming and the meeting at his home with Mr and Mrs Liu, nothing was discussed concerning the transfer to Mr Liu of property, shares or a car.
- [21] According to Suming, at the meeting that he and Mr Li had with Mr Liu in the middle of September 2008 at which no one else was present, Suming introduced the project and answered Mr Liu's questions about where the Sunshine Coast was and that he would be required to start in one or two months. Suming recalled that Mr Li asked Mr Liu to travel to Australia for the project. Suming stated at paragraph 31 of his affidavit filed on 16 May 2017:

“During the talk in my presence, Mr Li did not ask Chunqing or his family to migrate to Australia, and there was no conversation about his salary or any other rewards for him to work for the Biocane project in Australia.”

- [22] Mrs Li recalled that around September to October 2008 Mr and Mrs Liu came to her home to tell Mr Li and her that they were willing to have Mr Liu work in Australia and they did not say anything else. She stated at paragraph 27 of her affidavit filed on 18 May 2017:

“My sister requested that Chunqing LIU could be transferred back to work in China after two years’ expatriate assignment, while Chunqing LIU requested that he could have one to two times of home leave a year. The Couple had never mentioned that they required financial security for working in Australia. At that time, my husband and I did not discuss with the Couple about gifting them housing, car or company shares as the so-called incentive package for their family to migrate to Australia, as the arrangement was only for Chunqing LIU to work in Australia for a period of time rather than for his whole family to migrate.”

- [23] When Mrs Li was cross-examined, she could recall (at Transcript 3-27) that it was raised and discussed before Mr Liu left for Australia that Mr Liu wanted to have one holiday to China and Mrs Liu two holidays to Australia, but was not sure if it was discussed at the meeting at her home with Mr and Mrs Liu when her husband was present.

- [24] Mr Liu dealt with the two meetings with Mr Li about working in Australia in his affidavit affirmed on 1 August 2016 (the first affidavit). As to the first meeting which Mr Liu said occurred on or about 19 September 2008 when Mr Li sent for him during a YYG board meeting at the offices of YYG:

“37 During that meeting, Mr Li stated to me in front of the meeting that he desperately needed someone reliable and suitable to work on an innovative project they had just invested in on the Sunshine Coast in Australia.

38 He said that he was expecting that I could take up the role as a pioneer in development of the project and would move to Australia with my family.”

- [25] Mr Liu dealt with the meeting that he and his wife had at the home of Mr and Mrs Li at paragraph 42 of the first affidavit:

“I spoke to Mr Li a number of times before making the final decision to leave for Australia. Additionally, before making the final decision, my wife and I attended at the home of Mr Li and we talked together with Mr Li and his wife. Mr Li assured my wife and I that he would take care of everything and we would not have to worry about finances, as he would provide a home for me and my family as well as shares in various companies in YYG group to ensure our financial security. Mr Li also said he would give me a car which he subsequently did (a Toyota Camry). Only after this talk did my wife take great comfort in making the decision to prepare to move the family to Australia.”

- [26] During cross-examination, Mr Liu confirmed (at Transcript 4-18) that at the meeting that he and his wife had at the home of Mr and Mrs Li, the provision of a car to him was

discussed. When it was drawn to Mr Liu's attention that was not referred to in paragraph 8 of the counterclaim, he responded (at Transcript 4-18) that was a mistake and stated "in my mind, this is a parcel: a house, a car and, of course, the shares".

[27] The particulars of when Mr Li made the representations are set out in paragraph 8(d) of the counterclaim:

"The Mr Li representations were made orally by Mr Li (on behalf of himself, AYH or YYG) to the respondent in or about between September 2008 and June 2009:

- (i) in discussions between Mr Li and Mr Liu on divers occasions in September 2008;
- (ii) at a meeting in September 2008 – October 2008 between Mr and Mrs Liu and Mr and Mrs Li at the home of Mr and Mr Li in Kunming;
- (iii) at a meeting between Mr Li and Mr Liu at the Grand Mercure, Twin Waters on or about 16 June 2009;"

[28] During cross-examination Mr Liu conceded (at Transcript 4-16) that the particulars were not correct, as the representation was made by Mr Li first at "the two couple meeting" and repeated at a meeting between Mr Liu and Mr Li at the Grand Mercure on or about 16 June 2009. Mr Liu stated at paragraph 50 of the first affidavit that Mr Li said on the latter occasion "... don't worry about moving your family to Australia, I will manage to give you a house absolutely for you and your family's own use and shares also in my companies".

[29] Mr Liu stated at paragraph 44 of the first affidavit that based on the assurances by Mr Li and in order to support Mr Li's cause and to consolidate their family relationship, "we agreed on his request and commenced making arrangements to move to Australia".

[30] Mrs Liu in her affidavit affirmed on 1 August 2016 referred to the visit by her husband and her to the home of Mr and Mrs Li in September 2008 and stated at paragraph 20:

"During that meeting, Mr Li assured my husband and me that he would take care of everything and we would not have to worry about finances, as he would provide a home for us as well as shares in various companies in YYG group to ensure our financial security."

[31] Mrs Liu explained (at Transcript 4-71) that she and her husband were not sure about whether he would go to Australia and that was why they visited Mr and Mrs Li. It was at the end of the meeting, before they left, that Mr Liu indicated to Mr Li he was prepared to go to Australia.

[32] When Mrs Liu was cross-examined on whether anything was said in that conversation about her son and her living permanently in Australia, she responded (at Transcript 4-72):

“Definitely mentioned. During the conversation or during the process, Mr Li mentioned that – about the project, and he hoped that your family – if you accept this job, your family would consider to travel to Australia. So from my understanding, if he says ‘your family’, that definitely includes me and my son.”

- [33] When Mr and Mrs Liu met with Mr and Mrs Li on September 2008, Mrs Liu’s retirement date was in August 2016. It was her intention at that stage to continue working in China to ensure that she received her retirement benefits. Mrs Liu acknowledged in paragraph 12 of her affidavit affirmed on 7 September 2017 that she “did not consider my son’s education in Australia when we made the initial decision but only decided that he would come to Australia later”. This can be contrasted with her assertion in evidence (at Transcript 4-74) that it was decided at the time they agreed to travel to Australia that “we have already decided for him to finish his middle school and start his high school in Australia” which suggests caution in approaching Mrs Liu’s evidence.
- [34] It is of note that Mr Liu was the only person at the two couple meeting in September 2008 who gave evidence that Mr Li discussed provision of a car with him.

Purchase of the Mizzen Place property

- [35] When Mr Liu arrived in Australia, he and Suming stayed in an apartment at Grand Mercure, Twin Waters. They opened an account with Westpac in their joint names and \$49,982 was transferred to the account by YYG from its Hong Kong office. Suming had a health issue in May 2009 and returned to Kunming accompanied by Mr Liu.
- [36] A critical document in the applicants’ case was the report in typewritten Mandarin by Suming to the board of directors of AYH that was made on 20 May 2009 (exhibit 7). The translation of the report shows it recorded:

“According to the Group’s vision of ‘Going Global’ and its investment strategy in Australia, apart from actively supporting and advancing the construction of the Cow Candy Project, we have been collecting and assessing projects related to comprehensive processing agri-products, and we hereby developed the Australia strategic investment plan.

All the staff dispatched to work in Australia are living in the apartments of Grand Mercure Hotel nearby the Cow Candy Project. The design, positioning and function of this type of serviced apartments is mainly for use as temporary accommodation for family vacations, which is costly and inconvenient, particularly, the hotel could not stand the traditional Chinese cooking style, making it unsuitable for use as our long-time staff accommodation and office.

In consideration of the need of the Group to conduct investment and long-term development in Australia, and to advance the business development in Australia, I suggest the following:

1. To incorporate a wholly-owned subsidiary company in Australia as the platform for investment and management of projects in Australia. The way of establishment, corporate governance structure and registered capital etc. should be decided according to Australian law and the actual need of the company's development.
2. To look for and select a property nearby the Cow Candy Project as soon as possible which can be used as accommodation for the staff assigned by the Group to the Cow Candy Project and the personnel visiting Australia for project inspection as well as office premise. We learned that it will cost \$1-\$1.2 million to purchase a second-hand property containing 4-6 bedrooms and 1-2 living rooms (to be used as office).

Please kindly advise whether the above suggestions are appropriate.”

[37] Mr Wu on behalf of the board of AYH endorsed exhibit 7 on 21 May 2009 in handwritten Mandarin with an approval to establish:

“... a wholly-owned subsidiary company of the Group, and agree to buy a property within AUD\$1.2 million to meet the needs for staff accommodation and temporary office. Suming should be responsible for implementation of the two matters mentioned above.”

[38] Mr Wu confirmed that he visited Suming who was sick at home and received the report from him on the day it was dated. He recorded his approval the next day and then took the report endorsed with his approval to Mr Li's office where he showed it to Mr Li and the document was filed in the office of YYG.

[39] On the basis that Mr Liu had never seen this report before it was disclosed in this proceeding, Mr Liu asserted his belief the report with the endorsed approval was a fabrication. Mr Li denied the suggestion put to him in cross-examination that the report was not produced in 2009 and confirmed Mr Wu's evidence that Mr Wu gave him the document in Mr Li's office after Mr Wu had signed it. Suming's evidence on the preparation of the document and handing it to Mr Wu was given in a matter of fact way and was convincing. I therefore accept the evidence of Suming, Mr Wu and Mr Li about how this report was prepared and approved.

[40] It is apparent from the steps that were underway in obtaining Chinese Government approval to establish AYH that commenced in March 2009 that the report summarises the proposal in relation to that company that was already on foot, but the report also deals with the proposal to purchase a residential property that could be used as an office and to accommodate staff.

[41] Mr Liu and Suming went searching for a property on the Sunshine Coast. It is apparent from the terms of the report dated 20 May 2009 that the search began before that report was written. That was consistent with Mr Liu's recollection that between April and June 2009 they carried out “general investigations into the property market on the Sunshine Coast”.

- [42] The contract to purchase the Mizzen Place property was dated 10 July 2009 and showed Mr Liu as the purchaser. Mr Liu did not have the funds to purchase a house property. The deposit was paid from funds in the Westpac bank account in the names of Mr Liu and Suming. Suming and Mr Liu were introduced by the agent to a solicitor Ms Lever who acted in the conveyance on behalf of Mr Liu.
- [43] On her first meeting with Suming and Mr Liu, Ms Lever discussed the Foreign Investment Review Board requirements for purchasing residential property in Australia and her advice was the contract to purchase the property should be made subject to the buyer obtaining FIRB approval which usually took 14 days. After discussing the proposed purchase with a representative from the FIRB, Ms Lever's advice sent in an email to Mr Liu dated 7 July 2009 was then that the property should be purchased in the name of the person who held a four year visa known as a 457 visa (which was Mr Liu). It may be that Mr Liu did not receive the email, but Ms Lever repeated that advice at a meeting she had with Suming and Mr Liu. The contract for the purchase of Mizzen Place was signed by Mr Liu as purchaser after that advice was received. (It is submitted in the respondent's written submissions that Ms Lever advised the representatives of the applicants that to purchase the property in another's name was unlawful, but there was no evidence that advice was given in those terms by Ms Lever.)
- [44] Amongst the file kept by AYH relating to the property, there was a handwritten note by Mr Liu in Mandarin, the English translation of which is:
- “Australia Yinmore Holding Pty Ltd Property Purchase Expenditure/Major Event Record:
1. On 9 July, 10 July, made an offer and signed the contract, and paid L.J. Hooker a deposit of A\$2,000.00.
 2. On 20 July, 21 July, organised a check from Westpac and paid L.J. Hooker a (second) deposit of A\$38,000.00.
- Total amount of the two payments: A\$40,000. Both were remitted from Westpac.”
- [45] Mr Liu asserts (at Transcript 4-40) that was his personal note which was taken by AYH without his consent, but does not dispute that he wrote the note. When cross-examined on the reference in the note to AYH's purchase of the property, Mr Liu's unconvincing explanation (at Transcript 4-41) was that he did not mean that AYH was buying the property, but was paying the deposit.
- [46] On 15 July 2009 YYG deposited \$1,992,992 into the ANZ bank account of AYH which was the source of the funds of \$1,025,154.11 that was transferred to Ms Lever's trust account for the settlement of the purchase. Despite YYG being the ultimate source of the funds for the purchase of the Mizzen Place property, it is apparent that, as between YYG and AYH, the deposit and the balance purchase price were treated as being provided by AYH. Mr Liu signed the declaration for stamp duty purposes that he purchased the property as his principal place of residence which would have resulted in a stamp duty concession on the transfer.

- [47] Mr Liu moved into the Mizzen Place property after the purchase was completed. According to Suming, some of the directors and executives of YYG and all of AYH's employees have worked and lived in the Mizzen Place house. Suming lived at Mizzen Place when he was on the Sunshine Coast. The first time he stayed there was about three months after it was purchased, when he returned to Australia from China. Suming described (at Transcript 3-15) Mr Liu as occupying a single room in the Mizzen Place property "as other employees of YYG did". Suming recalled that another employee Ye Shi came to live in that property from October 2009. ASIC was notified by form 484 signed by Mr Liu on behalf of AYH that AYH's principal place of business was at Mizzen Place effective from 1 December 2009.
- [48] Mr Ang Liu (Ang Liu) was appointed as the deputy general manager of AYH by the board of YYG in August 2011 and came to Australia in September 2011.
- [49] Starting from 1 September 2011, those on the AYH staff list who lived at Mizzen Place had to pay an accommodation fee of \$100 per month to be used for maintenance of the office. On 13 April 2012, Mr Liu paid \$200 as the accommodation fee for September and October 2011.
- [50] The incorporation of AYH was undertaken by Ms Jie (Catherine) Yang, the principal of ABC Accounting Solutions, on instructions from YYG director Xie Bing. Ms Yang prepared the financial statements and taxation returns for AYH from and including the 2009-2010 year, but it was not until 2012 that Ms Yang had enough information to prepare the returns.
- [51] Ms Yang stated that on numerous occasions she had discussions with Mr Liu in the presence of other directors or employees of AYH regarding the house at Mizzen Place and on no occasion did he tell her that he claimed the house had been given to him by Mr Li or he owned the house himself. On other occasions when Ms Yang had discussions with Suming in the presence of Mr Li and Suming told her that it was AYH's house and would need to be transferred into AYH's name in the future, Mr Liu did not claim the house was his own.
- [52] It was Ms Yang who decided that it was not proper accounting to record the house in the balance sheet of AYH as an asset, as there was no document showing that AYH owned it, so she resolved to record it as "Loan to Chunqing" and set up an account called 1-3010. In the 2011-2012 year, Ms Yang added the amount of the cost of a Toyota Kluger motor vehicle that had been purchased in the name of Suming to the 1-3010 account and changed the name of the account to "Loan to A" where "A" stood for "Assets".
- [53] Ms Yi (Tina) Tian had arrived in Australia in 2008, studied at university and graduated in 2011. She obtained a bridging visa and was employed by AYH. She arrived at Mizzen Place on 19 December 2011. Ms Tian's formal contract with AYH started on 1 April 2012. Her role was to act as the company accountant and managed the company's documents.

[54] Mr Liu and Ms Tian met with the new accountants for AYH on 17 May 2013. One of the new accountants was Mr Qing (Scott) Lai. Mr Lai stated in paragraph 11 of his affidavit that at this meeting Mr Liu said to him words to the effect of “the parent company had loaned the money to AYH and it had paid for the House, but it was a quick transaction and we could not register the house in AYH’s name in the time available so it was bought in my name. I was the only one who could hold it legally at the time”. Mr Liu asserted in paragraph 43 of his affidavit affirmed on 7 September 2017 that he only said the company paid for the property, but did not say anything further as he “did not feel it was appropriate to discuss my arrangement with Mr Li with others”.

[55] Ms Tian prepared minutes of the 17 May 2013 meeting which she said Mr Liu amended, but Mr Liu (at Transcript 4-47) denied amending the minutes. Irrespective of whether the draft minutes had been amended by Mr Liu, it was the amended version that was circulated amongst staff of AYH. In relation to “the setting up of accounts in AYH’s financial statements”, the minutes record that Mr Lai suggested the following:

“V. About the management of company assets (property, vehicle, etc.) in individual’s name

What can be ascertained is that although the property and the vehicle of the company is currently in individual’s name, they are actually purchased with the funds of the company and are owned by the company. Nonetheless, documents proving that the purchases were made by individuals on behalf of the company are needed and to be used as a basis of the repayment for the company loan by the individual after the sale of the property and the vehicle in the future. As for costs related to the property maintenance, they can be paid by the company and included in non-deductible items, but no GST should be claimed to avoid FBT-related issues and risks. Alternatively, the company can enter into a lease agreement with the individual, where the company pays for costs related to the property usage and maintenance, and the rent offsets against the interest payable of the company loan by the individual. In this case, when the individual tax return is lodged, the property will be treated as investment, and in circumstances when the individual receives no rental income from the property, relevant tax obligation can be exempted. This approach is workable but it is quite complicated. The decision is up to the company and the individual to make, depending on the situation and the complexity of the execution.”

[56] Mr Liu said (at Transcript 4-49 to 4-50) that the minutes were wrong when they referred to the Mizzen Place property being owned by AYH, but he did nothing about it, because it was an accounting issue and beyond his control or authority, and the wording of the minutes did not affect his ownership of the property. Mr Liu expressed a similar attitude (at Transcript 4-53) to the treatment of the property in AYH’s financial statements for the year ended 30 June 2013 (that he signed on 16 August 2013) that was covered under “Loan to A” meaning loan to assets.

[57] The evidence of all the accountants shows that the registration of the Mizzen Place property in Mr Liu’s name presented a problem for AYH in dealing in its records with transactions associated with that property. Mr Lai is an independent accountant whose

evidence was not seriously challenged in cross-examination as to what he recalled Mr Liu told him about the purchase of the Mizzen Place property which was not consistent with the claim advanced by Mr Liu in this proceeding that it was the intention of Mr Li on behalf of AYH and/or YYG that the Mizzen Place property be given to him at the time it was purchased in his name. Mr Liu's explanations for allowing the minutes of the meeting on 17 May 2013 and AYH's financial statements for the year ended 30 June 2013 and following years to assert a position in relation to the Mizzen Place property that differed from his claim of beneficial ownership are unconvincing.

- [58] Ang Liu explained that when Ms Tian was applying for a work visa in early 2014, AYH was required to submit evidence of AYH's office address. Ang Liu instructed Ms Tian to prepare a lease agreement which was signed by Mr Liu in February 2014 solely for the purpose of assisting Ms Tian with her application. Ang Liu noted that AYH never paid the rents specified in that lease agreement to Mr Liu or any other person.
- [59] Ms Tian's evidence was consistent with that given by Ang Liu on this topic. After Ms Tian was advised by Ms Yang on what lease agreement was required to support her application for a visa, Ms Tian searched the internet for a template of a lease and drafted a lease of Mizzen Place based on the template. Ms Tian sent her draft to Ang Liu who asked her to send it to Mr Liu for review which Ms Tian did by email on 28 January 2014. Ms Tian inserted the commencement date as 1 October 2009, as she thought this would prove the company had been in existence since then. After checking further with Ms Yang to ascertain there was no tax risk to AYH or Mr Liu, Ms Tian emailed the lease to Ang Liu for his signature and, when it was returned, had Mr Liu sign it. Ms Tian states the lease was used only for the proof of the office address of AYH for her work visa.
- [60] Mr Liu said that in November 2011 after Mr Li purchased the house property in Mr Li's name at Blue Water Court, Twin Waters, Mr Li asked him to move into it and look after it which Mr Liu did. Mr Li asserted that he did not ask Mr Liu to live in the Blue Water property, but assumed his wife did and did not object to it. Mr Liu's son also lived at the Blue Water property.
- [61] Mr Liu exhibited to the first affidavit the lease agreement which he said he then prepared for the Mizzen Place property. It is for a term of 10 years commencing on 1 October 2011 for a monthly rental of \$4,000. After making some relevantly minor corrections to his affidavits at the commencement of his evidence-in-chief before confirming the information in the affidavits was true to the best of his knowledge and belief, Mr Liu then conceded in cross-examination (at Transcript 4-26) that the exhibited lease agreement was not the one he had prepared, but one that had been sent to him by email by Ms Tian in 2014 in which it is apparent from a comparison of the documents he had changed the dates from 2009 to 2011. He said he made a mistake in confirming that his affidavit was true and correct in this respect, as he had realised that the wrong lease agreement was exhibited to his affidavit. The mistake in not making the disclosure about the wrong lease document of which error Mr Liu said (at Transcript 4-27) he identified in his affidavit before the commencement of his evidence did not reflect at all well on Mr Liu's credit. His explanation for altering the dates in the document sent to him in 2014 by Ms Tian to produce the lease exhibited to his first affidavit which was due to difficulties in locating what he described as the real 2011

document on his computer is not credible at all and I reject it. If it were truly the case that Mr Liu had been unable to locate the lease agreement he said he prepared in 2011, it was open to him to explain that in his affidavit. This attempt by Mr Liu to make up a document and produce it to the court as favourable evidence reflects very poorly on his credit and I take that into account in assessing other aspects of his evidence.

- [62] Mr Liu asserted in paragraph 75 of his first affidavit that when he discussed the lease he had prepared with Mr Li, Mr Li said there was no need for a lease agreement as the rental payable for the Blue Water property would offset the rental payable to AYH for the occupation of the Mizzen Place property. Mr Li denied that he and Mr Liu had ever had any conversations about Mr Liu and his son living in the property and they never had any conversations about rent or maintenance costs of the property. In view of Mr Liu's creation of a lease agreement based on a 2014 document that was not in existence in 2011, I reject Mr Liu's evidence about these conversations he asserts he had with Mr Li about such a lease agreement for the Mizzen Place property and the basis of the occupation by his son and him of the Blue Water property.
- [63] Mr Liu did not pay any of the outgoings such as rates, insurance, or repairs and maintenance for the Mizzen Place property, but asserted (at Transcript 4-23) that those expenses were paid by AYH, because the residence was used by AYH.

Allotment of shares in AYH

- [64] The Yunnan Department of Commerce gave formal approval on 5 May 2009 to YYG to establish AYH as a wholly owned company with a registered capital of USD\$1m and an investment amount of USD\$10m. The business scope was described as "Plantation of flowers, fruit and vegetables; livestock breeding, fodder growing and development; and agricultural development."
- [65] The nine directors of YYG resolved at a board meeting on 1 July 2009:
- “1. To ensure progress of the initial work for the Group's proposed investment projects in Australia, the Group has established Australia Yinmore Holding Pty Ltd (AYH) in Queensland, Australia with a registered capital of USD\$1 million and a total investment of USD\$10 million, which will be injected gradually according to the investment projects. The company's business scope covers integrated agricultural development;
 2. The initial AUD\$2 million required for the Australian cow feed project will be remitted by the Group through purchase of foreign exchange;
 3. All of the Group's investment projects in Australia will be centrally managed by AYH, and all the funds will be centrally allocated by AYH.”

When Mr Wu gave evidence, he clarified (at Transcript 3-55) that when YYG invests, it uses US dollars, but they are converted to Australian dollars when the money comes to Australia, but that does not mean the two figures are equal to each other.

- [66] The three founding directors of AYH were Mr Li, Mr Liu and Mr Bing Xie. Mr Xie ceased as a director on 1 December 2009 and Suming was appointed in his place.
- [67] The form 201 lodged by the accountants for AYH to achieve the registration of AYH as an Australian company showed the shareholding of the issued shares as 110,000 to Huaijian Geng, 110,000 to Ning He, 120,000 to Mr Li, 110,000 to Mr Liu, 110,000 to Mr Wu, 110,000 to Mr Xie, 110,000 to Suming, 110,000 to Hou Yu, and 110,000 to Nan Xhang. That form showed that the shares were fully paid and beneficially owned by the respective members. Mr Liu conceded (at Transcript 4-62) that the capital to establish AYH came from YYG.
- [68] When the form 484 was lodged with ASIC in December 2009 to record changes to the details of AYH, the allocation of a further 40,000 shares to Mr Li was shown as fully paid and beneficially held. Mr Liu asserts he was never informed that he held the shares other than in his own right. That form also recorded that Mr Geng, Mr Xie and Mr Yu's shareholdings were reduced to zero, Mr Li's shares were increased by 130,000 and the shareholdings of Mr Zhang, Suming, Mr Wu and Mr He were also each increased by 40,000.
- [69] On 17 June 2011, the executive committee of YYG decided to launch AYH officially. The minutes for that meeting record that AYH is a subsidiary of YYG.
- [70] By the form 484 lodged with ASIC on 1 August 2011, the decrease in Mr Zhang and Mr He's shareholdings to zero and the corresponding increase in Mr Li's shareholding by 300,000 shares which took effect on 10 July 2011 was recorded.
- [71] In December 2011, Ang Liu and Suming drafted the "Shareholding Entrustment Agreement" that each of Mr Li, Suming, Mr Wu and Mr Liu entered into with YYG in respect of their respective shareholdings in AYH of 55 per cent, 15 per cent, 15 per cent and 15 per cent. Ang Liu said he brought Mr Liu's copy of the agreement from China to Australia and Mr Liu signed it in Ang Liu's presence without making any protest about it. Mr Liu asserts he signed this agreement under duress and commented to Ang Liu that the document was unfair, as he was not receiving anything for giving up his shares. If Mr Liu had, in fact, made the comment that he asserts he did to Mr Ang Liu, that is not the sort of comment that Mr Ang Liu as deputy general manager of AYH would be likely to forget. This agreement is not determinative of the issue of the ultimate beneficial ownership of the shares at the time of the respective allotments to Mr Liu, as it post-dated the allotments. It has the effect of being a declaration by Mr Liu that he holds his shares on trust for YYG. I find on balance that he did not protest about signing the agreement and the fact he asserts otherwise has some relevance in assessing his overall evidence.

YYG group of companies

- [72] Mr Li has been a director of YYG since its establishment in July 1992. Mr Li resigned from his position as chairman and general manager of YYG in April 2007, but continued as a director. He then took up the position of chairman and general manager of Yunnan Yinmore Sugar (Group) Ltd which is incorporated under the laws of the

PRC. There are a number of related companies. On 30 November 2007 China Yinmore Sugar Company Limited was incorporated in the Cayman Islands (the Cayman Islands company). The Cayman Islands company is the sole shareholder of Yinmore Sugar (Hong Kong) Co Ltd (Yinmore Hong Kong) which in turn is the sole shareholder of Yunnan Yinmore Sugar (Group) Ltd.

- [73] Mr Li was cross-examined on the second day of the trial by reference to recently obtained searches of the Chinese government's database for YYG. The search (exhibit 4) showed the shareholders of YYG were Yunnan Huizhi Investment Co Ltd, Yunnan Dongchen Investment Co Ltd and Yunnan Xingye Investment Co Ltd. Another search (exhibit 5) revealed the natural persons who were the shareholders for each of these companies. It is Mr Li, Mr Wu and Mr Xie for the Huizhi company, Mr Wu for the Dongchen company, and Mr Li and Mr Wu for the Xingye company. Mr Li explained (at Transcript 2-10) that he could only hold 2.66 per cent of the shares to benefit himself personally, but that he has "a lot of people behind me, in terms of the shareholdings in these companies". This was consistent with the evidence that he gave on the first day of the trial (at Transcript 1-46) that he held an indirect interest in YYG for himself (as to 2.66 per cent) and a group of people which he described in these terms:

"That group of people is actually the managing teams of all the branch companies and also the management people. And I – when the time comes to give dividends and dividends were given to all these individuals, not only – although, in name, I am – I'm having the name of the shareholder, so to speak. But, actually they get the dividends, not me. ...

I am actually 2.66 per cent of this group of people. So I get 2.66 per cent of the dividends."

- [74] Mr Li in paragraph 13 of his affidavit described Yunnan Yinmore Sugar Co Ltd (YYS) as a wholly-owned subsidiary of YYG, but conceded in cross-examination (at Transcript 1-53) that Yinmore Hong Kong was the only shareholder of YYS, but explained that the natural persons behind the companies that are the shareholders of the Cayman Islands company hold their shares on behalf of YYG. Strictly speaking, YYS is not a wholly owned subsidiary of YYG, but Mr Li has explained why he asserted it was. The shareholders in the Cayman Islands company in 2014 were Bright Sugar Group Co Ltd (60%), Great Ally Group Limited (Great Ally) (23%), Talent Business Investments Limited (Talent) (6%), Sino Million Investments Ltd (6%) and Goldman Sachs Strategic Investment (Agent) (5%).
- [75] In 2014 Talent brought a claim in the Cayman Islands against the Cayman Islands company for unpaid dividends declared on 24 May 2012. Talent was successful in obtaining judgment in its favour: *Talent Business Investments Limited v China Yinmore Sugar Company Ltd & another* (Unreported, Grand Court of the Cayman Islands, Smellie CJ, 24 April 2015) (the Cayman Islands case). The majority shareholder and sole director of Talent was Mr Zhang Nan. Mr Li was the majority shareholder and sole director of Great Ally. The amount of the dividend due to Talent was USD\$5,663,761.37. The Cayman Islands company counterclaimed against Talent and Mr Zhang for an amount of USD\$2,821,574 which the Cayman Islands company asserted was an overpayment of the dividend. It was common ground that an amount of USD\$8,503,460 had been paid to a third party on 31 July 2012, but the question was

whether the third party was acting in accordance with Mr Zhang's instructions or Mr Li's instructions when the third party received that sum and then transferred it onto other parties. Smellie CJ found that the third party acted in accordance with Mr Li's instructions and specifically noted at paragraph 266 of the judgment that Mr Li did not impress him as a witness of truth.

- [76] Mr Li had been a witness in the Cayman Islands case for the unsuccessful defendant. Mr Li's credibility and reliability were tested in cross-examination in this proceeding by reference to matters traversed in the judgment in the Cayman Islands case. The findings made in the Cayman Islands case reflect the evidence that was adduced to dispose of the issues that arose in that case. The lack of success of the defendant in the Cayman Islands case whose position was supported by Mr Li's evidence does not determine the outcome of this proceeding. It is the dealings between Mr Li and Mr Liu that are the focus of this proceeding. I have taken into account the evidence adduced arising from Mr Li's cross-examination in this proceeding by reference to the Cayman Islands case in assessing his evidence adduced in this proceeding. There was no support in the evidence adduced in the Cayman Islands case (referred to in the judgment) for the dividends paid to the shareholders being remitted to YYG at that time. Mr Li was careful, however, to make the point (at Transcript 2-55) that the position since January 2013 has been that, despite his holding a controlling interest of about 67.4 per cent in YYG, he receives 2.66 per cent of the dividends personally and the balance is distributed amongst staff.
- [77] Mr Li at the time of his dealings with Mr Liu in respect of the Cow Candy project and AYH was extremely influential in the business of YYG, but he was also a very astute businessman who appreciated the difference between funds belonging to YYG, AYH or others and his own. This was illustrated by his disavowing any entitlement after January 2013 to dividends in YYG greater than 2.66 per cent, even though his controlling interest on an analysis of shareholdings is much greater. This was also illustrated by his subsequent reaction when he found out that Mr Liu had instructed Ms Tian to advance the maintenance costs for the Blue Water property from AYH's funds. Mr Li reimbursed AYH with the amount of \$3,000 that had been advanced on Mr Liu's instruction and then provided his own funds to Ms Tian to pay for the future maintenance costs for the property. In assessing credit as between Mr Li and Mr Liu, I found it more helpful to focus on the evidence relating to the transactions in which they were both involved.

Purchase of the Camry car

- [78] Funds had been deposited into Mr Liu's bank account to enable Mr Li's purchase of the Blue Water property to be completed on 6 October 2011.
- [79] After Mr Li purchased the Blue Water property, there were sufficient funds remaining in Mr Liu's bank account to purchase a vehicle. Mr Liu selected the 2011 Camry motor vehicle, and had it registered in his name. Mr Li asserted at paragraphs 125 and 126 of his affidavit that when they were at the car dealer he told Mr Liu he was buying the car for Mrs Li to use when she came to Australia, but told him later, that when his wife was not in Australia, Mr Liu could keep and use the car. Mr Li asserted at paragraphs 129 and 130 of his affidavit that he never intended to give the car to Mr Liu and neither had

he said to Mr Liu he would give him the car nor promised him that he would give him the car as compensation for him to work in Australia. That is disputed by Mr Liu who said that Mr Li never told him that he was purchasing the Camry for his wife and that Mr Li never expressed any view other than the car belonged to Mr Liu, until their relationship broke down. Mr Liu paid for the fuel and servicing costs of the Camry and occasionally was reimbursed by AYH.

- [80] In August 2016 Mrs Li requested Mr Liu to hand over the Camry car to her. He refused to do so, claiming that Mr Li gave him the Camry as a gift or an employment incentive. It was not until then that Mr Li found out that the vehicle had been registered in Mr Liu's name.

The breakdown in the relationship between Mr Li and Mr Liu

- [81] Mr Liu described how he had a dispute with Mr Li over a personal matter from February 2015 that was followed by another dispute in August 2015 from when the conflict between Mr Liu and Mr Li escalated. Mr Liu describes that his relationship with Mr Li broke down leading to mistrust between them. Mr Liu moved out of the Blue Water property by October 2015. Mr Liu was dismissed as an employee of AYH in December 2015.

- [82] One of the consequences of the breakdown in the relationship between Mr Li and Mr Liu is the estrangement of their wives who had a close relationship as sisters. Mrs Li has not spoken to Mrs Liu since August 2016. The angst that has caused Mrs Li was apparent when she stated in her evidence (at Transcript 3-40):

“Emotionally, I have to say that I can't accept that we're not in good or friendly relationship at the moment. I have to say that we're still a family, and I have very close relationship with my younger sister. However, in terms of the law case or the legal case, the thing that I can do is to state the truth.”

- [83] During the month that preceded the commencement of the trial, Mrs Li sent a number of text messages to her sister trying to get her sister to influence Mr Liu to settle the litigation. I do not consider these text messages reflect adversely on Mrs Li. They are consistent with her desire to resolve the estrangement with her younger sister. Although it was apparent from these text messages that Mrs Li supported Mr Li in the litigation, it was also apparent from Mrs Li's evidence of the exchanges at the two couple meeting that she endeavoured to convey her best recollection of what was said and, when she was not sure of whether something was said at that meeting or not, she said so.

The presumption of a resulting trust

- [84] The applicants rely on the presumption of a resulting trust in favour of the purchaser that arises where the purchaser purchases property in the name of another: *Calverley v Green* (1984) 155 CLR 242, 246 and 266.

- [85] It is not in issue that Mr Liu bears the onus of displacing the presumption of a resulting trust. He seeks to do so by proving that it was the intention of Mr Li to gift the Mizzen Place property to him at the time of the purchase in his name.
- [86] It is critical to Mr Liu's case on Mr Li's intention to prove that Mr Li made the promises, statements or representations in the terms alleged by Mr Liu to persuade Mr Liu to take up the position in Australia and for Mr Liu and his family to migrate to Australia. Although Mr Liu's case is not pleaded as a misrepresentation case, the representations are relied on to prove the intention of Mr Li to make the gifts at the respective times that Mizzen Place was purchased in Mr Liu's name and the shares in AYH were allotted to Mr Liu.
- [87] It is not to be expected that the two couples who met in September 2008 would be able to recall precisely the conversation that took place. There are some matters which can be relied on as indications as to what was more likely than not to have occurred. Mr Li's quest to find an employee to work with Suming in Queensland who could travel to Queensland immediately was not at that stage a search to find an employee to move to Australia permanently. The request from Mr Li was for Mr Liu to go to work in Australia on the project. That was confirmed by Suming and I infer it was unlikely that Mr Liu would have been required to make a decision about migrating to Australia, before he had even visited Australia to see the project for the first time, and while his son was still only in middle school. Mrs Liu's evidence about the conversation at the meeting of the couples concerning whether Mr Liu's family "would consider to travel to Australia" was also consistent with a discussion about holidays. Mr and Mrs Liu's recollection of the course of the discussion at the home of Mr and Mrs Li has been coloured by the subsequent events, particularly the establishment of AYH and the purchase of the Mizzen Place property in Mr Liu's name and their eventual permanent relocation to Australia. There was no anticipation at the time of that meeting that an Australian company would be incorporated and that shares would be allotted to Mr Liu. There was no anticipation at the time of that meeting that Mrs Liu would eventually be giving up her employment in Kunming before she qualified for her retirement benefits. The evidence given by both Mr Liu and Mrs Liu was tainted by their sense of entitlement with hindsight (rather than what was anticipated at the two couple meeting), as to what was appropriate compensation for the years that Mr Liu spent working for YYG and AYH on the Sunshine Coast and the dislocation caused to their family as a result of Mr Liu living in Australia until their son and then Mrs Liu moved to Australia. I consider that Mr Liu's recollection of the course of the discussion with Mr Li at the Grand Mercure in June 2009 is similarly tainted. The tainting of Mr Liu's recollection of these conversations by his rationalisation of what he was entitled to was reflected in the answer he gave (referred to above) that "in my mind, this is a parcel: a house, a car and, of course, the shares".
- [88] Mr Liu's handwritten note concerning the payment of the deposit for AYH's purchase of the Mizzen Place property was inconsistent with his assertion that the property was purchased in his name as a gift to him. Mr Liu in his dealings with AYH's external accountants and Ms Tian did not assert he was the owner of the Mizzen Place property and did not demur from accounting treatment which was inconsistent with beneficial ownership by him of the Mizzen Place property.

- [89] When also taking into account the negative effect on Mr Liu's credit arising from other aspects of his evidence, but particularly the document he created for the purpose of the proceeding, I prefer Mr Li's evidence that the alleged representations or promises were not made by Mr Li at either the two couple meeting or at the meeting at the Grand Mercure in June 2009. Even though Mr Li's evidence was challenged, his evidence of his dealings with Mr Liu remained cogent and consistent and it was supported by the evidence of Mrs Li in respect of the two couple meeting.
- [90] As Mr Liu has failed to prove the representations in the terms that he pleaded, Mr Liu has failed to discharge the onus he bears to show that at the time of the purchase of the Mizzen Place property Mr Li on behalf of AYH intended to gift the property to him.
- [91] Although the parties do not agree as to proper characterisation of the transactions by which the funds were provided by YYG to AYH for the conduct of AYH's business in Australia, it is not in issue that Mr Liu did not provide any payment to AYH for the allotment of the shares to him in June 2009 or for the shares allotted to him in December 2009. The recording of Mr Liu in the financial records of AYH and on ASIC forms as the beneficial owner of these shares is only one piece of evidence as to the ownership. There is much evidence of the intention of YYG by its resolutions and the actions of its officers in relation to AYH that AYH was always intended to be a subsidiary of YYG. In view of the fact that YYG and not Mr Liu provided the funds for the shares, Mr Liu's reliance on how his ownership of the shares in AYH was treated was treated in certain documents would only be relevant if he were able to prove that the allotment of those shares was made pursuant to the promises, statements or representations made to him by Mr Li at the two couple meeting in September 2008 and the meeting between Mr Li and Mr Liu at the Grand Mercure on 16 June 2009. As he has failed to prove they were made, Mr Liu has therefore failed to discharge the onus he bears to show that at the time of the respective allotments of shares to him in AYH, YYG intended that he be the beneficial owner of those shares.
- [92] Mr Liu had difficulties with his case for claiming the Camry car as a gift from Mr Li, when his evidence at the trial that Mr Li promised him a car at the two couple meeting did not reflect his pleaded claim and was not supported by any other witness at the two couple meeting. This car was bought soon after Mr Li purchased the Blue Water property which made sense of his instruction to Mr Liu to purchase the car from the funds remaining after the purchase of the real property. It was the intention of Mr Li at the time he provided the funds for the purchase of the vehicle that is relevant. Even in the context of the familial relationship between Mr Li and Mr Liu, the fact that Mr Li permitted Mr Liu to use the vehicle for over four years before demanding the return of the vehicle does not persuade me to reject Mr Li's evidence about his intention at the time the car was purchased. Mr Liu's attempt to attribute to Mr Li the motive of giving Mr Liu the vehicle as part of his compensation for remaining in Australia with his family is inconsistent with Mr Li's unequivocal evidence that he did not intend to make a gift of the car to Mr Liu which I have no difficulty in accepting. Mr Liu therefore has failed to discharge the onus he bears to show that Mr Li intended to gift the Camry car to him.

Is there any impediment to AYH obtaining equitable relief?

- [93] Mr Liu relies on *Nelson v Nelson* (1995) 184 CLR 538 to assert that, as the Mizzen Place property was purchased and registered in Mr Liu's name to avoid an application for FIRB approval by AYH, a court exercising equitable jurisdiction would refuse to exercise its discretion in favour of making a declaration in favour of AYH.
- [94] The former general manager of AYH, Mr Mingwei Wang, caused an application to be made on behalf of AYH to the FIRB on 23 June 2016 to notify the FIRB of the purchase of the Mizzen Place property by AYH in 2009. Mr Wang provided further information required by the officer of the FIRB who was handling the application. Mr Wang received correspondence from the FIRB on 4 August 2016 confirming that AYH did not require FIRB approval to purchase the Mizzen Place property for staff accommodation.
- [95] The *Foreign Acquisitions and Takeovers Act* 1975 (Cth) in force at the time of the purchase of Mizzen Place contained s 38 in the same terms that were considered in *Ikeuchi v Liu* [2001] QSC 54:
- “An act is not invalidated by the fact that it constitutes an offence against this Act.”
- [96] If there had been a breach of that Act at the time of the purchase in Mr Liu's name, it did not follow that the purchase was invalidated by the fact that an offence may have been committed against the Act. The provision against which an offence may have been committed would have been s 26A which required FIRB approval before a purchaser to whom the Act applied entered into the agreement to acquire an interest in Australian urban land. Muir J (as his Honour then was) at [103] of *Ikeuchi* construed s 26A as not requiring prohibition of the acquisition of the land, if there were failure to comply with s 26A, in light of the express provision found in s 38. Muir J noted at [105] that the approach in *Nelson* as to whether the question of illegality would result in the denial of equitable relief “must be determined by reference to whether the purpose of the Act was such that public policy required the Courts to deny equitable assistance”, relying on the joint judgment of Deane and Gummow JJ in *Nelson* at 569-571.
- [97] The written submissions made on behalf of Mr Liu proceed on the basis that the FIRB information sheet which Ms Lever downloaded before she gave advice to Mr Liu and Suming in respect of FIRB approval was provided to them. That was not asserted by any of Ms Lever, Mr Liu or Suming. In considering whether it would be appropriate to deny equitable assistance to AYH in respect of a declaration as to its beneficial ownership of the Mizzen Place property, it is not irrelevant that advice was given by Ms Lever to Mr Liu and Suming that Mr Liu was the proper person to be the purchaser in the light of his holding the four year visa. It is also relevant that AYH has now attended to notifying the FIRB of its beneficial interest in the Mizzen Place property and, no doubt due to the current circumstances of Mr Li, FIRB approval for AYH's purchase is now not required.
- [98] AYH is in a stronger position in its proceeding to claim beneficial ownership about addressing the lack of FIRB approval at the time the relevant property was purchased than the plaintiff was in *Huang v Fu* [2011] NSWSC 316. The plaintiff in that case was still successful in obtaining a declaration that he was the beneficial owner of the

property purchased in his former wife's name with his funds, on condition that the plaintiff notify the FIRB of his having obtained an interest in the property in 1995 by provision of the purchase price and that should the FIRB require him to divest himself of the interest, he must do so. AYH disclosed the purchase of the Mizzen Place property to the FIRB prior to the commencement of this proceeding.

- [99] There may be other issues that arise as a result of the conclusion that AYH has been the beneficial owner of the Mizzen Place property upon the registration of the transfer of the property into Mr Liu's name, such as the stamp duty concession obtained on the purchase, because it was purchased in Mr Liu's name. These are matters for which AYH must be responsible in disclosing to Australian authorities in taking whatever steps are required to remedy the position. I do not consider that matters such as these and the lack of FIRB approval at the time of purchase amount to an impediment to AYH obtaining the equitable relief it seeks in respect of the Mizzen Place property or there is any impediment to YYG obtaining equitable relief in respect of the respondent's shares in AYH.

Orders

- [100] The following orders should be made:

1. It is declared that the respondent holds 150,000 shares in the first applicant on a resulting trust for the second applicant.
2. The respondent must forthwith cause the shares referred to in the preceding order to be transferred to the second applicant.
3. It is declared that the respondent holds the real property described as Lot 306 on Survey Plan 136028 in the County of Canning, Parish of Maroochy and situated at 9 Mizzen Place, Twin Waters in the State of Queensland on a resulting trust for the first applicant.
4. The respondent must forthwith deliver the certificate of title for and transfer the real property referred to in the preceding order to the first applicant.
5. It is declared that the respondent holds the Toyota Camry motor vehicle registration number 684RSV on a resulting trust for the third applicant.
6. The respondent must forthwith deliver possession and transfer the registration of the Toyota Camry motor vehicle to the third applicant.
7. Any stamp duty and other expenses associated with the respective transfers in the preceding orders must be borne by the respective transferees.
8. The counterclaim is dismissed.
9. Liberty to apply on two days' notice in writing to the other party.

[101] As Mr Liu has been unsuccessful in resisting the applicants' claims and in pursuing his counterclaim, my inclination is that costs should follow the event and there should be a costs order in favour of the applicants against Mr Liu in respect of both the claim and the counterclaim. But I will give the parties an opportunity to make submissions on the appropriate costs order in the light of these reasons and whether any other orders should be made to supplement the orders proposed in the preceding paragraph.