FACV 10/2015

IN THE COURT OF FINAL APPEAL

OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL (CIVIL) NO. 10 OF 2015

(On appeal from CACV 151 & 152/2013)

BETWEEN

LWYA	*Petitioner / 1st Appellant* (Wife)
and	
KYW	*Respondent / Respondent* (Husband)
and	
LLP	*Intervener / 2nd Respondent* (Father)

PRINTED CASE OF THE RESPONDENT

References in chain brackets are to [bundle / tab / page] numbers in Record Parts A & B. District Court Judgment = "DC"; Court of Appeal Judgment = "CA".

I. An Appeal against Concurrent Findings of Fact

1. This appeal, brought "as of right", is an attempt to challenge concurrent findings of fact.

2. It is wholly devoid of merit and should not have been brought; it serves only to waste valuable judicial time and resources: *Wealth*

Duke Ltd & Ors. v Bank of China (Hong Kong) Ltd,[1] at §33 and *Lau Koon Foo v Champion Concord Ltd & Anor*,[2] *per* Ma CJ at §6. Fortuitously, it is one of the last such "as of right" appeals that will come before this Court following the repeal of s. 22(1)(a) of the Hong Kong Court of Final Appeal Ordinance (Cap. 484).

3. The single question of fact in the case is:

> **Who is the beneficial owner of the relevant 20,000,000 shares in Nicegood Properties Limited - the Wife, or her Father (the Intervener)?**

4. Both Courts below found, as a fact, that the Wife beneficially owned the shares.

5. The question arose in the context of ancillary relief proceedings. If the 20,000,000 shares in Nicegood Properties Limited ("**NPL**", and the "**Shares**") belonged to the Wife (as contended by the Husband), then they were potentially 'in the matrimonial pot' for division; if the Father was the true owner, they were not.

6. Following a 5-day trial, Deputy District Judge Carlson held (by way of a Judgment dated 4 March 2013) that the Shares belonged to the Wife:

> *"61. … he* [the Father] *intended, I use the word advisedly, to transfer these shares to her outright, which is what he did. Had it been otherwise he would have created a specific instrument*

[A/3/33] at §61

[1] (2011) 14 HKCFAR 863.

[2] (2011) 14 HKCFAR 837.

of trust as he had in the past. This must have been, I find this as a fact, a deliberate choice to bring about a transfer of the beneficial interest in the shares."

7. The Court of Appeal (Hon Yuen, Kwan and Cheung JJA), having carefully considered all of the evidence, concluded that DDJC Carlson was correct and that the Wife was indeed the beneficial owner of the Shares. The Court of Appeal was acutely aware that the appeal was an attempt to challenge primary findings of fact:

> *"52. In seeking to overturn the judge's conclusion of the father's intention arrived at by a process of inference, the appellants are in effect challenging the underlying findings of primary fact made by the judge based on the oral testimony evaluated and rejected by the judge."*

[A/9/70] at §52

8. The Court followed its approach in *Z v X (C: Intervener)* [2012] 5 HKLRD 791 (which this Court affirmed on a further appeal: unrep., FACV 11 & 19/2013, 23 May 2014). See §53 of the Judgment under appeal.

[A/9/70] at §53

9. Having carefully considered all of the evidence, the Court below agreed with the learned Deputy Judge, rejecting both Appellants' submissions: see CA §§75, 81, 83, 85 & 87. Accordingly, they concluded that:

[A/9/77-82]

> *"88. There is no basis to impugn the finding of a gift or any reason for this court to interfere with the judge's finding."*

10. This Court has repeatedly stated that it will not embark upon a review of such concurrent findings save in *"**exceptional and rare**"* circumstances – *viz.*, where there is a miscarriage of justice or

violation of some principle of law or procedure: *Sky Heart Ltd v Lee Hysan Co. Ltd.*[3] There is manifestly none here.

11. In *Sky Heart* Bokhary PJ (as he then was) discussed the principles that final appellate courts apply by reference to the practice of the Privy Council, the House of Lords and the High Court of Australia.

12. He referred to *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy*[4] and the eight propositions in the Advice of the Board, and also to the judgment of Lord Steyn in *Smith New Court Securities Ltd v. Citibank NA.*[5] Lord Thankerton, who delivered the Board's Advice, stated in the fourth proposition:

> *"That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect."*

13. In *Smith New Court Securities Ltd v Citibank NA* Lord Steyn said this:

> *"While the jurisdiction of the House is not in doubt, it is most reluctant to disturb concurrent findings of fact. There are two reasons for this approach. First the prime function of the House*

[3] (1997-98) 1 HKCFAR 318, 333-338.

[4] *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy* [1946] AC 508.

[5] *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254, 275.

of Lords is to review questions of law of general public importance. That function it cannot properly discharge if it often has to hear appeals on pure fact. This point is underlined by the fact that, despite the economy of presentation of counsel, the hearing on liability lasted more than three days. Secondly, in the case of concurrent findings of fact, the House is confronted with the combined views of the first instance judge and the Court of Appeal. A suggestion that the House can be expected to take a different view on concurrent findings <u>of fact</u> generally gives rise to an initial sense of disbelief."

(Emphasis in the original)

14. This Court has repeated the wholly exceptional nature of interfering with concurrent findings of fact – see, for example *Cathay Pacific Airways Ltd v Wong Sau Lai*[6] and *Guangdong Native Produce Co Ltd v Tam Tze Ying T/A Sun Ying Trading Co*.[7] In the *Cathay Pacific Airways* case Bokhary PJ, with whom the other members of the Court agreed, said this:

"As can be seen from Sky Heart Ltd v. Lee Hysan Co. Ltd (1997-98) 1 HKCFAR 318 at p.334 B, this Court's practice not to disturb concurrent findings of fact save in wholly exceptional circumstances is not obviated by a dissent in the intermediate appellate court. The trial judge having so found and the Court of Appeal having (albeit by a majority) so affirmed, there are concurrent findings of fact that Cathay had failed to take reasonable care for Ms Wong's safety. Having examined the broad circumstances proved or admitted, being those discussed above, I am satisfied that they permit that view of the facts. And having examined the relevant legal principles, being those discussed above, I am satisfied that neither the trial judge nor the majority in the Court of Appeal made any error of legal

[6] *Cathay Pacific Airways Ltd v Wong Sau Lai* [2006] 2 HKLRD 586.

[7] *Guangdong Native Produce Co Ltd v Tam Tze Ying T/A Sun Ying Trading Co* (2008) 11 HKCFAR 455.

principle. While I of course respect the dissenting view which Rogers VP strongly held and clearly stated, I see nothing in the circumstances of this case to justify the wholly exceptional course of disturbing concurrent findings of fact."

15. In *Guangdong Native Produce Co Ltd v Tam Tze Ying* Chan PJ (as he then was) gave the judgment of the Court saying as follows:

7. With regard to concurrent findings of fact, this Court will not interfere unless there are wholly exceptional circumstances. In order to successfully challenge such findings, it is necessary to show that there is some miscarriage of justice or violation of some principle of law or procedure. See Sky Heart Ltd v Lee Hysan Co Ltd (1997-1998) 1 HKCFAR 318, 334. As Bokhary PJ added at p.336, the prime function of this Court is to review questions of law of general public importance and this is not altered by appeals as of right under s.22(1)(a) of the Hong Kong Court of Final Appeal Ordinance (Cap 484).

16. Here, the findings on the single question of fact – who owns the Shares in NPL – are unanimous and concurrent. They were reached after careful analysis and a full airing of the evidence, re-canvassed in fine detail on appeal. The appeal of the Wife and the Intervener should be dismissed *in limine*.

17. This Court rejected a similar attack on concurrent findings in *Z v X and C*, unrep., FACV 11 & 19/2013, Judgment of 23 May 2014.

18. In seeking to circumvent the practice of not disturbing a finding of fact, the Wife and the Father have not begun to approach the threshold that might form a basis for this Court to intervene. There can be no suggestion that what happened in the Courts below:

18.1. was "*not in the proper sense of the word judicial procedure at all"*; or

18.2. involved a violation of some principle of law or procedure that was *"such an erroneous proposition of law that if that proposition be corrected the finding cannot stand"*; or

18.3. some principle of law or procedure was neglected so that the finding cannot hold good.

19. The above disposes entirely of this appeal. Principle dictates that this Court need not be drawn into a third-tier appeal on the facts.

II. An Appeal without Merit

20. As stated above, the threshold for the Wife and Father to overcome is that there was no evidence on which the concurrent findings below are based. Far from this being the case, it is submitted for the Husband that more than ample evidence grounded the conclusion that the Wife beneficially owned the Shares.

II(A). Legal Principles

21. It was common ground that the Shares were transferred to the Wife. As both courts below recognised, it is a question of fact whether these transactions involved the passing of the beneficial interest in the Shares.

22. The starting point for the analysis of the transactions in question are the twin presumptions which operate (both in favour of the Husband) on transfers of this nature, namely: (i) the presumption that equity follows the law; and (ii) the presumption of advancement. As to the first, Nicholas Mostyn QC (as he then was) stated the law in *TL v ML* [2006] 1 FCR 465as follows:

> *'[38] A transfer of the legal title carries with it, prima facie, the absolute beneficial interest in the property conveyed. Any person other than the legal owner, who asserts that he is the beneficial owner, will need to establish a basis on which equity will intervene on his behalf.* […]
>
> *[39]* ***The burden of proof lies on the person asserting the existence of a trust****…',* [in that case, concerning land].*'*
>
> (Emphasis added)

23. Insofar as it is asserted on behalf of the Father [Intervener's Case §16] that the burden was on the Husband – a proposition in support of which no authority whatsoever has been cited – this is plainly incorrect. If any further authority were needed see *Stack v Dowden* [2007] 1 FLR 1858 at [56] (*per* Baroness Hale):

> *"[56] Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership.* ***The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership****. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest."*
>
> (Emphasis added)

24. As to the presumption of advancement, Lord Phillips MR laid out the modern position in *Lavelle v Lavelle* [2004] 2 FCR 418 in these terms:

> *"[13] Where one person, A, transfers the legal title of a property that he owns or purchases to another, B, without receipt of any consideration, the effect will depend on his intention. If he intends to transfer the beneficial interest in the property to B, the transaction will take effect as a gift and A will lose all interest in the property. If he intends to retain the beneficial interest for himself, B will take the legal interest but will hold the property in trust for A.*
>
> *[14] Normally there will be evidence of the intention with which a transfer is made. Where there is not, the law applies presumptions. Where there is no close relationship between A and B, there will be a presumption that A does not intend to part with the beneficial interest in the property and B will take the legal title under a resultant trust for A.* ***Where, however, there is a close relationship between A and B, such as father and child, a presumption of advancement will apply. The implication will be that A intended to give the beneficial interest in the property to B and the transaction will take effect accordingly****."*
>
> (Emphasis added)

25. These presumptions may be displaced by evidence that the parties subjectively intended some other result: *Lavelle v Lavelle* at §19. The party with the burden of proving the existence of this subjective intention must do so on objective evidence. Proof of subjective intention does not turn on the *ex post facto* say-so of the parties to the transaction – for whom escaping the true nature of the transaction may now be most expedient. The Appellants' approach is what Munby J called in *C v C (Privilege)* [2008] 1 FLR 115 at [50] *"the world of Humpty Dumpty"* where a party says: *"well unless and until the* [other party] *produces evidence to disprove our*

bald assertion, our bald assertion holds the field." Indeed until relatively recently, *ex post facto* statements of the parties as to their subjective intentions were inadmissible altogether: *Shepherd v Cartwright* [1955] AC 431, *per* Viscount Simmons at p.450:

> *"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 transaction, are admissible evidence either for or against the party who did the act or made the declaration… But subsequent declarations are admissible only as evidence against the party who made them and not in his favour."*

26. This was expressly endorsed in Hong Kong by Tang JA (as he then was), sitting as an additional judge of the CFI in *Eric Edward Hotung v Ho Yuen Ki* [2005] 4 HKLRD 558 at §32.

27. In *Lavelle v Lavelle* Lord Phillips MR was prepared to temper the strictures of this rule, to the following extent:

> *"[19] In these cases, equity searches for the subjective intention of the transferor. It seems to me that it is not satisfactory to apply rigid rules of law to the evidence that is admissible to rebut the presumption of advancement.* ***Plainly, self-serving statements or conduct of a transferor, who may long after the transaction be regretting earlier generosity, carry little or no weight****. But words or conduct more proximate to the transaction itself should be given the significance that they naturally bear as part of the overall picture…"* (Emphasis added)

28. The Judge had these principles well in mind when he came to analyse the contest between the contemporaneous documents (evidencing the share transfers to the Wife as being ordinary transfers of legal and beneficial interest) as against the self-serving

statements the Father and Wife proffered in this litigation: see Judgment §§55-56. [A/3/30-31] DC §§61-62

29. The Wife asserts in submissions that *"[t]he trial Judge however expressly engaged in a discretionary "enquiry" …"* (Printed Case at §16). No passage of the Judgment is cited in support of this assertion. On no fair reading of the first instance Judgment could it be said that the Judge thought he was exercising a discretion.

30. The Court of Appeal held, correctly, that the Judge had the right approach and faithfully applied it: see CA §§30, 39 & 64. On a reconsideration of the evidence, the Court of Appeal also agreed with the Judge's conclusion: see CA §81. [A/9/61, 64, 74] [A/9/79]

II(B). Analysis of the Evidence

31. Both Appellants invite this Court to review once again the evidence for itself and form a fresh view on the merits. In order to show that both the Judge and the Court of Appeal below plainly had a firm basis in evidence for reaching the finding of fact they did – that the Wife beneficially owns the Shares – it is useful to follow the two distinct strands of the case that compelled him to this conclusion. The first strand is constituted by an analysis of the contemporaneous documents, and the second is the concurrent rejection of the (entirely feeble) oral explanations of the Father and Wife as to the rationale behind the supposed trust arrangement. Of course either one alone would suffice for the Husband to prevail.

II(C). First Strand: the Contemporaneous Documents

32. On 28 April 1995 the registered share capital of NPL was increased to 66,000,000 shares with a nominal value of $1 each. Of these shares, 13,200,000 were issued to Kwun and 13,199,000 to Cham. The Intervener states that there was an understanding between Kwun, Cham and himself that the shares did not belong to them and could be recalled by him at any time.

[A/3/11] DC §§12-13

[A/3/11] DC §13

33. Cham's shares: Cham ceased taking part in the family business in 1996 or 1997, returning to Canada. In doing so, he returned his shares in NPL to the Intervener. The contemporaneous documents show that the shares were returned to the Intervener by way of bought and sold notes[8]; that consideration of $13,200,000 was paid for the shares; and that substantial stamp duty, of $22,825, was paid to the Government on the transaction. The Intervener claims, notwithstanding what the documents he admits signing expressly say, that no consideration changed hands and that this was a mere return of shares held on trust back to their beneficial owner. Absolutely no explanation (let alone a convincing one) has ever been given as to why substantial stamp duty would have been paid to the Government on a transaction which was nominal only and which would, if really a return only of a legal interest, not have attracted stamp duty (other than a $5 fee). The repeated assertion that no money changed hands in this transaction amounts to a claim that the documents the Intervener and Cham themselves signed (and the Intervener admits signing) were false, and that tax actually was paid to the Government when none was really owing.

[8] On appeal the Father suggested that these are "standard form documents": Intervener's Case §43. This is misleading and unsupported by evidence. In fact NPL's accountant said in evidence that his firm specifically prepared the transfer documents.

34. A glimmer of truth emerged from the Intervener when questioned by the Court as to why he went through such a "charade" (the Court's phrase) of producing false documents and paying unnecessary tax: *'One of the reasons',* the Intervener admitted, *'is he was going to Canada, he was leaving Hong Kong. ... And I wanted to let him know that I would **give** them to him in future if he put up a good performance in the company, **I would given them to him**, because in reality I want him to be back badly"*, emphasis added.

35. Kwun's shares: In 2004 following the death of the Intervener's mother, the Intervener explains that his relationship with Kwun soured. On 12 November 2004, Kwun executed a declaration of trust stating that the 13,200,000 shares in NPL in his name were held on behalf of the Intervener. It is not in dispute that the contemporaneous document record that substantial stamp duty was in fact paid on this transaction (i.e. $19,880). Again, there is no explanation as to why substantial stamp duty was paid if this document merely reflected a pre-existing state of affairs instead of an actual *transfer* of beneficial interest from Kwun to the Intervener.

[A/3/14] DC §§17-18

36. Kwun was evidently very dissatisfied with the new arrangements. On 8 December 2004 he transferred this shareholding to the Wife. The transfer document, labelled an instrument of transfer, expressly states that "nil" consideration passed, and is marked "**change of nominee**". In respect of this transaction, only nominal stamp duty was paid. A corresponding declaration of trust was executed by the Wife on the same day (stating that the 13,200,000 shares in question

belonged not to the Wife but to the Intervener). Again, only nominal stamp duty was paid on this document.

37. One then comes to the crucial transactions in question. By the Intervener's own admission, the Wife was not happy with the arrangements and felt that being made to enter into a formal trust arrangement was unfair. On 18 January 2005 she transferred the 13,200,000 shares in her legal name to the Intervener. This instrument of transfer states that the consideration given was: ***"Nil (Being shares transferred back from Nominee to Beneficial Owner)"***. Only nominal stamp duty was paid.

38. By April of 2005 the parties had a change of heart and the Intervener transferred the shares back to the Wife. Crucially, and in stark contrast to the immediately preceding transaction, this time a bought and sold note was executed, which was signed by both the Wife and the Intervener, recording that consideration of $13,200,000 had passed in exchange for 13,200,000 shares in NPL. The Wife is described in the documents as the "purchaser" of the shares. Moreover substantial stamp duty was paid in respect of this transaction. The instrument of transfer, again signed by the Wife and Intervener, also records that this was a transaction for value.

39. The Appellants contend that in principle the payment of stamp duty and the use of bought and sold notes showing a transaction for value do not prove that the beneficial interest must have passed in the transaction. But that misses the point. One has to look at the context. Given the history of the transactions just recounted, the Judge and the Court of Appeal were plainly entitled to find that this last

transaction to the Wife was a conveyance of the full interest in the 13,200,000 shares (making up the bulk of the total 20,000,000 Shares) and not merely a case of appointing the Wife as the Intervener's nominee – a status which, just three months earlier, she had plainly been unwilling to suffer.

40. Not even a vaguely plausible explanation has been put forward for why stamp duty was paid on this last transaction when, had it been a mere transfer of legal interest, none would have been due and owing. Likewise no explanation has been given for why the Wife should have been unwilling to be the express nominee of the Intervener in January 2005 pursuant to a written declaration of trust, but be happy to take on this status just three months later in April 2005 (this time, of course, without any declaration of trust and instead pursuant to instruments indicating a for-value transaction). When it was put to the Intervener in cross-examination that his evidence now was precisely a claim that the contemporaneous documents he signed were false, he broke from his lucidity about his business affairs at the time to plead ignorance and the passage of time. He claimed that his lawyers and accountants advised him and he followed. In other words, his lawyers advised him to sign official documents containing what, on his case, are patently false material particulars, and that his accountants advised him to pay stamp duty which (on his case) was not in fact due and owing. The Judge's disbelief cannot be faulted.

41. Of course the Husband cannot answer the question of whether or not money changed hands as recorded in the documents. That is not within his knowledge and he has never claimed that it is. Neither the

Intervener, Wife, Kwun nor Cham produced their bank records from the material times, which might have supported or diminished the documentary evidence stating that consideration did in fact change hands. None of this means, however, as the Appellants would have the Court believe, that their parol evidence in these proceedings, denying the contents of documents they themselves have signed, must therefore stand unquestioned (*cf.* the misleading statement in the Intervener's Case at §60 that the fact of non-payment is the undisputed position). Quite the contrary: the burden was on them to prove the existence of a trust and they were manifestly unable to do so. Moreover when a party signs an official document saying that money has changed hands in a given transaction, he can expect the rest of the world to believe that is so unless he provides seriously cogent evidence showing otherwise. The Intervener and Wife have done no such thing.

42. The Judge approached these transactions with common sense, holding the oral protestations of the Intervener and Wife up against the contemporaneous documents. There were three logical possibilities as regards the transfer of the 13,200,000 shares to the Wife: (1) a transaction for value, (2) a gift, or (3) a trust arrangement involving a transfer to the Wife of the legal interest only. If (1) or (2) were true then the Husband would win the issue, whereas only if (3) were the true position would the Intervener's claim be upheld. The Husband would succeed so long as the Intervener and Wife were not able to discharge their burden of proving that (3) was the true position.

43. DDJ Carlson, having analysed the various share transactions and carefully listened to the oral evidence of the Intervener, the Wife and their witnesses, found that they had not discharged their burden: DC §§57-63. The Appellants now seek to suggest that it was not enough for the Judge to reject their case that a trust had formed; he had to go on to decide between the remaining alternatives (purchase or gift) even though the Intervener and the Wife would lose on each of those permutations. That is neither logical nor practical, given that all of the relevant evidence as to whether or not payment had actually been made lies in the hands of the Intervener and the Wife but was not disclosed.

[A/3/31] DC §§56-63

44. Before moving to the second, independent strand of the Judge's reasoning, it should be mentioned that the share capital of NPL was increased in December 2006 by the issue of a further 60,000,000 shares at a nominal value of $1 each. Of these fresh shares, 6,800,000 were allotted to the Wife, bringing her total shareholding to the level of the 20,000,000 Shares in dispute. No trust document was executed. As will be seen below, no credible explanation has been given for why, in a share dilution, more shares should be allotted to a mere nominee. The Judge inferred, quite correctly, that the beneficial interest in these 6,800,000 shares also passed in this transaction.

II(D). Second Strand: Reasons for "Nominee Shareholding" Are Incapable of Belief

45. The Judge and the Court of Appeal considered with great care the reasons given by the Intervener and the Wife as underpinning the

supposed trust arrangement, and considered in particular why, if that were the true position, they filed patently false documents and paid stamp duty to the Government which was simply not owing. Two explanations for the supposed nominee shareholding of the Wife were put forward by the Intervener. First, it was claimed that the Wife's becoming a nominal shareholder in NPL would *"ostensibly add to the [Wife's] authority and bargaining power when dealing with outsiders such as estate agents and/or bankers"*. Secondly, the Intervener said that the Wife and the other children being mere nominee legal shareholders, i.e. with no powers and no benefits, would 'motivate' them or make them feel 'psychologically' or 'spiritually' satisfied.

46. Neither explanation bears a moment's scrutiny and DDJ Carlson did not believe them. As regards increased "ostensible authority" (a curious phrase for a man of primary school education to include in a witness statement), the Wife's role in NPL saw her concerned with 'internal' affairs, primarily accounting. Insofar as "ostensible authority" was needed, the Wife was in any event a director of NPL. It is extremely difficult to see how the mere fact of *nominal* shareholding would increase her status or bargaining power with third parties – unless, of course, it was (mis)represented to them that her shareholding was one of substance that, although a minority stake, might come with some actual ownership clout.

47. Moreover the evidence of the NPL's bank, from Mr. Lau Shing Hoi (who only came to know the Leung family after the shares were registered in the Wife's name) was that ultimately the strong impression he formed was that Wife had no real authority at all. She

continued to have to consult with the Intervener on any decisions of substance. NPL's real estate agent agreed that the Wife was never presented as having the supposed "ostensible authority". Likewise the firm's accountant. Thus even if it were plausible that a nominee shareholding could enhance a person's "ostensible authority", in this case the evidence from outsiders wholly contradicted the Intervener's claim that he intended the Wife to appear as a real decision-maker.

48. The argument that a nominal shareholding would produce 'spiritual' or 'psychological' satisfaction is fanciful. It also fails to account for why the Wife should not have attained spiritual and psychological satisfaction with a *written* express trust but would be so satisfied with an *oral* express trust (built on documentary evidence showing a for-value sale) as the January-April 2005 events show. Equally why, one asks rhetorically, would Cham come running back from Canada only to be made a mere nominee shareholder (as he had already been before, on the Intervener's case) for his father's corporate interests?

49. Similarly, no credible explanation is given for why the Wife's stake in NPL would have been increased to 20,000,000 shares in December 2006 if it were a merely nominal shareholding for spiritual or psychological purposes. Prior to this her shareholding was 13,200,000. The Intervener then issued 20,000,000 shares in Kwun's name. If the Wife and Cham's respective shareholdings were merely nominal and represented no real value, why was it necessary to increase the Wife's share by 6,800,000 shares to preserve 'equality'? She already had 'ostensible authority' and any 'spiritual satisfaction' at being (on her case) the Intervener's

nominee. This later transaction only makes sense if the beneficial interest also passed. In that case, there *would* need to be a further share issue to the Wife to preserve an equality gap of *substance* between her and her brother.

50. Finally, much evidence was called (apparently) for the purpose of demonstrating that the Intervener practices an autocratic style of business management and is a "traditional Chinese" father. This evidence misfires; it is irrelevant. There has never been any dispute from the Husband that the Intervener has always been the majority shareholder of NPL and that he has always maintained complete control over the management of NPL and the other family companies. The evidence of his control and domineering personality does not advance his case in the slightest.

51. The Judge carefully considered the explanations proffered by the Intervener and the Wife but ultimately did not believe them: Judgment §§57-63, and see also §§43-54. He also did not believe their witnesses. Having heard their evidence he found that none of the reasons put forward for the alleged trust were persuasive, let alone a reason which could begin to explain the state of the contemporaneous documents. There is absolutely no basis for impeaching his findings as being plainly wrong. The above two strands, both individually and *a fortiori* when viewed together, dispose of this appeal.

[A/3/31] DC §§57-63
[A/3/25] DC §§43-54

52. Insofar as it is contended (Father's Printed Case §§25 & 72-73) that the Judge failed to take into account the fact that, while the shares were registered in the name of the Wife, the share certificates were

neither signed nor sealed. That is flatly inaccurate: see DC Judgment §§31 and 58; CA Judgment §86. Both Courts took the points on board but were not persuaded. The Intervener and the Wife simply do not like the outcome.

[A/3/20, 32] DC §§31, 58 [A/9/82] CA §86

II(E). The Intervener and Wife's Conflicting Case on the BOC Shares

53. The Wife and Intervener cannot even agree between themselves what property is (supposedly) held on trust for the Intervener. It is noteworthy that the Wife, who is in charge of the company's accounts and can be expected to have an eye for detail, has given several contradictory versions about precisely how many shares she holds and whether some or all of them are held on trust for the Intervener.

54. In her Form E the Wife asserts that she has $3,420,000 worth of BOC shares in her name, held 100% on trust for the Intervener. In affirmation evidence the Wife then said she had only 150,000 BOC shares, but again all on trust for the Father. Finally in her oral evidence, the Wife admitted for the first time that in fact some of the shares were indeed her own (namely 200,000 of the 1,200,000 she holds).

55. Despite the Wife's (internally contradictory) claims about the Intervener being the beneficial owner of the BOC shares, the Intervener himself does not claim any interest at all in them. His Summons to intervene in these proceedings was expressly amended to remove any claim over the BOC shares. The net result is, yet

again, the Wife has been making exaggerated and unsupported claims to non-ownership of assets of value which would otherwise fall for potential division in the divorce proceedings.

III. The *Browne v Dunn* Point

56. The Father takes a bold point based upon the rule in *Browne v Dunn* (1894) 6 R. 67 (a point the Wife also took in the Court below, but appears to have abandoned[9]). The point is a bad one which the Court of Appeal roundly rejected: §§89-91. [A/9/83] CA §§89-91

57. The rule in *Browne v Dunn* is not a pedants' code. It is a rule of substantial procedural fairness. As the Court of Appeal recently said in *Menno Leendert Vos v Global Fair Indusrial Ltd & Ors*, unrep., CACV 281/2009, 6 October 2014:

> *"98. … the principle in Browne v Dunn (1894) 6 R 67 HL does not lay down an inflexible rule requiring every point that might be used against a witness to be put to him. It is ultimately a question of whether it would be unfair to the witness if a specific point was not put to him (Pacific Electric Wire & Cable Co Ltd v Texan Management Ltd & Ors, CACV 90, 91, 93 to 96/2012, 17 September 2013, §§124, 125)."*

58. See further the observations of Chan PJ (for the Court) in *HKSAR v Chan Hoi Tat* (2013) 16 HKCFAR 34 at §19. A witness must know that the other parties may ask the finder of fact to disbelieve what he has said, either beforehand or through the cross-examination.

[9] The Wife's Printed Case makes only passing reference to the issue (see §86) but the point is not otherwise developed.

59. A *Browne v Dunn* point was taken recently in the Federal Court of Australia (*Australian Competition and Consumer Commission v Air New Zealand Limited* [2014] FCA 1157) and given short shrift. In that case the issue was an alleged failure to cross-examine an expert witness but the underlying principle remains good:

> *"427. The Commission also cited Browne v Dunn (1894) 6 R 67 for the proposition that since Dr McCoy was not cross-examined to suggest that his view about tariff's being minima was wrong the airlines could not submit to that effect. I reject this submission.* ***The issue was plainly in contest; both sides knew their respective positions****; opinions had been exchanged. The rule in Browne v Dunn does not require the obvious to be put to a witness. In any event, quite apart from the airlines' position I am satisfied the Dr McCoy is certainly incorrect in the light of my own understanding of how the ASA should be interpreted as a matter of public international law. I do not propose to decide this case on a basis that I know to be wrong."*
>
> (Emphasis added)

60. On the facts of the present case, the entire context of the *TL v ML* hearing was the dispute over whether there really was a trust in respect of the Shares (as the Intervener and Wife claimed) or whether there was no such trust (the Husband's case). It cannot have escaped the Intervener and Wife's attention that the entire issue was whether or not their claim to an express oral trust was true. Counsel and Solicitors for the Intervener and Wife can be assumed to have done their professional duty by explaining the Husband's Written Opening to their clients, which in relevant part stated as follows: *"24. Prior to these proceedings, H had no knowledge of any such arrangement* ***and does not believe it existed****. (See: KWY – 2nd Aff - §4, 16)"*, emphasis added, and further at §§42-44, concluding:

> *"In the face of this clear chronology and the obvious significance of the transfers to W free of any written trust agreement,* ***the suggestion that an express trust nevertheless subsisted is spurious and has been recently manufactured to attempt to defeat H's ancillary relief claim****."*
>
> (Emphasis added)

61. It cannot be seriously suggested that the Father and Wife did not know that their bald allegations as to an express oral trust were in dispute by the time they came to give evidence.

62. In any event, in cross-examination it was clearly and expressly put to both the Intervener and the Wife that their evidence as to the existence of a trust could not live with documents which they had themselves signed evidencing a sale for value. The Father suggests (Printed Case at §9) that their self-serving, oral claims as the absence of payment for the Shares was not challenged in cross examination. The transcript shows that is simply inaccurate. Indeed the Court itself also put the question to the Intervener, asking him why he would go through such a "charade" of filing official documents stating that he received payment for the Shares when he now says that no such payment was ever made.

63. It should be noted that when the Husband's Counsel continued to press the Intervener on the documents which he had personally signed for filing with the Government which he was now *himself* claiming to be false, the Intervener's own then-Leading Counsel intervened and asked that these questions **not** be put to the Intervener, suggesting they should be put to the Intervener's accountant. Leading Counsel then intervened again with a view to preventing the same line of questioning being put to the accountant.

Now the complaint is advanced on appeal that *more* matters should have been specifically put along this line of questioning. The point is utterly spurious. The Judge was right to reject it: Judgment §44. [A/3/25] DC §44

64. It is also worth keeping in mind that although a *TL v ML* hearing involves a 'chancery issue', the mode of the hearing retains the quasi-inquisitorial character of ancillary relief proceedings generally: *Prest v Prest* [2013] 2 AC 415 *per* Lord Sumption, approved by Ribeiro PJ in *Kan Lai Kwan also known as Kan Lai Kwan Kay v Poon Lok To Otto formerly known as Pun Lok To Otto and Another*, unrep., FACV Nos 20 & 21 of 2013, at §§124-126. It is for the Judge, therefore, to enquire into the relevant matters, if necessary *proprio motu*. The Father's reliance upon strict adversarial procedures is inapposite.

IV. Conclusion

65. The appeal is wholly without merit and should be dismissed.

2 October 2015

CHALRES SUSSEX SC

NEAL CLOUGH

TIMOTHY PARKER

Counsel for the Respondent Husband