THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2019/0011

BETWEEN:

NG, MAN SUN
(also known as Ng Wei)

Appellant

and

[1] PECKSON LIMITED (a BVI company)
[2] CHEN, MEI HUAN

Respondents

Before:

The Hon Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon Mr. Gerard St. C. Farara, QC	Justice of Appeal [Ag.]
The Hon Mr. Eamon Courtenay, SC	Justice of Appeal [Ag.]

Appearances:

Mr. Philip Jones, QC with him, Ms. Victoria Lord, Mrs. Kimberly Crabbe-Adams and Mr. Romane Duncan for the Appellant.
Mr. John McDonnell, QC with him, Mrs. Dancia Penn-Salah, QC for the Second Respondent.

2020: January 20, 21, 22, 23 & 24;
April 8.

Commercial appeal — Retrial by order of Judicial Committee of Privy Council — Application for rectification of the register of members of BVI company — Dispute over beneficial ownership of shares in BVI company between appellant and second respondent — Whether trial judge erred in not making findings as to the credibility of the witnesses and the existence of oral Agreement — Shares transferred by appellant to second respondent — Whether transfer of shares for stated consideration which was never intended to be paid a gratuitous transfer — Whether transfer of shares gave rise to resulting trust — Whether transfer of shares to second respondent a gift — Onus of proof — Effect of registration as owner of company shares — Whether minutes of meeting of company directions and written declaration by appellant are decisive as to beneficial interest in shares — Whether trial judge erred in rejecting appellant's case on the Cotai Strip Project — Whether trial judge erred in finding that appellant transferred the shares to second respondent to evade his creditors —

Whether trial judge ought to have found that second respondent was appellant's "figurehead" or bare nominee

The appellant ("Mr. Ng") and the second respondent ("Madam Chen") had lived together in a *de facto* marriage for over 20 years. The first respondent Peckson Limited ("Peckson"), a British Virgin Islands ("BVI") company, was the owner of all the shares in Empresa Hoteleira de Macau, a Macau company ("Empresa") which it acquired in 1996. Empressa is the owner of the New Century Hotel in Macau ("the Hotel"). Mr. Ng and Madam Chen's relationship ended in 2012, after Mr. Ng had transferred 40,000 shares in Peckson (the "Shares") to Madam Chen on 4th October 2011, ostensibly for a stated consideration of US $40,000.00. The transaction was effected by virtue of a Bought Note and Sold Note as well as an Instrument of Transfer all dated 4th October 2011. The transfer of the Shares to Madam Chen was approved by a written resolution of the directors of Peckson dated 4th October 2011 and signed by both Mr. Ng and Madam Chen in their capacity as directors of the company. A share certificate, also dated 4th October 2011, (the "Share Certificate") was issued by Peckson to Madam Chen. It is common ground between the parties that the stated consideration of US $40,000.00 for the transfer of the Shares was never paid and was never intended to be paid.

In August 2012, Mr. Ng commenced a claim in the Commercial Court against Peckson for an order that the transfer of the Shares by him to Madam Chen on 4th October 2011 is void and of no effect, for an order for rectification of the register of members of Peckson to show Mr. Ng as the registered owner of the Shares, and for certain consequential orders. Madam Chen applied to be and was joined as a party to the proceedings. She filed a defence and counterclaim which sought declarations that Mr. Ng ceased to have any interest or right in the Shares as of 4th October 2011 and that she is, and has been since that date, the only true legal and beneficial owner of the Shares. The dispute was considered by a learned judge of the Commercial Court, who gave judgment in favour of Madam Chen. The learned judge treated the transfer as a 'sale' and transfer for valuable consideration, albeit not paid.

Mr. Ng appealed. The Court of Appeal allowed Mr. Ng's appeal and declared him to be the owner of both the legal and beneficial interest in the Shares. The Court held that the learned judge erred in treating the 2011 transfer of the Shares as a sale, as no such positive case had been pleaded by Madam Chen. Indeed, her pleaded case was that, she had provided the deposit for the purchase of the Hotel and pursuant to an alleged oral agreement between herself and Mr. Ng in 1996 ("the 1996 Oral Agreement"), she had retained the beneficial interest in the Shares when they had been transferred. The Court further found that the transfer of the Shares, not being for valuable consideration, gave rise to a presumption of a resulting trust in favour of Mr. Ng, which had not been rebutted by Madam Chen, who had not led any evidence that Mr. Ng intended to make a gift of the Shares to her.

Madam Chen appealed to the Privy Council. The Board allowed the appeal, and remitted the matter to the Commercial Court for retrial before a different judge. The Board posited that either the consideration of US$40,000 for the Transfer was still payable, or the parties never intended that it be paid, and, accordingly the transfer was not by way of sale, but was a gratuitous transfer. The Board therefore opined that the judge at the retrial should explore issues that would yield two possible results, either that Madam Chen held the Shares on a presumption of a resulting trust for Mr. Ng; or that the Shares were a gift from Mr. Ng to Madam Chen.

The matter came on before Adderley J for retrial. By the end of the retrial, it was common ground between the parties that the transfer was a gratuitous transfer. The learned judge dismissed Mr. Ng's claim and granted Madam Chen's counterclaim. He found that Mr. Ng ceased to have any interest or right of any kind in the Shares of Peckson and that Madam Chen was, and has since 4th October 2011 been, the only true beneficial owner of the Shares and the only person entitled to be registered as their legal owner.

Mr. Ng, being dissatisfied with the judgment, appealed. Madam Chen counter appealed, advancing several grounds in support of the judgment. At the conclusion of the hearing, learned counsel for Madam Chen, asked this Court not to make any conclusions on the counter notice of appeal. From the grounds of appeal, the following issues arise for this Court's determination: (i) whether the judge erred in failing to make certain findings of fact and as to the credibility of evidence in relation to the existence of the 1996 Oral Agreement; (ii) whether the transfer of the Shares gave rise to the presumption of a resulting trust in favour of Mr. Ng, whereby he retained and was entitled to a re-transfer of the beneficial interest in the Shares, or was it a gift to Madam Chen? The resolution of the second issue involves a consideration of: (a) statements made by Mr. Ng in a 22nd November 2011 declaration (the "Declaration") and recorded in 21st November 2011 Board minutes (the "Minutes") to the effect that he retained no right or interest in the Shares; (b) Mr. Ng's evidence relating to a 2011 Oral Agreement, as the reason for the transfer, and according to which the transfer of the Shares was temporary; (c) whether the transfer of the Shares was a pretence or sham transaction; and (d) whether a reason for the transfer was so that Mr. Ng could evade his creditors.

Held: dismissing the appeal and affirming the decision of the learned judge; awarding costs of the appeal to the Second Respondent, Madam Chen, such costs, if not agreed within 21 days, to be assessed by a judge of the court below at the rate of two-thirds of the amount awarded to the Second Respondent in the court below; dismissing the counter appeal and awarding costs to the Appellant, Mr. Ng, to be assessed by a judge of the court below, if not agreed within 21 days; and awarding costs of the application to prevent Mr. Ng from prosecuting this appeal, to the Appellant, to be assessed by a judge of the court below, if not agreed within 21 days, that:

1. The existence or non-existence of the 1996 Oral Agreement was critical to the fundamental issue in this case of who retained the Shares from 1996 to October 2011. If Madam Chen's evidence as to the alleged 1996 Oral Agreement was accepted, this would be determinative of the matter, as Madam Chen would have been entitled to demand that Mr. Ng transfer the legal interest in the Shares to her. Alternatively, both the legal and beneficial interest in the Shares were vested in Mr. Ng in 1996, and the remaining question for the court to answer was whether the transfer gave rise to a resulting trust in favour of Mr. Ng or it was a gift by Mr. Ng of both the legal and beneficial interest in the Shares to Madam Chen. The learned judge therefore ought to have made findings of fact and as to the credibility of both Madam Chen and Mr. Ng's evidence on the existence of the 1996 Oral Agreement.

2. The starting point is that the registered title to the Shares is indisputably with Madam Chen. Therefore, Madam Chen was entitled to rely on her registered title to the Shares as prima facie evidence as to where both the legal and beneficial ownership lies. The burden was therefore on Mr. Ng to displace her registered title to the Shares, by cogent evidence, either from the Bought Note and or Instrument of Transfer, or by the surrounding circumstances of the transaction, that he retained the beneficial interest in the Shares. It is only where Mr. Ng has established some right to or over the Shares giving rise either to a presumption of a resulting trust in his favour or to a contractual right to have the Shares re-transferred to him, that the burden shifts to Madam Chen to rebut that presumption.

   Stack v Dowden [2007] 2 AC 432 applied; **Portland Managements Ltd v Harte** [1977] QB 306 applied.

3. The principles of equity provide for the identification of beneficial interests arising from a gratuitous transfer of property under three categories. Under the first category, if either the transferor or the transferee makes a written (or oral) declaration as to those beneficial interests, or they do so together, that will generally be decisive, regardless of the intentions of either of them. In default of any such declaration, under the second category, the court looks for evidence from which a common intention as to beneficial ownership may be inferred. Finally, recourse may be had to presumptions, such as the presumption of advancement or the presumed resulting trust, but only where there is no evidence from which an inference as to the common intention may properly be drawn.

4. It is pellucid from the terms of both the Declaration and the Minutes, that Mr. Ng intended to and acknowledged that he had transferred to Madam Chen both the legal and beneficial interest in the Shares. This is so from the wording used in the two documents to the effect that Mr. Ng did not retain any right or interest in the Shares when he transferred them to Madam Chen. Accordingly, the learned judge correctly treated the Minutes and the Declaration as first category declarations and, hence, the legal and beneficial interest in the Shares reside with Madam Chen as from 4th October 2011. This is so irrespective of what is or may have been the intention of either Mr. Ng or Madam Chen at the time of the transfer. Therefore, the presumption of a resulting trust does not arise.

   Gany Holdings (PTC) SA v Khan and others 21 ITELR 310 applied.

5. Even if the Declaration and the Minutes ought not to be properly classified as first category documents, they provide strong evidence as to the common intention of Mr. Ng and Madam Chen at the time of the transfer of the Shares. The documents clearly show that Mr. Ng intended to transfer to Madam Chen both the legal and beneficial interest in the Shares. Accordingly, these two documents, even being treated as second category pieces of evidence, favour Madam Chen. It follows that, having concluded that the Minutes and Declaration fall within the first category or, alternatively, in the second category, resort cannot be had to the third category and to the presumption of

a resulting trust. Accordingly, the transfer of the Shares to Madam Chen in October 2011 was a gift.

Gany Holdings (PTC) SA v Khan and others 21 ITELR 310 applied.

6. It is well settled that an appellate court will be slow to overturn findings of fact made by the trial judge as the tribunal uniquely placed to hear and see the witnesses and to assess their demeanour and credibility, and to make a proper assessment as to what facts to believe. An appellate court, ought only to do so where it is satisfied that the trial judge committed a serious error, either of law or of fact, which undermines the soundness of the judge's conclusions on the facts or his assessment of the credibility of a witness, and not where the trial judge's findings are within the generous ambit of disagreement.

   Re Successful Trend Investments Corporation: Kathryn Ma Wai Fong v Wong Kei Yik and others BVIHCMAP2018/001 and BVIHCMAP2018/001 (delivered 27th March 2019, unreported) followed; **Henderson v Foxworth Investments Ltd. and another** [2014] 1 WLR 2600 applied.

7. There is no basis for this Court to interfere with the learned judge’s finding that there was no 2011 Oral Agreement, whereby the Shares were transferred to Madam Chen to facilitate her going to Beijing to obtain approval for the Cotai Strip Project. Indeed, there was no evidence of a revised feasibility study for the Project nor evidence that Madam Chen intended to go or went to Beijing for the purpose of seeking the said approval. There was also no solid evidential basis upon which to conclude that there was any oral agreement for the re-transfer of the Shares to Mr. Ng after a period of 6 months. The finding by the learned judge in relation to the 2011 Oral Agreement is therefore fatal to Mr. Ng’s contention that Madam Chen was his ‘figurehead’ or bare nominee and to him seeking to displace Madam Chen’s registered title to the Shares on the basis of a resulting trust.

8. As the Declaration is conclusive that Mr. Ng transferred all rights or interest in the Shares to Madam Chen, the intention of Mr. Ng at the time of the transaction and therefore the question of whether the transaction was a pretense or sham are irrelevant.

   Tinsley v Milligan [1994] 1 AC 340 considered; **Tribe v Tribe** [1996] Ch. 107 considered; **Whitlock v Moree** [2017] 20 ITELR 685 applied; **Gany Holdings (PTC) SA v Khan and others** 21 ITELR 310 applied.

9. Where the purpose of a transfer of property was for the transferor to evade his creditors, this can only be achieved by transferring both the legal and beneficial interest in the property to the transferee. Here, there is no basis upon which this Court can properly interfere with the learned judge's finding that Mr. Ng transferred the Shares to Madam Chen to evade his creditors. The judge correctly concluded based on the evidence, including statements made by Mr. Ng in his defence in Macau proceedings, that there was both an imminent and perceived threat held by Mr. Ng, that his creditors or potential creditors may come after him, and that he needed to take steps to protect his

assets. This is supportive of the learned judge's conclusion that, to do so, he transferred both the legal and beneficial interest in the Shares to Madam Chen. Accordingly, the presumption of a resulting trust does not arise and the transfer of the Shares was a gift to Madam Chen.

Tribe v Tribe [1996] Ch. 107 applied.

JUDGMENT

[1] **FARARA JA [AG]:** This is a matter of some vintage which has occupied a considerable amount of court time and resources up to the highest level. It concerns a dispute between two individuals over the beneficial ownership of shares in Peckson Limited ("Peckson"), a British Virgin Islands ("BVI") company. The two individuals, resident in Macau, who were not married to each other, lived together in a *de facto* marriage for over 20 years. The claim has been the subject of two trials before the Commercial Court in BVI, with appeals to the Court of Appeal from each such decision, and with an appeal to Her Majesty's Judicial Committee of the Privy Council (the "Privy Council") in London from this Court's decision on the appeal from the judgment of Bannister J in the first trial. The present appeal is from the judgment of Adderley J delivered on 28th February 2019 following the retrial in the Commercial Court ordered by the Privy Council on 17th August 2017. The record in this appeal is extremely voluminous, comprising some 96 bundles. Notably, this appeal was argued over five (5) days at a special sitting of this Court in the BVI.

Background

[2] As briefly stated above, this appeal concerns a dispute over the ownership of some 40,000 shares ("the Shares") in the first respondent, Peckson. The Shares are registered in the name of the second respondent Chen, Mei Huan ("Madam Chen"), having been transferred to her by the appellant Ng, Man Sun ("Mr. Ng") on 4th October 2011 ("the Transfer"), ostensibly for the stated consideration of US $40,000.00. The Transfer was by virtue of a Bought Note and Sold Note as well as an Instrument of Transfer, all dated 4th October

2011[1] ("the Notes and the Transfer"). The transfer of the Shares to Madam Chen was approved by a written resolution of the directors of Peckson dated 4th October 2011 and was signed by both Mr. Ng and Madam Chen in their capacities as directors of the company. A share certificate, also dated 4th October 2011, (the "Share Certificate") was issued by Peckson to Madam Chen.[2]

[3] On 24th August 2012, the claim was commenced by Mr. Ng, against Peckson, for: (i) an order that the purported transfer of shares by him to Madam Chen was void and of no effect; (ii) an order for rectification of Peckson's Register of Members to reflect Mr. Ng as the registered owner of the Shares; and (iii) for certain consequential orders. The claim form and statement of claim were amended on 15th November 2012. Madam Chen applied to be, and was, by order of the court, joined as a party to the proceedings. Since Madam Chen's joinder as a party, the case has proceeded as a dispute between Mr. Ng and Madam Chen, with Peckson playing no part other than that of a nominal defendant. She filed a defence and counterclaim on 18th March 2013. By her counterclaim, she sought declarations that Mr. Ng ceased to have any interest or right in the Shares as of 4th October 2011 and that she is and has been, since 4th October 2011 the only true legal and beneficial owner of the Shares. In response thereto, Mr. Ng filed a reply and defence to counterclaim on 2nd April 2013.

[4] Mr. Ng and Madam Chen, who lived together as husband and wife for over 20 years, have two children together. Their relationship spanned a period which included the 1996 acquisition of the five-star New Century Hotel in Macau ("the Hotel"). The Hotel also housed the Greek Mythology Casino (previously named "the New Century Casino"), and the Empresa Hoteleira de Macau ("Empresa"), a Macau company, both acquired in 1996. Peckson is the owner of all the shares in Empresa. The 'union' between Mr. Ng and Madam Chen came to an end and they went their separate ways in 2012, after Mr. Ng had transferred the Shares to Madam Chen on 4th October 2011, and after Madam

[1] See Core Bundle Part K – 95 p. 3888 and Part K – 96 p, 3889.
[2] See Core Bundle Part K – 97 p. 3890.

Chen had made a Will in Hong Kong leaving the Shares to Mr. Ng upon her death. After they split-up, Madam Chen changed her Will, effectively disinheriting Mr. Ng of the Shares. It is common ground between the parties that the stated consideration of US $40,000.00 for the Transfer was never paid and was never intended by the parties to be paid.

[5] The dispute was first considered by Bannister J in the Commercial Court, who gave judgment in favour of Madam Chen on 14th November 2013. Bannister J rejected the pleaded case of both parties as to why the Shares had been transferred to Madam Chen in October 2011 and registered in her name on the Peckson's Register of Members. Essentially, Bannister J treated the Transfer as a 'sale' or transfer for valuable consideration, albeit not paid. From the judgment of Bannister J, Mr. Ng appealed.

[6] By a written judgment delivered 22nd May 2015, the Court of Appeal of the Eastern Caribbean Supreme Court allowed Mr. Ng's appeal and declared him to be the owner of both the legal and beneficial interest in the Shares. The judgment of the Court of Appeal was delivered by Kentish-Egan JA [Ag.], with whom Baptiste JA and Michel JA concurred. The gravamen of that decision was that the Court found that Bannister J erred in treating the 2011 Transfer as a sale, as no such positive case had been pleaded by Madam Chen, and there had been no amendment by her of her pleadings to positively make such a case. Accordingly, a finding based upon a sale was inconsistent with her evidence, and incompatible with her claim that she had always held the beneficial interest in the Shares.

[7] The Court of Appeal also found that the Transfer of the Shares, not being for valuable consideration, gave rise to a presumption of a resulting trust that Madam Chen held the shares upon trust for Mr. Ng, a presumption which had not been rebutted by Madam Chen, who had not led any evidence that Mr. Ng intended to make an outright transfer or gift of the shares to her on 4th October 2011. Indeed, her pleaded case was that she had provided to Mr. Ng, the sum of HK $100 million (in two tranches of HK $50 million) to enable him to pay the deposit on the purchase of the Hotel. However, it was accepted as a fact by

Adderley J, and not challenged by Madam Chen, that the said money, if paid, had not been used by Mr. Ng for the purpose of making the deposit, as the deposit had been financed using a loan from the Bank of China. It was also Madam Chen's pleaded case during the first trial that, pursuant to an alleged oral agreement between herself and Mr. Ng in 1996, she had retained the beneficial interest in the shares when they had been transferred to Mr. Ng. The Court of Appeal found that this pleaded case and her evidence at the first trial, were contrary to any finding that the 2011 Transfer to her was a sale for valuable consideration.

[8] The matter went on appeal to the Privy Council. In its written decision delivered 17th August 2017 ("the Opinion"), the Board allowed Madam Chen's appeal, set aside both the judgment of Bannister J and the Court of Appeal, and ordered that the matter go back to the Commercial Court for retrial before a different judge. The unanimous decision of the Board is encapsulated at paragraph 62 of its opinion delivered jointly by Lord Neuberger and Lord Mance:

> "The Judge's reasoning for concluding that the Transfer constituted a sale for consideration and his decision to reject Mr Ng's case therefore cannot stand. The issue as to which of the possibilities identified in **para 36 above** may apply, whether the Transfer of 4 October 2011 gave rise to a **resulting trust**, and as to **the credibility of Mr Ng's evidence and case** all require further consideration in the light of evidence. It is self-evidently not possible for the Board to reach a conclusion on the issue of Mr Ng's credibility. The only possible outcome is therefore that this case must be sent back for full re-hearing. Subject to any order which the BVI High Court may give, it would be both unfair and impractical for it to go back on any basis other than that (i) the parties are both free to conduct their respective cases at the re-hearing **as if it was the first trial**, but (ii) their respective cases should be based on their existing pleadings and witness statements, **subject to such amendments and further evidence as the court at first instance may permit**, in particular with regard to the **new material deriving from the Macau legal proceedings** (para 46 above) and (iii) they will be entitled to rely on the transcript of the hearing before Bannister J as cross-examination material." (Emphasis added)

[9] The matter came on for a retrial before Adderley J in January and February 2019. In a written judgment delivered on 28th February 2019 ("the Judgment"),

Adderley J dismissed Mr. Ng's claim, granted Madam Chen's counterclaim, and made the following declarations:

> "(1) Mr Ng ceased to have (and does not now have) any interest or right of any kind in the Shares of the First defendant; and
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> (2) Madam Chen currently is, and has since 4 October 2011 been, the only true beneficial owner of the Shares and the only person entitled to be registered as their legal owner." [3]

[10] Mr. Ng, being dissatisfied with the Judgment, appealed to this Court by notice of appeal filed 10th April 2019[4] seeking a complete reversal of the decision, and a declaration that he is, and has been at all times and continues to be, the beneficial owner of the Shares. Mr. Ng relies on several grounds of appeal set out at paragraph 3 of the notice of appeal. In his written and oral submissions before us, Mr. Jones, QC, learned counsel for Mr. Ng, submitted, *inter alia*, that as a result of the learned judge's failure to make certain findings of fact and as to the credibility of witnesses in relation to what the learned judge characterized in the Judgment as 'the First Part of the Claim', this Court ought properly to order a second retrial of this matter.

[11] Madam Chen, by a counter notice of appeal filed 30th April 2019,[5] asserts several additional or alternative grounds in support of or in upholding the Judgment in her favour. In doing so, she contends that the learned judge could have and ought properly to have made certain findings on the said 'First Part of the Claim'. These include, importantly, findings as to Madam Chen having provided HK $100 million (by wire transfer in two tranches of HK $50 million) to Mr. Ng to enable him to pay the deposit on the purchase of the Hotel and Empresa. It is common ground that the Hotel property in Macau was valued at approximately HK $3.75 billion in 2012. Madam Chen also contends that the learned judge ought to have made findings of fact in relation to her evidence concerning the signing by Mr. Ng of a receipt for the HK $100 million that she had provided to him to pay the deposit on the purchase of the Hotel

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[3] See para. 101 of the Judgment.
[4] See Core Bundle Part A – 15 p. 177-184.
[5] See Core Bundle Part A – 15 p. 186 – 219.

and Empresa ("the Receipt"), and the expert handwriting evidence as to the authenticity of Mr. Ng's signature on the Receipt.

[12] By her counter notice, Madam Chen also contends that the learned judge ought to have made several other findings of fact under the First Part of the Claim, which:

> "…all supported the Judge's conclusion on what he called 'the Second Part of the Claim' by explaining why Madam Chen always regarded herself as having a beneficial interest in Peckson and the Hotel; and it was put to Mr Ng in cross-examination and relied on by Madam Chen for that purpose." [6]

[13] The learned judge formulated the First Part of the Claim in this way:

> "The first part deals with Madam Chen's claim that at the time the Peckson Shares were transferred to her, she was already the beneficial owner and Mr Ng as bare trustee was simply transferring the legal ownership to her or "back" to her, as she put it."[7]

[14] Accordingly, both parties contended on appeal that the learned judge ought to have made certain findings of fact regarding the evidence led by each of them on the First Part of the Claim. Had he done so, the learned judge would have had to make findings as to the credibility of the witnesses on both sides, including, importantly, Mr. Ng and Madam Chen. Instead, the learned judge at paragraphs 24 and 25 of the Judgment took this position on the First Part of the Claim:

> "[24] At the risk of appearing to make short shrift of this part, in my judgment there is no basis or utility for the court to examine the evidence because the necessary claim arising out of the cause of action has not been pleaded and no application has been made to amend. The court must assume that with both parties being represented by eminent counsel the decision was deliberate.
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> [25] Putting it another way Madam Chen claims that she made a gratuitous advance of HK$100 million to Mr Ng for the purpose of providing the deposit to purchase from the Bank of China for HK$900 million the repossessed hotel now owned by Empresa. She claimed that Mr Ng took the money, and did not use it for that purpose. She produced a receipt dated 17 November 1996 allegedly signed by Mr Ng acknowledging receipt of the HK$100 million shortly before the

[6] See Core Bundle Part A – 15 p. 186 – 219 at p. 187.
[7] See para. 22 of the Judgment.

hotel was bought, and an allegedly contemporaneous handwritten note on an envelope noting the details of a telephone conversation which she allegedly had with Mr Ng confirming her provision of the funds."

[15] The learned judge went on to find, under the First Part of the Claim, that the HK $100 million had not been used to purchase the Peckson Shares and, consequently, Madam Chen had not acquired any proprietary interest in the Shares.[8] He briefly considered whether Madam Chen would have a claim under a quistclose trust for the repayment of the said sum, but concluded that to make any order against Mr. Ng as to the HK $100 million, would be unfair to him, as he ought not to speculate as to what form of amendment Madam Chen would have applied for in order to make such a claim.[9]

[16] The upshot was that the learned judge declined to make a finding as to whether the HK $100 million had in fact been paid by Madam Chen to Mr. Ng[10] 'because there is no claim before the court to which such a finding will be relevant'. He took the view that, in any event, if the court decided that the funds had indeed been paid, 'it would not affect the outcome of the case'; and, if the finding was that it had not been paid, 'nothing would turn on that either'. Furthermore, the learned judge expressly declined to make any findings as to the expert handwriting evidence on the authenticity of Mr. Ng's signature on the Receipt, produced into evidence by Madam Chen. At paragraph 32 of the Judgment, the learned judge concluded on the First Part of the Claim in these terms: '[a]ccordingly, the court will not make findings of fact on these matters because the issue to which they would be relevant was not pleaded and as such is not before the court.'

The Privy Council Decision ("the Opinion") – 17th August 2017

[17] In ordering a retrial of the matter, the Privy Council, in its 17th August 2017 Opinion addressed with customary clarity and specificity, several of the relevant legal and factual issues of importance to the proper determination of the dispute, and provided helpful guidance to the judge in the conduct of the

[8] See para. 27 of the Judgment.
[9] See para. 28 of the Judgment.
[10] See para. 29 of the Judgment.

retrial, as well as helpful guidance in reaching a decision on the merits of pleaded cases, with possible amendments. This guidance was aptly provided without fettering the discretion and powers of the retrial judge. This guidance was recognized by Adderley J in the Judgment, both on the law and as to the potential significance of certain documents and facts.[11] In particular, at paragraph 16, the learned judge stated that the Privy Council had ordered a retrial for the reasons that Mr. Ng had not pleaded that the Note and Transfer were a sham, and, on the other hand, that Madam Chen had not pleaded that the transfer of the Shares was by way of a sale (as Bannister J had found) or, alternatively, by way of gift, or for the purpose of keeping them out of the reach of creditors. The learned judge went on to recognize that the Privy Council had posited that either the consideration of US $40,000.00 for the Transfer was still payable, or the parties never intended that it be paid, and, accordingly the Transfer was not by way of sale, but was a gratuitous transfer.

[18] At paragraph 17, the learned judge also recognized that, in the Privy Council's opinion, this would yield two possible results, either: (i) Madam Chen held the Shares on a presumption of a resulting trust for Mr. Ng; or (ii) the Shares were a gift from Mr. Ng to Madam Chen. It is these two scenarios which the learned judge correctly understood that the Privy Council had sent the matter back to "explore" at the retrial.[12] Indeed, before this Court, these are the two opposing or contending positions in law adopted by the parties: Mr. Ng contending that the Transfer gave rise to the presumption of a resulting trust, which Madam Chen has not rebutted; and Madam Chen contending, at least in the alternative, that it was a gift of the Shares to her. Madam Chen also relies upon her registered title to the Shares in Peckson and contends that the onus is on Mr. Ng to displace this by cogent evidence of a trust whereby he continued to hold the beneficial interest in the Shares.

[19] The most important passages from the Opinion are at paragraphs 36 to 46 and at paragraph 62. They serve both to highlight and to elucidate the primary issues of law and fact, and the key documentary evidence necessary for a

[11] See paras. 16 – 20 of the Judgment.
[12] See para. 18 of the Judgment.

resolution of the legal and factual issues. They also provide helpful guidance in determining, at the retrial, the dispute over the beneficial ownership of the Shares, and the main issues raised for determination in this appeal.

[20] As mentioned above, by the conclusion of the retrial, both sides were agreed that the Transfer was not a sale (as it was never their intention that the stated consideration of US$40,000 was to be paid); but was a class of 'gratuitous transfers'. At paragraph 36 of the Opinion, the Board addressed the two alternative analyses of the apparent agreement set out in the documents. These documents are: (i) the Bought Note, (ii) the Instrument of Transfer, (iii) the Written Resolution of the directors of Peckson approving the transfer of the Shares, and (iv) the Share Certificate issued in the name of Madam Chen for the Shares. Paragraph 36 states:

> "In the present case, the agreed statement that consideration had been paid was clearly gratuitous, and for the benefit of one side only. Both parties knew that it had not been paid, and neither can have relied on the statement that it had been paid. Their intention to be bound, or any reliance they placed on their agreement to be bound, without consideration cannot suffice; otherwise gratuitous promises could readily be made binding. In these circumstances, two alternative analyses exist of the apparent agreement recorded in the documents mentioned in para 3 above:
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> > (A) the parties' recital in the Transfer that consideration had been paid was simply inaccurate and the consideration of US $40,000 recorded in the Note was and, presumably, remains payable, or
> >
> > (B) the parties' real agreement, when executing the Note and the Transfer with its recital that the stated consideration of US $40,000 had been paid, was that no such consideration should ever be paid.
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> > In case (B), the Board considers that no contract for sale of the Shares can have come into existence. This lays the ground for Mr Ng's case, on which he succeeded in the Court of Appeal, that
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> > (Bi) the Transfer gives rise to a resulting trust (at least as a matter of presumption, which the Court of Appeal concluded that Madam Chen had not rebutted).
> >
> > But the Board considers that an alternative, in the light of all the circumstances, including the later documents mentioned

> in para 4 above and the rejection of Mr Ng's evidence (if the judge's rather than the Court of Appeal's assessment of it were to stand) is that
>
> (Bii) there was a gift of the Shares to Madam Chen."

[21] It is important to note, that the Board at paragraph 36, considered that the alternative of a 'gift' (Bii), arose both from 'all the circumstances' of the case and from the 'later' documents (executed by Mr. Ng just over a month after he had executed the Note and Transfer) referred to at paragraph 3 of the Opinion. These documents, listed at paragraph 3, were all in evidence before the learned judge at the retrial, along with statements made by Mr. Ng in his defence filed on 9th May 2014 in Action CV3-14-0018-CVO brought against him by Empresa and Peckson in Macau (the "Macau Defence"). The documents are: (i) the Board Minutes written in Chinese signed by Mr. Ng on 21st November 2011 stating that the Shares had "belonged to him personally" ("the 21st November 2011 Minutes"); and (ii) the 22nd November Declaration made by Mr. Ng to have the records of Peckson updated and corrected ("the Declaration"). Importantly, in the Declaration, (and in similar terms in the 21st November 2011 Minutes), Mr. Ng stated: 'After the transfer, the [Shares] shall be under [Madam Chen's] name in entirety, and [Mr. Ng] shall not keep any rights'.[13] By the Minutes, Mr. Ng acknowledged: 'After the transfer, all the said 40,000 shares were vested under Madam Chen Mei Huan's name, and Mr. Ng Man Sun did not retain any right or interest.'[14]

[22] Mr. Ng and Madam Chen, having separately concluded that the Transfer was a gratuitous transfer and not a sale for consideration, it follows that the transaction falls squarely within category (B) discussed at paragraph 36 of the Opinion, as no enforceable contract for sale of the Shares came into existence by virtue of the Note and/or the Transfer. Accordingly, the Note and Transfer gave rise to two possible scenarios: either to a presumption of a resulting trust (Bi) or a gift (Bii).

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[13] See Core Bundle Part K – 108 p. 3926 – 3930 at p. 3930.
[14] See Core Bundle Part K – 107 p. 3918 – 3925 at p. 3924.

[23] This type of transaction, framed as a sale in the underlying documents conveying title, but which in reality is not a sale, and was never intended to be a sale, is often categorized as a "sham" or a "pretence". That was the contention of Mr. Ng before this Court. Alternatively, if the Note and Transfer, properly construed in all the circumstances, was a "gift" of the Shares to Madam Chen, as contended by Madam Chen (at least in the alternative), it was not, and could not be categorized, as either a "sham" or a "pretence." However, at paragraph 45, the Privy Council, opined that the Court of Appeal was not necessarily correct to conclude, from Madam Chen's pleaded statements in the context of this case (which Bannister J had rejected), to the effect that she was the long-standing beneficial owner of the Shares, 'that the Transfer of 4 October 2011 fell necessarily within possibility (Bi) (resulting trust), rather than (a) (sale) or (Bii) (gift), identified in para. 36 above'. The Privy Council cautioned: 'Even if the right conclusion on the facts was that no consideration was ever really intended, agreed or payable, it does not follow that the Transfer did not operate by way of gift.'[15]

[24] The question as to whether the Transfer gave rise to a resulting trust in favour of Mr. Ng or whether it was a gift to Madam Chen, was further developed by the Privy Council, particularly in relation to where the onus of proof lies in light of the indisputable fact that the Shares are registered in the name of Madam Chen in Peckson's Register of Members: (see paragraph 40 of the Opinion). The Board, having disapproved of the reasoning of the Court of Appeal leading to a finding in favour of a resulting trust, concluded:

> "The simple answer to it is that, in the light of the incontrovertible fact that the Shares were registered in the name of Madam Chen, **the onus was firmly on Mr Ng** to establish a right over or in respect of the Shares. He was contending that he had the right to have the Shares transferred back to him, and it was for him to persuade the Judge that he had such a right or any other right over the Shares, in particular either by giving a credible account of the Note and Transfer involving the existence of such a right or by bringing the circumstances within possibility (Bi) (a resulting trust) mentioned in para 36 above, rather than possibility (A) (sale) or (Bii) (gift)." (Emphasis added)

[15] See para. 45 of the Opinion.

[25] Accordingly, it is clear that, in this matter, Madam Chen being indisputably the registered owner of the Shares in Peckson, the onus rested on Mr. Ng to establish on a balance on probabilities that, by operation of law and/or by cogent evidence, the Note and the Transfer gave rise to a presumption of a resulting trust in his favour, or that on the facts, he retained the beneficial interest in the Shares; or alternatively, that he had an enforceable right to have the Shares re-transferred to him, as he asserts.

[26] As to the importance of a party holding the registered title to an asset, the Privy Council, at paragraph 42, put it this way:

> "A major virtue of a register of ownership of assets, whether real or personal, whether corporeal or incorporeal, is that it incontrovertibly identifies the person who is, **at least prima facie**, the owner of an asset, and, subject to any qualifications on the register, throws the onus onto any third party who claims an interest in or right over the asset. This proposition was well established in the cases relied on in *Portland* where the third party raised a common law right, and the observations in *Stack* confirm that the position is the same where the third party's claim is equitable. It is unnecessary to decide the point, but, at least as at present advised, the Board is inclined to accept that Mr Ng's case involved claiming a right which was both contractual and equitable: he was contending for a contractual right to have the Shares transferred to him, which, if established, would have given him an equitable interest in the Shares." (Emphasis added)

[27] Specifically, as to Madam Chen's case as then pleaded, and her ability to rely on her registered title to the Shares, the Board had this to say at paragraph 43:

> "However, given that [Madam Chen] was the registered proprietor of the Shares, that did not undermine the fundamental point identified in para 40 above. As Bannister J pithily put it, '[i]n order to succeed in these proceedings Mr Ng needed to prove that he is entitled to call for a retransfer of the Shares. Madam Chen needed to prove nothing'. It is also true that no alternative case was put forward by Madam Chen to the effect that she should succeed on the point identified in para 40 above. **However, it does not appear to the Board to be unfair on Mr Ng that the point should be taken. It is a pure point of law which Mr Ng could not have produced any evidence to rebut, and it was a point which Mr Ng's legal advisers had the opportunity to deal with.**" (Emphasis added)

[28] At paragraph 44, the Board sought to identify another way in which Madam Chen could have advanced a case based upon her registered title to the Shares, albeit leading to the same position in law:

> "It may well be that Madam Chen could have advanced a case on a slightly different basis, namely that it was open to the Judge to find that the unchallenged transfer of the legal ownership of the Shares to Madam Chen in October 2011 inevitably led to the conclusion, at least in the absence of any contradictory evidence accepted by the Judge, that the beneficial, as well as the legal ownership of the Shares was vested in Madam Chen. Given that that transaction was completed by registration of Madam Chen as proprietor of the Shares, that seems to the Board to be a very similar, if somewhat more roundabout, basis for arriving at the same result."

[29] The possibility that Mr. Ng made the Transfer to evade his creditors, a matter which the Board noted had been put to him in cross-examination, was addressed in this way at paragraph 46:

> "Bearing in mind [Mr. Ng's] long-standing family relationship with Madam Chen, such an aim might well be achieved, indeed could only truly be achieved as a matter of law, by transfer of the whole interest in the Shares, whether for a comparatively small consideration or by way of gift. It is true that Madam Chen advanced no positive case on either point at the trial. But the specificity and number of ways in which Mr Ng averred that only Madam Chen had any interest in the Hotel from and after 4 October 2011 could be thought to militate against the existence of a resulting trust and/or to support a conclusion that some form of outright transfer of any and all interest occurred on that date."

[30] The Board also alluded to Madam Chen's failed application before the Court of Appeal to adduce fresh evidence, to wit, Mr. Ng's statements in his Macau Defence 'positively explaining the Transfer as designed to avoid the risk of seizure of Mr. Ng's assets by creditors'. The Board considered that such evidence:

> "…would potentially have had a real relevance in cross-examination, and that, if the matter goes back for re-hearing, there would on the face of it (and without limiting the judge's discretion) appear to the Board to be a strong case for permitting its use in this context. Those advising Madam Chen would have also of course to consider whether

any application should be made then to advance a positive case in this area."[16]

[31] As addressed above, Madam Chen amended her Defence and Counterclaim to positively plead and rely upon both Mr. Ng's statement in the Macau Defence and in the Declaration made by him on 22nd November 2011, as evidence of a likely reason why Mr. Ng transferred the Shares to her on 4 October 2011. This amendment, as permitted, was in step with the conclusions reached by the Board at paragraph 62.

Amendments to Pleadings post Privy Council Decision
Mr. Ng's Amendments

[32] Paragraph 62 of the Opinion sets the general parameters within which a retrial of the claim and counterclaim was to proceed. These mandated a trial de novo to be conducted based on the existing pleadings and witness statements, subject to such amendments and additional evidence as the court of first instance may permit.

[33] On 20th February 2018, Mr. Ng filed a Re-amended Claim Form and Re-amended Statement of Claim.[17] By these amendments, Mr. Ng pleaded that the Instrument of Transfer of the Shares and the Bought Note, both written in English, were drawn up on the instructions of Madam Chen, but were never translated into Chinese and Mr. Ng, who does not understand English, did not comprehend what these documents were saying before signing them.[18] Likewise, Mr. Ng pleaded by way of amendment, that the written resolution of the directors of Peckson dated 4th October 2011, approving the transfer of the 40,000 shares to Madam Chen, and the Share Certificate certifying that she was the registered holder of the Shares, were in English, drawn up at Madam Chen's instructions, and that he did not comprehend what any of these documents were saying.[19]

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[17] See Core Bundle Part A - 11 p. 93 – 96 and Part A - 12 p, 97 – 109.
[18] See Core Bundle Part A - 12 p. 97 – 109 at para. 17A.
[19] See Core Bundle Part A - 12 p. 97 – 109 at para. 17B.

[34] As to the Declaration, which was written in Chinese and made 22nd November 2011 by Mr. Ng, who expressed hope that 'the record of Peckson can be modified and corrected with both the BVI and Hong Kong companies registries'[20] and the 'corporate kit', Mr. Ng pleaded, by way of amendment, that he signed it without properly reading it.[21] The Declaration had been preceded the day before by minutes dated 21st November, which were signed by Mr. Ng, in which he made statements in terms similar to those enshrined in the Declaration.[22]

[35] Further, and by way of amendment to the statement of claim, Mr. Ng pleaded that because of the de facto marriage between himself and Madam Chen, and their previous course of dealing, he trusted Madam Chen and, accordingly, never sought advice in respect of any of the said documents. Also Mr. Ng pleaded that he did not understand that by the Instrument of Transfer, the Sold Note and Bought Note, he was selling the Shares to Madam Chen for no consideration, but was transferring them to her:

> "…pursuant to the arrangement set out in paragraphs 15 and 16 above, which did not involve any sale and purchase or the payment of any consideration. Mr. Ng's understanding derived from what [Madam] Chen told him was the effect of the documents."[23]

[36] He also pleaded, by way of amendment, that the Instrument of Transfer and the Sold Notes 'are both void on the ground of *non est factum*'[24] and void for mistake.[25] Mr. Ng also amended the statement of claim to plead, in the alternative, that Madam Chen holds the Shares on a resulting trust for him 'on the basis that no consideration was paid for the shares' and neither he or Madam Chen had agreed to or intended for the stated consideration to be paid.[26]

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[20] See Core Bundle Part K – 108 p. 3926 – 3930 at p. 3929.
[21] See Core Bundle Part A - 12 p. 97 – 109 at para. 18.
[22] See Core Bundle Part K – 107 p. 3918 – 3925.
[23] See Core Bundle Part A - 12 p. 97 – 109 at para. 35B.
[24] See Core Bundle Part A - 12 p. 97 – 109 at para. 35D.
[25] See Core Bundle Part A - 12 p. 97 – 109 at para. 35E.
[26] See Core Bundle Part A - 12 p. 97 – 109 at para. 35H.

[37] Paragraphs 15 and 16 (referred to at paragraph 35B, quoted in paragraph 35 above) of the Re-amended Statement of Claim, were not amended. These paragraphs set out Mr. Ng's pleaded case as to why he transferred the Shares in Peckson to Madam Chen on 4th October 2011. In essence, Mr. Ng contends that he and Madam Chen verbally agreed for him to transfer the shares to Madam Chen so that she could apply for government approval in her name to build a new hotel and casino on two lots 7 and 8 in Macau, estimated to cost HK $30 billion ("the Cotai Strip Project"). This was done because Madam Chen had represented to him that she had good government contacts in Macau and Beijing that would aid the application, and a friend of hers in Beijing had told her if she, Madam Chen, had applied for the approval, there would be a high probability of the application being successful. Also, it was part of their verbal agreement that she would transfer the Shares back to him after 6 months. However, there is no evidence that Mr. Ng had requested a re-transfer of the Shares to him after 6 months, or any time thereafter.

Madam Chen's Amendments

[38] Pursuant to orders made by Chivers J at a case management conference on 14th February 2018[27] permitting Madam Chen to amend her pleading, including to advance, in a limited way, an 'alternative case', as canvassed by the Privy Council at paragraphs 46 and 62 of its Opinion, the Madam Chen filed an Amended Defence and Counterclaim on 21st March 2018.[28]

[39] These amendments included: (i) the insertion of new sub-paragraphs (t) to (z) of paragraph 9 denying Mr. Ng's allegation in his pleading that he was planning in 2010 to build the Cotai Strip Project, and pleading that Mr. Ng is estopped from relying on the said allegation in these proceedings, by virtue of a written judgment[29] of the Macau Court of First Instance ("the Macau Court") delivered 9th June 2015 in proceedings brought against Mr. Ng by Empresa and the Greek Mythology Casino in Claims CV1-12-0006-CPV and CV1-12-0062-

[27]See Record of Appeal Bundle 27 – 971.
[28]See Core Bundle Part A – 13 p. 110 – 139.
[29] See Core Bundle Part L – 158 p. 4552 – 4574.

CAO[30] for possession of the Hotel, whereby the Macau Court of First Instance found that Mr. Ng had not proved the alleged agreement regarding Lots 7 and 8; (ii) a new paragraph 9A (a) to (k) dealing with the drawing-up, execution and carrying into effect in October 2011 of the Transfer, Sold Note, Bought Note, Written Resolution and the Share Certificate; and (iii) new sub-paragraphs (a),(cc),(g) and (h) of paragraph 10 relying on the voluntary Declaration made by Mr. Ng on 22nd November 2011 for the purpose of updating and correcting the statutory books or 'corporate kit' of Peckson ("the Declaration"). By the Declaration, Mr. Ng confirmed, *inter alia*, that upon the transfer of the Shares to Madam Chen in October 2011:

> "Peckson shall be under the name of [Madam Chen] in entirety**, and I shall not keep any rights**. I agree to record the 40,000 shares of Peckson under [Madam Chen's] name into Register of Members, allowing [Madam Chen] to become 80% shareholder of Peckson, and to issue stock certificate to [Madam Chen]."[31] (Emphasis added)

[40] Importantly, in her Amended Defence[32] Madam Chen maintained (unaltered) her pleading that: (i) she was the one purchasing the Hotel, which was to be effected through purchasing the shares in Empresa; (ii) she had paid the deposit of HK $100 million to Mr. Ng for the purchase of Empresa from her own funds;[33] (iii) she had asked for, and Mr. Ng had signed, the Receipt for the HK $100 million that she had transferred to him as a deposit on the purchase of Empresa;[34] and (iv) Mr. Ng is aware that Madam Chen, as the true beneficial owner of the Shares, had deliberately chosen not to hold the Shares in her name but in the name of Mr. Ng as her trustee and nominee, and that Mr. Ng held the Shares as trustee and nominee for her.[35]

[41] Accordingly, Madam Chen's pleaded case was that Mr. Ng held the Shares on trust for her, and that since 1996 the beneficial interest in the Shares remained with her. As to the alleged 1996 Oral Agreement itself, Madam Chen pleaded at paragraph 9(a) in these terms:

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30 See Core Bundle Part L – 156 p. 4413 – 4533 and Part L - 157 p. 4434– 4551.
31 See Core Bundle Part K – 108 p. 3926 – 3930 at p. 3930.
32 See Core Bundle Part A – 13 p. 110 – 139.
33 Ibid at para. 7(j) to (n).
34 Ibid at para. 7(m).
35 Ibid at para. 7(s) and (z).

> "In or around 1996, Mr Ng orally promised [Madam] Chen that he would immediately transfer the legal title to the Shares into [Madam] Chen's name unconditionally at any time in the future upon [Madam] Chen's request ("**the 1996 Oral Agreement**")."

[42] Following the guidance provided by the Privy Council in the Opinion, Madam Chen amended her Defence to also plead, in reliance upon evidence as to certain debts, and further, in reliance upon statements made by Mr. Ng in the Macau Defence, that a probable reason for Mr. Ng transferring the Shares to her in October 2011 was to avoid his creditors. Paragraph 11(o) states as follows:

> "Mr Ng's decision was probably motivated by the threat to the Shares represented by the claim on behalf of the Social Security Fund and other victims of the alleged large-scale scam for which he was being investigated by the Mainland Chinese Police as pleaded in sub-paragraphs (g) to (l) above and by his other creditors who included (in addition to those mentioned in sub-paragraphs (e) to (f) above) the Bank of China (Hong Kong), to whom he was indebted under the three Agreements dated 8 June 2011 already mentioned in sub-paragraph 9A(e) above for a total of HK$257,789,550.83 repayable by monthly instalments in respect of which he was at all material times in default and STDM, to whom he was indebted for HK$180 million as at 30 September 2011."

[43] Madam Chen goes on to plead, by way of further amendment, that the Macau Defence revealed 'at least part of Mr Ng's true motivation for the Transfer' of the Shares to her in October 2011.[36]

[44] Following the guidance by the Privy Council, Madam Chen also amended her Defence to deny that there was any agreement between her and Mr. Ng that she would act as his 'figurehead', in taking the transfer of the Shares in Peckson, as was stated by Mr Ng in the Macau Defence at paragraphs 11(p) a and 11(q). It is common ground that the term 'figurehead' means 'nominee'.

Madam Chen's 'alternative case'

[45] At paragraph 11A(a) to (c), Madam Chen pleaded the 'alternative case' in these terms:

[36] Ibid at para. 11(q).

> "(a) If (contrary to Madam Chen's case) Mr Ng was the beneficial owner of the Shares prior to the Date of Transfer and/or if (contrary to Madam Chen's case) Mr Ng did not transfer the Shares to her by way of performance of the 1996 Oral Agreement, Mr Ng nevertheless intended that after the Transfer Madam Chen should be both the legal and beneficial owner of the Shares so that they should be safe from his own creditors.
>
> (b) For the purpose of establishing Mr Ng's said intention [Madam] Chen will rely on the facts pleaded in sub-paragraphs 11(o) and (p) above.
>
> (c) Mr Ng made it clear by the Declaration that that was his intention, in particular by those parts of the Declaration which are pleaded in sub-paragraph 9(m) above."

[46] Paragraph 17 of Madam Chen's Defence and Counter Claim was also amended, by deleting sub-paragraphs (a) to (m) and inserting new sub-paragraphs (a) and (b) as follows:

> "(a) When the Instrument of Transfer and the Sold and Bought Notes were executed (and Mr Wong witnessed their signatures to the Instrument of Transfer) Mr Wong explained to Mr Ng and Madam Chen that he had included a nominal consideration of US$40,000, even though he was aware that no money was intended to change hands, in order to make it clear to any third parties that the Shares were being transferred to Madam Chen absolutely, and that he had prepared the Sold and Bought Notes on the same basis and for the same purpose.
>
> (b) Mr Ng and Madam Chen understood and approved that explanation and Mr Ng never suggested that Madam Chen should pay the nominal US$40,000, though she would have done so if she had been advised that she should."

[47] Mr. Jones, QC for Mr. Ng, emphasized during his oral submissions in this appeal, that Madam Chen did not plead that the Transfer was a gratuitous one or that it was a gift from Mr. Ng to her. As to the former, learned counsel Mr. Mc Donnell, QC during his closing oral submissions before Justice Adderley, conceded that the Transfer was gratuitous. This was also confirmed during his oral argument before this Court.

[48] As to the latter of the potential pleadings noted above, Mr. Mc Donnell, QC, quite correctly, in my opinion, pointed to Madam Chen's pleading at paragraph

11A(a) quoted above, where it is stated that if, contrary to her case, Mr. Ng was the beneficial owner of the Shares before the Transfer, he nevertheless intended Madam Chen to, after the Transfer, hold both the legal and beneficial interest 'so they could be safe from his own creditors'. This pleading is what has been referred to as the alternative case. I am of the view that, while not directly averring a 'gift', this sub-paragraph is tantamount to pleading, in the alternative, that Mr. Ng made a gift of the Shares to Madam Chen in order to evade his creditors. Specifically, learned counsel stated that it is Madam Chen's case that the Transfer was a gift by Mr. Ng to her, albeit Madam Chen has never resiled from, and continues to rely on, all of her pleaded case and evidence at the retrial. This included, the alleged payment to Mr. Ng of the sum of HK $100 million as the deposit on the purchase of Empresa and the Hotel, the 1996 Oral Agreement, and the Receipt. I shall return to these matters, and to the pleadings, the Declaration and the pertinent statements in the Macau Defence.

[49] Mr McDonnell, QC for Madam Chen, goes further. He submits that the alternative case was Madam Chen's only case, and that Adderley J was never invited to find that there was a 1996 Oral Agreement in relation to the Shares. Madam Chen's case at the retrial, he submits, was that even if Madam Chen did not have such an oral agreement relating to the Shares, on 4th October 2011, Mr. Ng transferred both the legal and beneficial interest in them to her. Mr. Mc Donnell, QC also submitted that the alternative case pleaded at the new paragraph 11A, was Madam Chen's only case from the beginning of the retrial, for which permission had been granted by Chivers J at the case management conference.

The Judge's treatment of the First Part of the Claim

[50] Adderley J considered that the Claim consisted of two parts. He formulated them at paragraphs 22 and 23 of the Judgment as follows:

> "22. The first part deals with Madam Chen's claim that at the time the Peckson Shares were transferred to her, she was already the beneficial owner and Mr Ng as bare trustee was simply transferring the legal ownership to her or "back" to her, as she put it."

> "23. The second part deals with the claim by Mr Ng that at the time of the transfer he was both the legal and beneficial owner of the Shares and he transferred the legal title to Madam Chen temporarily, to be retransferred after 6 months, so that she could apply for approval to purchase 2 strips of land to develop a very valuable (HK$ 25-30 billion) hotel/ casino project in Macau, and at the time of the application demonstrate to the authorities in Beijing and Macau her ownership of substantial assets."

[51] Learned counsel for the appellant, Mr. Jones, QC, at paragraph 23 of the appellant's skeleton argument before us, considered that there were three issues before this Court, which he formulated in these terms:

> "Was there an oral agreement that Mr Ng would hold the Shares on trust for Madame Chen? (**"The First Issue"**). If the answer was yes, Madame Chen would at all times have been the beneficial owner of the Shares and the Instrument of Transfer would have merely transferred the legal title to the Shares. On this basis Madame Chen would win.
>
> If there was no oral agreement, so that Mr Ng was at all times up to 4 October 2011 the beneficial owner, the next issue was whether there had been a sale for consideration. (**"The Second Issue"**)
>
> (c) If there had not been a sale for consideration, the transfer would be gratuitous and the presumption of a resulting trust would arise. The issue then would be whether or not there had been a gift of the Shares by Mr Ng to Madame Chen. (**"The Third Issue"**)

[52] By formulating the first and second issues specifically with reference to whether Madam Chen had made out her pleaded case of the existence of the 1996 Oral Agreement (by which she would have retained the beneficial interest in the Shares), and the consequences in law if she had failed to make out such an agreement (that both the legal and beneficial interest would have been held by Mr. Ng), learned counsel for the appellant has zeroed-in on the failure or refusal by the learned judge to make any findings on what he termed 'the First Part of the Claim'. This includes, specifically, his failure to assess and come to conclusions as to the credibility of witnesses and make findings of fact about the existence or not of the alleged 1996 Oral Agreement pleaded by Madam Chen. Mr Jones, QC submitted that this failure on the part of the learned judge has far-reaching implications for both parties. Madam Chen was entitled

to have positive findings of fact made with regard to her evidence as to the existence of the 1996 Oral Agreement and her retention of the beneficial interest in the Shares. And Mr. Ng was entitled to have findings made as to Madam Chen's truthfulness as a witness, findings which would then guide and inform the learned judge when he came to assess the evidence of both Mr. Ng and Madam Chen in relation to what the learned judge termed 'the Second Part of the Claim' and, importantly, what the reason was for the Transfer of the Shares, and the intention or common intention of the parties at the time.

[53] I will return to these issues later on. However, at this juncture, I would merely observe, with respect to the Second Issue as formulated by the appellant, that, as matters evolved before the learned judge, the question of whether the Transfer was by way of a sale of the Shares, was not a live issue, neither at first instance nor before this Court, it having been accepted that the consideration was never intended to be paid and, finally, that the Transfer was a 'gratuitous transfer'. Accordingly, the issue of a 'sale', as distinct from the consequences in law which flow from the accepted position on the facts that it was not a sale, was not a matter which ought properly to engage the learned judge or this Court. Furthermore, the Third Issue as formulated by the Appellant, is not entirely correct. This is so because, as a matter of law, the consequences of the Transfer not being a sale (as is common ground), could give rise, not only to the presumption of a resulting trust, but also to whether there was a gift of the Shares to Madam Chen and what is the effect in law of her registered title to the Shares.

Judge's conclusions on First Part of the Claim

[54] The learned judge made no positive findings with regard to the First Part of the Claim. This is clear from paragraph 24 of the Judgment. Indeed, the learned judge expressly stated: 'In my judgment there is no basis or utility for the court to examine the evidence because the necessary claim arising out of the cause of action has not been pleaded and no application has been made to amend.' Accordingly, the learned judge did not, for example, make any findings as to whether Madam Chen had provided to Mr. Ng the sum of HK $100 million to be used as a deposit on the purchase of Empresa and the Hotel; whether

there was in fact an oral agreement between them in 1996 whereby she retained the beneficial interest in the Shares in Peckson; whether Madam Chen had subsequently insisted upon and gotten Mr. Ng to sign the Receipt evidencing her payment to him of the sum of HK $100 million; and whether he accepted the evidence of Madam Chen or of Mr. Ng's handwriting expert as to the authenticity of the signature on the Receipt.

[55] While the learned judge alluded to some of these matters in dealing with the First Part of the Claim[37] the only positive finding which he made was at paragraph 27 that:

> "none of the alleged HK $100 million which was the subject matter of the receipt was utilized for the purchase of the Peckson Shares. Consequently I find that Madam Chen acquired no proprietary interest in the Shares as a result of her alleged payment of the funds to Mr Ng."

[56] The learned judge's treatment of the First Part of the Claim, has come in for strong criticism from the appellant, and to a degree from the Madam Chen, as I have already alluded to with reference to her counter notice of appeal. Indeed, this is the appellant's first ground of appeal. He contends that the learned judge 'misunderstood the first issue in the case', which was 'whether there was an oral agreement between Madam Chen and Mr Ng that Mr Ng would hold the Shares on trust for her'.

[57] In this regard, the appellant submits, quite forcefully, that the learned judge completely abdicated his responsibility as the primary tribunal for the assessment and adjudication of the salient issues and facts necessary for a proper judicial determination of the dispute underlying the Claim and Counterclaim. The appellant submits that the learned judge misunderstood what he had to decide on this aspect of the Claim;[38] and accordingly, wrongly decided that he did not need to examine the evidence and make any findings of fact as to whether Madam Chen was already the beneficial owner of the Shares, which claim and assertion directly concerned whether there was a

[37] See para. 25 of the learned judge's judgment.
[38] See paras. 24 - 25 of the appellant's Skeleton Argument.

1996 Oral Agreement as pleaded by her.[39] With these submissions, and with the greatest respect, I am entirely in agreement.

[58] It is manifest from the treatment 'the First Part of the Claim', which rested on the foundation of the alleged 1996 Oral agreement as giving rise to Madam Chen retaining the beneficial interest in the Shares, that the learned judge fell into grave error when he equated this aspect purely with the issue of whether Madam Chen had acquired a proprietary interest in the Shares; and whether she was now entitled, (having not pleaded it as part of her case), to a claim under a quistclose trust for the return of the HK $100 million she allegedly paid over or transferred to Mr. Ng.[40] The learned judge went on to deal with related issues of jurisdiction and forum, and applicable limitation periods. Not only was no such claim made by Madam Chen for a refund or restitution of the money allegedly paid over to Mr. Ng to meet the deposit on the purchase of Empresa and the Hotel, but, as I understand it, no such argument was advanced by or on behalf of Madam Chen at the retrial, and certainly not before this Court.

[59] But the appellant makes another, and perhaps more fundamental criticism of the learned judge's treatment of the First Part of the Claim. This is that both Madam Chen and Mr. Ng were separately entitled to the benefit of the lower court's assessment of Madam Chen's evidence as to the existence of the 1996 Oral Agreement. The reason being that a conclusion on this issue one way or the other, would be determinative of where the beneficial interest in the Shares lay up to 4th October 2011; whether in Madam Chen, as she asserts, or in Mr. Ng, as he asserts, there being no real issue that the legal title to the Shares was with Mr. Ng during that period. Furthermore, findings as to the credibility of Madam Chen on this issue, whether she was telling or not telling the truth during her testimony and cross-examination before the learned judge, were crucial to the judge's assessment of the evidence and his conclusions under what he termed the Second Part of the Claim.

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[39] See para. 26 of the appellant's Skeleton Argument.

[40] See para. 28 of the Judgment.

[60] In this regard, the appellant has, at paragraphs 60 to 200 of his written closing submissions before the learned judge,[41] and at paragraph 30 of the appellant's written skeleton argument, identified several untruths which he says Madam Chen gave in her evidence before the court of first instance, both at the first trial and the retrial, on these factual issues. Suffice it to be said, that none of these matters were referred to or assessed by the learned judge, with the exception of the judge's finding at paragraph 27 that none of the HK $100 million was in fact used to purchase the Hotel, and that Madam Chen acquired no proprietary interest in the Shares as a result of the alleged payment.

[61] This line of criticism, albeit to an end different from that contended for by the appellant, is buttressed, to some extent, by the counter notice of appeal filed by Madam Chen on 30th April 2019,[42] by which she contends that there are additional and alternative grounds upon which the conclusions reached by the learned judge ought to be upheld by this Court. Importantly, reliance is placed therein by Madam Chen on the failure of the learned judge to make certain findings on the First Part of the Claim. These include, but are not limited to, findings that Madam Chen had borrowed the money from the Bank of China in order to provide the HK $100 million (transferred to Mr. Ng in two tranches of HK $50 million); that the HK $100 million was to be used by Mr. Ng to pay the deposit on the purchase of Empresa and the Hotel; that Mr. Ng had signed the Receipt for the HK $100 million; and that the judge ought to have accepted Madam Chen's handwriting expert's evidence as to the authenticity of Mr. Ng's signature on the Receipt.

[62] At paragraphs 4 and 5 of her Counter Notice, the First Respondent asserts:

> "4. The Judge treated that evidence, and the other evidence under what he called "the First Part of the Claim", as relevant only to a claim which would have been open to Madam Chen but which she had not pleaded to recover the HK$100 million by way of restitution or resulting trust as having been paid to Mr Ng for a purpose which had failed.

[41] See Core Bundle Part G – 37 p. 2174 – 2312 at p. 2188 – 2221.
[42] See Core Bundle Part A – 16 p. 186 – 219.

5. In fact that evidence, and the other evidence under 'the First Part of the Claim', all supported the Judge's conclusion on what he called 'the Second Part of the Claim' **by explaining why Madam Chen always regarded herself as having a beneficial interest in Peckson and the Hotel**; and it was all put to Mr Ng in cross-examination and relied on by Madam Chen for that purpose." (Emphasis added)

[63] Accordingly, both parties in this appeal have been critical of the learned judge's treatment of the First Part of the Claim, which concerned Madam Chen's claim that she had retained the beneficial interest in the Shares from the time of their acquisition in 1996, a claim based upon the existence of the alleged 1996 Oral Agreement; and that the Hotel owned by Empresa was really hers, she having paid the deposit and eventually having paid-off the balance of the purchase price of HK $900 million. Moreover, it was common ground, as between both Mr. Ng and Madam Chen, on their respective appeal notices, that the learned judge had, under the First Part of the Claim, committed an error in treating the evidence as to the payment of the HK $100 million as relevant only to a possible claim by Madam Chen to restitution under a quitsclose claim, which had not been pleaded or relied upon by her.

[64] The appellant submitted that the consequence of these failures or errors on the part of the learned judge, was that he failed to find that Madam Chen was a dishonest witness, and accordingly, he failed to ask himself whether the reason she was not telling the truth about what happened in 1996, was that she knew Mr. Ng had not made a gift of the Shares to her on 4th October 2011, and it was implausible that he would have done so.[43] Had the learned judge asked himself that question he would or ought to have concluded that there was no 1996 Oral Agreement, the appellant submits.[44]

[65] The learned judge clearly committed a grave error when he failed, under the First Part of the Claim, to embark upon an assessment of the evidence as it related to the issue of whether Madam Chen had transferred to Mr. Ng the sum of HK $100 million in 1996 to be used to pay the deposit on the purchase

[43] See para. 31 of the Appellant's Skeleton Argument.
[44] See para. 32 of the Appellant's Skeleton Argument.

of Empresa and the Hotel; whether Mr. Ng had indeed signed the Receipt for the said sum; and whether Madam Chen had retained the beneficial interest in the Shares in Peckson. These issues of fact and law were essential to determining whether both the legal and beneficial interest resided with Mr. Ng up to the Transfer in October 2011, or whether he only had the legal interest, with the beneficial interest being vested in Madam Chen. The existence or non-existence of the alleged 1996 Oral Agreement, which Madam Chen relied on as part of her pleaded case (as amended), was critical on her pleaded case, not to the determination of any possible claim to restitution or repayment of the HK $100 million or to whether Madam Chen had acquired a proprietary interest in the Shares in 1996, as the learned judge wrongly concluded, but to the fundamental issue of who retained the beneficial interest in the Shares from 1996 to October 2011.

[66] It was imperative for the learned judge, as the arbiter of the facts, to have assessed the truthfulness, and make findings as to the credibility of both Madam Chen and Mr. Ng on this aspect or part of the case. If Madam Chen's evidence as to the alleged 1996 Oral Agreement was accepted, this would be determinative of the matter on both the claim and counterclaim, as Madam Chen would have been entitled to demand at any time that Mr. Ng transfer the legal interest in the Shares to her, and Mr. Ng would simply have been giving effect to this right in equity, or in contract, by virtue of the Transfer in 2011. On the other hand, if the judge had disbelieved the evidence of Madam Chen as to the existence of the 1996 Oral Agreement, this would mean that both the legal and beneficial interest in the Shares were vested in Mr. Ng from 1996, and the remaining question for the court to answer, since it was accepted that the Transfer was not a sale, was whether it gave rise to a resulting trust in favour of Mr. Ng, or it was an outright gift by Mr. Ng of both the legal and beneficial interest in the Shares to Madam Chen.

[67] Mr. Jones, QC for Mr. Ng submits that if this Court is with him on the First Issue he formulated, it would not be an appropriate or correct application of principle, for this Court to go on to make findings as to the evidence of Madam Chen on her claim to have retained the beneficial interest in the shares as a

result of an alleged 1996 Oral Agreement. In short, the submission is that this Court, in its appellate jurisdiction, should not embark upon an assessment of the truthfulness of the evidence of either Madam Chen or Mr. Ng (or indeed of any of the supporting witnesses on either side), and to make findings as to their relative credibility. Such matters are quintessentially for the trial judge and not for the Court of Appeal. With these submissions, which find much support in authoritative decisions of this Court, I am entirely in agreement. Accordingly, Mr. Jones, QC submits, the end result would be that this Court ought to remit the matter to the Commercial Court for a second retrial before a different judge.

[68] Learned counsel for Madam Chen, Mr. McDonnell, QC, disagreed. He submitted that were this Court to order a second retrial, that would be 'an unfortunate precedent'. He submitted that judges are not compelled to decide every issue which the parties to a case have raised, when the answer to a particular issue can properly be decided in a very limited way. He submits further that issues as to the credibility of witnesses need not be decided when the substantive issue in the case can be decided without reference to their credibility. In this regard, Mr. McDonnell, QC referred specifically to the 21st November 2011 Minutes and the 22nd November Declaration by Mr. Ng and whether they are, properly construed, first category documents (as Madam Chen contends) or second category documents (as Mr. Ng contends). He submitted also, that even if they fall to be assessed under the second category, they are nevertheless very important pieces of evidence regarding the common intention of the parties.

[69] While there is much to commend Mr. Jones, QC's criticism of the learned judge's approach to what he termed "the First Part of the Claim", they are not, in my judgment, necessarily dispositive of this appeal. I must go on to consider the findings and conclusions made by the learned judge on what he termed 'the Second Part of the Claim', and what Mr. Jones, QC, for the appellant, formulated as the 'Third Issue' in this appeal. His Third Issue is, with the transfer of the Shares not having been a sale but a gratuitous transfer, whether that transaction gave rise to the presumption of a resulting trust in

favour of Mr. Ng, whereby he retained and was entitled to a re-transfer of the beneficial interest in the Shares, or was it a gift to Madam Chen?

[70] This latter issue in the appeal, brings into sharp focus the effect in law of Madam Chen holding the registered title to the shares, and whether the appellant has discharged the onus on him, by cogent evidence, to establish ‘a right over and in respect of the Shares’. In other words, was the Transfer one only of the legal interest with Mr. Ng retaining the beneficial interest in the Shares, so that Madam Chen held the beneficial interest on a bare trust for him? Alternatively, the transfer not being for consideration and therefore a gratuitous transfer, is there a presumption by operation of law that it was not a gift, thus giving rise to the presumption of a resulting trust in favour of Mr. Ng, with the onus on Madam Chen to rebut that presumption?

[71] This issue also concerns whether there must be evidence of a common intention by the parties to the transfer, and if not, to what extent is the intention of Mr. Ng, as the transferor, relevant in deciding who holds the beneficial interest in the Shares; was the learned judge correct in his assessment, and in not accepting Mr. Ng's evidence relating to the Cotai Strip Project, as the reason for the Transfer to Madam Chen; and was the learned judge correct in finding that the reason (or one of the reasons) for the Transfer was so that Mr. Ng wanted to evade his creditors? Importantly, these issues involve considerations of the learned judge's treatment of the 22nd November 2017 Declaration, and of certain relevant statements made by Mr. Ng in his Macau Defence, relating to protecting his assets from creditors and to Madam Chen being his ‘figurehead’/nominee.

[72] To what extent was it open to Madam Chen to rely on her pleaded alternative case? Was the learned judge correct in finding that Mr. Ng transferred the Shares to her to evade his creditors (as Madam Chen asserts as a possible reason in her alternative case), or was Mr. Ng's sole reason for doing so linked to his steps to purchase and develop lots 7 and 8 in the Cotai Strip Project as he contended, which evidence the learned judge did not accept?

[73] Finally, and most significantly, are the statements by Mr. Ng in the Declaration to the effect that he retained no right or interest in the Shares, determinative of who held the beneficial interest in the Shares from 4th October 2011? In short, is the Declaration a first category document, as formulated by Lord Briggs in the Privy Council decision in **Gany Holdings (PTC) SA v Khan and others**[45] and, therefore, "decisive" as to the beneficial interest in the Shares, regardless of the subjective intentions of Mr. Ng or Madam Chen (as Madam Chen contends); or it is a second category document and, hence, merely one of the pieces of evidence from which a common intention as to the beneficial interest can be inferred, as Mr. Ng contends. These are all pertinent matters which could be determinative of this appeal.

Burden of Proof and Registered Title to the Shares

[74] At paragraph 49 of the Judgment, the learned judge incorrectly puts the burden or onus of proof on Madam Chen. He states:

> "As it was a gratuitous transfer, the burden of proof is on Madam Chen to prove that at the time Mr Ng made the transfer it was their common intention that both the legal and the beneficial ownership of the Peckson Shares should be transferred to her. However, if Madam Chen's evidence rises to the level to satisfy that burden, the burden then shifts to Mr Ng to rebut that evidence. By that I mean that Mr Ng will have to point to evidence, or the court will have to find that there is evidence, which in the court's opinion rebuts what appears on its face to be evidence of the common intention to transfer the beneficial interest to Madam Chen."

[75] With respect, the learned judge got the onus or burden of proof completely wrong. The starting point in this matter is that the registered title to the Shares is indisputably with Madam Chen. Madam Chen was entitled to rely on her registered title to the Shares as *prima facie* evidence as to where both the legal and beneficial ownership lies. The burden was therefore on Mr. Ng, and not Madam Chen, to displace her registered title to the Shares, by cogent evidence. That is, to establish, on a balance of probabilities, either from the Bought Note and/or the Transfer, or by the surrounding circumstances of the transaction, that he retained the beneficial interest in the Shares, or retained

[45] 21 ITELR 310 at para. 17.

some enforceable right to them. It is only where Mr. Ng has established some right to or over the Shares giving rise either to a presumption of a resulting trust in his favour or to a contractual right to have the Shares re-transferred to him, that the burden shifts to Madam Chen to rebut that presumption. This accords with the clear statements of principle at paragraphs 42 and 43 of the Privy Council Opinion in this matter, and in particular, paragraph 40 which is quoted at paragraph 24 above. It also accords with the learning at paragraph 56 of the judgement of Lady Hale in **Stack v Dowden**,[46] and with the prior decision of the English Court of Appeal in **Portland Managements Ltd v Harte**.[47]

[76] The importance of one party holding the registered title to an asset, while not absolutely conclusive, cannot be underestimated. This principle has been stoutly recognized in several authoritative decisions of the English courts. As noted above, they include **Portland Managements Ltd v Harte** a case relating to a claim of possession by the registered owner of land; and **Stack v Dowden**, a decision of the English Supreme Court. In **Stack v Dowden**, Lady Hale pointedly restated this important principle in these terms at paragraph 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."

[77] The learned judge referred to the passage from the opinion of Lady Hale at paragraph 49 of the judgment in this way:

> "As stated by Lady Hale, also, the onus is upon the person seeking to show that the person who holds the legal Ownership does not also hold the beneficial ownership (Stack v Dowden [2007] 2 AC 432 at [56]. There is no evidence that Madam Chen did not share the common intention that both the legal and beneficial ownership should be transferred to her, **so the court can infer that she did share that intention**." (Emphasis added)

[46] [2007] 2 AC 432.
[47] [1977] QB 306 per Scarman LJ at p. 314.

[78] It is clear from this passage, that the learned judge confused the importance of the registered title and where the onus of proof lies, at least initially, with the separate issue of determining or inferring, from the documents or the surrounding circumstances, what was the common intention of the parties when Mr. Ng transferred the Shares to Madam Chen in October 2011. The learned judge seems, incorrectly, to have approached the issue of common intention, to the extent that it may be relevant to the determination of the dispute over the beneficial interest in the Shares, by seeking to prove a double negative. That being, that since, in his assessment, there was no evidence that Madam Chen did not share a common intention that both the legal and beneficial interest in the Shares had been transferred to her, then it must be presumed that the common intention of the parties was that both the legal and beneficial interest had been transferred to her. Moreover, this approach would have the effect of placing the burden on Madam Chen to establish what was the common intention when the Shares were transferred to her in October 2011, and that she thereby received both the legal and beneficial interest.

[79] No such onus was on Madam Chen, unless and until Mr. Ng had established that the transaction gave rise to the presumption of a resulting trust in relation to the Shares. Instead, it was on Mr. Ng to establish that he retained the beneficial interest, and to do so either by the terms of the Bought Note, the Transfer or the Minutes of Peckson, or by the other surrounding circumstances such as an oral agreement to transfer the Shares to Madam Chen so as to facilitate the obtaining of government approvals for the development of the Cotai Strip Project; or that he had a binding contractual right to have Madam Chen re-transfer the Shares to him after 6 months. Any such evidence, if accepted, would establish that Madan Chen was Mr. Ng's trustee or "figurehead"/nominee in relation to the Shares, giving rise to the presumption of a resulting trust in favour of Mr. Ng, or to a contractual right to the re-transfer of the Shares, and Mr. Ng would win.

Gratuitous transfers and beneficial ownership

[80] As mentioned, the parties agreed by the end of the trial that the transfer was a gratuitous one. At paragraph 43 of the Judgment, the learned judge records

that: "both parties agree that the transfer was gratuitous for no consideration." A gratuitous transfer may give rise to a number of possible scenarios, including the presumption of a resulting trust or a gift. The position in law in relation to identifying where the beneficial interest lies has been restated by Lord Briggs in **Gany Holdings**. Paragraph 17 reads:

> "It is convenient to begin with a re-statement of the basic principles by which equity (which in this respect is shared by England and Wales and the British Virgin Islands) provides for identification of beneficial interests arising from a gratuitous transfer of property. **First**, if **either** the transferor or the transferee makes a written (or oral) declaration as to those beneficial interests, or they do so together in an agreed form, that will generally be **decisive**, regardless of the subjective intentions of either of them: see for example Whitlock v Moree [2017] UKPC 44, (2017) 20 ITELR 658. **Secondly**, and in default of any such declaration, the court looks for evidence from **which a common intention** as to beneficial ownership may be inferred. This may include evidence of statements made by either party before, at the time of or even after the relevant transfer, the parties' conduct, and the factual context in which the transfer takes place. Sometimes, a choice between possible conclusions as to beneficial interest may properly be arrived at by a process of elimination, whereby the most unlikely conclusions are first removed, leaving the least unlikely as the correct one. **Finally**, recourse may be had to time-honoured presumptions, such as the presumption of advancement or the presumed **resulting trust**, where there really is **no evidence** from which an inference as to common intention may properly be drawn. But these are, in modern times, a **last resort**, now that historic restrictions on the admissibility of evidence have been removed, and the forensic tools for the ascertainment and weighing of evidence are more readily available to the court." (Emphasis added)

[81] Accordingly, where one or both parties to a gratuitous transfer of property makes a declaration, written or oral, as to who will hold the beneficial interest upon the making of the transfer, such declaration falls squarely within the first category identified by Lord Briggs, and is generally decisive. Furthermore, in relation to first category declarations, neither the common intention of the parties nor their respective subjective intentions at the time of the transfer are relevant. Accordingly, if the 22nd November 2017 Declaration is to be construed as falling squarely within the first category, as Mr. McDonnell, QC, for Madam Chen, contends, Madam Chen wins, and the learned judge's decision and consequential declarations, must be upheld. This position in law was accepted by Mr Jones, QC, for the appellant, during his oral argument

before this Court, albeit he contended for the Declaration to be more appropriately treated as falling within Lord Briggs' second category, and for it to be treated as but one of the relevant pieces of documentary and other evidence to be taken into account by the court, together with the 'context' and surrounding circumstances of the transaction, in inferring what was the common intention of the parties to the Transfer at the time of its execution.

[82] It is important to bear in mind that the second category only applies in circumstances where there is no declaration of the first category type which speaks decisively to the beneficial interest in the property or asset being transferred. In relation to the Second Category, the court must seek to infer, from the accepted evidence, what was the intention of the parties to the transfer in relation to where the beneficial interest rests. Thus, it is in relation to this category, and only in relation thereto, that a court must embark upon an assessment of the evidence as to what was the common intention of the parties to the transfer. In carrying out such an assessment, a court is entitled to rely on a range of relevant evidence, whether oral or documentary, whether coming into existence before or at the time or after the transfer was effective, to the conduct of the parties and their evidence before the court, and to the context in which the transfer was made.

[83] As to the 'final' or third category, it is only where there is no evidence from which a common intention can properly be drawn or inferred (as in second category cases), and no declaration by the parties, or one of them, written or oral, as to the beneficial interest (the first category), that resort can be had by the court to such time honoured presumptions as the presumption of advancement and the presumption of a resulting trust. It is on the latter presumption that Mr. Ng's case rests. Accordingly, the effect of Lord Briggs' formulation of the final or third category to which a court can have resort when seeking to ascertain the beneficial interest upon a gratuitous transfer of property, is that the court must first be satisfied that the matter does not fall within either the first or second category.

[84] Put differently, it is only where the court concludes, firstly, that there is, no declaration by either Mr. Ng or Madam Chen which, properly construed, is decisive as to the beneficial ownership in the Shares; and then, secondly, that it is not possible from the documentary and other accepted evidence before the court to determine the common intention of the parties to the Transfer, that the judge ought to have regard to principles or historical presumptions such as the presumption of a resulting trust. This is manifestly so for the reason provided by Lord Briggs, that time-honoured presumptions are tools of last resort in these modern times, when seeking to identify a beneficial interest. In the instant matter, the learned judge did not have resort to the presumption of a resulting trust in determining where the beneficial interest in the Shares lies as a result of the Transfer, whether with Mr. Ng or with Madam Chen. Moreover, the burden of establishing that the Note, Transfer, Declaration and Minutes do not fall within the first category in **Gany**, rests with Mr. Ng, Madam Chen being the registered owner of the Shares.

[85] Accordingly, the question in this appeal of the greatest primacy is, into which of Lord Brigg's categories does the 21st November 2011 Minutes and the 22nd November 2011 Declaration fall?

Is the Declaration a first category document?

[86] Mr. Jones, QC, for the appellant, argues quite forcefully, that the 22nd November 2011 Declaration made by Mr. Ng for the purpose of reconstructing the internal statutory records or 'corporate kit' of Peckson, relating, as it does, to ownership and changes in ownership of shares in Peckson, was not a 'dispositive document' within the first category in **Gany**. He submits that the learned judge erroneously treated the Declaration as a first category document at paragraph 45 of the judgment and, thereby fell into error. In his view, the Declaration falls squarely into the second category, and is but one piece of relevant evidence to be taken into account by the judge in determining what was the common intention of the parties to the Transfer.

[87] On the other hand, Mr. McDonnell, QC for Madam Chen, submits that the Declaration is clearly a first category document and, accordingly, that is the

end of the matter. With this submission I am entirely in agreement. He submits that the phrase 'dispositive document' does not feature in Lord Briggs' formulation with respect to the first category, and is an expression crafted by learned counsel for Mr. Ng, and is, accordingly, not a relevant consideration. In fact, Madam Chen in her submissions before this Court places much reliance on both the Minutes and the Declaration, and submits, whether construed separately or in tandem, they are conclusive as to both the legal and beneficial interest in the Shares having been transferred to Madam Chen by virtue of the Transfer and that accordingly, that is the end of the matter, and Madam Chen wins.

[88] Firstly, there is nothing in Lord Briggs' formulation of the first category which stipulates or even suggests that such declarations are to be limited to documents 'dispositive' of the interest being transferred. Importantly, first category declarations as to where the beneficial ownership lies following a gratuitous transfer of an asset or property, may be made either in writing or orally (established by cogent evidence accepted by a court); and may be made by either the transferor or the transferee, or by both of them in an agreed form. It follows that such a declaration may be made either within the four corners of an instrument or instruments transferring the property or asset or the interest therein, or separate from such instruments, and need not be made contemporaneously with the instrument of transfer. Furthermore, such a 'declaration' as to the legal and beneficial interests can be made either before or after the transfer.

[89] The essential requirements for such a declaration are that it must be made by one of the parties to the transfer; it must relate to or concern the transfer in question and the property, the subject of that transfer; and, most importantly, it must identify what happens or has happened to the beneficial interest in the property. Such a declaration must accomplish the foregoing in clear terms, so as to be decisive of where the beneficial interest lies. In relation to such declarations, it would seem to me that statements by the transferor as to the beneficial interest, such as in the instant matter, are quintessentially of the

greatest significance, and would carry much weight in a court's identification of the beneficial interest upon a transfer of property.

[90] Accordingly, a party may make statements or declarations as to who retained or received the beneficial interest in the property, or whether the beneficial interest was transferred or intended to be transferred by virtue of the instrument of transfer. These statements or declarations may be made either in writing or orally, especially to the other party to the transaction or, as is the case in the instant matter, to the company whose shares are being transferred.

[91] In the circumstances, such statements will be decisive as to who holds the beneficial interest upon a gratuitous transfer. This is provided that they are sufficiently clear and are not contradicted by other material evidence accepted by the court. Indeed, such a declaration, because it is decisive, would dispel the application of any presumption of a resulting trust or presumption of advancement. This is both the tenor and legal effect of Lord Briggs' formulation of the first category. Furthermore, where the first category is not applicable, such presumptions, again being matters of last resort, would also not be applicable to an assessment of the evidence under the second category, in determining what was the common intention of the parties to a transfer.

[92] It is clear that neither the Bought and Sold Notes nor the Transfer or the Written Resolution made 4th October 2011 approving the transfer of the Shares to Madam Chen, contains a declaration or statement as to the beneficial interest in the Shares. These documents are in the usual format for such documents, and it would be somewhat unusual for them, especially the Transfer itself, to speak directly to what happens to the beneficial interest in the shares being transferred. Such matters are more likely to be addressed in an underlying written agreement or other document made by one or both of the parties to a transaction involving the transfer of shares or some other property. Absent any statements to that effect in any such document, the common intention of the parties as to the ownership of the beneficial interest becomes a matter to be determined by inference. If the court is unable to infer the

common intention of the parties from the evidence and surrounding circumstances, then may resort be had to the presumption of advancement or the presumption of a resulting trust.

[93] In this matter, it is the Declaration and the 21st November Minutes which fall to be construed as to whether they are determinative of the beneficial interest in the Shares as a result of the Transfer. These documents, both written in Chinese, the native tongue of both Mr. Ng and Madam Chen, were made just over one (1) month after the Transfer.[48]

[94] The 21st November Minutes record that 'the discussion items and resolutions passed in the meeting might have connections with their personal interest'.[49] The apparent purpose for making these resolutions was to update and correct Peckson's records, as the records of the company kept at the Hong Kong Companies Registry and the BVI Companies Registry, 'were inconsistent. As such, the directors wanted to collate and rectify the company's records'.[50] To this end, the directors had retained a firm of lawyers (in Hong Kong) 'to apply for the re-making of a new set of corporate kit from the BVI Incorporation Agent in order to replace the lost corporate kit, and the company's records were collated, rectified and re-filed'.[51]

[95] Paragraph 5(iii) of the 21 November Minutes states:

> "On 4th October 2011, Mr. Ng Man Sun transferred the entire remaining 40,000 shares held by him to Madam Chen Mei Huan and agreed to record the said transfer in the Register of Members and Register of Transfer of the company…".

Paragraph 5(viii) states, in part:

> "Mr. Ng Man Sun confirmed that he had never issued or signed any trust documents concerning the company's shares, including Trust Deed or Declaration of Trust. He had also never managed any of the company's shares or interests on behalf of any other person in written, oral, implied or any other forms."

[48] See Core Bundle Part K – 99 p. 3894 – 3895 and Part K – 108 p, 3926 – 3930.
[49] See Core Bundle Part K – Part K – 108 p, 3926 – 3930 at 3922 para 4.
[50] See Core Bundle Part K – Part K – 108 p, 3926 – 3930 at 3922 para 5(v).
[51] See Core Bundle Part K – Part K – 108 p, 3926 – 3930 at 3922 para 5(vi).

Material to this issue, paragraph 5(ix) states:

> "Mr. Ng Man Sun confirmed that the entire 40,000 shares of the company transferred to Madam Chen Mei Huan on 4th October 2011 belonged to him personally, and no third party's interest was involved. After the transfer, all the said 40,000 shares were vested under Madam Chen Mei Huan's name, **and Mr. Ng Man Sun did not retain any right or interest**. Mr. Ng agreed to register the 40,000 shares under Madam Chen Mei Huan's name into the Register of Members and issue the Share Certificate to Madam Chen Mei Huan." (Emphasis added)

[96] Under section 6, (the resolution section) of these Minutes, both Mr. Ng and Madam Chen resolved, in summary, that:

(i) Madam Chen had become, since 4th October 2011, the holder of the Shares 'and that her shares had been recorded in the register of Members' and Mr. Ng had signed the share certificate in her favour on behalf of Peckson.

(ii) Share certificates Nos. 1, 3 and 5 in Mr. Ng's name 'have been invalidated automatically and cancelled'.

(iii) The company would not recognize anyone in the future turning up with any documents or evidence 'that allegedly bear the signature of Mr Ng' claiming to have a share, right or interest in the company, 'whether in the form of gift, trust, bearer share or others', as such documents would not have been authorized or signed by Mr. Ng.

[97] The 22nd November Declaration made the following day and signed by Mr. Ng in Macau, was for a similar purpose (the updating and correcting of the corporate records of Peckson at the official corporate registries in both Hong Kong and the BVI), and is in declaratory terms very similar to those in the 21st November Minutes. Materially, paragraph 12 states:

> "Now I solemnly declare and confirm that the 40,000 shares of Peckson that I transferred to Ms. Chen Mei Huan on 4 October 2011 belong to me personally, and did not involve interests of a third party. After the transfer, the 40,000 shares of Peckson shall be under the name of Madam Chen Mei Huan **in entirety**, **and I shall not keep any rights**. I agree to record the 40,000 shares of Peckson under Ms. Chen Mei Huan's name into Register of Members, allowing Ms. Chen Mei Huan to become 80% shareholder of Peckson, and to issue stock certificate to Ms. Chen Mei Huan." (Emphasis added)

[98] It is clear from the last sentence of paragraph 45 of the Judgment, that the learned judge treated Lord Briggs' characterization of the kind of 'declaration' in his first category, as not limited to the actual instrument by which the interest in the asset, the subject matter of the gratuitous transfer, is transferred to a transferee. Albeit the learned judge incorrectly refers to the use of the words 'any written instrument', which words do not appear anywhere in the language used by Lord Briggs in formulating the first category, or any of the other categories for that matter. That was clearly a 'slip' by the learned judge, but one which, in my opinion, is really of no moment. I say this because, in my view, the learned judge was in any event quite correct in principle to conclude that Lord Briggs did not limit such a declaration to one found only in the instrument of transfer, or indeed, in any so called 'written dispositive instrument', as submitted by Mr. Jones, QC, for the appellant.[52] As I have already concluded above, there is no such limitation in either the language or intent of the first category in **Gany**. Indeed, nowhere does Lord Briggs use the adjective 'dispositive' to circumscribe the word 'declaration'.

[99] It is apparent from the evidence, particularly, of Advocate Reigades who was a witness to Mr. Ng signing the 22nd November 2011 Declaration, that Advocate Carvalho had advised Mr. Ng not to sign the Declaration. The learned judge so found at paragraph 77. His evidence remained uncontradicted and is therefore undisputed, as is the judge's assessment of Advocate Reigadas as a credible witness.[53] Moreover, it was Mr. Ng's testimony that he signed the Declaration because he trusted Madam Chen, albeit he had secretly signed a 30 year lease of the property of the Empresa hotel to himself at a nominal rent of one Pataca per year, the night before he signed the Transfer of the Shares to Madam Chen.

[100] One of the arguments advanced on behalf of Mr. Ng, relates to the purpose or reason for the Declaration, that is was purely for the purpose of reconstructing and correcting the corporate records of Peckson – the 'corporate kit' – and,

52 See para. 51 of the Appellants Skeleton Argument.
53 See para. 78 of the Judgment.

therefore, it ought not to be construed as decisive of where the beneficial interest in the Shares lies after the Transfer was made. I entirely reject this submission as being without merit, as did the learned judge. In my view, the fact that both the Minutes and the Declaration relate directly and were intended to be part of the internal corporate records of Peckson, which would in turn, inform its public filings at the registries in both the BVI and Hong Kong, strengthens the conclusion or the inference that they were intended to be both accurate and conclusive as to the complete divesting by Mr. Ng of all interest in the Shares to Madam Chen. At paragraph 80, the learned judge put it this way:

> "All the more it is conduct on which the court can rely as indicative of his intention when signing the transfer documents, and having regard to all the circumstances, the court relies on it as a clear declaration against interest and evidence that he intended to convey the beneficial interest in the Peckson Shares at the time of signing the transfer documents."

[101] In that passage, the learned judge appears to treat the Declaration as a first category document as per **Gany**, although he does not explicitly so state. He however addresses its significance in the context of what was the intention of Mr. Ng when he signed the Transfer, a matter which, as we have seen, is wholly irrelevant under the first category.

[102] It is pellucid from the terms of both the Minutes and the Declaration, that Mr. Ng intended to transfer, and acknowledged that he had transferred, both the legal and beneficial interest in the Shares to Madam Chen on 4th October 2011. This is so from the wording used in these two documents, signed by Mr. Ng, by which he clearly states, or is recorded as having stated, or represented to Peckson itself, that he 'did not retain any right or interest' in the Shares when he transferred them to Madam Chen, and when he caused Peckson to register the Shares in Madam Chen's name in the Register of Members and issue her a the Share Certificate evidencing her ownership of the Shares.

[103] In my view, the context in which the Minutes and Declaration were made, under Mr. Ng's signature, with the Minutes recording accurately what had transpired at a meeting between Mr. Ng and Madam Chen as the directors of

Peckson; and the Declaration being made by Mr. Ng, having consulted with lawyers in Hong Kong as to what was necessary in order to accurately and fully reconstruct the 'corporate kit' of Peckson; and, further, Mr. Ng, having been advised by Advocate Carvilho not to sign the Declaration, are all strongly supportive of Mr. Ng not only understanding what he was signing, but clearly and unequivocally intending to make clear that he retained no rights or interest in or over the Shares. Furthermore, these documents, made shortly after the Transfer, served to underscore the finality of the transaction, and the complete divesting by Mr. Ng of all interest which he had or may have had in and to the Shares to Madam Chen, with whom he lived for over two decades and was still living as de facto man and wife, and had been involved closely in business.

[104] It is not enough for Mr. Ng to say that he did not read and did not understand what he was signing when he signed the Declaration, especially having, the day before, signed the Minutes which were in very similar, if not exact terms. Significantly, as the learned judge commented, both documents were in Chinese, Mr. Ng's native language. It follows that, having regard to what I have said above, I can find no basis upon which this Court ought to disturb any of the findings of fact and conclusions made by the learned judge at paragraph 83 of the Judgment.

[105] In this regard, the video of Mr. Ng signing his Will in 1996 is of little or no assistance or evidential value. This is for the simple reason that it was made some 15 years prior to him signing the Minutes and making the Declaration. In any event, the learned judge, who viewed the video during the course of the retrial, concluded, at paragraph 84, that Mr. Ng was a careful man, who did not just sign what was given to him, but appeared to pay careful attention to what was being explained to him in Chinese, and asked questions in Chinese of the lawyers before signing his Will by which he intended to leave 'everything' he then owned to Madam Chen. There is certainly no basis for this Court to upset any of these findings by the learned judge, who was uniquely positioned to make these assessments and to draw his own inferences and conclusions therefrom.

[106] The learned judge's conclusions on this aspect of the case are summarized at paragraph 88:

> "On the evidence, I find that Mr Ng read the 22 November Declaration and knew the effect of the document that he was signing including the paragraph where he stated that he did not retain any interest in the Peckson Shares. He did not even come close to making out a case of *non est factum* and it was not pursued in his closing submissions."

[107] For the reasons given above, I find that the learned judge was correct in treating the Declaration as a first category document and, hence, decisive of where the legal and beneficial interest in the Shares resides after the Bought and Sold Notes and the Transfer. Both interests resided with Madam Chen as of 4th October 2011. This is so irrespective of what is or may have been the subjective intention of either Mr. Ng or Madam Chen at the time of the Transfer, or whether there was or was not evidence pointing to a presumed common intention, which evidence and considerations are irrelevant under the first category in **Gany**.

[108] In any event, even if these two documents ought not properly to be classified as first category declarations, they provide strong evidence as to the common intention of the parties at the time of the Transfer. In my view, both the Minutes and the Declaration, signed and made by Mr. Ng, clearly show that he intended to transfer to Madam Chen both the legal and beneficial interest in the Shares or, simply, any and all of his interest in the Shares. Madam Chen was a 'party' to the meeting of directors of Peckson, as confirmed by Mr. Ng under his hand and signature, at which meeting Mr. Ng made the relevant declarations as to him having transferred or divesting all rights and interests in the Shares to Madam Chen. The Declaration under his hand and signature is further confirmation of their common intention. Accordingly, on the basis of these two documents, even being treated as second category pieces of evidence, Madam Chen wins. Mr. Ng cannot now seek to resile from his clear declarations regarding the beneficial interest by saying that he did not understand what he was signing. It follows that, having concluded that the Minutes and Declaration fall within the first category or, alternatively, in the second category set out in **Gany**, resort cannot be had to the third category

and to the presumption of a resulting trust. Accordingly, the Transfer of the Shares to Madam Chen in October 2011 being, admittedly, a gratuitous transfer, was a gift ('Bii') and does not give rise to the presumption of a resulting trust in favour of Mr. Ng ('Bi').

[109] As learned counsel for the appellant conceded in oral argument before us, such a finding by this Court would completely dispose of Mr. Ng's appeal and Madam Chen would win. I so conclude, and, accordingly, on this basis alone, this appeal ought to be dismissed. That said, it would be prudent to go on to consider some of the other issues and submissions made on behalf of Mr. Ng before us, including whether the Declaration was part of the pretence or sham.

The Alleged 2011 oral agreement – the Cotai Strip Project and whether Madam Chen was Mr. Ng's "figurehead"

[110] It is Mr. Ng's case that the transfer of the Shares to Madam Chen in October 2011 was temporary, and she was under an obligation pursuant to an oral agreement between them to re-transfer the Shares to him after 6 months. These facts are said to give rise the presumption of a resulting trust in favour of Mr. Ng, or to a contractual obligation on the part of Madam Chen to re-transfer the Shares to him when requested to do so.

[111] The evidence and contextual facts relied on by the appellant to establish a resulting trust are that the alleged 2011 Oral Agreement between Mr. Ng and Madam Chen was made at a time when Mr. Ng intended to acquire and to develop the Cotai Strip Project. It is this alleged 2011 Oral Agreement which Mr. Ng pleads, at paragraphs 15 and 16 of his Re-amended Statement of Claim,[54] as the reason for him transferring the Shares to Madam Chen in October 2011. Paragraphs 15 and 16 state:

> "15. At the time, Mr Ng was planning to bid for government approval to build a new hotel and casino development on two connected pieces of land in Macau estimated to cost HK$30 billion. On or around August 2011, Chen represented to Mr Ng that she should apply for the relevant government approvals in her name instead of his own, as she had good government contacts in Macau and Beijing that would aid the application. Chen further represented that a friend of hers in

[54] See Core Bundle Part A – 12 p. 97 – 109 at p. 3930. At paras. 15 and 16.

> Beijing had told her that if Chen were to apply for the development approval, there would be a high probability of success, but she would need the assets in her name.
>
> 16. Mr Ng and Chen then verbally agreed that after Mr ng transferred the relevant shares to Chen, she would transfer the shares back to Mr Ng after six months, regardless of whether the application for government approval was successful. Mr Ng accordingly transferred the shares to Chen to enable her to proceed with the approval application. Chen did not pay any consideration for the shares as it was not intended that she would keep the shares permanently."

[112] Mr. Ng pleads specifically that he never intended to transfer the beneficial interest in the Shares to Madam Chen. Accordingly, she was his 'nominee', and held the Shares on a bare trust for him.[55] At paragraph 36A of his Re-amended Statement of Claim, Mr. Ng pleads:

> "36A. The shares were transferred to, and held by, Chen upon trust for the purpose of, or upon the condition that, she would use the record of her purported ownership of the shares to obtain government approval to build a new hotel and casino. She never did apply for any government approval and so the purpose and condition failed. The shares therefore result back to Mr Ng in any event."

[113] The learned judge's findings in relation to the Cotai Strip Project and the alleged August 2011 Oral Agreement between Mr. Ng and Madam Chen in relation to the transfer and re-transfer of the Shares, are at paragraphs 90 to 96 of the Judgment. There has been much criticism by the appellant of these findings. In essence, the appellant contends that the learned judge could not properly approach an assessment of the evidence of Mr. Ng and Madam Chen in relation to this aspect, without having first properly entered upon and assessed the evidence in relation to Madam Chen's pleaded 1996 Oral Agreement when Empresa and the Hotel were acquired by Peckson, and making appropriate findings as to the credibility of both Mr. Ng and Madam Chen on that First Part of the Claim. And, if having done so, the learned judge had concluded that Madam Chen was not a truthful witness, or, more bluntly, that she had lied in relation to the existence of the 1996 Oral Agreement, as counsel for the appellant puts it, and that Mr. Ng was telling the truth, the

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[55] See Core Bundle Part A – 12 p. 97 – 109 at p. 3930. At para. 36.

learned judge would have been in a better position than he was to properly assess Mr. Ng's evidence in relation to the alleged 2011 Oral Agreement, and, accordingly, would more readily have been disposed to positively conclude, on the Second Part of the Claim, that Mr. Ng was telling the truth in relation to the alleged 2011 Oral Agreement and the Cotai Strip Project. It is also argued that the learned judge would have been in a better position to conclude that this was the operative reason why Mr. Ng made a gratuitous transfer of the Shares to Madam Chen in October 2011, or that such was the purpose for the gratuitous transfer.

[114] As mentioned above in relation to the judge's treatment of the First Part of the Claim, there is much force in the appellant's criticism of the judge's handling of this part of the evidence and case. As earlier concluded, the learned judge erred in abdicating his judicial responsibility to conduct an assessment of the evidence in relation to the First Part, and to make appropriate findings thereon, including to the credibility of Mr. Ng and Madam Chen. Furthermore, that failure, in and of itself, would have warranted ordering another retrial of this matter before another judge of the Commercial Court, were it not for the findings and conclusions reached in this judgment as to the primacy and effect in law of both the Minutes and Declaration, as first category documents, decisive or conclusive as to the transfer of both the legal and beneficial interest in the Shares to Madam Chen. This is so regardless of the reasons therefor or the subjective intention of the parties.

[115] The learned judge did not accept Mr. Ng's evidence either with regard to the Cotai Strip Project being the common intention for the Transfer of the Shares or as to the existence of a contractual right to their re-transfer to him after 6 months. In rejecting this part of Mr. Ng's case, the learned judge, at paragraph 96, concluded:

> "Having considered the available evidence, I find that there was no agreement between Mr Ng and Madam Chen relating to the Cotai Strip. Accordingly the court cannot rely on this as evidence of Mr Ng's subjective intention at the time of the transfer not to transfer the beneficial interest to Madam Chen. Although I found that there was no estoppel and did not take it into account in my decision, I note that in the Macau Court, a panel made up of three Judges also found that the

> agreement was not proven because some of the persons who gave evidence had insufficient knowledge of what happened and the evidence of the others was not credible."

[116] The learned judge, in my view, correctly rejected the argument by Madam Chen based upon the issue of estoppel said to arise from the decision of the Macau Court that the alleged oral agreement relating to the Cotai Strip Project was 'not proven'.[56] This, he based upon the evidence and opinion of the two experts as to Macau law. The evidence and opinion was that the Cotai Project issues were not essential to the determination of the claim of possession by the Macau Court, in its final judgment of 9th June 2015.

[117] As to the 2011 Oral Agreement and the Cotai Strip Project, the learned judge reasoned to his conclusion on several bases. Firstly, if Madam Chen was intended to go to Beijing to secure government approval for the development project, 'it was highly probable that there would have been a revised draft Feasibility Study excising any reference to Mr Ng or Chong Gold'. It appears from the evidence before the learned judge that Chong Gold and its principal John Gong were, at the relevant time, being investigated by the police in Mainland China as to the operation of a Ponzi scheme involving Mr. John Gong and his company, Whitehouse Capital Limited, by which it was said that many investors in Mainland China had been defrauded of substantial sums of money to the order of some HK $280 million. Mr. John Gong was apparently wanted by the International Criminal Police Organization ("INTERPOL"), at least so it was reported in the Singaporean press, and both Ace High International Limited ("Ace High"), a BVI company owned by Mr. Ng, and Chong Gold International Limited, a Macau company owned 95% by Mr. Ng and 5% by Mr. John Gong, were dissolved. Mr. Ng had personally guaranteed some of the loans made to Ace High. However, there was no evidence that Mr. Ng was himself ever under criminal investigation.

[118] Secondly, at paragraph [93] the learned judge posited:

> "The fact that Madam Chen did not go to Beijing and apparently was never intended to go there, and there is no evidence of a revised

[56] See paras 91 and 96 of the learned judge's judgment.

feasibility study is entirely consistent with the fact that there was no agreement to go to Beijing. It is inconceivable that if it was intended for Madam Chen to go to Beijing, she would have gone with the feasibility study in evidence. If the story was true, one would have expected Madam Chen or Mr Ng to commission an amended feasibility study excising the references to Mr Ng and Chong Gold to make the application to Beijing. There was no such revised feasibility study in evidence from either party. Mr Ng when questioned by the court agreed that some sort of feasibility study should have been a part of such an application. The absence of such a revised feasibility study makes it improbable that such an application to Beijing was discussed and agreed with Madam Chen and was contemplated."

[119] While it may be correct to say that neither the absence of a revised feasibility study nor Madam Chen having gone to Beijing for the purpose of seeking approval to develop the new hotel and casino at the Cotai Strip, are either singularly or together, pointing to Mr. Ng having not told the truth about the alleged 2011 Oral Agreement, likewise they do not point conclusively to the existence of such an oral agreement. The appellant also relies on the fact that Madam Chen, who was then living with Mr. Ng in an apartment, had initially denied any knowledge of the existence of the Coati Strip Project, when the plans for the development was on the wall in Mr. Ng's office at their home. In my view, while there may be some basis upon which to question certain aspects of the learned judge's findings on this issue, it is equally arguable that most of his findings and conclusions are unassailable. The learned judge did not find that the Cotai Strip Project did not exist, but instead he was not satisfied, on the state of the evidence, as to the existence of the alleged 2011 Oral Agreement whereby the Shares were transferred to Madam Chen to facilitate her going to Beijing to obtain the necessary government and development approvals for the Cotai Strip Project in Macau.

[120] The learned judge also found that there was no consideration for the alleged 2011 Oral Agreement regarding the Cotai Strip Project, and no mention had been made of any consideration in the witness statements and in cross-examination during either of the two trials in this matter. Further, it was only in answer to a question from the learned judge at the retrial that Mr. Ng said, for the first time, that he had agreed to give Madam Chen 10% of the Shares. Needless to say, this was not part of Mr. Ng's pleaded case, even as

amended. Moreover, Mr Jones, QC, for Mr. Ng, during his closing submissions, conceded that there was no common law contract, and withdrew the claim for specific performance, albeit still maintaining the existence of an obligation in equity.[57]

[121] It is well settled that an appellate court will be slow to overturn findings of fact made by the trial judge as the trial judge is uniquely placed to see and hear the witnesses, to assess their demeanour and credibility, and to make a proper assessment as to what facts to believe or not believe. An appellate court, ought only to do so where it is satisfied that the trial judge committed a serious error, either of law or of fact, which undermines the soundness of the judge's conclusions on the facts or his assessment of the credibility of a witness, and not where the trial judge's findings are within the generous ambit of disagreement. In brief, therefore, an appellate court should only interfere with a trial judge's factual conclusions where the trial judge was plainly wrong.[58] In explaining the meaning of the expression ‘plainly wrong’, Lord Reed delivering the judgment of the United Kingdom Supreme Court in **Henderson v Foxworth Investments Ltd and another**,[59] at paragraph 62, emphasized:

> “The adverb “plainly” does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.”

[122] As foreshadowed, there is therefore no basis upon which this Court ought to set aside the assessment of the evidence and conclusions drawn by the learned judge, as it relates to this aspect of the case involving the alleged 2011 Oral Agreement, except to the extent, as already concluded, that any such assessment ought to have been informed by his positive findings and conclusions as to the credibility of both Mr. Ng and Madam Chen in relation to the First Part of the Claim. Indeed, it could very well have been that, had the

[57] See para 94 of the learned judge’s judgment.
[58] See Re Successful Trend Investments Corporation: Kathryn Ma Wai Fong v Wong Kei Yik and others BVIHCMAP2018/001 and BVIHCMAP2018/001 delivered 27th March 2019, unreported) Per Webster JA at paras. 60-62.
[59] [2014] 1 WLR 2600.

learned judge embarked upon such a forensic assessment and made appropriate findings as to credibility and fact, he may very well have reached the same conclusion regarding the alleged 2011 Oral Agreement. In my view, it would have been open to the learned judge to have concluded that Madam Chen was not truthful as to the existence of the 1996 Oral Agreement, but neither was Mr. Ng as to the existence of the 2011 Oral Agreement. Indeed, this is precisely the conclusions which Bannister J drew at the end of the first trial, having heard and assessed the evidence and credibility of each of Mr. Ng and Madam Chen. However, I make no such finding or conclusion, as to do so would take this Court into the realm of speculation, which is something that ought not to be embarked upon or countenanced.

[123] Suffice it to be said that, subject to the important caveat mentioned above regarding the learned judge's treatment of the First Part of the Claim, there was sufficient evidence before the learned judge to support his reasons for rejecting Mr. Ng's case on this aspect, and finding that there was no such 2011 Oral Agreement. Moreover, there was certainly no solid evidential basis upon which to conclude that there was any oral agreement for the re-transfer of the Shares to Mr. Ng after a period of 6 months. Mr. Ng certainly did not act upon any such agreement, and did not request or demand the re-transfer of the Shares to himself at the end or the 6 month period, or within a reasonable period thereafter. This factor served as well to undermine the existence of the alleged 2011 Oral Agreement, as the alleged obligation to re-transfer the Shares after 6 months was said to be a part of the same oral agreement involving Madam Chen agreeing to go to Beijing to seek government approval for the proposed Cotai Strip Project, it being accepted in cross-examination by Mr. Ng that any such applications of necessity would need to be accompanied by a proper feasibility study, and one which did not contain the referenced 'alarm bells'. This finding by the learned judge in relation to the alleged 2011 Oral Agreement goes to the heart of Mr. Ng's case for a resulting trust and, in my judgment, is equally fatal in seeking to displace Madam Chen registered title to the Shares on the basis of a resulting trust. Furthermore, this aspect of Mr. Ng's case also falls to be assessed within the context of the Minutes and the Declaration made under his signature after the Note and Transfer, and by

which he conclusively and decisively declared that he had transferred any and all interest in the Shares to Madam Chen.

Was the Transfer of the Shares a pretence or sham transaction giving rise to the presumption of a resulting trust?

[124] Mr. Ng also seeks to impugn the registered title of Madam Chen to the Shares on the basis that the transaction, properly construed, was either a pretence or a sham. As I understand the appellant's case on this aspect, the Transfer to Madam Chen was a dishonest transfer, and the Declaration was but another document made by Mr. Ng in furtherance of that dishonest transfer. Those circumstances, the appellant submits, give rise to the presumption of a resulting trust, and Mr. Ng retained the beneficial interest in the Shares, which Madam Chen holds as a bare nominee or 'figurehead' for him. Accordingly, the onus fell on Madam Chen to rebut the presumption of a resulting trust by evidence inconsistent with that trust.[60]

[125] As to resulting trusts, the appellant relies on **Snell's Equity**,[61] **Tinsley v Milligan**,[62] and **Lewin on Trusts**.[63] The passage relied upon at paragraph 25-001 of **Snell's Equity**[64] is not on point. It pertains specifically to circumstances where 'it is unclear whom the transferor intends to have the beneficial interest'. In such circumstances, 'by operation of law, a resulting trust may arise for the benefit of the transferor'. This gives rise to what is termed 'a default presumption about the intention of a person making a gratuitous transfer of property'. In other words, the Transfer in the instant matter would have to fall within the third category espoused by Lord Briggs in **Gany**.

[126] Firstly, it is not the case for the appellant that the Transfer falls within the third category, that is, where there is no basis upon which a common intention can be inferred, and resort may be had to such presumptions as a resulting trust.

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60 Westdeutsche Landesbank Girozentrale v Islington [1996] AC 669 at 708G.
61 See paras 25-001 and 25-003.
62 [1994] 1 AC 340, at 371 G-H.
63 See paras. 9-010 to 9-011.
64 Reproduced in the Appellant's Skeleton Argument at para. 42.

It is passing strange that the appellant is contending for a resulting trust, but not relying upon the one category where resort may be had to the presumption of a resulting trust in order to identify where the beneficial interest lies where there has been a gratuitous transfer.

[127] Instead, the appellant contended for the second category, where the court must seek to infer a common intention from all the relevant surrounding circumstances. Indeed, the instant matter does not concern a situation where it is unclear whom Mr. Ng intended should have the beneficial interest. As found above, his intention is clear from the Declaration under his signature whereby he stated in clear language that his intention was not to, and he did not, retain any right or interest in the Shares transferred. In our view, that is decisive of the issue regarding who holds that beneficial interest in the Shares. Furthermore, it is, at minimum, powerful evidence as to what was the common intention of both parties at the time of the execution of the Notes and the Transfer.

[128] It is Mr. Ng's case that his retention of the beneficial interest was pursuant to the alleged 2011 Oral Agreement with Madam Chen relating to the Cotai Strip Project, by which oral agreement she agreed to re-transfer the Shares to him after 6 months, regardless of whether she had been successful in obtaining the necessary development approvals for building a hotel and casino. If Mr. Ng had been successful in establishing the existence of the 2011 Oral Agreement with Madam Chen, this would have given rise to the presumption of a resulting trust, and the onus would then have shifted to Madam Chen to rebut that presumption by evidence negating the existence of a trust. As to the alleged contractual right to have the Shares re-transferred to him after 6 months, I have already concluded, in agreement with the learned judge, that absent any consideration, no such independent enforceable right arose.

[129] However, the appellant also comes to a conclusion based upon the presumption of a resulting trust, on the basis of a lack of consideration or that the stated consideration was not to be paid, as giving rise to the presumption. In **Snell's Equity** at paragraph 25-003, the principle is put this way:

"In both kinds of transaction, the facts giving rise to the presumption of a resulting trust are that A transfers property to B for which B provides no consideration. The trust arises by operation of law to give effect to a presumption that A did not intend B to take the property beneficially. The presumption can be rebutted by proof that A did in fact intend B to take the property as beneficial owner."[65]

[130] In the 1994 decision of the House of Lords in **Tinsley v Milligan**, Lord Browne-Wilkinson states at page 371 G-H:

"If he proves that the property is vested in the defendant alone but that the plaintiff provided part of the purchase money, or voluntarily transferred the property to the defendant, the plaintiff establishes his claim under a resulting trust unless either the contrary presumption of advancement displaces the presumption of resulting trust or the defendant leads evidence to rebut the presumption of resulting trust."

[131] Likewise, the appellant in his submissions at paragraph 47, relies on this passage from **Lewin on Trusts** at paragraphs 9-010 to 9-011 in support of the point that where a resulting trust arises from a gratuitous transfer, it is only the intention of the transferor that is relevant:

"It will be observed from what is said above that a resulting trust, whether based on a presumption, or on the evidence, is founded on a presumption or evidence, as to the transferor's intention. There is no requirement as such for the transferee to share or participate in that intention.

…What is presumed where the presumption of resulting trust applies is that the transferor did not intend a gift, and, where a resulting trust is sought to be established by reference to the transferor's intention, the relevant intention is that he did not intend a gift."

[132] Reliance was also placed by the Appellant on an oft cited passage from the judgment of Millett LJ (as he then was) in **Tribe v Tribe**.[66] This passage was relied upon at paragraph 91 of the earlier judgment of the Court of Appeal in this matter, in which the Court found in favour of the presumption of a resulting trust, which they concluded had not been rebutted by Madam Chen.

[133] **Tribe v Tribe** was a case dealing with the presumption of advancement in circumstances where a father, wishing to retire, transferred his shares in a

[65] Reproduced in the Appellant's Skeleton Argument at para. 42.
[66] [1996] Ch. 107.

company that sold ladies clothing from various shops, two of which were in poor state of repair and liable to being served with dilapidation notices by the landlord. The father first transferred 30 of his shares to the son for the stated consideration of £6,000.00, which was not to be paid. Subsequently, he transferred his remaining 459 shares in the company to the son for £78,000.00, which consideration was not and was never intended to be paid by the son. The dilapidation notices were nevertheless issued, and the son purchased the reversion in one of the two shops from the landlord. The father then requested the re-transfer of the 459 shares in the company to him. The judge at first instance found that the transfer had been made for an illegal purpose, namely, to deceive creditors, but since the illegal purpose had not been carried into effect, the plaintiff could lead evidence of a gift to rebut the presumption of advancement. He found that the son held the shares upon trust for the father pending settlement of the dilapidation claims by the landlord. The Court of Appeal dismissed an appeal, finding that since the transfer was a voluntary one between father and son for no consideration, the presumption of advancement applied, unless it could be rebutted. At page 128 H to 129 A-B Millett LJ stated:

> "A trust, like the presumption of advancement, rests on a presumption which is rebuttable by evidence: see Standing v Bowring (1885) 31 Ch D 282, 287. The Transferor does not need to allege or prove the purpose for which property was transferred into the name of the transferee: in equity he can rely on the presumption that no gift was intended. But the transferee cannot be prevented from rebutting the presumption by leading evidence of the transferor's subsequent conduct to show that it was inconsistent with any intention to retain a beneficial interest."

[134] In the instant matter the intention of the transferor, Mr. Ng, when making the Transfer, is clear. It is clear from his own declarations and statements made both in the 21st November 2011 Minutes and in the Declaration. These documents represent, individually, and when taken together, the best and most powerful evidence of Mr. Ng's intention at the time, and are inconsistent with any intention on his part not only to retain the beneficial interest, but any interest, in the Shares.

[135] The essence of the appellant's case, based as it is upon the principles and authorities referred to above, is that the Transfer of the Shares to Madam Chen in October 2011 was a gratuitous or voluntary one, not made for a consideration which was intended to be paid. Accordingly, the law presumes that it was not a gift, but, instead gave rise to a resulting trust in favour of Mr. Ng. In those circumstances, Mr. Ng does not have to allege or establish the purpose for which the transfer was made. The onus is on Madam Chen Respondent to rebut the presumption of a resulting trust, and to do so with evidence which displaces or would tend to displace a trust. In my judgment, to the extent that such a legal or evidentiary burden fell on Madam Chen (on the basis that the Transfer fell within Lord Briggs' second category in **Gany**), she has rebutted the presumption of a resulting trust in favour of Mr. Ng by reliance upon the Minutes and Declaration, and she has done so to the civil standard of proof that is required.

[136] At paragraph 36 of the Privy Council Opinion in this matter, the Board, in considering the two alternative potential outcomes, concluded that since no contract for sale of the Shares had come into existence (B), this gave rise to either a resulting trust (Bi) or gift (Bii). The Board posited that characterising the Note and the Transfer as a sham was 'not an unfair categorisation of the position if the parties were really in agreement that the stated consideration of US$40,000 would never be paid'. It does not follow from this passage, that the Transfer was definitively a pretence or a sham transaction, albeit, in the opinion of the Board, that would not be an unfair characterisation of it. Certainly, if Mr. Ng intended to transfer both the legal and beneficial interest in the Shares to Madam Chen, as he has declared in writing, and as we have so concluded, the fact that there is a stated consideration does not *ipso facto* make that transaction a pretence or a sham. The clear intention of Mr. Ng from the Minutes and the Declaration, was to make a gift of the Shares to Madam Chen, which gift is valid as a matter of equity. Put another way, Mr. Ng's clear intention was to transfer both the legal and beneficial ownership of the Shares to Madam Chen, and for no monetary consideration which she was obliged to pay.

[137] To some extent, the same dilemma identified by the Board at paragraphs 37 and 39 arises in the second round in this matter, whereby both Mr. Ng and Madam Chen, by their pleaded cases, are saying that the beneficial interest in the Shares did not move by the Transfer, but remained where it was. On the one hand, Mr. Ng's case is that he held both the beneficial and legal interest from 1996, and in October 2011 he transferred only the legal interest to Madam Chen, retaining to himself the beneficial interest by virtue of the 2011 Oral Agreement in relation to the Cotai Strip Project. It was contended that by the 2011 Oral Agreement, Madam Chen agreed to hold the legal interest for Mr. Ng on a resulting trust. On the other hand, it is Madam Chen's case that she always had the beneficial interest, and Mr. Ng, in October 2011, transferred to her the legal interest, to which she was entitled, upon her request. Alternatively, Madam Chen pleads that Mr. Ng may have intended to transfer the legal and beneficial interest to her in October 2011 so as to evade his creditors. In this regard, she relies on both the Declaration and the Macau Defence.

[138] Any reliance by Mr. Ng on his pleaded case as a basis for supporting a finding of a resulting trust was addressed by the Privy Council in its Opinion. Though already highlighted in this judgment at paragraphs 24 and 73 above, I find it worthwhile repeating for emphasis. At paragraph 40 the Board states:

> "The simple answer to it is that, in the light of the incontrovertible fact that the Shares were registered in the name of Madam Chen, the onus was firmly on Mr Ng to establish a right over or in respect of the Shares. He was contending that he had the right to have the Shares transferred back to him, and it was for him to persuade the Judge that he had such a right or any other right over the Shares, in particular either by giving a credible account of the Note and Transfer involving the existence of such a right or by bringing the circumstances within possibility (Bi) (a resulting trust) mentioned in para 36 above, rather than possibility (A) (sale) or (Bii) (gift)."

[139] It follows that where a transfer of property gives rise to the transferee holding the registered title to it, there is no automatic presumption of a resulting trust by operation of law in favour of the transferor, simply because it was a gratuitous or voluntary transfer, such that the transferee holds the registered property upon trust for the transferor. If that were so, it would follow that every

transfer of land for no consideration or by way of gift, where the transferee is registered as the proprietor of the land, would give rise to the presumption of a resulting trust in favour of the transferor. This would be the conclusion unless the transferee was able, by evidence, to rebut the presumption. Where the property is registered in the name of the transferee, the transferee is entitled to rely on his or her registered title as evidencing the transfer of both the legal and beneficial interest in the property, and the onus is upon the transferor by evidence to demonstrate to the satisfaction of the court that the transfer was not of the beneficial interest as well. There is no such credible evidence in this matter, as the learned judge found. In fact, the Minutes and the Declaration, under the signature of Mr. Ng, are all to the contrary, and do not assist the appellant's case, the onus being on him to displace the registered title by evidence demonstrable of a trust.

[140] In my opinion, this is the clear situation in the instant matter, where Madam Chen is the registered owner of the Shares in Peckson. In this regard, it is notable, that the Privy Council, at paragraph 43 of the Opinion, considered that this is a pure point of law which was open to Madam Chen, notwithstanding the issues surrounding the lack of a pleaded cases on the part of both parties:

> "However, it does not appear to the Board to be unfair on Mr Ng that the point should be taken. It is a pure point of law which Mr Ng could not have produced any evidence to rebut, and it was a point which Mr Ng's legal advisers had the opportunity to deal with."

At paragraph 44, the Privy Council further stated:

> "It may well be that Madam Chen could have advanced a case on a slightly different basis, namely that it was open to the Judge to find that the unchallenged transfer of the legal ownership of the Shares to Madam Chen in October 2011 inevitably led to the conclusion, at least in the absence of any contradictory evidence accepted by the Judge, that the beneficial, as well as the legal ownership of the Shares was vested in Madam Chen. Given that that transaction was completed by registration of Madam Chen as proprietor of the Shares, that seems to the Board to be a very similar, if somewhat more roundabout, basis for arriving at the same result."

[141] Furthermore, as Mr. Jones, QC, for Mr. Ng submits, where a transfer of property takes place by written instrument, the starting point, in seeking to

displace the presumption created by the registered title, is in construing the instrument or documents by which title was transferred.[67] In this matter, neither the Bought and Sold Notes nor the Transfer, addresses directly the beneficial interest in the Shares. There was no underlying written agreement between the parties giving rise to the Transfer of the Shares, and each party's case is that at the time of the Transfer they respectively held the beneficial interest which was retained by them pursuant to a separately pleaded oral agreement. That said, in practice, it is usual, but by no means conclusive, for a share transfer to transfer both the legal and beneficial interest in the shares, unless the shares being transferred are subject to an express trust or are clearly held by a trustee pursuant to a Deed of Trust.

[142] Accordingly, the starting point in identifying the beneficial interest, is to construe the instrument or instruments by which the property was transferred. The Bahamian case of **Whitlock v Moree** is a case concerning a joint bank account. As determined by the Privy Council, the determination of the beneficial ownership of the money in the joint account involved construing the account opening documents, and, accordingly, there was no room for the doctrine of presumed resulting trust, and an examination of the subjective intentions of the account holders or those who had deposited money into the account, was irrelevant and impermissible. Lord Briggs summarized the relevant principles at paragraph 23:

> "There are well-established principles which assist the courts in resolving disputes as to beneficial ownership of property, and the order in which what may be described as the contents of an equitable toolkit are to be deployed for that purpose. Thus, where the relevant property is transferred to the legal holders by a written instrument, a statement as to the beneficial ownership of the property in that instrument is usually conclusive: see Vandervell v IRC [1967] 1 All ER 1 at 8, [1967] 2 AC 291 at 312 per Lord Upjohn. The same passage makes clear that any question whether the instrument does address beneficial ownership, and any issue as to what that beneficial ownership is, falls to be decided as a matter of construction of the instrument, which is an objective process, in which evidence as to the subjective intention of the maker of the instrument is inadmissible."

[67] Whitlock v Moree [2017] 20 ITELR 685, per Lord Briggs at para 23.

[143] However, in the very recent case of **Gany**, Lord Briggs, considering the position in law in seeking to identify the beneficial interest in gratuitous transfers, formulated the first category to cover both written and oral 'declarations' as to the beneficial interest, whether made by one or the other of the parties to the gratuitous transfer, or by both 'in an agreed form'. As already stated, this clearly does not limit such documents to the actual instrument of transfer or to 'dispositive instruments', as Mr Jones, QC, for Mr. Ng submits. In **Gany**, Lord Briggs did not seek to limit a 'declaration' as to the beneficial interest by the parties to a gratuitous transfer, to declarations to be made or found only in the instrument by which title was transferred (an example of which is to be found in **Whitlock v Moree**), but to encompass as well, declarations made as to the beneficial ownership in any document under the hand of both or one of the parties to the transfer, or to declarations made orally by either of them to the same effect.

[144] It is axiomatic that certain types of property cannot be transferred by an oral declaration. Two such instances are the transfer of real property and the transfer of shares in a company, both of which must be carried out by written instrument, usually in a prescribed or acceptable form. Accordingly, the only documents, which in any way speaks to the beneficial interest, are the 21st November 2011 Minutes and the 22nd November Declaration. The language in both of these documents clearly point to the transfer of both the legal and beneficial interest in the Shares to Madam Chen by virtue of the Transfer of 11th October 2011. These documents are declaratory of Mr. Ng divesting himself of any rights or interest in the Shares. Whether these documents, in accordance with **Gany** fall within the first category (decisive), as I have concluded, or in the second category (common intention), they represent the most powerful evidence of where the beneficial interest lies as a result of the Transfer, which is clearly with Madam Chen.

[145] The important point in **Whitlock v Moree** is that the question as to whether such a declaration of beneficial ownership is made, is to be determined by construing the instrument of transfer or the written declaration of one or both of the parties to the transfer; and a determination that it identified the beneficial

interest, will be conclusive. Accordingly, if the Declaration made by Mr. Ng on 22nd November 2011, properly construed, clearly states, as it does, that Mr. Ng, as the transferor, disposed of all (or did not retain any), rights or interest in the Shares to Madam Chen when he executed the Transfer, that declaration is conclusive and decisive as to where the beneficial interest lies in the Shares as a result of the Notes and Transfer. Any evidence as to what was the subjective intention of the parties, or of Mr. Ng alone, at the time is irrelevant.

Was the Transfer to evade creditors? - The Macau defence

[146] Was the Transfer made by Mr. Ng to evade his creditors? This issue was canvassed by the Privy Council in the Opinion in this way at paragraph 46:

> "Mr Ng was, as the Board has in para 11 indicated, asked about the possibility that he was, by the Transfer aiming to evade his creditors. Bearing in mind his long-standing family relationship with Madam Chen, such an aim might well be achieved, indeed could only truly be achieved as a matter of law, by transfer of the whole interest in the Shares, whether for a comparatively small consideration or by way of gift…the specificity and number of ways in which Mr Ng averred that only Madam Chen had any interest in the Hotel from and after 4 October 2011 could be thought to militate against the existence of a resulting trust and/or to support a conclusion that some form of outright transfer of any and all interest occurred on that date."

[147] The Board in this matter, also addressed the then fresh evidence arising from Mr. Ng's Macau Defence filed 9th May 2014 and its possible relevance as a tool to cross-examination Mr. Ng at the retrial. They also opined that, at the retrial, Madam Chen could consider 'whether any application should be made …to advance a positive case in this area'. Madam Chen has been permitted to rely, in her amended defence, on Mr. Ng transferring the Shares in order to avoid his creditors. The relevant part of the Macau Defence states:

> "In October 2011, due to some disputes which meanwhile arose with third parties, resulting from businesses in which the Defendant [Mr Ng] was involved, in order to protect Empresa…and his own assets, [Mr Ng] agreed with [Madam Chen] a solution in which his partner would be converted to a 'figurehead' for the Group's business."

[148] On this issue, the learned judge assesses the evidence in some detail, and made certain findings at paragraphs 53 to 72. At paragraph 72, he concludes on this issue in this way:

> "In those circumstances it was very probable that Mr Ng would want to protect his personal assets from those possible creditors by transferring the beneficial interest to his "de facto" wife, the primary beneficiary under his will and mother of his two children."

[149] I do not intend, as I do not consider it necessary, to regurgitate the learned judge's findings on this aspect. Suffice it to be said that, in my judgment, the learned judge properly addressed his mind to this issue, analysed the evidence and facts before him, and came to an acceptable and supported conclusion, that it was 'very [probable]' that Mr. Ng had transferred the Shares to Madam Chen in October 2011 to avoid his creditors.

[150] **Tribe v Tribe** is also authority for the proposition that where the purpose of the transfer was for the transferor to avoid or evade his creditors, this can only be achieved by transferring both the legal and beneficial interest in the property to the transferee. This principle is addressed by Millett LJ at pages 134 H to 135A as follows:

> "(6) The only way in which a man can protect his property from his creditors is by divesting himself of all beneficial interest in it. Evidence that he transferred the property in order to protect it from his creditors, therefore, does nothing by itself to rebut the presumption of advancement; it reinforces it. To rebut the presumption it is necessary to show that he intended to retain a beneficial interest and conceal it from his creditors. (7) The court should not conclude that this was his intention without **compelling circumstantial evidence** to this effect. The identity of the transferee and the circumstances in which the transfer was made would be highly relevant. It is unlikely that the court would reach such a conclusion where the transfer was made in the absence of an imminent and perceived threat from known creditors." (Emphasis added)

[151] Applying the sixth and seventh propositions set out by Millett LJ in **Tribe v Tribe**, I am satisfied that Mr. Ng's statement in the Macau Defence regarding the reason for the transfer being to evade his creditors, even though he tried to disavow it by saying that his lawyers had made an error, lays the foundation on

which the lower court could conclude that a likely reason for the Transfer to Madam Chen, made at the time when they had been living together for some 20 years as a family with two children, was that Mr. Ng wanted to evade his creditors or potential creditors. I am also satisfied that the learned judge took into consideration relevant evidence of Mr. Ng's indebtedness, including his potential indebtedness as a guarantor of the loans of Ace High, and the matters surrounding the investigation into a massive fraud involving, or said to be involving, Mr. John Gong (who was reportedly wanted by INTERPOL) and the company, Chong Gold International.

[152] It would have been passing strange for Mr. Ng not to have been justifiably concerned about this state of affairs, to seek to disavow any role in it, and to distance himself from such a fraud, involving, as it did, citizens of Mainland China, and a criminal investigation there into the said fraud. It would have been equally strange for him not to take steps to protect his assets from creditors or potential creditors, in circumstances where he had given a number of personal guarantees to banks to cover the indebtedness of the primary obligator. In my view, the issue is not whether Mr. Ng had sufficient assets or net worth to cover any potential liability under his various guarantees, but whether there was a real possibility of creditors coming after him and his assets, including any valuable shares in his name. All in all, I can see no rational basis upon which this Court can properly interfere with the judge's findings on this issue.

[153] It is clear from the authorities that, in order to effectively evade one's creditors, Mr. Ng would have to transfer all interest, legal and beneficial, in the Shares to Madam Chen.[68] In the circumstances, the learned judge was correct to conclude that there was both an imminent and perceived threat held by none other than Mr. Ng himself, that his creditors or potential creditors may come after him, and that he needed to take steps to protect his assets and not wait until the threats were effectively upon them. This conclusion would have been based on the evidence before the learned judge of Mr. Ng's debts and

[68] Per Millett LJ, Tribe v Tribe [1996] Ch. 107 at p. 134 H to 135A.

potential debts, and his clear statements in the Macau Defence which provided the most compelling evidence from Mr. Ng himself. This provided a likely and plausible reason for him transferring the Shares to Madam Chen in October 2011, and is further supportive of the learned judge's conclusion that, in order to do so, he transferred both the legal and beneficial interest in the Shares to Madam Chen.

Madam Chen's counter notice of appeal

[154] At the conclusion of the hearing, Mr. McDonnell, QC, learned counsel for the Madam Chen, did not persist with the counter notice of appeal, and expressly asked this Court not to make any conclusions on it. Accordingly, we make no findings or decisions on it. Indeed, in light of our decision on the appellant's appeal, we do not consider that any useful purpose could be served by such an exercise.

Application to prevent Appellant from prosecuting appeal

[155] On the first day of the hearing, the Court heard Madam Chen's application, to prevent Mr. Ng. from prosecuting this appeal during the week reserved for the hearing, on account of his alleged interference with the order made by the Privy Council on 29th November 2017 appointing joint receivers over the disputed shares in Peckson. Most of the first day reserved for the hearing of this appeal was taken up with this application. The Court delivered its oral decision on the fifth day (24th January 2020) and dismissed the application.

[156] It was accepted by both sides that the costs associated with the application would be dealt with as part of this appeal. We have determined that the basic rule that costs follow the event ought to apply and, accordingly, the Appellant ought to be awarded its costs directly related to that application.

Conclusion

[157] For the reasons set out above, the appeal by the Appellant, Mr. Ng, is dismissed and the decision of the learned judge declaring the Second Respondent, Madam Chen, to be, as from 4th October 2011, the true beneficial

owner of the Shares and the only person entitled to be registered as the legal owner, is affirmed.

Order

[158] This Court makes the following orders:

(1) The appeal by the Appellant, Mr. Ng, is dismissed and the decision of the learned judge is affirmed.

(2) Subject to the costs order at paragraph 4 below, costs are awarded to the Second Respondent, Madam Chen, in this appeal, to be assessed by a judge of the court below at the rate of two-thirds of the costs in the court below, if not agreed within 21 days.

(3) The Second Respondent's counter notice of appeal is dismissed with costs to the Appellant to be assessed by a judge of the court below, if not agreed within 21 days.

(4) Costs of the application to prevent Mr. Ng from prosecuting this appeal are awarded to the Appellant, to be assessed by a judge of the court below, if not agreed within 21 days.

[159] We wish to express our appreciation to learned lead counsel for each of the parties, and their respective teams, for their helpful submissions, both written and oral. We also thank the staff of the court in the BVI, who have been of much assistance to the bench throughout the hearing of this appeal over a period of some five days, involving, as it did, many lever arch files of documents.

I concur.
Paul Webster
Justice of Appeal [Ag.]

I concur.
Eamon Courtenay
Justice of Appeal [Ag.]

By the Court

Chief Registrar