Press Summary (English)

Press Summary (Chinese)

FACV Nos. 10 & 11 of 2015

FACV No. 10 of 2015

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 10 OF 2015 (CIVIL)

(ON APPEAL FROM CACV NO.151 OF 2013)

BETWEEN	LEUNG WING YI ASTHER	Petitioner (Appellant)
	and	
	KWOK YU WAH	Respondent (Respondent)
	and	
	LEUNG LUN PING	Intervener

FACV No. 11 of 2015

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 11 OF 2015 (CIVIL)

(ON APPEAL FROM CACV NO.152 OF 2013)

BETWEEN		
	LEUNG LUN PING	Intervener (Appellant)
	and	

LEUNG WING YI ASTHER	Petitioner
and	
KWOK YU WAH	Respondent (Respondent)

Before : Mr Justice Ribeiro PJ, Mr Justice Tang PJ, Mr Justice Chan NPJ, Mr Justice Stock NPJ and Lord Collins of Mapesbury NPJ

Date of Hearing: 19 November 2015

Date of Judgment: 22 December 2015

JUDGMENT

Mr Justice Ribeiro PJ:

1. I agree with the judgment of Mr Justice Stock NPJ.

Mr Justice Tang PJ:

2. I agree with the judgment of Mr Justice Stock NPJ.

Mr Justice Chan NPJ:

3. I agree with the judgment of Mr Justice Stock NPJ.

Mr Justice Stock NPJ:

Introduction

4. These are appeals against concurrent findings of fact. They arise from the determination by the District Court[1] of a preliminary issue in an application by the respondent husband for matrimonial ancillary relief. That issue was whether the beneficial interest in 20 million shares in a privately owned company was held by the petitioner wife or, on the other hand, by her father who was joined as intervener.

5. The shares were registered in the wife's name but it was her contention and that of her father that she holds them on trust for him. The judge rejected that contention and declared that the shares are part of the wife's assets and therefore available for distribution upon the ancillary relief application.

6. The judge's decision was upheld by the Court of Appeal[2], whose judgment predated the repeal of section 22(1)(a) of the Court of Final Appeal Ordinance[3] so that, since the matter in dispute involves a claim to shares clearly quantifiable at a value in excess of $1 million, the appeals come to this Court pursuant to that "as of right" provision[4].

7. The established practice is that this Court will not interfere with concurrent findings of fact other than in exceptional and rare circumstances, namely, where it is demonstrated that there has been a miscarriage of justice or violation of some principle of law or procedure, and:

> "That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand: or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law."[5]

8. The submission advanced by the petitioner (the wife) and her father is that in this case there are exceptional circumstances which warrant a review of the concurrent findings. Those circumstances are said to be inconsistent findings on the central issue; findings against the credibility of witnesses despite a failure to challenge that credibility; fundamental failures of analysis; and a failure by the first instance judge to provide adequate reasons. We are asked to reverse the declaration, failing which to order a retrial.

9. Most of the complaints can be addressed briefly and do not warrant other than summary disposal, for they do not lend themselves to reasonable argument justifying a full review. There was, however, one aspect of the judgment at first instance which, in my opinion, does warrant review; that is whether the judge at first instance explained what weight he gave to certain events said by the wife and her father to be cogent evidence in support their case and why, despite that evidence, he found against them.

The evidence

10. The parties were married in 1999. They have one child. They lived together in properties provided rent-free by the company in question. The wife filed a petition for divorce on 11 October 2011 and a decree nisi was granted on 4 October 2012.

11. The wife was aged 46 years at the time of the trial of the preliminary issue. She has

three siblings: her elder sister, Leung Wa Yi, who lives in Canada; Leung Cham Wah (Cham), also in his mid-40s; and Leung Kwun Wa (Kwun), the youngest, aged 40 years at the time of trial.

12. The father, aged 79 years at the time of trial, is a highly successful businessman. In 1977 he established Yee Fung Polyfoam Ltd (Yee Fung) and, subsequently, other companies including HK Sports Helmet Manufacturing Limited, leading manufacturers of crash helmets.

13. The wife commenced work at Yee Fung in about 1990 and continued to work there at all material times. Before he left for Canada in 1997, Cham worked there and Kwun still does.

14. The father invested most of the profits of these businesses in real estate and in March 1995 he acquired a shelf company, Nicegood Properties Limited (NPL), to hold the matrimonial homes of his family members and other properties.

15. In April 1995 the authorised share capital of NPL was increased to $66 million divided into 66 million ordinary shares of $1 each. The father became the registered shareholder of 40 million shares and Cham and Kwun were each allotted 13.2 million shares.

16. The father's case was that he told those of his children who held shares in NPL that they were not to deal in any way with them without his prior consent and that should they leave the family business, the shares were to be returned to him. It was well understood that the shares registered in the names of the two sons belonged to the father beneficially. No dividends were paid to them. He alone provided the working capital for NPL and was the sole authorised signatory of all NPL's bank accounts.

17. In 1997, Cham went to live in Canada and on 15 December 1997 he transferred his 13.2 million shares to the father. The instrument of transfer and the bought and sold notes state that the transfer was made in consideration of the payment to Cham of $13.2 million. Stamp duty of $22,825 was paid for the transaction. However, the oral evidence was that no consideration was in fact paid.

18. On 11 November 2004, Kwun executed a declaration of trust by which he stated that he held the NPL shares as nominee for his father. The evidence of the father and of the wife was that this occurred because of a falling out between the father and Kwun and that the father wanted thereby to show his lack of trust in Kwun. The effect of the father's testimony was that whereas the trust arrangement had hitherto arisen by reason of oral communications, the relationship between himself and Kwun now required that it be spelt

out in writing. In respect of this transaction, stamp duty of $19, 880 was paid.

19. Shortly thereafter, in early December 2004, the father asked the petitioner to replace Kwun as the nominee shareholder of those 13.2 million shares and to hold them on trust for him, the father. There followed, dated 8 December 2004, an instrument of transfer by Kwun to the wife of the 13.2 million shares and the consideration was therein stated to be nil with the words "change of nominee" inserted in manuscript. There is an official stamp on the document stating : "No Ad Valorem Duty payable."

20. On the same day, the wife executed a declaration of trust stating that she held the shares as nominee for her father, the beneficial owner. The document states that no duty was chargeable.

21. About six weeks later, namely, on 18 January 2005, the wife transferred those shares back to her father, again by an instrument of transfer expressed to be for no consideration followed by the words: " Being shares transfer back from Nominee to Beneficial Owner". The document states that no ad valorem duty was payable.

22. According to her testimony, she returned the shares because her involvement in the dispute between her father and her brother had made her uncomfortable. The father's evidence was that the request to execute a declaration of trust was, he thought, taken by her as a slight, an indication that her word that she held them on trust was not good enough. In those circumstances and since, at the time, the wife was the only one of his children upon whom he felt able to rely in respect of business and family matters, he thought it appropriate for her to hold shares for him but to do so, as had her brothers in the past, without requiring her to sign a declaration of trust. He also thought that transferring shares to her name would add to her authority and bargaining power with third parties such as estate agents and bankers. He told her and she agreed that "if she left the family business or upon my request, she had to return all things (including the shares of Nicegood) to me … ."[6]

23. Consequently, by an instrument of transfer dated 31 March 2005, 13.2 million shares were transferred by the father to the wife but, according to that instrument and the relevant bought and sold notes, that transfer was effected in consideration of the sum of $13.2 million; however, the oral testimony by the father, the wife and the father's accountant was that no sum was in fact paid. Stamp duty of $15,249 was paid.

24. In December 2006, as a result of tax advice, the authorised share capital of NPL was increased by 60 million shares of $1 each, taking the total authorised share capital to $126 million. The funds were provided by the father, though from what source and whether by

director's loan to the company, the evidence did not disclose. His testimony was that since his relationship with Kwun had by then improved, he decided to restore Kwun to his status as a shareholder and allotted to him 20 million shares in NPL and, to achieve parity between Kwun and the wife, allotted 6.8 million shares to her. Still, according to this evidence, the arrangement remained – although nowhere recorded - that all NPL shares in the names of Kwun and the wife were held on trust for the father; neither was asked by him to sign a declaration of trust because a trust was sufficiently understood.

25. Amongst the matters which the father prayed in aid of his contention that he never intended to confer beneficial ownership of the shares upon Kwun and the wife were that he regarded NPL as his personal "piggybank"; that to donate shares to only some of his children would unfairly discriminate between his children, grandchildren and other family members; that he alone controlled NPL, its working capital and bank accounts; that no dividends were paid to Kwun or to the wife; that no consideration passed from Kwun or the wife for the shares[7]; that in 1997 Cham acceded to the father's request to return the shares in Cham's name, conduct which sat squarely with the trust understanding; that, similarly, in 2004 Kwun acceded to the father's request to execute a declaration of trust and to assign his shares to the wife, a further instance of the understanding in action; that the share certificates held by the wife and Kwun were never signed; and that in the light of the divorce petition presented in October 2011 and the certain prospect of a claim for ancillary relief, he would never have permitted the subsequent purchase by NPL, in February and April 2012, of two properties for a total price of $208.8 million.

26. The wife's testimony supported that of her father, as did the evidence of Kwun. There was other evidence that no money had changed hands upon any of the transfers of NPL shares between father and his children; and of the father's complete control of the affairs of NPL and the Yee Fung group.

27. The husband's evidence was that no one ever suggested in his presence that the siblings held NPL shares on trust for the father. His assumption was that, absent declarations of trust, the intention in transferring shares to the siblings who worked for the company was as a reward for having done so and an encouragement to continue. He speculated that the declarations of trust signed in late 2004 were triggered by the unusual tension between Kwun and his father and that the step by which Kwun's shares were transferred to the wife upon her express declaration of trust was intended to send a message to Kwun that if he maintained his attitude of hostility to his father, his position would be supplanted by her. He asserted that the father was a generous man given to making gifts of blue-chip shares to the wife and providing substantial financial support to her and to him.

The absence of pleadings

28. The order for joinder of the father as intervener was made[8] pursuant to a consent summons which sought an order that he be so joined "to seek a declaration in respect of shares in [NPL] held in the name of the petitioner in which he claims beneficial ownership". [9] In accordance with the terms of that consent summons, a direction was given for the petitioner to serve copies of all pleadings and other relevant documents in the suit on the intervening party, which, in context, can only have meant the pleadings - such as the petition and cross petition - and documents hitherto filed in the matrimonial proceedings.

29. However, no direction was sought and none given for the filing of pleadings or for the discovery of documents in support of and directed to the preliminary issue. That omission was unfortunate and was understandably categorised by the Court of Appeal as contributing to confusion as to "what case was advanced by the husband in opposition to the father's claim, how the husband's case was conducted in the course of the trial, and the findings that should be made by the judge on the competing claims or contentions to resolve the dispute."[10] In this regard, I endorse the practice commended by the Court of Appeal that in the context of matrimonial proceedings for ancillary relief, disputes between a spouse and a third party as to ownership of property should procedurally be approached as in standard claims for ownership of property: in other words, after a direction for trial of the dispute as a preliminary issue and the joinder of the claimant as intervener, by directions for the filing of pleadings on the preliminary issue and for witness statements and discovery relevant to that issue.[11] It does not however lie at the door of any party to the present proceedings now to complain about the procedural lacuna since the flawed directions were sought on the joint application of the parties and ordered by consent without anyone suggesting that appropriate directions be given for the preliminary issue.

The first instance judgment

30. As to the law, the judge said:

> (1) that "[g]iven that the documents hold out the wife to be the legal and beneficial owner of the shares, shares apparently purchased by her for $13.2 million, it is for her and her father to prove on a balance of probabilities that the wife is the father's trustee and that he remains the beneficial owner of the shares"[12]; and
>
> (2) that it was his function to discover what the father's intention was when he

transferred the shares to the wife, in which context he cited several passages from *Lavelle v Lavelle*[13] "which", he said, "succinctly [address] what is required of me in the circumstances"[14] :

> "[13] Where one person A transfers the legal title of property that he owns or purchases to another, B, without receipt of any consideration, the effect will depend on its intention. If he intends to transfer the beneficial interest in the property to B, the transaction will take effect as a gift and A will lose all interest in the property. If he intends to retain the beneficial interest for himself, A will take the legal interest but will hold the property in trust for [B] [15].
>
> "[14] Normally there will be evidence of the intention with which the transfer is made. Where there is not, the law applies presumptions. Where there is no close relationship between A and B , there will be a presumption that A does not intend to part with the beneficial interest in the property and B will take the legal title under the resultant trust for A. Where, however, there is a close relationship between A and B, such as father and child, a presumption of advancement will apply. The implication will be that A intended to give the beneficial interest in the property to B and the transaction will take effect accordingly."
>
> "[19] **In these cases equity searches for the subjective intention of the transferor. It seems to me that it is not satisfactory to apply rigid rules of law to the evidence that is admissible to rebut the presumption of advancement."[16]**

31. Under the heading " Conclusions", the judge said that there was no doubt but that the father had been very generous towards the wife and her husband; that the father was a traditional patriarchal head of the family, who demanded obedience and loyalty, factors to which he, the judge, had paid great attention. He said that he noted, as well and with care, "the pattern of share transfers both on the basis of trusteeship and of apparent transfers of beneficial interests"[17], and had given careful consideration to "the fact that the father made purchases of valuable property after he knew of the pending divorce."[18]

32. A key question in the case was what point there was, whether from the perspective of the father or from that of the siblings, in the siblings holding the shares as mere nominees. As to the father's explanation in this regard, most particularly in relation to the transfer of shares to the wife in March 2005, the judge found as follows:

> "I am bound to say that I have great difficulty in accepting the logic of the father's case that the motive in transferring the shares to the wife in this way was to provide her with 'a psychological lift' and in giving her more clout when dealing with third parties. As to the former I cannot really discern any 'lift' when the recipient of the shares was a mere nominee. As to added status, the fact of the matter is that status, if any, comes from the fact that she is a director but, even more importantly, that she is her father's daughter who overwhelmingly controls the group. No doubt when she speaks, she speaks for him so much so that she would need to consult with him before entering into any important transaction. This really betrays a certain contradiction; more standing with third parties in representing the company and yet, to the knowledge of the third parties called as witnesses, having to defer and consult her father before any final decision is to be taken. I do not believe this proferred motive for transferring the shares as nominee in this way can hold any water at all. I reject it as a reason."[19]

33. He concluded as follows:

> "61. In the final analysis I am afraid to say that the truth of this matter is that this kind and

> generous father decided to reward his beloved daughter and Kwun, with whom he had happily become reconciled, with this very valuable interest in NPL. As to the point that he would not do so because this would favour some relatives over others, is not a matter that I find at all persuasive. The fact is that when the time comes, he still holds great wealth in his own hands, he will be able to do what is right for the remainder of them. The wife in this case is his right hand and he intended, I use the word advisedly, to transfer the shares to her outright, which is what he did. Had it been otherwise he would have created a specific instrument of trust as he had in the past. This must have been, I find this as a fact, a deliberate choice to bring about a transfer of the beneficial interest in the shares.
>
> 62. Now of course this has become very inconvenient because the husband is saying, and rightly so on my finding, that the shares, being the wife's must form part of the matrimonial estate which falls to be divided up between him and the wife in such proportion as the court considers correct and just. In order to avoid such a consequence, I regret to say that these usually honest and decent people have decided that they would give false evidence as to the basis of the transfer of these shares."

34. He accordingly dismissed the father's application for a declaration that the beneficial ownership of shares in NPL held in the name of the wife rested with him and ordered that the shareholdings stand as part of her beneficially owned assets available for distribution on the hearing of the ancillary relief application.

35. During the course of the hearing on the preliminary issue, the judge raised of his own motion the question whether the instrument of transfer of shares to the wife and the bought and sold notes constituted an estoppel as against the father and the wife. In his judgment, he said that:

> "Having found that the father's intention was to and did transfer the beneficial interest in the shares to the daughter is sufficient to dispose of the issue … I am therefore not required to decide whether an estoppel is available [to the husband] as an additional ground for succeeding in this matter."[20]

36. He nonetheless addressed that issue "in deference to counsel's researches and in case the matter needs to be considered in another court" and, without providing analysis, held that the father and the wife were indeed estopped "from denying the truth of the contents of the instrument of transfer and the bought and sold notes. So this must stand as a further ground for the dismissal of the Intervener's summons."[21]

The Court of Appeal

37. In the Court of Appeal, it was contended on behalf of the father and the wife that the judgment at first instance was internally inconsistent in that the judge held that there had been a sale for value of the shares to the wife but, inconsistently, that the father had gifted the shares to her; that the documents purportedly recording a sale were erroneously treated by the judge as precluding the existence of a trust; that the judge failed to distinguish between the different circumstances in which the wife acquired the two parcels of shares (13.2 million in March 2005 and 6.8 million in December 2006); that he had ignored the evidence of a consistent pattern of trust arrangements between the father and three of his

children, as demonstrated by the return of shares to the father by Cham in 1997 and Kwun in 2004; that the judge failed to appreciate the significance of the absence of signatures on the share certificates; that he failed to recognise the significance of the father's investment in properties through NPL after he became aware of the institution of divorce proceedings; and that, contrary to the principle in *Browne v Dunn*[22], it had never been put to the father or the wife, or to other witnesses, in cross-examination of them on the husband's behalf, that their accounts of an oral trust agreement were untrue.

38. It was conceded by the respondent before the Court of Appeal that the judge had erred in his finding of an estoppel but, in a careful and thorough judgment[23], that Court rejected the argument that that conclusion had infected the judge's central findings. The Court was satisfied that the judgment evidenced a single uncontradicted finding by the judge that the father had made a gift of the two parcels of shares to the wife; that there were significant indicia which countered the assertion of a trust; and that the failure to put to the witnesses in terms that their evidence was not true was of no consequence since it must have been obvious to the parties and to the witnesses that the husband's case was a challenge to their assertions of a trust arrangement.

39. The Court was not persuaded that the judge had overlooked relevant evidence. The Court pointed to cogent factors against the wife's case and that of her father:

> "78. … the transfer to the wife in March 2005 was made without a declaration of trust, and this came not long after declarations of trust were executed by Kwun in November 2004 and by the wife in December 2004. No plausible explanation was given by the wife why she should have been unwilling to be the express nominee of the father when she returned the shares to him in January 2005 but was happy to take on the status in April 2005 without a declaration of trust. When the father was pressed for an explanation why he executed documents stating that consideration was paid and received when the shares were transferred to the wife, when it was his case that no consideration was paid as it was a trust arrangement, he said the documents were just formalities and claimed he did not remember much and did not know the contents. The father admitted at that time, he understood what a declaration of trust was, that it was a simple way of setting out the true beneficial ownership as opposed to registered ownership.
>
> 79. As for transferring the shares to the wife as a nominee to provide motivation for the other children to join the family business and work hard, Mr Sussex asked rhetorically why would Cham come running back from Canada only to be made a mere nominee shareholder as he had already been before, on the father's case. That the father had wanted all along his children to carry on the family business was entirely consistent with the gift of the shares to them."

Further, the Court agreed, "there was no credible explanation why the wife's shareholding was increased to 20 million in 2006 if it was a merely nominal shareholding for spiritual or psychological purposes." [24]

40. The Court concluded that the trial judge was entitled to disbelieve the father and the wife, whose evidence he had heard and that there was no basis to impugn the finding of a gift.[25] Accordingly, the appeals were dismissed.

Concurrent findings

41. These appeals challenge concurrent findings of fact. The established practice, to which I refer at the outset of this judgment[26], is that this Court will not interfere with concurrent findings of fact other than in exceptional and rare circumstances. The exceptional circumstances advanced on behalf of the father and wife are, in their combined effect, a repetition of the grounds of appeal canvassed before the Court of Appeal albeit, in the case of the father, with some difference of emphasis. I first address those which can be disposed of in short order.

Inconsistent findings

42. This complaint is not maintained by Mr Burns SC for the father but is maintained by Mr Coleman SC for the wife. Mr Coleman's suggestion is, first, that resolution of the preliminary issue required the judge to decide not only whether the wife held the beneficial interest in the shares but, if she did, whether it was by reason of gift or of purchase since the route by which that interest was hers would impact upon the degree to which, if at all, the value of those shares would enure to the benefit of the husband in his claim for ancillary relief. The contention is, with respect, not sound, for the preliminary issue defined by the father's summons and ordered to be tried, was whether he held the beneficial ownership of the shares, no more and no less. In the event, the point matters not since the question whether a gift or a purchase, if not a trust, was in reality destined to be addressed – as indeed it was - and, more particularly, it is clear to me, as it was to the Court of Appeal, that the first instance judgment does not yield any inconsistent finding. The judge decided, as is apparent in that part of his judgment entitled "Conclusions", that in 2005 and in 2006, the father made a gift to the wife of the NPL shares in contention.

The Browne v Dunn point[27]

43. It is true that there was an inconsistency in the husband's case as canvassed in the District Court,although not, as just pointed out, in the judge's findings. The inconsistency was that in his affirmations, his case was that the shares were transferred to the wife by way of gift whereas at trial his case appeared to be that she had purchased them. Yet what was apparent throughout and must have been clear to the witnesses was that their suggestion of a trust was not accepted. The same complaint, when advanced to the trial judge, was dismissed by him with the comment that the entire curial contest had, to everyone's knowledge, concentrated upon the issue whether the father and the wife were telling the truth when they said that it had been agreed between them that she would hold the shares as trustee for the father. "Everybody knows," he said "that their evidence is under the severest challenge." A contrary contention is, in my opinion, not tenable. In the

circumstances which prevailed at this trial – and such an issue is always case specific - a requirement to put to the witnesses in terms that they were not telling the truth would have been an insistence for form over substance.

Judge's reasoning: the arguments

44. Mr Burns asserts that the judge erred in respect of the burden of proof. The suggestion is that in the matrimonial proceedings it was for the husband to prove that the shares belonged beneficially to the wife whereas the judge held[28] that since the documents held out the wife to be legal and beneficial owner, it was for her and the father to prove that she was a trustee.

45. He further argues that whereas the judge was required to ascertain the father's subjective intention as at the time of transfers of shares to the wife in March 2005 and December 2006, the judge instead adopted an objective test in that he allowed the documents to distract him from evidence of the father's subjective intention. According to this argument, the documents were neutral in their effect since they purported to evidence sales for value whereas it was accepted that no sale had taken place, yet the documents on their face were inconsistent with a gift as well as with the creation of a trust. There was therefore no inference to be drawn from the documents and all that remained was the testimony of the father. It follows, it is said, that the judge's approach was fundamentally flawed.

46. It is then contended that since it was the father's case that his evidence of intention was supported by two key undisputed facts - that shares were twice returned to the father upon his request and that expensive properties were injected into NPL after presentation of the petition - it was incumbent upon the judge to explain what impact those facts had upon his reasoning, whereas all he said in his judgment was that he noted them.[29] This is said to demonstrate either a failure by the judge to understand the significance of the key evidence in support of the father's case or a failure to provide adequate reasons for his decision; in either event, such a significant neglect as to warrant interference by this Court.

47. The argument concludes with the suggestion that if the father's testimony was correctly rejected, there remained only the presumption of a resulting trust since the transfers of legal title were made without consideration; a presumption which could be rebutted by the presumption of advancement only if the latter presumption were available in the case of transfer of a legal interest by a parent to an adult independent child, a proposition which counsel categorised as debatable.[30] It was incumbent on the husband to rebut the presumption of a resulting trust but the judge erred in not approaching the

issue on that basis.

48. Mr Coleman adopted and further developed these submissions.

The burden of proof

49. It is unnecessary to decide upon whom the burden of proof lay and whether the judge erred in this regard. That is because the decision against the wife and the father on the preliminary issue did not rest upon a failure by them to discharge a burden of proof. It flowed from a finding of fact by the judge that the father intended by the transfers of shares to the wife to make a gift of them to her.[31]

Subjective or objective approach

50. The judge's task was to ascertain the subjective intention of the father when in March 2005 he transferred the shares to the wife and when in December 2006 he caused shares to be allotted to her; and the case proceeded on the footing that the intention was the same on both occasions. The judge expressly recognised subjective intention as the key question[32] and I am satisfied that that is the test which he in fact applied. I do not accept the argument that he adopted an objective test; neither do I accept the argument that he should have treated the documents as neutral in their evidential effect.

51. It is plain that what the judge did was to look primarily at the evidence presented to him of words and conduct contemporaneous with and proximate to the transfers in question in order to ascertain the subjective intention of the transferor at the time of the transfers. That evidence was of words allegedly passing between the father and the wife, and of conduct evidenced by the content and pattern of written declarations of trust and instruments of transfer. He concluded that the content of the documents and the stark contrast between them at a time when the father knew the effect of a trust declaration and had the benefit of legal and accounting advice, spoke volumes as to the father's intention in respect of the transfers in issue. At such a time, he chose on some occasions to cause such declarations to be made and on other occasions not to do so. He chose on some occasions instruments of transfer to bear the words "change of nominee" and "transfer back from nominee to beneficial owner" and on other occasions not. Absent a reasonable explanation for the choices he made in March 2005 and December 2006 not to seek written declarations of trust and not to refer to the wife as a nominee, and to pay duty on each such transaction, it was clearly open to the judge to reject the contention that on those occasions he intended the wife to hold the shares on trust.

52. The father and the wife said, however, that there was indeed a reasonable explanation for wanting her and her brothers to hold as mere nominees and, save in the unusual

circumstances pertaining at the end of 2004, to do so without the need for documents to evidence that status. But the palpable implausibility of that explanation was soundly revealed by the judge and by the Court of Appeal as not according with the common sense of the matter; and the logic of their analyses is not susceptible to valid criticism.

53. There was no need in the circumstances for the judge to invoke the presumption of a resulting trust or to look to the presumption of advancement and he did not do so. The presumptions of resulting trust and advancement arise as a matter of default; in other words, where there is otherwise insufficient evidence of subjective intention. That is the point made in the passage cited by the judge from *Lavelle* that :

> "Normally there will be evidence of the intention with which the transfer is made. Where there is not, the law applies presumptions."[33]

and summarised thus, that:

> "Even where this [an express declaration of trust] is absent, the court aims to arrive at the parties' real intentions by considering direct evidence of the entire transaction. This requires an objective inference drawn from the parties' words and conduct. As a result, the presumptions of resulting trust or of advancement are only relied upon as default rules where there is no sufficient evidence to displace them."[34]

Non-proximate conduct

54. In that it is said that the judge's conclusion evidenced a reliance on conduct proximate to the transfers themselves to the wrongful exclusion of non-proximate conduct (the 1997 and 2004 returns of shares at the father's request; and the 2012 property purchases), the answer is, first, that he did not ignore the earlier or later events or the suggested significance of them. He mentioned them as matters to which he had close regard[35] and expressly recognised the reliance placed on them[36]. Whether he revealed what he made of those events and why, despite those events, he rejected the contention of a trust arrangement is a matter which merits scrutiny and to which I will shortly turn.

55. A question canvassed in the course of argument before this Court was whether those earlier and later events were admissible as evidence of intention at the time of transfers. It seems to me that they were and that the issue was one of weight. In the context of a question whether evidence of conduct subsequent to the registration of shares in the names of children was admissible to rebut the presumption of advancement, it was held in *Shephard v Cartwright*[37] that whereas acts and declarations of the parties before or at the time of the transaction or so immediately after it as to render it a part of that transaction are admissible "either for or against the party who did the act or made the declaration.. . subsequent declarations are admissible as evidence only against the party who made them, not in his favour."[38] The modern approach is less rigid in relation to

evidence of subsequent conduct:

> "… it does not follow that subsequent conduct is necessarily irrelevant. Where the existence of an equitable interest depends upon a rebuttable presumption or inference of the transferor's intention, evidence may be given of the subsequent conduct in order to rebut the presumption or inference which would otherwise be drawn."[39]

56. As a matter of common experience, contemporaneous conduct is inherently more likely to be a reliable indicator of intention, to be given greater weight, than are words and conduct after the event, especially in the case of " self serving statements or conduct of the transferor, who may long after the transaction be regretting earlier generosity."[40] That rationale is not restricted to evidence in rebuttal of presumptions but embraces any evidence from which an inference of the transferor's intention may properly be drawn.

57. The 1997 and 2004 transfers to the father by Cham and Kwun, respectively, predated the 2005 transfer and 2006 allocation to the wife; and were admissible in support of the father's theme that shares in his children's name were to be returned to him upon his request. So too in my judgment was the father's 2012 injection of properties, even though subsequent to 2005 and 2006 events and, as to weight, such a substantial investment might justifiably be said not to be in the nature of a self serving afterthought.

58. That the judge treated the 1997 and 2004 transfers to the father and the 2012 purchases of property as admissible evidence as to intention is clear enough and it is also apparent that that evidence did not move him to accept the father's and the wife's central contention. What, however, has prevented a summary disposal of this application to review concurrent findings of fact, is the absence of an express explanation by the judge as to why that was so; why, in other words, that evidence did not persuade him to a different result.

Adequacy of reasons

59. The question whether reasons provided in a judgment are adequate is always case and issue specific, and is a question which is to be approached with common sense [41]. It must, however, be made apparent to the parties, especially to the losing party, from the reasons which are provided, why the judge has arrived at his decision and :

> " … if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process."[42]

60. The pattern of return of shares to the father, in so far as two occasions might be termed a pattern, as well as the injection of properties in 2012, were key planks of the

case for the father and the wife and, in my judgment, it would have been preferable had the judge explained in terms how those events sat comfortably with his finding that, nonetheless, the father's intention in March 2005 and December 2006 was to gift shares to his daughter. Yet the question is whether, despite the absence of a direct explanation, his reasoning in that regard is sufficiently apparent.

61. The weight of the evidence which constituted these key planks was expressly addressed by the Court of Appeal in the context of submissions that the judge had overlooked them. The Court said that not only had the judge taken them into account but that :

> "… just as [counsel for the father] had sought to persuade us by looking at the pattern of transfers and allotments in a particular light, equally if not more cogent reasons could be advanced showing that the transfer in dispute was not a trust arrangement."[43]

The Court thereupon tabulated compelling factors which, notwithstanding the pattern relied upon, sat ill with the notion of a transfer to the wife as trustee[44].

62. It is sufficiently apparent from a sensible reading of the first instance judgment as a whole that the judge's reasoning as to the significance of the two planks of evidence so much relied upon by the father and the wife, was the same as that subsequently articulated by the Court of Appeal; which is to say, that the account offered by the father and the wife made no sense either in practical terms or in the light of the documentary history preceding and accompanying the transfer in March 2005; and that, since no consideration was in fact paid, the only conclusion to which the evidence and the common sense of the matter drove him was that a gift had been intended.

63. These findings by the judge and the Court of Appeal do not sit at odds with the incidents upon which the appellants rely. They are consistent with a desire by the family's patriarch to reward by gift those who worked with him but with a willingness on the part of the siblings, as a matter of filial rather than legal obligation, to convey beneficial ownership to him should unusual circumstances so indicate.

64. As for the suggested significance of the injection of property assets into NPL after filing of the petition, the weight of the point is highly doubtful since there was not a scintilla of evidence of the impact of those acquisitions on the value of NPL shares; and it is the shares, not the properties, which were liable to form part of the matrimonial assets.

65. In the event, I am persuaded that the complaint of inadequate reasons must fail.

Fresh evidence

66. There was an application to this Court by the wife and father that, for the purpose of

these appeals, they be permitted to adduce evidence of the purchase by Yee Fung of Mainland property in the names of several individuals and of a finding by a Mainland court in August 2015 that such of those properties as were conveyed into the name of the husband, were held by him on trust for Yee Fung. That finding was contrary to his contention prior to and in the Mainland proceedings that the four flats in his name were held by him beneficially. The proposed evidence, including the ruling, is said to exemplify the father's practice of appointing family members and others to hold properties as nominees without formal declarations of trust.

67. We rejected the application. Issues of relevance aside, no adequate reason was advanced for the failure previously to adduce or to apply to adduce the evidence. The properties were purchased in 2006 and it was known by Yee Fung in mid-2014 that the husband disputed Yee Fung's ownership claim. The hearing of the NPL dispute before the District Court took place in November 2012 and the hearing in the Court of Appeal took place in November 2014 without any reference in either forum to the Mainland property, in respect of which it would have been open to the father and the wife to apply to adduce evidence from persons, other than the husband, in whose names flats in the same district had been purchased at the same time.

68. The father's explanation was that due to the insignificant value of the flats, he forgot about them during preparation for trial of the preliminary issue and was not reminded of them until May 2014 when, as a result of the termination of the employment by Yee Fung of one of the property holders, he was reminded of them by Yee Fung's accounts department. Even then, he did not appreciate the relevance of the trust arrangements for those flats to the issue of beneficial ownership of the NPL shares.

69. The first condition for the reception of fresh evidence at the appellate stage is that the evidence could not have been obtained with reasonable diligence for use at the trial[45]. The appellants did not begin to meet that condition.

Conclusion

70. For the reasons which I have provided, I would dismiss this appeals and make an order nisi that the costs of the appeals and of the applications to adduce fresh evidence be to the respondent, to be taxed if not agreed.

Lord Collins of Mapesbury NPJ:

71. I agree with the judgment of Mr Justice Stock NPJ.

Mr Justice Ribeiro PJ:

72. The Court unanimously dismisses the appeals and an order as to costs is made in the terms proposed in paragraph 70 above.

(R.A.V. Ribeiro)	(Robert Tang)	(Patrick Chan)
Permanent Judge	Permanent Judge	Non-Permanent Judge

(Frank Stock)	(Lord Collins of Mapesbury)
Non-Permanent Judge	Non-Permanent Judge

Mr Russell Coleman SC and Mr Robin Egerton, instructed by Simon C W Yung & Co, for the Petitioner (Appellant in FACV 10/2015)

Mr Charles Sussex SC, Mr Neal Clough and Mr Timothy Parker, instructed by T C Foo & Co, for the Respondent (Respondent in FACV 10/2015 and FACV 11/2015)

Mr Ashley Burns SC, Ms Maggie Wong and Ms Tanie Toh, instructed by Li, Wong & Lam & W I Cheung, for the Intervener (Appellant in FACV 11/2015)

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[1] Deputy District Judge Carlson, FCMC 14018 of 2011, 4 March 2013.

[2] Cheung, Yuen and Kwan JJA, CACV 151 of 2013 and CACV 152 of 2013, 4 December 2014.

[3] The repeal took effect on 24 December 2014: section 7 Administration of Justice (Miscellaneous Provisions) Ordinance.

[4] Leave was granted by the Court of Appeal on 23 April 2015.

[5] *Srimarti Bibhabati Devi v Kumar Narayan Roy* [1946] AC 508 at 521-522, the test applied by this Court in *Sky Heart Ltd v Lee Hysan Co td* (1997-98) 1 HKCFAR 318; *Wu*

Yee Pak v Un Fong Leung (2004) 7 HKCFAR 498; *Chinachem Charitable Foundation Ltd v Chan Chun Chuen* (2011) 14 HKCFAR 798; and *Wealth Duke Ltd v Bank of China (Hong Kong) Ltd* (2011) 14 HKCFAR 863.

[6] The father's affirmation dated 25 September 2012, para 21.

[7] A contention described by the judge in the course of proceedings as incontrovertible.

[8]Judge Melloy 25 September 2012.

[9] Consent summons dated 13 September 2012.

[10] Paras 30 and 31, *per* Kwan JA.

[11] Court of Appeal judgment, para 30, citing with approval *TL v ML & Ors* [2006] 1 FCR 465 at [34] and [37].

[12] District Court judgment para 43.

[13] [2004] 2 FCR 418.

[14] *Ibid* para 55.

[15] The report of the judgment says "A" but that must be a slip.

[16] The emphasis is that supplied by Judge Carlson.

[17] Judgment para 58.

[18] *Ibid* para 59.

[19] *Ibid* para 60.

[20] *Ibid* para 66.

[21] *Ibid* para 67.

[22] (1894) 6 R 67 HL. See para 43 below, fn. 27.

[23] Kwan JA, with whom the other members of the Court agreed.

[24] Para 80.

[25] *Ibid* paras 81 and 88.

[26] Para 7 above.

[27] See para 37 above. Put broadly, the principle in *Browne v Dunn* is that where a party intends to impeach the credibility of a witness on a material point, that party is bound to

challenge the witness in cross-examination so as to give the witness an opportunity of making any explanation open to him; failure to do so may be taken as an acceptance of his evidence. But there are cases "in which [notice of the challenge] has been so distinctly and unmistakably given and the point upon which he is impeached, or is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it": *Browne v Dunn* (1894) 6 R 67 HL at 70-71. See also *Markem Corp v Zipher Ltd* [2005] R.P.C. 31 at [57] - [61]; and Phipson on Evidence, 18th ed., [12-12] and [12-35].

[28] See para 30(1) above.

[29] See para 29 above.

[30] The question whether the presumption of advancement applies to the case of a transfer without consideration by a parent to an adult independent child has been left open by the Court of Appeal : *Suen Shu Tai v Tam Fung Tai* [2014] 4 HKLRD 436 at [10.16] and by this Court upon appeal from that judgment: FACV No 9 of 2015, 5 November 2015.

[31] See para 61 judgment; para 30 above: " … he intended, I use the word advisedly, to transfer the shares to her outright, which is what he did. Had it been otherwise he would have created a specific instrument of trust as he had in the past. This must have been, *I find this as a fact*, a deliberate choice to bring about a transfer of the beneficial interest in the shares." (emphasis added).

[32] See his emphasis on para [19] of the judgment in *Lavell*, referred to at para 27(2) above.

[33] *Lavelle* at [14]. See also *Au Yuk Lin v Wong Wang Hin* [2013] 4 HKLRD 373 at [18] to [19]; and *Pettitt v Pettitt* [1970] AC 777 at 811 and 813, passages referred to in *Lavelle* at [17].

[34] Snell's Equity 33rd ed., at 25-11(a).

[35] See para 31 above; paras 58 and 59 of the District Court judgment.

[36] Judgment paras 15 and 47.

[37] [1955] AC 431 at 445.

[38] Citing Snell's Principles of Equity (24th Ed. p 153).

[39] *Tribe v Tribe* [1996] Ch 107 at 129 *per* Millett LJ, as he then was. See also *Lavelle*, above, at [17] to[19] and Snell's Equity 33rd ed., 25-013.

[40] *Lavelle* para [19].

[41] *Oriental Daily Publisher Ltd v Commissioner for Television and Entertainment Licensing Authoriy* (1997-98) 1 HKCFAR 279 at 290-291.

[42] *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 at [19]. See also as to the duty to give adequate reasons: *Zhou Cui Hao v Ting Fung Yee* 1999 3 HKC 635; *Welltus v Fornton Knitting* [2013] 5 HKC 105.

[43]Court of Appeal judgment, para 77.

[44] *Ibid* paras 78 to 80, repeated at para 39 above.

[45] *Ladd v Marshall* [1954] 3 All ER 745 at 748.

香港終審法院

THE HONG KONG COURT OF FINAL APPEAL

This Summary is prepared by the Court's Judicial Assistants

and is not part of the Judgment.

The Judgment is available at:

http://www.hkcfa.hk/en/work/cases/index.html

or

http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp

PRESS SUMMARY

Leung Wing Yi Asther and Kwok Yu Wah and Leung Lun Ping

FACV Nos. 10 & 11 of 2015 on appeal fromCACV Nos. 151 & 152 of 2013

APPELLANT: Leung Wing Yi Asther

RESPONDENT: Kwok Yu Wah

INTERVENER: Leung Lun Ping

JUDGES: Mr. Justice Ribeiro PJ, Mr. Justice Tang PJ, Mr. Justice Chan NPJ, Mr. Justice Stock NPJ, and Lord Collins of Mapesbury NPJ

COURTS BELOW: District Court, Depute Judge Carlson; Court of Appeal, Cheung, Yuen and Kwan JJA

DECISION: Appeal unanimously dismissed

JUDGMENT: Mr Justice Stock NPJ delivering the Judgment of the Court

DATE OF HEARING: 19 November 2015

DATE OF JUDGMENT: 22 December 2015

COUNSEL FOR THE APPELLANT: Mr. Russell Coleman SC, and Mr. Robin Egerton

COUNSEL FOR THE RESPONDENT: Mr. Charles Sussex SC, Mr. Neal Clough, and Mr. Timothy Parker

COUNSEL FOR THE INTERVENER: Mr. Ashley Burns SC, Ms. Maggie Wong, and Ms. Tanie Toh

SUMMARY:

1. These appeals arose in the context of matrimonial proceedings. The respondent husband had made a claim in the District Court for ancillary relief in relation to the assets of his wife, the petitioner. He asserted that she held the legal and beneficial interest in 20 million shares in a private company established and controlled by her father. The wife and her father asserted, on the other hand, that although the shares were registered in her name, she held them on trust for the father. The District Court Judge ordered that issue to be tried as a preliminary issue.

2. The case for the father and his daughter at trial was that he controlled the company and he only transferred shares to those of his adult children who helped him in his business with an understanding that if they left the business they were to return the shares and he relied in part on the fact that when one of his sons left Hong Kong he transferred his shares to his father, as did another son when there had been a falling out. The point of transferring shares to his daughter, he said, was to give her more status when dealing with third parties. He also said that he would not have allowed the company to buy properties after the divorce proceedings were in prospect had he thought that the shares were part of the daughter's assets.

3. The District Court Judge held that the shares were part of the wife's assets. The judge said that the father's explanation for transferring shares to his daughter was not logical, that had he intended her to hold the shares on trust for him, he would have executed a written declaration of trust as he had previously with one of his sons and once with the daughter, that the daughter was his right hand and that he intended to transfer the shares to her outright.

4. The judge's decision was upheld and endorsed by the Court of Appeal. That Court noted that the relevant transfers of shares to the wife were made without declarations of trust at a time when the father, according to his own admission, knew what a declaration of trust was and had used such declarations; and the Court agreed that the evidence was entirely consistent with an intention to gift the shares to the daughter.

5. The wife and her father thereupon appealed to this Court, seeking to challenge the findings of the lower courts as to the beneficial ownership of the shares. At the time of the Court of Appeal's decision in December 2014, the fact that the matter in dispute amounted to more than $1 million was a fact which, on its own, gave a right of appeal to this Court. These appeals came to this Court under that "as of right provision", a provision which has since been

repealed.

6. The appeals were appeals against concurrent findings of fact; in other words the same findings of fact by both the District Court and the Court of Appeal. The established practice is that the Court will not interfere with concurrent findings of fact other than in exceptional and rare circumstances.

7. The wife and her father argued that there were exceptional circumstances which warranted a review by the Court. They said that the trial judge had made inconsistent findings; that he wrongly rejected their evidence even though key assertions by them when they testified had not been challenged; that he did not apply the correct approach in deciding what the father's intention was when he transferred the shares to his daughter; and that he failed to give enough weight to the history of the father's dealings with his daughter and her brothers; and that the judge failed to provide adequate reasons for deciding as he did.

8. The Court held that most of the complaints did not warrant other than summary disposal since they did not lend themselves to reasonable argument justifying a full review of concurrent findings. The judge made no inconsistent finding: he found that the father intended to gift the shares to the daughter; the challenge to the father and daughter as witnesses was clear enough; and the judge adopted the correct test in deciding the father's intentions.

9. The Court held that the only issue which warranted review was whether the judge explained what weight he gave to the key events relied on by the father and daughter in support of their case and why, despite those events, the judge found as he did. Those events were the occasions on which shares were returned to the father and the property purchases by the company of property after divorce proceedings were in prospect.

10. The Court held that whilst it would have been preferable for the judge to explain in terms how these events sat comfortably with his finding that, nonetheless, father's intention was to gift shares to his daughter, the judge's reasoning was sufficiently apparent from a sensible reading of his judgement as a whole. It was the same reasoning as articulated by the Court of Appeal, namely, that the account offered by the father and the wife made no sense either in practical terms or in the light of the documentary history and that since no consideration was paid for the shares the only rational conclusion was that a gift was intended. In the context of this case, the findings were not at odds with the incidents of return of shares on which the father relied.

11. Accordingly, the Court dismissed the appeals.

[Chinese Translation — 中譯本]

香港終審法院

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新聞摘要

Leung Wing Yi Asther and Kwok Yu Wah and Leung Lun Ping

終院民事上訴*2015*年第*10*及*11*號

(原上訴法庭民事上訴*2013*年第*151*及*152*號)

上訴人：Leung Wing Yi Asther

答辯人：Kwok Yu Wah

介入人：Leung Lun Ping

主審法官：終審法院常任法官李義、終審法院常任法官鄧國楨、終審法院非常任法官陳兆愷、終審法院非常任法官司徒敬，及終審法院非常任法官郝廉思勳爵

下級法院：區域法院（區域法院暫委法官郭靄誠），上訴法庭（上訴法庭法官張澤祐、上訴法庭法官袁家寧及上訴法庭法官關淑馨）

判決：一致裁定駁回上訴

判案書：本院非常任法官司徒敬頒發本院的判案書

聆訊日期：2015年11月19日

判決日期：2015年12月22日

上訴人由資深大律師高浩文先生及大律師艾家敦先生代表

答辯人由資深大律師沙惜時先生、大律師Neal Clough先生及大律師白天賜先生代表

介入人由資深大律師包毅成先生、大律師黃佩琪女士及大律師杜慧燃女士代表

摘要：

1. 本上訴源於婚姻法律程序。答辯人（丈夫）在區域法院就呈請人（妻子）的資產作出關於附屬濟助的申索。丈夫聲稱妻子持有一家由她父親開設和控制的私人公司二千萬股份的法定和實益權益。妻子及其父親則聲稱雖然該批股份以她的名義登記，但她只是以信託方式代其父親持有該批股份。區域法院法官下令以之作為初級爭論點進行審訊。

2. 在審訊中，兩父女的說法是：公司由父親控制，他只是把股份轉移給協助他處理公司業務的成年子女，但子女們均明白他們一旦離開公司，便須將股份歸還。父親並列出某些事實作為支持其說法的部分理由：他其中一名兒子因離開香港而將股份歸還給他，另一名兒子則因與他不和而將股份歸還給他。父親說他將股份轉移給女兒，是為了讓她在與第三方洽談業務時更有地位。他又表示，若他認為該批股份為其女兒的資產的一部分，則當他知道離婚法律程序將會展開之後，便不會准許公司購買物業。

3. 區域法院法官裁定該批股份是妻子的資產的一部分。法官指出父親關於為何將股份轉移給其女兒的解釋不合邏輯，若他有意將股份交由女兒以信託形式持有，則他應與女兒簽立一份信託聲明書，事實上，他之前曾與其中一名兒子簽立信託聲明書，亦曾一度與這名女兒簽立這類文件。法官裁定，由於女兒是父親的得力助手，因此父親有意無保留地將該批股份轉讓給她。

4. 法官的判決獲上訴法庭贊同及維持不變。上訴法庭指出，父親自己曾承認在他將有關股份轉移給其女兒時，他已知道何謂信託聲明書，並曾使用這類文件，但他仍然不與她簽立這份文件。上訴法庭亦同意案中證據完全支持父親有意將有關股份送贈其女兒的說法。

5. 妻子與她父親遂上訴至本院，試圖推翻下級法院就有關股份的實益擁有權所作的裁斷。當上訴法庭於2014年12月作出決定之時，由於有關爭議所涉款項超過一百萬元，此一點亦足以使之具有上訴至本院的資格。本院乃根據“當然權利條文”受理本上訴，但此項條文其後已被廢除。

6. 本上訴所針對的是一致的事實的裁斷，即區域法院和上訴法庭同樣作出的事實的裁斷。根據既定的做法，本院只會在特殊和罕有的情況下才會對一致的事實的裁斷作出干預。

7. 妻子和她的父親辯稱，基於本上訴的特殊情況，本院應予以覆核。他們指主審法官曾作出互相矛盾的事實的裁斷，錯誤地駁回他們的證供，儘管他們的供詞的主要內容並沒受

到質疑。他們又指法官就父親將有關股份轉移給其女兒的意圖作出裁定時使用錯誤的方法，亦沒有充分考慮父親過往對其女兒和她兄弟所採取的做法，以及法官並沒充分解釋他為何如此裁定。

8. 本院裁定，他們的大部分申訴均不具有使本院須全面覆核有關的一致的裁斷的合理辯據，因此本院僅須予以簡易處理。主審法官並無作出互相矛盾的裁斷，他裁定父親有意將該批股份轉讓給其女兒，兩父女在以證人身分作供時明顯受到質疑，而主審法官在決定父親的意圖時已採取正確的驗證標準。

9. 本院裁定，唯一值得覆核的爭議點是：主審法官有否解釋他對兩父女賴以支持其說法的主要事件的重視程度；以及儘管發生該等事件，他為何仍然作出如此裁定。該等事件是指兒子歸還股份給父親及公司在已知離婚法律程序將會展開後購買物業。

10. 本院裁定，主審法官較佳的做法當然是明確地解釋，為何該等事件並不妨礙他作出父親有意將該批股份送贈其女兒的裁斷，但他整體而言已在其判詞中合理地充分明確地提出他的理由。上訴法庭亦提出相同理由，即兩父女的解釋實際上並無意義，而且亦無任何文件證明女兒曾就該批股份付出任何代價。因此，唯一合理的結論是"有意送贈"。就本案的情況而言，下級法院的裁斷與父親所依賴的兒子歸還股份的事件並無衝突。

11. 因此，本院駁回本上訴。

Appeal History

Case Number	Date	Reported in	Remarks
FACV10/2015	22/12/2015		
CACV151/2013	23/04/2015	[2015] 2 HKLRD 1029	
	04/12/2014		

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CACV 151/2013 AND CACV 152/2013

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NOS. 151 AND 152 OF 2013

(ON APPEAL FROM FCMC NO. 14018 OF 2011)

CACV 151/2013

BETWEEN

LWYA	Petitioner
and	
KYW	Respondent
and	
LLP	Intervener

CACV 152/2013

BETWEEN

LLP	Intervener
and	
LWYA	Petitioner
and	
KYW	Respondent

(Heard together)

Before: Hon Cheung, Yuen and Kwan JJA in Court

Dates of Written Submissions: 4 February 2015, 2, 16 and 17 March 2015

Date of Judgment: 23 April 2015

J U D G M E N T

Hon Cheung JA:

1. I agree with the judgment of Kwan JA and the orders she proposes to make.

Hon Yuen JA:

2. I agree with the judgment of Kwan JA.

Hon Kwan JA:

3. On 4 March 2013, Deputy District Judge Carlson gave judgment in the determination of a preliminary issue in an application for ancillary relief. He found in favour of the husband that the 20 million shares in Nicegood Properties Limited ("NPL") held in the name of the wife are beneficially owned by her, contrary to the contention of the wife and her father ("the intervener") that she held the shares on trust for the intervener.

4. On 4 December 2014, this court handed down judgment dismissing the appeals of the wife and the intervener. As the challenges of the wife and the intervener to the judge's findings of primary fact were all rejected, concurrent findings of fact have been made that the shares allotted to the wife were in the nature of a gift from the intervener.

5. The wife and the intervener wish to mount a challenge to the concurrent findings of fact before the Court of Final Appeal. Because the judgment of this court was given before 24 December 2014, they are entitled to apply under the "as of right" ground pursuant to the old section 22(1)(a) of the Hong Kong Court of Final Appeal Ordinance, Cap 484[1]. Provided they come within the "as of right" ground, leave to appeal would be given without inquiry into the merits of proposed appeal.

6. The applicants rely on the second limb of section 22(1)(a), namely, that the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of $1,000,000 or more.

7. The preliminary issue decided by the judge involves the determination of the beneficial ownership of the 20 million shares held by the wife in NPL. It is a claim to some

particular property or a proprietary right. The only question is whether, on the evidence, the value of the claim is "clearly quantifiable" in the sum of $1 million or more (*China Field Ltd v Appeal Tribunal (Buildings) (No 1)* (2009) 12 HKCFAR 68 at §24; *Chinachem Charitable Foundation Ltd v Chan Chun Chuen* (2011) 14 HKCFAR 798 at §20(vi)).

8. In *Z v X (C: Intervener)*, CACV 166/2011, 26 March 2013, the Court of Appeal granted leave to appeal to the intervener in the determination of a preliminary issue concerning the beneficial ownership of shares in a company on the basis that the requirement of the second limb of section 22(1)(a) was satisfied[2]. In that case, evidence on the valuation of the shares which exceeded $1 million was adduced in the court below (§7 of the judgment).

9. In contrast, the Court of Appeal refused leave to appeal in *To Pui Kui v Ng Kwok Piu & Ors*, CACV 281/2012, CACV 1/2013 and HCMP 2466/2012, 29 January 2015, noting that the applicant for leave did not file evidence regarding the value of the 20 shares which was the subject of the claim. It was simply asserted by counsel that the company was the 99% of various subsidiaries which owned property valued in 1997 at over $81 million according to a party. The valuation was disputed and there was pending litigation which would affect the value of the shares. In those circumstances, the court could not be satisfied that it could be said without regard to such dispute that the shares had a readily ascertainable value of over $1 million (§§27 and 28 of the judgment).

10. In opposing these applications, Mr Sussex, SC submitted on behalf of the husband that the value of the shares was never in issue in the determination of the preliminary issue, and that the court was concerned solely with the ownership of the shares in NPL. As the issue of valuation has not yet arisen, no valuation evidence was called for or received. No findings on the value of the shares have been made. He submitted that nowhere near sufficient disclosure has been made in relation to NPL for the husband to be expected even to take a firm view on valuation at this stage. He contended there are just bald assertions that the shares are worth more than $1 million, and that is insufficient to confer a right of appeal to the Court of Final Appeal. He referred to *Pacific Electric Wire & Cable Co Ltd v Texan Management Ltd & Ors*, FAMV 5, 6, 7 & 8/2014, 14 October 2014. The subject matter of the claim in that case was three shares with a total par value of US$3 in two holding companies at the apex of a corporate network. The Appeal Committee held that leave as of right was not made out and Ribeiro PJ said this at §26:

> "To translate the value of the shares from their US$3 par value to a real value, there is clearly a need for further adjudicatory processes requiring the resolution of contentious questions as to the proper methodology and as to what conclusions can properly be drawn, given the seriously depleted state of the group's financial records. Such processes of assessment, quantification or

> apportionment are likely to be extremely difficult and may, in some cases, be virtually impossible. Even with the extensive evidence before us, it could not be shown that the requisite value of $1 million or more was reached. In truth, the evidence only served to underline the sheer difficulty or impossibility of the exercise. This is not the type of case the "as of right" procedure was meant to cover."

11. Mr Sussex submitted that the position here is indistinguishable. Although NPL holds a number of valuable landed properties, he argued that one cannot draw conclusions as to the value of its shares merely from a snapshot of a selection of its prized assets, and that is not evidence resulting in clear quantification of value.

12. It is not necessary in every case to adduce valuation evidence of the shares that form the subject matter of a claim. Whether on the evidence the court can be satisfied that the shares are clearly quantifiable in the sum of $1 million or more would depend on the particular circumstances.

13. We are here concerned with 20 million shares in NPL with a total par value of $20 million. In none of the other cases cited was the court concerned with shares with a total par value in excess of $1 million. As Mr Todd for the intervener has pointed out, the capital maintenance provisions in the legislation prevent a company from disposing of more than its par value by, for example, dividend declaration. So any drop below this value would be unlawful and no one has suggested that the intervener has been acting unlawfully. The husband has also relied on the par value in his submissions before the judge regarding the consideration shown in the instrument of transfer on the basis there was an "outright sale for value".

14. In *Pacific Electric Wire & Cable Co Ltd*, the Appeal Committee had approached the value of the shares by first looking at the par value, and, if the value could not be readily ascertainable from this, it would need to inquire into their real value. Ribeiro PJ said at §14:

> "This is therefore not a straightforward case of a claim to recover, say, a flat or a house, whose value is readily ascertainable and which will be the same whether viewed from the perspective of appellant or respondent. Top Selection's shares in Blinco and Patagonia each have a par value of US$1 so that it is necessary to inquire into their real value which in turn depends on assessing the value of the group of companies whose shares were held by them. That also is not straightforward since the capital of those companies was generally also nominal, so that any valuable properties held by them must have been acquired against some countervailing liability. Moreover, assessment of the assets and liabilities involved has been seriously hampered by the loss or destruction of financial records relating to the relevant companies. This is obviously important where the evidence indicates that there were numerous inter-company transfers, set-offs and so on, within the group."

15. Contrary to Mr Sussex's submission, the present situation is wholly distinguishable. Unlike the companies in *Pacific Electric Wire & Cable*, NPL is not a trading company. The undisputed evidence was that the business of NPL is to hold landed properties for

rental income or as residences for family members of the intervener. And there is nothing nominal about the capital of NPL. The intervener gave evidence that in December 2006 he injected working capital to NPL and increased its authorised capital to $126 million. This was supported by the documents filed at the Companies Registry adduced at trial. Unlike the network of companies in *Pacific Electric Wire & Cable*, NPL directly holds a number of properties it had purchased as mentioned in the husband's evidence. Even after the petition for divorce was presented, properties with an aggregate purchase price of over $208 million were acquired by NPL in 2012. These properties would have appreciated in value over time.

16. There was also produced before the judge in November 2012 the last audited financial statements of NPL for the year ended 31 March 2011, showing that the total value of fixed assets as at 31 March 2010 was over $413 million and that the turnover for the year 2011, being the rental income from the letting of properties, was over $11 million. For the year ended 31 March 2011, it recorded a profit of $5.8 million.

17. On the above evidence, I am satisfied that the 20 million shares in NPL held by the wife, which amounted to 16% of the issued share capital, are clearly quantifiable at a value in excess of $1 million.

18. I would grant leave to appeal to the wife and the intervener on the "as of right" ground and make an order *nisi* that the costs of the applications for leave to appeal be costs in the cause of the appeal. I would direct the wife and the intervener to apply within 14 days of this judgment to the Court of Final Appeal for setting the conditions on leave to appeal and for further directions as to the prosecution of the appeal.

(Peter Cheung)	(Maria Yuen)	(Susan Kwan)
Justice of Appeal	Justice of Appeal	Justice of Appeal

Written submissions by Mr Russell Coleman SC and Mr Robin Egerton, instructed by Simon C W Yung & Co, for the Petitioner (Appellant in CACV 151/2013)

Written submissions by Mr Charles Sussex SC, Mr Neal Clough and Mr Timothy Parker, instructed by T C Foo & Co, for the Respondent (Respondent in CACV 151/2013 and CACV 152/2013)

Written submissions by Mr Richard Todd and Ms Maggie Wong, instructed by Li, Wong & Lam & W I Cheung, for the Intervener (Appellant in CACV 152/2013)

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[1] The Administration of Justice (Miscellaneous Provisions) Ordinance 2014 (Ord No 20 of 2014) came into force on 24 December 2014. It repeals section 22(1)(a) of Cap 484. Section 7 of this ordinance provides that it applies in relation to a final judgment of the Court of Appeal if the date of the final judgment (whether pronounced orally or delivered in writing) falls on or after the commencement date of the relevant part, i.e. 24 December 2014.

[2] On 27 September 2013, the Appeal Committee granted leave to appeal to the husband on the issue of the ownership of the shares on the "or otherwise" basis, to avoid the possibility of inconsistency as leave to appeal had already been granted to the intervener on that issue (FAMV 14/2013).

CACV 151/2013 AND CACV 152/2013

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NOS. 151 AND 152 OF 2013

(ON APPEAL FROM FCMC NO. 14018 OF 2011)

CACV 151/2013

BETWEEN

LWYA	Petitioner
and	
KYW	Respondent
and	
LLP	Intervener

CACV 152/2013

BETWEEN

LLP	Intervener
and	
LWYA	Petitioner
and	
KYW	Respondent

(Heard together)

Before: Hon Cheung, Yuen and Kwan JJA in Court

Date of Hearing: 20 November 2014

Date of Judgment: 4 December 2014

J U D G M E N T

Hon Cheung JA:

1. I agree with the judgment of Kwan JA and the orders she proposes to make.

Hon Yuen JA:

2. I agree with the judgment of Kwan JA.

Hon Kwan JA:

Introduction

3. This court is concerned with the appeals against the determination of a preliminary issue in an application for ancillary relief, after a five-day trial before Deputy District Judge Carlson in November 2012. Judgment was given on 4 March 2013. The issue for determination relates to the beneficial interest in 20 million shares in a private company, Nicegood Properties Limited ("NPL"), held in the name of the wife petitioner ("the wife"). The husband respondent ("the husband") contended that the shares are beneficially owned by the wife. The wife and her father ("the father"), who appeared as the intervener in the trial of the preliminary issue, contended that she held the shares on trust for the father. The judge found in favour of the husband and granted a declaration that the shares do stand as part of the wife's beneficially owned assets and are available for distribution on the hearing of the ancillary relief application. The wife and the father separately appealed against the judgment, with leave granted by the Chief Judge on 15 July 2013.

The background

4. I will first relate the relevant background matters in chronological order.

5. The father is an extremely wealthy and very successful businessman. He received only primary education and started as a factory worker. He rose to become a pioneer of the polyfoam manufacturing industry in Hong Kong. His factories in China are among the leading manufacturers of crash helmets which are sold worldwide. At the time of the trial in 2012, he was aged 79.

6. The father has two daughters and two sons by his wife. The eldest is a housewife living in Canada. The wife is the second child. The third child is a son now living in Canada. He is referred to in the judgment as "Cham". The fourth child is a son living in Hong Kong. He is referred to in the judgment as "Kwun". At the time of the trial in 2012, the wife was 46 years old, Cham was 44 years old and Kwun 40 years old.

7. The father gave this description of his children and his relationship with them[1]:

> "7. My family is a very traditional Chinese family. I have brought my children up that way and have instilled in them the traditions in which I was raised. Like most of the traditional family business, all my children (except my eldest daughter who is married and has been living in Canada for years) have been working in my companies for the family business. Cham in the past and [the wife] have assisted me in taking care of the finance, administration and real estate investments of the family business. Kwun has been responsible for sales and marketing. My children report their work to me directly and interpret to me the English documents such as the financial reports and companies' resolutions, whenever necessary.
>
> 8. In the light of our family culture education and tradition, my children are very obedient to me and regard me as the "Patriarch" of our family as well as the family business. I have retained the sole overall control and ownership of the family business and all family assets."

8. The father has invested most of the profits he made from his businesses in real estate in Hong Kong. In March 1995, on the advice of his accountant, he acquired NPL as a shelf company. He used this as a vehicle to hold his property investments.

9. Shortly after acquiring NPL, the father increased its authorised share capital to $66 million, divided into 66 million shares of $1 each. According to the return of allotments on 28 April 1995, the father held 40 million shares (60%), Cham and Kwun each held 13.2 million shares (20% each). Cham and Kwun did not pay for their shares.

10. The father had this to say about the shares allotted to his sons[2]:

> "11. All along, before and after the transfer of the said shares, from time to time, I told my children that they had to return all the shares to me upon my request or when they left the family business. They could not transfer, cede, sell or in any way deal with or dispose of the shares in [NPL] without my prior consent and they confirmed their understanding each time. In this regard, I am well aware that it became our mutual understanding and agreement that the shares registered in the names of my two sons actually belonged to me and were not owned by them beneficially. To repeat, they had to return all the shares to me upon my request or when they left the family business."

11. Cham left the family business when he left Hong Kong for Canada in 1996 or 1997. He made a transfer of his 13.2 million shares in NPL to the father in this manner. He and the father executed an instrument of transfer and bought and sold notes dated 15 December 1997, in which Cham was named as the seller and the father as the purchaser, with a consideration paid and received of $13.2 million. Stamp duty of $22,825 was paid for the transaction.

12. The father asserted, contrary to the above documents, that Cham returned the 13.2

million shares to him at no consideration. The judge made the observation that "this transaction is not free from difficulty" and "on the face of it therefore an arms length sale and purchase of this shareholding by son to father which plainly contradicts any notion that the son held the shares as nominee/trustee for his father as beneficial owner and at his father's pleasure"[3].

13. In May 1999, the husband and the wife got married. The wife gave birth to a daughter in 2001. In that same year, the husband also joined the father's business. During their 12-year marriage, the husband and the wife had lived in several properties in succession; all provided by NPL free of rent, outgoings and utilities expenses. They were provided with a car by another of the father's companies, with petrol and maintenance expenses all paid for.

14. Likewise, Kwun's residence was also provided by NPL on the same basis. He had the free use of two cars.

15. In 2004, the father's relationship with Kwun turned sour. In November that year, he asked the wife to tell Kwun to sign a declaration of trust in respect of the 13.2 million shares held by Kwun since 1995. Kwun did so and executed a declaration of trust dated 11 November 2004 in favour of the father, with an undertaking to transfer the shares to the father or as directed by him when called upon to do so. Stamp duty was paid in respect of this document at $19,880.

16. Shortly afterwards, the father asked the wife to replace Kwun as the nominee shareholder in respect of those 13.2 million shares. Kwun executed an instrument of transfer dated 8 December 2004 in which he was the transferor and the wife the transferee and the consideration was described as "nil (change of nominee)". The wife executed a declaration of trust also dated 8 December 2004 in favour of the father, in the same terms as the declaration executed by Kwun in November. The transfer and the declaration were adjudicated not chargeable with stamp duty.

17. On 18 January 2005, the wife told the father she did not want to get involved in the conflict between Kwun and the father by holding the shares previously in Kwun's name and insisted on transferring the shares back to the father. On 18 January 2005, she executed an instrument of transfer in which she was the transferor and the father the transferee. The consideration was described as "nil (Being shares transfer back from Nominee to Beneficial Owner)". No ad valorem duty was payable for this transfer.

18. The transfer that gave rise to the present dispute came in less than three months' time. On 31 March 2005, the father transferred 13.2 million shares to the wife. They executed

an instrument of transfer and bought and sold notes in respect of the 13.2 million shares, with the father described as the seller and the wife as the purchaser and that $13.2 million was paid and received as consideration. Stamp duty of $15,209 was paid in respect of the transaction.

19. The father and the wife maintained that she was to hold the shares on trust for him, even though no declaration of trust was executed by the wife on this occasion. Both asserted that the wife did not pay any consideration for the transfer.

20. The father's evidence on the reason for this transfer, and why no declaration of trust was signed, was summarised in the judgment at §23:

> "What he has in effect said is that with Cham out of the picture in Canada and, given his poor relationship with his younger son Kwun, the wife was the only person who he could trust in purely family-related matters as well as in business in which she had been of great help to him in finding real property to invest in through NPL. Rightly or wrongly, his belief was, he says, that by allowing her to hold shares in NPL this would add to her authority and, as he puts it, "bargaining power" when dealing with third parties such as estate agents and bankers. This being his view, he decided that she too should hold shares in NPL as her brothers before her had done. That is to say without having to sign any Declaration of Trust in respect of such a shareholding."

21. The father also gave evidence that he told the wife on this occasion she had to work hard for the family business and that if she ever left the business she had to transfer the shares back to him.

22. In 2005 or 2006, NPL purchased some industrial properties with secured loans from the banks. As at 31 March 2006, the father's loans to NPL amounted to $22 million. He received advice from his tax adviser that NPL might be regarded by the Inland Revenue Department as speculating in properties instead of holding properties as long-term investments because most of its capital could easily be transferred via the repayment of director's loans. Hence, the father injected working capital to NPL and increased its authorised share capital to $126 million by allotting 60 million shares for cash. According to the return of allotments dated 5 December 2006, the father was allotted 33.2 million shares, the wife 6.8 million shares and Kwun 20 million shares.

23. At this time, the father's relationship with Kwun had improved. Kwun was promoted to general manager of one of the father's companies by the end of 2006. The father explained he allotted 20 million shares to Kwun "to restore the shareholding arrangement to that of 1995" and, to treat his two children (the wife and Kwun) working in the family business equally, he also allotted 6.8 million shares to the wife so that each held 16% shares in NPL[4].

24. The father gave evidence that the funds for the allotment of new shares were

provided by him alone.

25. It is not in dispute that the father controlled NPL throughout. He provided all its working capital and operational funds, and retained sole control over the operation of its bank accounts. He regards NPL as a personal "piggy bank". He keeps his property investments and rarely sells. No dividends were ever declared by NPL. The children did not gain any benefit, nor did they bear any responsibility, from their holding of the shares in NPL. The share certificates in respect of the 20 million shares held by the wife have not been signed by any director and the seal of NPL has not been affixed. As at 31 March 2011, NPL's statement of financial position stood at about $451 million.

26. On 11 October 2011, the wife filed a petition for divorce. In December 2011, the husband resigned from the father's companies and the father learned of the divorce petition. On 4 October 2012, a decree *nisi* of divorce was granted on the petition.

27. NPL made two substantial purchases of properties even after the father had known about the divorce petition. In February 2012, a residential property in The Albany, Albany Road, Central was assigned to NPL for $83.8 million. In April 2012, a shop in Nathan Road, Mongkok was assigned to NPL for $125 million.

The trial of the preliminary issue

28. On 18 May 2012, at a hearing for directions before HH Judge Melloy, the husband's counsel raised the issue of the ownership of 20 million shares in NPL held by the wife as the wife had stated in her Form E that these shares are beneficially owned by the father. Counsel submitted that if there was to be a full ancillary relief hearing, this issue should be determined first as a preliminary issue. Judge Melloy made an order that day for the case to be listed before Deputy District Judge Carlson for preliminary issue hearing with a call over hearing on 8 October 2012 and that the substantive hearing of the preliminary issue was to commence on 5 November 2012.

29. On 25 September 2012, Judge Melloy made an order that the father be joined as an intervening party "to seek a declaration in respect of shares in [NPL] held in the name of [the wife] in which he claims beneficial ownership." Directions were given for the wife to serve copies of all pleadings, orders, affidavits and other relevant documents in this suit[5] on the father within a specified time, and for three rounds of affirmations to be served by the father, the wife and the husband.

30. It is well established that a dispute between a spouse and a third party as to the beneficial ownership of property can be adjudicated in ancillary relief proceedings. In *TL v ML & Ors (ancillary relief: claim against assets of extended family)* [2006] 1 FCR 465,

Mostyn, QC, sitting as a Deputy High Court Judge, had this to say about the task of a judge determining such a dispute and the procedure that should be followed:

> "[34] It is to be emphasised, however, that the task of the judge determining a dispute as to ownership between a spouse and a third party is of course completely different in nature to the familiar discretionary exercise between spouses. A dispute with a third party must be approached on exactly the same legal basis as if it were being determined in the Chancery Division[6].
>
> …
>
> [37] In my opinion, it is essential in every instance where a dispute arises about the ownership of property in ancillary relief proceedings between a spouse and a third party, that the following things should ordinarily happen: (i) the third party should be joined to the proceedings at the earliest opportunity; (ii) directions should be given for the issue to be fully pleaded by points of claim and points of defence; (iii) separate witness statements should be directed in relation to the dispute; and (iv) the dispute should be directed to be heard separately as a preliminary issue, before the [Financial Dispute Resolution]."

31. In this instance, there was not even a proper framing of the issue required to be determined as a preliminary issue, not to mention the pleading of the issue fully in points of claim and points of defence. No discovery ever took place. It seems to this court that much of the criticisms made for the appellants as to what case was advanced by the husband in opposition to the father's claim, how the husband's case was conducted in the course of the trial, and the findings that should be made by the judge on the competing claims or contentions to resolve the dispute, could have been avoided if the parties here had followed the procedure mentioned in *TL v ML* that is essential for the proper resolution of this kind of dispute.

32. To ascertain the respective cases of the parties here, one could only go to the affirmations they filed.

33. The father and the wife filed affirmations of themselves and their witnesses in support of their case that the shares in the wife's name were held on trust for the father. Some of that evidence has been summarised in the background matters mentioned above.

34. In his affirmation in opposition, the husband denied the wife's allegation that she had told him from time to time she was holding her NPL shares on trust for the father. He deposed that neither the wife nor anybody else suggested that they held the NPL shares on trust for the father. He alleged that the transfer of the 13.2 million shares by the father to the wife in March 2005 was a gift, as the wife was the only child supporting and assisting the family business at the time and the father transferred the shares to her as a gift to secure her loyalty and continuous support of him as well as her assistance in the family business[7].

35. In the affirmation in reply of the father, he denied he had ever made gifts of the shares in NPL to Cham, Kwun and the wife.

36. When the husband opened his case at the trial in November 2012, his counsel maintained the contention in his affirmation that the shares were gifts to the wife for her continued contributions to the family business, and reliance was also placed on the presumption of advancement[8].

37. When the husband's counsel came to cross-examine the father, much emphasis was placed on the documents executed by the father and his children on the various occasions when the shares were transferred, and the suggestion was made to the father that the documents signed and the payment of substantial stamp duty contradicted the notion that the wife held the shares as a nominee or trustee for him[9]. The judge described the husband's stance and the arguments he advanced at the trial in this manner:

> "The husband's stance is that where these shares, on the face of the documents, belong to the wife for which apparent value has been given by her then these must be brought into account as part of the matrimonial estate and divided between them in such proportions as the court decides."[10]
>
> "Mr Clough[11], in a trenchant submission, says that there can only be one conclusion to this issue. These documents speak for themselves and are to be taken at face value."[12]
>
> "… Mr Clough submits that there is simply no reason why, had a relationship of trustee and beneficial owner been the desired outcome, the documents evidencing the transfer of shares into the wife's name had not been prepared as they had been on the previous occasion with a declaration of trust. This was a deliberate decision to bring about a transfer of shares between father and daughter on the basis of an outright sale for value ($13.2 million) upon which stamp duty had to and was paid."[13]

38. It was the manner in which the trial was conducted, the failure to formulate properly the issue for determination, and the lack of pleadings that generated much debate on appeal whether it was open to the judge to make a finding of gift of the shares to the wife, which was apparently inconsistent with the notion of a sale for value that was pursued by the husband vigorously in the course of the trial.

The judge's findings

39. Having summarised the evidence of the parties and some of the witnesses of the father[14], and the submissions made by the parties on the evidence[15], the judge set out the approach he should take regarding the evidence. He correctly recognised that his task was to discover what the father's intention was when he transferred these shares to the wife[16], citing these relevant passages in the judgment of Lord Phillips MR in *Lavelle v Lavelle* [2004] 2 FCR 418:

> "[13] Where one person, A, transfers the legal title of a property that he owns or purchases to another, B, without receipt of any consideration, the effect will depend on his intention. If he intends to transfer the beneficial interest in the property to B, the transaction will take effect as a gift and A will lose all interest in the property. If he intends to retain the beneficial interest for himself, A will take the legal interest but will hold the property in trust for A."

> "[14] Normally there will be evidence of the intention with which a transfer is made. Where there is not, the law applies presumptions. Where there is no close relationship between A and B, there will be a presumption that A does not intend to part with the beneficial interest in the property and B will take the legal title under a resultant trust for A. Where, however, there is a close relationship between A and B, such as father and child, a presumption of advancement will apply. The implication will be that A intended to give the beneficial interest in the property to B and the transaction will take effect accordingly."
>
> "[19] In these cases equity searches for the subjective intention of the transferor. It seems to me that it is not satisfactory to apply rigid rules of law to the evidence that is admissible to rebut the presumption of advancement."

40. He set out his analysis and conclusion on the evidence of the subjective intention of the father when the shares were transferred to the wife at §§57 to 62. He expressly stated he had taken these matters into account: the father's relationship with the wife and his two sons Cham and Kwun, the pattern of share transfers both on the basis of trusteeship and of apparent transfers of beneficial interests, the absence of signatures on the share certificates of the wife, and the purchase by the father of valuable property after he knew of the pending divorce.

41. I quote in full §§ 60 to 62 of the judgment, which are material:

> "60. I am bound to say that I have great difficulty in accepting the logic of the father's case that the motive in transferring the shares to the wife in this way was to provide her with "a psychological lift" and in giving her more clout when dealing with third parties. As to the former I cannot really discern any "lift" when the recipient of the shares was a mere nominee. As to added status, the fact of the matter is that her status, if any, comes from the fact that she is a director but, even more importantly, that she is her father's daughter who overwhelmingly controls the group. No doubt when she speaks, she speaks for him so much so that she would need to consult with him before entering into any important transaction. This really betrays a certain contradiction; more standing with third parties in representing the company and yet, to the knowledge of the third parties called as witnesses, having to defer and consult her father before any final decision is to be taken. I do not believe this proferred motive for transferring the shares as nominee in this way can hold any water at all. I reject it as a reason.
>
> 61. In the final analysis I am afraid to say that the truth of this matter is that this kind and generous father decided to reward his beloved daughter and Kwun, with whom he had happily become reconciled, with this very valuable interest in NPL. As to the point that he would not do so because this would favour some relatives over others, is not a matter that I find at all persuasive. The fact is that when the time comes, he still holds great wealth in his own hands, he will be able to do what is right for the remainder of them. The wife in his case is his right hand and he intended, I use the word advisedly, to transfer these shares to her outright, which is what he did. Had it been otherwise he would have created a specific instrument of trust as he had in the past. This must have been, I find this as a fact, a deliberate choice to bring about a transfer of the beneficial interest in the shares.
>
> 62. Now of course this has become very inconvenient because the husband is saying, and rightly so on my finding, that the shares, being the wife's must form part of the matrimonial estate which falls to be divided up between him and the wife in such proportion as the court considers correct and just. In order to avoid such a consequence, I regret to say that these usually honest and decent people have decided that they would give false evidence as to the basis of the transfer of these shares."

42. The judge then said in §63 that for the reasons he gave above, he dismissed the father's summons and would order that the shares do stand as part of the wife's beneficially owned assets and available for distribution on the hearing of the ancillary

relief application. In the above paragraphs, the judge had clearly found on his analysis of the evidence that all the shares held in the wife's name, whether transferred or allotted to her, were in the nature of a gift to her. In making this finding of gift as the father's true subjective intention, the judge did not find it necessary to invoke the presumption of advancement. I will come back to the appellants' arguments whether the judge had also made an inconsistent finding of a sale for value of the shares.

43. In the remaining paragraphs of the judgment, the judge dealt with a separate issue which was raised on his own initiative in the course of the father's cross-examination, namely, whether the father and the daughter would be estopped by virtue of the documents they executed which evidenced a sale of the shares for valuable consideration from asserting that in truth the wife was merely the father's nominee[17].

44. As what the judge said in addition regarding the issue of estoppel gave rise to much argument on appeal, I will quote §§ 66 and 67 of the judgment in full:

> "Having found that the father's intention was to and did transfer the beneficial interest in the shares to the daughter is sufficient to dispose of the issue and I am therefore not required to decide whether an estoppel is available to Mr Clough as an additional ground for succeeding in this matter.
>
> In deference to counsel's researches, and in case the matter needs to be considered in another court, I am persuaded by Mr Clough's submissions and for the reasons that he has given that father and daughter are now estopped from denying the truth of the contents of the instrument of transfer and of the bought and sold notes. So this must stand as a further ground for the dismissal of the Intervener's summons and as reason for saying that the wife is to be held as the beneficial owner of these shares."

45. This finding of the judge on estoppel is clearly wrong in law, and Mr Charles Sussex, SC[18], appearing for the husband on appeal, did not support it. In short, there is no estoppel by deed or by record (which the judge seemed to have in mind) or by representation.

Finding of primary fact

46. Before I consider the arguments advanced on appeal by Mr Wong Yan Lung, SC[19] for the father and Mr Russell Coleman, SC[20] for the wife, it is apposite that I should first deal with Mr Wong's submission that the judge's finding of the father's intention was not a finding of primary fact but a finding of fact made by a process of inference and so the appeal court should be in as good a position as the trial judge in drawing the proper inference on the evidence.

47. Mr Wong made the point that the judge rejected all the oral evidence given in support of the father's intention to create a trust. There was no witness who gave direct evidence to prove a contrary intention. So the judge's finding of the father's intention

was an inference drawn from primary evidence including the father's words and conduct, the documents adduced in evidence, and the surrounding circumstances. He submitted that it was a conclusion reached not of primary fact, nor was it based on the credibility of witnesses. So for the appeal court to reverse the judge's finding made by inference, he does not need to demonstrate that the judge was plainly wrong, and the appeal court should be able to form an independent opinion about the proper inference of fact to be drawn. Mr Wong cited the statement of Lord Reid in *Benmax v Austin Motors Ltd* [1955] AC 370 at 376:

> "But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion."

48. He referred also to *Ting Kwok Keung v Tam Dick Yuen* (2002) 5 HKCFAR 335, see in particular §34.

49. I do not agree with his submissions.

50. In *Metropolitan Borough of Battersea v The British Iron and Steel Research Association* [1949] 1 KB 434 at 471, Denning LJ had this to say about primary facts and inferences:

> "On this point it is important to distinguish between primary facts and the conclusions from them. Primary facts are facts which are observed by witnesses and proved by oral testimony or facts proved by the production of a thing itself, such as original documents. Their determination is essentially a question of fact for the tribunal of fact, and the only question of law that can arise on them is whether there was any evidence to support the finding. The conclusions from primary facts are, however, inferences deduced by a process of reasoning from them."

51. The judge's evaluation and rejection of the oral evidence of the father and the wife is crucial to his conclusion regarding the father's intention. It was a conclusion drawn from his findings of primary fact. And it is not correct to say that his findings of primary fact, from which his conclusion was drawn, were not based on the credibility of witnesses. That there was no witness able to give direct evidence of an intention contrary to the father's avowed intention of a trust is beside the point. A finding of primary fact can be a positive or a negative finding. This is certainly not a case where the conclusion of the judge is not based on or in any respect influenced by his opinion of the witnesses orally examined before him. This is not a case, in the words of Lord Reid, "where there is no question of the credibility or reliability of any witness".

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

judge.

53. Cheung JA said in *Z v X (C: Intervener)* [2012] 5 HKLRD 791 at §18(1):

> "Unless the Judge had erred on the well established grounds where a finding of fact may be vitiated, such as, for example, he had ignored some relevant evidence or considered some irrelevant evidence which rendered the finding plainly wrong, this Court is unlikely to interfere. This is to give recognition to the fact that the Trial Judge had the benefit of directly seeing and hearing the witnesses giving evidence and the danger of an appellate court forming a view which is based on a reading of parts of the evidence referred to by the parties without the benefit of having a complete picture of the evidence as it unfolded at the trial."

54. This is the approach that should be adopted for these appeals.

Inconsistent findings of fact

55. At the forefront of the arguments of Mr Wong and Mr Coleman is the contention that the judge had made findings of fact on the mutually inconsistent bases of a gift and an arms length sale for value. This contention was put in a number of ways.

56. Firstly, it was submitted by the appellants that the judge's finding in §67 of the judgment that the father and the wife are estopped from denying the truth of the contents of the instrument of transfer and the bought and sold notes is a substantive finding that there was a sale for value. This finding of a sale for value undermined his earlier finding of a gift. As these are mutually inconsistent findings of fact, they should cancel each other out.

57. I firmly reject this submission.

58. The judge had clearly stated in §66 of the judgment that he was not required to decide whether an estoppel is available as an additional ground for the husband to succeed in this matter. It was an entirely free-standing point. The error of law made by the judge in the issue of estoppel did not undermine or cancel out his finding of fact that the father's intention was one of gift. The ruling on estoppel was not a finding on the facts that there was a sale for value. As the judge had said at §67, if an estoppel were available, its effect would be to preclude the father and the wife from denying the truth of the contents of the documents they executed. The truth of the contents of the documents would not be established by estoppel.

59. Secondly, it was contended by Mr Coleman that quite apart from the ruling concerning estoppel which came at the end of the judgment, the judge must have already made a finding that there was a sale for value in the earlier paragraphs. Having held that the wife had purchased the shares, the judge was wrong to hold simultaneously that the intention was one of gift. His argument was along these lines.

60. In §43 of the judgment, it was said that there is a burden to be discharged by the father and the wife, "given that the documents hold out the wife to be the legal and beneficial owner of the shares, shares apparently purchased by her for $13.2 million, it is for her and her father to prove on a balance of probabilities that the wife is the father's trustee and that he remains the beneficial owner of the shares". In the ensuing paragraphs, the judge set out the husband's submission that the documents should be taken at face value, the salient parts of which I have quoted earlier on. Then in §60, the judge rejected the father's evidence on his reasons for transferring the shares to the wife as his nominee. In the latter part of §61, the judge said that the father's intention was "to transfer these shares to [the wife] outright", and that was echoing or accepting the submission of the husband in §48 that "this was a deliberate decision to bring about a transfer of shares between father and daughter on the basis of an outright sale for value".

61. I am simply unable to read the judgment in that way. On a fair and proper reading of the judgment, the only finding of the father's intention was one of gift. The judge did not make any finding of fact that there was a sale for value.

62. Thirdly, it was submitted by Mr Wong that the judge reached the conclusion that the father's intention was to transfer the beneficial interest of the shares to the wife on the mutually inconsistent bases of gift and an arms length sale for value. His decision-making process was plainly defective and the finding he reached by that method was unsafe (*AA v NA (Appeal: Fact-Finding)* [2010] 2 FLR 1173 at §[15]). Mr Coleman made a similar submission. Mr Wong had argued as follows.

63. Mr Wong submitted that the expressions "on the face of the documents" and "estoppel" were key themes in the judgment, citing §§16, 26, 27, 42, 43, 45, 56. The error of law regarding estoppel permeated the whole judgment and rendered the decision-making process defective. Mr Wong referred to §§27, 43 and 56 and made the point that insofar as the judge had found that the documents "compel a conclusion that this is a sale for value at arms length", it was contradicted by the judge's "final analysis" in §61 that the father decided to "reward his beloved daughter and Kwun … with this very valuable interest in NPL". Conversely, insofar as the judge found "reward" in §61, he contradicted himself by the earlier conclusion that the documents compelled him to conclude an arms length sale for value.

64. I do not agree with counsel that estoppel permeated the judgment or that the decision-making or fact-finding process of the judge was in any way defective. The paragraphs in the judgment cited by Mr Wong, in which emphasis was placed on what appeared on the face of the documents, were by and large the contentions of the

husband's counsel. The judge did not take up Mr Clough's suggestion in §45 and find that there was a sale for value on the face of the documents[21]. What the documents appeared to say on their face is material to the proper assessment of the explanation given by the father and the wife in the face of the documents. Thus, in §46, he set out the submission of the father that "whilst the documents may show otherwise, the situation has been clearly and logically explained by the father". In §55, he cited relevant passages in *Lavelle v Lavelle* dealing with the situation of transfers of legal title without the receipt of any consideration. In the end, he rejected the father's explanation in §60 and found in §61 that the father's intention was one of gift. The judge did not arrive at his conclusion that the father's intention was to transfer the beneficial interest of the shares to the wife on the mutually inconsistent bases of gift and an arms length sale for value.

The finding of gift

65. The father and the wife sought to impugn the factual finding of a gift on a number of grounds.

66. Firstly, Mr Wong took us at some length to the share allotments and transfers in the past to make the point that the judge had failed to consider the consistent pattern of trust arrangements which the father had made with Cham, Kwun and the wife over the years. I have set out earlier those share allotments and transfers in the background matters.

67. Mr Wong submitted that when Cham left for Canada, he returned his shares to the father in 1997 at no consideration, notwithstanding that an instrument of transfer and bought and sold notes evidencing a sale for value were executed. This, he said, was similar to the transfer in question by the father to the wife of 13.2 million shares in March 2005, when like documents were executed. Mr Wong contended that the fact-finding process was compromised by the judge placing "undue emphasis" on what the documents said, wrongly thinking that he was precluded from finding a trust arrangement by the documents as they stood.

68. Next, the allotment of 13.2 million shares to Kwun in 1995 was made without the execution of a declaration of trust. Mr Wong made the point that it was only when Kwun's relationship with the father had turned sour that he was asked to execute a declaration of trust in November 2004. So the execution of a declaration of trust was done in exceptional circumstances, and provided support for the father's case that his normal relationship with his children was such that no such document was required as they had understood and agreed they only held the shares as his nominee and had to return them at his request. Mr Wong submitted it was wrong for the judge to equate the strained circumstances in November 2004 with the situation in March 2005 when the

father transferred the shares to the wife. He also submitted that the judge had placed heavy reliance on stamp duty, which would have to be paid in any event and this was not something of great concern to the father. It could hardly be suggested that where stamp duty was paid in circumstances where exemption might be claimed by submission to adjudication, the father had any intention to mislead or defraud the government.

69. As for the reasons given by the father for transferring the shares to the wife, other than the reasons mentioned in §§46 and 60 of the judgment (providing the wife with a "psychological lift" and giving her more clout when dealing with third parties), which were rejected by the judge, Mr Wong submitted there was yet another reason mentioned by the father, not apparently dealt with by the judge. When the father was cross-examined why he asked Cham to transfer the shares back to him when Cham left the family business, he said these in answer:

> "And I wanted to let him know that I would give them to him in future if he put up a good performance in the company, I would give them to him, because in reality I want him to be back badly."[22]
>
> "I badly wanted him to know that when he left the company, I had to get them back. I wanted him to return from Canada badly so that my business - - so that he could continue to deal with my business because I am old."[23]

70. Later on when the father was cross-examined about his reasons for transferring the shares to the wife, he said these:

> "I wanted to show to other children that if they performed better and if they came back to the company, I would transfer the shares to them so that they would come back to the company."[24]
>
> "It was able to encourage Kwun because later on Kwun came back to work for me." [25]

71. When he was asked why that would encourage his children if the wife was only to hold the shares as nominee for him, he said "they would be satisfied spiritually"[26].

72. In re-examination, he was asked to explain why he thought transferring the shares to the wife might encourage the other children to come back to the company and he said:

> "There are two things: firstly, so that they would be more motivated to work and they would be encouraged psychologically. Well, secondly, the traditional Chinese family wants to pass their business to the next generation because there is a Chinese saying that everything is hard to come by, and we hope our children would continue the business, sorry, the factories that we have been dealing with."[27]

73. Mr Wong submitted from the above statements that the father's purpose of transferring the shares to the wife for her to hold as a nominee was to provide motivation to her and the other children to work for the family business and if they should perform well, they would get the shares in the end. Mr Wong reasoned that if the shares were transferred to the children outright, that would defeat the purpose of motivation.

74. Mr Wong also emphasised that the transfer of 13.2 million shares to the wife in March 2005 was the first time that the father had transferred shares to one of his children and said this was significant somehow. As for the instrument of transfer by Kwun of 13.2 million shares to the wife in December 2004 which was executed with a declaration of trust, Mr Wong said this was not an instance of the father transferring out the shares but getting them back from Kwun.

75. I am not persuaded by Mr Wong's submissions that the judge had overlooked some relevant evidence or had considered irrelevant evidence which rendered his finding of a gift plainly wrong.

76. To start with, the judge had expressly stated in §58 that he had "noted with care the pattern of share transfers both on the basis of trusteeship and of apparent transfers of beneficial interests".

77. Further, just as Mr Wong had sought to persuade us by looking at the pattern of transfers and allotments in a particular light, equally if not more cogent reasons could be advanced showing that the transfer in dispute was not a trust arrangement as alleged.

78. The transfer of shares to the wife was made at a time when she was the only child the father could trust in family related and business matters. As pointed out by Mr Sussex, the transfer to the wife in March 2005 was made without a declaration of trust, and this came not long after declarations of trust were executed by Kwun in November 2004 and by the wife in December 2004. No plausible explanation was given by the wife why she should have been unwilling to be the express nominee of the father when she returned the shares to him in January 2005, but was happy to take on this status in April 2005, without a declaration of trust. When the father was pressed for an explanation why he executed documents stating that consideration was paid and received when the shares were transferred to the wife, when it was his case that no consideration was paid as it was a trust arrangement, he said the documents were just formalities and claimed he did not remember much and did not know the contents[28]. The father admitted at that time, he understood what a declaration of trust was, that it was a simple way of setting out the true beneficial ownership as opposed to registered ownership[29].

79. As for transferring the shares to the wife as a nominee to provide motivation for the other children to join the family business and work hard, Mr Sussex asked rhetorically why would Cham come running back from Canada only to be made a mere nominee shareholder as he had already been before, on the father's case. That the father had wanted all along his children to carry on the family business was entirely consistent with

a gift of the shares to them.

80. Mr Sussex also submitted there was no credible explanation why the wife's shareholding was increased to 20 million in 2006 if it were a merely nominal shareholding for spiritual or psychological purposes. He submitted this later transaction would only make sense if the beneficial interest had also passed. In that case, there would need to be a further allotment of shares to the wife to preserve an equality of substance between her and Kwun.

81. I do not think it is right for the appeal court to attempt to form a view which of the rival contentions should be accepted solely on the basis of the transcript of evidence and documents, without the benefit of seeing and hearing the witnesses. The trial judge was entitled to disbelieve the father and the wife on their evidence with the result that they have failed to discharge the burden of establishing that the shares of the wife were held on trust for the father and to find against them that the shares were a gift to the wife.

82. Secondly, the appellants submitted that the judge's finding was vitiated in that he appeared to have overlooked there were two separate lots of shares held by the wife, a transfer in March 2005 of 13.2 million shares and an allotment in March 2006 of 6.8 million shares. The allotment of 6.8 million shares was wholly unaffected by the judge's views regarding the father's explanation of the use of an instrument of transfer and bought and sold notes. Further, it was contended that the judge had apparently not considered what the father's intention was when he caused the 6.8 million shares to be allotted to the wife.

83. I also reject this submission. When the judge found in §61 that the father had "decided to reward his beloved daughter and Kwun … with this very valuable interest in NPL", he must have been referring to the whole of the 20 million shares held by the wife, as it was by the subsequent allotment of 6.8 million shares that she and Kwun each held an equal amount of shares. It is correct that the judge did not analyse separately the father's intention regarding the allotment of the 6.8 million shares to the wife. I do not think that matters, as there was no suggestion by the father or the wife that the father had a separate intention regarding the allotment of shares in 2006, different from his intention for the transfer of shares in March 2005. As Mr Sussex has submitted, it was the father's case that his intention of putting the shares in the wife's name on both occasions was "all pervading". This is demonstrated by the father's answer when he was cross-examined about his reasons for putting 20 million shares in the wife's name. He was clearly treating his reasons as applicable to both parcels of shares held by the wife[30].

84. Thirdly, Mr Wong and Mr Coleman criticised the way the trial was conducted for the

husband and submitted that this vitiated the fact-finding process. It was pointed out that Kwun was not cross-examined on his evidence he held his shares on trust for the father, so the judge could not or should not have come to the conclusion that the allotment of shares to Kwun and the wife in March 2006 was in the nature of gift. There was no evidence from the husband to contradict the evidence of Kwun. There was no cross-examination of the father regarding his intention of the allotments to Kwun and the wife in March 2006. It was not put to the father or the wife that the shares transferred or allotted to her were in the nature of gift. To the contrary, it was put to the wife in cross-examination "the position is either the document represents the true transaction and [she] paid $13.2 million or [her] affidavits and [her] oral evidence establishes the true position and [she] didn't pay $13.2 million, but both propositions can't be correct"[31]. The focus of the husband's counsel in the cross-examination of witnesses and his closing submission was on the documents and the judge was asked to take the documents at face value, namely, that it was a sale for value. Counsel did not press for the finding of a gift.

85. I am not persuaded that any of the criticisms should vitiate the judge's finding of a gift. Whatever emphasis the husband's counsel chose to place on the documents which on their face suggested consideration was paid and received, so as to undermine the credibility of the evidence given by the father and the wife, it is clear that the husband had not at any time abandoned his case asserted on affirmation at the outset that the shares of the wife were a gift. The father and the wife were aware of the husband's allegation of a gift, they were given the opportunity to respond to this and did so in the affirmations filed in reply. That Kwun did not respond to the allegation of gift further in his evidence in chief and was not cross-examined about this is not material. Nor did it matter it was not put to the father or the wife the shares she held were a gift. It was open to the judge to make that finding on his analysis of the evidence. That there was no evidence to the contrary from the husband as he was not privy to the arrangements between the father and his children is not a matter of consequence.

86. Fourthly, it was urged upon us there were undisputed matters pointing away from a gift, the significance of which the judge had ignored. The share certificates of the shares held by the wife were not signed by the directors and did not bear the company seal. The father retained control of NPL throughout. He continued to make substantial investments buying properties through NPL even after he had known of the divorce proceedings. And although the father had been happy to provide rent-free accommodation to his children, he had not given them the ownership of the properties, which are all held by NPL. It is therefore unlikely that he would make a gift to them of significant shareholdings in the company that owns the properties.

87. I see nothing in these points. The judge mentioned specifically the points about the share certificates of the wife and the father's continual investment in §§58 and 59 and said they would need to be given careful consideration. He was entitled to give these matters such weight as he saw fit when he made his final analysis. As for the father retaining control in NPL, this is just as consistent with a gift of part of the shares. The fact that the father had not made a gift of the properties to the children does not have a direct bearing regarding his intention in respect of the NPL shares, as the father had said in evidence he used the shares to encourage and entice his children to work for the family business.

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

The complaint of procedural unfairness

89. Mr Wong and Mr Coleman both raised a point based on *Browne v Dunn* (1894) 6 R 67 HL, making complaints that it was unfair to the father, the wife and the witnesses called in that various matters were not put to them in cross-examination and particular aspects of their evidence were not specifically challenged. It was not put to them that a trust arrangement never took place, that their evidence regarding a trust was deliberately untrue, or that the shares transferred to the wife were a gift.

90. At the trial, the father's counsel Mr Grossman, SC had also made the point that it was not suggested by the husband's counsel in cross-examination that the father or the wife was not telling the truth when they said the shares were held by the wife as a trustee. The judge did not think it necessary to put to the father or the wife they were lying. As stated in §44 of the judgment,

> "Everybody knows where they have stood in this regard. … The issue is well and truly joined and if I find for the husband, I am afraid that the basis of such a conclusion will be that the father's and the wife's evidence has not been truthful. The fact that such a suggestion was not in terms put to them is in my view neither here nor there. Everybody knows that their evidence is under the severest challenge."

91. I agree with the judge. I am satisfied there was no procedural unfairness. The parties knew their respective positions regarding the issue plainly in contest. The father and the wife knew the imputation intended to be made against them and had the opportunity to make any explanation open to them. There was no need to put to them what was obvious.

Conclusion and costs

92. For the above reasons, I would dismiss the appeal. I would make an order *nisi* that the father and the wife should pay the husband's costs of this appeal, as well as the costs

of their application to the Court of Appeal for leave to appeal. I would grant a certificate for three counsel to the husband in resisting the two appeals. The costs awarded to the husband are to be taxed by a taxing master.

(Peter Cheung)	(Maria Yuen)	(Susan Kwan)
Justice of Appeal	Justice of Appeal	Justice of Appeal

Mr Russell Coleman SC & Mr Robin Egerton, instructed by Simon C W Yung & Co, for the Petitioner (Appellant in CACV 151/2013)

Mr Charles Sussex SC, Mr Neal Clough & Mr Timothy Parker, instructed by T.C. Foo & Co, for the Respondent (Respondent in CACV 151/2013 and CACV 152/2013)

Mr Wong Yan Lung SC, Ms Maggie Wong & Ms Tanie Toh, instructed by Li, Wong & Lam & W.I. Cheung for the Intervener (Appellant in CACV 152/2013)

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[1] Affirmation of the father filed on 25 September 2012, §§7 and 8

[2] Affirmation of the father filed on 25 September 2012, §11

[3] The judgment, §16

[4] Affirmation of the father filed on 25 September 2012, §§26, 27

[5] The pleadings referred to are the pleadings in the divorce suit, not the pleadings in respect of the father's claim of beneficial ownership of the shares in NPL.

[6] See also Z v X, FACV 11 & 19/2013, 23 May 2014, §10

[7] Affirmation of the husband filed on 9 October 2012, §§3, 11 and 16

[8] Opening submissions of the husband dated 3 November 2012, §§2.3, 3.1, 38, 41 and 54. See also the transcript of proceedings [T/12L to P], [T/31D to F].

[9] Transcript [T/70D], [T/70Q to 71O], [T/72A to 73F]; the wife was cross-examined on the same lines at [T/123A to E, O to V]

[10] The judgment, §42

[11] Appearing with Mr Timothy Parker for the husband at the trial

[12] The judgment, §45

[13] The judgment, §48

[14] The judgment, §§5 to 42. The father's witnesses were Kwun, Cheng Chi Wing Andre (manager of a firm of certified public accountant), Lau Shing Hoi (assistant general manager of the Bank of China) and Yip King Lin Irene (estate agent). The wife and the husband did not have any witness.

[15] The judgment, §§44 to 54

[16] The judgment, §56

[17] The judgment, §§56, 64; and the transcript [T/72K to N]

[18] Appearing with Mr Neal Clough and Mr Timothy Parker

[19] Appearing with Ms Maggie Wong and Ms Tanie Toh

[20] Appearing with Mr Robin Egerton

[21] See also this exchange of the judge with Mr Clough in his closing submission: "… the evidence is, now I think this is incontrovertible, isn't it, that no value was in fact given …" at Transcript [T/143P to Q]

[22] Transcript [T/55E to F]

[23] Transcript [T/55R to S]

[24] Transcript [T/65I to J]

[25] Transcript [T/65R]

[26] Transcript [T/65T to 66A]

[27] Transcript [T/77N to P]

[28] Transcript [T/71N, 72/C to H, 73E to F]

[29] Transcript [T/52L to P]

[30] Transcript [T/65N to P]

[31] Transcript [T/123R to T]