IN THE EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO.: BVIHC (COM) 88 of 2012

BETWEEN

NG MAN SUN

Claimant

and

[1] PECKSON LIMITED
[2] CHEN, MEI HUAN

Respondents

Appearances:

Mr Philip Jones QC of Serle Court and with him Ms Victoria Ann Lord of Harney Westwood & Riegels, for the Claimant

Mr John McDonnell QC of Three Stone Chambers and with him Ms Rosalind Nicolson of Walkers for the Defendant

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2019: January 21-24, 29-31,
February 4-7, 12-14, 18, 28

JUDGMENT

Gratuitous transfer-Resulting Trust -How proved--Burden of proof-Standard of proof

[1] Adderley, J: The claimant ("Mr Ng") claims to be the beneficial owner of certain shares in the first defendant ("the Peckson Shares" or "the Shares") and applies to the court to rectify its Register of

Members under s.43 of the Business Companies Act 2004 to place his name thereon in place of that of the second defendant. The name of the second defendant ("Madam Chen") was on the Register as the legal owner at the commencement of these proceedings.

Background

[2] The first defendant, Peckson Limited (formerly named Peckham Ltd) is a British Virgin Islands ("BVI") company. It is the owner of all the shares in Empresa Hoteleira de Macau Limitada (Empresa"), a Macau company, which owns the New Century Hotel, a 5-star hotel in Macau, in which there is a casino called the Greek Mythology Casino. The property was valued in November 2012 in the neighbourhood of HK$ 3.75 billion.

[3] The first casino at the Hotel opened in 1997. It was called the New Century Casino. It was not owned or operated by Empresa. It was owned and operated by a BVI company called Century Diamond Entertainment Investment Limited **("Century Diamond")**.

[4] The casino was reopened under the name Greek Mythology in December 2004.

[5] The new business was owned and operated by a Macau company called, in English, Greek Mythology (Macau) Entertainment Group Limited ("Greek Mythology").

[6] Amax International Holdings Limited ("Amax"), a Bermuda-incorporated, Hong Kong-listed company, acquired various shares in Greek Mythology.

[7] Mr Ng was a shareholder in Amax. By the end of March 2011, he held 28.66% of Amax's share capital, and Amax held 24.82% of Greek Mythology.

[8] There were proposals in 2005 to list Greek Mythology in the United States. Because of the strict background checks in the United States, solely for the purpose of listing in the United States, Mr Ng transferred the 30.1% shareholding he had in his own name to Madam Chen in March 2007 and she became 'the administrator' of Greek Mythology in place of Mr Ng.. The proposed listing was abandoned in mid-2007.

Procedural History

[9] The case was first heard by Bannister J where he dismissed the claim on 14 Nov 2013.

[10] An appeal was allowed from Bannister J's judgment by the EC Court of Appeal on 29 September 2015.

[11] On 17 August 2017 the Judicial Committee of Her Majesty's Privy Council ("the Privy Council)[1] allowed the appeal against the judgment of the Court of Appeal in so far as it held that the Shares were legally owned by Madam Chen but were held on resulting trust for Mr Ng, but also rejected Bannister J's reasons for dismissing Mr Ng's claim as the beneficial owner and finding that Madam Chen was the legal and beneficial owner, because none of the reasons on which Bannister J made his decision had been put to Mr Ng and ought to have been.

[12] Bannister J had rejected Madam Chen's case that the Shares were since 1996 held in trust for her by Mr Ng because he had bought them with HK$100 million provided by her to him for that purpose. He did not believe Mr Ng's handwriting on the receipt for HK$100 million as genuine and preferred the evidence of the handwriting expert called by Mr. Ng who found that it was a forgery.

[13] Bannister J had found that there was consideration for the transfer of the 40,000 shares (referred to later in the judgment) to Madam Chen as evidenced on the face of the Bought Note and the Sold Note, and that it was not necessary for that purpose to have proof that the consideration was in fact paid. There was no pleading that the documents were a sham.

[14] He had rejected Mr Ng's explanation for making the transfer and Madam Chen not paying any consideration namely that it was not intended that she keep the Shares but that it was to be retransferred within 6 months. His case was that the Shares were transferred to Madam Chen as his nominee for the purpose of obtaining the necessary approvals from Beijing for a Cotai Strip Casino/Hotel Project in Macau. I observe here that this was similar to what he had done in 2007 when he anticipated listing the Casino in the United States. Bannister J also rejected Mr Ng's case that there had been an agreement with Madam Chen that she would transfer the Shares back to him in 6 months.

[1] Chen v Ng [2017] UKPC 27

[15] He had also rejected any notion of the Shares having been transferred gratuitously, and even if they were Mr Ng's Declaration against interest was sufficient to negative the presumption of resulting trust.

[16] The Privy Council has therefore sent the matter back to be retried by another judge, as I understand it, mainly for the following reasons:

(1) There was the absence of a plea by Mr Ng that the documents were a sham which would have implied that the intention was that the US$40,000 consideration was never to be paid but on the other hand there was the absence of a plea by Madam Chen that the Note and Transfer (later defined) were by way of sale, or alternatively they were by way of gift, or to keep them out of the reach of Mr Ng's creditors. The Privy Council felt that the possible result of these scenarios was not properly explored namely:

(1) the recital in the Transfer was inaccurate and the US$40,000 was still payable, or

(2) the parties' intention in stating in the Note and Transfer that the consideration had been paid was that it should never be paid in which case there was no sale and the transfer of the Shares was gratuitous.

[17] This yielded 2 possible results:

(1) Madam Chen held on presumptive resulting trust for Mr Ng, or

(2) the Shares were a gift from Mr Ng to Madam Chen

[18] The Privy Council sent the case back to explore those scenarios.

[19] The Shares are now being held by Receivers appointed by the Court, pending determination of the matter, funded by US$ 2 million paid into court by Mr Ng at an earlier stage and US$ 1 million paid into court by Madame Chen.

[20] In its Judgment the Privy Council made certain comments obiter:

(1) (At para 46) "Mr MCDonnell applies to introduce fresh evidence, only available since the trial, in the form of a defence put in on behalf of Mr Ng in Macau legal proceedings positively explaining the Transfer as designed to avoid the risk of

seizure of Mr Ng's assets by creditors." The Court of Appeal refused to admit it, but the Privy Council expressed the view that, if the matter went back for re-hearing there would be a strong case for admitting it as being relevant in cross examination, and seemed to suggest that Madam Chen should apply to amend the pleading of her positive case.

"…(1) the parties are both free to conduct their respective cases at the rehearing as if it was the first trial but (ii) their respective cases should be based on their existing pleadings and witness statements, subject to amendments and further evidence as the court should allow, in particular new evidence deriving from the Macau defence.

(2) They will be entitled to rely on the transcripts of the proceedings before Bannister J as cross-examination material."

[21] The first case lasted 5 days. It lasted 15 days this time and there were about 80 bundles. In my judgment the case can be split into two parts.

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

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

THE FIRST PART OF THE CLAIM

[24] At the risk of appearing to make short shrift of this part, in my judgment there is no basis or utility for the court to examine the evidence because the necessary claim arising out of the cause of action has not been pleaded and no application has been made to amend. The court must assume that with both parties being represented by eminent counsel the decision was deliberate.

[25] Putting it another way Madam Chen claims that she made a gratuitous advance of HK$100 million to Mr Ng for the purpose of providing the deposit to purchase from the Bank of China for HK$900

million the repossessed hotel now owned by Empresa. She claimed that Mr Ng took the money, and did not use it for that purpose. She produced a receipt dated 17 November 1996 allegedly signed by Mr Ng acknowledging receipt of the HK$100 million shortly before the hotel was bought, and an allegedly contemporaneous handwritten note on an envelope noting the details of a telephone conversation which she allegedly had with Mr Ng confirming her provision of the funds.

[26] There is clear uncontested evidence that the money was not provided to Peckson for the purpose of providing the deposit to purchase the hotel, because the transaction was self-funding. Mr lu, Po Shing gave evidence, which was supported by the documentary evidence, of how Mr Ng purchased Empresa through Peckson. The purchase of Empresa was paid out of:

(1) the 1996 Loan of HK$ 100 million that Mr Ng, in the name of Peckson, obtained from Liu Chong Hing Bank .

(2) money from a syndicated loan.,

(3) HK$ 100 million from the sale of 20% of the shares in Peckson to Sociedade de Tourismo e Diversoes de Macau S.A.R.L. controlled by Dr Stanley Ho the person holding the monopoly on casino licenses in Macau at the time.

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

[28] If the money was paid, it is possible that Madam Chen may have a claim under a Quistclose Trust if BVI law governs (see the recent EC Court of Appeal decision from Grenada in Prickly Bay Waterside Ltd v British American Insurance Co.Ltd [2]), but in light of the fact that the payment was paid and received in the PRC or Macau the possibility of another governing law may arise which may not even recognize the concept of such a trust. There may also be a question of limitations depending on which form of restitution was pleaded and a question may arise whether it is statute barred. And so the court cannot speculate on what form of amendment Madam Chen would have applied for, and it would be unfair to Mr Ng to make an order against him in relation to the HK$100 million on a case which he was not required to meet.

[2] GDAHCVAP02015/0026

[29] It is therefore unnecessary for the court to decide whether the HK$100 million was, in fact, paid by Madam Chen to Mr Ng because there is no claim before the court to which such a finding will be relevant. If the court decided that the money was paid it would not affect the outcome of the case. If the court found that it was not paid, nothing would turn on that either. Since the funds were admittedly not used for the purpose of obtaining a proprietary interest in the Peckson Shares, all it would mean is that Madam Chen would have a claim of the nature discussed above. This was correctly pointed out in paragraph 61 of the Claimant's closing submissions. No such claim was pleaded. Therefore there is no right to which this evidence is relevant on which the court must declare.

[30] I acknowledge the expert evidence given by two prominent handwriting experts Mr Radley and Mr Leung; however for the same reasons it is not really necessary to decide on the expert handwriting evidence, and so I decline to do so..

[31] There is no reason therefore to examine and make findings of fact on the expert handwriting evidence, or the evidence proving the provenance of the funds, or Madam Chen's financial capability to have provided such funds, or whether or not the receipt and the note on the envelope were genuine, whether she borrowed the funds in two allotments as claimed, or whether or not to support her claim of financial capability she owned hotels in the past, or was making the monthly income claimed.

[32] Accordingly, the court will not make findings of fact on these matters because the issue to which they would be relevant was not pleaded and as such is not before the court.

[33] I therefore move on to the second part.

THE SECOND PART

[34] On 4 October 2011 although there was no prior agreement for sale (which is not surprising because Mr Ng and Madam Chen had been in a *de facto* husband/wife relationship for about 20

years at the time) Mr Ng signed the following documents authorizing the transfer, and then transferring the Peckson Shares to Madam Chen:

(1) Sold Note dated 4 October 2011 in respect of the Shares signed by Mr Ng. The consideration received is stated to be US$40,000.

(2) Bought Note in respect of the Shares signed by Madam Chen. The consideration paid is stated to be US$40,000.

(3) Instrument of Transfer dated 4 October 2011 signed by Mr Ng. It states that in consideration of US$40,000 paid to him by Madam Chen he does by the instrument transfer the Shares to Madame Chen.

(4) Share Certificate No 6 dated 4 October 2011 signed by Mr Ng certifying that Madam Chen is the registered holder of the Shares.

(5) The Register of Members of Peckson Ltd recording Madam Chen's name as a member on 4 October 2011 and that Mr Ng ceased to be a member on that same date.

(6) Written Resolution of Peckson Ltd dated 4 October 2011 signed by Mr Ng and Madam Chen as directors of Peckson Ltd approving the transfer of the Shares at par value US$1.00 each, confirmed by Notary Luis Filipe Pereira Reigadas.

[35] This was followed by other conduct after 4 October 2011 confirming the transfer :

(1) Board of Directors' Minutes of Peckson Ltd dated 21 November 2011

(2) Declaration by Mr Ng dated 22 November 2011 in Chinese signed by Mr Ng along with a notary certificate attached stating.

i That he originally held 50,000 shares in Peckson. He transferred 10,000 to STDM and kept the remaining 40,000 shares ("the Shares")

ii That on 4 October 2011 he transferred the Shares to Madam Chen

iii That he had discovered that he did not have and had never had the corporate kit for Peckson and that the records had not been updated for a long time

iv That he never issued any shares or signed any trust documents relating to the Shares and had never managed Peckson's rights on behalf of others in any written, oral, or implied form

v That the Shares belonged to him personally and that after the transfer the Shares shall be under the name of Madam Chen in entirety and he shall not keep any rights in respect thereof.

(3) A letter dated 18 June 2012 to Mr Li Chi-Keung [from Mr Ng] read:

> "Logo of New Century Hotel Macau
> To Mr Li Chi Keung of Hong Kong of Hong Kong Onshine
> Securities Limited
> Greetings! Keung Gor, thank you so much for your support for over 10 years. Today, New Century Hotel and Greek Mythology Casino have nothing to do with me, Ng Man Sun (Ng Wei). The profits and debts of Greek Mythology Casino all belong to Chen Mei Huan. The money borrowed by New Century Hotel and Greek Mythology Casino from Keung Gor is not related to me, Ng Man Sun (Ng Wei), at all from now on. I hope Keung Gor would understand. Thank you, Keung Gor, once again for your support.
> Best Wishes!
> [signed personally by Mr Ng]
> Yours sincerely from Ng Man Sun (Ng Wei)
> Date:18th June 2012."

[36] On 18 January 2012 Madam Chen executed a Will dealing only with the Peckson shares (and none of her other assets) leaving the Shares to Mr Ng. Following their break-up she changed him as beneficiary.

[37] The question under this second part is, by signing the transfer documents and the later supporting documents, did Mr Ng at the time of the transfer have the intention to transfer not just his legal interest to Madam Chen, but his beneficial interest as well.

[38] Mr Ng says it was a temporary transfer and he intended to transfer the legal title to Madam Chen for 6 months only, and had no intention of transferring the beneficial interest at all. He didn't use the word 'sham' in his pleadings, but in Madam Chen's pleadings she understood him to be saying in his pleadings that he wanted to use her as a "figurehead" for the group of companies as he had averred in the earlier Macau possession action.

[39] In paragraph 11(p) of the Amended Defence and Counterclaim Madam Chen recognizes that this is Mr Ng's claim and denies it at paragraph 11(p) of the paragraphs 11(o) to 11(q) extracted below:

(p) Mr Ng pleaded that as the reason for the Transfer in his Defence (Contestação) filed on 9 May 2014 in an Action CV3-14-0018-CAO brought against him in Macau by Empresa and the Company [Peakson] in which he alleged in particular that "In October 2011, due to some disputes which meanwhile arose with third parties, resulting from business in which the Defendant was involved, and in order to protect Empresa Hoteleira de Macau Limitada and his own assets, Mr Ng agreed with Chen Mei Huan a solution in which his partner would be converted into a figurehead for the Group's businesses".

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(q) No such agreement as is there alleged was ever made with Chen; but that pleading has probably revealed at least part of Mr Ng's true motivation for the Transfer

11A.(a) If (contrary to Madam Chen's Case) Mr Ng was the beneficial owner of the Shares prior to the Date of Transfer and/or if (contrary to Madam Chen's case) Mr Ng did not transfer the Shares to her by way of performance of the 1996 Oral Agreement, Mr Ng nevertheless intended that after the Transfer Madam Chen should be both the legal and beneficial owner of the Shares so that they should be safe from his own creditors."

[40] In his Re-Amended Statement of Claim Mr Ng's primary case is pleaded as follows at paragraphs 15 and 16:

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

16. Mr Ng and Chen then verbally agreed that after Mr Ng transferred the relevant shares to Chen, she would transfer the shares back to Mr Ng after six months, regardless of whether the application for government approval was successful. Mr Ng accordingly transferred the shares to Chen to enable her to proceed with the approval application. Chen did not pay any compensation for the shares as it was not intended that she would keep the shares permanently."

[41] In paragraph 36 it is further pleaded:

"36. Mr Ng never intended to transfer the beneficial ownership in the shares to Chen. She was to be his bare nominee, holding the shares on trust while she sought that development approval.

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

[42] Finally in paragraph 43 Mr Ng seeks the following orders:

"(6) An order that any purported shareholder's resolutions made by Chen be void and of no effect.;

(6A) Alternatively, a declaration that the shares are held on trust for Mr Ng and /or should be returned to Mr Ng;

(6B) Alternatively, an order that Chen do specifically perform the agreement referred to in paragraph 16 above by retransferring the shares."

[43] Both parties agree that the transfer was gratuitous for no consideration, Madam Chen because, according to her, she demanded that her shares be transferred 'back', and Mr Ng because, as he claims, it was only intended to be a temporary transfer and because of that understanding no consideration passed or was intended to pass.

THE LAW

[44] In its judgment in the present case on 22 May 2015 the EC Court of Appeal said at [91]

"Millett LJ in [*Tribe v Tribe*] directs us clearly to the position that, it is not the purpose of the transfer that is intrinsic to establishing a resulting trust, rather what counts is the intention of the transferor or the "presumed" intention (as Megarry J put it in *In re Vandervell's Trusts (No 2)).* In *Tribe v Tribe* Millett LJ stated:

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

show that it was inconsistent with any intention to retain a beneficial interest" (Emphasis added)."

[45] Since then the Privy Council has delivered two judgments which have given further learning on the law in this area. In Gany Holdings (PTC) SA v Khan [2018] UKPC 21 referencing Whitlock v Moree [2017] UKPC 44. on appeal from the BVI Lord Briggs speaking for the Board stated at [17]:

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

I take the words 'any written instrument' in the passage to mean just that, and not limited to an instrument of transfer.

[46] As far as transferring to defeat creditors, as Millet LJ stated in Tribe v Tribe [1996] Ch 107 at 134H

> "(6) The only way in which a man can protect his property from his creditors is by divesting himself of all beneficial interest in it…".
> This was echoed in the Privy Council's judgment in this case at para 46 where Lords Neuberger and Mance stated "
> "…such an aim [evading Mr Ng's creditors] might well be achieved, indeed could only truly be achieved as a matter of law, by transfer of the whole interest in the Shares…"

[47] The UK Supreme Court has also provided guidance on how the court should approach claims of acting as a figurehead which Mr Ng has referred to as 'sham'. Patel v Mirza [2016] UKSC 42, [2017] AC 467 overturned the then current law on the enforcement of contracts tainted with illegality and disapproved Tinsley v Milligan which had been decided on the prevailing law that the court would not grant its aid to enforcing contracts that had to disclose illegal acts to maintain a defence. It decided that, as Lord Neuberger and Lord Mance observed, some illegality involved in the claim should not of itself deprive the claimant of a remedy.

[48] In Patel v Mirza Lord Toulson set out the new principles as follows at [120]:

> "The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, ...). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified [above]."

THE BURDEN OF PROOF AND STANDARD OF PROOF

[49] As it was a gratuitous transfer, the burden of proof is on Madam Chen to prove that at the time Mr Ng made the transfer it was their common intention that both the legal and the beneficial ownership of the Peckson Shares should be transferred to her. However, if Madam Chen's evidence rises to the level to satisfy that burden, the burden then shifts to Mr Ng to rebut that evidence. By that I mean that Mr Ng will have to point to evidence, or the court will have to find that there is evidence, which in the court's opinion rebuts what appears on its face to be evidence of the common intention to transfer the beneficial interest to Madam Chen. As stated by Lady Hale, also, the onus is upon the person seeking to show that the person who holds the legal Ownership does not also hold the beneficial ownership (Stack v Dowden [2007] 2 AC 432 at [56]. There is no evidence that Madam Chen did not share the common intention that both the legal and beneficial ownership should be transferred to her, so the court can infer that she did share that intention. As stated in

Gany relying on the presumption of resulting trust is a recourse of last resort to be called in aid only where there really is no evidence from which an inference as to common intention may properly be drawn.

[50] The standard is the usual civil standard on a balance of probability. However in applying that standard the court should also look at the inherent probabilities. The more improbable a matter is the stronger should be the evidence in support of it to reach the conclusion that it was proved on a balance of probability.

THE EVIDENCE

[51] The Privy Council made the powerful observation (per Lord Neuberger and Lord Mance speaking for the Board) at paragraph 46 of its judgment dated 17 August 2017 that although Madam Chen advanced no positive case on either point [the transfer was for a small consideration or by way of gift] the specificity and number of ways in which Mr Ng averred that only Madam Chen had any interest in the Hotel from and after 4 October 2011 could be thought to militate against the existence of a resulting trust and/or to support a conclusion that some form of outright transfer of any and all interest occurred on that date.

[52] Using that as a starting point, based on the evidence on which the statement was based, on its face Mr Ng would likely lose. So the burden shifts to him in the sense that I explained above to show that it was his intention to make a temporary transfer of the legal title only, and not transfer the beneficial interest.

THE DEBTS

[53] We start with his debts. The evidence shows that in 2011 Mr Ng's companies whose debts he had personally guaranteed were having difficulties servicing their debts and went into default with the Bank of China (Hong Kong). This led to a default resulting in the Bank of China rescheduling the debts with what could be considered very onerous repayment terms. It led to him selling some assets in 2014.

[54] In considering the debts of Mr Ng's companies for which he gave personal guaranties, an overarching consideration must be that in giving a personal guaranty the guarantor's personal assets are at risk because he loses the benefit of limited liability which is inherent in a limited liability company. Therefore, at all material times before the transfer to Madame Chen, his most valuable personal assets at risk were the Peckson Shares.

[55] There was genuine cause for much anxiety in 2011 surrounding Ace High/ Chong Gold/Whitehouse Capital loans of about HK$280 million from possible fraudulent and money laundering sources which he personally guaranteed and which possibly could carry with it confiscation of his personal assets. There was evidence from Madam Chen that he considered this possibility, and although he denied it, the objective evidence pointed to such a possibility.

[56] Mr McDonnell QC put to Mr Ng the pleading by his Portuguese counsel in the Macau Removal case CV3-14-0018-CAO. In Mr Ng's Macau defence filed on 9 May 2014 the following averment was made:

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

[57] Mr Ng stated that this was a mistake made by his lawyers in Macau, because he was on a long time stay at the hospital at the time, and by the time he learned about it and applied to the Macau court to amend it, too much time had passed. One of the legal experts in the case, Professor de Brito, explained in his first report that there are only limited grounds on which a defence can be amended in the Macau court and the misunderstanding of client's instructions was not one of the reasons that could be given after a certain passage of time. In her reply report Professor Costa e Silva who Madam Chen had called as an expert agreed.

[58] The EC Court of Appeal dismissed a request of Madam Chen to adduce this defence as fresh evidence since it occurred after the conclusion of the case in the EC High court on the ground that

it would not advance her case against the presumption of resulting trust because on its face while it fleshes out the bare bones submission put to Mr Ng that his financial difficulties was the reason for the Peckson Transfer, at face value it is also consistent with an intention to transfer the legal title only.

[59] That decision was before Gany where the Privy Council made it clear that the starting point is not that there is a resulting trust, and reliance on the presumption is a last resort: Lord Briggs put it this way: "*the time-honoured presumptions, such as the presumption of advancement or the presumed resulting trust, where there really is no evidence from which an inference as to common intention may properly be drawn… are, in modern times, a last resort*,"

[60] The Privy Council then at [46] went on to say there was a strong case for admitting the fresh evidence as being relevant in cross examination, and seemed to suggest that Madam Chen should apply to amend the pleading of her positive case, as she has now done. Following Gany the statement of defence by Mr Ng could be used, among other evidence, in determining whether there was an intention to transfer the beneficial ownership "*regardless of the subjective intentions of either of them [Mr Ng or Madam Chen]"* because in law the only way in which one can defeat ones creditors is by conveyance of the beneficial interest.

[61] On 8 June 2011 as a result of a default with the Bank of China there were three agreements entered into relating to debts of Sheen River Investments Limited, Silver Faith Holdings Limited, Tronken Enterprises and Super Faith Corporation Ltd. Mr Ng had stood as personal guarantor of the debts of all of these companies. The companies were unable to meet their loan payments so the bank demanded that Mr Ng reschedule the debts. In all probability there was much pressure in 2011. Even the rescheduled payments could not be met and so Mr Ng had to sell the properties in 2014 to reduce the debt. The sale yielded a surplus of HK$27 million which on the outstanding amount HK$202 million suggests that in 2011 the loans were somewhere in the neighbourhood of over 85% of the property value.

[62] Mr Ng also had a personal debt to Dr Ho's company STDM of HK$180 million, but from his evidence of the history of their dealings, it is not reasonable to conclude that he needed to have concerns about that debt.

[63] As a personal guarantor for the loans of companies, the personal assets of the guarantor are very much at risk because the guarantor will have lost the protection of limited liability, at least under BVI law, so it is entirely probable in time of default he would want to buttress himself against third party unlimited personal liability. What better way to protect his personal assets and at the same time keep them in the family with his "de facto" wife of 20 years and mother of his children. The Privy Council said as much at [46]

> "Mr Ng was ... asked about the possibility that he was, by the Transfer aiming to evade his creditors. Bearing in mind his long-standing family relationship with Madame Chen, such an aim might well be achieved, indeed could only truly be achieved as a matter of law, by transfer of the whole interest in the Shares, whether for a comparatively small consideration or by way of gift."

[64] Mr Jones QC seemed to argue that the fact that the debts were highly collateralized with the Bank of China made it improbable that Mr Ng had to worry. It was all the more a need for a guarantor to worry because there was a risk of losing or dramatically reducing the value of all his personal assets by a forced bank sale brought about by the default of any of the companies. In the surrounding circumstances at the time the defence that was pleaded in the Macau hearings certainly could be seen (as the EC court observed to be one possibility) as evidence that at the time Mr Ng made the transfer his intention was to convey the beneficial interest to protect him from his creditors. There is no doubt that debts were on his mind when he wrote his letter dated 18 June 2012 to Mr Li Chi-Keung. But there were other reasons for anxiety raised by the Whitehouse Capital loans.

ACE HIGH/ WHITEHOUSE CAPITAL LOANS

[65] There was an Investment Agreement dated 26 May 2010 between Ace High International Holdings Limited ("Ace High") and Guangdong Grand Resources,("Guangdong") a company owned or controlled or related to Mr John Gong. Ace High was a BVI company owned 100% by Mr Ng. John Gong was a financial entrepreneur named by a Singapore newspaper in 2015 as one of 26 Singaporeans wanted by Interpol. The purpose was for Guangdong to raise money for investment in VIP tables at the Greek Mythology casino. Mr Ng gave a personal guarantee of the Ace High loans.

[66] There was a similar agreement dated 20 May 2010 between Ace High and Whitehouse Capital Limited another company owned and controlled by Mr John Gong. Chong Gold international Limited ("Chong Gold") was a Macau company owned 95% by Mr Ng and 5% by Mr John Gong. It appears that by the end of December 2010 Chong Gold had replaced Ace High in the funding agreement.

[67] The provenance of the funds were called into question because they were secured by obvious fraudulent misrepresentations. In the prospectus there was the promise to invest US$100 million in Ace High as operator of the Greek Mythology Casino at the New Century Hotel in Macau which had hit a record of generating profits of over HK$60 million per day. This and other representations were false as came out in cross examination of Mr Ng by Mr McDonnell QC, and it appears that investors had acted on them by investing in Chong Gold.

[68] As a consequence of the fraud there were in existence alert notices by the United Kingdom Financial Services Authority (12 January 2011) and the Singapore Monetary Authority in relation to a company called Whitehouse Capital. There was a media release from the Lien Foundation saying that Whitehouse Capital had been selling private equity investment instruments in the PRC leveraging on the name and reputation of Dr Lien and the Lien Foundation, but that they were not related.

[69] The adverse publicity was enormous in the popular press. There was talk that the police from mainland China were looking for Mr Ng to question him. Mr Ng abruptly caused all of the agreements with Whitehouse Capital to be cancelled and caused their representative to move out of the Greek Mythology Casino hotel immediately. Madam Chen said that Mr Ng feared that the Chinese officials might seize his assets. Part of the reason for this was that there that there was negative publicity of the scheme having defrauded the Social Security Fund of the People's Republic of China of around HK$100 million.

[70] Ace High went into voluntary liquidation in May 2011 and Chong Gold was dissolved in August 2011

[71] It appears that over HK$280 million was received through these agreements with Mr John Gong and Whitehouse Capital between June 2010 to May 2011. It appears that the money came mainly from Mainland China individuals but the prospectus referred to US$ investment of 100 million.

There was no way of knowing what claims, if any, would be made by or after October 2011 and there was no evidence before the court that the investigation was over. Mr Ng himself upon urging had made a complaint to the Macau police. He denied that he knew anything about the monetary arrangements, or how much money was coming into the casino or its origin.

[72] Even though by October 2011 the heat of the storm had abated, and the debtor companies Ace High and Chong Gold had been dissolved, and although he denied it, on the objective evidence it was clearly impossible for anyone, including Mr Ng, to know if and when any of the PRC or other investors/creditors, including the Social Security Fund of the PRC would come after him to call on his personal guarantees. Nor could he know when the Police and authorities' investigation would end. In those circumstances it was very probable that Mr Ng would want to protect his personal assets from those possible creditors by transferring the beneficial interest to his "de facto" wife, the primary beneficiary under his will and mother of his two children.

NOT GETTING THE BANK'S CONSENT

[73] Mr Ng relies mainly on two independent occurrences which he says manifest his intention that the transfer was to be temporary; namely, that he did not tell the bank about the transfer , and Madam Chen's making a will which dealt solely with the Peckson Shares (none of her other assets) and left them to him.

[74] In the latter case, the making of the will is consistent with Madam Chen holding the beneficial interest in the shares. When their relationship soured, she changed the beneficiary in the will.

[75] With respect to the former the letter informing Mr Ng of the problem came well after the transfer. There is no evidence that the problem was drawn to his attention on 4 October 2011 or that Mr Ng considered it when he was making the transfer. The letter from the attorneys was not purporting to remind him of previous advice given. There is no evidence that Solicitor Wong brought it to his attention even though on its face it was a transfer of the legal as well as the beneficial interest in the Shares. Therefore, the court will not speculate that Mr Ng had in mind that he was inducing a default under his loan documents with the bank but he was not worried because he knew the transfer was temporary. It is more probable than not that if he had considered that the transfer

would be a breach of his loan terms, in light of the difficulties he was already having with the bank he would not have made the transfer without their consent. Rather than being an indication that the transfer was intended to be temporary it is more probably an indication that it did not enter his mind at all and there is no evidence to the contrary. Mr Ng himself did not in his evidence say anything to the contrary. In his witness statement he stated that "… as to the letter from LCP to Madam Chen and me dated 12 December 2011 I do not recall receiving it at any time".

THE DECLARATIONS AGAINST INTEREST

[76] On Mr Ng's signing the other supporting documents which evidenced his intention to divest himself of the beneficial ownership of the Shares, namely, the director's minutes of 21 November 2011 and the Declaration dated 22 November in even more precise terms, Ms Carita Wu was vigorously cross examined as well as was Advocate Reigadas. Both of them along with Mr Ng's lawyer, Advocate Carvalho, were at the meeting. The aim of the cross examination was apparently to explore Ms Wu's recollection of what happened at the meeting when the documents were signed. The objective appeared to be to show that Mr Ng did not know the import of what he was signing, and that he did so, as Mr Ng stated on many occasions, because he trusted Madam Chen and she had told him to sign it.

[77] Advocate Reigadas was clear that Advocate Carvalho told Mr Ng not to sign the Declaration. The court infers in the circumstances that Advocate Carvalho knew what the purpose of the document was and that it was declaring what it purported to declare.

[78] The court found Advocate Reigadas to be a thoroughly credible witness.

[79] Mr Ng said that he signed the declaration because he trusted Madam Chen. The self-serving statement that he trusted Madam is inconsistent with the actions which he said he took the night before signing the transfer documents where he purportedly made a lease of the premises of the Empresa Hotel in his favour for one Pataca per year for 30 years in the event Madam Chen were to renege on the Cotai Strip oral "Agreement".

[80] It was suggested that the Declaration is simply a declaration to the company as to past events so that it can keep it on file and be satisfied that the corporation documents that had been reconstituted were accurate. All the more it is conduct on which the court can rely as indicative of his intention when signing the transfer documents, and having regard to all the circumstances, the court relies on it as a clear declaration against interest and evidence that he intended to convey the beneficial interest in the Peckson Shares at the time of signing the transfer documents.

[81] It was also argued that the whole thing was a pretence and that one will always get subsequent documents carrying out the pretence, and it is no different to the numerous subsequent documents that Ms Tinsley signed in *Tinsley v Milligan* for the benefit of defrauding the Department of Social Security to declare and represent that she had no interest in the house. That is a possibility but not the most probable on the facts of this case.

[82] It was further argued that although Mr Ng was asked to read the document there is no evidence that he would have read it, or read it in detail, or even knew what the words "I shall not keep any rights" to the Shares meant. He would have seen this as just another necessary document to pretend that Madam Chen was to appear as the outright owner of the Shares.

[83] There is no evidence that Mr Ng did not understand what it was he was signing. The declaration was written in Chinese, and if Advocate Carvalho, Mr Ng's lawyer, who did not read or speak Chinese appreciated from the translations and description given at the meeting in the presence of Mr Ng, enough to advise him not to sign it, it being written in Chinese, it is highly improbable that Mr Ng did not understand it in his own language. Although Mr Ng was not generally a detailed man, when it came to signing documents he was very careful to know what they were about. This evidence was given by Ms Wu and Madam Chen.

[84] There was evidence which tended to corroborate Ms Wu's and Madam Chen's evidence on this claim in the video shown to the court of the event of the signing Mr Ng's will in 1996. The will was in English. The video showed Mr Ng between Solicitors Tsui Wai Hay and Wong Chi Man ("Mr Wong") from Messrs LCP lawyers. Mr Wong explained to him in Cantonese what he was signing. The meeting was in what appeared to be a dining area. Mr Ng appeared to listen intently then, before signing, asked a question of the lawyers in Chinese to ascertain that he was leaving

"everything" to Madam Chen. Having been assured of that, he then signed. A copy of the will dated 3 November 2009 duly signed by Mr Ng and witnessed by Mr Wong and Mr Hay from Messrs LCP lawyers was in evidence.

[85] Under vigorous and skilful cross examination by Mr Jones, QC Ms Wu did not stick doggedly to her witness statement and conceded where she was not sure. She apologised if she was wrong that there were 'draft minutes' at this meeting, or that Advocate Reigadas had taken the documents away to place the stamps on the documents when Advocate Reigadas said that he did not take them away and that the stamps were placed on at the meeting, or that the clerk explained the documents to Mr Ng. However, Ms Wu denied that she sought to deliberately set out to mislead, and confirmed that the meeting took place and Mr Ng did sign the document in the presence of Advocate Carvalho and Advocate Reigadas.

[86] In his evidence Advocate Reigadas corroborated material particulars of Ms Wu's evidence namely that Mr Ng read the documents (which were in Chinese), and that his lawyer Advocate Carvalho was there and told him he should not sign it. He said that even though his function is to notarise the signature, as a matter of practice he always asks the client to confirm that he understood the document, and that it was in accordance with what he wanted to sign.

[87] I found Ms Wu to be a credible witness and do not think the quality or content of her witness statement (especially paragraph 50 pertaining to what happened at the signing) was diminished in material parts by cross examination.

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

[89] I therefore dismiss the application for an order that that the purported shareholders' resolutions made by Madam Chen be declared void and of no effect, and I also accept the declaration against interest in the Declaration as conduct manifesting Mr Ng's intention when he signed the transfer

documents, not to retain the beneficial interest but to transfer it to Madam Chen. It is together with other evidence sufficient to rebut the presumption of resulting trust.

THE **"O**RAL AGREEMENT**"** RE THE COTAI STRIP PROJECT

[90] This was pleaded in paragraph 15 of the re-amended statement of claim (see above). The Privy Council did not rule on the Cotai Strip project.[63].

[91] Based on the opinion expressed in oral re-examination by Professor de Britto and in cross examination by Professor Costa e Silva that the findings of "not proven' on the Cotai Strip issues were not essential to the determination by the Macau Court's final judgment on 9 June 2015 on the possession issue, I find that there is no *issue estoppel* in favour of Madame Chen referred to in the pleadings as the "Third Estoppel" .

[92] However, if such an agreement was made with Mr Ng, in light of the bad publicity surrounding him and Chong Gold at the time (there was ample evidence in the public domain), it was highly probable that there would have been a revised draft Feasibility Study excising any reference to Mr Ng or Chong Gold. When it was put to Mr Ng that in the then existing environment placing a document with his name and that of Chong Gold so prominently in an application to Beijing would make it implausible for the project to be approved, Mr Ng's reply was that that was beside the point because Madam Chen never went to Beijing to advance the Project.

[93] The fact that Madam Chen did not go to Beijing and apparently was never intended to go there, and there is no evidence of a revised feasibility study is entirely consistent with the fact that there was no agreement to go to Beijing. It is inconceivable that if it was intended for Madam Chen to go to Beijing, she would have gone with the feasibility study in evidence. If the story was true, one would have expected Madam Chen or Mr Ng to commission an amended feasibility study excising the references to Mr Ng and Chong Gold to make the application to Beijing. There was no such revised feasibility study in evidence from either party. Mr Ng when questioned by the court agreed that some sort of feasibility study should have been a part of such an application. The absence of such a revised feasibility study makes it improbable that such an application to Beijing was discussed and agreed with Madam Chen and was contemplated. Mr Steve Fukee Chan while he

gave viva voce evidence that he discussed the project with Mr Ng and Madam Chen stated in his witness statement that he was not sure if Madam Chen was present. He admitted that since his stroke which hospitalized him in March to April of 2011 his memory has been faulty. Mr Hutchins who did the feasibility study was not retained by Madam Chen.

[94] Furthermore, ostensibly there was no consideration for the alleged oral "Agreement". According to Mr Ng he and Madam Chen had agreed that he would make the transfer of the Peckson Shares to her and if she was not successful she would retransfer the Shares after 6 months. Throughout his witness statements and cross examination during the first trial and this one no reference was made to any consideration which he gave to Madam Chen to exact her promise. He was recalled by the court just before the opening of Madam Chen's case. The court asked Mr Ng what did they agree should she be successful in the application. For the first time Mr Ng said that in such case they had agreed that he would give her 10% of the Shares. He was asked if he discussed this with Madam Chen and from his answer clearly had not. After his answer both counsel were given an opportunity to ask him any question they wished, but they both declined the offer. Eventually on the day of closing submissions, Mr McDonnell QC pointed out that there was no common law contract. Mr Jones QC conceded and withdrew his claim for specific performance made in paragraph (6B) of his Amended Statement of Claim. He suggested that there was still an obligation in equity but he did elaborate on this.

[95] It is also improbable that if such an agreement existed it would surface for the first time in the Macau Possession Action on 6 August 2012 where it was referred to in the MOP$1 30 year lease filed in that action. Mr Yau Chuen gave evidence of the production of that lease but the period in which he was to produce it overnight with no expertise, and the menacing way, as it appeared to the court, in which he pointed his finger on occasion at Madam Chen from the witness box, while referring to Mr Ng as "boss", did not inspire confidence that he was an unbiased and reliable witness. I had no difficulty in rejecting his evidence.

[96] Having considered the available evidence, I find that there was no agreement between Mr Ng and Madam Chen relating to the Cotai Strip. Accordingly the court cannot rely on this as evidence of Mr Ng's subjective intention at the time of the transfer not to transfer the beneficial interest to

Madam Chen. Although I found that there was no estoppel and did not take it into account in my decision, I note that in the Macau Court, a panel made up of three Judges also found that the agreement was not proven because some of the persons who gave evidence had insufficient knowledge of what happened and the evidence of the others was not credible.

THE 18 JANUARY 2012 WILL

[97] Mr Jones QC has relied on Mr Ng's request that Madam Chen make a will of the Peckson Shares as conduct indicating that at the time of making the transfers Mr Ng intended the transfer to be temporary. There is another way to look at that evidence. It is highly improbable that Mr Ng would have asked Madam Chen to make a will of the Peckson shares unless he knew he had transferred the beneficial interest to her. When asked by Mr Jones QC": "Why the Peckson Shares? Why not all your property? Madam Chen's answer was that Mr Ng said that "should I die before he did whether I would return to him or give him Peckson. I said OK." This is not an idle point raised by Mr Jones QC because in her replacement will dated 28 February 2012 she left all her property, and not just the Peakson Shares to her beneficiaries. I considered this and preferred the explanation that Mr Ng only asked her about the Peckson Shares.

[98] What is telling is that Mr Ng did not ask :"should you die within the next 6 months, or should you die before you make the Cotai Strip application to Beijing", or anything like that, and the question was asked in circumstances where there was no evidence of the contemplation of her, or indeed Mr Ng, dying anytime soon. Furthermore this was a private document, and so could not be used to promote his so called "figurehead" plan to third parties. This is perhaps one of the most cogent pieces of evidence of conduct by Mr Ng indicating that he intended to transfer the beneficial interest in the Peckson Shares to Madam Chen. When their relationship later soured Madam Chen changed the beneficiaries of her will. A redacted copy was before the court.

[99] Furthermore, when on day 4 Mr Ng was asked in cross examination by Mr McDonnell QC why did he not have Madam Chen sign a blank transfer which would be filled in with his name after the expiration of 6 months as he had done in a previous transaction, he said because had he done so Madam Chen would think he did not trust her. He also said he didn't know how it was done. Mr Ng never said that it didn't come to his mind. The use of the blank transfer was referred to in his

witness statement. Mr Ng in his witness statement stated that around March 2007 he had temporarily transferred the role of Administrator of the casino to Madam Chen for the purpose of listing the casino on the US Stock Exchange. At the time his lawyer suggested that he should have Madam Chen sign an undated blank instrument of transfer in respect of the Greek Mythology shares as security since the transfers were only temporary. He therefore sent a blank transfer to her and it was returned signed in a few days later. The incident is referred to earlier in this judgment.

CONCLUSION

[100] Since before the transfer Madam Chen clearly never had a proprietary claim to the Peckson shares by virtue of her alleged HK$100 million payment, and Mr Ng at all material times knew that, the First Estoppel and the Second Estoppel never arose. I have also found against the Third Estoppel. Therefore, Madam Chen's alternative counterclaim fails.

[101] Nevertheless, for the reasons given including the signing of the transfer documents, the two clear written declarations against interest, the will, his conduct, and the prevailing circumstances at the time, evident from the objective evidence, I find that at the time he made the transfers, it was Mr Ng's intention shared by Madam Chen to transfer the beneficial interest in the Peckson Shares to Madam Chen at the same time as he transferred the legal interest. I therefore dismiss the claim of Mr Ng and grant the counterclaim of Madam Chen. According, I declare that from 4 October 2011:

(1) Mr Ng ceased to have (and does not now have) any interest or right of any kind in the Shares of the First defendant; and

(2) Madam Chen currently is, and has since 4 October 2011 been, the only true beneficial owner of the Shares and the only person entitled to be registered as their legal owner..

[102] I will hear the parties on costs on a date to be fixed.

[103] This judgment was circulated in draft to counsel 3 days prior to delivery, and I wish to thank them for their editorial comments some of which have been incorporated, as well as clarifications of my own, and for their valuable assistance to the court during the trial.

Hon. Justice K. Neville Adderley
Commercial Judge

By the Court

Registrar