

AUSTRALIA / JUDGMENT

Li v Ye

[2025] NSWCA 227

COURT

Court of Appeal

DECIDED

16 October 2025

BEFORE

Mitchelmore JA at [1];
Kirk JA at [2];
Adamson JA at [106]

CASE / FILE NUMBER

2024/386693

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Hearing dates: 16 May 2025

Date of orders: 16 October 2025

Decision date: 16 October 2025

Before: Mitchelmore JA at [1];
Kirk JA at [2];
Adamson JA at [106]

Decision: (1) Appeal allowed in part.
(2) Order 2 made by Stevenson J on 8 November 2024 is set aside and, in lieu thereof, order that the plaintiffs are to pay 80% of the defendants’ costs.
(3) The appellants are to pay 60% of the first and second respondents’ costs of the appeal.

Catchwords: EQUITY — Trusts and trustees — intention to create — real property purchased by one company with funds provided by another company — existence of express, resulting, “Quistclose” and/or constructive trusts alleged — intention to create trust determinative of each alternative trust claim — significance of evidence subsequent to claimed agreement to create trust — whether evidence established intention to create trust
COSTS — Costs assessment — Determination — Review/appeal — primary judge accepted some of appellants’ claims in court below but did not conclusively determine — whether appellants should be liable for entirety of costs of proceedings below

Legislation Cited:	Conveyancing Act 1919 (NSW), s 23C Corporations Act 2001 (Cth), ss 232, 233, 471B, 474(2)
Cases Cited:	Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq) (2000) 202 CLR 588; [2000] HCA 25 Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (in liq) (1978) 141 CLR 335; [1978] HCA 45 Bahr v Nicolay (No 2) (1988) 164 CLR 604; [1988] HCA 16 Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567 Bosanac v Federal Commissioner of Taxation (2022) 275 CLR 37; [2022] HCA 34 Brunskill v Sovereign Marine & General Insurance Co Ltd (1985) 59 ALJR 842; [1985] HCA 61 Byrnes v Kendle (2011) 243 CLR 253; [2011] HCA 26 Calverley v Green (1984) 155 CLR 242; [1984] HCA 81 Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304; [2009] HCA 25 Charles Marshall Pty Ltd v Grimsley (1956) 95 CLR 353; [1956] HCA 28 Fox v Percy (2003) 214 CLR 118; [2003] HCA 22 Galati v Deans [2023] NSWCA 13 House v The King (1936) 55 CLR 499; [1936] HCA 40 Jago v District Court (NSW) (1989) 168 CLR 23; [1989] HCA 46; Kauter v Hilton (1953) 90 CLR 86; [1953] HCA 95 Korda v Australian Executor Trustees (SA) Ltd (2015) 255 CLR 62; [2015] HCA 6 Lee v Lee (2019) 266 CLR 129; [2019] HCA 28 Legal Services Board v Gillespie-Jones (2013) 249 CLR 493; [2013] HCA 35 Li v Tao (2023) 113 NSWLR 131; [2023] NSWCA 310 Nelson v Nelson (1995) 184 CLR 538; [1995] HCA 25 Oceanic Sun Line Special Shipping Company Inc v Fay (1988) 165 CLR 197; [1988] HCA 32 Raulfs v Fishy Bite Pty Ltd [2012] NSWCA 135 Re Australian Elizabethan Theatre Trust (1991) 30 FCR 491 Re Imperium Projects Ltd [2017] NSWSC 141 Rochefoucauld v Boustead [1897] 1 Ch 196 Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538; [1990] HCA 55 Watson v Foxman (1995) 49 NSWLR 31
Texts Cited:	JD Heydon and MJ Leeming, Jacob's Law of Trusts in Australia (8th ed, 2016, LexisNexis Butterworths)
Category:	Principal judgment
Parties:	Xuxu Li (First appellant) Kevin Ross Waters-Marsh (Second appellant) Xiaosi Chaney Qian (Third appellant) Mana Assets Management Pty Ltd (Fourth appellant) XCQ Holdings Pty Ltd (Fifth appellant) Phoenix Group Australia Pty Ltd (Sixth appellant) Feng Ye (First respondent) Thomas Gem Stone Pty Ltd (Second respondent) Shield Resources Pty Ltd (Fourth respondent) Shield Hardwood Pty Ltd (Seventh respondent)

Representation:

Counsel: M Condon SC / H Rogers (Appellants)
JC Kelly SC / A Maroya (First and second respondents)

Solicitors: GWH & Associates (Appellants)
GOH Lawyers (First and second respondents)
Swaab (Third to fourteenth respondents)

File Number(s): 2024/386693

Publication restriction: Nil
Decision under appeal

Court or tribunal: Supreme Court

Jurisdiction: Equity – Commercial List

Citation: Li v Ye [2024] NSWSC 1176; Li v Ye (No 2) [2024] NSWSC 1421

Date of Decision: 18 September 2024; 8 November 2024

Before: Stevenson J

File Number(s): 2024/125503
[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

Ms Li, Mr Qian and Mr Ross Waters-Marsh (the first to third appellants) and Mr Ye (the first respondent) together conducted a timber export business through a group of companies (the Shield Group). In 2018 some realty in Chinchilla in Queensland (the Chinchilla Property) was acquired and registered in the name of Mr Ye's personal corporate vehicle, Thomas Gem Stone Pty Ltd (TGS). A company in the Shield Group (Shield Resources) provided TGS a sum of approximately \$435,000 to enable the purchase. The appellants argued, in the context of an oppression claim, that the funds were advanced by Shield Resources to TGS in a manner that gave rise to a trust of some type. The primary judge rejected that claim. In so doing his Honour found that a conversation to which Ms Li deposed, which was said to evince the parties' intention to create a trust, had not occurred. His Honour made orders winding up companies in the Shield Group, which orders were not challenged.

There were three issues on appeal:

- (1) Was the Chinchilla Property held on a trust of some kind by TGS for Shield Resources in light of a claimed agreement between Mr Ye and Ms Li (whether a “Quistclose-type” trust, an express trust, a resulting trust or a constructive trust)?
 - (2) Did the appellants have standing to pursue the relief of a declaration of trust over the Chinchilla Property?
 - (3) In apportioning costs, did the primary judge err in ordering the appellants to pay the whole of the respondents’ costs below when his Honour had accepted that there was merit in the appellants’ money claims as to unpaid loan, salary and superannuation entitlements?
- The Court (per Kirk JA, Mitchelmore JA agreeing, Adamson JA dissenting in part) dismissed the appeal save on the costs issue:

As to Issue 1:

1. Per Kirk JA, Mitchelmore JA agreeing: each trust claim ultimately turned on the same core issue, namely whether, at the time that the funds were advanced from Shield Resources to TGS to enable purchase of the Chinchilla Property, Mr Ye and Ms Li should be understood to have agreed that the property would not be beneficially owned by TGS but rather by a new company to be established to hold the Chinchilla Property, if and when created for that purpose, and otherwise it would be held on trust for Shield Resources itself: [45]. The evidence taken at its highest did not establish such an intention, with the result that each trust claim failed. It was not necessary to determine whether the claimed conversation occurred: [76]-[77], [95]. The evidence as to subsequent conduct by and large was not relevant, but in any event did not support the appellants’ case: [78]-[94].
Calverley v Green (1984) 155 CLR 242; [1984] HCA 81; *Bosanac v Federal Commissioner of Taxation* (2022) 275 CLR 37; [2022] HCA 34, applied.
Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567; *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491; *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (in liq)* (1978) 141 CLR 335; [1978] HCA 45, considered.
Legal Services Board v Gillespie-Jones (2013) 249 CLR 493; [2013] HCA 35; *Kauter v Hilton* (1953) 90 CLR 86; [1953] HCA 95; *Bahr v Nicolay (No 2)* (1988) 164 CLR 604; [1988] HCA 16; *Byrnes v Kendle* (2011) 243 CLR 253; [2011] HCA 26; *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62; [2015] HCA 6; *Lee v Lee* (2019) 266 CLR 129; [2019] HCA 28; *Raulfs v Fishy Bite Pty Ltd* [2012] NSWCA 135, referred to.
2. Per Adamson JA, dissenting: the primary judge erred in finding that the claimed conversation did not occur: [145]. The conversation proves a common intention to create an express trust, and also attracts the operation of the presumptions of constructive and resulting trusts. Ms Li’s evidence establishes a common intention to create an express trust of which TGS would hold the legal title (pending transfer to Newco) on trust for Shield Resources which funded the purchase of Chinchilla. Those facts also give rise to a constructive trust and, when the transfer failed, a resulting trust in favour of Shield Resources: [149]-[151].
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22; *Lee v Lee* (2019) 266 CLR 129; [2019] HCA 28; *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353; [1956] HCA 28; *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (in liq)* (1978) 141 CLR 335; [1978] HCA 45; *Galati v Deans* [2023] NSWCA 13, referred to.

As to Issue 2:

3. Per Kirk JA, Mitchelmore JA agreeing: in circumstances where the trust claims failed it was unnecessary to determine the issue of standing: [96].

4. Per Adamson JA, dissenting: the appellants' claim was neither inconsistent with the liquidators' control of Shield Resources nor the orderly conduct of the winding up. The liquidators consented to a grant of leave to proceed and the relief sought, if granted, would be to the benefit of the company and its creditors. In these circumstances, the fact that Shield Resources is now in liquidation neither deprives Shield Resources of standing nor provides an impediment to the grant of relief: [155].

Re Imperium Projects Ltd [2017] NSWSC 141, considered.

Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304; [2009] HCA 25, referred to.

As to Issue 3:

5. Per Kirk JA, Mitchelmore and Adamson JJA agreeing: in deciding not to determine the merits of the money claims, the primary judge failed to take into account the material consideration that the appellants were entitled to seek determination by the Court of their loan and debt claims, and that was so even if it had been likely or practically inevitable that the Court would make orders winding up some or all of the companies in the Shield Group. The appropriate order was for the plaintiffs to pay 80% of the costs of the proceedings at first instance: [1], [102]-[103], [157].

House v The King (1936) 55 CLR 499; [1936] HCA 40; Jago v District Court (NSW)

(1989) 168 CLR 23; [1989] HCA 46; Oceanic Sun Line Special Shipping Company Inc v Fay (1988) 165 CLR 197; [1988] HCA 32; Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538; [1990] HCA 55, referred to.

JUDGMENT

MITCHELMORE JA: I agree with Kirk JA.

KIRK JA: The central issue in this appeal is whether a commercial property legally owned by one company is held on a trust of some type in circumstances where the funds for the purchase of the property were provided by another company.

In 2016 the first appellant, Ms Xuxu (Suzie) Li, and the first respondent, Mr Feng (Thomas) Ye, together started a timber export business operated through Shield Resources Pty Ltd. Over time the business expanded, encompassing various companies (the Shield Group). The business operated in South Australia and Queensland and involved the import and export of timber. Mr Ye owned the majority of shares in companies in the Shield Group both directly and through his company Thomas Gem Stone Pty Ltd (TGS), which is the second respondent. He was a director of each company in the group. Ms Li was described as the Chief Executive Officer of the group. The third appellant Mr Xiaosi Chaney (Robin) Qian was described as the Chief Financial Officer. Ms Li and Mr Qian were directors of some companies within the group, and they owned shares in some of these companies both directly and through their respective corporate vehicles (being the fourth and fifth appellants). The second appellant, Mr Kevin Ross Waters-Marsh, is Ms Li's husband. He played the role of Chief Operating Officer in the Shield Group from at least October 2022 to early 2024. He and Ms Li jointly controlled the sixth appellant, which in turn owned shares in the seventh respondent, Shield Hardwood Pty Ltd.

In 2018 some realty in Chinchilla in Queensland (the Chinchilla Property) was acquired and registered in the name of Mr Ye's company, TGS. Shield Resources provided TGS a sum of approximately \$435,000 to enable the purchase. The Chinchilla Property was subsequently used by Shield Hardwood for its export business. A key dispute below, and the main issue raised on appeal, relates to the terms upon which the purchase funds were provided. The appellants argued that the funds were advanced by Shield Resources to TGS to acquire the Chinchilla Property; that TGS was to hold the property on behalf of a new company to be established within the Shield Group (which it is convenient to call Newco) as part of a foreshadowed restructuring exercise; if and when that occurred the legal interest was to be transferred to Newco; and if that purpose or condition failed then the beneficial interest was to be held by TGS for the benefit of Shield Resources. The appellants say that those facts gave rise to a trust of some type, whether a Quistclose-type trust, an express trust, a resulting trust or a constructive trust.

By 2023 the relationship between Mr Ye on the one hand and Ms Li, Mr Qian and Mr Waters-Marsh on the other had deteriorated. The latter three, together with their corporate vehicles, initiated proceedings in the Supreme Court. The primary claim made was that the affairs of Shield Group companies had been conducted oppressively within the meaning of s 232 of the Corporations Act 2001 (Cth). As part of that claim, it was alleged that the beneficial interest in the Chinchilla Property had now vested in Shield Resources, in circumstances where the plan to transfer the legal or beneficial interest to Newco had not come to fruition. The appellants additionally alleged that companies in the group owed them money, both under loan facilities and for unpaid salary and superannuation. They proposed that the appropriate order was that TGS buy them out of the Shield Group and/or that Shield Resources be wound up, and they sought orders for payment of the amounts said to be owed. The respondents contested all of those claims.

The primary judge, Stevenson J, in substance found for the respondents. His Honour held that the appellants' oppression claim was for the most part not made out; Ms Li and Mr Qian had themselves been oppressive in excluding Mr Ye from involvement in Shield Group's operation; no trust was established over the Chinchilla Property (such that a standing issue raised by the respondents with respect to that claim did not need to be determined); in any event the companies in the group should be wound up considering their operational and financial position and the state of the parties' relationship; and, as regarded the money claims, the appellants had established that they were owed some money by companies in the Shield Group, but his Honour decided to leave resolution of those claims to the liquidators to be appointed: *Li v Ye* [2024] NSWSC 1176 (J1).

His Honour gave the parties time to consider his reasons. Orders winding up the Shield Group companies and appointing two joint liquidators were then made by consent the following month. The issue of costs was determined subsequently. The appellants argued that because their money claims had been made out they should not be liable for all of the respondents' costs. His Honour rejected that argument on the basis of "the inevitability of the Shield companies being wound up regardless of the merits of the claims made by the parties", ordering that the proceedings be

dismissed and that the appellants pay the whole of the respondents' costs: *Li v Ye* (No 2) [2024] NSWSC 1421 (J2).

Ms Li, Mr Waters-Marsh and Mr Qian, along with their corporate vehicles, now appeal. They were granted leave to proceed against Shield Resources and Shield Hardwood under s 471B of the Corporations Act by consent. Those companies have entered submitting appearances. Leave was also granted by consent for the appellants to discontinue the proceedings against the third, fifth, sixth and eighth to fourteenth respondents (being various other companies in the Shield Group). The first and second respondents are Mr Ye and TGS, whom it is convenient to call the respondents.

The notice of appeal in this Court raised 10 grounds. Grounds 6-9 concerned the money claims, which were not pressed. The following issues were raised by the remaining grounds:

Was the Chinchilla Property held on a trust of some kind by TGS for, in the event, Shield Resources (grounds 1-5)?

Did the appellants have standing to pursue the relief of a declaration of trust over the Chinchilla Property? This issue only arises insofar as the appellants are successful in making out the trust claim.

In apportioning costs, did the primary judge err in ordering the appellants to pay the whole of the respondents' costs below when his Honour had accepted that there was merit in the appellant's money claims as to unpaid loan, salary and superannuation entitlements (ground 10)?

In my view the appellants have not established that his Honour's conclusion on the trust issue was erroneous. The standing issue therefore falls away. There is force, however, in the appellants' argument as to the apportionment of costs below. The appeal should succeed only to that limited extent. In what follows I summarise the background to these issues (at [11]-[26]), identify relevant legal principles (at [27]-[45]), then address the first and third issues in turn (at, respectively, [46]-[96] and [97]-[103]).

Background

The parties and the primary judge referred to the four key individuals by their anglicised first names. I see no reason not to follow the usual respectful formalities given the nature of the matter and the fact that there can be no confusion between the parties.

Mr Ye had been involved in the timber industry from the 1990s, first in his home country of China, then in Australia after he immigrated here in the early 2000s. He and Ms Li, who also immigrated from China, met some time around the turn of the century. She was working as a migration agent. They decided to conduct business together to benefit from their combined experience – Mr Ye in the industry and Ms Li in business management. The first company through which they jointly conducted business was Shield Resources, established in 2016. Mr Ye and Ms Li “agreed that they would be directors and make decisions together” (J1 [24]). Ms Li commenced acting as the Chief Executive Officer in July 2016. She initially only held (indirectly)

2% in Shield Resources, with that percentage increasing to 4% in September 2016 (pursuant to the initial agreement, according to Ms Li); to 6% in 2019; and to 30% in 2022. The remainder was owned by Mr Ye through TGS (which also owned a majority of shares in the various other Shield Group companies which were incorporated from time to time).

In 2017 Mr Qian joined the business. He, like Ms Li, owned some shares in some of the Shield Group companies through his corporate vehicle.

In 2018 the Chinchilla Property was acquired by TGS, in circumstances which will be outlined in more detail below. Critical to the appellants' trust claim is a conversation that Ms Li testified occurred between her and Mr Ye around 27 August 2018. His Honour was not persuaded that the conversation had taken place (J1 [269]).

After acquisition, the Chinchilla Property was redeveloped to make it a suitable site for the operation by Shield Hardwood of its timber export business.

Mr Ye, Ms Li and Mr Qian had discussions at various times about restructuring the Shield Group, involving a redistribution of shares among the three. It suffices to note here that Mr Ye said to Ms Li and Mr Qian in those discussions that their shareholdings would increase in reflection of their contributions to the business. Some changes in the shareholding structure of the group were made whereby Ms Li's shareholding increased. Notably, as indicated above, Ms Li's interest in Shield Resources increased to 6% in 2019 and to 30% in 2022. The latter increase was a response to the role Ms Li played in procuring funding in a particular respect, including by offering her home as security and providing a guarantee (J1 [134]). Mr Qian had also given a personal guarantee for a particular loan (J1 [139]).

By 2023 the relationship between Ms Li and Mr Qian (together with Mr Waters-Marsh) on the one hand and Mr Ye on the other had deteriorated (J1 [139]). Around May 2023 Ms Li and Mr Qian proposed that the shares in the Shield Group companies be held in proportions 50:30:20 by Mr Ye, Ms Li and Mr Qian respectively, through their corporate entities (J1 [140]-[142]). Against that backdrop Shield Holdings Australia Pty Ltd was incorporated; it can be inferred this was done at Ms Li's instigation. Its shares were initially held in the proportions proposed by Ms Li and Mr Qian. However, the three protagonists subsequently signed documents which had the effect that shares in this company, and units in an associated unit trust, were held on a 64:20:16 split (J1 [38]-[40] and [146]). The primary judge found that this was the result of "hard bargaining" between the parties (J1 [158]). His Honour concluded that the evidence did not enable him to conclude that this split was not fair, nor that it amounted to oppression (J1 [159]).

Shortly after Shield Holdings came into being, Shield Investments QLD Pty Ltd was incorporated as its wholly owned subsidiary (J1 [220]). After the signing of the documents just discussed, Shield Assets QLD Pty Ltd was incorporated as a wholly owned subsidiary of Shield Investments QLD (J1 [222]). A draft subscription agreement – the provenance of which was unclear – circulated amongst the parties which suggested that "ownership" of the Chinchilla Property was to be transferred to Shield Assets QLD (J1 [225]-[226]). At this stage Mr Ye was agreeable, at least in principle, to the Chinchilla Property being transferred to Shield Assets Qld and thus into the

Shield Group (J1 [229]). That, however, did not eventuate.

Relations continued to deteriorate. On 12 September 2023, Mr Ye convened a meeting of shareholders of Shield Holdings, which passed a motion to appoint his wife and two family members as additional directors, over the objection of Ms Li and Mr Qian (J1 [160]-[161] and [342]-[343]).

On 13 November 2023 Ms Li wrote to all staff at the three main Shield Group facilities stating that Mr Ye had breached his directors' duties and a shareholder agreement, and that he and his associates "are not allowed to enter any company facilities" (J1 [334]). After that there were no further board meetings of the relevant companies and Mr Ye was excluded from any participation in the business and affairs of the Shield Group (J1 [335]-[338]).

In January 2024 Ms Li, Mr Waters-Marsh, Mr Qian and their associated companies commenced proceedings in the Federal Court against Mr Ye, TGS and various Shield Group companies (J1 [318]). Those proceedings made claims to similar effect to those subsequently raised in the Supreme Court. They were discontinued soon thereafter. The appellants initiated the present proceedings in April 2024. The claims made and relief sought were summarised at J1 [14]-[19].

The primary judge concluded that after the breakdown of the parties' relationship none of the companies in the group had a functional board (J1 [43]). There was an issue as to the solvency of the group companies, in particular as to Shield Resources, which was the principal trading company in the group. His Honour concluded that the financial records of the Shield Group were "most unsatisfactory" (J1 [104]); that Shield Resources was "likely insolvent" (J1 [107]); and that even if the appellants' oppression claim was successful, a plan Ms Li and Mr Qian had proposed for the business would likely cause the companies to trade whilst insolvent (J1 [114]).

His Honour addressed and rejected the trust claim over the Chinchilla Property – which had been raised as part of the appellants' oppression case – at J1 [179]-[277]. He dealt with the various other strands of the appellants' oppression claim, rejecting each in turn. His Honour's view of the 64:20:16 ownership split of Shield Holdings has already been noted (above at [17]). As to an allegation that Mr Ye improperly used the funds of Shield Resources and Shield Hardwood to fund improvements to the Chinchilla Property, his Honour found there to be a lack of evidence (J1 [279]) and in any event the claim did not compel the relief sought (J1 [284]). As to alleged mismanagement by Mr Ye of the construction of a sawmill facility for the Shield Group in South Australia, his Honour found Mr Ye "may well have been guilty of poor management oversight" but this did not suffice to establish oppressive conduct (J1 [329]-[332]). The primary judge also rejected allegations that Mr Ye was acting oppressively by attempting to remove or "diminish" Ms Li (J1 [339]-[357]), "misappropriating" group funds (J1 [358]-[417]), and refusing to pay a bank loan (J1 [418]-[425]).

His Honour did find that Mr Ye's appointment of his family members to the board of Shield Holdings was so that they could outvote Ms Li and Mr Qian, and that was conduct capable of being oppressive, but it led to no practical consequence (J1 [346]-[351]). Conversely, he found that Ms Li, Mr Qian and Mr Waters-Marsh had acted oppressively to Mr Ye by wrongfully excluding him from management (J1 [338], [430]). His Honour addressed the money claims at J1 [440]-[477], as explained further below.

The primary judge concluded that in light of the wider background of the relationship breakdown, the non-functioning of the boards of the group companies, and the parlous financial position of Shield Resources as the principal trading company, "there can be no point in these companies continuing to trade" (J1 [431]-[432]). He considered that the appropriate course was for orders to be made for all companies in the Shield Group to be wound up, but deferred making those orders to give the parties an opportunity to consider possible alternative arrangements (J1 [438]-[439]). As noted, the parties subsequently agreed to consent orders winding up all companies in the Shield Group. Further written submissions were provided as to costs, which were addressed in his Honour's second judgment.

Most of the issues addressed by his Honour are not raised in the appeal. The appellants challenge only his Honour's conclusions with respect to the Chinchilla Property and as to the costs order. Neither side challenges the winding up orders.

Relevant legal principles

The appellants submitted that the "most natural analysis" would lead to the finding of a trust of the kind described by Gibbs ACJ in *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (in liq)* (1978) 141 CLR 335 at 353; [1978] HCA 45, namely what is sometimes described as a "Quistclose trust". They then said that the "trust also might be characterised as an express trust ... subject to a condition or proviso limiting Shield Resources' entitlement to call for the property, as distinct from directing its transfer to a new company". The appellants further submitted that "the same result would be reached by application of the presumption of resulting trust in the absence of evidence that Shield Resources intended to part with a beneficial interest in the funds transferred to [TGS] or the property acquired with those funds". The appellants also said, without much elaboration, that the alleged trust could be a constructive trust.

The legal issues relating to these various arguments were not addressed in any depth. The appellants submitted that the "precise juridical character of that trust is a largely arid question" in circumstances where the Shield Group is now in liquidation and any specific purpose or condition applying to TGS's holding of the Chinchilla Property had become incapable of fulfilment. The respondents agreed. Nor was the issue addressed in any detail by the primary judge. His Honour indicated that the appellant's case based on an express trust, a Quistclose trust, a resulting trust, along with a claimed agreement or estoppel (two variants no longer the subject of contention), all "depended on my acceptance of [Ms Xi's] evidence concerning the August 2018 conversation", and "I do not accept such a conversation took place" (at J1 [268] and [269]).

Even so, it is appropriate to identify the nature of the various trust possibilities invoked by the appellants, and thus to address whose intentions are relevant, why and as to what.

A Quistclose-type trust

The appellants relied on the following passage in *Mainline* at 353, explaining the significance of the decision in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567:

That case is authority for the proposition that where money is advanced by A to B, with the mutual intention that it should not become part of the assets of B, but should be used exclusively for a specific purpose, there will be implied (at least in the absence of an indication of a contrary intention) a stipulation that if the purpose fails the money will be repaid, and the arrangement will give rise to a relationship of a fiduciary character, or trust.

By implication the appellants' argument was that, analogously to Quistclose, funds were advanced by Shield Resources to TGS for a specific purpose, being for the latter to acquire the Chinchilla Property; TGS was to hold the property for the benefit of Newco, to be established within the Shield Group as part of a restructuring exercise; if and when that occurred the legal interest was to be transferred to Newco; and if that purpose or condition failed then the beneficial interest was held by TGS for the benefit of Shield Resources.

The Quistclose case can be characterised in various ways, including as involving an express trust with two limbs (where the beneficial interest is held for X subject to a condition being fulfilled and otherwise it is held for Y), or as an express trust associated with an automatic resulting trust insofar as there was an incomplete or failed disposition of the beneficial interest: *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491 (*Re AETT*) at 500-502 (Gummow J); JD Heydon and MJ Leeming, *Jacob's Law of Trusts in Australia* (8th ed, 2016, LexisNexis Butterworths) at [2-13]-[2-16]. As Gummow J explained in *Re AETT*, "the facts in such cases are susceptible of infinite variation and the trust is a supple instrument", and to "speak of a Quistclose trust as if it were a new legal institution rather than an example of the particular operation of principle upon the facts as found is to set the listener or reader off on a false path" (at 503). Thus Bell, Gageler and Keane JJ said in *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493; [2013] HCA 35 (citation omitted):

[112] The terminology of a "Quistclose trust" is helpful as a reminder that legal and equitable remedies may co-exist. The terminology is not helpful if taken to suggest the possibility apart from statute of a non-express trust for non-charitable purposes.

Campbell JA identified the appropriate approach in *Raulfs v Fishy Bite Pty Ltd* [2012] NSWCA 135 as follows:

[51] ... Quistclose recognises that sometimes there can be a trust whose terms are that the trust property is to be paid to particular people, and if it is not paid to those people, it is to be held for someone else. That is a matter arising from analysis of the facts of the particular case in accordance with well established principles for identifying when there is a trust, not because there is any separate legal institution known as a “Quistclose trust”.

The brief summary of Quistclose by Gibbs ACJ in *Mainline* is not inconsistent with the understanding articulated in these other sources. In this context, the appellants’ reliance on Quistclose and *Mainline* devolves into a close analysis of whether there was an express and/or resulting trust of some nature, applying the tests applicable for such trusts. Consistently with their generally undetailed approach, the appellants did not seek to articulate whether they invoked Quistclose and *Mainline* on the basis of a two-limbed express trust, or an express trust with an automatic resulting trust, or something else. In this context it is sufficient to assume that it was the former, noting that the appellants did make a separate argument in the alternative that there was a presumptive resulting trust.

An express trust

As regards express trusts, “in order to constitute a trust the intention to do so must be clear and ... it must also be clear what property is subject to the trust and reasonably certain who are the beneficiaries”: *Kauter v Hilton* (1953) 90 CLR 86 at 97; [1953] HCA 95; see also *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq)* (2000) 202 CLR 588; [2000] HCA 25 at [29]. An intention to create a trust involves at its core an intention that the property in question be held for the benefit of another or others, such that it is not part of the assets of the legal owner: see eg *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 618-619; [1988] HCA 16; *Mainline* at 353; *Bosanac v Federal Commissioner of Taxation* (2022) 275 CLR 37; [2022] HCA 34 at [44]. The intention is inferred from the language employed by the party or parties and the relevant surrounding circumstances, including the nature of the transaction and the circumstances of the relationship: *Re AETT* at 503; *Associated Alloys* at [34]; *Byrnes v Kendle* (2011) 243 CLR 253; [2011] HCA 26 at [54] and [112]-[113]. The intention to create a trust is ascertained objectively; it is not necessary that the settlor subjectively appreciates that the arrangements will have the equitable effect of creating a trust so long as they hold the requisite intention just described: *Byrnes v Kendle* at [17]-[18], [55]-[59] and [113]-[115]. These matters are to be established on the balance of probabilities in the usual manner. A previous reluctance to draw an inference that a trust was intended no longer applies: *Bahr v Nicolay* at 618-619; *Re AETT* at 503. If a trust is claimed to have been created by way of an agreement then the manifest intention of the parties to that agreement will be relevant, as it is a matter of construing the agreement’s effect: see eg *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62; [2015] HCA 6 at [109].

Here, the alleged settlor was Shield Resources pursuant to a claimed agreement between Mr Ye and Ms Li. The primary judge found that Mr Ye and Ms Li had earlier “agreed that they would be directors [of Shield Resources] and make decisions together”: J1 [24]. It was thus Ms Li and Mr Ye together who constituted Shield Resources’ controlling mind at the relevant time. On the other

side of the transaction was TGS, as recipient of the funds being provided. Its sole director was Mr Ye. No sensible distinction can be drawn between his intentions on one side of the transaction and his intentions on the other. Thus insofar as an express trust is alleged, the issue involves objective ascertainment of the mutual intentions of Mr Ye and Ms Li.

A resulting trust

The appellants also sought to invoke, in the alternative, what their senior counsel called a “classic resulting trust” – that being a presumed trust arising from the provision of funds to purchase a property, as opposed to an automatic resulting trust such as the kind referred to in *Re AETT* relating to an incomplete or failed disposal of the beneficial interest (note eg *Bosanac* at [93]-[94]). Where it applies, the presumption is that the person who (relevantly) pays the purchase funds for a property intended that the property be held on trust for them to the proportionate extent of their contribution: *Bosanac* at [12]-[16], [44], [51], [104]-[111]. Where it is applicable the presumption operates in effect as an onus of proof, and only has work to do insofar as the evidence of actual (objectively ascertained) intention to create a trust or not is truly equivocal: *ibid* at [13], [64]-[67], and [102]-[110]. Gordon and Edelman JJ described the presumption as “weak” in *Bosanac* (at [98]). In the same case Gageler J said:

[67] ... the presumption ... [is] of practical significance only in rare cases where the totality of the evidence is incapable of supporting the drawing of an inference, one way or the other, on the balance of probabilities about what contributors and purchasers actually intended when they participated in the purchase transaction.

A presumptive resulting trust can thus be understood as an express trust established by way of a particular evidentiary route in particular circumstances. The focus is on the manifest intentions of those parties who are relevant to determination of whether or not a trust was intended to be created. That will involve consideration of the intention of the person providing the funds: *Nelson v Nelson* (1995) 184 CLR 538 at 547 and 586; [1995] HCA 25; *Bosanac* at [13]. Insofar as an agreement is involved between the provider and recipient of the funds, analysis of intention will involve consideration of what was agreed between them. Thus, here, the relevant intentions are again those of Mr Ye and Ms Li.

A constructive trust

The appellants did not develop their constructive trust argument in written submissions to this Court. In oral submissions they said that for this type of trust “[o]ne looks to the joint intentions of the parties and the basis upon which the property was acquired by [TGS]”. The argument thus appeared to be one based upon a “common intention constructive trust”, that being how this variant of the argument was put at first instance. That legal notion is attended by some controversy. It is not necessary to consider it in any detail here. It suffices to note that in the way in which it was put, involving the parties’ common intentions, it did not appear to add much if anything to the other ways in which the appellants had argued their case.

Another argument on constructive trust which the appellants made in the court below was that such a trust arose by reason of Mr Ye deriving the benefit of the Chinchilla Property from an alleged breach of his fiduciary duty to Shield Resources. The primary judge addressed this at J1 [272]-[277]. No such argument was made on appeal.

Dispositions of an interest in land must in general be in writing

Section 23C of the Conveyancing Act 1919 (NSW), being a descendant of the Statute of Frauds, requires that an interest in land be created or disposed of in writing. That requirement extends to creation of a beneficial interest in land by an express trust: see eg Jacob's at Ch 7, [12.13] and [12.15]. That requirement can be sidestepped in certain ways, notably by the doctrine of part performance or the doctrine in *Rochefoucauld v Boustead* [1897] 1 Ch 196: see eg *Li v Tao* (2023) 113 NSWLR 131; [2023] NSWCA 310. The parties did not seek to address this issue, even though the heart of the appellants' case involves an oral agreement. In this context, the respondents can be taken to have conceded that in one way or another s 23C did not preclude recognition of the claimed trust.

The temporal issue

The appellants' case involved an assertion that a trust of some kind came into being at or around the time Shield Resources provided TGS the funds for the purchase of the Chinchilla Property. It is therefore the manifest intentions of Mr Ye and Ms Li at that time which are relevant. As was explained by Mason and Brennan JJ in *Calverley v Green* (1984) 155 CLR 242 at 262; [1984] HCA 81 (citations omitted):

The evidentiary material from which the court might have drawn an inference as to the intention of the parties included their acts and declarations before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction. Evidence of those acts and declarations were admissible either for or against the party who did the act or made the declaration, but any subsequent declarations would have been admissible only as admissions against interest.

Gordon and Edelman JJ spoke to the same effect in *Bosanac* at [113], saying that "[t]he objective intention of the parties is determined at the time when the trust was purportedly created" and, apart from admissions against interest, "[s]ubsequent events and conduct are otherwise not admissible". As shall be seen, the parties failed to recognise this point in their submissions.

Summary

The appellants' case is that there was an agreement between Shield Resources and TGS as to the basis upon which the funds to purchase the Chinchilla Property were being provided. Each alternative of the appellants' trust claim hinges on the intention of Shield Resources, being that of Mr Ye and Ms Li together, along with the intention of Mr Ye as the controlling mind of TGS. As senior counsel for the appellants put it, referring to Mr Ye and Ms Li, "all roads lead back to both of them". The respondents did not argue otherwise.

The core question thus is whether, at the time that the funds were advanced from Shield Resources to TGS to enable purchase of the Chinchilla Property, Mr Ye and Ms Li should be understood to have agreed that the property would not be beneficially owned by TGS but rather by Newco, if and when created for that purpose, and otherwise it would be held on trust for Shield Resources itself. The presumption of a resulting trust only arises insofar as the evidence is entirely equivocal as to the mutual, objectively ascertained intentions of Mr Ye and Ms Li.

Was the Chinchilla Property acquired by TGS on trust?

The appellants have five grounds of appeal directed to the trust issue. They only needed the fourth and fifth. Those grounds claim that the primary judge "ought to have concluded that [TGS] held the Chinchilla Property on express or constructive or Quistclose trust for Shield Resources" (the fourth), or alternatively that it was held on resulting trust "because the Respondents did not identify any evidence capable of rebutting the presumption of resulting trust" (the fifth).

The other grounds do little to advance matters. The second ground asserts that the primary judge incorrectly rejected the evidence of Ms Li which concerned "the nature of the agreement struck" between her and Mr Ye on 27 August 2018 (when it was said the trust came into existence), and the ground then referred to evidence occurring well after that date. The third ground complains that the primary judge failed to have regard to certain evidence, all of which postdates August 2018 other than a generic assertion relating to a claimed failure by Mr Ye "to adduce evidence of any communications with the Appellants concerning the payments [in question] being loans".

The first ground complains that the judge erred in asking of the money provided by Shield Resources to TGS in relation to the Chinchilla Property, "what else could the transfers ... be" other than a loan, given that "[n]o-one suggests the transfers constituted gifts" (J1 [199]). The appellants said that the question revealed error whereby "his Honour perceived there to be only two possible characterisations of the money transferred to TGS: a loan or a gift", whereas it may have been that the money was held on trust instead. This ground may readily be disposed of. It cannot fairly be said that the rhetorical question distorted his Honour's analysis. After posing the question his Honour went on carefully to analyse the facts surrounding the advancement of the money, concluding that they militated against a trust characterisation. In any event, given that the appellants have challenged that conclusion it is now for this Court to reach its own view.

Two key arguments made by the respondents may also readily be dismissed. First, they argued that because the trust claim was substantially based on the alleged conversation occurring on 27 August 2018, the “first thing that would need to be done is to raise by way of a ground of appeal a challenge to the finding that no such conversation took place”, and the notice of appeal did not expressly include such a ground. The submission is misguided. To begin with, the fact that such a challenge was being made was obvious from the appellants’ written submissions, and the respondents had no possible procedural fairness complaint. Further, the primary judge’s lack of persuasion that the 27 August 2018 conversation alleged by Ms Li took place was the crystallisation of his Honour’s conclusion, not the foundation of it. His Honour said at J1 [267], after consideration of the facts, that he did not have an “actual persuasion” that the arrangements between Ms Li and Mr Ye in August 2018 concerning the Chinchilla Property could have been as Ms Li had deposed. His Honour then said, at J1 [269], that he did not accept that such a conversation as had been claimed by Ms Li had taken place. By challenging the primary judge’s rejection of the trust claim the appellants necessarily put in issue his conclusion that the conversation had not taken place.

The other argument was that appellate restraint is required with respect to the review of factual findings which are likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence: note *Lee v Lee* (2019) 266 CLR 129; [2019] HCA 28 at [55]. The respondents submitted that the primary judge did not accept the appellants’ claim of a trust arrangement because he did not accept Ms Li’s evidence of the conversation, and the rejection of Ms Li’s evidence was based on a finding as to her credit. But, as already noted, that finding was the conclusion of his analysis. Moreover, a conclusion that an asserted conversation six years prior to the hearing did not take place does not necessarily stem from an adverse finding as to the credit of the person who gave evidence that it did, let alone a credit finding based upon what the judge saw or heard in court. His Honour made no reference to Ms Li’s demeanour or credibility. And this is not a case where the witness’s evidence was rejected based on an implicit credibility finding: cf *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842 at 844; [1985] HCA 61. On the contrary, the primary judge said the following with respect to Mr Ye, Ms Li and Mr Qian, each of whom gave evidence:

[13] Each of these individuals presented as being confident of the importance of their contribution to the fortunes of the Shield Group and, as between [Mr Ye] on the one hand and [Ms Li], [Mr Waters-Marsh], and [Mr Qian] on the other, dismissive of the contributions of the other. Much was said during submissions about the credit of each of these individuals and how they presented when giving their evidence. For the most part, I am able to resolve the disputes between them and determine the outcome of the proceedings without reference to such matters.

The task for this Court is to reach its own conclusion on the trust claim based on consideration of the facts before it.

The claimed 27 August 2018 conversation

The primary judge observed that to “a large extent, the Plaintiffs’ case concerning the Chinchilla Property depends on” the alleged conversation between Ms Li and Mr Ye around 27 August 2018 (J1 [184]). Consistently with that understanding, the appellants’ argument in this Court commenced by focusing on that claimed conversation. Before addressing the conversation, it is necessary to explain something of the context in which it occurred.

As noted above, Ms Li commenced working as CEO in July 2016. At that time the only relevant Shield entity was Shield Resources. Mr Qian started acting as CFO in mid-2017. Shield Resources was engaged, notably, in a softwood export business operating from Bordertown in South Australia, and plans developed for it also to conduct a sawmill operation. It seems that Shield Resources only started selling softwood logs from Bordertown in early 2019.

According to Ms Li’s evidence, in 2018 Mr Ye suggested that there was a market for Queensland hardwood in China, to be exported as logs. Ms Li’s evidence was that she, Mr Ye and Mr Qian had a conversation to the effect that a separate company would be used for this business. To that end, a company that Mr Qian had previously used for other purposes was renamed Shield Hardwood Pty Ltd. Ms Li had earlier obtained a 4% shareholding in this company, with TGS holding the remaining 96%. Ms Li’s (indirect) shareholding in Shield Resources and in Shield Hardwood was increased to 6% in March and April 2019 (respectively). She said this occurred because Mr Ye “wanted to recognise my efforts in setting up the Business”.

Ms Li explained that another company, Shield Equipment Pty Ltd, was incorporated on 19 November 2018 to hold and manage sawmill production equipment and machinery in South Australia. It was thus associated with Shield Resources’s operations. The initial shareholding in this company is not apparent, but it may be inferred it was probably owned by TGS and Ms Li in the same proportions as the other two companies.

Although the parties referred to the Shield Group, none of these companies were owned by a common holding company.

Ms Li and Mr Ye gave conflicting evidence as to who located the Chinchilla Property for use in the Shield Hardwood log export business, but the primary judge did not consider it necessary to resolve the issue (and nor do I). It appears that it had been identified by mid-2018.

Ms Li’s affidavit evidence as to the claimed conversation on 27 August 2018 was as follows:

[90] In the discussion I had with [Mr Ye] around 27 August 2018, [he] also told me that:

- (a) since the Chinchilla Property was being purchased for the Shield Hardwood (Chinchilla) Log Export Business – part of the Shield Group’s Business – Shield Resources should pay for the Chinchilla Property;

- (b) property assets such as the Chinchilla Property were best held in a “clean” company rather than an operating company that was heavily involved in the operations of the Business and incurring trading debts and the like;
 - (c) for that reason, although the Chinchilla Property was going to be paid for using Shield Resources’ funds, it would be better to put it in the name of Thomas Gem Stone, a company he controlled, in order to protect the Property from what he called “operational risks”;
 - (d) Thomas Gem Stone would only hold the Chinchilla Property until arrangements were made for a new company in the Shield Group to be established to hold the Chinchilla Property (NewCo), at which time the Chinchilla Property would be transferred to NewCo; and
 - (e) the shareholdings of NewCo would be in the same proportions as agreed in due course for the whole Shield Group.
- [91] At the time, I trusted [Mr Ye] – only a few months prior, and as I have said, [he] said to [Mr Qian] and me that we were so important to the Business and that we were “unbreakable” and “like an iron triangle”. Because I trusted [Mr Ye], I told him that I agreed with what he proposed (the Chinchilla Property Agreement). I believed [Mr Ye] when he said these things, and understood from the discussion that Thomas Gem Stone would hold onto the property as part of the Chinchilla Property Agreement. I did not give any real thought to when or how these arrangements would be made, and thought that it was something that would be worked out later, and probably during the course of the restructuring that [Mr Ye] had repeatedly said would occur in conjunction with the raising of funds for the major sawmill project works in South Australia.
- [92] If I had known that [Mr Ye] would try to claim that the property was that of Thomas Gem Stone, and not held for the benefit of Shield Resources or a company appointed by it to hold the land for its benefit, I would not have agreed to allow Shield Resources’ funds to be used to buy the property, and would have sought instead to have the land bought by Shield Resources or another company with the same directors and ownership.

Despite Ms Li’s reference at [90] to what Mr Ye “also told” her on the identified date, she did not give evidence of anything else said on that date. Nor did she identify how it was that she could remember that date, in circumstances where she accepted she made no note of the conversation (see J1 [185]).

Mr Ye denied that such a conversation took place.

Mr Qian was not a participant in the claimed conversation, but he gave the following affidavit evidence, which was not tested in cross-examination (this paragraph was actually objected to and rejected, with leave to adduce evidence of the specific matters discussed; some limited further evidence was given to support the paragraph; and in those circumstances the appellants treated this paragraph as having been revived):

In our discussions about buying the property, [Mr Ye] said to us the Chinchilla Property should be held by a ‘clean’ company, separate from the trading company, for risk control. He suggested that his company, Thomas Gem Stone, was a clean company that could be used for the purchase for now, and that when the Business was restructured later, the Chinchilla Property would be transferred into the Shield Group. I accepted that [Mr Ye] would act in the way he described, and agreed.

In my view, even if some conversation took place and an agreement was reached as alleged by Ms Li, it does not suffice to establish a mutual objective intention to create some kind of trust. There are three, overlapping core difficulties with the appellants’ argument.

First, as the appellants themselves put it in submissions, based on the claimed conversation, the property was put into the name of TGS for “the agreed purpose of asset protection”. That is an entirely plausible aim. Similarly, Ms Li also testified that when the “Nangwarry Property” in South Australia was acquired in 2021 for the purpose of the proposed sawmill operations, the three protagonists agreed that a new company would be incorporated (Shield Holdings South Australia Pty Ltd) to purchase and manage it so “that there was a ‘clean’ company that owned the asset”. That company was owned by the three in the proportions of 93% to TGS, 6% to Ms Li (indirectly), and 1% was held by another investor through a company called Awake.

Yet the purpose of asset protection would be defeated if the beneficial ownership was held by Shield Resources, being the operating company for the South Australian business, where the very concern said to have motivated the arrangement was to protect the Property from “operational risks”. This point is enough of itself to defeat the presumptive resulting trust argument, for it manifests a positive intention that the beneficial interest not be held by the company providing the funds. On Ms Li’s own evidence there is nothing equivocal to be resolved by the presumption. More generally, this point is also inconsistent with any other variant of an argument by which the beneficial interest was to be held, even conditionally, by Shield Resources.

Lest there be any suggestion that the protagonists would not have understood the subtleties of the differences between legal and beneficial ownership, that does not assist the appellants. Even apart from the fact that the issue is to be judged by a reasonable businessperson in the position of the parties, it is clear from Ms Li’s own evidence that the protagonists had a clear and subtle understanding of the desirability of having major assets owned by companies separate from the operating entities. Whether or not they understood that ownership has two dimensions in common law systems, there is no reason to doubt that (on Ms Li’s evidence) they intended the whole ownership interest to be protected.

Senior counsel for the appellants accepted that “to achieve the aim of asset protection it would be necessary that the beneficial owner should not be in an operating company such as Shield Resources”. However, he argued that “it would be consistent with beneficial ownership ultimately being held by another company in the Shield Group”. So much can be accepted, so long as that company was not itself owned by an operating company. Nevertheless, all variants of the appellants’ trust arguments involve Shield Resources having some potential beneficial interest, as

is being asserted in this very proceeding.

The second difficulty is that the reported conversation does not of itself imply the creation of a trust. The claimed asset protection aim could be achieved by establishing a new company to own the Chinchilla Property, to be owned in some proportions as agreed, as raised by points (d) and (e) in Ms Li's recitation of the claimed agreement. Her reference to the foreshadowed restructuring harkens back to what she had said earlier in her affidavit:

In March 2018 ... [Mr Ye] said to [Mr Qian] and me that we were so important to the Business and that we were "unbreakable" and "like an iron triangle". He said that right now he was holding the shares for all of us, but when funding arrived for the major works, he would redistribute the shares as part of a restructuring of the business and its ownership. He referred to this future "restructure" on a number of occasions over time.

The claimed statement in point (d) that TGS "would only hold the Chinchilla Property until arrangements were made for a new company in the Shield Group to be established" to hold it is perfectly consistent with the legal and beneficial interest being held by TGS until a new company, to be owned in proportions yet to be determined, was established. That understanding is also consistent with the version given by Mr Qian. At that time TGS held 96% of Shield Resources and Shield Hardwood, and Ms Li held 4% of each. In that context it is plausible that Mr Ye would have intended the Chinchilla Property to be held by his own company, with the money being loaned by Shield Resources. The primary judge noted that it was "common ground that there was a running account in place between [TGS] and Shield Resources" (J1 [203]). Such an intention is consistent with an understanding that there would be a restructuring down the track.

This point is reinforced by Ms Li's evidence that "I did not give any real thought to when or how these arrangements would be made, and thought that it was something that would be worked out later". A general plan to move the Chinchilla Property in the future into an as yet unincorporated company, to be owned in proportions yet to be determined, all to "be worked out later", might be consistent with the beneficial interest being held other than by the company holding legal title to it in the meantime, but it certainly does not require such a conclusion.

The potential for restructuring leads to the appellants' third core difficulty. One of the core requirements for establishment of a trust is that it is reasonably certain who the beneficiaries are (see above at [35]). Even accepting Ms Li's evidence, that requirement is not satisfied here, for she raised different permutations:

Her recitation of the claimed agreement at [90] in her affidavit refers to the Chinchilla Property being transferred to Newco, the shareholdings of which would be "in the same proportions as agreed in due course for the whole Shield Group". That statement indicates an intention that Newco would not be owned by a Shield Group holding company, nor by Shield Resources, but rather by the protagonists themselves, without any suggestion that Newco's interest would then be held on trust for any other entity. The division of ownership was to be achieved through Newco itself.

Ms Li also suggested at [92] in her affidavit that her understanding was that the property would be “held for the benefit of Shield Resources or a company appointed by it to hold the land for its benefit”. Thus she there suggests that the land was to be held “for the benefit”, directly or indirectly, of Shield Resources.

In cross-examination she said that the discussion was that “Shield Group is going to have this property, but at that time, we hadn’t decided which entity to hold it”, so Mr Ye suggested “his own company can hold it for Shield Group”. She later said “the real owner is the Shield Group”. There was no one legal entity at that time constituting a holding company for the Shield Group; there were separate companies in existence.

The appellants’ case is and always has been fundamentally uncertain as to who or what was to obtain the beneficial interest in the Chinchilla Property. As the primary judge noted, that uncertainty was manifest in the claim being articulated in various ways in the proceedings (J1 [241]-[253]). In the appellants’ amended summons, consistently with what Ms Li said at [92] in her affidavit, a declaration was sought that TGS held the Chinchilla Property on trust for Shield Resources either “absolutely” or, in the alternative, on the basis that it was held for Shield Resources pending the establishment of a new company, to which the Chinchilla Property was required to be transferred, owned 69.5% by TGS, 30% by Ms Li’s company, and 0.5% by Awake. Yet those proportions reflected the ownership of Shield Resources by the time of proceedings (see J1 [26]) and no part of Ms Li’s evidence suggested any such consensus as to proportions had been reached at the time of the alleged conversation and agreement.

The appellants’ Amended Commercial List Statement (ACLS) alleged that the funds were provided to TGS “on the basis that a new company in the Shield Group would be established with the same shareholdings as Shield Resources (NewCo) to hold the Chinchilla Property”. That variant did not identify the percentages. It was not entirely consistent with Ms Li’s evidence at [90(e)] that the shareholding in NewCo would be in the same proportions as “the whole Shield Group”. In the alternative, the ACLS alleged there was an agreement between Ms Li, Mr Ye, TGS and Shield Resources under which TGS was “obliged to hold the Chinchilla Property for the benefit of Shield Resources pending the establishment of NewCo, and to do all things necessary to facilitate the establishment of NewCo and the transfer of the Chinchilla Property to NewCo”.

In their closing written submissions, the appellants asserted first an express trust, saying that “Shield Resources, the entity that paid for the Chinchilla Property, is the object of the trust”, and “[t]he object was not New Co because, at the time, New Co was not in existence”. Next, in the alternative, they asserted a “common intention constructive trust” or a constructive trust based on breach of fiduciary duty. Next they asserted a Quistclose-type trust, then a resulting trust, then an estoppel, and finally they relied on the claimed agreement (noting that the claims based on breach of fiduciary duty, estoppel and contract were not reagitated on appeal).

In their closing oral submissions, however, things were put differently again. The appellants eschewed a claim that the Property was purchased on a simple trust for Shield Resources. As senior counsel appearing for the appellants in the court below put it, “we can’t say to your

Honour the intention and agreement was that it would be held by [TGS] for Shield Resources such that Shield Resources can now say, “Transfer it to me, please”. That was not consistent with what Ms Li had said in her affidavit at [92], nor with the primary way in which it had been put in the Amended Summons and written submissions. Senior counsel then said that rather the “primary case” was based upon the alleged agreement, saying that was “buttressed to the extent necessary by estoppel and part performance”, seemingly to address any issue about it being in writing. He said that the agreement was that Newco would have the same shareholdings as Shield Resources which, as the primary judge noted, was not what Ms Li had claimed (J1 [249]-[253]). Senior counsel went on to explain that the “B case” was a Quistclose-type trust, and the “C case” was breach of fiduciary duty.

In sum Ms Li’s own evidence involved different possibilities as to which entity was to hold the beneficial interest in the Chinchilla Property in due course (being either Newco or Shield Resources itself). And the appellants’ articulation of the legal argument varied at different times, both as to which entity was to hold the beneficial interest and in what proportions (whether the specific percentages pleaded, or the same proportion as Shield Resources, or the same proportion as the Shield Group as a whole). The appellants’ difficulty in consistently and clearly articulating their case reflected the uncertainty at the heart of the evidence upon which it relied.

At its highest, Ms Li’s evidence about the claimed agreement reached in August 2018 was that the Chinchilla Property would be bought by TGS for asset protection purposes, using funds provided by Shield Resources, and at some time in the future it would be transferred to a new company owned by Mr Ye, Mr Qian and herself in proportions to be determined. That does not suffice to establish any beneficial interest in the property in Shield Resources. The claimed agreement was always the foundation of the appellants’ claim. The conclusion that it does not support any kind of trust as alleged means that the appeal on this issue fails. For completeness, however, I will address the other evidence referred to by the appellants.

On this view it is not necessary to consider whether or not the conversation alleged by Ms Li took place.

The description as a “loan”

It was not disputed that Shield Resources transferred \$19,000 to TGS on 17 September 2018 to pay for the deposit on the Chinchilla Property, and transferred a further \$416,584.48 on 27 November 2018 to pay the balance of the purchase price and related expenses such as stamp duty and solicitors fees (see J1 [189]-[192]). The latter transaction was described at the time in Shield Resource’s bank statement with the description “Wdl Branch Eastwood”, and TGS’s bank statements as “Shield Resources Loan”. The primary judge noted that the parties proceeded on the basis that the description in the TGS statement reflected Mr Ye’s instructions. TGS became the registered proprietor on 12 December 2018.

As noted above, it was common ground that there was a “running account” between TGS and Shield Resources (J1 [203]).

Mr Ye's description of the transaction as a loan by Shield Resources is the only contemporaneous record of the nature of the transaction. The appellants conceded that this description was "obviously a valuable piece of evidence" for Mr Ye's case, but said that in the absence of any evidence that Ms Li was aware of or adopted that description, it was "of limited assistance" in characterising Shield Resources' purpose in funding the purchase.

Senior counsel for the appellants made the ambitious argument that "the word 'loan' may have a particular significance in the Court of Appeal, for example, but between business people working nuts and bolts issues, it wouldn't be dispositive". The difference between a loan and ownership is hardly arcane; they are notions in common use. A reasonable businessperson would understand the difference well.

In my view the evidence in this business record is of significant weight even given the absence of evidence that Ms Li knew of it. The relationship between the protagonists at the time was harmonious. Mr Ye had no reason to misdescribe what had occurred or what had been agreed. This evidence supports the conclusion I have reached above insofar as it indicates that whatever had or not been discussed, it did not amount to creation of a trust arrangement.

In August 2019 TGS transferred to Shield Resources a sum of \$470,000 which was \$34,415.52 over the total purchase price advanced, with the entry in Shield Resources' account reading "Feng Ye Loan Ye Ft" (J1 [202]). At the time the relationship between Ms Li and Mr Ye was still harmonious (J1 [205]). It seems that "Ft" referred to a family trust. The primary judge said that the difference "may constitute a payment on account interest" (J1 [203]). The appellants submitted, with some merit, that it was difficult to see any factual foundation for that suggestion. On the other hand, it was consistent with there being a running account with payments backwards and forwards.

The appellants noted that Ms Li testified that Mr Ye never suggested to her that these funds were transferred to pay Shield Resources back for the purchase of the Chinchilla Property, and she further indicated that Shield Hardwood was to pay the interest on a bank loan made to TGS which was the source of the funds for the claimed repayment. They say these facts are supportive of their case.

The weight of the evidence identified at [83] outweighs the point made at [84]. However, I do not place any reliance either way on this repayment evidence. The repayment occurred some 12 months after the claimed agreement, and some nine months after the main transfer to pay for the Chinchilla Property. The interest payments occurred subsequent to that. This evidence does not meet the requirement of contemporaneity identified above at [42]-[43] and cannot be characterised as an admission against interest.

Subsequent use of the property

As explained, after the acquisition of the Chinchilla Property it was used by Shield Hardwood as a timber processing site. For that purpose it was redeveloped (J1 [209]), with improvements including construction of permanent buildings and facilities paid for by Shield Resources and Shield Hardwood, totalling some \$638,000 (J1 [210]). The property had additionally been used as

security for borrowings by companies within the Shield Group (J1 [215]). These facts were said by the appellants to be, “[w]hile not in [themselves] dispositive”, “consistent with the Chinchilla Property forming part of the property of the Shield Group”.

As to the improvements, the appellants submitted that the judgment below “did not address the purpose of the parties in permitting Shield Resources’ funds, or Hardwood’s funds, to be used to improve the property”. His Honour did in fact address that purpose, saying that “the expenditure on these improvements related to the use of the Chinchilla Property for the purpose of carrying on a timber business, and it was Shield Hardwood, not TGS, that carried on the business” (J1 [214]). His Honour acknowledged the improvements increased the property’s value by some \$313,800 (J1 [212]) but that was to be considered also in the context of Shield Hardwood enjoying the use of the site “evidently without charge or any formal arrangements” (J1 [213]). Moreover, under no variation of the appellants’ trust case is Shield Hardwood a beneficial owner of the property. Whilst expending money on improvements of the property is consistent with beneficial ownership, it is not uncommon for a business making use of a property to spend money on improvements to make it more suitable for its use. Ms Li also gave evidence that “[f]unds generated by the various businesses in the Shield Group have been available to, and used for, the needs of all businesses over time”.

As to the use of the Chinchilla Property as security for borrowing by companies within the Shield Group, that was not antithetical to the respondents’ case either. Mr Ye, the sole shareholder of TGS, was also the majority shareholder of the Shield Group companies. It would have been in his interest to secure loans for the companies using TGS’s property. This was further illustrated by the fact that Ms Li, a minority shareholder in the group, had used her own home as security for the group’s borrowing (see J1 [134]).

In any case, once again, none of this evidence of subsequent conduct meets the requirement of contemporaneity, nor can it be characterised as an admission against interest by either side.

Restructure negotiations

The primary judge found that in the course of 2023 Mr Ye “was agreeable, at least in principle, to the Chinchilla Property being transferred to Shield Assets QLD, and thus into the Shield Group”, and his Honour accepted that showed “that the possible fate of the Chinchilla Property was a matter very much on the table during the restructure discussions” (J1 [229]). Specifically, the judge accepted that the three protagonists “did have a discussion ... in September 2023 about the subject of the Chinchilla Property being transferred to Shield Assets QLD” (J1 [239]). The appellants submitted that it was hard to understand why that would have been so if there had been no agreement that the Chinchilla Property “would be held for the benefit of Shield Resources or the Shield Group”.

Yet much had happened in the intervening five years. Notably, by that stage Ms Li and Mr Qian had mortgaged their own property to raise funds for Shield companies. And, as noted above, funds from Shield companies had been spent on improving the property. In that context it is not

surprising that Mr Ye would be prepared to bring the Chinchilla Property to the table as part of the restructuring discussions. In any case, again, the passage of that time and the significance of what had occurred in the interim undercuts the claimed relevance and significance of this evidence.

When Ms Li first asserted the existence of a trust

Ms Li did not dispute TGS's beneficial ownership of the Chinchilla Property at any point prior to the Federal Court proceedings, which were commenced in February 2024 (J1 [263]). The appellants conceded as much in submissions before this court. When cross-examined about the point, Ms Li asked rhetorically: "why would I make complaint if [Mr Ye] always said he's going to transfer the property to Shield Group, as agreed?" But as the primary judge pointed out, even if that had been the mentality of Ms Li prior to 2023, it is difficult to understand why she did not complain when the restructuring discussions did not result in the transfer (J1 [265]).

In my view this point can be characterised as an admission by silence. It tends to undercut Ms Li's evidence as to the content of the claimed conversation in August 2018. However, as explained, I do not consider it necessary to determine whether that conversation took place, so it is not necessary to rely on this point.

Conversely, the appellants submitted that Mr Ye did not adduce any evidence of any communications with Ms Li or Mr Qian about the transfers from Shield Resources to TGS, especially as the primary judge had found that Mr Ye and Ms Li had agreed to make decisions together. The point has some, but limited, force. The affidavits were prepared nearly six years after the events in question.

Conclusion

The testimony of Ms Li and Mr Qian at its highest does not establish that the beneficial interest in the Chinchilla Property was not intended by Mr Ye and Ms Li to vest in TGS, but rather was to be held to the benefit of Newco or, failing that, to the benefit of Shield Resources. The conclusion that no trust was intended is reinforced by the only contemporaneous document, in which Mr Li labelled the funds transfer a "loan". The evidence of subsequent conduct relied upon by the appellants does not make out their claim, and in any case is not relevant. The primary judge was correct to reject the appellants' trust claim, in all of its iterations.

That being so, the standing issue does not arise. As the arguments raised in relation to that issue were somewhat complex, it is appropriate to leave its resolution to some future case where the point is dispositive.

Costs of the proceedings below

Ground 10 challenges the costs order made by the primary judge. It is raised independently of the trust claim. The appellants argued that they should not have been ordered to pay the entirety of the costs of the proceedings below when his Honour had accepted that the appellants' claims for repayment of loans and payment of certain salary entitlements (including superannuation) had merit. As the award of costs involves a discretion, it is necessary for the appellants to establish error of the kind referred to in *House v The King* (1936) 55 CLR 499 at 505; [1936] HCA 40.

As regards the loans, the primary judge was satisfied that one or more Shield Group companies owed money to Ms Li, Mr Qian and the fourth appellant (a company that Ms Li used as a corporate vehicle), but his Honour was unable to determine the exact figures payable (J1 [462]-[463], [470]). Indeed the respondents accepted that one of the Shield companies owed the fourth appellant some \$1.4 million, although they submitted that the company was "in no position to pay the amount in question" (J1 [477]). His Honour said that "[i]n view of my overall conclusion as to the appropriate manner in which these proceedings should be disposed of, I do not propose to consider the matter further" (J1 [463]). By implication, his Honour considered it was sufficient and appropriate for the liquidators who would be appointed to wind up the companies to determine the exact amounts owed (see J1 [440]).

As to the salary claims, his Honour noted the respondents' acceptance that entitlements were payable to Ms Li, Mr Qian and Mr Waters-Marsh (J1 [478]-[479]). The issue was quantification.

It is apparent that his Honour considered the appellants had not made a clear case as to quantification in some respects. However, he did not suggest that it was not possible to make some reasonable estimation where the quantification was not clear. And quantification was admitted for at least one significant claim.

His Honour determined the costs issue in J2. He accepted that there was "some substance" in the appellants' submissions that they should not have to pay the entirety of the costs when they had established that their money claims had merit (J2 [10]). However, he said that the "wider background" summarised at J1 [20] "pointed to the inevitability of the Shield companies being wound up regardless of the merits of the claims made by the parties" (J2 [15]). His Honour concluded that "[i]n these circumstances, I am persuaded that the appropriate order is that the plaintiffs pay the defendants' costs of the proceedings" (J2 [16]).

Even if it is accepted that it was practically inevitable that the companies would be ordered to be wound up – a point that it is unnecessary to resolve – that outcome did not preclude determination of the money claims. Nor did the fact that the companies may not be able to pay the claims in part or whole. The basis on which his Honour decided not to determine the merits of the money claims is not apparent. A party who has regularly invoked the jurisdiction of a competent court has a *prima facie* right to insist upon its exercise and to have their claim heard and determined: *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76; [1989] HCA 46; *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 241; [1988] HCA 32; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 554; [1990] HCA 55. Judgment on a debt claim

is not a discretionary remedy. However, it is not necessary to address whether or not his Honour erred in declining to determine the loan and salary claims. It suffices to note that his Honour failed to take into account the material consideration that the appellants were entitled to seek determination by the Court of their loan and debt claims, and that was so even if it had been likely or practically inevitable that the Court would make orders winding up some or all of the companies in the Shield Group. This is a *House v The King* error.

The apportionment proposed by the appellants below, and again on appeal, is that they pay 80% of the respondents' costs at first instance. The respondents did not suggest that this would be an inappropriate percentage were the appellants to succeed on this point. The apportionment should be as the appellants proposed.

Orders

The appellants have succeeded on one of the three issues they raised. Most of the argument on appeal was directed to the first two issues. In the circumstances it is appropriate that the appellants pay 60% of the costs of the appeal (which, on a net basis, reflects an estimate of 80% overall success for the respondents on the appeal).

The orders of the Court should be as follows:

Appeal allowed in part.

Order 2 made by Stevenson J on 8 November 2024 is set aside and, in lieu thereof, order that the plaintiffs are to pay 80% of the defendants' costs.

The appellants are to pay 60% of the first and second respondents' costs of the appeal.

ADAMSON JA: The appellants and the first and second respondents, who are the active parties to this appeal, are shareholders in a group of companies (the Shield Group) which carried on a timber business in Queensland and South Australia. In the Court below, the appellants sought relief under s 233 of the Corporations Act 2001 (Cth) on the basis of alleged oppressive conduct; a declaration that a property at Chinchilla in Queensland (Chinchilla) which was owned by the second respondent, Thomas Gem Stone Pty Ltd (Thomas Gem), was held on trust for the fourth respondent, Shield Resources Pty Ltd (Shield Resources); and judgment on account of loans and salary entitlements against a number of companies in the Shield Group.

The primary judge rejected the appellants' oppression claims, ordered that the Shield Group be wound up, and declined (on a basis which is not explained by the reasons) to determine the salary and debt claims: *Li v Ye* [2024] NSWSC 1176 (the principal judgment or PJ). His Honour ordered the appellants to pay the respondents' costs of the proceedings: *Li v Ye* (No 2) [2024] NSWSC 1421 (the costs judgment).

The appellants allege that the primary judge was in error in:

failing to find that Chinchilla was held by Thomas Gem on trust for Shield Resources (grounds 1-5); and

ordering the appellants to pay all of the respondents' costs of the proceedings in the Court below (ground 10).

The principal natural persons involved in this dispute are Ms Xuxu (Suzie) Li, the first appellant; Mr Xiaosi (Robin) Qian, the third appellant; and Mr Feng (Thomas) Ye, the first respondent. The parties were referred to by their Anglicised names in the Court below, the PJ, and in this Court.

Mr Ye is the majority shareholder of each company in the Shield Group through his company, Thomas Gem, and is a director of each company. Ms Li holds shares in each company (either personally or through her related companies). Since July 2016, she has been the Chief Executive Officer (CEO) of the Shield Group. Since 2017, Mr Qian has been the Chief Financial Officer (CFO) of the Shield Group and, through a related company, holds shares in Shield Holdings Australia.

Shield Resources was the first entity in the Shield Group. Ms Li and Mr Ye, through Shield Resources, conducted a softwood logging export business from a facility in Bordertown and a property at Nangwarry in South Australia (the Nangwarry Property) (PJ [22]). Although Ms Li's shareholding was only 4%, she and Mr Ye agreed that, as directors, they would "make decisions together" (PJ [24]). The primary judge found, in accordance with the evidence, that Ms Li's shareholding in Shield Resources increased to 6% in 2019 and to 30% in 2022 "in recognition of her role in securing funding to refinance the purchase by Shield Holdings South Australia of the Nangwarry Property" (PJ [25]). Ms Li's contribution to that refinance included offering her home and a personal guarantee as security (PJ [134]).

On 29 July 2017, Ms Li and Mr Ye obtained a 100% shareholding in a company which operated a hardwood timber export business from Chinchilla (PJ [29]). As a consequence, the company, which was renamed Shield Hardwood, became part of the Shield Group. In about 2018, Shield Resources provided the funds for the purchase of Chinchilla by Thomas Gem, which became its registered proprietor (PJ [30]).

The critical question for this Court is whether the advance of funds for the purchase of Chinchilla:

constituted a loan from Shield Resources to Thomas Gem (as the respondents contended and the primary judge found); or

served to create a trust of which Thomas Gem was trustee, Shield Resources was the beneficiary and Chinchilla comprised the trust property (as the appellants contended).

In the Court below, the appellants pleaded their claim for a declaration that Thomas Gem held Chinchilla on trust for Shield Resources in their amended Commercial List Statement filed 29 May 2024 as follows:

CHINCHILLA PROPERTY CLAIMS

Circumstances giving rise to a trust including the Chinchilla Property Arrangement

216. On 14 September 2018, Thomas Gem Stone entered into a contract with Danma Property Pty Ltd (ACN 120 235 681) for the purchase of the Chinchilla Property (Chinchilla Sale Contract) for AUD\$418,000.

Particulars

The Chinchilla Sale Contract was express and in writing in a document titled "Contract for Commercial Land and Buildings" dated 14 September 2018.

217. During the period from September to November 2018, Shield Resources provided Thomas Gem Stone with the funds required to enter into and complete the Chinchilla Sale Contract, and did so using funds borrowed from Mr Zhong for which it is now liable.
218. The funds were provided by Shield Resources on the basis that Thomas Gem Stone would hold the Chinchilla Property not for itself, but instead on the basis that a new company in the Shield Group would be established with the same shareholdings as Shield Resources (NewCo) to hold the Chinchilla Property as part of a proposed restructuring of the Shield Group, with the Chinchilla Property to be transferred to NewCo upon NewCo's formation (the Underlying Purpose for the provision of funds).

Particulars

This was discussed and agreed between Suzie and Thomas prior to the purchase of the Chinchilla Property.

219. Further or in the alternative, Thomas and Thomas Gem Stone are parties to an agreement (Chinchilla Property Arrangement) with Suzie and Shield Resources under which Thomas Gem Stone is obliged to hold the Chinchilla Property for the benefit of Shield Resources pending the establishment of NewCo, and to do all things necessary to facilitate the establishment of New Co and the transfer of the Chinchilla Property to NewCo.

Particulars

The Chinchilla Property Arrangement was discussed and agreed between Suzie and Thomas prior to the purchase of the Chinchilla Property.

220. On or about 12 December 2018, the Chinchilla Property was registered in the name of Thomas Gem Stone (and remains so registered today).
221. The Underlying Purpose has not materialised and, in breach of the Chinchilla Property Arrangement, Thomas Gem Stone and Thomas have not facilitated the transfer of the Chinchilla Property as discussed and agreed.

221A. In the course of planning for a proposed restructure of the Shield Group in 2023, it was discussed and agreed between the parties, consistently with the Chinchilla Property Arrangement, that a company called Shield Assets Qld Pty Ltd would be established as a wholly

owned subsidiary of an ultimate holding company in the Shield Group (Shield Holdings Australia) for the purpose of holding the Chinchilla Property, and these companies were established for this purpose, but the restructuring discussions broke down and the restructuring was not finalised as later described.

222. In the premises:

- (a) Thomas Gem Stone holds the Chinchilla Property on an express, resulting, constructive or Quistclose trust for Shield Resources; or
- (b) alternatively, Thomas and Thomas Gem Stone are obliged to give effect to the Chinchilla Property Arrangement.

The primary judge's determination of the appellants' claims in the Court below

In the principal judgment, the primary judge:

did not find that Mr Ye's conduct gave rise to oppression or was commercially unfair and therefore did not order the Shield Group to be wound up on that basis (PJ [157]-[159]);

rejected the appellants' contention that Chinchilla was held on trust for Shield Resources (PJ [179]-[291]) (which is the subject of grounds 1-5);

found that because Shield Resources was probably insolvent and the parties' relationship had broken down, "there was no point in these companies continuing to trade" (PJ [431]-[432]);

ordered that the companies in the Shield Group (who were parties to the proceedings) be wound up under ss 459B (the insolvency ground) and/or 461(1)(k) (the just and equitable ground) of the Corporations Act, although no party sought orders under those sections the reasons did not specifically address those provisions; and

declined to deal with the money claims, despite finding that significant amounts were due to Ms Li, her husband and Mr Qian (PJ [462] and [470]).

In the costs judgment, the primary judge determined that the appellants ought pay the respondents' costs of the proceedings on the ordinary basis. His Honour's reasons indicated that the principal basis on which this order was made was that a winding up order was inevitable and the respondents had "embraced" it from the outset whereas it had only been "belatedly embraced" by the appellants.

The finding at (2) is principally based on the following.

The primary judge correctly noted that the appellants' case that Chinchilla was held on trust for Shield Resources was based on Ms Li's evidence of a conversation with Mr Ye in 2018. At PJ [182], his Honour said:

Suzie said that on 27 August 2018 she had a conversation with Thomas in which Thomas told her that:

“(a) since the Chinchilla Property was being purchased for the Shield Hardwood (Chinchilla) Log Export Business - part of the Shield Group’s Business - Shield Resources should pay for the Chinchilla Property;

- (b) property assets such as the Chinchilla Property were best held in a ‘clean’ company rather than an operating company that was heavily involved in the operations of the Business and incurring trading debts and the like;
- (c) for that reason, although the Chinchilla Property was going to be paid for using Shield Resources’ funds, it would be better to put it in the name of Thomas Gem, a company he controlled, in order to protect the Property from what he called ‘operational risks’;
- (d) Thomas Gem would only hold the Chinchilla Property until arrangements were made for a new company in the Shield Group to be established to hold the Chinchilla Property, at which time the Chinchilla Property would be transferred to NewCo; and
- (e) the shareholdings of NewCo would be in the same proportions as agreed in due course for the whole Shield Group.”

The primary judge recorded at PJ [183] that Mr Ye denied the conversation and, at [185], that Ms Li made no note of it. His Honour continued:

186 In this context it has been held that:

“Where a party seeks to rely upon spoken words as a foundation for a cause of action, including a cause of action based on a contract, the conversation must be proved to the reasonable satisfaction of the court which means that the court must feel an actual persuasion of its occurrence or its existence.”

187 Faced with this conflict in the evidence, it is necessary to look at such objectively established matters as might cast light on the probability of what was said in the August 2018 conversation.

188 It is also necessary to bear in mind the observations of McLelland CJ in *Eq in Watson v Foxman* [(1995) 49 NSWLR 315 at 319]:

“... human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.”

(Emphasis added.)

The primary judge proceeded to address the various objective matters and determined that he was not persuaded that the conversation to which Ms Li had deposed had occurred.

The primary judge considered that, had the conversation to which Ms Li deposed actually occurred, her conduct would have been different. His Honour found as follows:

262 If Suzie had, in August 2018, received an assurance from Thomas that the Chinchilla Property would be transferred to NewCo established for that purpose, and having a shareholding “in the same proportion as agreed in due course for the whole Shield Group”, surely the time to insist that such assurance be honoured would have been during the 2023 restructure discussions.

263 In fact, Suzie did not make any assertion concerning the Chinchilla Property until the commencement of the Federal Court proceedings in February 2024.

264 Mr Kelly asked Suzie about this:

“Q. ... what’s your explanation for nothing ever being raised by way of complaint by you between 2018 and 2024?”

A. Well, why would I make complaint if Thomas always said he’s going to transfer the property to Shield Group, as agreed?”

265 The answer to Suzie’s rhetorical question is that if, as she asserted, Thomas had “always said he’s going to transfer the [Chinchilla] Property to Shield Group”, the obvious time to raise the issue was during the 2023 restructure discussions at which time the “proportions ... for the whole Shield Group” were agreed, to adopt the words that she contends Thomas used in August 2018.

266 But, although the Chinchilla Property was referred to in those negotiations in the circumstances I have described, Suzie and Robin ultimately settled the restructure absent any provision for the Chinchilla Property.

267 In those circumstances I do not have an “actual persuasion” [referring back to PJ [186]] that the arrangements between Suzie and Thomas in August 2018 concerning the Chinchilla Property could have been as Suzie has deposed.

(Emphasis added.)

Accordingly, his Honour rejected the appellants’ claim that Shield Resources was the equitable owner of Chinchilla. This is the subject of grounds 1-5, which is addressed below.

Grounds 1-5: the finding that Chinchilla was not held on trust for Shield Resources

The appellant alleged the following grounds:

1 The primary judge erred in concluding (at J [199]) that the payments made by the Fourth Respondent (Shield Resources) of:

- a. \$19,000, to pay for the deposit of the Chinchilla Property (J [190]); and
- b. \$416,584.48, to pay the balance of the purchase price thereof (J [191]) could only be a loan (absent any suggestion of a gift) (J [199]).

2 The primary judge incorrectly rejected the evidence of the First Appellant (Suzie) concerning the nature of the agreement struck between her and the First Respondent (Thomas) in relation to the Chinchilla Property on 27 August 2018 (J [257]-[267]), including because :

- a. having apparently found (at J [157]) that:
 - i. Thomas had threatened to stop work at the Nangwarry Property and not cooperate with efforts to refinance it;
 - ii. Suzie and the Third Appellant (Robin) would likely have been concerned by those threats, as they had guaranteed and provided security for the finance over the Nangwarry Property; and
 - iii. Suzie and Robin were vulnerable should the lender enforce its rights, he ought to have concluded that:
 - iv. Susie and Robin were coerced into an arrangement with Thomas on 12 July 2023; and
 - v. that fact explained why they did not then insist that the Chinchilla Property then be transferred out of the name of Shield Resources the Second Respondent (Thomas Gem Stone) (cf J [259]).

3 The primary judge failed to have regard to the following matters as indicating that Thomas Gem Stone did not beneficially own the Chinchilla Property:

- a. the provisions of funds by Shield Resources and the Seventh Respondent (Shield Hardwood) to improve the Chinchilla Property (J [209]-[214]), in circumstances where Thomas acquiesced in that expenditure;
- b. the use by the Shield Group of the Chinchilla Property as security for borrowings (J [215]-[217]);
- c. the draft Subscription Agreement referred to at J [225] and Thomas' concession that he had no difficulty with the transfer of ownership of the Chinchilla Property to a company to be called Shield Assets QLD Pty Limited (J [228]);
- d. the documents referred to at J [230]-[233]; and
- e. Thomas' failure to adduce evidence of any communication with the Appellants concerning the payments referred to in ground 1 being loans.

4 The primary judge ought to have concluded that Thomas Gem Stone held the Chinchilla Property on express or constructive trust or Quistclose trust for Shield Resources.

5 Further or in the alternative to ground 4, the primary judge ought to have held that the Chinchilla Property was held on resulting trust for Shield Resources because the Respondents did not identify any evidence capable of rebutting the presumption of resulting trust.

Mr Condon SC, who appeared with Mr Rogers on behalf of the appellants, submitted that the primary judge's characterisation of the advance of funds as a loan, rather than a contribution which conferred an equitable interest in Shield Resources in Chinchilla, was erroneous and at odds with principle. He submitted that Ms Li's version of the conversation was consistent with the objective facts and, accordingly, ought to have been accepted.

Mr Kelly SC, who appeared with Mr Maroya on behalf of the respondents, submitted that the primary judge's rejection of Ms Li's version of the conversation said to give rise to Shield Resources' alleged equitable interest in Chinchilla was unassailable and could not be reviewed by this Court by reason of authorities such as *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 and *Lee v Lee* (2019) 266 CLR 129; [2019] HCA 28 since it reflected the primary judge's advantage in hearing and seeing the witnesses give evidence. He submitted that, in order to disturb this finding of fact, this Court would have to be satisfied that it was "glaringly improbable" and that this threshold could not be met.

I reject Mr Kelly's submission. It is plain from the primary judge's judgment that the reason his Honour did not reach a state of actual persuasion that Ms Li's version was correct because his Honour adjudged the result, that Shield Resources would be the equitable owner of Chinchilla, to be at odds with the objective probabilities and the law and not because of any matter concerning her demeanour or presentation in the witness box. In citing *Watson v Foxman* (1995) 49 NSWLR 31 at the crucial point of rejecting Ms Li's version, his Honour was, in substance, adopting the principles stated in that authority: namely, that human recollection was fallible and that, in order to assess whether one person's recollection of an oral statement was correct, it was necessary to measure up that statement by reference to objective facts and probabilities. It is plain from PJ [187], when read in context, that the task which the primary judge performed was to look at the objectively established matters to discern whether they made the conversation to which Ms Li deposed more or less likely.

In these circumstances, I accept Mr Condon's submission that this Court is in as good a position as the trial judge to perform this task.

However, Mr Kelly submitted that there was a further obstacle to the appellants obtaining the relief they seek (a declaration that Thomas Gem holds Chinchilla on trust for Shield Resources): namely, that the appellants had no standing to seek such relief since they had been wound up and only the liquidator could seek such relief. I propose to undertake the task which the appellants submitted this Court ought undertake before addressing Mr Kelly's further submission.

The objective facts and uncontroverted evidence

The following objective facts and uncontroverted facts (many of which were set out by the primary judge at PJ [189]-[192]), which are numbered for ease of reference, are relevant to the question whether the appellants have established that Shield Resources is the equitable owner of Chinchilla:

the agreement between Mr Ye and Ms Li was that they would each be directors of Shield Resources and would "make decisions together" (PJ [24]);

on 14 September 2018, Thomas Gem contracted to purchase Chinchilla from Danma Property Pty Ltd for \$418,000;

on 17 September 2018, Shield Resources transferred \$19,000 to Thomas Gem's account to pay for the deposit;

on 18 September 2018, Shield Resources entered into a loan agreement with Mr Zhong, pursuant to which he advanced \$1,151,645.06 to Shield Resources on 21 September 2018;

on 27 November 2018, Shield Resources transferred \$416,584.48 to Thomas Gem (from the amount of the funds advanced from Mr Zhong) to pay the balance of the purchase price and associated expenses which included stamp duty and solicitors fees;

Shield Resources bank statements recorded the entry in (5) as "Wdl [withdrawal] Branch Eastwood" and Thomas Gem's bank statements recorded the entry as "Shield Resources Loan", in accordance with Mr Ye's instructions (given without consultation with, or the knowledge of, Ms Li) to the relevant bank at the time;

on 12 December 2018, Thomas Gem became the registered proprietor of Chinchilla;

it was common ground that there was a running account between Thomas Gem and Shield Resources which was used at times to put Shield Resources in funds in order that payments could be made by it to third parties;

on 8 August 2019, Thomas Gem transferred \$470,000 to Shield Resources;

the credit entry in Shield Resources' account for (8) recorded "Feng Ye Loan Ye ft [family trust]", indicating that, as was the case, the source of the funds was Mr Ye's family trust of which Thomas Gem was the trustee;

on 14 August 2019, Shield Resources transferred an amount of \$500,100 from its account with Westpac to an account in its name at the Agricultural Bank of China, which was withdrawn on 15 August 2019 to pay HXX (Sally Hong) (PJ [206]);

Chinchilla was redeveloped to make it suitable for the operation of Shield Hardwood's timber export business (PJ [209]), using funds provided by Shield Resources (a little less than \$400,000) and Shield Hardwood (\$238,000) (PJ [209]-[210]);

Ms Li and Mr Qian's unchallenged evidence was that they committed Shield Resources to the expenditure referred to in (12) because they believed that Chinchilla was part of the Shield Group and did not constitute the private property of Thomas Gem;

Chinchilla was used as security for borrowings by members of the Shield Group (PJ [215]-[217]);

Ms Li's unchallenged evidence was that she agreed to Chinchilla being used as security for borrowings by members of the Shield Group in reliance on Mr Ye's representation that it had been acquired for the Shield Group (in the disputed conversation referred to above);

from about 2017, there were discussions between Ms Li, Mr Qian and Mr Ye about a restructure of the Shield Group which would, if it transpired, lead to a redistribution of the shareholdings in the Shield Group (PJ [132]-[133] and [173]);

the course of events in 2023 indicated that the fate of Chinchilla was “front of mind to both Robin and Suzie during the restructure discussions” (PJ [240]);

in early to mid-2023, Ms Li spoke to Mr Ye and Mr Qian about the overall structure of the Shield Group, including the transfer of Chinchilla to Shield Assets Qld, a subsidiary in the Queensland side of the Shield Group, which would be an asset holding company;

Shield Assets Qld was incorporated for the purpose of holding and managing Chinchilla (PJ [260]);

as at May-July 2023, Mr Ye had no difficulty with Chinchilla being transferred to Shield Assets Qld (PJ [228]-[229]);

there was no evidence that suggested that Shield Assets Qld would have to pay Thomas Gem for Chinchilla;

by May 2023, Ms Li and Mr Qian suggested that the shareholding in the group be split 50% (to Mr Ye), 30% (to Ms Li) and 20% (to Mr Qian) (PJ [141]). Although a further company, Shield Holdings Australia Pty Ltd was incorporated as a holding company with shares held in those proportions by, or on behalf of Mr Ye, Ms Li and Mr Qian, Mr Ye objected to the prospect of losing his status as a majority shareholder;

Ms Li gave evidence, to which the primary judge referred at PJ [151] as follows:

[Thomas] said that if we did not agree to a deal under which he had the majority ownership, he would stop works at the Nangwarry Property and just walk away, and would not cooperate with any efforts to refinance the [Nangwarry Property] to a new lender, which would be a problem for us as [the existing lender] had issued a default notice and ... had the personal security Robin and I had provided for that loan, which included the house that I lived in.

in response to Mr Ye’s threat, Ms Li capitulated with his demand that he retain majority ownership. The primary judge observed at PJ [157]:

It seems probable that Thomas, perhaps angrily, insisted that he retain a majority interest in the Shield Group. And assuming that he made the threats to which Suzie deposed, this would likely have been a concern to Suzie and Robin, as they had guaranteed and provided security for the finance over the Nangwarry Property and were vulnerable should the lender seek to exercise its powers over that security.

in September 2023, Mr Qian circulated a corporate diagram which showed Shield Assets Qld as holding Chinchilla (PJ [233]); and

discussions about the transfer of Chinchilla continued in September 2023 (PJ [237]-[240]).

The primary judge’s reasons for characterising Shield Resources’ advances for the purchase of Chinchilla as a loan

The primary judge, at PJ [199], asked rhetorically what else, other than loans, could the transfers of funds which were used by Thomas Gem to pay the deposit and the balance for Chinchilla be since they could not be characterised as gifts. His Honour said:

But what else could the transfers ... be? No-one suggests the transfers constituted gifts. On Suzie's account of her 27 August 2018 conversation with Thomas, he told her that "the Chinchilla Property was going to be paid for using Shield Resources' funds". Thus, on her own evidence, she and Thomas did "talk about there being a 'loan' for the benefit of Thomas Gem". Small wonder that Thomas caused his bank to describe the larger transfer as a "loan".

The primary judge found that the advance of funds from Shield Resources to Thomas Gem for the purchase of Chinchilla ought be characterised as a loan and that the transfer of \$470,000 amounted to a repayment of that loan. His Honour said at PJ [203]:

The payment by Thomas Gem of \$470,000 appears to represent the repayment by Thomas Gem of the amounts advanced to it by Shield Resources on 17 September 2018 and 27 November 2018: \$19,000 and \$416,584.48 respectively, a total of \$435,584.48. The difference of \$34,415.52 may constitute a payment on account [of] interest.

The primary judge considered that this conclusion was "confirmed" by Mr Ye's use of the descriptor "loan" in relation to the deposit to the Shield Resources account (PJ [204]). Having found, at PJ [207], that the payment made on 8 August 2019 represented repayment by Thomas Gem of the advances made by Shield Resources, the primary judge found that, by 8 August 2019, Thomas Gem had itself funded the purchase of Chinchilla (and was, accordingly, its beneficial as well as legal owner).

The primary judge considered that the fact that expenditure on the development of Chinchilla benefited Shield Hardwood (which operated the hardwood business on Chinchilla) and not Thomas Gem (PJ [214]) to favour the respondents' case and not to support the conversation to which Ms Li deposed. While the primary judge noted at PJ [215]-[217] that Chinchilla was used as security for borrowings by the Shield Group, his Honour did not link that fact with the probability or otherwise of the conversation to which Ms Li deposed. Rather, the only relevance of this fact, as far as the primary judge was concerned, was that the effect of these borrowings was that there was unlikely to be any equity remaining in Chinchilla (PJ [217]).

The primary judge found that the appellants had not proved their case and said:

254 Her evidence was that Thomas said the shareholding in NewCo was to be "in the same proportion as agreed in due course for the whole Shield Group", not the same shareholdings as Shield Resources "as part of a proposed restructuring of the Shield Group".

255 The restructuring agreed in 2023 for the "whole Shield Group was that agreed for Shield Holdings Australia: 64% for Thomas through Thomas Gem Stone, 20% for Suzie through Mana Assets, and 16% for Robin through XCQ Holdings: not 69.5% for Thomas Gem Stone, 30% for Mana Assets and 0.5% for Awake, as is claimed in the Amended Summons.

256 Assuming it was permissible for Suzie and Robin to depart from their pleaded case, and that urged by their counsel in final submissions, there is a wider problem.

257 Suzie said that it was agreed as part of the 27 August 2018 conversation that, once NewCo was established, the Chinchilla Property would then be transferred to it. This is reflected in the allegation in the Amended Commercial List Statement set out above that NewCo would have the same shareholding as Shield Resources “as part of the proposed restructuring”, and that the Chinchilla Property would then be transferred to NewCo: that is, also “as a part of the proposed restructuring”.

258 But during the 2023 restructuring negotiations, Suzie did not act as if she understood this was the agreement. There was a proposal, evidently made in the context of a hoped for \$5.5 million investment by a third party, that the Chinchilla Property be transferred to Shield Assets OLD. For some reason not explained in the evidence, that proposal did not proceed. There is no suggestion in the evidence that Suzie put forward any other proposal whereby the Chinchilla Property would be transferred to NewCo as part of the restructure. And Suzie and Robin eventually agreed to the restructure reflected in the 23 July 2023 documents without insisting on any arrangement relating to the Chinchilla Property.

Consideration of the conversation in light of the objective probabilities

The relevance of the payments by Shield Resources for the purchase of Chinchilla

That Shield Resources paid the deposit, the balance of the purchase price and associated expenses for the purchase of Chinchilla (facts (3) and (5) above) is consistent with the creation of a beneficial interest in the property in the payer (in this case, Shield Resources). Indeed, without more, the presumption that a transferee of a property who provides no consideration holds it on trust either for the transferor (if the transferor has not been paid) or for the provider of the purchase price would not be displaced: *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353 at 364-365; [1956] HCA 28, cited by *White JA in Galati v Deans* [2023] NSWCA 13 at [51].

The description in Thomas Gem’s bank statement – “Shield Resources Loan” – (fact (6) above) cannot advance the matter. Although Mr Ye was the majority shareholder throughout, he agreed that he and Ms Li, as directors, would make decisions together regarding Shield Resources. Ms Li’s evidence (which was neither challenged nor rejected) was that she was not aware of the contents of the bank statements and did not have access to them at that time. I reject Mr Kelly’s submission that Mr Ye was the controlling mind of Shield Resources for these purposes and could therefore determine that the provision of the purchase price was to be treated as a loan rather than the creation of a trust. This submission is at odds with Mr Ye’s agreement with Ms Li that they would make decisions by agreement. I accept Mr Conlon’s submission that, in those circumstances, Mr Ye could not be said to be the alter ego of Shield Resources, although he was the majority shareholder. Accordingly, Mr Ye did not have the authority to determine the correct characterisation of the advances from Shield Resources to Thomas Gem for the purchase of Chinchilla since Ms Li did not agree to them being loans.

The primary judge appears not to have seriously countenanced the hypothesis that Shield Resources acquired an equitable interest in Chinchilla by virtue of having paid for it (either by reason of an express trust or a constructive trust). The primary judge considered (at PJ [199]) that it followed from Ms Li's evidence that Mr Ye told her that Chinchilla would be paid for using Shield Resources' funds that they had talked about a loan, although Ms Li did not say that the word loan was used at all. This reasoning revealed his Honour's view (expressed in the rhetorical question in PJ [199]) that the only relevant characterisations were that the money was either a loan or a gift. I accept Mr Conlon's submission that this posited a false dichotomy since it omitted a third hypothesis, which accorded with the appellants' case. Although Mr Kelly submitted that this case had not been pleaded, it is evident from the extract from the appellants' amended Commercial List Statement (set out above) that it was.

The alternative case based on the failure of the purpose of transferring Chinchilla to NewCo

Further, his Honour does not appear to have addressed the appellants' alternative case that the sole purpose of Thomas Gem acquiring the legal title to Chinchilla was so that it could be transferred to a new company, NewCo, within the Shield Group, which would be established for the purpose of holding Chinchilla. On the appellants' alternative case, once that purpose failed, Thomas Gem held Chinchilla on a resulting trust for Shield Resources, which had provided the funds for its purchase in accordance with the presumption that arises in these circumstances: *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (in liq)* (1978) 141 CLR 335 at 353; [1978] HCA 45.

The alleged "repayment"

The primary judge dealt with the disparity between the monies paid by Shield Resources to Thomas Gem for the purchase of Chinchilla (which were quantified by reference to the deposit, balance and expenses associated with the sale) and the monies "repaid" by Thomas Gem by conjecturing that the difference could be interest (PJ [203]). But this, as the primary judge's wording indicated, was no more than speculation. There was no evidence that there was any agreement as to interest or that it was ever charged.

Further, because of the primary judge's focus on the loan/gift dichotomy, his Honour saw that transfers from Thomas Gem's account to the account of Shield Resources as repayments of the loan (which his Honour had found as a result of the transfer of funds for the purchase of Chinchilla), rather than as payments which were consistent with there being a running account between Thomas Gem and Shield Resources as part of normal company operations. Thus, payment by Thomas Gem to Shield Resources of \$470,000 was, as was accepted by the primary judge, consistent with the monies having been provided by Thomas Gem prospectively in order to put Shield Resources in funds to make the payment of \$500,100 to Mrs Hong. This circumstance was, contrary to the view of the primary judge who considered it to be equivocal, probative of the payment having been a prospective payment by Thomas Gem in accordance with the normal operation of the running account and inconsistent with the characterisation of

the payment of \$470,000 being referable to the monies advanced by Shield Resources for the purchase of Chinchilla and therefore a retrospective payment related to a past liability.

The relevance of Shield Resources' expenditure on Chinchilla

In PJ [214], the primary judge expressly accepted the respondents' submission that Shield Resources' expenditure on Chinchilla benefited Shield Hardwood and not Thomas Gem without explaining why that matter was inconsistent with the conversation to which Ms Li deposed. I regard Shield Resources' expenditure on the development of Chinchilla as supporting the conversation. First, it accorded with the statement attributed to Mr Ye in PJ [182](a) that because Chinchilla was to be purchased for Shield Hardwood's business, Shield Resources should pay for Chinchilla. Second, the fact that most of the funds for the development were provided by Shield Resources directly, rather than through Shield Harwood supported the proposition that Shield Resources had its own interest in Chinchilla. Third, the primary judge did not, in this context, refer to Ms Li's unchallenged evidence (referred to in fact (13) above) that she only agreed to commit Shield Resources to funding the development of Chinchilla because she believed that it was part of the Shield Group and did not constitute the private property of Thomas Gem or that Chinchilla was used as security for borrowings by members of the Shield Group (PJ [215]-[217]). This fact, too, supported the conversation to which Ms Li deposed.

The probative value of Ms Li's failure to complain during restructuring discussions about the fact that Chinchilla had not been transferred to NewCo

The primary judge was, as his Honour's reasons at PJ [262]-[267] reveal, plainly influenced by the fact that Ms Li did not complain to Mr Ye, during the discussions regarding the proposed restructure, about his failure to honour the assurance which she deposed was given in the disputed conversation that Chinchilla would be transferred to NewCo which would be established for that purpose and have the same shareholding as agreed in due course for the whole Shield Group.

I am not persuaded that the primary judge's assessment of this factor is correct. The primary judge found that the fate of Chinchilla was "front of mind to both Mr Qian and Ms Li during the restructure discussions" (at PJ [240], as referred to above) and that the possible fate of Chinchilla "was a matter very much on the table during the restructure discussions" (at PJ [229], as referred to above). The parties went so far as to agree on the transferee of Chinchilla, Shield Assets Qld, was incorporated for the purpose of holding Chinchilla. However, it is plain that the principal issue between the parties in the course of the restructure discussions was the percentage shares of each of Mr Ye, Ms Li and Mr Qian. Until that crucial matter was agreed, there was no point in transferring Chinchilla to any other company which the parties had contemplated would be the transferee, such as Shield Assets Qld. Ultimately the discussions broke down because Mr Ye would not countenance a restructure which disturbed his position as majority shareholder.

No evidence or discussion about the price at which Thomas Gem would transfer Chinchilla to a Shield entity

It is also, in my view, significant that there was no discussion or suggestion about the transferee of Chinchilla having to pay any consideration to Thomas Gem for the transfer. In these circumstances, Mr Ye's preparedness to have Thomas Gem transfer Chinchilla to Shield Assets Qld is consistent with Thomas Gem holding only the legal title to Chinchilla and appreciating, because it did not contribute to the purchase price of the property, that it did not hold the equitable title and, thus, that it had no right to be paid for it.

Conclusion with respect to factual matters underlying grounds 1-5

I consider that the matters referred to above make it more likely that the conversation to which Suzie deposed occurred. For these reasons, grounds 1-5 have been made out.

The next question which arises is what consequences flow from the conversation.

The starting point is the presumption that a transferee of a property who provides no consideration holds the property on trust either for the transferor (if the transferor has not been paid) or for the provider of the purchase price: *Charles Marshall Pty Ltd v Grimsley* at 364-365, cited by White JA in *Galati v Deans* at [51]. This presumption can be displaced if there is a debtor/creditor relationship between the transferee and the provider of the funds for the acquisition of the property by the transferee. In other words, if the money for the purchase has been advanced to the transferee pursuant to a loan agreement which obliges the transferee to repay the money, the transferee will hold not only the legal title to the property but also the equitable title. For the reasons given above, the evidence, such as it is, that there was a loan is weak and largely comprises a unilateral description by Mr Ye to Shield Resources banker.

I regard the primary judge's inference that transfer of \$470,000 was a repayment of the putative loan as no more than speculation, having regard to the running account between Thomas Gem and Shield Resources and the absence of any probative evidence of a loan agreement.

The conversation to which Suzie deposed is, in these circumstances, sufficient to create an express trust whereby:

Shield Resources declared that it would advance the funds to purchase Chinchilla (and did advance them) on the following basis:

Thomas Gem would hold the legal title to that property pending transfer to NewCo;

Shield Resources would hold the equitable title to Chinchilla until the legal title was transferred to NewCo;

As equitable owner of Chinchilla, Shield Resources would contribute to its development for the purposes of the business to be conducted on the property by one of its subsidiaries; and

Thomas Gem would not contribute to the development of Chinchilla as it had no equitable interest in the property.

The circumstances are also, in my view, sufficient to create a constructive trust in favour of Shield Resources arising from the presumption that flows from its having contributed the funds to purchase Chinchilla, with the consequence that Thomas Gem holds only the legal title to Chinchilla and Shield Resources holds the equitable title. In these circumstances, the remedy of a constructive trust is available to recognise this consequence.

Further, once it became evident that the purpose of the acquisition of Chinchilla (the eventual transfer of Chinchilla to another Shield entity) would not come to pass (since the disputes between Mr Ye, Suzie and Mr Qian about their respective shares proved incapable of resolution), the presumption of a resulting trust arose in accordance with *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (in liq)* at 353. Thus, after the discussions had finally broken down, Thomas Gem held Chinchilla on a resulting trust for Shield Resources which had provided the funds for its purchase.

Whether it is open to this Court to grant the relief claimed having regard to the fact that companies in the Shield Group have been wound up

The respondents submitted that, if (as I have found) Shield Resources is the beneficiary of a trust, that interest is now property which, by statute, is property within the control of its liquidators who have the exclusive right to determine whether any action ought be brought to claim or enforce that interest. They submitted further that because there was no challenge to finding of oppression or to the winding up order made in respect of Shield Resources, “the oppression claim [was] spent”, with the consequence that the appellants had no standing to bring proceedings on behalf of any of the companies in liquidation, including Shield Resources. On this basis, the respondents submitted that the grounds 1-5 of the appeal were incompetent.

It does not appear that the primary judge’s order for winding up was made on the ground of oppression. Rather, his Honour expressly ordered the winding up “pursuant to s 459B and/or s 461(1)(k) of the Corporations Act 2001”. Accordingly, I reject the submission in so far as it is based on the premiss that the suit was for oppression.

While the circumstance that the claimant for relief is a company in liquidation is relevant to the discretion whether to grant relief, it is not determinative: see the discussion of the authorities in *Re Imperium Projects Ltd* [2017] NSWSC 141 at [27]-[31] (Black J). As Black J observed at [29], the plurality (French CJ, Gummow, Hayne, Heydon and Kiefel JJ) in *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304; [2009] HCA 25 at [182] expressly left open the question whether an order under s 233 of the Corporations Act could be made if the oppression had ceased and the company which was the alleged victim of the oppression is in liquidation.

The appellants’ claim in these proceedings is neither inconsistent with the liquidators’ control of Shield Resources nor the orderly conduct of the winding up. The property of Shield Resources (including its rights or interest in the Chinchilla property) is not vested in the liquidator (as no order under s 474(2) of the Corporations Act was made) and therefore remains property of the company. As such, it is under the control of the liquidators. The liquidators have consented to a grant of leave to proceed and the relief sought, if granted, would be to the benefit of the company

and its creditors. In these circumstances, the fact that Shield Resources is now in liquidation neither deprives Shield Resources of standing nor provides an impediment to the grant of relief.

For these reasons, I would allow the appeal and make the following declaration:

Declare that the second defendant, Thomas Gem Stone Pty Ltd in its own right and in its capacity as trustee of the Ye Family Trust, holds the property comprising Lot 1 in Registered Plan 41445 and Lot 2 in Registered Plan 14931, situated at and known as 195 Auburn Road, Chinchilla, QLD, 4413, on trust for Shield Resources.

Costs

If my view were a majority one, the costs order made by the primary judge would fall away and a further costs order would need to be made by this Court as to the costs in the Court below.

However, as my view as to grounds 1-5 is a minority one, it is sufficient to record that, accepting the majority view on grounds 1-5, I agree with Kirk JA's reasons and orders on ground 10.

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