NEW SOUTH WALES COURT OF APPEAL

CITATION: Damberg v Damberg & Ors [2001] NSWCA 87

FILE NUMBER(S):
40636/99

HEARING DATE(S): 3 April 2001

JUDGMENT DATE: 25/05/2001

PARTIES:
Wilfried Robert Damberg (Appellant)
Bruenhild Damberg (First Respondent)
Oliver Damberg (Second Respondent)
Nicole Damberg (Third Respondent)

JUDGMENT OF: Spigelman CJ Sheller JA Heydon JA

LOWER COURT JURISDICTION: Family Court of Australia

LOWER COURT FILE NUMBER(S): PA 4703/98

LOWER COURT JUDICIAL OFFICER: Purdy J

COUNSEL:
Mr P L G Brereton SC (Appellant)
Mr L P Robberds QC/Mr J A Trebeck (Respondents)

SOLICITORS:
Campbell Paton & Taylor (Appellant)
Wilson Fardell & Moore (First Respondent)
Garden & Montgomerie (Second and Third Respondents)

CATCHWORDS:
Equity - Implied Trusts - Resulting trusts - Whether rebuttal of presumption of advancement from parent to child of equitable interest in property in addition to legal title - Whether parent possessed "definite intention" to retain beneficial interest - Application of general law of evidence to determine whether "definite intention" proved
Conflict of Laws - Breach of foreign law - Whether Australian Courts will prevent party from enforcing in Australia a resulting trust created in a foreign jurisdiction for a purpose that was "illegal" or "unlawful" in that foreign jurisdiction - Identification of "illegal" or "unlawful" purpose - Necessity to examine provisions of foreign legislation - Ascertainment of "policy" of legislation - Where foreign jurisdiction is Germany - Where foreign law relates to capital gains tax avoidance or evasion
Conflict of Laws - Presumption of identity of unproved foreign law and the lex fori - Whether such presumption should be made - Where foreign jurisdiction is Germany - Where relevant unproved foreign law is likely to be statute-based - Where relevant unproved foreign law relates to capital

gains tax avoidance and evasion - Where taxation law is not an area of law that is based on broad principles that can be assumed to be part of any given legal system - D

LEGISLATION CITED:

DECISION:
See para 200

JUDGMENT:

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THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40636/99
PA 4703/98

SPIGELMAN CJ
SHELLER JA
HEYDON JA

Friday, 25 May 2001

Wilfried Robert DAMBERG v Bruenhild DAMBERG & Ors

Equity - Implied Trusts - Resulting trusts - Whether rebuttal of presumption of advancement from parent to child of equitable interest in property in addition to legal title - Whether parent possessed "definite intention" to retain beneficial interest - Application of general law of evidence to determine whether "definite intention" proved

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Conflict of Laws - Presumption of identity of unproved foreign law and the lex fori - Whether such presumption should be made - Where foreign jurisdiction is Germany - Where relevant unproved foreign law is likely to be statute-based - Where relevant unproved foreign law relates to capital gains tax avoidance and evasion - Where taxation law is not an area of law that is based on broad principles that can be assumed to be part of any given legal system

In 1983 the Appellant ("the husband") transferred pieces of land in Germany to his son and daughter, who were the second and third Respondents respectively. Shortly before doing so, the husband had consulted an accountant in relation to the German capital gains tax implications of transferring land to members of his family. The husband proceeded to construct buildings on these lands at his own expense and through loans. Rental income derived from the properties was declared in the tax returns of the children rather than those of the husband. In 1988 the husband transferred further pieces of German land to his son. The husband funded the construction of buildings on this land also, and the rent therefrom was declared on the son's income tax returns.

From 1987 the husband and the first Respondent ("the wife") commenced the purchase of farming properties in Australia. These purchases were funded in part by various dealings by their son and daughter in relation to the aforementioned German lands. Six payments flowed from the son's pieces of land and one from the daughter's land.

From 1995 the relationships between the four Dambergs came under strain. The wife returned to Germany and the husband followed her. The husband and his son entered a Management Agreement in 1997, under which the son was to manage the Australian farming properties while the husband was in Germany. The husband attempted to terminate this agreement in mid-1998.

The wife instituted proceedings against the husband in the Family Court of Australia and their children intervened seeking pecuniary relief based on a claim of anterior equitable interests in the property of the husband and wife. The son also claimed monies allegedly owed to him by the husband under the Management Agreement. The Family Court held that although the husband intended to transfer the German lands to the children on trust, he did so to avoid German capital gains tax and therefore they should be treated as outright gifts. As a result, the monies transferred by the children to their parents were loans, requiring repayment. The Family court also allowed the son

payment of $2,000 per month from the date of the termination of the Management Agreement until judgment (totalling $7,377.79). The Family Court did not make any explicit order in relation to the costs of the proceedings before it.

The husband appealed from the Family Court to the Court of Appeal, and the children applied for leave to appeal in relation to the costs of the Family Court proceedings.

Held by Heydon JA (Spigelman CJ and Sheller JA concurring), allowing the appeal, and dismissing the Respondents' application for leave to appeal:

1. The Family Court trial judge was correct in finding that the father had rebutted the presumption of advancement from parent to child of equitable interest along with legal title.

(a) The presumption can be rebutted by showing that the parent did not possess the actual intention to transfer the beneficial interest in addition to the legal title. *Calverley v Green* (1984) 155 CLR 242 applied. A "definite intention" of the parent to retain beneficial title must be proved.

(b) The evidentiary rules applying to the proof of a "definite intention" to retain the beneficial interest, are those of the general law of evidence and the *Evidence Act* 1995.

(c) The trial judge found it proven that the father had such a definite intention to retain the equitable interest and therefore the presumption of advancement was rebutted. The trial judge did not err in principle or mistake the facts. Nor did he misuse his advantages in relation to observing oral testimony. The findings that the trial judge made were reasonably open on the evidence available.

2. Even if the presumption of advancement was not rebutted, the husband would not have been estopped from denying that it was not rebutted.

(a) The estoppel argument should not be entertained by this Court since estoppel was not pleaded, but was only raised in final address by counsel for the children. This course can cause unfair surprise and may require the tendering of extra evidence. *Supreme Court Rules* 1970 (NSW), Pt 15, r 13.

(b) There was no proof that in relying on an assumption, the children acted or abstained from doing so.

3. The payment made by the son on 4 July 1989 was not made out of the son's own property.

(a) Although the money was sourced from a loan that the son was personally liable to pay, the son took out the loan at the behest of the father against the security of property beneficially owned by the father. Therefore, the money was acquired by the son as a trustee for the father.

(b) There was no evidence that the father intended to make the son the beneficial owner of the money.

4. The trial judge erred in finding that the husband was barred from relying on any resulting trust due to his avoidance of German capital gains tax.

(a) For the husband to be so barred, an "unlawful" or "illegal" purpose must be identified.

Martin v Martin (1959) 110 CLR 297 and *Nelson v Nelson* (1995) 184 CLR 538 applied.

(b) In the case of a purpose that is purported to be unlawful or illegal due to the statute, the policy of the statute as demonstrated by its provisions, must be closely examined in order to ascertain:

(i) whether an "unlawful" or "illegal" purpose existed;

(ii) whether the "policy" of the legislation was defeated;

(iii) the degree to which the benefit stemmed from the illegal/unlawful conduct, and the appropriate means of retracting it.

Nelson v Nelson applied.

(c) It may be assumed that German capital gains tax law rests on a statute. However, neither the trial judge nor the court of Appeal were taken to any such statute. Therefore, the requisite close examination of the statute did not occur.

(d) Although there is much judicial support for the proposition that where foreign law is not proved it will be presumed to be the same as the *lex fori*, there is also support for courts refusing to presume this. In this case, it should not be presumed that the German legislation relating to capital gains tax avoidance and evasion is identical to the Australian legislation.

(i) the limited evidence at trial of German capital gains tax law indicated that it is likely to differ from that in Australia;

(ii) taxation law cannot be assumed to be a field of law that is premised on "great and broad principles likely to be part of any given legal system" (Heydon JA at [162]).

(e) Even if the German law of capital gains tax was assumed to be the same as Australian, that law could not be relied on to defeat the resulting trusts, because to do so would amount to the enforcement of a foreign revenue law.
Government of India v Taylor [1955] AC 491;
Peter Buchanan Ltd v McVey [1955] AC 516;
Rossano v Manufacturers' Life Insurance Co [1963] 2 QB 352; *Bath v British and Malayan Trustees Ltd* (1969) 90 WN (Pt 1) (NSW) 44; *Rothwells Ltd (in liq) v Connell* (1993) 119 ALR 538, applied.

Regazzoni v K C Sethia (1944) Ltd [1956] 2 QB 490;
Regazzoni v K C Sethia (1944) Ltd [1958] AC 301,
distinguished.

5. The son was not entitled to recover $7,377.79 on a quantum meruit notwithstanding the husband's attempt via letter to terminate the Management Agreement.

(a) To recover on a quantum meruit, the benefit provided must be requested or accepted. *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 applied. In this case, the father did not request or accept the son's work, but rejected it.

(b) The order of the Family Court that the son continue to operate the farming business was made in order to resolve a dispute on an interim basis and it did not stipulate any remuneration for the son.

6. Since the husband's appeal was allowed on grounds adverse to the children, the children's application for leave to appeal in relation to the costs of the trial, was dismissed.

THE SUPREME COURT
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CA 40636/99
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SPIGELMAN CJ
SHELLER JA
HEYDON JA

Friday, 25 May 2001

Wilfried Robert DAMBERG v Bruenhild DAMBERG & Ors

JUDGMENT

1 **SPIGELMAN CJ:** I agree with Heydon JA.

2 **SHELLER JA:** I agree with Heydon JA.

3 **HEYDON JA:**

Background

This is an appeal from orders made by Purdy J sitting in the Family Court of Australia on 4 June 1999 after a fifteen day trial. The judgment stood reserved from 21 May, but it was delivered orally rather than in writing. The proceedings involved property disputes between a husband and a wife about their assets and claims by their two children to some of those assets. The children largely succeeded in their claims. The trial was hard and bitter. The trial judge rightly and repeatedly urged the parties to settle the proceedings because of the disproportion between what was at stake and what the trial was costing the parties financially and in other ways. The parties did not settle the case. It is appropriate to apply the words used by Lord Nottingham LC at the start of his celebrated judgment on the presumption of advancement in *Grey v Grey* (1677) 2 Swans 594; 36 ER 742 to the effect that it involved "the concerns of a family, in which I would be glad to avoid the deliverance of any opinion, because I foresee that a victory on either side can never produce the peace of it …".

4 The appeal comes to this Court, rather than the Full Court of the Family Court, by reason of the following matters. The proceedings below were instituted by Bruenhild Damberg ("the wife"), who married Wilfried Damberg ("the husband") on 22 June 1961. Their son, Oliver Damberg ("the son"), intervened and claimed pecuniary relief based on anterior equitable interests in the property of the husband and wife. The daughter of the

husband and the wife, Nicole Damberg ("the daughter"), also intervened seeking similar relief. The jurisdiction of the Family Court to deal with the claims of the son and the daughter rested on s 4(2) of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (NSW). That sub-section conferred on the Family Court original and appellate jurisdiction with respect to "State matters" (namely matters in which the Supreme Court of New South Wales had jurisdiction otherwise than by reason of a law of the Commonwealth or of another State). On 17 June 1999, thirteen days after Purdy J's orders, the High Court delivered judgment in *Re Wakim; ex p McNally* (1999) 198 CLR 511. That case held that State legislation such as s 4(2) could not confer State jurisdiction on a federal court such as the Family Court. The New South Wales Parliament then enacted the *Federal Courts (State Jurisdiction) Act* 1999 ("the Act"). Section 4(1) defined "ineffective judgment" as:

> "a judgment of a federal court in a State matter given or recorded, before the commencement of this section, in the purported exercise of jurisdiction purporting to have been conferred on the federal court by a relevant State Act."

Paragraph (a) of the definition of "State matter" in s 3 defined a "State matter" as meaning a matter "in which the Supreme Court has jurisdiction otherwise than by reason of a law of the Commonwealth or of another State or a Territory". Paragraph (c) of the definition defined "State matter" as meaning a matter "in respect of which a relevant State Act purports or purported to confer jurisdiction on a federal court". The *Jurisdiction of Courts (Cross-Vesting) Act* 1987 was one of the Acts set out in the definition of "relevant State Act". Hence the matter dealt with by Purdy J under the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 was a "State matter", and his judgment was an "ineffective judgment" within the meaning of s 4(1). Section 6(a)(ii) of the *Federal Courts (State Jurisdiction) Act* 1999 provided:

> "The rights and liabilities of all persons are, by force of this Act, declared to be, and always to have been, the same as if:
>
> (a) each ineffective judgment of: …
>
> (ii) the Family Court of Australia, otherwise than as a Full Court of the Family Court of Australia,
>
> had been a valid judgment of the Supreme Court in a Division constituted by a Judge of the Supreme Court …."

Section 7 provided:

> "(1) A right or liability conferred, imposed or affected by section 6:
>
> (a) is exercisable or enforceable, and
>
> (b) is to be regarded as always having been exercisable or enforceable,
>
> as if it were a right or liability conferred, imposed or affected by a judgment of the Supreme Court.
>
> (2) Without limiting section 6 or subsection (1) of this section, the rights and liabilities conferred, imposed or affected by section 6 include the right of a person who was a party to the proceeding or purported proceeding in which the ineffective judgment was given or recorded to appeal against that judgment.
>
> (3) For the purposes of subsection (2), each effective judgment of:

…

(b) the Family Court of Australia, otherwise than as a Full Court of the Family Court of Australia,

is deemed to be a judgment of the Supreme Court in a Division constituted by a Judge of the Supreme Court."

Thus Purdy J's judgment was deemed to be a judgment of the Supreme Court in a Division constituted by a Judge of the Supreme Court. Hence this Court has jurisdiction under s 101(1)(a) of the *Supreme Court Act* 1970 to hear an appeal against Purdy J's orders so far as they related to the cross-vested matters. An appeal by the wife in relation to matters which were not cross-vested was heard by the Full Court of the Family Court on 7 December 1999.

5 Apart from the Notice of Appeal filed by the husband, there is also before the court an application by the son and the daughter seeking leave to appeal. It was filed because Purdy J did not make any order explicitly dealing with the costs of the proceedings before him. It is not entirely clear whether his orders are to be construed as including an order that there be no order as to costs, or whether it is the case that he simply failed to make any order as to costs. The son and the daughter contend that he ought to have ordered the husband to pay all the costs. The husband has from time to time raised the possibility that the application for leave to appeal may not be an adequate vehicle for that purpose, and to cover that possibility, the son and the daughter obtained an order from the Duty Judge of the Common Law Division on 28 March 2001 pursuant to Pt 12 r 2 of the Supreme Court Rules removing into this Court certain common law proceedings (*Oliver Damberg and another v Wilfried Damberg and another*, CL Div No 12244 of 1999) in which the son and the daughter sought a favourable costs order on the assumption that Purdy J had failed to make one. The order made by the Duty Judge was:

> "That pursuant to P 12 Rule 2 proceedings No 12244/99 be removed into the Court of Appeal for determination by it.
>
> That the Court of Appeal determine the Question. 'Are each of the Plaintiffs entitled to an order for costs arising out of the Judgments entered by Purdy J on 4.06.99.'"

On appeal the husband contended that that order was insufficiently broad, despite having not pressed any objection of that character at the time when the merits of making the order were debated before a single judge of appeal on 28 March 2001 or before the Common Law Division Duty Judge on that day.

6 Though the wife was joined as first respondent to the appeal, she filed a submitting appearance and took no part in the argument. The contest was between the husband as appellant and the son and daughter as second and third respondents respectively.

The Nature of the Cross-Vested Proceedings

7 So far as they remain live issues in this appeal, the claims in the cross-vested proceedings, and their treatment by the trial judge, fall into two parts.

(a) Transfer of properties to children and payment by children to parents sourced from those properties

8 The son claimed repayment of $522,689 allegedly advanced by him to the husband on various dates between 4 July 1989 and 25 January 1995. The daughter claimed repayment of an advance of $149,615 allegedly made on or about 4 October 1991. These sums had been paid from accounts in the name of or under the control of the son or daughter, as the case may be, into accounts in the names of the husband and the wife. The case of the

children was that the monies had been generated by selling or mortgaging properties in Germany which had been given by the husband to them, or which were transferred to the son in recompense for work done by him. The husband, on the other hand, contended that the properties in the children's names were not held by them on their own account, but on resulting trust for him.

9 The trial judge found that when the husband placed the properties in the names of the children, he did not intend to make an absolute gift, but intended to retain the beneficial interest: that is, the trial judge found that the presumption of advancement operating between father and child was rebutted. However, he also found that the purpose of putting the properties in the names of the children was to avoid German capital gains tax, that the properties had been sold and capital gains tax had been avoided as intended, that the transactions should thus be treated as gifts to the children, and that the court should do what it could to avoid the violation of the revenue laws of a friendly foreign country, namely Germany. Since the monies transferred by the children to the parents were derived from the properties which on this reasoning had been given to the children without there being any resulting trust, and since the trial judge apparently found that they were advanced as loans, the children succeeded.

(b) Management Agreement

10 The son also claimed $7,377.79. He claimed that on a contractual basis as the balance allegedly owing under a Management Agreement pursuant to which he was to receive $2,000 per month for managing certain rural properties. Alternatively, he claimed it as on a quantum meruit, being the reasonable cost of the services which he had rendered and not been paid for. The husband contented himself with a bare denial in answer to the relevant part, paragraphs 14 and 16-20 of the Further Amended Statement of Claim: see paragraph 3 of the husband's Amended Points of Defence. The trial judge noted at Red 46P-U that the Management Agreement in the form in which it was signed by the husband and the son in Australia on 28 April 1997 was altered by the wife when she signed it on 14 May 1997 in Germany: a clause permitting termination on six weeks' notice was altered to six months' notice. Though some arguments were put about this, the trial judge did not deal with them. However, he may have implicitly upheld them, since his acceptance of the claim was apparently on the quantum meruit rather than the contractual basis.

The Primary Facts

11 The trial judge made numerous findings of fact. His task in doing so, and this Court's task in assessing the criticisms made by the parties of his reasoning, have not been assisted by the fact that the first language of none of the five principal witnesses was English. The husband showed a considerable and reciprocated bitterness towards the other three parties. The affidavit evidence of the husband and the children about the primary transactions is in an unsatisfactory form where it is not actually misleading. Perhaps because of the different locations of the onus of proof on different issues, the affidavit evidence was not prepared or tendered in a coherent order. Various exhibits recording conveyancing and financial transactions have been lost since the trial. The parties did not make copies of those exhibits. Some of the evidence was not closely analysed either before the trial judge or before this Court. To some degree the trial judge's findings are contradictory. They are scattered throughout the reasons for judgment in a manner which makes a concise statement of them by quotation difficult. And to some degree key facts were not found explicitly, but have to be elicited by processes of inference or implication. Accordingly it is convenient at the outset to set out the primary facts which were not in controversy as an aid to understanding the issues which were in controversy.

(a) The German background

12 Though the parties have gone to law in Australian courts and have acquired substantial quantities of Australian land, most of their lives have been spent in Germany. The husband was born in 1938, the wife in 1940, the son in 1963 and the daughter in 1967. The husband has had many occupations, but an important one was as a developer of land, and after 1974 he concentrated on this field. His modus operandi was to buy small blocks of land, subdivide them, build on them, and then lease or sell them. The family was based in Hamm, Westphalia, and the properties were in or near Hamm.

(b) The property acquisitions relevant to this appeal

13 In about 1981 the husband acquired the land relevant to this case. The land was at Dillweg Ahlen Dolberg. It was described as "lots 508-515". It was bought for DM332,010 (Blue 2/215H).

14 In 1983 the husband decided to subdivide it. He consulted an accountant, Mr Dieter Stiegler, whose services he had employed since 1978, about what the tax implications could be of transferring land to the wife and children. According to Mr Stiegler, under German law a land owner might buy and sell three properties in five years without having to pay capital gains tax; but if this number were exceeded, capital gains tax was payable on the profits from sale of all the properties. Following the conference, the husband told Mr Stiegler that he proposed to subdivide and transfer part of lots 508-515 Dillweg to the children (but not to the wife, who already had several properties).

15 Pursuant to a contract dated 19 July 1983, the son received two lots of land, being lots 508 and 509, which were thereafter described as 68 and 70 Dillweg or 68-70 Dillweg (Black 2/304EL). The daughter also received two lots located beside the son's lots, probably lots 510 and 511, which were thereafter described as 64 and 66 Dillweg or 64-66 Dillweg (Blue 1/2J, 2/216R-U and 305R).

16 The husband then constructed residential buildings on the lots transferred. The costs of acquiring, subdividing, transferring and developing the land were paid partly out of the husband's own resources and partly out of loans (Blue 1/65T-W). The loans were secured on the four lots transferred (and on other security). The rental income was used to meet interest obligations (Blue 1/66B-G) and was declared in the tax returns of the children, not those of the husband (Blue 2/216F; Black 4/809H-J).

17 After further advice from Mr Stiegler, the husband transferred two further lots of the Dillweg land to the son pursuant to a contract of sale dated 14 September 1988 for a price of DM94,000 (Black 2/303R-304J). These were lots 512 and 513, known as 60-62 Dillweg or 60 and 62 Dillweg (Blue 1/66H, 2/305T and 306P). Six flats were built on the land transferred at the husband's expense (Blue 1/66O-V). There was a mortgage on the land; the rent from the flats was used to meet interest obligations. The rent was declared in the son's income tax returns (Blue 2/216F and Black 4/809H-J).

(c) The relevant payments sourced from the properties acquired

18 From 1987 the husband and wife began purchasing farming properties in Australia, and spent the majority of their time here (Red 43D). Their purchases caused a need for money, and some of this need was met out of dealings by the son and the daughter in the six lots of land just described.

19 There were six relevant payments generated from the son's lots, and one from the daughter's.

20 In 1989 DM200,000 (A$150,086) was borrowed by the son on the security of 60-62 Dillweg and transferred to his parents with a view to them using that sum to assist in the purchase of a property called "Manacumble" (Red 55K-X and 59H). The contract of loan between the son and the lending bank (the Volksbank) was signed on 30 June 1989 by the son and on 4 July 1989 by the bank (Blue 1/39-40). The DM200,000 was transferred to the wife as part of a larger payment on 20 September 1989 (Blue 1/41-42). This increased the debt secured on 60-62 Dillweg (Blue 1/23Q).

21 On 8 January 1991 lot 508, 70 Dillweg, was sold by contract of sale of that date for DM240,000. On 26 March 1991 that sum was paid to the Volksbank at the son's direction (Blue 2/305B-G).

22 On 26 April 1991 lot 509, 68 Dillweg (Blue 2/306K-N), was sold by contract of sale of that date for DM255,000, which was paid by 2 July 1991.

23 On 28 October 1994 lots 512 and 513, 60 and 62 Dillweg, were sold by contract of sale of that date for DM850,000, which was paid at the son's direction on 17 and 18 January 1995 (Blue 2/306P-307E).

24 The trial judge found that, in a way which neither he nor the evidence clearly explained, out of the proceeds of sale of 60, 62, 68 and 70 Dillweg the following sums were paid to the parents for the funding of a purchase of Australian land: on 26 March 1991 DM80,000 (A$58,394.16); on 31 May 1991 DM50,000 (A$36,363.64); on 19 June 1991 DM50,000 (A$36,363.64); and also on 19 June 1991 DM80,000 (A$58,394.16) (Red 59P-W).

25 Finally, the trial judge found that on 25 January 1995 the sum of DM250,000 (A$213,087.40) was "sourced" from property in the son's name (Red 59J).

26 In their detail these findings appear to be inaccurate, because the sale of 60 and 62 Dillweg in 1994-1995 was well after the making of the payments on 19 June 1991. The correct position appears more probably to be that the four payments made on 26 March, 31 May and 19 June1991 were sourced from the sales of 68 and 70 Dillweg in early 1991, and the 25 January 1995 payment was sourced from the sale in 1994-1995 of 60 and 62 Dillweg. The inaccuracy of the findings does not matter, because the parties accepted that the five payments in 1991 and 1995 were sourced from property in the name of the son.

27 On 4 October 1991 the daughter paid DM201,433 (A$149,614.69) obtained from the sale of 64 and 66 Dillweg to her parents (Red 66aP-R).

(d) Later events

28 In the period March 1995-October 1996 relations between the wife and the son on the one hand, and the husband on the other, deteriorated, and the wife returned to Germany (Red 45C-F).

29 In early 1997 the husband and the son had a violent argument about the financial affairs of the family. The husband pleaded guilty to various offences relating to the use of a .22 rifle and was placed on a two year good behaviour bond (Red 46C-J).

30 On 28 April 1997 the husband and the son signed, in Australia, a Management Agreement pursuant to which the son was to manage the Australian farming properties while the husband went to Germany to attempt a reconciliation with the wife. It provided for six weeks' notice of termination. When the wife signed it in Germany on 14 May 1997, she changed that period to six months without the husband's consent (Red 46L-V; Blue 1/55).

31 From March 1998 relations between the husband and the daughter became bad (Red 47U-Y).

32 On 30 June 1998 the husband purported to terminate the Management Agreement with effect from 10 July 1998 (Blue 2/265).

33 On 7 August 1998 the husband was served with ex parte orders of the Family Court obtained by the wife on 3 August 1998.

34 On 21 September 1998 the Family Court made an order in the following terms:

> "That Oliver Damberg continue to operate the farming business as manager and in relation thereto:
>
> (a) account to each of the parties for the operation of the business on a month to month basis;
>
> (b) pay all monies received by him as a result of his management of the business into the account of the husband and the wife in accordance with Order No 2 above."

The Issues On The Appeal

35 In outline, the issues on the appeal were as follows.

(a) Was the presumption that the transfer of the German properties by the husband to the children was an absolute transfer rebutted with the consequence that the children only held on resulting trust?

(b) If the presumption of advancement were not rebutted, was the husband estopped from denying that it was not rebutted?

(c) Was the first payment made by the son on 4 July 1989 out of his own property?

(d) Was the husband disentitled from relying on any resulting trust by reason of his avoidance of German capital gains tax?

(e) Were the payments made by the children sourced from the German properties loans?

(f) If the payments made by the children sourced from the German properties were not loans, did the children have an equitable entitlement to recover them or a property interest reflecting them?

(g) Was the son entitled to recover $7,377.79 on a quantum meruit notwithstanding the husband's letter purporting to terminate the Management Agreement?

(h) Assuming that the appeal were dismissed or substantially dismissed, what costs order should be made in relation to the trial?

Was the Presumption of Advancement in Relation to the German Properties Rebutted?

36 The first main issue considered by the trial judge was whether the German properties acquired by the children in 1983 and 1988 out of which the advances made to the parents were sourced were owned by the children on resulting trust for the husband, or absolutely. The question was whether the presumption that the placing of property in the name of a child where the costs of purchase were paid by the husband, which raises a presumption that the husband intended to make a gift to the child, had been rebutted. The trial judge found that it had been, and the husband accepted this finding before moving to arguments critical of the reasoning about tax avoidance. On the other hand, the children attacked the trial judge's finding on the presumption of advancement, before moving to arguments defending the trial judge's reasoning about tax avoidance.

37 Whether the presumption was rebutted is thus a critical issue, for if the children succeed on it, the merits of the trial judge's reasoning on tax avoidance do not arise.

38 It was common ground between the parties on the appeal that with the exception of the first payment by the son, all payments made by the children were sourced from properties in their names. Whether that was also true of the first payment is issue (c) on the appeal.

39 The trial judge found that the presumption of advancement was rebutted. He said (Red 63H-J):

> "The fact is although the husband so far as I can see never told the children point blank that the transfers were anything but gifts he in fact never had the intention of transferring the equitable title to the children."

The reasoning supporting this conclusion was put thus (Red 63F-H and M-W):

> "I have a high opinion of the husband in this matter but neither he nor the other two adults involved would have been highly motivated by scruples, if it was possible to avoid any significant taxation.
>
> ….
>
> He went through all the motions at the time. He listened to his tax accountant, Mr Stiegler, but he always had strongly in the back of his mind that the whole manoeuvre was merely for tax

purposes and had no relevance to real life. It goes without saying that at the time the parties saw Mr Stiegler and got the advice neither they nor Mr Stiegler had the slightest idea that the family would later break up. The view that I have expressed as to Mr Damberg's lack of intention to pass the full title is confirmed in his inability in the witness box to concede that a certain act either amounts to a gift or does not amount to a gift. English is by no means Mr Damberg's preferred language but it was plain that he had in his mind, although he would not use such terms, some concept of conditional gift. In other words, his view was that if he made a gift at a point when the family were all on good terms and only made it because they were on good terms he was entitled to revoke that gift later if the family broke up. That is almost exactly what happened."

The trial judge also made the following remarks about the parties' credit (Red 71U-Z and 73A-P:

"… in general I formed the impression that I would accept the husband's credit in this matter ahead of Oliver or the wife. In the main I have few objections to Nicole's evidence. The only thing that I would say is that both Nicole and Oliver gave evidence of father to child conversations which in no way had the ring of truth. Admittedly they had to be translated from German into English and father/child conversations may lose their real flavour under such circumstances but it seems to me that the types of conversations which Oliver and Nicole alluded to with the husband putting his arm on their shoulder and looking out into the wide blue yonder and saying, 'One day this will all be yours', was in fact most unlikely to have occurred. I am not sure if it did occur that it favoured the children but they said it occurred and the husband denied it. It did not seem to be like the husband, as I saw him, but more importantly it was impossible for me to reconcile conversations like that with the husband clearly making these gifts as a result of taxation advice.

The only purpose it seems to me in such conversations is to say: Look, I am not going to give you anything at the moment but when I die you will get your reward. As I say, so far as whether those conversations occurred or not I certainly accept the husband's evidence in preference to the other adults involved. All in all I found the husband a truthful witness but where he did stray was because he confused his motivation and what ought to have happened with what in fact did happen. But in the main, I thought he was trying to tell me the truth."

40 It cannot be said that the language recording the trial judge's conclusions about the presumption of advancement was closely reasoned. The trial judge did not, for example, set out in one place the husband's evidence on his state of mind, the evidence of the children and Mr Stiegler about conversations tending to reveal his state of mind, and objective material bearing on the husband's state of mind, and proceed to analyse that material. Indeed, to some extent, there were conflicting trends in the evidence not squarely confronted and resolved in the trial judge's reasoning. Thus he said the following of Mr Stiegler's evidence (Red 65X-66M):

"I should deal with Mr Stiegler's evidence. He gave evidence by international telephone hook-up. His evidence was given in excellent English and was extremely believable. He was in no doubt that the whole arrangement was performed on the basis [of what] the husband had said, that is that it was a gift in order to avoid a particular provision of German taxation that if more than three items of real estate are sold in five years then capital gains tax is payable not only on those in excess of three but on the first three and all in excess of three."

The problem is that Mr Stiegler said German taxation could only be avoided if there were no resulting trust and said also that the husband was told this; if his advice had been followed, there would not have been any room for a resulting trust.

41 The legal background to the attacks by the children on the trial judge's reasoning in relation to the presumption of advancement is as follows.

42 There is a presumption that where one or more parents convey property to a child, the parent or parents intended to give the child the beneficial interest in the property, not merely the legal title. That presumption can be rebutted by showing, on the balance of probabilities, that the parent or parents did not have that intention. In the

present circumstances, where the husband alone transferred the property, it is his actual intention alone which is to be ascertained: *Calverley v Green* (1984) 155 CLR 242 at 246-251 per Gibbs CJ.

43 It has been said that although the presumption is rebuttable, it does "not … give way to slight circumstances": *Shephard v Cartwright* [1955] AC 431 at 445 per Viscount Simonds, quoted in *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353 at 365 by Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ. According to Viscount Simonds, the quoted words were uttered by Lord Eldon LC in *Finch v Finch* (1808) 15 Ves Jun 43; 33 ER 671; in fact they were not, though they appear in the headnote, though the expression "slight circumstances" was used by the losing counsel, Sir Samuel Romilly, in argument (at 48 and 673), and though Lord Eldon LC said that the "presumption is not to be frittered away by nice refinements" (at 50 and 674). There are other authorities suggesting that the standard of proof is higher than the normal civil standard. In *Grey v Grey* (1677) 2 Swans 594 at 598; 36 ER 742 at 743, Lord Nottingham LC said:

> "the natural consideration of blood and affection is so apparently predominant, that those acts which would imply a trust in a stranger, will not do so in a son; and, *ergo*, the father who would check and control the appearance of nature, ought to provide for himself by some instrument, or some clear proof of a declaration of trust, and not depend upon any implication of law; for there is no necessity to give way to constructive trusts, but great justice and conscience in restraining such constructions."

(By "constructive trusts" he meant "resulting trusts".) In *In Re Kerrigan; ex p Jones* (1946) 47 SR (NSW) 76 at 87 the presumption was said by Davidson J to be "a strong one".

44 However, A W Scott and W L Fratcher, *The Law of Trusts* (4th ed) vol V para 443 pp 194-196 said:

> "It has been said in a number of cases that the presumption of a gift where property is purchased in the name of a relative can be rebutted only by evidence that is strong and clear, or as it is said in some cases by conclusive or indubitable evidence. There is no reason, however, why the payor should be required to produce evidence of this character. The better view is that it is necessary to produce such evidence as is required to establish any other fact. As the court said in one case: 'It is the intention of the parties in such cases that must control, and what that intention was may be proved by the same quantum or degree of evidence required to establish any other fact upon which a judicial tribunal is authorised to act'."

The quotation was from *Hartley v Hartley* 117 NE 69 at 73 (1917, SC Ill). See, to the same effect, R P Meagher and W M C Gummow (eds), *Jacobs' Law of Trusts in Australia* (6th ed, 1997) para 1216 p 300. Hence the standard of proof to be met in order to rebut the presumption does not call for application of the principles discussed in *Briginshaw v Briginshaw* (1938) 60 CLR 336, or rest on any analogy with the high standard of proof in rectification. But it does call for proof of a "definite intention" to retain beneficial title, not a "nebulous intention to rely upon the … relationship as a source of control over the property": *Drever v Drever* [1936] ALR 446 at 450 per Dixon J (dissenting, but not on this point).

45 In *Shephard v Cartwright* [1955] AC 431 at 445 Viscount Simonds said at 445-6:

> "It must then be asked by what evidence can the presumption be rebutted, and it would, I think, be very unfortunate if any doubt were cast (as I think it has been by certain passages in the judgments under review) upon the well-settled law on this subject. It is, I think, correctly stated in substantially the same terms in every textbook that I have consulted and supported by authority extending over a long period of time. I will take, as an example, a passage from Snell's Equity, 24th ed., p. 153, which is as follows:
>
> > 'The acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, are admissible in evidence

> either for or against the party who did the act or made the declaration … But subsequent declarations are admissible as evidence only against the party who made them, and not in his favour.'
>
> I do not think it necessary to review the numerous cases of high authority upon which this statement is founded. It is possible to find in some earlier judgments reference to 'subsequent' events without the qualifications contained in the textbook statement: it may even be possible to wonder in some cases how in the narration of facts certain events were admitted to consideration. But the burden of authority in favour of the broad proposition as stated in the passage I have cited is overwhelming and should not be disturbed."

That was approved in *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353 at 365; *Calverley v Green* (1984) 155 CLR 242 at 262 per Mason and Deane JJ and *Bryson v Bryant* (1992) 29 NSWLR 188 at 215 per Sheller JA. Viscount Simonds' formulation is generally taken implicitly to exclude not only subsequent declarations which are not admissions, but subsequent conduct: see *Snell's Equity* (30th ed, 2000) para 9-16; *Lewin on Trusts* (17th ed, 2000) para 9-36; Underhill and Hayton, *Law Relating to Trusts and Trustees* (15th ed, 1995) p 329; Ford and Lee, *Principles of the Law of Trusts* (3rd ed), [21130] and [21160] and *Jacobs' Law of Trusts in Australia* (6th ed, 1997) [1213]. The principles are old: eg *Sidmouth v Sidmouth* (1840) 2 Beav 448 at 455; 48 ER 1254 at 1257 per Lord Langdale MR. They stem from an age when party-witnesses were disqualified on grounds of interest. Read by itself, Viscount Simonds' formulation might suggest that testimony by the husband in his own favour was inadmissible, as being a subsequent declaration. However, Viscount Simonds' formulation does not exclude testimonial evidence of intention. The reference to "declarations" is a reference to out of court declarations. In truth the propositions enunciated by Viscount Simmonds are not peculiar to this field, nor are they an exhaustive statement: they merely summarise parts of the common law rules relating to res gestae evidence and admissions. "[Q]uestions … as to the relevancy and admissibility of evidence … can best be considered … by reference to the principles and authorities to be found in a textbook on evidence. There are no special rules relating to cases of this kind; such cases merely illustrate general evidentiary principles": *Davies v The National Trustees Executors and Agency Co of Australasia Ltd* [1912] VLR 397 at 402 per Cussen J. In general a person whose intention at an earlier time is in issue may give evidence of it, and the position is the same here, even though the weight of the evidence, coming as it does from an interested witness, must be scrutinised with care: *Devoy v Devoy* (1857) 3 Sim & Giff 403 at 406; 65 ER 713 at 714 per Stuart V-C; *Dumper v Dumper* (1862) 3 Giff 583 at 590; 66 ER 540 at 543 per Stuart V-C; *Davies v The National Trustees Executors and Agency Co of Australasia Ltd* [1912] VLR 397 at 403; *Drever v Drever* [1936] ALR 446; and *Martin v Martin* (1959) 110 CLR 297 at 304 per Dixon CJ, McTiernan,

Fullagar and Windeyer JJ. It follows from the proposition that the rules for admissibility of evidence tendered to rebut the presumption are simply those of the general law that any modifications effected by the *Evidence Act* 1995 (Cth) are applicable.

46 The evidence relating to the husband's intentions in relation to 64-66 Dillweg, 68-70 Dillweg and 60-62 Dillweg, in the order in which it was given, property by property, was as follows.

47 So far as the transfer of 64-66 Dillweg to the daughter is concerned, the daughter's affidavit dated 29 March 1999 said in paragraphs 3-5 (Blue 1/2G-J):

> "3. In or about late 1983 I had a conversation with my father. He said to me, 'I am going to give you some of the land at Dillweg. We will build two houses on that land. This will give you security, will always be there for you. It will be a substantial asset for you'. I said 'Thank you'. My father said 'I am doing the same for Oliver. We will have to subdivide the land and you will have to attend the Solicitors and sign the papers when they are ready'. I said 'I will'.
>
> 4. My father and I went to the Solicitors and my father transferred to me Lots 64 and 66, which were next to the blocks he gave to Oliver (Lots 68 and 70).
>
> 5. I went to my bank and borrowed the money to build a house on each block. Oliver and my father's other tradesman built the house on my blocks and on Olivers. They were constructed at about the same time in about the first half of 1984."

48 The husband's affidavit dated 8 April 1999 said that the daughter made no financial contribution to the costs of the lots transferred, or to the costs of construction of a building on them (Blue 1/65P-W). The affidavit was silent as to the husband's intentions.

49 By an affidavit of the husband dated 3 May 1999 which replied to the daughter's affidavit (though for some reason it described the daughter's affidavit as being dated 9 April 1999), the husband denied the conversation she narrated. He said (Blue 2/221L-P):

> "I deny the conversation between Nicole and I as alleged. I say that the land at Dillweg was transferred to Nicole upon receipt of certain advice from my accountant. At that time, Nicole was about 16 years old. I asked Nicole to sign documents to effect the transfer of the land into her name. I did not discuss with Nicole or did I have any conversation with Nicole to the effect that the land was to be transferred to her for her benefit."

He also said it was he, not the daughter, who borrowed money to acquire and build on the land (Blue 2/221Q-U). This affidavit, too, was silent as to the husband's intentions at that point, but a little later said:

"It was never intended that the property is to be transferred to Nicole for her own benefit" (Blue 2/223C).

50 In cross-examination to which this Court was not taken, the daughter admitted it was not her loan (Black 1/224Q). She gave a somewhat different account of the relevant conversation (Black 1/228F-229C and 229K-M):

> "I see and did your father - how did your conversation commence? In direct speech?
>
> Yes, who commenced the conversation? I guess it has been my father.
>
> What do you say he said? He said to me words to the effect, because I was together with a boyfriend and I was - at that time I was really much interested in marry. He told me: look, before you do any such things I will give this to you to make sure that you have your own financial security and that you can stand on your own two feet whatever will happen.
>
> That is what your father said? Yes.
>
> What did you say? That is a really good idea.

Was that the end of it? No.

What happened then or what was said then? He said to me words to the effect or something like that: well, maybe it's better you do not hurry up with the marriage or just - just wait a little bit more time because that was his opinion at that time. Assets you may receive during the marriage will be separated in a divorce and in case he would have given me some more assets or some more properties or some more houses or whatever, they would have been separated in a - maybe, or whatever called, in a divorce that might have had occurred so he asked me just to tell him before I really want to go to marry, tell me, because I want to give you all the things that you should be given or that belong to me or should be shared by Oliver and me. You know, he just didn't want to wait until his death to transfer all these things.

Now, you were in 1983, I think, 17 years of age, or was it 16? Yes, something like that, yes.

In '62 you were born? I what?

Born in March of '67, I am sorry. The German 7 has floored me again. Born in 1967? Yes, I know it sounds funny but that's what he told me.

Well, that is highly relevant, isn't it, if that is what he told you? Yes, that's what he told me.

And you at all times knew that it was critical to put down exactly, as best you could, what was said? Yes, I know that is important that it's the truth that I say, I know.

…

You see ma'am, the sworn evidence you gave in paragraph 3 of your affidavit you have now been shown, made no reference to a boyfriend, did it? No, there's nothing said about boyfriend."

She said that what she said in the witness box was correct (Black 1/230C-D).

51 In cross-examination the husband admitted that the contract pursuant to which the land was transferred to the daughter described the transaction as a gift ("schenken"), but said it was not intended as a gift (Black 3/649F-M). He said it was motivated by a desire to reduce taxes after taking advice from Mr Stiegler, and he trusted the daughter to give it back (Black 3/649Q-650K). In cross-examination to which this Court was not taken, the husband denied the conversation narrated in the daughter's affidavit. His evidence was (Black 3/734N-735E):

"With respect to Nicole I suggest that you had a conversation with her in about 1983 when you said to her you were going to give her some of the land at Dillweg? Never. Forget it, never.

And that two houses would be built on the land and this would give her security? No. I told her: Only I give - you have to sign the contract by the solicitor, I give you two blocks that I can build houses in your name and can sell that a bit earlier, but not for the ---

Well now, that doesn't appear in your affidavit, does it, that conversation? I told you many times she was seventeen. I have two million mortgage on my head.

Yes, but that conversation - just a minute - that conversation you just gave evidence of doesn't appear in your affidavit, does it? In my affidavit, no.

You just made that up, I suggest, haven't you? No.

HIS HONOUR: Tell me again what you said? You said that you told her you'd give her two blocks, is that what you said? I told her she has to go to the solicitor and sign the - the contract. I make the contract that I want to transfer property from my name to her name and then I can build houses on this and have the things, when I want it I can sell that quicker. Only for the tax reduction that I have not - any - any building in my own name. That I make that until 1970 when I give the first block to the other people."

52 So far as the transfers to the son are concerned, he gave the following evidence in his affidavit of 31 March 1999 about 68-70 Dillweg. He said he assisted the husband in building some units on another block of land, and after the work was finished, his father said (Blue 1/20V-21K and 21Q-T):

> "'Instead of you getting your profit from this job now I will transfer to you one of the blocks at Dillweg.' Dad and I had previously spoken of subdividing the land which was then owned by him at Dillweg. Dad said to me: 'I think we should subdivide Dillweg into three blocks initially. On the first block we will build a double house similar to the ones we have built a few years ago. I will transfer about a quarter of the land and put it in your name and we will build a double house on that land. That will all be yours and will give you a start to put you on your feet. Are you happy with that?' I said: 'Thank you, that is reasonable.' Dad said: 'I will also give a block to Nicole and we will build a double house on her block. That way she will be independent.' I said: 'I'm happy with that.'
>
> …
>
> At one time before we commenced to build the double houses on blocks of land in my name and the blocks of land in Nicole's name, my father said to me: 'If, after we build the houses, you want to live in one house with, say, your girl friend you can sell the other, pay off your mortgage and live rent free.'"

53 The son gave the following evidence about 60-62 Dillweg (Blue 1/24KQ):

> "This particular parcel of land being the third parcel subdivided was purchased by me from my father in 1988 after I received a gift of 20,000 deutschmarks from my maternal grandparents. The purchase price of that land was approximately 80,000 deutschmarks. I borrowed the balance from my bank and I paid my father the full purchase price at the time of acquiring title to that parcel of land. I then borrowed the necessary money and built six units on that land."

54 The husband in his affidavit of 8 April 1999 said of 68-70 Dillweg: "I transferred … two lots to Oliver's name" and said that the son made no financial contribution to the cost of acquiring the land or constructing buildings on it (Blue 1/65P-X). The affidavit was silent as to the husband's intentions. In that affidavit the husband said of 60-62 Dillweg (Blue 1/66H-T):

> "A few years later namely, some time in or about 1987/1988 upon advice from my accountant, I further transferred 2 lots bearing numbers 62 and 60 to Oliver, and kept the remaining lot bearing numbers 58 and 56 in my name solely. I developed the land by building 6 flats on each of the double lots. I paid or caused to be paid all the construction costs.
>
> I was solely responsible for the work involved in the development and construction of those flats including organising finance with the bank using the block as security and any other property held in my name at the time as joint security. I developed the blocks by putting the floor plan together, designing the building, organising the tradesmen, buying materials, supervising tradesmen, working on the sites with the tradesmen and managing the rental up until they were sold respectively in 1992 and 1995.
>
> At the time when the properties at 62 and 60 Dillweg Ahlen Dolbery were placed into the name of my son, Oliver was working as an apprentice with Sennekamp. His income was approximately DM 1,200 per month."

The husband said that the son gave some limited assistance with labour on the site. He said: "The properties were transferred to be held by Oliver on my behalf" (Blue 1/66V).

55 The husband in an affidavit of 3 May 1999 in answer to the son's affidavit denied the conversations about 68-70 Dillweg (Blue 2/229P-230P):

> "(23) I deny the conversation between Oliver and I as alleged. I further deny that I had any conversation with Oliver to that effect. I say that in or about 1982/1983 I transferred two (2) blocks of land at Dillweg which was owned by me and subsequently subdivided to Oliver and Nicole upon receipt of certain advice from my accountant. At that time Nicole was only 16 years

old and Oliver was only 18 years old. I told them to go to the solicitors office to sign some documents in order to effect the transfer of the properties to their name. However, I have never had any conversation with Oliver and Nicole to the effect that I was transferring the property to them for their benefit.

(24) I deny the contents therein and say that Nicole and Oliver did not have any assets except for land which was transferred to them by me. From the best of my recollections, I borrowed 300,000 deutschmark to purchase the whole block of land. After subdivision, the land continued subject to mortgage to Volksbank, Hamm. I then borrowed a further 270,000 deutschmark for construction of two (2) duplexes on the blocks transferred to Oliver and Nicole. The loan was applied for by me from Volksbank, Hamm. As Oliver is the registered proprietor of the said block, all government documents would issue in Oliver's name such as building certificates. Otherwise, I was responsible for the acquisition, and construction of the buildings. I was also responsible for finding tenants and negotiation of rental payable since completion of the buildings. All rental was deposited into my bank account from which all the mortgage repayments, rates and associated costs and expenses were paid.

(25) I deny the alleged conversation.

(26) I refer to my reply to paragraph 25.

(27) I do not admit the contents therein."

56 He also denied or did not admit the son's evidence about the acquisition by the son of 60-62 Dillweg (Blue 2/231R). In particular, he denied receiving approximately DM80,000 in relation to that transfer.

57 In cross-examination to which this Court was not taken, the son's evidence about the transfer of 68-70 Dillweg was strongly challenged (Black 2/358M-Q and 359D-367Q) but he continued to adhere to it. In cross-examination to which this Court was also not taken, the son was asked about conversations in relation to the purchase from the husband of 60-62 Dillweg but could not remember them (Black 2/390E-391F).

58 In cross-examination about 68-70 Dillweg the husband gave similar evidence to that which he had given about the daughter's lots, namely that the property was not a gift to the son even though the contract said it was (Black 3/647U-W and 649M), and gave similar evidence about its role in tax reduction and his trust in the son. In cross-examination about 60-62 Dillweg he said he was not aware of the truth of the son's evidence about funding the DM84,000 purchase price from an inheritance and a loan and gave no distinct evidence about his intention (Blue 2/644B-647T). The evidence about the transfer of 68-70 Dillweg being designed to reduce tax and the husband's trust in his children was not initially applied to the acquisition of 60-62 Dillweg (Black 3/651T and 652D and H), but then appeared to be adopted (Black 3/653Q-T and 654C).

59 In cross-examination to which this Court was not taken the husband denied receiving the purchase price of DM84,000: Black 2/415F. At Black 3/644H-J he said he was not sure whether he received it. At Black 3/732Q he denied receiving it. He said it was not his intention to sell the land to the son: Black 2/415J.

60 The court was not taken to any cross-examination of the husband specifically on the conversations which the son alleged.

61 Mr Stiegler gave detailed evidence about the advice he gave the husband about the Dillweg transactions. This Court was taken to it in detail and it will be analysed below.

62 One issue that arose on the evidence at trial but which did not arise on appeal was whether the son had contributed work to the improvement of properties. His evidence suggested that he had; the husband said he had not. On appeal the son made no attempt to argue that he had any equitable interest by reason of contributions of that kind. The sole issue was whether the husband had rebutted the presumption by establishing an intention not to give.

63 A resolution of the conflicts of testimony between the husband and his children would ordinarily call for a detailed analysis of that testimony. The trial judge did not record any detailed analysis of that kind. There was a fuller, but not complete, analysis by counsel on both sides before this Court.

64 In effect, the children submitted that the husband's statements of intention were inconsistent with Mr Stiegler's evidence. Mr Stiegler was a Chartered Accountant of thirty years' experience by the time of the trial (Blue 2/213K). He prepared "partnership statutory accounting returns" for the husband and wife from 1978 until 1992 and "statutory accounting declarations" from the husband from 1992, the son from 1983 to 1992 and the daughter from 1984 to 1992 (Blue 2/217J-M). He acted for the husband in relation to the following matters:

> "(a) Preparation of statutory annual income tax declarations and lodgment of same.
>
> (b) Advice on capital expenditure evaluations.
>
> (c) Advice on various investment portfolios and planning.
>
> (d) Negotiations with bank with respect to loan applications and to provide information as and when required by the bank to assist with the loan applications.
>
> (e) Preparation of investment plans and budget projections" (Blue 2/213N-S).

He said (Blue 2/213T-215B):

> "Since 1978, I have been actively involved with Wilfried's financial affairs in that Wilfried often discussed with me his investment plans before decisions were made and acting on my advice. He made decisions later recorded in the documentation and statutory declarations I prepared on his behalf.
>
> On the basis of my discussions and documents I prepared for Wilfried, I recorded and prepared income tax declarations which confirmed that Wilfried had developed a number of properties in Germany since 1978. Wilfried developed vacant land and sold the same later for profit which was used for further developments together with money borrowed from the bank.
>
> To my knowledge he always improved the land by construction of houses, flats, units or townhouse and then managed them as rental property for a period of time until the sale.
>
> On many occasions, Wilfried was often accompanied by his wife Bruenhild Damberg in my office and consulted me with his business and investment plans before decisions were made.
>
> Wilfried developed many properties some of which were registered in his name and some of which were registered in the names of his wife Bruenhild Damberg, and his children Oliver Damberg and Nicole Damberg.
>
> In the case of Oliver Damberg the following properties were registered in Oliver's name:
>
> (a) …
>
> (b) 68-70 Dillweg, Dolberg, Germany;
>
> (c) 60-62 Dillweg, Dolberg, Germany.
>
> In the case of Nicole Damberg, the following properties were registered in Nicole's name:
>
> (a) 64-66 Dillweg, Dolberg, Germany;
>
> (b) …
>
> In the case of Bruenhild Damberg, the following properties were registered in Bruenhild's name:
>
> (a) 69 Dillweg, Dolberg, Germany;
>
> (b) …

(c) … ."

65 His evidence about the Dillweg properties was as follows (Blue 2/215G-217H):

"… in or about 1983, Wilfried came to my office and sought advice from me in relation to his plans of developing a vacant block of land being Lots 508-515 Dillweg, Dolberg which he purchased in 1981 for 332,010 deutschmark. I recall Wilfried, his wife Bruenhild and I had discussions regarding Wilfried's development plans and his plans to subdivide the land. Although I cannot recall the exact contents of the conversation, I do recall we had a conversation discussing the following matters:

(a) The source of funds for the development. It was discussed whether to borrow money from the bank or to realise cash from the sale of the property or to borrow part and realise part of the funds.

(b) Any tax liabilities on profit upon realisation of those properties once developed.

(c) Wilfried's development plan for the land.

(d) The tax implications on the sale of the property if transferred to the wife and the children.

At the time, the applicable taxation law in Germany concerning the profit from the sale of real property was such that if an owner sold more than three (3) properties in 5 years, all the profits derived from the sale of those properties would be taxable.

On the basis of my instructions, I recall advising Wilfried Damberg in the presence of his wife as follows:

(a) It would be my advice to divide the land in Dillweg and transfer some to other members of the family.

(b) It would be better to have some of the subdivided land transferred to the names of the children and to build the house in the children's names.

(c) Upon receipt of those properties, each of the children have to have income tax declarations prepared declaring rental income from those properties.

After discussions referred to in paragraph 15 Wilfried had further conferences with me and informed me of his decision to subdivide and transfer part of the property to his two (2) children Oliver Damberg and Nicole Damberg. From my instructions, Wilfried's wife Bruenhild already had a number of real properties registered in her name at that time and the transfer of further property to her was not a commercially viable option in order to utilise the benefits as provided by the then German Tax Laws.

Soon after, I accompanied Wilfried Damberg to the bank for the purpose of raising funds for the development of the land. I recall that Wilfried and I discussed Wilfried's development plans and transfer part of the land to the children as part of his development plans with the bank manager. The loan was approved to enable Wilfried to complete the construction of two (2) double houses on the lots proposed to be transferred to Oliver and Nicole. The mortgage was applied for by Wilfried and the documents were signed by him.

Subsequent to the subdivision and transfer of the land to Oliver and Nicole, 64-66 Dillweg, Dolberg was transferred to Nicole and 68-70 Dillweg, Dolberg was transferred to Oliver. I was advised the whole of the cash component came from Wilfried Damberg and the bank provided the balance of funds required for the costs of subdivision, transfer and construction.

> Prior to the transfer of the Dillweg property to Oliver Damberg, also as part of the financial planning and to utilise the benefits that were provided by the German Tax Law, from my instructions …
>
> Subsequent to those transactions, Wilfried in September 1988 transferred a further block of the subdivided Dillweg property number 60-62 Dillweg, Dolberg to Oliver and developed the land by erecting 6 flats on the said property.
>
> The above transactions were designated to realise benefits provided by the German Tax Law in that it allows an individual to buy and sell three (3) properties in 5 years without having to declare the profit received from the sale of those properties."

66 At the trial counsel for the husband asked the trial judge to find Mr Stiegler to be "a witness of truth" and said: "No criticism could be attached to any aspect of his evidence and it should be wholly accepted" (Black 4/877U-V; see also 877B). The trial judge said in argument that "he sounded pretty good" (Black 4/877D). The trial judge said in his judgment (Red 65X-66G):

> "I should deal more with Mr Stiegler's evidence. He gave evidence by international telephone hook-up. His evidence was given in excellent English and was extremely believable. He was in no doubt that the whole arrangement was performed on the basis [of what] the husband had said, that is that it was a gift in order to avoid a particular provision of German taxation that if more than three items of real estate are sold in five years then capital gains tax is payable not only on those in excess of three but on the first three and all in excess of three."

(The trial judge's statement that Mr Stiegler's evidence was given in excellent English is an exaggeration:

it was very good for a German national resident in Germany, but it was not excellent.)

67 Mr Stiegler's evidence in cross-examination conveyed a rather different impression from that conveyed by his affidavit. In view of the heavy reliance which the arguments of the children placed on it, it is desirable to set it out in some detail. First, Mr Stiegler repeated his evidence about the impact of German law on the taxation of capital gains if the same person sold more than three properties in five years (Black 4/804J-L). He then gave the following evidence (Black 4/804N-805T):

> "Does it make any difference if the owner of the property is a trustee? Is a what?
>
> Is a trustee, that is that they hold the property upon trust for somebody else? No.
>
> You understand what I mean by that? Yes, of course, if it is in trust, it is to be paid to.
>
> If the properties are in different names on their title but --- ? No, say it again please.
>
> Different names, names of different people, do you understand? No, say it again please.
>
> If the properties are - if there are say five properties but each is in the name of a different person --- ? Yes, I see.
>
> But those --- ? That was the reason because I gave the advice to Mr Damberg you are four members in your family and give properties, one, two, three to your wife, give one, two, three to Nicole and give one, two, three to Oliver because you have the possibility to sell 12 properties without paying taxes because the properties are in different names.
>
> And to do that did you tell him that he has to give the properties to his wife and each of the children? Yes, that was my advices.
>
> But if what he did was that he transferred the properties into their names but they held the properties upon trust for him so that he was the real owner of all the properties, does that make a difference to the tax consequences. Do you understand? It is not - if you do it in trust for example it is my property but I give it to you but only in trust for me.

Yes? Then he would have paid the taxes and that was what I told him. If you give the properties as a gift to the children and to your wife, they are off and out from you but when they sell it, they will not pay taxes you know, three properties, no taxes. That is what I told him and he made the registrations on the name of his family and that was okay and that if Oliver sold for example or Nicole, there were no taxes all these years for selling it, you know.

Yes? But in trust, it is as I understand a trust is I give my property to you but only in trust. In reality it is mine.

That is right? That is what I understand under trust.

Now is that had of --- ? But he gave it to them and was very - he said this is my family and my children and the whole thing together and therefore I can do that because everything of the money is coming in the family cash.

Yes? That is what he thought, we are one family and I give one, two, three to him, to her and so on.

Yes but if the properties were held on trust for him by the members of the family and they sold more than three in five years, would they have to pay the tax? Yes.

Is that because the real owner is the same person in each case? Yes."

68 In that evidence Mr Stiegler revealed a clear understanding of the difference between the husband "giving" the children property outright, in which case he lost ownership of it and it was theirs, and the husband "giving it but only in trust", in which case "in reality" it remained the husband's. He also stated clearly that capital gains tax could only be avoided by an outright gift; if the transfers were only on trust and three properties were sold in five years then tax would be payable.

69 After being referred to a letter which the wife wrote to him on 20 February 1985 (Blue 2/243), Mr Stiegler gave the following evidence (Black 4/806F-S):

"The letter is in German, but we have been told that, in English, it is tell you that the land at Dillweg had been divided into eight parcels? Yes.

That two were given to Oliver and two were given to Nicole? Yes.

Is that your understanding of the letter? Yes. You know, all coming from my earlier advices I always gave Mr Damberg - you have to count it with your fingers; always three parcels or three properties to your family and count the years, one two three, five years, and now you can, without tax, selling if you want to.

Right? The problems all coming this registration for the children and for Oliver but in trust, as a gift, for the financial offices, it has to be a gift otherwise he would have paid taxes if it was in trust, but what they meant, what Mr Damberg always meant, we are one family - all coming in one spot, and therefore I can do that. They are very good to each other and therefore I will do that.

Did you advise him that for tax purposes he must actually give the properties to the wife and children? Yes.

Is your understand[ing] that that's what he did? Yes. He just did what I told him. Do that, and he did it, and he always thought it is mine because all the money and so on is coming from my side and we are a good family together. I can do that, and in reality that if I will go Australia, for example, one day, I would have all this money from selling because we are one family and I can buy me a ranch in Australia, or so on."

70 Here, after reiterating that tax could only be avoided by an outright gift, and that that was what he told the husband, Mr Stiegler said that that was what the husband actually did. He also repeated a point made earlier: that it was the husband's view that one day he would consolidate all the assets "because we are one family".

71 The evidence continued (Black 4/806U-807L, 807P-T and 808M-Q):

> "Rather than stopping, your Honour, I just thought I'd make a submission later about this. Mr Stiegler, was there any document in your files that you can remember where it was ever indicated to you that these properties would be held by either of the children on trust for Mr Damberg? No, no.
>
> Was the tax office, as far as you know, ever informed that the properties were to be held on trust for the children - on trust by the children for Mr Damberg? No.
>
> If the tax office was told that now, after the properties have been sold, would that lead to the tax office wanting to levy tax on the profit? No, because in the act - in the act giving the property to the children is no word that it is in trust, and therefore - therefore the financial officers will not take tax from him because of it we have a contract that Wilfred, Mr Wilfred Damberg, give the properties as a gift to his children.
>
> Right, but if Mr Wilfred Damberg now said to the tax office, actually I didn't give it to the children, I intended them to hold it on trust for me. Would the tax office then take a different view about the matter? For the so-called open years, for the open years there may be treated new over, maybe, yes.
>
> You mean they may want to levy some tax? Yes, that's right. They would think it over - they would have another view for the open years, you know. The open years.
>
> By open years what do you mean? Open years were for the years the office has no declarations. The office - the financial office has no declarations of Mr Damberg for the years '95 to '98.
>
> …
>
> Right. We have the contracts here for the transfer to Oliver and Nicole of the properties number 74 to 70 Dillweg, and the contracts say that those properties were a gift. Did you know that? Yes. All the contracts he made with the children were gifts for - just gifts for the office because the income tax law wouldn't work otherwise, you know. You have to say I gift that as a gift to you and then all these things about the properties come in the income declaration for Oliver and Nicole, but if he would have said it comes to you but in trust, the law wouldn't work, you know.
>
> …
>
> Yes, but to obtain the benefits - if you call them that - of the tax law about selling not more than three properties in five years, it would be important to know, wouldn't it, that the properties, although they are in different names, were or were not held really for one person? If he would held it for one person the advantages wouldn't work, you know.
>
> That's right, and you would have told him that, wouldn't you? I told it to Wilfred always. Please notice always giving it by gifting act or by selling act."

72 The cross-examiner then turned to a new point (Black 4/808R-809J):

> "If the property was owned by one of the children but was really owned by Mr Damberg, then the income from that property - if it was rented - would be income of that trust, wouldn't it? The income of - for example, the property is now on my name, in the register, in my name and there is a rent or income on my name, I have to give a declaration to the office.
>
> Yes? We always had a declaration for Wilfred Damberg and Bruenhild Damberg together, as a couple, and a special declaration for Nicole and a special declaration for Oliver.
>
> Right? I always made three declarations for the Damberg family. Oliver, Nicole and Bruenhild and Wilfred together.

> But if any of the children held the property on trust for, say, their father, and they were receiving rent as the trustee of that property for him, then that would have to be shown in the tax return, wouldn't it? No.
>
> Well, wouldn't it have to show that the income was received as a trustee? If it was a trust then the income would have come on the side of Wilfred Damberg. If there was a trusting act it would be Wilfred Damberg's income.
>
> Right, is that because although the property might be in the child's name, the real owner of the income is - would be Mr Damberg? Yes, yes.
>
> So the income would appear in his tax declaration, not in the owner's declaration? Yes, and we had it in the declaration for Nicole and Oliver because the act was okay, registered on her name or on his name, and then I make the declaration and give the income they showed me to their declaration."

73 In re-examination the following evidence was given (Black 4/809N-W):

> "Mr Damberg said to you something along the lines of we are very good to each other. He was referring to his family. You then said something along the lines of he thought that all the money would be available, and he would buy a ranch? Yes.
>
> What led you to believe that Mr Damberg thought that he would have the money all available for himself? Do you mean at what year it was?
>
> No, what was it that led you to say that. Did Mr Damberg tell you something along those lines? Mr Damberg told me in the former years one day I will give - my advice was I - give the properties to your family, divide it to the family members and then he said one day the best thing I could do in my life would be to sell all properties and go to Australia for - getting me a ranch, and he always thought - because we are a good family - all the money is coming in one total and I can buy a ranch from that."

74 In essence, the children submitted that Mr Stiegler advised the husband that it was crucial he give (or sell) the properties outright, since if he retained any beneficial title tax could not be reduced; that Mr Stiegler thought he acted on that advice; that no record was kept by Mr Stiegler and no communication to the tax authorities was made indicating otherwise; that income from the properties was included in the children's tax returns (Red 66L), which was consistent with an absolute transfer and inconsistent with a trust; and that the only basis on which the husband thought he might regain the assets to buy a ranch was because the family were at that time united and on good terms.

75 The children submitted that there were specific parts of the cross-examination of the husband which, when read in the light of Mr Stiegler's evidence, supported the conclusion that his intention was to make an outright gift. They submitted that that material revealed that the husband made the transfer on the advice of Mr Stiegler for the purpose of avoiding tax; that the transfers were made by way of gifts; that he intended to transfer the beneficial interest and did so in the belief that he could rely upon his good family relationship with his children, whom he trusted, and in the belief that his children would always consult his interests and comply with his wishes in exercising their proprietary rights.

76 The children submitted that the only evidence supporting the husband's case was his own, given sixteen years after the 1983 transfers and eleven years after the 1988 transfer. It was uncorroborated and calls for the closest scrutiny. In particular, the children submitted that there was no evidence that the husband had ever told anyone - either child, the wife or Mr Stiegler - that he intended to retain the beneficial interest. The husband did not dispute that submission, and the trial judge did find that the husband "never told the children point blank that the transfers were anything but gifts": Red 63H-J.

77 The children also submitted that the wife believed that the husband had made an outright gift, and pointed to a letter supporting the submission (Blue 2/243, Black 3/655Q-R and 658G). They submitted that Mr Stiegler shared that belief. They also submitted that they shared that belief. The husband, however, submitted that the only basis for such a belief rested on their evidence of their conversations with the husband, and since the trial judge rejected their evidence of those conversations, he must have rejected the view that they had that belief. The

husband's submission is not supported by any passage in the trial judge's reasons for judgment specifically rejecting those particular conversations. He did say that their evidence of some "father to child conversations … in no way had the ring of truth" (Red 71X). However, he then identified the conversations thus:

> "it seems to me that the types of conversations which Oliver and Nicole alluded to with the husband putting his arm on their shoulder and looking out into the wide blue yonder and saying, 'One day this will all be yours', was in fact most unlikely to have occurred" (Red 73C-E).

That in fact appears to be a reference to evidence given by the daughter of a conversation in Australia in early 1993 as they looked over "Manacumble" from a hill, not a conversation about the Dillweg land: Blue 1/3Q-U. The court was not taken to any conversation of that kind to which the son was a party. The trial judge said: "it was impossible for me to reconcile conversations like that with the husband clearly making these gifts as a result of taxation advice" (Red 73G-L). As the children submitted, this observation is unsound: an intention to give two lots of land in Dillweg in 1983 is not negated by a 1993 conversation suggesting that a farm in Australia would one day, but not immediately, be the daughter's. The husband submitted that the trial judge was treating the "early German conversations" as falling within the same class as the "Manacumble" conversation. The imprecision of the findings is too great to permit this conclusion. It is true that the trial judge said of the husband that he had a high opinion of him (Red 63G), which is a curious conclusion in view of the fact that the husband was apparently, in the view of the trial judge, guilty of blatant frauds on the German revenue authorities if he did have an intention to retain the beneficial title. It is also true that the trial judge said (Red 73N-P):

> "All in all I found the husband a truthful witness but where he did stray was because he confused his motivation and what ought to have happened with what in fact did happen. But in the main, I thought he was trying to tell me the truth."

But that is not a specific rejection of the children's evidence in the Dillweg conversations. To some degree, however, this controversy is of only minor significance. If it was the fact that none of the husband's circle believed he had retained beneficial title, he could still rebut the presumption even if he had told no-one about his intention to retain beneficial title and even if they misunderstood his intention.

78 The children then made a submission about the trial judge's finding: "the husband … never told the children point blank that the transfers were anything but gifts": Red 63H-J. The submission was that the finding "means that [the trial judge] found that the appellant told the children that the transfers were gifts". That submission is rejected. It does not follow from the fact that the husband never said that they were not gifts that he did say they were gifts.

79 The children next submitted that because the documents pursuant to which 64-66 Dillweg and 68-70 Dillweg were transferred used the word "gift" ("schenken"), they were out and out transfers. That appears to be no more than a minor circumstance pointing against the husband: it is far from decisive. It might have more weight if there had been expert evidence indicating that that expression was a technical term indicating an out and out transfer, but there was no such evidence. It may also be, as the husband submitted, that the word "gift" was used in contradistinction to "sale" rather than in contradistinction to "trust".

80 The children finally submitted that the husband's real intention was revealed in some answers of his in cross-examination "to be understood in the light of" Mr Stiegler's evidence. The husband said that until 1995 (in the case of the son) and 1996 (in the case of the daughter), "I trusted my family member and to give that back to me when I want it" (Black 3/650J, 669L-P and 670G). He said that if the land were given to the children in trust for him, "this is the wrong way for the tax office" (Black 3/651H-J). The cross-examination continued (Black 3/651J-S):

> "Why, what's wrong with that? You cannot put something in other name and then want it back and then the property's in my name - the same as the moment to other rent was pinched by Nicole until January '97 I have to pay $30,000 tax of this money, never arrived in my hands.
>
> Yes? That's the point.
>
> You see the tax office has to have the impression, doesn't it, that the land is not owned by you? Yes.
>
> Whether in name or in fact? Yes.
>
> So, if you had a trust deed with Oliver or Nicole which indicated that they really held it for you, that wouldn't achieve the tax purpose, would it? No. He has to pay the capital gains tax when he makes a profit.
>
> And that's because that property would be included with your ones in your own name? Yeah.
>
> Yes? It was only the way I can go and sell the block quicker or - yeah, quicker than normal time."

At Black 3/652N-R the evidence was:

> "The only way you could avoid the tax consequences that I just spoke about is either to have contracts which give the properties to the children --- ? Or the parent whatever.
>
> Well, the children in this case? What you can trust.
>
> Yes or to have a contract which appears to be a sale of the property to the children - it's the only way you can avoid it, isn't it? A sale of the property, yeah."

At Black 3/653U-654D the following appeared:

> "Yes and Mr Stiegler told you, didn't he, that the only way you can avoid the tax lawfully would be to give the properties away to members of the family? Yeah and then you believe the people give it back and then everything is okay.
>
> That's right but in circumstances where they're not obliged to give it back to you? When the people was not prepare and give that back in '91 or in '95, then I have to ask them why but never - was never the problem. Everything was informed. It's only for one point or one reason and that was 35 years the same when I put three properties in my wife's name."

81 None of this material unequivocally supports the submission. It does show that the husband understood that German tax law required an outright transfer if tax was to be lawfully avoided. It also shows that Mr Stiegler advised the husband to this effect. It shows that the husband appreciated that a transfer to the children on express trust for himself would not permit tax to be avoided. But the material does not show that the husband did not resolve to retain for himself the beneficial interest. It does not establish any contradiction with the evidence which the husband gave in chief about his intention to retain the beneficial interest. A belief that the children would re-transfer the property does not support the view that his original intention was to make an outright gift. To transfer property to the children because he trusted them to deal with the property by returning it when he wanted them to is not to transfer the property for the children to deal with as they pleased.

82 The final key passage relied on by the children consisted of the following words in an answer to a question from the trial judge: "when I give the gift to the pair of them and I never expect the gift to come back to me". By

themselves those words could support the children's case. But counsel for the husband contended that read in context they did not. The material appears in answer to the third of three questions. Those questions and the answers are (Black 3/661S-662E):

> "Well, put it another way - if you had been giving Oliver and Nicole those blocks of land on their own account, you would have done exactly this, wouldn't you - you would have signed a transfer to them with the word schenkeng and verschenk on --- ? No.
>
> Well? I never make - when I ---
>
> No, I'm not saying you did but if you had - I'm not saying that you will agree that you did but if you had been giving them - if you'd been making a gift of properties to them - this is exactly what you would have done - the same documents. Now, what is the difference? What the different - the different is - what we talk is - when we start this morning when I give the gift to the pair of them and I never expect the gift to come back to me but in this case we put it only in his name or her name and we have never the discussion as to the or a problem that the part come back."

Counsel for the husband pointed out that the evidence relied on is given on an assumption, namely that the husband had given the properties to the children in the sense of transferring them outright. But the trial judge in his question was making it plain that he was aware that the husband was rejecting that assumption, and accordingly the husband's acceptance of it for the purpose of dealing with the question cannot count as an admission by him.

83 The children submitted that there was no evidence to support the trial judge's finding that the husband "always had strongly in the back of his mind that the whole manoeuvre was merely for tax purposes and had no relevance to real life" (Red 63N). The evidence is to be found in the husband's answers in cross-examination about trusting his family to return the property when he wanted it (Black 3/650-654). During those passages the husband made it clear that he regarded the steps apparently needed to ensure non-payment of tax as a matter of form, quite independent of the substantive question of his rights of ultimate enjoyment of the property.

84 The children also attacked the following passage (Red 63Q-V):

> "The view that I have expressed as to Mr Damberg's lack of intention to pass the full title is confirmed in his inability in the witness box to concede that a certain act either amounts to a gift or does not amount to a gift. English is by no means Mr Damberg's preferred language but it was plain that he had in his mind, although he would not use such terms, some concept of conditional gift. In other words, his view was that if he made a gift at a point when the family were all on good terms and only made it because they were on good terms he was entitled to revoke that gift later if the family broke up."

It was said that there was no evidence of the husband's inability to make the concession described or of the husband's view that he could always revoke a gift. The husband in argument did not point to evidence explicitly revealing an inability to make the concession, but that inability may be inferred from Black 3/647U-649P, where the husband refused to accept that the word "gift" in the 1983 contracts meant that the properties were transferred by way of gift as distinct from what happens "in the family business transfer from one name in the other name" (Black 3/648F). The husband's view that he could revoke the gift if the family broke up is supported by evidence in which he said he could get it back at any time -

"when I want it" (Black 3/650K), and evidence that this would be effective because of his trust in his family (Black 3/652P and 653V).

85 The last major submission which the children advanced turned on the fact that (save for one immaterial reference to "evasion") the trial judge consistently said that the husband's purpose was to "avoid", not "evade" tax. If the husband were to avoid tax - i.e. escape its incidence lawfully - it was vital that the transfers be absolute, and that there be no resulting trust. On the other hand, the purpose of "evading" tax would be achieved if an intention to retain the beneficial title existed. Since the trial judge made no finding of evasion, there is an inconsistency in his reasoning. This submission has only artificial merit. It is far from clear that the trial judge was directing his mind to the conventional difference between avoidance and evasion. Indeed it is not clear whether the trial judge's finding that the husband's desire was to make conditional gifts is to be characterised as a finding of avoidance or evasion. In short, the inconsistency propounded does not reveal a radical flaw in the trial judge's reasoning.

86 It may be noted that there is some evidence-in-chief of the son which, while not specifically directed to 68-70 Dillweg, supports the view that though the husband intended to transfer properties to his children, he intended to do so only after his death, or at least at a much later time. At some time before June 1982, according to the son, the husband said:

> "Oliver, I know you are working very hard to help me in my building work. I am not going to pay you for that work now. If you need anything I will provide it for you. One day most of this will be yours anyway" (Blue 1/17V-18D).

The husband denied this (Blue 2/227C-E) and the trial judge made no specific finding about it. However, as the trial judge noted at Red 53R-S, if this conversation happened, it affords general support for the husband's position, not the son's, and indicated the son's understanding.

87 In short, the position is as follows. The trial judge's approach to the credibility issue was vague and general, and not closely reasoned. The trial judge made remarks critical of the children's credibility, but without giving satisfactory reasons. He did not specifically reject their evidence of the relevant conversations in 1983. Even if he had, the question of the credibility of the husband's evidence about his intention to retain beneficial title, not disclosed to his family or Mr Stiegler or anyone else, would remain. The trial judge made remarks favourable to the husband's credibility, even though his evidence was given at a time when he had strong motives of self-interest which might well significantly affect the reliability of his recollection or the honesty with which he narrated it. The trial judge did so despite the absence of any corroboration of the husband. And he did so even though acceptance of his credibility involved finding that he willingly permitted a false appearance to be presented to the German tax authorities in the face of clear advice from Mr Stiegler as to what the law required. Apart from the fact that income from the properties was dealt with as though they had been given outright to the children, and the fact that the 1983 transfers spoke of a "gift", there were no objective circumstances casting light on whether the presumption of advancement was rebutted. On the other hand, the husband was never shaken in cross-examination or moved from his evidence-in-chief on his intention not to make an absolute transfer.

88 If the husband had died before trial, or if he had been unfit to give evidence at the trial, so that the issues had to be determined without his testimony, the children would have been in an extremely strong position. Similarly, a trier of fact who read the evidence of the husband and the children as recorded in the affidavits and the transcript might well regard the case of the children as very strong. And an appellate court unconstrained by conventional limitations on appellate intervention in trial findings might form that view as well. But the husband did give evidence; the trial was not conducted only on paper but by viva voce testimony; and appellate courts are usually regarded as being in a position of disadvantage compared to trial judges when resolving conflicts of testimony or evaluating testimony about mental states. "Trial by transcript can seldom be an adequate representation of an oral trial before a judge or an oral trial before a judge and jury": *Rosenberg v Percival* [2001] HCA 18 at [41] per McHugh J, Gummow J concurring at [92]. Further, it is incumbent upon a party seeking to challenge findings of fact - here the children - not merely to persuade an appellate court that that court might have come to different findings from the trial judge had the appellate court been the court of trial, but rather to demonstrate appellable error in the reasoning of the trial judge: *Williams v The Minister Aboriginal Land Rights Act 1983* [2000] Aust Torts R 81-578 at [60]-[61].

89 It would be unusual to set aside, or order a new trial on the ground of, the trial judge's findings based on the husband's credibility unless it could be concluded that the trial judge failed to use or palpably misused the advantage he had of seeing and hearing the witnesses, or that the trial judge relied on evidence which was inconsistent with facts incontrovertibly established by the evidence, or that the trial judge acted on evidence which was glaringly improbable, or that the trial judge fell into some error of principle, or that the trial judge mistook or misapprehended the facts, or if the effect of the overall evidence was such that it was not reasonably open to make the findings he did: *Abalos v Australia Postal Commission* (1990) 171 CLR 167; *Devries v Australian National Railways Commission* (1993) 177 CLR 472; *Rosenberg v Percival* [2001] HCA 18 at [37]-[42] and [92] per McHugh J and Gummow J. However, it is possible to set aside, or order a new trial on the ground of, credibility-based findings in other circumstances, because "no short exhaustive formula" of the above kinds can meet every case: *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 160 ALR 588 at [3] per Gaudron, Gummow and Hayne JJ, quoting *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 480 per Deane and Dawson JJ. Another instance where this appellate intervention can take place is "where in a complex pattern of events incontrovertible evidence can only be fitted into the pattern if a different view of the credibility of a witness is taken by the court on appeal": *Agbaba v Witter* (1977) 51 ALJR 503 at 508 per Jacobs J, approved in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 160 ALR 588 at [4] by Gaudron, Gummow and Hayne JJ.

90 Unsatisfactory though the relevant passages in the reasons for judgment are, a perusal of the transcript reveals that the trial judge followed the testimony closely, and also that he had very good opportunities to observe the witnesses, particularly the husband, over lengthy periods of cross-examination. It cannot be said that the trial judge failed to use those advantages, or that he misused them. Those advantages were even greater than usual in circumstances where the husband's English was not good, because demeanour, considered not as a factor relevant to dishonesty, but as a factor relevant to what the witness was trying to communicate, becomes unusually important. The trial judge did not err in principle or mistake the facts. It cannot be said that the effect of the overall evidence was such that it was not reasonably open to make the findings under challenge. The trial judge's acceptance of the husband's evidence as to his intentions in 1983 and 1988, leading to the trial judge's finding that the husband saw what he had done as amounting to conditional gifts, revocable at a later time, was not inconsistent with facts incontrovertibly established by the evidence; nor was it glaringly improbable. Indeed it accords with the probabilities. The husband, a German born in 1938, would have had only hardship as his garment in the early years of his life. He was a man without any background of wealth, rank or education. He was a provincial, seemingly never moving far from Hamm. Before he concentrated on his construction and property development business from 1974 on, he had worked as an electrician, an electrical sub-contractor, a crane operator, a motor repairer, a second-hand car dealer and a service station operator, as well as in construction. It is clear that as a young man his income was low. His activities depended on numerous bank loans and on the renting of properties to tenants. By 1983, it seems, he was steadily accumulating a small fortune largely by his manual and mental efforts, and was indeed becoming quite a substantial man of property. It accords with the probabilities that a hard-headed man of business, gradually improving his position after an immense struggle using no assets other than those he himself had built up, would be secretive about the transfers he made in 1983 to two adolescent children - even though neither the marriage nor the father-child relationships were then disharmonious. It also accords with the probabilities that a person with the husband's background and history would not intend to make an outright gift to his children in 1983. The children had done nothing in particular to merit any exercise of bounty in their favour at that stage. An intention not to transfer the beneficial interest and to preserve power over the property accorded with the most natural promptings of naked self-interest. The husband, on the trial judge's approach, was less than frank with Mr Stiegler, but, if so, he was far from being the first or last client of an accountant to let the accountant believe one thing while preparing to do another, particularly where the hope of tax savings was being experienced. The trial judge did not endeavour to reconcile Mr Stiegler's evidence with the husband's, except to say that the husband's intention was as he found it. The reconciliation must simply be that the husband wanted to adopt parts of Mr Stiegler's advice, though not all of it, in the hope that the parts he adopted, coupled with silence about his refusal to adopt other parts, would reduce the tax payable. The case is not one where it is necessary to depart from the trial judge's views on the husband's credibility if incontrovertible evidence is to be fitted into the overall pattern of events. And there appears to be no other basis on which it is open to reject the trial judge's acceptance of the husband's evidence. If in 1983 the husband intended to reserve the beneficial interest to himself, the same intention is likely to have prevailed in relation to the transfer to the son in 1988, by which time the son had done little more to provoke an outright gift than he had done up to 1983.

91 The husband relied on his conduct in developing the properties and working on them even after they were in the names of the children. Use of the evidence about that conduct for that business offends the principles laid

down in *Shephard v Cartwright* [1955] AC 431 at 445-6 so far as they survive the *Evidence Act* 1995 (Cth): the conduct was not an admission, was not part of the transaction, and was self-serving. If the principles laid down in *Shephard v Cartwright* do not survive the *Evidence Act*, the evidence could have been objected to as insufficiently relevant, or as liable to exclusion in the discretion of the court under s 135, or as limited to other purposes pursuant to s 136. However, the evidence was admitted, and admitted without any s 136 limitation. The children made no complaint about this. The evidence in question is far from conclusive, but it offers some support for the trial judge's conclusion.

92 In my opinion the challenge to the trial judge's conclusion that the husband rebutted the presumption of advancement fails.

If the Presumption of Advancement Were Not Rebutted, Was the Husband Estopped From Denying That It Was Not Rebutted?

93 In view of the conclusion just stated that the challenge to the trial judge's conclusion that it was rebutted is not shown to be wrong, this question does not arise. If it did, I would answer it unfavourably to the children for the following reasons.

94 First, estoppel was never pleaded, but was only raised in the final address of counsel for the children at the trial, after counsel for the husband had addressed. It seems that there was no objection to this course. However, an estoppel question is a prime example of the type of issue which, unless pleaded or otherwise brought to the notice of other parties by the party wishing to raise it, is liable to cause unfair surprise and is likely to require extra evidence to be tendered if it is to be justly dealt with. See, for example, Pt 15 r 13 of the Rules of the Supreme Court of New South Wales. The husband lost an opportunity of testing the children on their states of mind and in particular on their reliance on any state of mind allegedly engendered by him. In these circumstances the estoppel argument should not be entertained in this Court.

95 Secondly, even if the estoppel argument were to be entertained in this Court, whether by reason of its late introduction into the trial or not, there is an absence of evidence that in reliance on an assumption on the part of the son and the daughter that the properties were theirs, they acted or abstained from acting. Some conduct of the children was pointed to, but it was not said by them to have been engaged in because of an assumption of ownership.

Was the First Payment Made By the Son on 4 July 1989 Out of His Own Property?

96 The son submitted that even if 60-62 Dillweg were held by him on resulting trust for the husband, the DM200,000 he borrowed on the security of the land on or about 4 July 1989 was, once borrowed, owned by the son: he was personally liable to repay it. In response the husband pointed out that that loan was repaid to the bank in 1995 as a result of a sale of the property, which was owned in equity by the husband. The husband pointed to the son's evidence that he arranged the borrowing in response to a request by the husband made in the following circumstances (Blue 1/23M-S):

> "'If we are successful in purchasing 'Manacumble' we will need quite a bit of money. Can you go to our bank and see what additional moneys we can borrow'. I said: 'I'll do what I can'.
>
> I made application to Volks Bank and I was successful in obtaining an extension on my existing mortgage with that bank. I borrowed an additional two hundred thousand deutschmarks. The loan was approved on the 4th July 1989. That mortgage was secured over my six unit building in Dillweg."

The husband submitted that the generation of funds by a borrowing effected by the son on the security of property owned in equity by the husband was not in any different position from the generation of funds by the sale of property owned in equity by the husband.

97 In my opinion the son's argument fails. To borrow money at the request of the husband against the security of property owned in equity by the husband was to acquire the money as a trustee for the husband. The sparse state of the evidence points only to the conclusion that the son held the land as trustee on a resulting trust for

the husband and when he caused the value of the equity of redemption to fall by DM200,000 at the request of the husband, the beneficiary, he held the cash generated by the borrowing on the same trust. Had there been evidence that at that stage the husband intended to make the son the beneficial owner of the DM200,000, the conclusion would be different; but there was no such evidence.

Was the Husband Disentitled From Relying On Any Resulting Trust By Reason of His Avoidance of German Capital Gains Tax?

98 The reasoning of the trial judge on this issue proceeded as follows. The trial judge cited *Payne v McDonald* (1908) 6 CLR 208; *Perpetual Executors and Trustees Association of Australia Ltd v Wright* (1917) 23 CLR 185; *Donaldson v Freeson* (1934) 51 CLR 598; *Drever v Drever* [1936] ALR 446; and *Martin v Martin* (1959) 110 CLR 297. He extracted from those cases a proposition which, though not explicitly formulated by him, appeared to be as follows: if the purpose of the husband in placing the properties in the names of the children was unlawful and had been carried into effect, the husband was debarred from enforcing the resulting trusts.

99 The trial judge then said (Red 64C-W):

> "Having come to this conclusion we must now examine the effect of the husband's purpose in transferring the legal title to the three blocks. As to this purpose there is no doubt. The purpose was to avoid capital gains tax or its German equivalent on those items of real estate which he transferred to Oliver. Next, one must examine whether the proviso in *Payne v McDonald* and the other cases listed above apply, and that is does the husband escape the consequences of the transfer merely because of the arrangement not being put into effect and the answer to that is unequivocally no. The three properties have in fact all been sold and capital gains tax has in fact been avoided as intended by the arrangement.
>
> It thus follows that the amounts which I previously listed having their provenance either in mortgages or sales of real estate must all be seen as amounts raised on properties given to Oliver for the purpose of avoiding German capital gains tax and thus under Australian law would have to be treated as gifts to Oliver by the parents. First of all, what is the relevance of the fact that this is German law? The parties were agreed that in the absence of evidence to the contrary I had to assume that German law was identical to Australian law and I have done that. Secondly, does the fact that it is German taxation that is being avoided and not Australian taxation that is being avoided affect things and the answer to that seems to be made clear by a case which I take to be still good law, recalling it vaguely from law school, *Ragazoni v K C Seppia Limited* (1956) 2 All ER and the effect of that is that the Courts of England and therefore of Australia in the absence of good reason to the contrary must do what they can to avoid the violation of the revenue laws of friendly foreign countries."

The case which he had in mind was in fact *Regazzoni v K C Sethia (1944) Ltd* [1956] 2 QB 490, a decision of the Court of Appeal upheld by the House of Lords: [1958] AC 301.

100 In outline, the husband's submissions to this Court were as follows.

101 First, even in a claim directly to enforce a resulting trust, there is no general rule that equity will refuse to enforce the trust at the suit of the transferor if the purpose of the transferor in placing title in the name of another was unlawful: *Nelson v Nelson* (1995) 184 CLR 538. It was submitted that at most the court would consider the imposition of terms on the husband to make some payment of the tax escaped.

102 Secondly, the husband had done nothing unlawful in placing title in the names of the children. Any illegality lay in subsequent conduct - not declaring the proceeds as taxable capital gains in the husband's tax returns when those gains were ultimately realised. It was submitted that the "illegality" doctrine does not operate retrospectively to revoke a resulting trust which was constituted at the time of purchase.

103 Thirdly, the case did not involve a claim directly to enforce the trust. The monies had in fact been paid back to the transferor, i.e. the husband, who under the trust was beneficially entitled to them; rather it was the transferees who are seeking to recover the monies. By refusing relief to the transferees, the court would not be enforcing an illegal transaction. *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 at 71 was relied on.

104 Fourthly, under Australian law, the unlawfulness of the husband's purpose did not justify declining to recognise the resulting trust, let alone an affirmative conclusion that the transactions should be treated as absolute gifts despite the rebuttal by the husband of the presumption of advancement. Even where equitable relief was withheld from a party in the position of the husband, it did not lead to the conclusion that - contrary to the intention of the transferor - there was a gift. Rather, the court merely declined to lend its aid to the enforcement of a trust established for an unlawful purpose.

105 Fifthly, *Regazzoni v K C Sethia (1944) Ltd* was not authority for the wide proposition for which the trial judge cited it. That case held only that the courts would not enforce a contract knowingly to break, or to procure someone else to break, the laws (including the revenue laws) of a friendly foreign country. The trial judge was not asked to enforce any such agreement.

106 Sixthly, in any event, *Regazzoni v K C Sethia (1944) Ltd* could not have the consequence that an intention to evade a foreign revenue law was enough to deter a court from enforcing a local resulting trust, where intention to evade a local revenue law did not prevent enforcement of a local resulting trust.

107 Seventhly, it was submitted that the application of *Nelson v Nelson* would call for the husband's equitable title to be recognised on condition that he paid whatever tax was owing under German law; to do that would be impermissibly to enforce a foreign revenue law; and *Nelson v Nelson* would not require the imposition of that type of condition. *Rossano v Manufacturers' Life Insurance Co* [1963] 2 QB 352, *Bath v British and Malayan Trustees Ltd* (1969) 90 WN (Pt 1) (NSW) 44 and *Rothwells Ltd (in liq) v Connell* (1993) 119 ALR 538 were referred to.

108 The children submitted that since German law must be assumed to be the same as Australian law, and since the policy of Australian law is that tax payers must declare the whole of their income in tax returns with a view to accurate assessments being formulated, the failure of the husband to declare the capital gain on the sale of the properties in his returns was illegal. The resulting trusts were thus illegal because they were associated with or in furtherance of a purpose which was contrary to the policy of the law. The policy of the legislation would not be defeated by the court enforcing the resulting trusts provided that the amounts of tax evaded, together with interest and penalties, were paid to the German government. But if those terms were not appropriate (and they were not because the court could not calculate the amount of tax not paid), then the husband's equitable claims to resulting trusts should be refused. The same conclusion flowed if (which the children denied) the imposition of the condition amounted to the enforcement of a foreign revenue law. The children contended that both the *Bowmakers* case and the authorities relied on to support the proposition that a foreign revenue law was being enforced were distinguishable.

109 There is a difficulty anterior to these submissions. It is not dealt with in the submissions of the parties, though it was raised by the court in argument. The difficulty would have to be resolved before the parties' submissions were considered. The application of the principle for which the children contended depends on identification of an "unlawful purpose" which has been carried out (*Martin v Martin* (1959) 110 CLR 297 at 305) or an "illegal purpose" (*Nelson v Nelson* (1995) 184 CLR 538 at 562). Where the purpose is allegedly to be characterised as unlawful or illegal by reason of the statute, the policy of the statute as reflected in its provisions must be examined. In *Nelson v Nelson* (1995) 184 CLR 538 at 564 Deane and Gummow JJ said:

> "The intersection between the institution of the resulting trust and the principles of illegality is identified by Scott as follows [Scott and Fratcher, *Law of Trusts*, 4th ed (1989) par 444]:
>
> > 'Although a resulting trust ordinarily arises where A purchases property and takes title in the name of B, A may be precluded from enforcing the resulting trust because of the illegality of his purpose. If A cannot recover the property, B keeps it and is thereby enriched. The question in each case is whether the policy against the unjust enrichment of the grantee is outweighed by the policy against giving relief to the payor who has entered into an illegal transaction.'
>
> However, where the illegality flows from statute, the matter is not at large in the manner suggested above. Rather, it is a question of the impact of the statute itself upon the institution of the resulting trust."

110 They then examined Australian, English and American authorities. They pointed out that the American cases discussed turned on a distinction between the legislative provisions explicitly prohibiting the acquiring of land

by placing it in the name of another for a particular purpose, and legislative provisions which did not contain any prohibition on such an acquisition, but merely provided for the loss of particular benefits if the acquisition occurred. They concluded (at 567):

> "Against the background traced above we accept the submission for the appellants that the crucial step is to identify the relevant public policy, beginning with the provisions of the [*Defence Service Homes* Act 1918 (Cth)] …"

111 The other member of the majority, McHugh J, did not adopt reasoning which was identical with that of Deane and Gummow JJ, but his reasoning overlaps with theirs, and, like theirs, it makes close analysis of the relevant statute essential. He said (at 613):

> "courts should not refuse to enforce legal or equitable rights simply because they arose out of or were associated with an unlawful purpose unless: (a) the statute discloses an intention that those rights should be unenforceable in all circumstances; or (b)(i) the sanction of refusing to enforce those rights is not disproportionate to the seriousness of the unlawful conduct; (ii) the imposition of the sanction is necessary, having regard to the terms of the statute, to protect its objects or policies; and (iii) the statute does not disclose an intention that the sanctions and remedies contained in the statute are to be the only legal consequences of a breach of the statute or the frustration of its policies."

112 It may be assumed that German tax law in relation to capital gains rests on a statute. The trial judge was not taken to the terms of any relevant German statute. Nor was this Court. All the trial judge was invited to do was assume that German law was identical to Australian law. He was not taken to any statutory provision in Australian law. This Court was not taken to the detail of the relevant Commonwealth legislation. This Court, too, was asked to assume that German and Australian law were the same. The only evidentiary material which casts light on German law was the evidence of Mr Stiegler. Whether or not Mr Stiegler would have been held qualified to give evidence about German law had objection been taken to his qualifications, there is no reason to doubt his evidence that if the beneficial owner of property sold more than three items of property in five years, that owner became liable to pay capital gains tax on all items even though had three or less been sold there would have been no liability. That position is so radically different from the Australian position as to suggest that to make an assumption that German and Australian law are the same for any purpose in relation to capital gains tax is to embrace an entirely artificial and almost certainly misleading fiction. Mr Stiegler also gave some vague evidence which appeared to suggest that there was a statute of limitations preventing the German taxation authorities from recovering tax four years earlier than 1995 (Black 4/807M). If that evidence bears that meaning and if it is correct, again the difference from the Australian position is so extreme as to indicate the danger in assuming that the two bodies of law are identical in any relevant respect. The same conclusion flows from a further point of difference between the two systems: whatever German law was, at the time when most of the property transfers were made in 1983, there was in Australia no provision for taxing any capital gains other than short term capital gains.

113 The content of German law is vital from several points of view.

114 First, it is crucial to the question which the *Martin v Martin* line of authorities requires to be posed, namely: "was what the husband did 'illegal', 'unlawful' or, as the children submitted, 'criminal'?" It is possible to imagine a legal regime in which the husband's conduct gave rise to rights of recovery in the civil courts or rights of recovery by administrative law processes, without that conduct being characterised as "unlawful", "illegal" or "criminal".

115 Secondly, the content of German law is crucial to the inquiry: "did the husband's conduct defeat the policy of the German statute?" According to Deane and Gummow JJ, that is an essential inquiry, and according to McHugh J it is an inquiry which is relevant (elements (b)(ii) and (iii) of his formulation). Further, Deane and Gummow JJ's inquiry into policy includes an inquiry into whether the statute actually prohibits the conduct or merely attaches consequences to it, which corresponds with element (a) of McHugh J's formulation.

116 Thirdly, the majority in *Nelson v Nelson* imposed terms on the successful party to deny her the benefit she would otherwise have gained from the unlawful conduct. It is necessary to analyse the relevant statute in order to see how far the benefit stemmed from the unlawful conduct and what terms are appropriate to effectuate deprivation of it.

117 The significance of statutory analysis on the approach of the majority in *Nelson v Nelson* may be inferred from the fact that Deane and Gummow JJ devoted five pages (568-572) to analysis of the legislation with a view to answering the questions set out above, and McHugh J devoted more than three pages (615-618) to that purpose.

118 A common assumption of the parties was that if German law was not proved as a fact, the court had no alternative but to apply Australian law. Is that assumption sound?

119 The proposition that where foreign law is not proved it will be presumed to be the same as the *lex fori* is amply supported: *Lloyd v Guibert* (1865) LR 1 QB 115 at 129 (dictum); *Pickering v Stephenson* (1872) LR 14 Eq 322 at 340 (special powers of directors or members of a corporation only to be exercised for its purposes); *The Nouvelle Banque de L'Union v Ayton* (1891) 7 TLR 377 (negotiability of bill); *Wright Heaton & Co v Barrett* (1892) 13 NSWLR (L) 206 at 210 (waiver of notice of dishonour of promissory note); *Bowden Bros & Co v Imperial Marine and Transport Insurance Co* (1905) 5 SR (NSW) 614 at 616 (dictum in argument); *The Parchim* [1918] AC 157 (law relating to sale of goods); *Ertel Bieber & Co v Rio Tinto Co Ltd*; *Dynamit Actien-Gesellschaft (Vormals Alfred Nobel & Company) v Rio Tinto Co Ltd* [1918] AC 260 at 295 and 301 (validity of contracts involving trading with the army in wartime); *The Colorado* [1923] P 102 at 111 (dictum); *Sedgwick, Collins & Co, Ltd v Highton* (1929) 34 LlL Rep 448 at 457 (construction of contracts); *The Torni* [1932] P 78 at 91 (construction of statute); *Hartmann v Konig* (1933) 50 TLR 114 at 117 (construction of contracts); *De Reneville v De Reneville* [1948] P 100 at 121 (French law on whether incurable impotence renders marriage void ab initio); *Re an Arbitration Between A/S Tank of Oslo and Agence Maritime L Strauss of Paris* [1940] 1 All ER 40 at 42 (construction of contracts); *Re Parana Plantations Ltd* [1946] 2 All ER 214 at 217-8 (construction of contracts); *Casey v Casey* [1949] P 420 at 430 (Canadian law on voidability of marriages); *Jabbour v Custodian of Absentee's Property of State of Israel* [1954] 1 All ER 145 at 153 (construction of contracts); *The Marinero* [1955] P 68 at 73 (guarantees); *Szechter (orse Karsov) v Szechter* [1971] P 286 at 296 (dictum); *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766 at 799 (dictum); *Mount Cook (Northland) Ltd v Swedish Motors Ltd* [1986] 1 NZLR 720 at 726-7; *Bumper Development Corp Ltd v Commissioner of Police of the Metropolis* [1991] 1 WLR 1362 at 1369 (dictum); *Royal Boskalis NV v Mountain* [1999] QB 674 at 693 and 725 (duress rendering contract unenforceable).

120 However, there are numerous instances where the courts have refused to assume that foreign law is the same as the *lex fori*, and some where learned authors have opposed that course. It is not easy to classify the exceptions by reference to principle, and initially it is convenient to do so by jurisdiction and chronologically.

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121 In *Florance v Hutchinson* (1891) 17 VLR 471 an attempt by the plaintiff to enforce an agreement with the defendant that the defendant should apply for and obtain a ticket in a £10,000 sweep promoted in New South Wales on a horse race in Victoria, and that the resulting prize be shared, was met by a defence of illegality, namely that the action arose from a lottery or scheme by which a prize was gained within the meaning of s 37 of the *Police Offences Act* 1890 (Vic). A'Beckett J said (476-7):

> "I have now to deal with the defence of illegality - that the agreement alleged is one by way of gaming or wagering, and that the money sued for was won in a lottery, and therefore cannot be recovered. This is not a case in which the money sued for was paid to the defendant for the use of the plaintiff. It is therefore necessary to resort to the agreement entered into between them to prove that the plaintiff is entitled to anything, and if that agreement is illegal, the plaintiff can recover nothing. If instead of buying a ticket in a sweep, the defendant had backed a horse in partnership with the plaintiff, won the wager, and received the money, the plaintiff could recover his half …. An agreement to make a bet is not illegal, though as between persons betting with one another the money won cannot be recovered by action. This Court has ordered accounts to be taken of a partnership in a betting business …. Getting up a lottery in Victoria such as that in which the prize in this action was won would be illegal under sec. 87 of the *Police Offences Act*, but it was neither alleged nor proved that the lottery in which the prize was won in New South Wales was illegal under the law of New South Wales. Apart from positive enactment, I see nothing to render the taking of a ticket in a lottery illegal. I think it is not illegal for persons in Victoria to agree to take a ticket in a lottery to be got up and drawn in a country out of Victoria, where the lottery is not illegal. On the continent of Europe state lotteries are common enough, and the agreement proved in this case is no more illegal than would be an agreement between persons in Victoria to subscribe for a ticket in a state lottery in Europe. Suppose such an agreement were acted upon, and money won in the lottery were sent to Victoria to one of the

> subscribers, he could not successfully resist an action by his partner to recover his share, nor can the defendant here avail himself of the law against lotteries in Victoria to keep the plaintiff's share of a prize won in a lottery in New south Wales."

Thus A'Beckett J declined to act on any assumption that New South Wales law was the same as Victorian.

122 A party who wishes to prove a will must establish affirmatively that the will is valid by the law of the last domicile of the testator, even though the will is in accordance with the *lex fori*: *Re Williamson* (1912) 8 Tas LR 33. That is, a failure to offer evidence that the law of the last domicile cannot be overcome by a presumption that it is the same as the *lex fori*.

123 In *Norris v Woods* (1926) 26 SR (NSW) 234 at 244, 248 and 251 Long Innes J treated *Florance v Hutchinson* as correct.

124 In *Zoubek v Zoubek* [1951] VLR 386 it was held that a marriage celebrated abroad should be proved affirmatively to have been celebrated in accordance with the law of the place of celebration.

125 In *Allsopp v Incorporated Newsagencies Co Pty Ltd* (1975) 26 FLR 238 at 242 Blackburn J stated that the principle was "unsatisfactory".

126 In *BP Exploration Co (Libya) Ltd v Hunt* [1980] 1 NSWLR 496 at 503 Hunt J said that the presumption "is not of universal application". He said:

> "According to Sykes & Pryles, *Australian Private International Law*, at p 145, in the United States, for example, the application of the lex fori where the foreign law is not proved depends upon whether it is 'in the interests of justice' to do so. In Canada, it seems, the local court will not assume that there has been introduced into the foreign law the statutory variations and additions made to the common law by the lex fori: *Conflict of Laws in Australia*, Nygh, 2nd ed, at p 300.
>
> In my view, the application of the presumption is intended to operate against, not in favour of, the party whose obligation it is to prove the foreign law, so that he is deprived of the benefit of a right or exemption given by that foreign law, but not by New South Wales law, if he does not establish that foreign law in the proper way. It would, in my opinion, be an absurd interpretation of the requirements of Pt 10, r 5 (that non-personal service is to be effected) which enabled a judgment creditor, by mere non-disclosure on the ex parte application for registration, to obtain the benefit of a more advantageous New South Wales provision as to service, which is in fact not available in the foreign jurisdiction in which service is to be effected. Such an interpretation would render the requirement in r 5 otiose."

127 In *Elders IXL Ltd v Lindgren Pty Ltd* (1987) 79 ALR 411 at 415, Fox J considered whether the applicant seeking to serve a cross claim outside the jurisdiction had a prima facie case within the meaning of Ord 8 r 2 (2)(c) of the Federal Court Rules. He said:

> "The question whether a prima facie case has been established (r 2(c)) would need further consideration, particularly because the full contract is not before me, and because I have nothing before me as to Japanese law, assuming it to be the proper law. It was put that I should assume, at least for present purposes, that it is the same as the law of Australia, or, as it would have to be put, the law of an Australian State or States (not specified). If the matter were in due course contested, and Japanese law proved, it may appear that there never was a prima facie case. The problem starts with incomplete knowledge of the contract (there may indeed have been more than one) but my present view is that the requirement that there be a prima facie case requires proof going towards the establishment of the matters relied on, and people in Japan are not to be made liable or threatened with liability on the basis of the law of an Australian State or States, when they have, expressly or by operation of law, made Japanese law applicable."

England

128 In *Male v Roberts* (1800) 3 Esp 163; 170 ER 574 Lord Eldon did not assume that the Scottish law in relation to infancy was identical with that of the *lex fori*.

129 In *Guepratte v Young* (1851) 4 De G & Sm 217 at 224; 64 ER 804 at 808 Sir James Knight Bruce V-C said, in a case concerning a contract entered by a married woman domiciled in France respecting her reversionary interests in trust funds (namely $32,525 worth of consols and £17,475 worth of East India Co notes) which was invalid in English law but arguably valid in French law:

> "whatever may be the English law concerning the rights, powers and capacities of married men and their wives, as to the wives' reversionary interests in personalty, it ought, in my opinion, not to create a presumption or lead to any inference as to the law of France on such subjects; … the difference of that law from ours in this respect ought to have been considered by the Master as not less probable than the concord, until knowledge of the truth had been obtained …"

That was a case in which evidence of French law had been called from at least ten French experts. Sir James Knight Bruce V-C's observations may have been stimulated by his reaction to that evidence (at 221 and 806-7):

> "I am not aware whether the Judges of France (administering law under codes) differ among themselves seldomer than those of England, who, in addition to unwritten law, and plain statutes, are occasionally required to expound legislative riddles, such as might have saved the sphinx. But I am satisfied, so far as relates to counsel, that Westminster Hall has never exhibited a more amazing conflict of opinions upon English law than that which Mr Tinney's well-propounded questions upon French law have raised at the Parisian Bar among so many of its eminent members - a conflict not encouraging to those who look to codes, whether universal or partial, as being, at least when not prepared by quacks and sciolists, a kind of panacea for legal uncertainty."

His observations have been explained as turning on the fact that the foreign law in question was not based on the common law (Richard Fentiman, *Foreign Law in English Courts*: *Pleading, Proof and Choice of Law* (1998) p 147; Dicey & Morris, *The Conflict of Laws* (13th ed, 2000) para 9-025). His observations may rest on the inherent improbability of the two legal systems arriving at the same result in the particular area of married women's property, a field in which English law before 1882 is not now commonly praised.

130 In *Saxby v Fulton* [1909] 2 KB 208 at 211 Bray J said:

> "I was asked to assume, in the absence of evidence, that the law in Monte Carlo is the same as in England as regards gaming, but I decline to make this assumption; it is notorious that at Monte Carlo roulette is not an unlawful game."

131 In *R v Naguib* [1917] 1 KB 359 the Court of Criminal Appeal collected authorities establishing that if in a bigamy case the prosecution wished to prove as the first marriage a marriage depending on a rule of foreign law, it had to establish validity under that law, and held that the same applied if the defendant wished to prove such a marriage.

132 In *R v Governor of Brixton Prison, ex p Caldough* [1961] 1 All ER 606 the Divisional Court of the Queen's Bench Division (Lord Parker CJ, Winn and Widgery JJ) declined to assume, in extradition proceedings, that Canadian law was the same as English law in relation to the taking of depositions.

133 There is authority against summary judgment being granted on the presumption that foreign law is the same as the *lex fori*: *National Shipping Corporation v Arab* [1971] 2 Lloyd's Rep 363 at 366 per Buckley LJ.

134 In *Österreichische Länderbank v S'Elite Ltd* [1981] 1 QB 565 at 569 Roskill LJ said in an ex tempore judgment (with which Brightman LJ and Sir David Cairns agreed):

> "there is no evidence whatever of the relevant Austrian law. The whole argument has proceeded upon the assumption that the relevant Austrian law is the same as the relevant English law. Pressed with this omission by the court, Mr Thomas relied upon the so-called presumption, if that be the right word, that in the absence of evidence to the contrary, foreign law is presumed to be the same as English law. In proper cases, of course, that presumption can be applied but I question whether it has any place in a matter of this kind where an assertion is made of fraud, based upon a provision of an English statute which does not have any direct application, at any rate at first sight, to the law of the country of the incorporation of the company whose conduct is complained of - or indeed of the bank, whose conduct is complained of."

In that case an Austrian company, the drawers of a bill of exchange drawn on and accepted by the defendants, were insolvent when the bill was drawn. The drawers later negotiated the bill to the plaintiff bank, which knew of the insolvency. The bill was dishonoured on presentation, and the bank brought an action against the defendants for the amount of the bill. A Master gave summary judgment for the bank, and Lloyd J dismissed an appeal. The argument which the Court of Appeal had under consideration was (566G-567A):

> "It is at least arguable that the negotiation of the bill to the bank took place in circumstances disclosing a fraudulent (or voidable) preference. The expression 'fraud' in sections 29 and 30 of the Bills of Exchange Act 1882 is wide enough to include the making of a fraudulent preference within section 44(1) of the Bankruptcy Act 1914…. It follows that, if the fraudulent preference is established, the bank's title as holder in due course of the bill is defective by reason of section 29 of the Act of 1882 since the negotiation of the bill was obtained by 'fraud'. That is the position in English law and reliance is placed on the presumption that foreign law is the same as English law unless the contrary is proved …"

Hence counsel for the defendants was arguing that the Austrian law of bankruptcy and of bills of exchange should be assumed to be the same as English law. Roskill LJ did not give specific reasons for his question. Fentiman suggests two reasons. One is that "the relevant English rule is territorially limited to claims arising within the jurisdiction of the English courts". He gives an illustration, based on the authority of an unreported decision, *Mother Bertha Music Ltd v Bourne Music Ltd* [1997] EMLR 459 at 492-3 as follows:

> "It cannot be assumed, for example, that the law of copyright of a foreign country is the same as that of England because the relevant English legislation applies only to infringements in England."

The other reason given by Fentiman for Roskill LJ's question is:

> "The role of the presumption has also been doubted where fairness requires a claimant to establish its case positively, as where an allegation of fraud has been made."

Canada

135 In *Purdom v Pavey & Co* (1896) 26 SCR 412 at 417 the Supreme Court of Canada, speaking through Strong CJ, declined to set aside a mortgage on land in Oregon on the ground that it was taken pursuant to a fraudulent scheme to defraud the creditors of the mortgagee's predecessor in title. The Court said:

> "we cannot presume that the law of Oregon corresponds with the present state of our own statutory law."

136 In *Hellens (falsely called Densmore) v Densmore* [1957] SCR 768 at 780 Cartwright J (Taschereau and Fauteux JJ concurring) said, in a case in which British Columbia was the forum:

> "In my opinion the majority in the Court of Appeal in the case at bar erred in holding that the petition failed because of the lack of evidence as to the law of Alberta. In the absence of such evidence the British Columbia Court should proceed on the basis that in Alberta the general law, as distinguished from special statutory-provisions, is the same as that of British Columbia. It is the general law which determines whether the Courts of one jurisdiction will recognize an incapacity to remarry until the lapse of a specified time forming an integral part of the proceedings of the Courts of another jurisdiction dissolving a former marriage of the parties …"

137 In *Gray v Kerslake* [1958] SCR 3 Cartwright J (Kerwin CJ concurring) said, in a case in which the rights of beneficiaries under an insurance policy made in New York and governed by New York law, but in which New York law was apparently not proved (at 10):

> "It is contended that the Court of Appeal were right in presuming that the law of the State of New York was the same as that of Ontario, but the presumption relates to the general law and does not extend to the special provisions of particular statutes altering the common law."

Purdom's case was then referred to.

138 In *The Ship "Mercury Bell" v Amosin* (1986) 27 DLR (4th) 641 the Federal Court of Appeal held that the rights of certain seamen who were citizens of the Philippines against the owners of a ship on which they served were governed by the law of the flag state, Liberia. There was no proof of Liberian law. Under Canadian law an agreement between the owners of the ship and the "Special Seafarers Section" of the International Transport Workers' Federation ("ITF") setting higher wage rates than the seamen had stipulated for in their original contracts, if applicable, would supersede those contracts. Marceau J (with whom Lacombe J agreed) said (at 645):

> "If the parties, wilfully or inadvertently, fail to bring expert evidence of the foreign law, the court will act as if the foreign law is the same as its own law, it will apply the *lex fori*. This rule is peculiar to English law. It is contrary to that followed in other countries such as France where the judge is not only entitled to take judicial notice of the foreign law but, at least according to the leading doctrine, is even required to do so in view of the public order character of the rules of conflict of laws."

He then said (at 645):

> "The problem with this jurisprudential rule is that, however old, basic and simple it may be, its real meaning and scope have never been clearly defined. What is still unclear is whether the *lex fori* applicable should include the statute law or be limited to the common law. The point is theoretically of major importance, no doubt, but nevertheless it may be of concern to us here only if the disposition of the action requires that a position be taken on the matter. So, for the moment, let us examine whether the legal position of the plaintiffs could be different under the statute law from what it is under our common law."

He then said (at 647-648):

> "As I said previously, this problem of the content of the *lex fori* applicable in the absence of proof of the foreign law is generally seen as turning on a simple choice between the common law and the statute law. This is at least how it is presented by the commentators and while a few contend that the common law alone is to be considered, most do not accept that statute law can be excluded. A few quotations will help clarify the positions of the two groups. In Johnson, W.S., *Conflict of Laws*, 2nd ed. (1962), we read at p. 54:
>
> > But it is also the English rule, followed in the United States and in the English law provinces, that in the absence of proof of the foreign law it will not be presumed to be similar to the *statutory* law of the forum where the conflict is to be decided. Like the rule, the exception, seeing their common source, is followed in Quebec.
> >
> > The point was decided by the Supreme Court of Canada, on appeal from the Court of Appeal of Ontario, in *Purdom v Pavey*.

In Dicey, A.V., and Morris, J.H.C., *The Conflict of Laws*, 10th ed. (1980), at p. 1216:

> The burden of proving foreign law lies on the party who bases his claim or defence on it. If that party adduces no evidence, or insufficient evidence, of the foreign law, the court applies English law. This principle is sometimes expressed in the form that foreign law is presumed to be the same as English law until the contrary is proved. But this mode of expression has given rise to uneasiness in certain cases. Thus in one case the court refused to apply the presumption of similarity where the foreign law was not based on the common law, and in others it has been doubted whether the court was entitled to presume that the foreign law was the same as the statute law of the forum. In view of these difficulties it is better to abandon the terminology of presumption, and simply to say that where foreign law is not proved, the court applies English law.

In Castel, J.-G., *Canadian Conflict of Law*, 2nd ed. (1986), at pp. 146-6:

> 85. *Absence of proof*
>
> If foreign law is not proved, it is assumed to be the same as the *lex fori*. This seems to include statutes as well as the law established by judicial decision.
>
> Where a foreign statute has been proved by admission, in the absence of proof to the contrary, the court will presume that the rules of construction in the foreign country are the same as those of the *lex fori*.
>
> Some Canadian courts have doubted whether they are entitled to presume that the foreign law is the same as the statute law of the forum. Thus, a distinction has sometimes been made between the general foreign law, which in the absence of proof is presumed to be the same as the *lex fori*, and the case where the *lex fori* has recently been changed by statute. In the latter case the common law is applied unless the person who asserts that it does not prevail proves it.
>
> The presumption of identity, which is nothing more than a rule of convenience, should be rejected. It would be better to say that in all cases, where foreign law is not proved, the *lex fori* will prevail as it is the only law available."

He then referred to *Purdom's* case, *Hellens'* case and *Gray's* case. At 650 he said:

> "What has appeared constant to me, however, in reading the cases, is the reluctance of the judges to dispose of litigation involving foreign people and foreign law on the basis of provisions of our legislation peculiar to local situations or linked to local conditions or establishing regulatory requirements. Such reluctance recognizes a distinction between substantive provisions of a general character and others of a localized or regulatory character; this distinction, a distinction, formally endorsed I think by Cartwright J in the two passages I have just quoted, is wholly rational which is more than can be said of a simple division between common law and statute law. This English jurisprudential rule that, in the absence of proof of the foreign law governing the case, the judge will apply the law of the forum should not and cannot be seen, it seems to me, as a pure abandonment of the rule of conflict, as if a rule of conflict was so unimportant that its application could be left to the whim of the parties. In fact, it is not a genuine rule of conflict; the situation is in no way comparable to that which exists in the case of a *renvoi* when the foreign law refers back to the law of the forum. It is a rule strictly related to the incidence of evidence. The court does not repudiate the premise that the case is governed by and has to be decided on the basis of the foreign law, but simply says that in so far as it is formally aware the foreign law is similar to its own law. It is, as noted by Castel, a pure rule of convenience, and one which, it seems to me, can be rationally acceptable only when limited to provisions of the law potentially having some degree of universality. In my view, there lies the solution to this case.
>
> The law of Liberia is the law which is applicable here. We have no proof of that law so we must presume that it is similar to our law but only in so far as the substantial provisions thereof are

concerned. Looking at the *Canada Labour Code*, it seems to me that the provisions recognizing the role of labour unions, giving effect to collective agreements and, as interpreted by the courts, recognizing the right of each individual employee to sue for his wages under the agreement (*Hamilton Street R Co v Northcott* (1966), 58 DLR (2d) 708, [1967] SCR 3, 66 LLC 59) are fundamental and have that potential degree of universality, while the others, namely, those dealing with the role of the Canada Labour Relations Board and the requirement of arbitration for the settlement of disputes, are linked to Canadian circumstances and purposes. I therefore consider that the ITF agreement has full force and effect under Liberia law as it would have under the basic provisions of our Labour Code, regardless of the fact that provisions for arbitration were not spelled out in it."

139 Hugessen J agreed for the following reasons (at 651-2):

"I wish … to add some brief comments on the English law rule by which the Court, in the absence of evidence of the content of the applicable foreign law, applies the *lex fori*.

In the first place, I would note that expressions of the rule dating from the last century were obviously coloured by the climate of their time. English law and custom were being exported and spread by colonial expansion to every corner of the globe. English lawyers and judges, not unnaturally, viewed their system as being far superior to any other. Kipling expressed a general sentiment when he spoke of 'lesser breeds without the law'; there is no doubt that the law he referred to was the common law of England.

In those circumstances, it was perhaps understandable that the rule should frequently have been expressed in terms of a 'presumption' that the foreign law was identical to English law since the latter expressed the standard against which all others must be measured. In the modern context, however, such a presumption makes little or no sense. It certainly is not necessary as a justification for the rule. In my view, the court applies the *lex fori* for the simple reason that it is the only law which it is competent to apply. Where the court 'knows' (in the juridical rather than the strictly factual sense) the foreign law, it will apply it, as when the Supreme Court of Canada is faced with a conflict of laws problem between two or more Canadian jurisdictions; so too, presumably, this Court.

My second observation relates to the suggestion, in some of the authorities, that the application of the *lex fori* is limited to the common law as settled by judicial decisions and excludes all statutory provisions. Here again I think the expressions of the rule have been coloured by the historical context and go back to a time when the great body of English law was judge-made; statutes were creatures of exception, outside the general body of the law. Even at that time, however, I doubt that it would seriously have been argued that a statute of general application such as, for example, the *Bills of Exchange Act*, RSC 1970, c. B-5, should be overlooked, so as to oblige the court to search in the obscurities of history to determine the state of the law prior to its enactment. The proper expression of the rule, as it seems to me, is that the court will apply only those parts of the *lex fori* which form part of the general law of the country.

Finally, I would add that it seems to me to be obvious that, in applying the *lex fori* in place of the unproved applicable foreign law, the court must make the necessary adjustments; in legal jargon, the law is read *mutatis mutandis*. That this is so is surely as true for common or judge-made law as for a statute. I would expect that a court called on to apply the law of treasure trove in a conflict situation would hold that the treasure belonged to the sovereign of the place where it was found and not to the Crown of England.

Applying these considerations to the facts of the present case, the question at issue is whether the 'collective agreement' between the owners of the 'Mercury Bell' and a trade union creates enforceable rights in favour of the plaintiffs. Since the defendant is a Liberian flag ship engaged in international trade, the question is to be answered by reference to the law of Liberia. Absent evidence of Liberian law, we must ask what law would apply if the ship flew the Canadian flag. That law is the *Canada Labour Code*, RSC 1970, c. L-1, as amended. It is a law of general application, limited only by the constitutional limitations of the Parliament which adopted it. Those limitations would have no effect upon its application if the defendant were a Canadian flag ship engaged in international trade. The Code provides a clear, affirmative answer to the question

before us. To suggest, as appellant's counsel did, that many provisions of the *Canada Labour Code* could not be applied to the 'Mercury Bell' and her crew is nothing to the point. Of course not. She is not a Canadian ship. By applying Canadian law in the absence of evidence of Liberian law, we do not make her one; nor do we subject her and her crew to the jurisdiction of the Canada Labour Relations Board or to the multitude of provisions to be found in the Code. We simply apply so much of Canadian law as is necessary to answer the question."

South Africa

140 In *Schnaider v Jaffe* (1916) 7 CPD 696, the question before the Cape of Good Hope Provincial Division was whether the goods of a married couple were held in community by reason of their having married in Russia. Gardiner J, with whom Searle J concurred, said at 698-700:

> "There being no evidence as to what the law of Russia is, it is argued that we must presume that the marriage was in community. In *Schapiro v Schapiro* (1904, T.S. 673), it was laid down that 'the *onus* lies upon any party who asserts that the law of a foreign country applies, to prove what the law of that country is and wherein it differs from our own'. It may be pointed out that there was evidence in that case which Curlewis J., in the Court below considered as equivalent to an admission on the defendant's part that the estate of his wife and himself was a joint one. But if the case of *Schapiro v Schapiro* is to be taken as deciding that, in the absence of evidence to the contrary, all foreign marriages must be presumed to have been in community, it is contrary to the decision of a full Court of the Transvaal in *Lowe v Liquidator of Hugo Theron, Malherbe and Sanderson* (5 Off. R. 117), and to the judgment of this Court in *Fortuin's Executor v Abrahams* (14 S.C 21). The editor of the 8th edition of Story's *Conflict of Law*, in his note to sec 637 says:- 'Presumption has a proper place within limits in regard to foreign laws. Thus it would not be necessary to give evidence that in a foreign country breach of contract, battery, conversion or damage caused by fraud or negligence would give a right of action. … The presumption arises on grounds of probability, growing out of the fact that the law is known to be widespread and uniform. Nothing short of this should be sufficient to turn the burden of proof upon him who would deny the existence of such law. There is no ground in principle for raising presumption upon a single fact, declaring for instance that because a law exists in the state of the forum it will be presumed in the absence of proof to exist in another state or country, or (what is the same thing) that if evidence of the foreign law is not shewn, the domestic law will be applied.' The cases of *Smith v Gould* (4 Moore P.C. 21) and *Lloyd v Guibert and Others* (L.R. 1 Q.B. 115), where the doctrine was laid down that in default of evidence foreign law must be presumed to be the same as the law of the forum, were both shipping cases, while *Brown v Gracey* (Dowl. & Ry. 41 note), where the same doctrine was applied, was an action upon a promissory note. In *Pickering v Stephenson* (L.R. 14 Eq. 322) the Court, in the case of a Turkish trading company, held in the absence of evidence as to Turkish law, that the directors of a company were bound by the special purposes of the original bond of association. But Wickens V.C., said that 'this is not a mere canon of English municipal law, but a great and broad principle which must be taken, in absence of proof to the contrary, as part of any given system of jurisprudence.' It may be that in matters of law relating to shipping or to bills of exchange, subjects which of themselves connote intercourse with foreign countries, or in questions of broad principles of jurisprudence or commercial morality, the probability is that the law in foreign countries will be the same as our own, and the presumption may arise. But this does not necessarily apply to question of status. It may be noted that in *Male v Roberts* (3 Esp. 163) Lord Eldon, in the absence of evidence as to the law of Scotland, refused to presume that the law of that country as to the contractual capacity of an infant was the same as the law of England. I hesitate therefore about expressing my assent to the proposition that in the absence of evidence as to the law of the matrimonial domicile we must presume that a foreign marriage was in community."

He continued a little later (at 700-701):

> "Even if we have to presume that the common law of the Cape Colony and the law of Russia are the same, I know of no authority for the presumption that the law of Russia is the same as the statutory law of this country. In the note to Story's *Conflict of Laws*, already referred to, the learned editor says: 'Presumption has sometimes been raised that statutory law prevails in another state like that of the forum or (what is much the same thing) that in the absence of

evidence of the foreign law a domestic statute may be applied to the question in hand. This view of presumption has however generally been repudiated.' It is true that further on he says: 'But it appears to be too sweeping to deny presumption altogether in regard to foreign statutory law. The existence of the Sunday law may well be presumed in the various states. So it may be presumed that registration laws exist in all the states, that conveyances of land must be in writing, and that verbal leases of land for a period exceeding three years will not be enforced. And so of such other statutes and parts of statutes as are known to be sufficiently uniform and general; such perhaps as some of the fundamental principles of the statutes making void conveyances in fraud of debtors' (presumably 'creditors' is meant). But the presumption here referred to is that drawn by the Courts of one state as to the law of another state in the same republic, and I do not take it that these departures from the general principle would be made where the law of a foreign country was in question. In my view, therefore, we cannot presume that the law which the legislature of this country enacted some 40 years ago, and which changed what had been the law of South Africa for over 200 years, is to be found in the jurisprudence of Russia."

Authors

141 A rather obscure passage in Westlake, *A Treatise on Private International Law* (6th ed, 1922) para 353 states:

> "Foreign law is presumed to be the same as English, of course excluding those parts of the latter which only exist as special institutions with special machinery, such as bankruptcy …."

142 Arthur Nussbaum, "The Problem of Proving Foreign Law", 50 Yale LJ 1018 at 1040-1 states (omitting footnotes):

> "On the other hand, there must be a limit to using the *lex fori* solely on the ground that the applicable foreign law was not pleaded or proved. One may assume a kind of counterpart to the 'public policy' concept which, in exceptional cases, insists upon application of the *lex fori*. Similarly, there are situations in which applications of the foreign law is required under all circumstances.
>
> One group of such situations relates to rights originating in foreign familial and inheritance relations. It hardly need be said that the foreign law governing divorce, or annulment of marriage, cannot be replaced by the *lex fori* merely because of failure to plead or to ascertain the foreign law. The same can probably be said of property litigation originating in familial and inheritance situations. Where personal property, belonging to a foreign decedent's estate, was found within the jurisdiction of the forum where it was claimed by an alleged representative of the decedent, an American court has held application of the *lex fori* to be out of the question although there was no proof of foreign law. Nor was the court in the German case discussed above prepared to hold a person liable for debts of a deceased alien non-resident on the ground that he would be liable for these debts under German law. And where an illegitimate child sued his alleged father for maintenance in a Dutch court and the facts clearly indicated that Swiss law should control the situation, the Dutch court refused to render judgment for the plaintiff on the basis of Dutch law, even though Swiss law was not pleaded. These decisions are explained by the well-known disparities existing between the inheritance and maintenance laws of the various countries. There is the additional consideration in inheritance and familial cases that the judgment, in fact or in law, may have disturbing effects beyond the immediate objects of the litigation.
>
> The consciousness of far-reaching disparities between local enactments may also lie behind the reluctance of American courts when, in wrongful death actions for wrong done abroad where the foreign law is not proved, they hesitate to resort to application of the local wrongful death statute; the strength of the common law tradition disfavouring these actions might be another factor. American courts are also hesitant to inflict forfeitures or penalties in foreign situations under the law of the forum where there is no proof of the applicable foreign law."

143 So far as the reporters whose opinions are recorded in Restatement of the Law, Conflict of Laws 2d, para 136(h) correctly record United States law, they reveal an amorphous position:

"In all of these situations, where either no information, or else insufficient information, has been obtained about the foreign law, the forum will usually decide the case in accordance with its own local law except when to do so would not meet the needs of the case or would not be in the interests of justice. The forum will usually apply its own local law for the reason that in this way it can best do justice to the parties. Frequently, however, the forum will not give this explanation for application of its own local law. When both parties have failed to prove the foreign law, the forum may say that the parties have acquiesced in the application of the local law of the forum. In this and in the other situations mentioned above, the forum may also explain application of its own local law on the ground that it is applying a fundamental principle of law that exists in all civilized countries. Or the forum may presume that the foreign law is the same as its own local law, especially where it is the common law. The forum will usually not be deterred from applying its own local law by the fact that the party who under normal principles would have the burden of proof as to the particular issue has failed to provide any information, or else has provided insufficient information, as to the content of the foreign law.

To be distinguished is a situation where the foreign law is referred to, not on the ground that it is the applicable law under the forum's choice-of-law rules, but rather to provide the basis of a claim under the forum's own local law. The forum will not apply its own local rule in such a case. So if suit is brought against an attorney to recover damages sustained by reason of his alleged negligence in failing correctly to ascertain a foreign law, the plaintiff must establish as part of his case the content of that foreign law. Again, the state of the forum may permit an alien to inherit local land only if the state of the alien's nationality would permit inheritance under similar circumstances by a citizen of the forum. In such a case the alien must submit satisfactory information as to the content of the local law of the state of his nationality in order to inherit local land. Likewise, to take advantage of a provision in a forum statute that a will shall be held valid as to form if there was compliance with the requirements of the state where the will was executed or of the state where the testator was domiciled at the time the will was executed, it will be necessary to provide satisfactory information as to the content of the local law of those states.

The forum will also not apply its local law in situations where insufficient information has been provided about the foreign law if such application would not be in the interests of justice. One factor that may induce the forum to refuse to apply its local law is the likelihood that the foreign law differs from the local law of the forum and that the parties relied on the foreign law in planning their transaction. Suppose, for example, that the defendant in state X distributes movables in accordance with the oral instructions of a decedent who died intestate while domiciled in state Y. In this situation, an X court, in the absence of adequate information about Y law, would be reluctant to hold the defendant liable to a person who under X local law would inherit the decedent's movables upon intestacy. Another factor that may induce the forum to refuse to apply its local law is the fact that the applicable local law rule of the forum imposes a peculiar obligation. A possible example of the latter situation is where suit is brought in state X to recover for injuries sustained in an automobile accident in state Y, and it appears that the defendant's automobile was not equipped with a safety device required by an X statute whose violation under X local law would be negligence per se. In such a case, the X court, in the absence of adequate information about Y local law, would probably feel it unfair to the defendant to charge the jury that his failure to equip his automobile with the safety device was negligence per se. Situations of this sort, however, arise with relevant infrequency."

Nature of cases where the identity of the foreign law and the lex fori have been assumed

144 The cases in which foreign law has been assumed to be the same as the *lex fori* are instructive. Many involve merely the repetition in dicta of the general principle. Some involve the application of common law principles unlikely to differ from foreign principles (e.g. the principles of contractual construction). Thus in *The Parchim* [1918] AC 157 the Privy Council (Lord Parker of Wadington, Lord Wrenbury and Sir Arthur Channell), in the absence of any proven foreign law, applied the English law of sale of goods. The Board pointed out that though the English law of sale of goods was to be found in a statute, the *Sale of Goods Act* 1893, it was "merely a codification … of this branch of English mercantile law" (at 160-161). The Board continued (at 161):

"having regard to the presumption that unless the contrary be proved the general law of a foreign country is the same as the English law, the mere fact that the contract was entered into with

> reference to the law of another country will be immaterial. Having regard to the history of English mercantile law, the presumption referred to is itself quite reasonable. An investigation of the commercial codes of foreign countries would probably show that they differ from English commercial law rather in detail or in the inference to be drawn from particular facts than in substance or principle."

In short, it was assumed to be reasonable to apply English law because it was unlikely to differ greatly from foreign law.

145 In *Ertel Bieber & Co v Rio Tinto Co, Ltd* [1918] AC 260 the law assumed to be the same as English law was the common law principle of public policy rendering unenforceable contracts involving trading with the enemy. Further, the House of Lords proceeded on the basis that even if German law had been proved to have a rule of public policy different from that of English law, the public policy of the forum against trading with the enemy in wartime was not to be evaded by making a contract governed by a law other than that of the forum.

146 Cases in which the "foreign" law is that of a State within the same federation as the forum are in a different category from those in which the foreign law is that of an entirely unrelated polity: *Wright Heaton & Co Ltd v Barrett* (1892) 13 NSWLR (L) 206 at 209-210.

147 In *Pickering v Stephenson* (1872) LR 14 Eq 322 at 340 the principle that the powers of the directors and members of a corporation are to be exercised for the purposes of the corporation, which was applied in the absence of proof that Turkish law was to the contrary, was said to be "not a mere canon of English municipal law, but a great and broad principle which must be taken, in absence of proof to the contrary, as part of any given system of jurisprudence. Possibly in this or that system the line may be drawn more or less sharply by decisions."

How Far Are Admissions Or Agreements Between the Parties Binding On the Court?

148 The problem of when a civil court can or must refuse to be bound by a failure of parties to prove relevant foreign law and a consensus between them that the *lex fori* applies is one part of a wider problem. The wider problem is the extent to which the parties, by their conduct of proceedings, can prevent the court from deciding a case in accordance with the law or the facts.

149 A plaintiff who fails to plead all available causes of action or to tender the evidence which would make out an available pleaded cause of action can bring about the result that there is a verdict for the defendant even though that plaintiff had a just claim: it will not usually be open to the plaintiff to commence a second set of proceedings on the same set of facts. A defendant who fails to plead an available defence (e.g. limitation or an equitable defence or a statutory defence) or tender the evidence which would make out an available defence can bring about the result that the plaintiff's claim succeeds even though it was bad. It will not normally be possible for the defendant to have that outcome altered by agitating the defence later. To these principles there is one limited exception: the doctrine of ex facie illegality holds that if an agreement sued on is on the face of it illegal the court will not enforce it whether or not illegality has been pleaded. There is also another: an allegation of a legal right by one party which is not denied by another cannot support a claim or defence. In *Chilton v Corporation of London* (1878) 7 Ch D 735 at 740 Sir George Jessel MR said:

> "if the right by itself is one which cannot be supported in law, it cannot entitle the Plaintiff to judgment merely because the Defendant does not deny the right. The Court is bound to give judgment according to law."

150 The two exceptions just referred to relate to matters of law; proof of foreign law, however, is not a matter of law but a matter of fact, and there are numerous ways in which admissions of fact can be made.

151 There is the informal out-of-court admission, but this may be contradicted by other evidence. The court can choose between the admission and the other evidence, and indeed the court is not bound to accept the admission as correct even if it is not contradicted.

152 There is that type of formal admission which is made in answer to interrogatories: again, it can be contradicted and the court is not bound to accept it (*Gannon v Gannon* (1971) 125 CLR 629 at 640 and 644; *Tomic v Limro Pty Ltd* (1993) 47 FCR 414).

153 There is that type of formal admission pursuant to rules of court which is made either by notice (e.g. rules of the Supreme Court of New South Wales, Pt 18 r 1) or by expressly admitting or not disputing the facts set out in a Notice to Admit Facts (Pt 18 r 2): the rules do not prevent these admissions from being contradicted or not acted on.

154 A party may admit allegations made in pleadings by the opposing party, and may do so either expressly or by non-traverse. The effect of such admissions is to narrow the issues in dispute: they can thus have the effect of restricting the evidence to be tendered and can prevent evidence being called to the contrary. The same is true of similar admissions designed to permit concentration only on what is bona fide in dispute, such as concessions by a solicitor before a trial (*Ell v The Hunter District Water Supply and Sewerage Board* (1927) 27 SR (NSW) 437) or by counsel during a trial (*Dunn v Brown* (1911) 12 SR (NSW) 22) or admissions ordered by the court as an alternative to filing evidence to the contrary within a specified time (*Coopers Brewery Ltd v Panfida Foods Ltd* (1992) 26 NSWLR 738). **a** modern extension of these facilities is to be found in s 191 of the *Evidence Act* 1995 (NSW). This permits the parties to agree facts; if they do so, no evidence is required to prove the facts and no evidence may be adduced to contradict or qualify them, unless the court gives leave.

155 There are significant limitations on the extent to which the use of the above facilities can compel a court to decide a case on a basis contrary to fact.

156 First, at least in jurisdictions where pleadings must be verified on oath or affirmation, a fact is not to be alleged unless it is believed to be true (e.g. rules of the Supreme Court of New South Wales, Pt 15 r 23(4)(b)(iii)). It would be ethically questionable, at least, to admit a fact which was not believed to be true. Similarly, admissions in answer to interrogatories must be verified on oath or affirmation.

157 Secondly, the court is not bound to act on admissions made by the parties or on states of fact agreed between the parties. In *Gramophone Co Ltd v Magazine Holder Co* (1911) 28 RPC 221 the issue was whether the defendants had infringed the plaintiffs' registered design for a gramophone cabinet. After describing the registered design, Lord Loreburn LC said (at 225):

> "If a Court is not precluded from applying a little commonsense, the first question that occurs to one is this:- How can it be said that the shape or configuration of this cabinet is new and original so as to come within the Act?
>
> To this question Mr. *Walter* [counsel for the plaintiffs] answers, politely but firmly, that it is really no concern of ours, because the Defendants - who, by the way, have themselves also registered their cabinet - admit the novelty and originality. So that as between the parties the matter is concluded, though no one else is bound except, apparently, the Court which has the duty of adjudicating.
>
> I am afraid I cannot accept the position prescribed by Mr. *Walter*. It is the duty of a Court to decide cases according to the truth and fact, not according to any assumed or artificial state of facts which the parties may find it convenient to present. No doubt Courts of Law allow and indeed encourage parties to simplify litigation by making admissions and to a certain extent by waiving their rights, because, when there is a real controversy depending upon real facts, everyone ought to facilitate its authoritative settlement. But that is a very different thing from allowing people to obtain an adjudication upon the footing that something exists or has happened which in truth does not exist, or has never happened. The objection to such a course is most striking when the parties agree to admit as true something which lies at the root of the jurisdiction, and any judgment obtained upon the footing of its truth may be used as a weapon *in terrorem* against persons not parties to the admission. A Court of Justice can never be bound to accept as true any fact, merely because it is admitted between the parties."

The Earl of Halsbury and Lords Atkinson and Shaw agreed. The reasoning was applied by Isaacs J in *Davison v Vickery's Motors Ltd (in liq)* (1925) 37 CLR 1 at 7, and by Hope JA and Bowen CJ in Eq in *Termijtelen v Van Arkel* [1974] 1 NSWLR 525 at 530 and 534-5.

158 A similar approach was taken by Lord Uthwatt in *Adams v Naylor* [1946] AC 543. Adams was a boy who was seriously injured while playing on a minefield in the Second World War. Captain Naylor was an officer of the Royal Engineers who was nominated by the Crown as the appropriate defendant. The Statement of Claim alleged on behalf of Adams that Naylor "was at all material times in control and responsible for the maintenance and safeguarding" of the minefield, and Naylor admitted this. Lord Uthwatt agreed with the rest of the House of Lords that Adams' injuries were "war injuries" within the meaning of a statute preventing proceedings in relation to war injuries. He continued (at 544-5):

> "This conclusion renders it unnecessary to consider whether apart from the defence given by the Act the defendant was under any liability to the plaintiffs, but I desire to make some observations on this part of the case. The allegation made in the statement of claim as to the defendant's connexion with the matter was that he was the officer of the Royal Engineers 'in control and responsible for the maintenance and safeguarding of' the minefield. It was not suggested that he was in possession of the minefield. On the issue under the Act it was proved that the Crown was in possession of the minefield and had laid the minefield, but on the main issue these facts were not pleaded nor was any plea put forward that the maintenance of an unfenced minefield was justifiable as a due exercise by the Crown of its prerogative or statutory powers relating to the defence of the realm. The Crown - the party responsible - did not appear in the picture at all. So far as the pleadings were concerned, the assumption of control and responsibility for the maintenance and safeguarding of an unfenced minefield on the land not in his possession appears to be simply an eccentricity on the part of an officer of the Royal Engineers. This divorce from reality was not allowed to continue. A new departure was made. In the proceedings the Crown was standing behind the defendant and apparently by agreement the defendant was treated as the occupier of the land. The question of the defendant's liability was discussed in the Court of Appeal on that footing. The case pleaded against him was not dealt with. The noble and learned Lord on the woolsack has emphasized that the establishment of a duty owed by the defendant to the plaintiffs was essential to the plaintiffs' success in the action and, with my noble and learned friend, Lord Simonds, I express my complete concurrence with his observations. It was not open to the parties to this suit by agreement to have the matter dealt with on the footing, proved to be false, that the defendant was in occupation of the land in question. The matter could not be dealt with on the basis wished by the Crown."

The other members of the House agreed that the then immunity of the Crown from suit could not be evaded by the nomination of the defendant as occupier of land unless in truth it were established that that defendant was personally liable.

159 In *Royster v Cavey* [1947] KB 204 the Crown nominated the superintendent of a factory in which the plaintiff was injured as its occupier. Scott LJ said (at 208):

> "As a matter of fact …, the defendant so named had nothing whatever to do with the accident; he was not the occupier of the premises; he had not been guilty of any negligence, nor of any breach of statutory duty under the Act. Those allegations, that he did occupy that position and was so guilty, were accepted by the defence to the extent of not raising the question of his personal position."

The Court of Appeal in the circumstances held that the appeal by the plaintiff should be dismissed. Bucknill LJ said (at 211):

> "The result is, in my view, that this court cannot pronounce judgment against a defendant when in truth and in fact he is not under any liability at all."

160 In short, the courts are averse to pronouncing judgments on hypotheses which are not correct. To do so is tantamount to giving advisory opinions and to encouraging collusive litigation. On the other hand, the courts will act on admissions of or agreements about matters of fact where there is no reason to doubt their correctness. But they are reluctant to do so where there is reason to question the correctness of the facts admitted or agreed. A similar caution appears to apply in relation to an assumption or agreement that foreign law is the same as the *lex fori*.

The present problem considered

161 Strictly speaking the issue of German law arises at two levels. If the parties had never come to Australia and had been litigating in a German court, German law would determine whether the acts of the husband in 1983 and 1987 created "equitable" rights in himself. The relevance of German law at that level cannot be altered by the fact that after those acts were carried out, the parties moved to Australia. The parties in this litigation assumed that German law on the subject of whether the husband's acts in 1983 and 1987 created "equitable rights" was the same as Australian law. The parties then proceeded to a contest over whether what Australian law calls the presumption of advancement was rebutted, and assumed that Australian law applied. There was some reason to accept the validity of the parties' assumption that German and Australian law were in these respects similar, since Mr Stiegler appeared to be familiar with the existence in German law of ideas similar to those underlying resulting trusts in Australian law. Even if that process of equating German with Australian law is permissible, a second order problem arises when the children seek to escape the consequences of the trial judge's finding of resulting trusts by relying on the *Martin v Martin* line of authorities and on *Nelson v Nelson*. Those cases compel attention to the precise terms of the relevant prohibition, if any. Those terms can only be found in German law, and in what is probably a statutory enactment by the federal German legislature. The question is whether the assumption that that enactment is to the same effect as Australian enactments can legitimately be made.

162 To state exhaustively when a court will not assume that the unproved provisions of foreign law are identical with those of the *lex fori* would be a difficult task. It is not necessary to perform it in this case. The issue in this case is whether it should be assumed that German law in relation to the avoidance or evasion of capital gains tax is the same as Australian law. In my opinion it should not. It is to be noted that the relevant law, on the contention of the children, must combine many characteristics which have pointed against the making of such an assumption in past cases. German law on the point must be statutory. German law is not a common law-based system. According to the children, the conduct of the husband was criminal and fraudulent: whether it was criminal depends on the terms of legislation, and whether any fraud had relevant consequences depends on the terms of the legislation also. There is a risk that there may be special machinery and highly individual provisions in German law as there are in Australian tax law: indeed the only evidence of German law, from Mr Stiegler, suggests that it is quite different from Australian law. Taxation law cannot be assumed to be a field resting on great and broad principles likely to be part of any given legal system.

163 Beyond those considerations, however, there is a decisive factor. The resistance of the children to the resulting trusts which the trial judge found depends on showing some aspect of German law defeating those resulting trusts. They appeal to *Nelson v Nelson*. The High Court majority in *Nelson v Nelson* called for a close analysis of the relevant German statutory provisions. To substitute for an analysis of relevant German statutory provisions an analysis of irrelevant Australian statutory provisions is simply to fail to carry out the mandate of *Nelson v Nelson*.

164 For the above reasons the attempt by the children to escape the consequences of the trial judge's findings of resulting trusts fails. The reasoning of the trial judge on this part of the case is invalid because it does not face up to the anterior question just discussed. The answer to that question makes it unnecessary to consider the validity of the submissions of either the husband or the children summarised above.

Enforcement of a foreign revenue law

165 If the case were to be decided on the basis which the parties assumed was correct, namely that the German and Australian law of capital gains tax are the same, in my opinion the resulting trusts in favour of the husband must still be recognised. Had the transactions all occurred in Australia, *Nelson v Nelson* would require that Australian tax law be complied with in the sense that the following conditions would be imposed on the husband. He would be obliged to communicate with the Australian tax authorities with a view to ascertaining the amount of tax escaped, and now payable, together with interest and penalties, and obliged to pay the relevant amount. The fact that the evidence before the court does not permit the calculation of what is owing does not matter, because in *Nelson v Nelson* (1995) 184 CLR 538 the majority granted the parties time to reach agreement on the relevant sum, and in default of agreement contemplated that the matter would be referred to the trial court for an appropriate finding (at 572 and 618-9).

166 But the transactions did not occur in Australia, and any entitlement to unpaid tax lies not with the Australian tax authorities but with the German tax authorities. What conditions are appropriate in those

circumstances? Either the German tax authorities have an entitlement or they do not. If they have no entitlement, no condition is appropriate. If they do have an entitlement, the imposition of a condition that they be communicated with so as to permit the calculation of what is owing, and the condition that any sum so calculated be paid, would amount to the enforcement of a foreign revenue law.

167 The relevant principle does not turn on whether the foreign State is actually suing for a tax debt. The German tax authorities are not parties any more than the Egyptian tax authorities were in *Rossano v Manufacturers' Life Insurance Co* [1963] 2 QB 352, the Singapore tax authorities were in *Bath v British and Malayan Trustees Ltd* (1969) 90 WN (Pt 1) (NSW) 44 or the Western Australian tax authorities were in *Rothwells Ltd (in liq) v Connell* (1993) 119 ALR 538. In *Peter Buchanan Ltd v McVey* (a decision of the Supreme Court of Eire reported at [1955] AC 516), Kingsmill Moore J said at 527:

> "Those cases on penalties would seem to establish that it is not the form of the action or the nature of the plaintiff that must be considered, but the substance of the right sought to be enforced; and that if the enforcement of such right would even indirectly involve the execution of the penal law of another State, then the claim must be refused. I cannot see why the same rule should not prevail where it appears that the enforcement of the right claimed would indirectly involve the execution of the revenue law of another State, and serve a revenue demand."

That passage was approved in *Government of India v Taylor* [1955] AC 491 at 508 by Viscount Simonds (with whom Lords Morton and Reid concurred) and at 510 by Lord Keith of Avonholm. It was approved by McNair J in *Rossano v Manufacturers' Life Insurance Co* [1963] 2 QB 352 at 377. It was applied by Helsham J in *Bath v British and Malayan Trustees Ltd* (1969) 90 WN (Pt 1) (NSW) 44 at 48. It was also approved by McPherson J in *Rothwells Ltd (in liq) v Connell* (1993) 119 ALR 538 at 548.

168 Here the children contend that it is their right to prevent the resulting trusts from being recognised by reason of what they allege is non-compliance with German law. Under *Nelson v Nelson*, the only way in which the children's right can be vindicated is by imposing a condition that the tax allegedly owing be paid. The "enforcement of the right claimed" by the children "would indirectly involve the execution of the revenue law of" Germany.

169 The children argued that for the prohibition on enforcement of the foreign revenue law to apply:

> "there must be a claim by a party which amounts to a direct or indirect claim for the collection of revenue by a foreign country. There is no such claim.
>
> The defendant is seeking equitable relief, namely, a ruling by the court that the properties were held upon [a] resulting trust for him but the court, not a party, if it had capacity to do so would impose appropriate conditions upon the grant of the relief.
>
> If the court concludes that it is appropriate that relief only be granted on terms that he pay the tax interest and penalty to the German government, that is not the enforcement of a claim by a party for collection or payment of taxes."

I would reject that submission. On the authorities, there need not be a claim so long as execution of the revenue law is indirectly involved.

170 The reliance by the trial judge on *Regazzoni v K C Sethia (1944) Ltd* [1956] 2 QB 490 was misplaced. That decision does not contradict the rule against enforcing a foreign revenue law; it holds merely that a local court will not enforce a contract made with the object of breaking foreign laws, including revenue laws. As Denning LJ said at 516:

> "if two people knowingly agree together to break the laws of a friendly country or to procure someone else to break them or to assist in the doing of it, then they cannot ask this court to give its aid to the enforcement of their agreement."

The same point was made by Viscount Simonds when the House of Lords dismissed the appeal in *Regazzoni v K C Sethia (1944) Ltd* [1958] AC 301 at 318. Here the trial judge was not asked to enforce any contract of the type described by Denning LJ. There was no finding that there was any such contract, or indeed a finding that there was any contract at all. If there had been a contract, it had been fully performed and did not call for any enforcement by the Family Court.

171 Given that no condition amounting to the enforcement of German revenue law can be imposed, is the consequence that the resulting trusts are unconditionally recognised, or not recognised at all?

172 The husband referred to two passages in *Nelson v Nelson* (1995) 184 CLR 538.

173 At 563-4 Deane and Gummow JJ said:

> "no doubt the operation of the particular statute will be critical. That is illustrated by the money lending legislation considered by the Privy Council in *Kasumu v Baba-Egbe* [[1956] AC 539] and by this Court in *Mayfair Trading Co Pty Ltd v Dreyer* [(1958) 101 CLR 428]. These are best understood as cases in which the legislation precluded the money lender from recovering any compensation for the loan which had been made by it, with the result that it was not open for such compensation to be recoverable by means of the imposition of a term upon equitable relief sought by the borrower [*Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 226, 261-262, 269-270].
>
> In *Kasumu*, the borrower brought an action seeking delivery under the mortgage documents and the Privy Council rejected the contention of the money lender that such relief, being equitable, should be granted only on terms that the principal amount of the mortgage be repaid. The money lender had failed to comply with the requirements of the relevant statute which had provided that, in those circumstances, the money lender 'shall not be entitled to enforce any claim in respect of any transaction in relation to which the default shall have been made'. Hence, the Privy Council held that the imposition of a requirement of repayment, as a condition of equitable relief, would constitute a claim in respect of a transaction within the very terms of the statutory prohibition."

174 McHugh J said (at 617):

> "Of course, equity cannot condone Mrs Nelson's unlawful purpose or encourage it. So far as is possible, rights associated with or arising out of unlawful conduct should only be enforced on condition that the wrongdoer takes all lawful steps to overcome the consequences of that conduct. It will not always be possible for the claimant to do so or for the courts to impose terms designed to remedy the wrongdoing. For example, in *Kasumu v Baba-Egbe* [[1956] AC 539], legislation specifically prevented a moneylender from enforcing any claim where there had been a breach of the Act. To grant relief to the borrower on terms that he or she restore to the moneylender any benefits obtained from that person would be contrary to the policy of the legislation [cf *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428]. In other situations, the inability of the court to mould appropriate terms may be a ground for refusing relief."

175 The husband submitted that just as relief could be granted to the wrongdoer notwithstanding the ability to impose terms overcoming the consequences of the wrongdoing (whether it was because of the statutory prohibition on imposing the terms, or an inability to mould them) so it could be granted to the husband here, assuming his conduct had been contrary to German law, notwithstanding an inability to impose terms overcoming the consequences of the wrongdoing arising from the need to avoid enforcing foreign revenue laws. The children offered no answer to that specific submission, and in my opinion it is valid.

176 In short, the children accepted that any unlawful conduct by the husband in relation to German tax law did not automatically invalidate the resulting trusts: they could be enforced provided satisfactory conditions overcoming the consequences of the unlawfulness were imposed. It was, however, necessary to ensure that any condition imposed on the husband as the price of recognition of the resulting trusts in his favour did not amount to

the enforcement of a foreign revenue law. It is not possible to say what condition could be imposed, and whether it amounted to the enforcement of a foreign revenue law, unless something is known of German law. But the children contended that the same condition would be imposed in relation to the German tax authorities as would be imposed in relation to the Australian tax authorities if Australian tax law had been contravened. If that contention were correct, the condition would involve the enforcement of a foreign revenue law, and would not be imposed, leaving the resulting trusts operative. Even if the children were wrong in that contention, they have not called evidence of German law to exclude the risk that the doctrine of *Nelson v Nelson* would result in the enforcement of a foreign revenue law.

Were the Payments Made By the Children Sourced from the German Properties Loans?

177 This question only arises if the properties in the children's names used to source the payments made by the children to the husband were beneficially owned by them. Since it has been concluded that they were not, and that there is no impediment to the husband relying on his beneficial entitlement, the question does not arise, and accordingly will be dealt with only briefly.

178 The trial judge said the following about the payments out of the properties in the children's names (Red 65M-S and 66M-Q):

> "There were certainly no words of gift at the time Oliver provided those moneys, in some cases, the case of the mortgages, he had himself to pay interest on the mortgages and what language was used was of a commercial kind not gift and there is simply no basis on which to assume or to find that those moneys were gifted by Oliver to his father.
>
> …
>
> The whole problem relates to the purpose of the schemes and the putting into effect of those schemes, the purpose was to avoid taxation and that purpose was put into effect and once that is found then in the absence of the funds being, to the Court's clear satisfaction, provided back to the family as gifts then they must be treated as commercial advances and I intend to so treat them."

These are far from being explicit findings that the children paid the monies to the husband as loans. However, the passages appear to indicate that the trial judge did not regard the transfers of money as gifts and did regard them as "commercial advances", that is, loans.

179 The husband submitted that the trial judge ought to have found that the evidence did not establish that the advances were loans.

180 First, he submitted that the evidence of the children was equivocal and did not reveal an intention to effect legal relations. The children did, however, speak of the husband inviting them to "invest" their money in the Australian assets (Blue 1/3C-E and 26J), and the son attributed the language of the loan to the husband (Blue 1/29M). In cross-examination the daughter said that the husband asked her to "invest" the money in Australia (Black 1/239S). To "invest" money is either to acquire an interest in an asset with it, or to lend it. The evidence-in-chief was not wholly clear, and nor was the evidence of the daughter in cross-examination, but it was more than equivocal. The court was not taken to any cross-examination of the son on his evidence-in-chief.

181 Secondly, the husband submitted that he had denied the children's evidence, and that the trial judge should have preferred his evidence to that of the children. It is far from clear, however, that the trial judge's preference for the husband's evidence to that of the son extends to this particular aspect, and the trial judge had only "few objections" to the daughter's evidence. In my opinion no contradiction is established between the trial judge's remarks on general credibility and the findings about the advances being loans.

182 Thirdly, the husband submitted that in the passages set out above the trial judge reversed the burden of proving that the advances were loans - a heavy one given that domestic dealings were involved - and placed it on the husband, not on them. In my opinion the passages on their true construction do not bear out that submission. The trial judge first found that the language was of "a commercial kind not gift".

He then said twice that there was no evidence of gift. That does not suggest that he misdirected himself on the burden of proof.

If the Payments Made By the Children Sourced From the German Properties Were Not Loans, Do the Children Have An Equitable Entitlement to Recover Them Or A Property Interest Reflecting Them?

183 This question does not arise. If it did, it would be very hard to answer it, since it involves making findings which the trial judge did not make in substitution for other findings which he did make in circumstances where the trial judge had to evaluate the precise meaning of conversations described to him by witnesses which he saw but this Court did not. However, the husband submitted that the use of the language of "investment" was "much more consistent with a contribution to the purchase price resulting in some sort of resulting trust than it is with their agreement [for] a loan". He also referred to the possibility of a constructive trust, citing *Hussey v Palmer* [1972] 1 WLR 1286; [1972] 3 All ER 744, and the possibility of an equitable charge. The husband recoiled from the view that the court should act on any of these possibilities on the ground that a new trial would be necessary. Whatever the obscurities in the trial judge's reasoning, he does appear to have held distinctly that the children did not advance the money by way of gift. If both contracts of loan and gifts are excluded as possibilities, there would appear to be force in the argument, if it were necessary to decide on its validity, that the advances must have been made in circumstances creating equitable rights in or in relation to the land. Since "Manacumble" has been sold, there can be no proprietary interest in it, but an order reflecting the rights formerly existing in or in relation to it in money terms could be made if necessary.

Was the Son Entitled To Recover $7,377.79 On A Quantum Meruit Notwithstanding the Husband's Letter Purporting To Terminate the Management Agreement?

184 It was common ground that the only basis for recovery was on a quantum meruit. There was a tacit consensus between the parties that the change to the Management Agreement as executed by the husband and the son made by the wife rendered the whole Management Agreement void. It was also common ground, in the sense that the husband did not on the appeal, as distinct from at the trial, contend to the contrary, that the work done was not so poor in quality as not to warrant payment.

185 The findings of the trial judge were as follows (Red 66aC-J):

> "Finally, as to the question of the management agreement, there is no doubt that Oliver has managed the properties. How well he managed them, I am not in a position to judge but the rate of remuneration is a reasonably modest one, he has, as I say, managed the properties and it seems to me that he is entitled to the sum of $2000 a month during that period. There is an exhibit which sets out the amounts that Oliver has received by his actions of self help and I accept those and it follows that I accept that Oliver's claim is made out in the sum of $7377.79."

186 The husband argued that he had made it clear to the son by his purported notice of termination of the Management Agreement dated 30 June 1998, stated to be effective from 10 July 1998, that he no longer wanted the son to perform management services. Whether or not the concession was necessary, the husband conceded that the notice became effective no earlier than 14 August 1998 (since under the ineffective Management Agreement as signed by the husband six weeks' notice should have been given). The husband submitted that the trial judge was wrong in allowing the son $2,000 per month in the ten months from August 1998 until judgment in June 1999. The husband submitted:

> "one cannot recover on a quantum meruit for rendering [services] which are opposed and resisted by the person against whom you bring the claim. The whole concept of quantum meruit is services provided at the request of the parties requesting them for whom they are provided, which was Mr Damberg who says [by] notice of termination, 'stop, I don't want you any more'."

187 The son submitted that it was sufficient that in fact the husband had received the benefits conferred by the son's labour whether or not he wanted the son to do the work. The son referred to the following passage in the reasons for judgment of Mason and Wilson JJ in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 227:

> "Deane J, whose reasons for judgment we have had the advantage of reading, has concluded that an action on a quantum meruit … rests, not on implied contract but on a claim to restitution or one based on unjust enrichment, arising from the respondent's acceptance of the benefits accruing to the respondent from the appellant's performance of the unenforceable oral contract."

They concluded that Deane J was correct in his statement of the basis of recovery.

188 The trial judge's reasoning does not deal with the argument advanced to this Court, either because it was not put to him or because it was only put so briefly (Black 4/913K) as not to have been noticed by him. The son took no point that the husband's argument had not been advanced to the trial judge. The argument would not appear to be one in relation to which there was a possibility that it could have been defeated by the calling of further evidence.

189 The starting point must be that the Management Agreement is void. However, it seems that neither the husband nor the son knew that it was void or why it was void until the change made by the mother came to light at some time after 30 June 1998.

190 The son's submission that mere receipt of a benefit by the husband suffices is unsound: the benefit must have been requested or accepted.

191 In my opinion it is not possible to describe the husband as having manifested "acceptance of the benefits accruing" to him from the son's performance of the void contract. Acceptance could be found in a subsequent evaluation of the benefits and the consent to take them; the corresponding non-acceptance would be a refusal to take them. Acceptance could also be found in an expression of willingness to take the benefits before they were provided (i.e., a request that they be provided); the corresponding non-acceptance would be an expression of unwillingness to take the benefits before they were provided (i.e., a request that they not be provided). The husband's notice of 30 June 1998 was a request that as from 10 July 1998 (or, on the husband's concession in argument, 14 August), the benefits should not be provided. That negated "acceptance" of them when they were provided.

192 Goff and Jones, *The Law of Restitution* (5th ed, 1998), in discussing the need to establish that the provision of services benefited the defendant, say (at pp 18-19, omitting footnotes):

> "The receipt of money always benefits the defendant. But *services* may not do so. From their very nature services cannot be restored; and the defendant may never have wished to receive them or, at least, to receive them if he had to pay for them. As Pollock CB laconically once remarked: 'One cleans another's shoes. What can the other do but put them on?' For that reason the common law originally concluded that a defendant could be said to have benefited from the receipt of services only if he had requested them. A true request will normally lead to the conclusion that the defendant who requested the services has contractually bound himself to pay for them. But a defendant, who is not contractually bound, may have benefited from services rendered in circumstances in which the court holds him liable to pay for them. Such will be the case if he *freely accepts* the services. In our view, he will be held to have benefited from the services rendered if he, as a reasonable man, should have known that the plaintiff who rendered the services expected to be paid for them, and yet he did not take a reasonable opportunity open to him to reject the proffered services. Moreover, in such a case, he cannot deny that he has been *unjustly* enriched.
>
> It is said that the recognition of free acceptance, so defined, is in principle objectionable for it erodes the right of a person to determine his own choices; only if he has *requested* services can he be said to have 'chosen' and gained a *benefit*. If a principle of free acceptance is recognised, a defendant may be compelled to pay for services which he asserts, honestly if perversely, are of no benefit to him; or he may be indifferent, not caring one way or the other, whether the services are rendered or not. Again, the defendant may concede that the services are beneficial but plead that he had 'more important things on which to spend his money'. But, in these exceptional circumstances, the burden should be on the defendant, who is not the reasonable man, immediately to tell the plaintiff that he is perverse, indifferent or that he has more important things to do with his money. If he does not do so, he cannot deny that he has gained a benefit.
>
> It is true that few judges have explicitly adopted a principle of *free acceptance*. But the principle enshrined in that concept is the most satisfactory explanation of those decisions which recognised the plaintiff's claim that his services, which had not been requested, had benefited the defendant. Many of the successful claims have arisen in the context of ineffective contracts. A plaintiff who rendered services under a contract which was void because the parties had not agreed on essential terms was awarded a sum which was 'what the services were worth'; a builder who did extra work, thinking that a contract was about to be made, recovered a 'reasonable price'; and the High

> Court of Australia has granted a restitutionary claim for services rendered under a contract which was executed but was unenforceable by action."

The last-mentioned case is *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221.

193 To adopt the language of Goff and Jones, the husband cannot be said to have freely accepted the son's services, because he took "a reasonable opportunity open to him to reject the proffered services". The husband may be said to have honestly thought that the son's services were of no future benefit to him: he "immediately" told the son that. Accordingly it would not be right that he should have to keep paying the son from the time when that intimation became effective.

194 Further, Goff and Jones, *The Law of Restitution* (5th ed, 1998), in discussing the principle that a plaintiff who acts officiously in conferring a benefit on the defendant cannot succeed in a restitutionary claim, say (p 63, omitting footnotes):

> "Judges and juries have sought to express this limiting principle in a number of different ways. Other statements of the same principle are: recovery will be denied if the plaintiff was *officious*; or if he *thrust himself* on the defendant; or if he intervened without '*adequate justification*'.
>
> Such expressions as 'officiousness,' 'mere volunteer' or 'thrust himself on another' are simply a 'form of legal shorthand' which conceals the conclusion that a defendant should not be required to pay for benefits which the plaintiff knows that the defendant neither solicits nor denies. He takes the risk that the defendant will pay him for the benefit which he conferred on him. The risk is on his head. He has no cause to complain if his hope is disappointed. Consequently, it is irrelevant whether or not the defendant has gained an incontrovertible benefit."

Before 30 June 1998 the son was not behaving officiously, or thrusting himself on the husband, or intervening without adequate justification, because both he and the husband thought he was purportedly performing a valid contract to which they and the wife were parties, namely, the Management Agreement. From 30 June 1998 the son knew that the husband no longer wanted him to perform it from the time when the notice of that date became effective. The husband's argument assumed that the 30 June 1998 notice would have operated as a termination of the Management Agreement as from 14 August 1998, had the Management Agreement not been void. Even if that assumption is not correct, the husband could have given a notice of termination on 30 June 1998 expressed to be effective from 14 August 1998. Had he done so, and had the Management Agreement been valid in the terms which the husband and the son intended (namely, that it was terminable on six weeks' notice), the son would not have been able to recover for any work done beyond 14 August 1998. It is hard to see why his rights should be greater where there was no contract operating in the terms intended by him and the husband because of the change made by the wife than his rights would have been if there had been a contract operating in those terms.

195 The son advanced a distinct argument to support the trial judge's conclusion. That argument was that the order made by the Family Court on 21 September 1998 under which the son was to continue to operate the farming business as manager justified the quantum meruit claim. In my opinion the order does not do so. The order was made as part of a resolution of a dispute on an interim basis. It made no provision for the son to be remunerated, and if it were to entitle him to remuneration (for example, as a court-appointed manager), it would have been necessary to stipulate for that outcome.

Assuming That the Appeal Were Dismissed or Substantially Dismissed, What Costs Order Should Be Made in Relation to the Trial?

196 Since the above reasoning leads to the conclusion that the appeal should not be dismissed, but should be allowed on a basis wholly adverse to the children, this question does not arise. The husband advanced a wide array of technical and procedural arguments adverse to the children's stand in relation to the costs of the trial, and very few arguments going to the substance of the question. However, there is no point in dealing with any of these arguments. The application for leave to appeal and Common Law Division proceedings No 12244 of 1999 must be dismissed.

Orders

197 Though the Notice of Appeal sought an order that the Second and Third Respondents pay the Appellant's costs of the trial referable to their claims, no written or oral argument was advanced in support of that order. Accordingly it should not be made.

198 Since the appeal succeeds, the Second and Third Respondents should pay the costs of it. Since the application for leave fails, they should pay the costs of that too. The same is true of the application for costs in the Common Law Division. Though the Notice of Appeal also sought an order that the First Respondent pay the Appellant's costs of the appeal, no written or oral argument was advanced in support of that order. The First Respondent had no interest in maintaining Orders 1 and 2 made by Purdy J, which were adverse to her interests. The Appellant's success in the appeal is thus favourable to her interests. Her non-participation in the appeal meant that she did not add to the Appellant's costs. In all the circumstances no order that she pay the Appellant's costs should be made.

199 The Appellant's written submissions concluded with a statement to the effect that to the extent that the Second and Third Respondents had been paid pursuant to Orders 1 and 2 made by Purdy J, "restitutionary orders will be required". If in truth the Second Respondent or the Third Respondent have been paid anything, it should be restored with interest.

200 In those circumstances, I propose the following orders:

1. That the appeal be allowed.

2. That Orders 1 and 2 made by Purdy J be set aside.

3. That there be judgment for the Appellant and the First Respondent on the Further Amended Statement of Claim filed by the Second Respondent on 20 May 1999.

4. That there be judgment for the Appellant and the First Respondent on the Statement of Claim filed by the Third Respondent on 23 April 1999.

5. That the application for leave to appeal be dismissed.

6. That the Second and Third Respondents pay the Appellant's costs of the appeal, of the application for leave to appeal, and of Common Law Division proceedings No 12244 of 1999.

7. That the Appellant and the Second and Third Respondents file in the Registry within seven days consent orders for the repayment by the Second Respondent or the Third Respondent to the Appellant of any part of the sums ordered by Orders 1 and 2 of Purdy J to be paid; in default of agreement, the Appellant and the Second and Third Respondents are to file within fourteen days written submissions setting out the orders for repayment contended for and why they should be made.

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