HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HEYDON, CRENNAN AND BELL JJ

LEONILDA MARCOLONGO APPELLANT

AND

YU PO CHEN & ANOR RESPONDENTS

Marcolongo v Chen [2011] HCA 3
9 March 2011
S114/2010

ORDER

1. *Appeal allowed.*

2. *Dismiss the summons filed by the second respondent seeking to file a notice of contention out of time.*

3. *Set aside paragraphs 1, 2, 3, 4 and 5 of the order of the New South Wales Court of Appeal made on 12 November 2009, and in their place order that:*

   (a) *the appeal to the New South Wales Court of Appeal be dismissed;*

   (b) *Yu Po Chen pay Leonilda Marcolongo's costs in the New South Wales Court of Appeal; and*

   (c) *the sum of $60,000 paid into the New South Wales Supreme Court by Yu Po Chen as security for Leonilda Marcolongo's costs in the New South Wales Court of Appeal, together with interest thereon, be paid out forthwith to Leonilda Marcolongo's solicitor.*

4. *The first and second respondents pay the appellant's costs of the appeal to this Court.*

5. *The second respondent pay the appellant's costs of the summons filed by the second respondent seeking to file a notice of contention out of time.*

On appeal from the Supreme Court of New South Wales

Representation

T A Alexis SC with D H Mitchell for the appellant (instructed by Dunstan Legal)

No appearance for the first respondent

T S Hale SC with D J A Mackay for the second respondent (instructed by Unsworth Legal Pty Ltd)

CATCHWORDS

Marcolongo v Chen

Real property – Conveyancing – *Conveyancing Act* 1919 (NSW), s 37A – Voluntary alienation to defraud creditors – Appellant sought to set aside registered transfer of land from second respondent to first respondent – Whether intent to defraud creditors satisfied by proof of "actual" or "predominantly" fraudulent intent – Whether satisfied by proof that transfer would "delay, hinder or defraud" creditors – Whether intent may be inferred where transfer is voluntary.

Words and phrases – "delay, hinder or defraud".

Conveyancing Act 1919 (NSW), s 37A.
An Act against fraudulent Deeds, Gifts, Alienations, etc 1571 (Imp) (13 Eliz I c 5).

1 FRENCH CJ, GUMMOW, CRENNAN AND BELL JJ. This appeal from the Court of Appeal of the Supreme Court of New South Wales (Allsop P, Giles and Young JJA)[1] turns upon the application of the New South Wales legislation (s 37A of the *Conveyancing Act* 1919 (NSW) ("the Conveyancing Act")) which replaced in that State the statute 13 Eliz I c 5. This had been passed in 1571 and was generally identified by reference to the words in the long title "An Act against fraudulent Deeds, Gifts, Alienations, etc" ("the Elizabethan Statute"). As elsewhere in the British Empire[2], the Elizabethan Statute had been received as part of the law of England applicable in New South Wales[3].

The course of the litigation

2 The appellant, Mrs Marcolongo, challenges the decision of the Court of Appeal which set aside the decision in her favour of the primary judge (Hamilton J)[4] in the Equity Division of the Supreme Court. Mrs Marcolongo had on foot in the District Court an action for damages against the second respondent, Lym International Pty Limited ("Lym"), and in the Supreme Court she had relied upon s 37A to achieve a result of Lym retaining a substantial asset to meet its obligations under any decision in her favour in the District Court litigation.

3 At the suit of Mrs Marcolongo, Hamilton J applied s 37A to a contract for sale of land under the provisions of the *Real Property Act* 1900 (NSW) ("the RP Act") and to the registered transfer in completion of that contract. Lym was the vendor and the purchaser was the first respondent, Mr Chen. Ms Limin Yang was a director of Lym and Mr Chen was their fiduciary adviser in the transaction as well as purchaser.

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1 *Chen v Marcolongo* (2009) 260 ALR 353.

2 Instances were given in *Kerr on Fraud and Mistake*, 6th ed (1929) at 217; they included at least parts of British India: *Abdool Hye v Mir Mohamed Mozuffer Hossein* (1883) LR 11 Ind App 10 at 17-19; *Eugene Pogose v The Delhi and London Banking Co Ltd* (1884) ILR 10 Calc 951.

3 See *Godfrey v Poole* (1888) 13 App Cas 497; *Coghlan v Alexander* (1905) 5 SR (NSW) 441; *Re William Deane; Ex parte The Official Assignee* (1906) 6 SR (NSW) 580. The Elizabethan Statute also was received in many jurisdictions in the United States: Kent, *Commentaries on American Law*, (1827), vol 2, Lecture XXXIX at 405; Story, *Commentaries on Equity Jurisprudence, as administered in England and America*, 13th ed (1886), vol 1, §353.

4 *Lym International Pty Ltd v Chen* [2009] NSWSC 98.

4 Two proceedings were heard together by Hamilton J. In the first, Lym and Ms Yang and her daughter, Ms Yang Liu, successfully made good their claim that Mr Chen had acted in breach of his fiduciary duty. His Honour set aside the transfer to Mr Chen and made consequential orders.

5 In her Supreme Court action against Lym and Mr Chen, Mrs Marcolongo had pleaded an intention by Lym to defraud her, and Lym joined issue on that pleading. Notwithstanding this defence, at trial Lym did not actively dispute Mrs Marcolongo's claim, directing its energies to its claim against Mr Chen for breach of his fiduciary duty. Mr Chen appealed to the Court of Appeal against the decisions in both proceedings and Lym filed a submitting appearance in the Marcolongo appeal. In the Court of Appeal Mr Chen failed on all grounds relating to his liability to Lym.

6 However, the Court of Appeal reversed the decision in favour of Mrs Marcolongo and set aside the orders declaring the contract and the transfer to be voidable at her instance and requiring Mr Chen to transfer the property back to Lym. The result is that although, by reason of the failure of Mr Chen's appeal in the Lym litigation, the subject land is to be restored to Lym and thus will be available to answer claims by Mrs Marcolongo in enforcement of her District Court action, unless she succeeds in this Court, she will be left to bear the burden of costs in her Supreme Court litigation.

7 In this Court, Mr Chen did not appear by counsel but the Court received his written submissions resisting the appeal. The burden of the oral advocacy supporting the outcome in the Court of Appeal thus fell upon counsel for Lym.

8 The Court of Appeal allowed the appeal in the Marcolongo litigation essentially on the basis that s 37A was enlivened only by an "actual"[5] or "predominantly" fraudulent[6] intent or purpose to deprive creditors of their rights or of the fruits of their rights and that this required an "element of dishonesty" by Lym which the Court of Appeal held to be absent[7].

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5 (2009) 260 ALR 353 at 357, 389.

6 (2009) 260 ALR 353 at 382.

7 (2009) 260 ALR 353 at 358, 390.

9 For the reasons which follow the appeal should be allowed and the decision of Hamilton J in favour of Mrs Marcolongo restored. The issues on the appeal best appear after consideration of the provenance of s 37A, which in turn involves consideration of the place of fraud in the framework of general legal principle.

The varieties of fraud

10 In the joint reasons of the whole Court in *SZFDE v Minister for Immigration and Citizenship*[8] their Honours observed:

> "In his celebrated speech in *Reddaway v Banham*[9], Lord Macnaghten spoke of the various guises in which fraud appears in the conduct of human affairs, saying 'fraud is infinite in variety'. A corollary, expressed by Kerr in his *Treatise on the Law of Fraud and Mistake*[10], is that:
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> > 'The fertility of man's invention in devising new schemes of fraud is so great, that the courts have always declined to define it ... reserving to themselves the liberty to deal with it under whatever form it may present itself.'
>
> Nevertheless, much judicial effort has been expended in exploring different shades of meaning, and sometimes deeper distinctions, in the constituents of 'fraud' in various areas of the law. Recent decisions in this Court respecting 'fraud' concern criminal law[11], the tort of deceit[12],

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8 (2007) 232 CLR 189 at 194 [8]-[10]; [2007] HCA 35.

9 [1896] AC 199 at 221.

10 6th ed (1929) at 1 (footnote omitted).

11 *Macleod v The Queen* (2003) 214 CLR 230 at 241-242 [32]-[38]; [2003] HCA 24.

12 *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 at 579-580; [1995] HCA 68.

registered designs law[13], the law of agency[14], statutes of limitation[15] and dealings in Torrens title land[16].

Professor Hanbury[17] described the common law and equity as having 'quarrelled over the possession of the word "fraud" like two dogs over a bone, off which neither side was sufficiently strong to tear all the meat', and said that the word fraud applied 'indifferently to all failures in relations wherein equity set a certain standard of conduct'. Hence the attachment of the term 'fraud' to the exercise of powers of appointment, and of other powers, such as those of company directors, in a fashion of which equity disapproved[18]."

11 Hanbury went on[19] to refer to English decisions in the latter part of the 19th century manifesting "appalling confusion" between the quite different senses in which the common law used the term "fraud", exemplified by the tort of deceit, and in which equity used the term "fraud" in its exclusive jurisdiction. The phrase "actual fraud" captures the sense of the common law and "constructive fraud" that in equity. The Elizabethan Statute had been said by Lord Mansfield to represent the common law[20], and thus to require proof of a "real" rather than "constructive" fraud. But, as will appear below, the distinction has not always been well appreciated.

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13 *Polyaire Pty Ltd v K-Aire Pty Ltd* (2005) 221 CLR 287 at 295-296 [17]-[18]; [2005] HCA 32.

14 *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160 at 197 [73]-[74]; [2007] HCA 1.

15 *The Commonwealth v Cornwell* (2007) 229 CLR 519 at 532-533 [40]-[45], 543-544 [74]-[75]; [2007] HCA 16.

16 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 167-171; [2007] HCA 22.

17 *Modern Equity*, 8th ed (1962) at 643-644.

18 See the discussion by Dixon J in *Mills v Mills* (1938) 60 CLR 150 at 185; [1938] HCA 4.

19 *Modern Equity*, 8th ed (1962) at 643-644.

20 *Cadogan v Kennett* (1776) 2 Cowp 432 at 434 [98 ER 1171 at 1172].

The provenance of s 37A

12 The Elizabethan Statute with respect to the transferor used the terms "purpose and intent" and contained a proviso in favour of what might be called innocent third parties, who purchased without "any manner of notice or knowledge of such ... fraud or collusion". A succinct description of the operation of the Elizabethan Statute as understood in 1912 was given by Parker J in *Glegg v Bromley*[21]. His Lordship said:

> "Now the scheme of that statute is this: By it all conveyances and assignments made with intent to hinder and delay creditors are rendered void against all creditors hindered or delayed by their operation. There is, however, a proviso for the protection of a purchaser for good consideration without notice of the illegal intention. In the authorities which deal with the statute it is not always clear whether the judges are dealing with the operative part of the Act or with the proviso. The illegal intent under the operative part is a question of fact for the jury or the judge sitting as a jury. On the one hand the want of consideration for the conveyance or assignment is a material fact in considering whether there was any illegal intent, but it is not conclusive that there existed any such intent. In the same way consideration was by no means conclusive that there was no illegal intent. When, however, one comes to deal with the proviso, it is quite clear that any person relying on the proviso must prove both good consideration and the fact that he had no notice of the illegal intent."

13 In England, the Elizabethan Statute was replaced by the *Law of Property (Amendment) Act* 1924 (UK)[22] ("the 1924 Act") and a substituted provision was made by Item 31 in Pt II of the Third Schedule. As indicated by the heading to Pt II, Item 31 was one of a series of provisions for "facilitating consolidation of the law of property and conveyancing". The use throughout Pt II of the expression "substituted for" the old statute law is significant.

14 Differing language was used in Pt I of the Third Schedule to the 1924 Act. The heading to the Schedule as a whole was "CONVEYANCING AND LAW OF PROPERTY" and Pt I was simply headed "AMENDMENTS". Commentary

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21 [1912] 3 KB 474 at 492.

22 15 Geo V c 5.

upon the property law legislation of this period has not always sufficiently distinguished between provisions made to alter the pre-existing statute law and those designed to re-express it[23]. This distinction between Pt I and Pt II had been devised in the Report of the Committee on the Law of Property Consolidation Bills[24] chaired by Romer J. Part I was to contain "definite amendments of the law", while Pt II was "not intended to amend the law". The committee had reported to Viscount Haldane LC. Thereafter, when speaking on the Bill for the 1924 Act, he said[25]:

> "If your Lordships have read the Bill through, you will find that it deals with all sorts of interesting subjects, such as the Statute of Uses, and other Statutes going back to Tudor times. *It puts them into a much improved form, so far as it does not get rid of them*, and leaves the whole matter in such a shape that the Committee of my noble friend Lord Muir Mackenzie can consolidate them without difficulty." (emphasis added)

15 Section 3 and the Third Schedule to the 1924 Act were repealed by the *Law of Property Act* 1925 (UK) ("the 1925 Act")[26]. The long title to the 1925 Act described it as a statute "to consolidate the enactments relating to Conveyancing and the Law of Property in England and Wales". The 1925 Act introduced s 172 as a provision in Pt IX (ss 172-174), headed "VOIDABLE DISPOSITIONS". Section 172 has since been replaced by the elaborate provisions of ss 423 to 425 of the *Insolvency Act* 1986 (UK)[27].

16 Section 172 differed in minor respects from the provision in the 1924 Act which it replaced, but both provisions operated upon conveyances of property "with intent to defraud creditors". The Elizabethan Statute had spoken of dispositions made "to the end, purpose and intent, to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts,

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23 See Sparkes, "The 1925 Property Legislation: Curtaining off the Antecedents", (1988) *Statute Law Review* 146.

24 (1924) Cmd 2271 at 3.

25 United Kingdom, House of Lords, *Parliamentary Debates* (Hansard), 10 December 1924, vol 60, cc 82-83.

26 15 Geo V c 20, s 207 and Seventh Schedule.

27 *Giles v Rhind (No 2)* [2009] Ch 191 at 198-199.

damages ...". It followed that a disposition made *pendente lite* by a defendant with the necessary intent would fall within the very terms of the statute[28].

17 In New South Wales, the *Conveyancing (Amendment) Act* 1930 (NSW) ("the 1930 Act") repealed the Elizabethan Statute in its application to New South Wales[29] and followed the text of s 172 of the 1925 Act with the introduction[30] of s 37A into the Conveyancing Act. It is upon the construction and application of s 37A that this appeal turns. Section 37A now states:

> "(1) Save as provided in this section, every alienation of property, made whether before or after the commencement of [the 1930 Act], with intent to defraud creditors, shall be voidable at the instance of any person thereby prejudiced.
>
> (2) This section does not affect the law of bankruptcy for the time being in force.
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> (3) This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intent to defraud creditors."

18 In *Re Cummins; Richardson v Cummins*[31] Clyne J observed of s 37A that it "says nothing about an intent to hinder or delay creditors", and concluded that, while Mr Cummins "did hinder or delay his creditors" by leasing his property to his wife for a three-year term, the lease was not made "with intent to defraud his creditors".

19 However, the better view of the abbreviated terms employed in s 172 and s 37A is that of Pennycuick V-C in *Lloyds Bank Ltd v Marcan*[32]. This is that,

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28 *Reese River Silver Mining Co v Atwell* (1869) LR 7 Eq 347 at 351.

29 Section 2.

30 Section 10.

31 (1951) 15 ABC 185 at 191. See also *World Expo Park Pty Ltd v EFG Australia Ltd* (1995) 129 ALR 685 at 708.

32 [1973] 1 WLR 339 at 344; [1973] 2 All ER 359 at 367; affd [1973] 1 WLR 1387; [1973] 3 All ER 754. See also *Trautwein v Richardson* [1946] ALR 129 at 133; *P T Garuda Indonesia Ltd v Grellman* (1992) 35 FCR 515 at 522.

beginning with its appearance in the consolidation provision in the 1924 Act, the term "defraud" was designed to reproduce the meaning of the expression "delay, hinder or defraud" in the Elizabethan Statute. That statute was understood as if it read "delay, hinder or [otherwise] defraud". The contrary has not been suggested in the present case.

20 From this legislative history two things of immediate relevance appear. The first is that an understanding of the issues in this appeal is assisted by consideration of the case law upon the Elizabethan Statute which had been built up before that statute's repeal and restatement in s 37A. The second is that, in accordance with that case law, exemplified by remarks of Lord Mansfield[33], and more recently of Arden LJ[34], the provision and its modern representatives should receive a liberal construction in effecting their purpose of suppressing fraud.

21 There is one relevant qualification where, as here, the subject matter is a contract for the sale of land under the provisions of the RP Act which has been completed and the transfer registered. In *Regal Castings Ltd v Lightbody*[35], a majority of the Supreme Court of New Zealand held that the indefeasibility provisions of the Torrens system allowed for the enforcement against the registered proprietor of *in personam* remedies given by the Elizabethan Statute and its local representative. The contrary was not contended for on the present appeal. The view taken in New Zealand had earlier been accepted by Hogg[36] and Kerr[37] in their works on the Torrens system.

22 In his treatise on equity jurisprudence, Story had seen the object of the Elizabethan Statute as the protection of creditors "from those frauds which are frequently practised by debtors under the pretence of discharging a moral

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33 *Cadogan v Kennett* (1776) 2 Cowp 432 at 434 [98 ER 1171 at 1172].

34 *Giles v Rhind (No 2)* [2009] Ch 191 at 199.

35 [2009] 2 NZLR 433 at 449-450 per Elias CJ, 465 per Blanchard and Wilson JJ, 481-482 per Tipping J. McGrath J (at 491-494) saw the Elizabethan Statute as an exception to the indefeasibility of title.

36 Hogg, *The Australian Torrens System*, (1905) at 835.

37 Kerr, *The Principles of the Australian Lands Titles (Torrens) System*, (1927) at 223.

obligation [to] wives, children, and other relations"[38]. But the term "voluntary" did not appear in the statute[39] and the case law established that its application was not so limited. On appeal from the Supreme Court of New South Wales, the Privy Council in *Godfrey v Poole*[40] had approved the statement of principle respecting the operation of the Elizabethan Statute which had been made by Kindersley V-C in *Thompson v Webster*[41]. The Vice-Chancellor said:

> "The language of [the Elizabethan Statute] being that any conveyance of property is void against creditors, if it is made with *intent* to defeat, hinder or delay creditors, the Court is to decide in each particular case whether, on all the circumstances, it can come to the conclusion that the *intention* of the settlor, in making the settlement, was to defeat, hinder or delay his creditors." (emphasis in original)

23 The Vice-Chancellor (like Parker J in the passage from *Glegg v Bromley* set out above) had also been at pains to point out that to attract the Elizabethan Statute it was not sufficient, of itself, merely to show that the deed was voluntary; nor, on the other hand, was it necessary in order to set aside a voluntary deed that the settlor should actually be insolvent.

The sufficiency of proof of intent

24 Nevertheless, the 19th century cases did support a related distinction bearing upon the sufficiency of proof in these cases. The effect of the decisions was summed up as follows in the treatment under the title "Fraudulent and Voidable Conveyances" in the first edition of *Halsbury's Laws of England*[42]:

> "In an action to set aside an alienation under the statute the onus of proof of actual fraud on the part of the grantor, and that the grantee was privy to the intent, rests upon the plaintiff where the alienation is for

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38 Story, *Commentaries on Equity Jurisprudence, as administered in England and America*, 13th ed (1886), vol 1, §353.

39 *Holloway v Millard* (1816) 1 Madd 414 at 418-419 [56 ER 152 at 154].

40 (1888) 13 App Cas 497 at 503.

41 (1859) 4 Drewry 628 at 632 [62 ER 241 at 242].

42 (1911), vol 15 at 84, par 173.

> valuable consideration (a)[43]. Where, however, the alienation is voluntary, then on proof that the grantor was at the time of its execution contemplating his entry upon a hazardous business (b)[44], *or that the natural consequence of the alienation was to delay, hinder, or defraud creditors* (c)[45], or that the circumstances under which the alienation was effected bore one of the indications or badges of fraud hereafter mentioned (d)[46], the onus of upholding the alienation is imposed on the defendants." (emphasis added)

The two leading authorities given in footnote (c) to this passage are *Freeman v Pope*[47] and *Ex parte Mercer; In re Wise*[48]. However, neither case concerned a transaction cast in the form of a contract for sale of property. Rather, each transaction was a voluntary settlement of property, which was set aside in the first case but not in the second.

25 The point sought to be made in the text of *Halsbury* attached to footnote (c) may be expressed by saying that it would be the duty of the judge to direct a jury that they might infer an intention by the settlor to defeat or delay creditors, even in the absence of direct evidence of that intention, where this outcome was the necessary consequence of a voluntary settlement[49]. In this way, it was easier to infer a dishonest intention if the conveyance were voluntary than

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43 *Re Johnson; Golden v Gillam* (1881) 20 Ch D 389 at 394; *Re Cranston; Ex parte Cranston* (1892) 9 Morr 160; *Re Tetley; Ex parte Jeffrey* (1896) 3 Mans 226 at 233; *Re Hirth (Carl); Ex parte Trustee* [1899] 1 QB 612 at 620; *Re Holland; Gregg v Holland* [1902] 2 Ch 360; *Re Reis; Ex parte Clough* [1904] 2 KB 769.

44 *Mackay v Douglas* (1872) LR 14 Eq 106.

45 *Freeman v Pope* (1870) LR 5 Ch App 538; *Ex parte Mercer; In re Wise* (1886) 17 QBD 290; *Re Holland; Gregg v Holland* [1902] 2 Ch 360; see *Re Tetley; Ex parte Jeffrey* (1896) 3 Mans 226.

46 See *Halsbury's Laws of England*, 1st ed (1911), vol 15 at 84-87, pars 174-177.

47 (1870) LR 5 Ch App 538.

48 (1886) 17 QBD 290.

49 Cf *Williams v Lloyd* (1934) 50 CLR 341 at 360-361; [1934] HCA 1.

if it were made for consideration[50]. Evidence that the conveyance was voluntary does not replace the requirement of proof of intent by a distinct category where constructive fraud, with notions of constructive knowledge or notice as understood in equity, would suffice for the application of s 37A[51]. Rather, the evidence is that species which has sufficient weight to entitle the fact finder to decide an issue (here the necessary intent) in favour of the moving party, although the fact finder is not obliged to do so and other evidence given may be decisive to the contrary[52].

26 The statement by Parker J in *Glegg v Bromley*[53] that the existence of the necessary intent is a question of fact for the jury, or the judge sitting alone to try the facts, is important here. In such a case remarks of Lord Esher MR in *English and Scottish Mercantile Investment Co v Brunton*[54] are in point. His Lordship spoke of inferences of fact, "drawn because you cannot look into a man's mind", whereby it is actual knowledge which is inferred, which is distinguished from the purely equitable doctrine of constructive notice or constructive knowledge.

27 However, in the United States the Conference of Commissioners on Uniform State Laws, when promulgating the Uniform Fraudulent Conveyance Act ("the UFCA") in 1918, sought to remove what it saw as a confusion; this stemmed "from judicial attempts to stretch the original English fraudulent conveyance statute ... and its offspring ... which permitted relief only on a showing of actual intent to defraud, to apply to situations where no such actual intent could be proven"[55]. This was done by providing, as distinct grounds in the UFCA, "constructive fraud" manifested by the absence of "a fair consideration", and conveyances with "actual intent" to hinder, delay or defraud present or future

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50 Cf *Lloyds Bank Ltd v Marcan* [1973] 1 WLR 1387 at 1392; [1973] 3 All ER 754 at 761.

51 *Kerr on Fraud and Mistake*, 6th ed (1929) at 282.

52 See *Cross on Evidence*, 8th Aust ed (2010) at 121 [1600].

53 [1912] 3 KB 474 at 492.

54 [1892] 2 QB 700 at 708.

55 *Marine Midland Bank v Murkoff* 508 NYS 2d 17 at 21 (1986). For a discussion of the Elizabethan Statute in the United States prior to the UFCA, see Bump, *A Treatise upon Conveyances Made by Debtors to Defraud Creditors*, 4th ed (1896).

creditors which, however, might be proved as a matter of inference[56]. The Uniform Fraudulent Transfer Act ("the UFTA") was approved by the Commissioners in 1984 and has been adopted in some 43 States[57]. Like s 548 of the Bankruptcy Code, enacted in 1978, it preserves the distinction in the UFCA between transfers made with an actual fraudulent intent and constructively fraudulent transfers[58].

The proper mental state for s 37A

28 The particular and specific course taken in the United States with the UFCA and the UFTA as to the ground of constructive fraud did not represent the English case law upon the Elizabethan Statute as it stood in 1924. That case law is summed up in the passage from *Glegg v Bromley* set out earlier in these reasons. Consequently, the operation of s 37A of the Conveyancing Act was not qualified by a notion of constructive fraud. However, the reasoning of the Court of Appeal in the present case appears to proceed otherwise. It appears to have been assumed that in order to repel an interpretation of s 37A that would extend its scope to cases of equitable or constructive fraud, it was appropriate to fortify the requirement of an intention to defraud by some notion of dishonesty involving a desire to "cheat" or "swindle" those prejudiced[59]. Hamilton J then was held to have erred in law in not considering that requirement for the operation of s 37A.

29 In the Court of Appeal, Allsop P (with whom Giles JA agreed) began his analysis with the observation that there was a debate as to "the proper mental state for s 37A"[60] and continued:

> "The cases in the 19th and 20th centuries revealed a tension between those which stated that the fraud required to be proved was 'real' or 'actual' and

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56 *United States v McCombs* 30 F 3d 310 at 323-328 (1994).

57 Erens, Friedman and Mayerfeld, "Bankrupt Subsidiaries: The Challenges to the Parent of Legal Separation", (2008) 25 *Emory Bankruptcy Developments Journal* 65 at 80, fn 19.

58 *Collier on Bankruptcy*, 15th ed (rev) (1998), vol 5, §548.01 [1]-[3].

59 Cf *Hardie v Hanson* (1960) 105 CLR 451 at 456, 463; [1960] HCA 8.

60 (2009) 260 ALR 353 at 356.

those which provided for constructive fraud based upon the consequences of the acts undertaken and impugned."

He went on to regard *Ex parte Mercer; In re Wise*[61] as rejecting the proposition that a finding of intent for the Elizabethan Statute was a conclusion from the necessary effect of what was done, so that on this view "fraud may not involve deceit, but does involve dishonesty", and to treat *Freeman v Pope*[62] as a decision which looked to the "necessary effect" of a disposition.

30 However, at trial Mrs Marcolongo had shouldered the burden of establishing in all the circumstances that the contract and transfer were made with intent to defraud creditors with the consequence that they were voidable at her instance as a person thereby prejudiced. She did not rely upon any adverse inference based upon the absence of consideration and the alleged natural consequence of the conveyance or transfer as being to defraud creditors.

31 Allsop P went on to identify the "central question", which Hamilton J had not addressed, as being whether Lym "had an actual and real intention" to defraud Mrs Marcolongo[63], and Young JA spoke of a requirement of "some element of dishonesty"[64]. In this Court, Lym, in the first of its submissions supporting the decision of the Court of Appeal, treated this as requiring "an actual intent" in the sense of an animus shown by an "awareness" that the transaction would have an effect on the ability of creditors to recover from Lym.

32 However, in response Mrs Marcolongo correctly relies upon a statement by Blanchard and Wilson JJ when considering the comparable New Zealand legislation[65] in *Regal Castings Ltd v Lightbody*[66]. Their Honours said that it was unnecessary to show that the debtor wanted creditors to suffer a loss or that the debtor had a purpose of causing loss: it was necessary to show the existence of

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61 (1886) 17 QBD 290.

62 (1870) LR 5 Ch App 538.

63 (2009) 260 ALR 353 at 358.

64 (2009) 260 ALR 353 at 390.

65 *Property Law Act* 1952 (NZ), s 60, now replaced by sub-pt 6 of Pt 6 (ss 344-350) of the *Property Law Act* 2007 (NZ).

66 [2009] 2 NZLR 433 at 456-457.

an intention to hinder, delay or defeat creditors and *in that sense* to show that accordingly the debtor had acted dishonestly. Mrs Marcolongo correctly relies also upon the observation by Russell LJ when considering s 172 of the 1925 Act in *Lloyds Bank Ltd v Marcan*[67]. His Lordship said:

> "I am not sure what is meant by a perfectly innocent defeat, hindrance or delay. It must be remembered that in every case under this section the debtor has done something which in law he has power and is entitled to do: otherwise it would never reach the section. If he disposes of an asset which would be available to his creditors with the intention of prejudicing them by putting it, or its worth, beyond their reach, he is in the ordinary case acting in a fashion not honest in the context of the relationship of debtor and creditor. And in cases of voluntary disposition that intention may be inferred. ... The intention of Mr Marcan is perfectly plain: the lease to his wife was designed expressly to deprive the bank of the ability to obtain the vacant possession to which the bank plainly attributed value, and to diminish to that extent the strength of the bank's position as creditor. To take that action at that juncture, in my judgment, was, in the context of relationship of debtor and creditor, less than honest: it was sharp practice, and not the less so because he was advised that he had power to grant the lease. It was, in my judgment, a transaction made with intent to defraud the bank within section 172, and would have been within the [Elizabethan Statute]."

33 To that may be added the statement in the joint reasons of the Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[68]:

> "As a matter of ordinary understanding, and as reflected in the criminal law in Australia[69], a person may have acted dishonestly, judged by the standards of ordinary, decent people, without appreciating that the act in question was dishonest by those standards. Further, as early as 1801, Sir William Grant MR stigmatised those who 'shut their eyes' against the receipt of unwelcome information[70]."

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67 [1973] 1 WLR 1387 at 1390-1391; [1973] 3 All ER 754 at 759-760.

68 (2007) 230 CLR 89 at 162 [173].

69 *Macleod v The Queen* (2003) 214 CLR 230 at 242 [36]-[37].

70 *Hill v Simpson* (1802) 7 Ves Jun 152 at 170 [32 ER 63 at 69]. See further *May v Chapman and Gurney* (1847) 16 M & W 355 at 361 [153 ER 1225 at 1228]; *Jones*

(Footnote continues on next page)

34 Lym relied upon the references by Brennan CJ and McHugh J in *Cannane v J Cannane Pty Ltd (In liq)*[71] to "the onus of proving an actual intent". But their Honours were adding the word "actual" as a periphrasis to emphasise that, while the existence of the intent might be inferred from the evidence, it was to be found as a fact. With Gaudron J and Gummow J, Brennan CJ and McHugh J concluded that the facts of *Cannane* did not support the drawing of such an inference[72].

35 The first submission by Lym should be rejected. Before turning to its second submission something more should be said of the facts.

The facts

36 Lym was involved in two property developments at Mona Vale, on the northern beaches of Sydney; the first was at 1 to 5 Darley Street ("Project 1") and the second was at 34 to 36 Golf Avenue ("Project 2" and "the subject property"). By mid-2006, Project 1 was completed and the units in the development had been sold. Mrs Marcolongo owned and lived on the property adjacent to Project 1. In 2004 she instituted an action in the District Court of New South Wales for damages for the removal of support during the building operations for Project 1. Eventually, after a lengthy trial, on 26 November 2009 Mrs Marcolongo recovered a judgment against Lym for $388,643.62 with costs.

37 After the units in Project 1 were sold, the subject property remained the only asset of substance held by Lym in Australia. During 2004 and 2005 there had been correspondence between the solicitors for Mrs Marcolongo and Lym concerning her District Court litigation and the prospect of an interlocutory motion for an assets preservation order[73] in respect of Project 2 to protect her position. On 27 August 2004 the District Court had refused a motion by Mrs Marcolongo that Lym retain in the trust account of its solicitors $500,000 from the proceeds of sale of the units in Project 1. However, the correspondence continued into 2006.

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v Gordon (1877) 2 App Cas 616 at 625, 628-629, 635; *English and Scottish Mercantile Investment Co Ltd v Brunton* [1892] 2 QB 700 at 707-708.

71 (1998) 192 CLR 557 at 565-566 [10]-[12]; [1998] HCA 26.

72 (1998) 192 CLR 557 at 568 [17], 572 [31]-[32], 579-580 [58].

73 See *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 399-401 [41]-[44]; [1999] HCA 18.

38 On 5 September 2005 Mrs Marcolongo filed an amended Statement of Claim in the District Court proceedings, which increased the amount claimed to $600,000. In December 2005 the estimated value of the subject property once completed was $18.5 million. This was exceeded by Lym's liabilities.

39 On 15 August 2006, Lym transferred the subject property to Mr Chen. Ms Limin Yang had been a director of Lym since 1998. At the hearing before Hamilton J she was cross-examined by counsel for Mrs Marcolongo and counsel for Mr Chen. Ms Yang resided in New Zealand and was an equal shareholder in Lym with a Mr Mao. Mr Mao had been managing Project 2 until his return to China in February 2006. Ms Sandy Lai was appointed to manage the project in Mr Mao's absence. In early March 2006, the builder terminated its retainer with Lym for Project 2 and on 7 April 2006 a quantity surveyor estimated that it would cost around $3.4 million to complete Project 2.

40 In May 2006, Ms Yang's husband, a Mr Liu, was detained by authorities in China; Ms Yang and her daughter, Ms Yang Liu, were concerned and fearful about steps that the Chinese authorities might take against them and assets of the family in Australia and New Zealand. Ms Yang became more dependent on Mr Chen and his wife, Amanda (who also lived in New Zealand), for friendship, business advice and assistance in attempts to conceal herself and her assets from the Chinese authorities. Ms Yang withdrew funds from bank accounts and deposited them in a bank account of one of Mr Chen's companies. She also transferred her shares in family companies to Mr Chen.

41 In mid-July 2006, Mr Chen offered to go to Sydney for Ms Yang and investigate the state of Project 2 and the affairs of Lym, if Lym granted him a power of attorney. The power of attorney was granted on 24 July 2006. Hamilton J made it clear that he did not find that Ms Yang had made any firm decision by that date to "sell" the subject property. However, Mr Chen had considered as a possible course that he should buy the subject property from Lym as a means of obtaining the discharge of substantial debts due from the Liu interests to him and his associates. He travelled to Sydney on 25 July 2006, inspected the subject property and learned that many contractors needed to be paid for work done on Project 2; he collected from Ms Sandy Lai a large quantity of books and records of Lym. It was then that he learned of the $600,000 claim by Mrs Marcolongo against Lym.

42 Ms Yang executed the contract and the transfer on 31 July 2006 in New Zealand. This had been preceded by numerous telephone conversations Mr Chen had with her from Sydney in which he had conveyed to her information concerning Project 2. It was during these conversations that Mr Chen told Ms Yang:

> "[Lym] has got some problems with its first real property project. The company has completed that project and all properties have been sold. Now, all the purchasers of those real properties have decided to sue your company, because of the quality problems of those properties. As the builder of those properties has gone into liquidation. *Your company will be solely liable for a damage of more than $0.6 million* to those purchasers. *If you are not [sic] going to transfer the development property, you must do it quickly, the plaintiffs will freeze any dealing in relation to the development property. If that is the case, the company will suffer a big loss.*" (emphasis added)

43 The evidence established that by late July 2006 the builder of Project 1 had gone bankrupt and Mrs Marcolongo desired to "freeze" dealings in relation to Project 2 with an application for an assets preservation order. There were further conversations between Ms Yang and Mr Chen, during which he said to Ms Yang: "You can transfer the project to me, and then neither the company nor you can then be liable for any money to the purchasers" and that "Lym has to pay $600,000 to purchasers (of the other project) otherwise they may sue Lym and its assets will be frozen".

44 Hamilton J found that Mr Chen was determined to induce Ms Yang to enter into the contract for sale to solve his problem with the debts owed by the Liu interests and that, when he said "purchasers" may sue, he was referring, in reality, to the $600,000 claim by Mrs Marcolongo in the District Court. Further, his Honour found that Mr Chen did "indicate to her that there was a potential debt of $600,000 arising from Project 1 that both [Lym] and she would escape if [Lym] divested itself of the subject property as a matter of urgency".

45 It was during these conversations that it was agreed that Mr Chen would "buy" the subject property from Lym. He arranged for the preparation of the contract for sale and the transfer in Sydney and his solicitors sent the documents to lawyers in New Zealand on 27 July 2006 for execution by Ms Yang "as soon as possible". Mr Chen specified the $15 million purchase price in the contract and transfer. This was not the subject of any prior discussion or negotiation with Ms Yang. Project 2 was not marketed for sale.

46 Accordingly, it was on 31 July 2006 that for the first time before executing the documents in New Zealand Ms Yang saw the $15 million purchase price specified on the contract for sale and the transfer. She also signed a document confirming that the New Zealand solicitor named on the contract as the solicitor for Lym had not provided any legal advice with respect of the transaction. The transaction proceeded with haste.

47 Hamilton J held that Ms Yang had made "significant admissions as to the intent with which the transaction was entered into" during her cross-examination. Ms Yang accepted that one of the reasons for transferring the subject property was to "get the property ... out of [Lym's] name and away from those who might be making a claim against the company". She also accepted that she signed the contract "so as to avoid [Lym] suffering a big loss". His Honour found that her preparedness to admit the "avoidance" of the $600,000 claim as a reason for her entering into the contract for sale, also conduced to acceptance that she knew of the claim before the contract was entered into.

48 The contract did not come into effect until 15 August 2006 when it was executed by Mr Chen in Sydney and he simultaneously exchanged and settled the transaction on the same day both for himself and as attorney for Lym. The contract contained a special condition 33:

> "**Price**
>
> The Purchaser must pay the Purchase Price as follows:
>
> (a) $7,625,000 to the mortgagee of the Land; and
>
> (b) the balance to be applied to the debts owed to the Purchaser by the Vendor or a related entity (as that term is defined in the *Corporations Act* 2001 (Cth)) of the Vendor."

49 On completion, Mr Chen arranged for the outgoing mortgagee to be paid about $7.6 million to discharge its mortgage over the subject property, by monies largely borrowed from Westpac Banking Corporation ("Westpac"). He executed a mortgage in favour of Westpac. The mortgage was registered and the relief granted by Hamilton J preserved that security and any existing tenancies.

50 No settlement statement was prepared, nor any accounting or statement with respect to the application of the balance of the sale proceeds (about $7.4 million) to debts due to Mr Chen by Lym or related entities. No statement was provided as to what debts owed by the Liu interests to the Chen interests were satisfied by credit out of the proceeds of sale. No arrangements were made for Mr Chen to otherwise pay Lym the balance. On completion, Mr Chen used monies in Lym's bank account to pay $360,000 towards payment of the outgoing mortgagee and about $810,000 for stamp duty.

51 The critical findings of fact by Hamilton J were[74]:

> "I am not unmindful that [Ms Yang's] account of what [Mr Chen] said was somewhat garbled and inaccurate in that the claimants of the $600,000 were said to be purchasers of town houses rather than the next door neighbour. However, there was in fact only one potential source of debt and what Mr Chen was referring to in reality was the $600,000 claim by Mrs Marcolongo in the District Court proceedings, whether he erroneously referred to purchasers or the mistake was made in Ms Yang's recounting of the conversation. I find that he did make representations to her that there was an outstanding claim or claims against [Lym] of $600,000 and that [Lym] should divest itself of the subject property as a matter of urgency in order to deflect that liability from the company and herself."

52 Hamilton J referred to admissions made by Ms Yang in cross-examination which supported the case that the transaction was entered into with intent to defraud creditors and continued[75]:

> "The objection that those admissions were self serving, because they support Mrs Marcolongo's case, the success of which would achieve the setting aside of the transaction, which Ms Yang also sought, is not without force. However, particularly in the context of cross examination in which the admissions were made, including the promptness of the responses, I did not have any impression that the answers were calculated to advantage Ms Yang, rather than being frank and straightforward responses to the propositions put to her. I accept her evidence to this effect. Incidentally, Ms Yang's preparedness to admit that avoidance of the $600,000 claim was a reason for her entering into the contract for sale also conduces to acceptance that she knew of the claim before the contract was entered into."

53 His Honour then said (and we agree) that his acceptance of these admissions rendered comparatively simple the decision on the s 37A case. His Honour continued[76]:

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74 [2009] NSWSC 98 at [141].

75 [2009] NSWSC 98 at [145].

76 [2009] NSWSC 98 at [182].

> "I find that the alienation of property was made 'with intent to defraud creditors'. Mrs Marcolongo is a person prejudiced by the transaction and therefore entitled to bring proceedings. She had at the time and has a claim for some $600,000 against [Lym]. Although she was not within the terms of the category of creditors as expressed in the admissions it was indeed her potential debt of $600,000 intended to be referred to. Mr Chen cannot characterise himself as a purchaser in good faith not having notice of the intent to defraud. This equally flows from the fact that I have found ... above that he pressed upon Ms Yang the existence of the claim and urged her to carry out the transaction expeditiously in order to avoid its effect. Mrs Marcolongo is therefore entitled to have the transaction declared voidable."

The remaining issues

54 In this Court Mr Chen submits that he was a purchaser for value. But the findings by the trial judge set out above deny any application in his favour of the proviso in s 37A(3).

55 For its part, Lym seeks to uphold the decision of the Court of Appeal on the basis that Mrs Marcolongo had not established that its intention was "fraudulent predominantly", and that she must fail if the "primary purpose" of the transaction had not been its effect on creditors including Mrs Marcolongo. Both phrases had been used by Young JA[77]. His Honour also had regarded it as significant that "the real fraudster was Mr Chen" and that Lym's intentions, whatever they were, had been "formed principally from the influence of Mr Chen"[78]. Allsop P adopted the discussion of evidence by Young JA (and Giles JA agreed with Allsop P)[79] and identified the issue as insufficiency of material upon which to conclude "that an operative intention of Ms Yang was to defraud Mrs Marcolongo"[80].

56 Three things should be said here. First, the reference to "defraud", in the light of what has been said earlier in these reasons, includes the hindering or delaying of creditors, in particular of Mrs Marcolongo in the exercise of her legal

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77 (2009) 260 ALR 353 at 381, 382.

78 (2009) 260 ALR 353 at 382.

79 (2009) 260 ALR 353 at 355, 359.

80 (2009) 260 ALR 353 at 357.

remedies, whether by an assets preservation order in respect of Project 2 pending determination of her District Court action against Lym, or by execution upon Project 2 to recover her verdict and costs were she to be successful. No doubt, the transaction was not expressed as voluntary and Lym was to receive some value in exchange. But the provision in special condition 33(b) for application of the balance of the proceeds to debts owed by Lym and related entities of Lym, and the evidence as to the lack of arrangements for Mr Chen to pay that balance, shows the deterioration to the position of Mrs Marcolongo that inevitably ensued. It is no answer, as it was no answer in *In re Fasey; Ex parte Trustees*[81], that there had been no delay and hindrance occasioned by the transaction because eventually she might have had some recovery for any judgment she recovered and costs.

57 The second point is that s 37A requires a finding, which Hamilton J made, of intent to achieve the proscribed prejudice. The section does not postulate a mixture of motives from which there must be extracted what is identified as a predominant intent to defraud. Further, as Stephen J indicated in his discussion in *Barton v Deputy Federal Commissioner of Taxation*[82], a provision such as the Elizabethan Statute does not require for its operation that the proscribed intent to defraud be the sole intent. Nor is it an answer to an application under the section that the transferor formed the intent of which it speaks by reason of the misconduct of another or, as here, of the transferee; the transferor, as in this case, will have remedies against that party but that does not deny success on the application made under the section by the person prejudiced. Counsel for Lym was unable to point to any line of authority in the extensive case law upon the Elizabethan Statute which would confine s 37A in this fashion.

58 The final point is that the limiting effect which Lym sought to place upon s 37A would be to deny it the liberal construction which the Elizabethan Statute has long been held to require.

Conclusions and orders

59 For these reasons the appeal should be allowed. Costs of Mrs Marcolongo's appeal to this Court should be paid by Mr Chen and Lym. The Summons by Lym seeking to file a Notice of Contention out of time was not pressed. It should be dismissed with Mrs Marcolongo's costs against Lym.

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81 [1923] 2 Ch 1 at 13, 15, 17.

82 (1974) 131 CLR 370 at 375; [1974] HCA 43.

60 Orders 1, 2, 3, 4 and 5 of the orders of the Court of Appeal made on 12 November 2009 allowing the appeal to that Court should be set aside and in place thereof the appeal to that Court should be dismissed, the costs of Mrs Marcolongo of the appeal to be paid by Mr Chen. The sum of $60,000 paid into the Supreme Court by Mr Chen as security for the costs of Mrs Marcolongo, together with interest thereon, should be paid out forthwith to her solicitor.

61 The effect of the above orders of this Court will be to reinstate the orders made by Hamilton J and entered on 23 March 2009, save for order 12, which already is spent. Order 11 of those orders is a grant of liberty to apply to the Equity Division of the Supreme Court. Order 9(c) makes distinct provision for satisfaction of the judgment sum and costs of the District Court action, in which Mrs Marcolongo has succeeded.

62 HEYDON J. On 31 July 2006, Lym International Pty Ltd executed a contract to transfer 34-36 Golf Avenue, Mona Vale, to Mr Yu Po Chen.

63 Was that contract (and the consequential transfer on 15 August 2006) liable to be set aside as having been made with the intention of defrauding creditors in breach of s 37A of the *Conveyancing Act* 1919 (NSW)?

64 The critical period was the period leading up to the execution of the contract by Lym International Pty Ltd on 31 July 2006. The critical mind was that of Lym International Pty Ltd. In the critical period the critical human mental states corresponding with the critical mind were those of one of its directors, Ms Limin Yang, who was also a 50 percent shareholder. That is because it was her decision to enter the contract of sale and complete the transaction, and hers alone. The company's other director, Mr Weilin Mao, who owned the other 50 percent of the shares, was in China and was not shown to have participated in the relevant decisions.

65 In evaluating Ms Yang's state of mind, the following events are relevant.

66 Mona Vale is a suburb in the "Northern Beaches" area of Sydney. Mrs Leonilda Marcolongo owned a property adjoining a site at 1-5 Darley Street, Mona Vale. On that site Lym International Pty Ltd constructed a townhouse development. Excavation for the development removed support from Mrs Marcolongo's property and caused it damage in August 2002. Mrs Marcolongo commenced proceedings in the District Court of New South Wales on 9 August 2004 for damages in the amount of $400,000. The claim was increased to $600,000 on 5 September 2005. Meanwhile, on 3 May 2005, Lym International Pty Ltd had endeavoured to protect itself by cross-claiming against R C J Young, who carried out the excavation and development of 1-5 Darley Street, and also a company which was responsible for certain works connected with the excavation and development. Mr Young was bankrupt and in September 2005 Lym International Pty Ltd also cross-claimed against Mr Young's insurer.

67 Immediately after the proceedings began, Mrs Marcolongo applied for an injunction seeking to protect $500,000 of the proceeds of sale of the townhouses at 1-5 Darley Street as a possible source out of which the claimed damages could be paid. She was unsuccessful. But she maintained pressure on Lym International Pty Ltd for that protection. In a letter dated 13 September 2005, the solicitors for Mrs Marcolongo asked the solicitors for Lym International Pty Ltd for their client's consent to retaining a sum of money from the net proceeds of sale of the development at 34-36 Golf Avenue as a source for meeting any damages recovered in the District Court proceedings. The letter noted that the principals of Lym International Pty Ltd were nationals of the People's Republic of China, and raised questions about the extent to which the company had assets in Australia. It referred to the need for a Mareva injunction if agreement could

not be reached. After Mrs Marcolongo's solicitors sent a reminder on 7 October, Lym International Pty Ltd's solicitors replied on 11 October. The letter said:

> "[O]ur client has a continuing development at 34-36 Golf Avenue, Mona Vale. We are instructed that the development comprises 15 units with the units having significant value. At the date of this letter we are instructed that the construction phase is due to be completed in the latter part of this year and all 14 units are for sale. We are instructed that our client has no other projects at this stage."

68 By 11 October, the townhouses at 1-5 Darley Street had been sold, and the only asset of substance which Lym International Pty Ltd had in Australia was the project at 34-36 Golf Avenue. Before December 2005 the estimated value of 34-36 Golf Avenue on completion was $22.5 million, but in December 2005 that value fell to $18.5 million, which was less than the amount of Lym International Pty Ltd's debts.

69 That event rendered false the assurances to be inferred from the 11 October 2005 letter that Lym International Pty Ltd was good for any judgment that Mrs Marcolongo might obtain. Thereafter matters worsened for the development at 34-36 Golf Avenue.

70 On 25 January 2006 the solicitors for Mrs Marcolongo wrote to the solicitors for Lym International Pty Ltd demanding that the net proceeds of sale of the 34-36 Golf Avenue development be retained as "security for any judgment".

71 The manager of the development, Mr Mao, withdrew from the management of Lym International Pty Ltd in January 2006 and subsequently returned to China. Little work was done on the development after that time.

72 There were disputes with the builder. It was owed approximately $400,000. It had been told that Lym International Pty Ltd lacked the funds to pay it. In March 2006 it terminated its retainer.

73 On 7 April 2006 Lym International Pty Ltd's quantity surveyor estimated that the cost of completing the development would be $3.4 million – double what it had been in January, because defective work had come to light.

74 In April 2006 the mortgagee whose loans were financing construction revalued the property downwards, and successfully demanded repayment of $4.2 million, leaving $7.6 million owing to that mortgagee. That sum was provided by Heard Park Ltd, a company of which Mr Chen was the principal. Mr Chen and his wife had for some years been business and personal associates of Ms Yang and her husband, Mr Liu.

75 In May 2006 Mr Liu was imprisoned in China by the authorities there.

76 The personal affairs of Ms Yang and the business affairs of her company, Lym International Pty Ltd, had thus reached a stage of crisis. She could not speak or write English. She lived in New Zealand. Mr Chen then took on the role of fiduciary adviser to Lym International Pty Ltd. He offered to assist her by travelling from New Zealand to Sydney in order to investigate the state of the 34-36 Golf Avenue development provided he was granted a power of attorney. On 24 July 2006 that power of attorney was granted. By that date he considered that a possible course was for him to buy 34-36 Golf Avenue as a means of obtaining the discharge of debts owed by Mr Liu's interests to him or his associates.

77 On 25 July Mr Chen went to Sydney. On 26 July he inspected 34-36 Golf Avenue. On succeeding days he observed that many contractors were unpaid, and he collected a large quantity of books and records. He learned that there was a claim of $600,000 against Lym International Pty Ltd arising out of the development of 1-5 Darley Street.

78 The trial judge made certain crucial credit-based findings. They were not challenged in the Court of Appeal or in this Court, nor could they reasonably have been challenged. He found that Ms Yang had several conversations with Mr Chen before Lym International Pty Ltd executed the contract of sale on 31 July 2006. He found that Mr Chen was determined to induce her to enter the contract in order to solve the problem of the debts owed to his interests by the Liu interests. He found that Mr Chen represented that there was an outstanding claim or claims against Lym International Pty Ltd of $600,000 arising from the development of 1-5 Darley Street. He found that Mr Chen represented that Lym International Pty Ltd should divest itself of 34-36 Golf Avenue as a matter of urgency in order to deflect that liability from Lym International Pty Ltd and Ms Yang – or, as Ms Yang's evidence put it, avoid the company's assets being "frozen". He found that Mr Chen said that if Ms Yang did not do this, she could go to gaol – an improbable prediction, but she believed it. He accepted admissions in cross-examination by Ms Yang that a reason for her signing the contract of sale on behalf of Lym International Pty Ltd was to get the property away from those who might claim against that company and to avoid the company suffering a "big loss" in the form of the $600,000 claim.

79 For those reasons he found that the contract of sale was entered, and the transfer was made, with an intent to defraud creditors.

80 The trial judge's finding that Ms Yang was being urged to act with extreme haste is supported by the haste with which she did act, and by various other circumstances.

81 Some of those circumstances were known to, or could have been inferred by, Ms Yang. On 25 July 2006, before inspecting 34-36 Golf Avenue or making inquiries, Mr Chen instructed his Sydney solicitors to prepare a contract of sale and transfer of the land. They sent the documents to Mr Chen's New Zealand solicitors on 27 July 2006 for execution "as soon as possible". Mr Chen specified the purchase price of $15 million. This was not the subject of any prior discussion or negotiation with Ms Yang. Ms Yang first became aware of the price when she saw it on the documents just before executing them. She signed a document confirming that a New Zealand solicitor introduced to her by Mr Chen had not given her any legal advice.

82 There were other circumstances known to Mr Chen, though not necessarily known to Ms Yang. It was submitted for Mrs Marcolongo that Mr Chen's role as attorney of Lym International Pty Ltd in relation to the execution and completion of the contract of sale meant that his intention to defeat Mrs Marcolongo's interests was relevant. It is not necessary to accept that perhaps ambitious submission; it is sufficient to say that those other circumstances are relevant at least because they suggest a sense of urgency on his part which he is likely to have communicated to Ms Yang before 31 July. The contract of sale was completed on the same day as Mr Chen signed it – 15 August. That completion took place without any reference to Ms Yang, without instructions from Lym International Pty Ltd, and without any representation by solicitors on behalf of Lym International Pty Ltd. Special Condition 33(b) to the contract of sale, the meaning of which was never conveyed to Ms Yang, provided that, after $7,625,000 of the purchase price was paid to the mortgagee, the balance was "to be applied to the debts owed to the Purchaser by the Vendor or a related entity (as that term is defined in the *Corporations Act 2001 (Cth)*) of the Vendor." There was no settlement statement stating the amount paid to the mortgagee, or showing what the balance was, or showing how it was applied to the "debts owed" within the meaning of Special Condition 33(b). Mr Chen provided no accounting to Lym International Pty Ltd or Ms Yang for any of the proceeds of sale. He provided no statement of what debts were satisfied out of the proceeds of sale – of what quantum, owed by whom and to what extent. He gave no identification of whether there was any surplus of those debts over the amount satisfied by settlement of the transaction, or vice versa. He supplied no acknowledgment of satisfaction of the debts which the debtors could produce as evidence of their discharge from the debts.

83 There are two other indications of extreme haste. One concerns the second director of Lym International Pty Ltd, Mr Mao. Before the contract was made, the New Zealand solicitor acting for Mr Chen was given a copy of a letter in which Mr Mao purported to resign as director. But the signature on the letter was not that of Mr Mao. It was forged. Although the trial judge said there was no evidence that either Ms Yang or Mr Chen was responsible, the production of the letter does reveal a desire to proceed with great urgency. The other indication of extreme haste was that Mr Chen used money in Lym International Pty Ltd's

bank account to pay $360,000 towards the discharge of the mortgagee's mortgage and about $810,000 for stamp duty, for which Mr Chen was liable. No explanation was apparently offered to Ms Yang in relation to that conduct.

84 All these indications of haste reveal determination on Mr Chen's part, communicated to Ms Yang before 31 July, to ensure that 34-36 Golf Avenue passed into safe hands rather than remaining in peril of being frozen to support the interests of Lym International Pty Ltd's creditors.

85 The fears afflicting Mr Chen and Ms Yang were realised. On 26 November 2009 Elkaim DCJ entered a verdict and judgment in favour of Mrs Marcolongo in the District Court proceedings for $388,643.62 plus costs. Although that was less than $600,000, it was said in this Court, without contradiction, that the trial lasted three weeks and that the costs incurred by Mrs Marcolongo during it were $600,000-$800,000.

86 The legal issue for this Court was put as being whether s 37A required "an actual dishonest intent" or whether something less sufficed. In the Court of Appeal judgments there are references to the need for "a real intent to defraud"[83], a "real and actual state of mind … of detrimentally affecting the property and rights of others"[84], an "actual intent to deprive creditors of their rights"[85], and "a serious finding of an actual and real intent to defraud"[86]. In the Court of Appeal it was said that "constructive fraud or equitable fraud" was not enough[87]; nothing "constructive[,] imputed or implied will do."[88] The reasoning of the Court of Appeal posed other possible issues: whether a "predominantly" fraudulent intent[89], or an actual and real intent which was "operative as one of the reasons for the transaction"[90], was required, or whether an intent to have a "merely incidental" effect on creditors sufficed[91].

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83 *Chen v Marcolongo* (2009) 260 ALR 353 at 357 [14].

84 *Chen v Marcolongo* (2009) 260 ALR 353 at 357 [15].

85 *Chen v Marcolongo* (2009) 260 ALR 353 at 357 [17].

86 *Chen v Marcolongo* (2009) 260 ALR 353 at 357 [17].

87 *Chen v Marcolongo* (2009) 260 ALR 353 at 389 [295].

88 *Chen v Marcolongo* (2009) 260 ALR 353 at 382 [243].

89 *Chen v Marcolongo* (2009) 260 ALR 353 at 382 [241].

90 *Chen v Marcolongo* (2009) 260 ALR 353 at 358 [24].

91 *Chen v Marcolongo* (2009) 260 ALR 353 at 381 [236].

87 Whatever the precise test called for by s 37A, the intent underlying the conduct of Lym International Pty Ltd through Ms Yang was enough to satisfy it. It was as "actual" and "dishonest" an intent as it is possible to have. The intent was to delay or hinder a creditor, Mrs Marcolongo, by forestalling any attempt by her to obtain an injunction ensuring that assets in the hands of Lym International Pty Ltd would remain available to satisfy any judgment which she obtained in the District Court proceedings. It was an intention that was primary and not "merely incidental" to other intentions[92]. The intent was not merely a minor element amidst a range of mental states. Lym International Pty Ltd submitted that Ms Yang's reasons for entering the transaction were many and varied. On examination each of them boils down either to an element of or factor in the intent found by the trial judge, or to a worry Ms Yang was experiencing but which the transfer could not overcome. In the Court of Appeal it was said that she was very worried about "a great number of factors, including the incarceration of her husband in China, the stalled building project, the claims from the first project and her inability to fund the project."[93] The first cannot have been a reason for the transfer, and the remainder are all related to the intent found by the trial judge. Lym International Pty Ltd submitted that Ms Yang was unwell, but that did not go to her intent. In evidence she identified as other reasons for the transaction the following: the indebtedness of Lym International Pty Ltd; the need for another $3.4 million to complete the project; the need for that money to be invested within two months, when the construction licence would expire; and the need to repay a debt to avoid going to gaol. Of these reasons, only two were not related to the intent found by the trial judge. One was the need to invest the $3.4 million. The other was the need to repay a debt to avoid going to gaol. The transaction with Mr Chen did not meet either need.

88 The evidence accepted by the trial judge, and his findings, reveal that the proscribed intention was probably the sole one, but at all events it was a predominant and primary one.

89 The second respondent appeared to submit that Mr Chen was the primary wrongdoer. In passing the Court of Appeal referred to the undoubted fact that Mr Chen was the primary wrongdoer, and that the intentions of Lym International Pty Ltd derived from him[94]. But as the Court of Appeal also said, the crucial intention was not his, but Lym International Pty Ltd's, and the greater role of Mr Chen was immaterial.

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92 *Chen v Marcolongo* (2009) 260 ALR 353 at 381 [236].

93 *Chen v Marcolongo* (2009) 260 ALR 353 at 358 [22].

94 *Chen v Marcolongo* (2009) 260 ALR 353 at 382 [241].

90 Finally, Mr Chen submitted that he was a purchaser in good faith without notice of the intent to defraud creditors within the meaning of s 37A(3). This submission must be rejected. In him was the immediate origin of the relevant intent. He was acting in total bad faith. He had complete notice of the relevant intent.

91 For those reasons the appeal must be allowed with costs.