IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 17

Civil Appeal No 73 of 2020

Between

Toh Eng Tiah

… *Appellant*

And

Angelina Jiang

… *Respondent*

Civil Appeal No 74 of 2020

Between

Angelina Jiang

… *Appellant*

And

Toh Eng Tiah

… *Respondent*

In the matter of HC/Suit No 621 of 2017

Between

Toh Eng Tiah

… *Plaintiff*

And

Angelina Jiang

… *Defendant*

JUDGMENT

[Gifts] — [Inter vivos]
[Contract] — [Intention to create legal relations] — [Sham]

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v
Jiang Angelina and another appeal

[2021] SGCA 17

Court of Appeal — Civil Appeals Nos 73 and 74 of 2020
Andrew Phang Boon Leong JCA, Judith Prakash JCA and Debbie Ong J
18 January 2021

5 March 2021 Judgment reserved.

Andrew Phang Boon Leong JCA (delivering the judgment of the court):

1 This is an appeal concerning an intense – albeit brief – love affair gone awry. The parting was not amicable, to say the least, and the present proceedings are the result of both claim and counterclaim by the two former lovers. In the midst of the legal battle, two specific legal topics, as we shall see, take centre stage.

2 The first focuses on whether moneys transferred between the parties were gifts. If they were, then that would be the end of any claim because the essence of a gift is that, once transferred, it cannot (in the absence of some vitiating factor such as fraud or some independent agreement) be retrieved.

3 The other relates to an old legal chestnut – the parol evidence rule. In the Singapore context, the aforementioned rule is statutorily embodied within the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"). In this appeal, its precise role

has to be ascertained in the context of an alleged sham contract (which, although it has been addressed in passing before, appears to have been raised squarely for consideration for the first time in a Singapore court in this case). This – in turn – raises for this court the issue whether extrinsic evidence is admissible in this case and, if so, what the juridical basis is for the admission of such evidence. It might be useful, even at this preliminary juncture, to note that the parol evidence rule itself prohibits the introduction of parol or other extrinsic evidence to add to, vary or contradict a written instrument or contract; put simply, the express *terms* of *the contract* are to be found only in the written contract itself. As has been observed, "[t]he rationale for this rule is probably grounded on the objective theory of contract and (on a practical level) the attendant promotion of certainty as well as ensuring that only the best evidence possible is admitted" (see Andrew B L Phang & Goh Yihan, *Contract Law in Singapore* (Wolters Kluwer Law & Business, 2012) at para 993). The important point to note for the purposes of the present appeal is that the application of the parol evidence rule *presupposes* the ***existence*** *of a contract in the first place*. Hence, it follows that if the contract is indeed a *sham*, there is ***no existing contract*** to speak of (as, *ex hypothesi*, the parties had no intention to create legal relations, which is an essential element in the formation of a valid and binding contract), and the parol evidence rule is *therefore* ***not even engaged***. We will elaborate upon this particular point later in this judgment.

4 So much by way of the briefest of capsule summaries of the present appeal, which is against the decision of the High Court judge ("the Judge") in *Toh Eng Tiah v Jiang Angelina* [2020] SGHC 65 ("the Judgment"). We turn now to set out the facts and background, followed by the Judge's decision.

Facts and background

The parties

5 The appellant in CA/CA 73/2020 ("CA 73") and the respondent in CA/CA 74/2020 ("CA 74") is Mr Toh Eng Tiah ("Mr Toh"), who was the plaintiff below. The respondent in CA 73 and the appellant in CA 74 is Ms Angelina Jiang ("Ms Jiang"), the defendant below.

6 Mr Toh and Ms Jiang met each other sometime in November 2016. At the time, Mr Toh was around 55 years old and was married to one Mdm Chong Lee Yee ("Mdm Chong"). He had three grown children from a previous marriage. He was a businessman and the director and shareholder of a number of companies, including ST Paper Resources Pte Ltd ("Mr Toh's company"). Ms Jiang was around 30 years old and was a licenced property agent and manager of a construction and engineering company. She was the owner of a property at 13 Prome Road at the material time. The parties entered into a romantic relationship sometime around 20 December 2016.

The money transferred

7 It was not disputed that Ms Jiang received money from Mr Toh on a number of occasions between December 2016 and March 2017. Mr Toh passed the money to her in various ways and we refer to these collectively as "transfers", a neutral term. The transfers can be categorised into two classes: (a) general transfers of money between December 2016 and March 2017 ("General Transfers"); and (b) transfers related to the intended purchase of a property at 9 Hillcrest Road ("9 Hillcrest Transfers").

8 The General Transfers are summarised in the following table:

Item	Date	Method of transfer	Amount ($)
1.	On or around 19 December 2016	Cheque	200,000
2.	On or around 22 December 2016	Tele-transfer	20,000
3.	On or around 28 December 2016	Cash	20,000
4.	29 December 2016	Tele-transfer	13,000
5.	3 January 2017	Cheque	10,000
6.	6 January 2017	Cheque	65,000
7.	6 January 2017	Cash	35,000
8.	10 January 2017	Cheque	50,000
9.	12 January 2017	Cheque	150,000
10.	24 January 2017	Cheque	82,000
11.	31 January 2017	Cheque	158,532
12.	6 March 2017	Tele-transfer	16,000
		Total	819,532

9 It suffices here to note that apart from Item 1, which was remitted to Ms Jiang to assist her in purchasing a shophouse at 315 Balestier Road, the General Transfers were intended to be used for various expenses and to pay off debts that Ms Jiang owed.

10 Between January and February 2017, Ms Jiang also transferred various sums totalling $95,000 to Mr Toh. This amount formed part of Ms Jiang's counterclaim.

11 There were four transfers related to the purchase of 9 Hillcrest Road, as follows (we continue the numbering from the table above):

Item	Date	Method of transfer	Amount ($)
13.	26 January 2017	Cheque	30,800
14.	27 February 2017	Cheque	123,200
15.	21 March 2017	Cheque	250,000
16.	24 March 2017	Cheque	872,000
		Total	1,276,000

12 While the parties disputed the purpose for which 9 Hillcrest Road was being purchased, the facts surrounding that transaction are not controversial. On 12 January 2017, Mr Toh wanted to purchase 3H Hillcrest Road for $2,830,000, and issued a cheque for $28,300 as payment for the option fee. The parties then went to see 9 Hillcrest Road the next day and decided to buy it instead. Thus Mr Toh forfeited the option fee for 3H Hillcrest Road. On 26 January 2017, Mr Toh issued a cheque of $30,800 (being 1% of the purchase price of 9 Hillcrest Road) (Item 13 above) and the option to purchase was issued in Ms Jiang's name. On 16 February 2017, Mr Toh passed a cheque for $123,200 to Ms Jiang through her solicitors handling the purchase and Ms Jiang used this to exercise the option. This cheque, however, was countermanded. It was only on 27 February 2017 that a new cheque for $123,200 was issued and then later handed to the vendor (Item 14 above).

13 When there were issues with the financing of the purchase, various proposals were considered and rejected by the parties. Sometime between 23 and 27 February 2017, they ultimately decided that some terms should be documented. On 27 February 2017, Ms Jiang instructed her solicitor, Mr Christopher Yong ("Mr Yong") from Legal Solutions LLC/Kennedys Law, to begin preparing a formal document, and on 28 February 2017, she informed Mr Toh that she had done so. Thereafter a series of drafts was exchanged between Ms Jiang's lawyers and Mr Toh's lawyer, Ms Pamela Chong ("Ms Chong") from Infinitus Law Corporation ("Infinitus Law") (see the Judgment at [85]–[96]). These drafts resulted in what was called the Loan Facilities Agreement ("the LFA"). It suffices to note here that both sides had included terms in the LFA that appeared to protect their respective interests. Before the LFA was signed, Mr Toh passed a cheque of $250,000 to Ms Jiang (Item 15 above).

14 The LFA was signed on 24 March 2017 before a Commissioner for Oaths. The first recital of the LFA stated that Ms Jiang wished to invest in property and in particular in 9 Hillcrest Road. The third recital stated that at Ms Jiang's request, Mr Toh had agreed to provide her with a loan facility. We summarise the key terms of the LFA as follows:

(a) The loan facility granted under the LFA was in the amount of $2m. Out of that sum, it was stated that Mr Toh had already advanced $1,128,000 by March 2017 (this included the $250,000 advanced on 21 March 2017) and that the remainder would be disbursed by cashier's order or cheque for $872,000 (cl 2.2). There was to be no interest chargeable (cl 2.3), and the loan facility was stated to be the purpose of purchasing 9 Hillcrest Road (cl 2.4).

(b) The loan facility was to be fully repaid upon either the sale of 13 Prome Road or on the redemption date (*ie*, 10 years from the date of full disbursement of the loan facility or upon occurrence of an event of default per cl 1), whichever was earlier. However, if Ms Jiang wished to sell 13 Prome Road, Mr Toh was to be given the right of first refusal at a price to be mutually agreed with reference to the market price (cl 3.1). If Mr Toh agreed to purchase 13 Prome Road, Ms Jiang would be entitled to set off the loan against that purchase price (cl 3.2). If it was sold to a third party, the loan was to be deducted and paid from the sale proceeds.

(c) If Mr Toh passed away before the redemption date, the loan was to be deemed to be fully repaid and Ms Jiang's obligations fully extinguished (cl 4).

15 The sum of $1,128,000 mentioned in cl 2.2 had been arrived at by adding Items 1 to 15 together then deducting the $95,000 which Ms Jiang had transferred to Mr Toh. This gave a figure of $1,128,532 which was then rounded down to $1,128,000.

16 On 24 March 2017, after the LFA was signed, Mr Toh handed a cheque for $872,000 to Ms Jiang (Item 16 above). Ultimately, however, the purchase of 9 Hillcrest Road did not go through – by a letter dated 31 March 2017, Ms Jiang's lawyers informed the vendor's lawyers that she was unable to proceed with the purchase as she was unable to obtain a housing loan. As a result, the vendors threatened to sue Ms Jiang and, after some negotiations, Ms Jiang paid an additional $60,000 to settle all claims arising from the aborted transaction.

Subsequent events

17 Sometime around 31 March 2017, Ms Jiang transferred a sum of $150,000 to Mr Toh. Following this, on Ms Jiang's instructions, Mr Yong prepared three drafts of a Deed of Gift ("Draft Deed 1", "Draft Deed 2", and "Draft Deed 3", respectively, and "Draft Deeds", collectively) on 6 April, 27 April, and 5 May 2017, respectively. None of these Draft Deeds was executed by Mr Toh.

18 As noted above, the purchase of 9 Hillcrest Road did not go through. The parties continued to correspond after the LFA was signed, but they began to grow distant. From 12 April 2017, according to Ms Jiang, she had difficulty reaching Mr Toh. On 19 April 2017, she discovered that she was pregnant and informed Mr Toh (unfortunately, she later suffered a miscarriage). There were some replies from Mr Toh in late April 2017, but by 12 May 2017, Ms Jiang was unable to contact Mr Toh.

19 On 13 June 2017, Mr Toh's lawyers wrote a letter of demand to Ms Jiang seeking repayment of $2m. There were letters exchanged concerning the pregnancy, with Mr Toh denying that he was the father. On 11 July 2017, Mr Toh started proceedings in the High Court against Ms Jiang seeking to recover the sum of $2m as money loaned to Ms Jiang, and to invalidate the LFA.

The parties' cases at trial

Mr Toh's case

20 The central plank of Mr Toh's claim was that the moneys that he had advanced to Ms Jiang were loans and not gifts. He alleged that Ms Jiang had repeatedly requested loans from him from December 2016 to March 2017, and

the moneys advanced as Items 1 to 12 above were advanced pursuant to those requests and on the basis that the sums were repayable on demand. The $95,000 which Ms Jiang transferred to him between January and February 2017 was part repayment of these loans. As for the 9 Hillcrest Transfers, those were at Ms Jiang's requests and were intended to be loans. Mr Toh emphasised that the sums were all treated as loans under the LFA.

21 At the same time, Mr Toh also sought to set aside the LFA. This was a necessary part of his claim for immediate repayment – as observed above, it was a term of the LFA that repayment of the alleged loan was only to be made upon the sale of 13 Prome Road or the expiry of ten years, whichever was earlier. Neither event having come to pass, Mr Toh would not be able to seek immediate repayment unless the LFA was set aside. He claimed that he had signed the LFA on the basis of Ms Jiang's misrepresentation that all the amendments from a draft sent on 23 March 2017 by his lawyer had been incorporated and that there was provision for a caveat on 13 Prome Road and a right of first refusal for any sale of that property. Further, as he did not have his lawyer with him at the time of signing, the terms of the LFA were not explained to him. Therefore, he argued that the LFA should be set aside on the bases of undue influence, unilateral mistake, *non est factum*, and/or misrepresentation.

22 In the alternative, he argued that Ms Jiang had breached the LFA and was liable for breach of contract on the basis that cl 2.4 provided that the purpose of the loans was solely for the purchase of 9 Hillcrest Road and that this was a condition. As she failed to complete the purchase of that property and expressed her intention not to purchase that property, Mr Toh argued that this was a repudiatory breach of the LFA. Further or in the alternative, a *Quistclose* trust arose over the $2m as the moneys were advanced for the sole purpose of purchasing 9 Hillcrest Road and because that purpose could not be carried out,

a trust arose over that money in favour of Mr Toh (see the decision of the House of Lords in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] 1 AC 567 at 580), and in failing to repay that sum, Ms Jiang was in breach of trust.

23 In addition, Mr Toh sought a declaration that he had a caveatable interest in 13 Prome Road on the basis that cl 3.1 of the LFA gave him a right of first refusal in respect of any intended sale of 13 Prome Road and cl 3.3 gave him a right over the sale proceeds of 13 Prome Road.

Ms Jiang's defence and counterclaim

24 Ms Jiang asserted in response that all of the moneys transferred to her had been gifts. She alleged that the parties treated each other as husband and wife. On 12 January 2017, Mr Toh purchased an ancestral tablet from the Buddha Tooth Relic Temple ("the Temple") and made a number of vows, including vows to pay off Ms Jiang's personal debts, give her a sum for living expenses, purchase a property for her and set up home with her. Mr Toh told her that he wanted to obtain a divorce from Mdm Chong. As for the General Transfers, Mr Toh had voluntarily offered to settle her loans for her, and the sums advanced for these purposes were gifts. As for the 9 Hillcrest Transfers, they had intended to set up a home together and the payments were made for that purpose.

25 As for the LFA, her primary case was that it was unenforceable as a sham. Her account of the circumstances leading to the LFA was as follows. Sometime around 27 January 2017, Mdm Chong discovered their relationship and called Ms Jiang. When Ms Jiang messaged Mr Toh saying that they should not purchase 9 Hillcrest Road and that she would return the moneys given to her, Mr Toh asked her to give him time. In February 2017, Mr Toh told

Ms Jiang that it was necessary for them to enter into a written agreement in respect of the $2m that he was intending to give her for the purchase of 9 Hillcrest Road. This was just to "assuage" his family, friends and employees, as a "ploy" to improve his standing among them, and to obtain a loan of $2m from his company. He assured her that he would not enforce the agreement or commence legal proceedings. Ms Jiang also pleaded that the vitiating factors relied upon by Mr Toh were not present. Mr Toh and Ms Jiang had reached an agreement over the telephone on 23 March 2017 as to the terms of the LFA, and that the amendments referred to by Mr Toh (*ie*, those in his lawyer's letter of 23 March 2017) were not to be incorporated. In response to Mr Toh's attempts to set aside the LFA, Ms Jiang pleaded that Mr Toh understood the terms of the LFA.

26 In the alternative, she pleaded that (a) Mr Toh had by his conduct extinguished the loan facilities and her liability had been discharged; (b) Mr Toh was estopped from enforcing the LFA; and/or (c) there was insufficient consideration for the LFA as the sum of $1,128,000 was past consideration. In any event, even if it were a condition of the LFA that 9 Hillcrest Road be purchased, there was no breach of the LFA as she did not complete the purchase of 9 Hillcrest Road at Mr Toh's direction. Further, the LFA was varied and/or discharged by subsequent agreement.

27 Ms Jiang also pleaded the following as her counterclaim. In January and February 2017, Ms Jiang had lent a total of $95,000 to Mr Toh. Further, she transferred $150,000 to Mr Toh around 31 March 2017 as a short-term loan, as Mr Toh stated that he needed the money to placate Mdm Chong. Thereafter, Mr Toh made various representations that he would return that sum. Around 5 April 2017, Mr Toh told her that Mdm Chong was not consenting to a divorce, and that he would not be able to get $2m from his company. This meant he

would not be able to provide further funding for 9 Hillcrest Road. He stated, however, that the moneys that had already been transferred would be a gift to her. In response, Ms Jiang instructed her solicitors to prepare a document recording the loan of $150,000 that she had made to Mr Toh and his gifts of money to her. These were the Draft Deeds which treated the $2m or part thereof as gifts. The $150,000 was, however, never repaid. Ms Jiang also claimed further sums, but as the Judge disallowed those claims and Ms Jiang has not appealed against that part of the Judge's decision, we do not deal with those any further.

The decision below

28 The Judge began by identifying the two conditions needed for there to be a valid gift *inter vivos*: (a) the intention to gift; and (b) delivery of the precise subject-matter of the gift (see the Judgment at [32]). He clarified that the relevant intention was the donor's, and the mere fact that a recipient treats the transfer as a loan does not prevent it from being effective as a gift (see the Judgment at [33]). Further, a donor cannot subsequently convert a gift into a loan (see the Judgment at [34]). The Judge summarised the factors that a court would consider in order to determine whether any transfer of money was a gift or a loan (see the Judgment at [35]). The Judge also identified the circumstances under which a loan can be converted to a gift, namely (a) waiver of a contractual right; or (b) estoppel (see the Judgment at [36]).

29 The Judge then considered the nature of the relationship. The Judge undertook a careful and thorough examination of the facts. He rejected Mr Toh's account of the relationship on the strength of the WeChat messages between Mr Toh and Ms Jiang (see the Judgment at [42]), in particular where Mr Toh addressed Ms Jiang as his "wife" and expressed a desire to divorce

Mdm Chong to be with her (see the Judgment at [43]). He found that, contrary to Mr Toh's assertions, Mr Toh had made several vows at the Temple, including to provide for Ms Jiang and to purchase a matrimonial home for them both. Further, by 25 January 2017, Mr Toh had informed Ms Jiang that he intended to divorce his wife (see the Judgment at [45]).

30 The Judge's conclusions on the General Transfers can be summarised as follows:

(a) Item 1, the transfer of $200,000, was a loan. The parties had entered into an express loan agreement, and the parties had just met the month before (see the Judgment at [48]). Ms Jiang alleged that after their first sexual encounter, Mr Toh tore up the agreement and said that the $200,000 was a gift. The Judge did not accept this evidence (see the Judgment at [49]). Further, although Mr Toh did not promptly seek repayment when the sums were due under the agreement, he did send a letter of demand within six months of when the repayment was due (see the Judgment at [51]).

(b) Items 2 to 12 were gifts. Mr Toh had clearly stated that he wanted to provide for Ms Jiang (see the Judgment at [53]–[54]). He had also made the vows at the Temple in January 2017 (see the Judgment at [56]). There were no messages that suggested that the sums were loans, nor did he ever indicate that he was expecting repayment. He also used words such as "gave" in reference to these sums in his messages to Ms Jiang. Further, he did not make claims for various other transfers that were made at around this time, which was incongruous with his case on these transfers (see the Judgment at [57]).

(c) The various statements that Ms Jiang made that she would return the moneys did not necessarily mean that there was a legal obligation to repay (see the Judgment at [61]). While there were disputes over the authenticity of certain WeChat messages in which Ms Jiang appeared to consider the sums as loans or that repayment was necessary, the Judge did not make a finding on authenticity but concluded that, even if the messages were accepted, that would not have affected any of the analysis above as it was Mr Toh's and not Ms Jiang's intention that was central to the case (see the Judgment at [63]).

(d) The Judge also found, as a matter of law, that the LFA could not convert the gifts into loans (see the Judgment at [64]).

31 In relation to the $154,000 (Items 13 and 14) for the option fee and exercise of the option for 9 Hillcrest Road, the Judge rejected Mr Toh's evidence that 9 Hillcrest Road was Ms Jiang's investment property and that she had asked for a loan from him (see the Judgment at [78]). In the context of the gifts above, there was nothing to suggest that Items 13 and 14 were not gifts. Both parties, in truth, were looking to buy a property together at the time (see the Judgment at [78]). When Ms Jiang made proposals to complete the purchase of 9 Hillcrest Road, Mr Toh refused the proposals that would have been less favourable to Ms Jiang (see the Judgment at [79]). Further, Mr Toh did not make a claim for the $28,300 option fee that parties forfeited in relation to 3H Hillcrest Road. It was incongruous for Mr Toh to claim Items 13 and 14, but not this sum. The Judge did not believe Mr Toh's explanation that the sum was accidentally omitted as his own AEIC referred to this sum (see the Judgment at [80]).

32 The Judge then turned to the LFA and the remaining transfers (see the Judgment at [103]–[113]). He found that the LFA appeared complete on its face. In interpreting the LFA, reference to the context was permissible to resolve ambiguities and also to establish if there was an ambiguity to begin with. However, there was no suggestion of ambiguity in the LFA. The parties were legally represented, and the LFA went through a number of rounds of proposals and counter-proposals, which would not have been necessary if the agreement was only a ploy. Therefore, the parties' intention was to be found in the language of the LFA, and the parol evidence rule in ss 93 and 94 of the EA applied. Ms Jiang's evidence that the LFA was just a ploy was difficult to believe as it was not clear how the agreement would be capable of achieving the objectives it was intended to, and in any event (and more importantly), such evidence could not contradict the terms of the LFA. Any collateral agreement that Mr Toh would not enforce the LFA did not assist Ms Jiang as the evidence would be inconsistent with the terms of the LFA and therefore be inadmissible under s 94(*b*) of the EA. Such evidence could not fall within s 94(*d*) as the collateral agreement would have arisen before and not after the LFA.

33 The various declarations by Mr Toh purportedly stating that the sums transferred were gifts were not effective to convert them to gifts as there was no consideration provided for those promises, nor were they made under seal (see the Judgment at [121]). The fact that the Draft Deeds were prepared was taken as evidence that Ms Jiang recognised that the LFA was enforceable in the absence of such a deed (see the Judgment at [122]). There was no consideration in this case: (a) contrary to Ms Jiang's submission, the reward was not for pregnancy but for the birth of a daughter, but this never eventuated because she had a miscarriage; and (b) the act of entering into the LFA and foregoing a sum of $1,128,000 was not consideration for subsequent discharge of the loan given

the effort put into negotiating the LFA. In any event, that evidence was inadmissible as it contradicted the LFA (see the Judgment at [129]).

34 It followed that (a) Item 16, the $872,000 transferred on 24 March 2017; and (b) Item 15, the $250,000 transferred on 21 March 2017, were both lent to Ms Jiang (see the Judgment at [130] and [133], respectively).

35 The Judge also found that there was no caveatable interest in 13 Prome Road as the Loan Agreement did not create a proprietary interest in that property (see the Judgment at [137]).

36 Having found that Items 15 and 16 were loans under the LFA, the Judge then considered whether the LFA should be set aside. The Judge rejected the vitiating factors raised by Mr Toh. He found that there was no evidence that Mr Toh could not appreciate the document that he had signed. Instead, he was a "seasoned business man" and had access to counsel and could have sought clarification on the terms of the LFA (see the Judgment at [138]). Indeed, he had taken steps to protect his interests during the negotiations, and had read the LFA before signing and asked questions of the Commissioner for Oaths (see the Judgment at [139]–[140]). Further, no *Quistclose* trust arose as there was no restriction on Ms Jiang's use of the moneys advanced to her under the LFA (see the Judgment at [145]).

37 As for the counterclaim, the Judge rejected the counterclaim for the various compensation sums as the legal bases for those parts of Ms Jiang's counterclaim were not clear (see the Judgment at [150]–[151]). However, the Judge found that the $150,000 had been transferred as a loan, as there was contemporaneous evidence of this and Mr Toh also admitted during cross-examination that it was a loan (see the Judgment at [153]). The Judge also found

that the $95,000 was a loan. There was evidence that Mr Toh had sought loans from Ms Jiang at around this time. Further, in so far as Items 2 to 12 were gifts and not loans, the transfer of $95,000 could not be treated as repayment of any loans, and Mr Toh had not shown that it was intended to be repayment of Item 1 (see the Judgment at [154]).

38 Hence, Mr Toh was entitled to immediate repayment of $200,000. The sums due under the LFA ($250,000 and $872,000) could only be repaid in accordance with the LFA and were not yet due. Ms Jiang was entitled to repayment in the sum of $245,000. Setting off these two sums, Ms Jiang was entitled to payment of $45,000 from Mr Toh. The Judge declined to award interest on the sum (see the Judgment at [156]). After hearing parties on costs, the Judge awarded Ms Jiang the costs of the suit fixed at $174,000 and reasonable disbursements.

The parties' cases on appeal

39 Mr Toh and Ms Jiang appeal against the respective parts of the Judge's decision that were not in their favour. CA 73 is Mr Toh's appeal against the Judge's decision concerning Items 2 to 14, the vitiating factors and the counterclaim (to the extent that it was allowed). CA 74 is Ms Jiang's appeal against the Judge's decision concerning Items 1, 15 and 16.

CA 73

40 In CA 73, Mr Toh argued that the Judge had erred in treating Items 2 to 14 as gifts as he had placed undue weight on the parties' romantic relationship, and that there was no evidence to show that the transfers were *intended* as gifts. There were also admissions on Ms Jiang's part subsequently that the Items would be treated as loans, including her conduct in obtaining the Draft

Deeds which recognised the $2m as a loan. Further, the LFA itself clearly stated that the sum of $2m, which included Items 2 to 14, was a loan and the Judge's findings on Items 13 and 14 (two transfers made for the purpose of purchasing 9 Hillcrest Road) were inconsistent with his findings with regard to Items 15 and 16. It was also inconsistent for the Judge to accept the terms of the LFA but to characterise only part of the $2m as a loan. We observe here that it seems to us that this was the central plank of Mr Toh's contention – indeed, it was the argument that was emphasised by Mr Toh's counsel at the hearing before us.

41 In relation to the alleged vitiating factors, Mr Toh argued that the circumstances in which the LFA was signed were suspicious. The Judge had erred in rejecting his claims to set aside the LFA on the basis of undue influence, unilateral mistake and misrepresentation.

42 We note here that although a *Quistclose* trust was pleaded and the Judge rejected the existence of a *Quistclose* trust, no substantive arguments were made against that finding on appeal. We therefore proceed on the basis that Mr Toh is no longer advancing that argument.

43 In relation to Ms Jiang's counterclaim, Mr Toh argued that the Judge failed: (a) to consider that the sum of $95,000 was already deducted from the amounts transferred by Mr Toh to Ms Jiang for the purposes of the LFA, and that Ms Jiang never demanded repayment of this sum; and (b) to appreciate the evidence that showed that the $150,000 was to be set off against Ms Jiang's debts. Mr Toh also appealed against the Judge's rejection of his claim to a caveatable interest in 13 Prome Road and against the Judge's costs order.

44 Ms Jiang's case on appeal was essentially that the Judge was correct to conclude that Items 2 to 14 were gifts. She also argued that the LFA was a sham.

Her arguments on the LFA reflect her arguments in CA 74, which we set out below. In relation to Mr Toh's appeal against the Judge's decision on the counterclaim, Ms Jiang argued that (a) in so far as the transfers at Items 2 to 12 were gifts there could be no repayment; (b) there was evidence that the $95,000 was loaned by Ms Jiang; and (c) Mr Toh admitted that the $150,000 was a loan and it was also described by him as such repeatedly.

45 In relation to the vitiating factors, Ms Jiang submitted that none of them was made out. She highlighted, in particular, that Mr Toh admitted during cross-examination that he was not cheated, that Mr Toh deliberately chose not to have his lawyer present at the time of signing, and that the LFA was explained to him twice before he signed it. In relation to the allegations of breach, Ms Jiang contended that, even if the LFA was not a sham, Mr Toh had not shown that it was a condition of the contract that 9 Hillcrest Road be purchased. In any event, Mr Toh had waived repayment under the LFA. Alternatively, the failure to purchase 9 Hillcrest Road was entirely due to Mr Toh's conduct. Ms Jiang also sought to uphold the Judge's finding regarding the caveatable interest and the Judge's costs order.

CA 74

46 Ms Jiang's case in relation to Items 1, 15 and 16 was that the LFA was invalid and unenforceable as it was a sham – the Judge had erred in his application of the parol evidence rule and the facts as a whole justified the finding that the LFA was a sham. In the alternative, even if the LFA were valid and enforceable, Mr Toh had waived Ms Jiang's obligation to make repayment. She argued that there was waiver by estoppel as she had relied on the representations that the $2m was treated as a gift by not seeking to formally invalidate the LFA through the Draft Deeds. In any event, Ms Jiang urged this

court to adopt the doctrine of pure waiver, which has not yet been adopted in Singapore.

47 Mr Toh argued that the Judge did not in fact err in the application of the parol evidence rule, but had considered whether the LFA was valid and enforceable with reference to the surrounding context and facts before deciding to apply the parol evidence rule. In any event, the evidence did not go to show that the LFA was a sham. On the issue of waiver, Mr Toh argued that the messages relied upon by Ms Jiang were not unequivocal representations that the obligation to repay would be waived. In relation to pure waiver, Mr Toh argued that the doctrine should not be accepted.

Issues for determination

48 Both CA 73 and CA 74 are, in effect, concerned with the same issues. We therefore deal with them in the round and address the parties' arguments on each of the transfers of money in turn. While the LFA is potentially relevant to all of the transfers – Mr Toh's claim is that even the earlier transfers should be treated as loans because of their later inclusion in the LFA – it appears to us to be more logical to approach the transfers in the order in which they were made. This focuses the inquiry on the facts surrounding each of the transfers at the time each was effected, which is the central issue in determining if a transfer is intended by the transferor to be a gift or not (see the decision of this court in *Tan Yok Koon v Tan Choo Suan and another and other appeals* [2017] 1 SLR 654 ("*Tan Yok Koon*") at [83]). In so far as the LFA may have a relevance to the earlier transfers, that should only be analysed after the status of those transfers, based on the contemporaneous facts, has been established.

49 With that in mind, we will address the issues arising in this case in the following manner:

(a) First, did the Judge err in concluding that Item 1 was a loan, and that Items 2 to 14 were gifts, based on the contemporaneous evidence?

(b) Second, did the Judge err in his conclusions on the LFA?

(i) Was the parol evidence rule properly applied?

(ii) Was the LFA a sham?

(iii) If so, what would be the effect of that finding on Mr Toh's claims?

(c) Third, did the Judge err in allowing (to the extent that he did) Ms Jiang's counterclaim?

50 While this dispute has been argued on the basis of a dichotomy between loans and gifts, we observe here that these two options are not necessarily the only ones applicable to the transfers as a matter of law. There is also the possibility that although there were no *loans* that Ms Jiang was supposed to repay, Mr Toh also did not intend to *give* her an interest in the moneys. If this were the case the transfers would give rise to a resulting trust in his favour over the moneys and over the properties purchased with those moneys. Another claim that is distinct from there being a loan or a gift was Mr Toh's initial claim that there was a *Quistclose* trust over the moneys. However, Mr Toh did not plead a case of resulting trust and he has not raised any argument against the Judge's finding that there was no *Quistclose* trust. Further, his pleaded case on the *Quistclose* trust was predicated on the LFA being found to be an enforceable and valid agreement. It is therefore sufficient in the present case to proceed on

the basis that the only two options that we have to deal with are whether the transfers were loans or gifts.

The characterisation of the transfers prior to the LFA

51 Turning to the first issue, we agree with the Judge that Item 1 was a loan and that Items 2 to 14 were gifts. The Judge had conducted a meticulous analysis of the facts and properly appreciated the applicable legal principles.

Applicable law

52 A valid gift *inter vivos* is made where there is an intention to gift and delivery of the precise subject matter of the gift (see the decision of this court in *Lee Hiok Tng (in her personal capacity) v Lee Hiok Tng and another (executors and trustees of the estate of Lee Wee Nam, deceased) and others* [2001] 1 SLR(R) 771 at [35]). The court assesses the subjective intention of the donor at the time of the transfer (see *Tan Yok Koon* at [83]).

53 The Judge also held that once a donor has made a gift, he or she cannot resile from his or her position and convert the gift into a loan. He reasoned that once there is a gift, the donor parts fully with the property and, having no title to the property, he cannot then convert it into a loan (see the Judgment at [34]). A gift cannot be revoked unless some ground for setting aside the transfer can be found (see the High Court decision of *Goh Eileen née Chia and another v Goh Mei Ling Yvonne and another* [2014] SGHC 3 at [50]).

54 In this appeal, Mr Toh cited the English High Court decision of *Dewar v Dewar* [1975] 1 WLR 1532 where Goff J (as he then was) held at 1538:

> [W]here a person intends to make a gift and the donee receives the thing given, knows that he has got it and takes it, the fact that he says: 'Well, I will only accept it as a loan, and you can

> have it back when you want it' does not prevent it from being an effective gift. Of course, it does not turn it into a loan unless the donor says: 'Very well, let it be a loan.' He could not force the donor to take it back, but the donor, having transferred it to him effectively and completely, intending to make a gift, and he – so far from repudiating it – having kept it, it seems to me that it is an effective gift …

Mr Toh argued that this *dictum* suggests that where a *recipient* treats the gift as a loan, it is possible to convert a gift into a loan. However, with respect, Goff J's *dictum* is not inconsistent with any of the principles above. In the circumstances described by Goff J, the parties would have agreed to a loan. There is nothing in that case to suggest that one party's later view that the transfer was a loan could convert the gift into a loan, or even that a later agreement to that effect would necessarily be effective.

55 However, with respect to the Judge, we leave open the question of whether *no* subsequent agreement can oblige a donee to repay a sum of money initially given as a gift. As a matter of principle, there is no reason why parties should not be free to enter into a contract which would provide that previous gifts would have to be repaid, as long as the requirement of consideration is satisfied in respect of that contract, for example, in exchange for receiving further payments. The question of *title* (which prevents a donor from revoking a gift) is distinct from the question of a *personal obligation* undertaken by the donee to return the moneys. However, given our views on the LFA in the present case (see [124]–[126] below), it is not necessary to resolve this particular question for our determination of this appeal and we do not deal with it any further.

Item 1: $200,000

56 The Judge had found that Item 1 was a loan. In CA 74, Ms Jiang appealed against that finding, but her argument on appeal was directed at showing that the LFA was a sham. She has not taken issue with the Judge's finding that the $200,000 was a loan because of the circumstances surrounding that transfer in December 2016 (see the Judgment at [48]). Her argument on appeal was primarily that the loan of $200,000 was waived by Mr Toh. It is convenient for us to address this argument here.

57 The $200,000 loan was covered by a written agreement entered into in on 19 December 2016 ("$200,000 Loan Agreement"). This document came about after Mr Toh repeatedly offered a loan to Ms Jiang, who eventually accepted it. No dispute turns on the terms of the $200,000 Loan Agreement.

58 Ms Jiang's argument on appeal was based on Mr Toh's conduct and representations in April 2017:

(a) On 2 April 2017, Mr Toh messaged Ms Jiang saying: "Give birth to a daughter will have a reward of 2 million".

(b) On 25 April 2017, Mr Toh messaged Ms Jiang the following:

(i) At 5.03pm: "I am fine, don't worry. Please tell Lawyer Yong to cancel the agreement for the $2 million. I will sign when I return".

(ii) At 5.17pm: "I don't want to pressure you. Don't need to pay the money back to me. I don't want it. It's for you".

(c) On 27 April 2017 at 6.03pm, Mr Toh again messaged Ms Jiang, saying, "I have given you $2 million as a gift, don't talk about it any more [*sic*]".

(d) On 28 April 2017, Mr Toh messaged Ms Jiang, "Good to have it! Have the money, house, shop and child. You are the most blissful person in the world. To be contented is happiness".

To succeed with her argument on waiver, Ms Jiang had to relate those comments pertaining to the $2m under the LFA to the $200,000 which is a subset of that $2m. We do not think that she has done so on the facts of this case.

59 The message on 2 April 2017 does not assist Ms Jiang as she did not in fact deliver a daughter, and it is not clear whether the $2m referred to was the same as the $2m "loan" under the LFA. As for the remaining messages, the difficulty for Ms Jiang is that the representations made there cannot be treated as being representations by Mr Toh that he would not to insist upon the legal right to make a claim for repayment of the loan of $200,000. In so far as they dealt with repayment, the messages constituted a broader representation relating to the loan facility under the LFA as a whole. Given our view of the LFA (see [124]–[126] below), it cannot be said that the $200,000 Loan Agreement was somehow novated or that the obligation to repay the $200,000 arises from the LFA. As such, these representations concerning the $2m purportedly due under the LFA cannot be taken to be representations concerning the original $200,000 loan. In these circumstances, as a matter of fact, Ms Jiang's argument that the obligation to repay the $200,000 was waived cannot be sustained. Therefore, we hold that the obligation to repay $200,000 was not waived and

that the Judge correctly found that Ms Jiang was obliged to repay the sum of $200,000.

Items 2 to 12

60 To recap, Items 2 to 12 were the transfers made by Mr Toh to Ms Jiang during their romantic relationship, between December 2016 and March 2017. We have noted that Mr Toh's primary argument on appeal was that the Judge had failed to give adequate weight to the fact that by the LFA the parties had documented their agreement that the sums advanced would be treated as loans. That issue is dealt with below after we consider the legal status of the LFA. At present, the issue is whether having considered each transfer in the light of the factual matrix in which it was made the Judge had erred in characterising these transfers as gifts.

61 We are unable to agree that the Judge had erred in his analysis of these transfers. The Judge rightly considered the transfers against the background of the parties' romantic relationship (see the Judgment at [54]–[56]). Indeed, Mr Toh has not challenged those findings on appeal, even in relation to the promises that the Judge found that Mr Toh had made at the Temple, which included a promise to take care of Ms Jiang's troubles. Once those factual findings are accepted, we agree with the Judge that the only question that can be raised would be whether there was any evidence to show that the transfers were *otherwise* treated as loans (see the Judgment at [57]–[59]). The general tenor of the communications between the parties revealed that the transfers were gifts – there were no messages contemporaneous with each transfer that suggested any obligation to repay those sums.

62 While Mr Toh pointed to certain messages sent by Ms Jiang to Mr Toh on 27 January 2017 that suggested that Ms Jiang would "return" the moneys that she "owe[d]" to Mr Toh, we see no reason to disagree with the Judge's finding that the messages were sent in the context of Ms Jiang's doubts about being in a relationship with a married man (see the Judgment at [62]). Indeed, these messages have to be viewed in the context of a call that Mdm Chong had made to Ms Jiang on 27 January 2017 during which Mdm Chong had confronted her about her relationship with Mr Toh. When cross-examined on this point, Ms Jiang explained that she had wanted to return the money to Mr Toh because she believed that their relationship would be coming to an end. None of this was premised on the basis of an obligation to repay (see also the Judgment at [61]). Although she used the word "owe" in message number 2139, she was using that word in the sense of owing him a favour since, if they could not be together, she felt that she should return the money to him.

63 Mr Toh also argued that the Judge had erred in not giving due weight to the existence of two sets of handwritten notes sent by Mr Toh to Ms Jiang on 23 February 2017 ("the February Notes") and 20 March 2017 ("the March Note") which set out the various sums transferred by Mr Toh to Ms Jiang. Mr Toh claimed that the fact that the parties kept such diligent records of the sums transferred suggested that the parties kept their financial arrangements formal and that Mr Toh did not intend that the moneys transferred would be gifts. We are unable to give much weight to these notes. First, there are no *contemporaneous* records of the transfers made at the time of each transfer, which undermines the claim that the parties were "calculative" in dealing with these transfers. Instead, these notes appear to have been written specifically in response to certain events. The March Note, in particular, was written after the parties "went through [their] accounts together". Second, in the first of the

February Notes, next to the words "20W" (which refers to Item 1, the loan of $200,000) and "shops", two Chinese characters were written which mean "loaned". In our view, Ms Jiang's argument that the placement of these words suggests that *only* the $200,000 was a loan is persuasive. This undermines Mr Toh's reliance on the February Notes in so far as his case is concerned. Third, the March Note, in particular, was prepared for the purposes of the LFA, and the weight to be given to the March Note therefore turns on our findings with regard to the legal status of the LFA.

64 In arguing that these sums should be treated as loans, Mr Toh cited the High Court decision of *Chee Jok Heng Stephanie v Tan Kian Meng William* [2010] SGHC 208. In that case, the plaintiff was seeking, *inter alia*, recovery of $259,000 which she claimed to have lent to the defendant over a six-year period. The defendant claimed that they were "love gifts". Tay Yong Kwang J (as he then was) rejected the defendant's account on the bases that (a) the payments were always done pursuant to requests from the defendant (at [11]); and (b) the defendant couched each request as a request for a loan (at [14]). While Tay J was hesitant to find that the parties were, in fact, in a romantic relationship (at [22]), it would appear that the two factors above would have led him to conclude that the sums were loans in any event. In our view, this case can be easily distinguished. First, in the present case, while many of the payments were made at Ms Jiang's request, they were done in the broader context of Mr Toh's assurances that he would assist Ms Jiang and share in her burdens. Second, there is no evidence that any of the individual requests was couched as a request for a loan. The Judge's findings were in accordance with the specific evidence in *this* case.

65 For these reasons, we find that the Judge's conclusions on Items 2 to 12 were not against the weight of evidence, and accordingly decline to depart from his conclusions that these transfers were gifts.

Items 13 and 14

66 These transfers were for the option fee for 9 Hillcrest Road and the balance of 4% of the purchase price upon the exercise of the option. We do not see any reason to depart from the Judge's findings. As we will discuss in detail below, we agree with the Judge that the purpose of the purchase of 9 Hillcrest Road was to provide a home for Mr Toh and Ms Jiang, and that it was not a commercial transaction (see the Judgment at [78]). Further, the Judge rightly observed that Mr Toh's claim for Items 13 and 14 was inconsistent with his decision not to seek repayment of the sum of $28,300 that had been advanced for the option fee for 3H Hillcrest Road (see the Judgment at [80]). Finally, these transfers occurred *before* the LFA was drafted or even contemplated. In the absence of the LFA, there was no other evidence that these transfers were loans instead of gifts. Mr Toh's appeal against the Judge's findings on these two Items was based almost entirely on the existence of the LFA. We turn now to deal with that contention.

The LFA

Did the Judge err in his application of the parol evidence rule?

67 The first issue that arises in relation to the LFA is the Judge's application of the parol evidence rule. Ms Jiang contended on appeal that the Judge had erred in his application of the rule and had excluded evidence which he ought to have considered, and that his finding that the LFA was not a sham was affected by that decision. Mr Toh argued, instead, that the Judge had in fact

applied his mind to why the LFA should be treated as containing the parties' agreement and had correctly applied the parol evidence rule once that finding was made.

68 While it is true that the Judge did make certain findings about why the LFA should be treated as containing the parties' agreement (see the Judgment at [108]–[109]), it is also clear to us that his approach to the LFA was governed by his understanding of the parol evidence rule. At various junctures, the Judge applied the parol evidence rule to the evidence which Ms Jiang argued would have pointed to the existence of a sham. In other words, although the Judge made some comments about Ms Jiang's arguments concerning the sham, he had placed greater weight on the exclusion of evidence on the basis of his understanding of the parol evidence rule in the context of the present case. For example, although the Judge considered that Ms Jiang's evidence on the sham was "difficult to believe", he then went on to hold that "*more importantly*, such evidence cannot be allowed to contradict the terms of the [LFA]" (see the Judgment at [111] [emphasis added]). The parol evidence rule took centre stage in the Judge's reasoning, and the question on appeal is, as a preliminary matter, whether this was correct. With respect to the Judge, we disagree with his view of the applicability of the parol evidence rule in this context.

69 We begin by setting out ss 93 and 94 of the EA, which contain the parol evidence rule:

> **Evidence of terms of contracts, grants and other dispositions of property reduced to form of document**
>
> **93.** When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such

matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

…

Exclusion of evidence of oral agreement

94. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 93, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms subject to the following provisions:

(*a*) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;

(*b*) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved; in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

(*c*) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;

(*d*) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;

(*e*) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved; except that the annexing of such incident would not be repugnant to or inconsistent with the express terms of the contract;

> (*f*) any fact may be proved which shows in what manner the language of a document is related to existing facts.
>
> …

70 It is important to appreciate the scope and import of ss 93 and 94 of the EA. Section 93 of the EA operates as a rule concerning the proof of the terms of a contract – if the contract has been reduced to a document or is required by law to be reduced to a document, the document itself must be adduced as proof of the terms of the contract, and secondary evidence is admissible to prove the contents of the document only in exceptional circumstances governed by the rules concerning secondary evidence under the EA. In this manner, s 93 is "said to deal with the exclusiveness of the documentary evidence" (see Goh Yihan, *The Interpretation of Contracts in Singapore* (Sweet & Maxwell, 2018) ("*Interpretation of Contracts*") at para 8.006). Section 94 of the EA operates in conjunction with s 93 and applies *only* where the terms of the contract have been proved according to s 93 (see *Interpretation of Contracts* at para 8.007). In such circumstances, s 94 provides that "no evidence of any oral agreement or statement shall be admitted … for the purpose of *contradicting, varying, adding to, or subtracting from its terms*" [emphasis added], unless one or more of the provisos which follow applies. Except for s 94(*f*) of the EA, which has been said to have broader relevance to issues relating to the evidence admissible for the purposes of *interpretation* (see *Interpretation of Contracts* at para 8.012 and this court's decision in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [48]), it is clear that the provisions discussed so far under ss 93 and 94 of the EA are concerned only with the *proof* of the *terms of the contract*.

71 As the application of s 94 of the EA is contingent on the application of s 93, the question of whether the parol evidence rule stated in these provisions

applies turns entirely on whether s 93 of the EA applies. Section 93, in turn, is stated expressly only to apply "[w]hen the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document". In other words, s 93 would not apply where the parties have not reduced the contract to the form of a document and where there is no requirement in law to do so. Implicit in this requirement, as a matter of logic, is that *there is a* ***contract*** *in the first place* which has been reduced to a document. Indeed, while counsel for Ms Jiang initially relied on s 94(*a*) of the EA, he accepted that the logically prior question was whether there was a contract such that ss 93 and 94 applied in the first place.

72 Before turning to ascertain how this relates to allegations of a sham, we note for completeness that s 94(*a*) of the EA could be taken, at first glance, to undermine this distinction between the proof of the contract terms and the existence of the contract in the first place. Section 94(*a*) of the EA expressly states that where s 93 applies, no evidence can be admitted to contradict, vary, add to or subtract from the proved terms of the contract except evidence of "any fact … which would invalidate any document or which would entitle any person to any decree or order relating thereto", and expressly includes "want of capacity" and "want or failure of consideration" in the list of examples of such fact. It may be argued that the absence of capacity and consideration go to the existence of the legal contract in the first place. Even if that is so, however, we do not think that the presence of these examples in s 94(*a*) of the EA contradicts the above analysis. The mere fact that these facts which may go towards the existence of the agreement are listed under s 94(*a*) does not logically entail that they and other facts relevant to the existence of the agreement may not be relevant at an earlier stage of the inquiry.

73 The question then is what the *legal basis* is for an allegation of sham and how that relates to s 93 of the EA. The classic definition of a sham was provided by Diplock LJ (as he then was) in the English Court of Appeal decision of *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 ("*Snook*") at 802C–E:

> … I apprehend that, if [the term 'sham'] has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think is clear in legal principle, morality and the authorities … , that for acts or documents to be a 'sham,' with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived. …

74 Put another way, the essential element of a sham is that the parties did not intend to create the legal relations that the acts done or documents executed give the impression of creating. Similarly, in the English Court of Appeal decision of *Hadjiloucas v Crean* [1988] 1 WLR 1006 at 1019, Mustill LJ (as he then was) explained that the term "sham" "denotes an agreement or series of agreements which are deliberately framed with the object of deceiving third parties as to *the true nature and effect of the legal relations* between the parties" [emphasis added]. Although he appeared to distinguish this from the situation where the "arrangement between the parties was never intended to create any legally enforceable obligation", in our view, the implication of Mustill LJ's definition of a "sham" is that the agreement which is used to *deceive* third parties was not intended by the parties to create legally enforceable obligations either. In that same case, Purchas LJ stated (at 1013):

> Sham cases do envisage the incorporation of a clause *by which neither party intends to be bound* and which is obviously a smokescreen to cover the real intentions of both contracting parties … [emphasis added]

75 In reliance on these and other authorities, GP Selvam JC (as he then was) summarised the principle as follows in the High Court decision of *TKM (Singapore) Pte Ltd v Export Credit Insurance Corp of Singapore Ltd* [1992] 2 SLR(R) 858 ("*TKM*") at [48]:

> To ascertain whether documents represent the true relationship between parties the following test as laid down by Lindley LJ in the *Yorkshire Wagon Company* case … and Diplock LJ in the *Snook* case … may be formulated: Whether the documents *were intended to create legal relationships* and whether the parties did actually act according to the apparent purpose and tenor of the documents. [emphasis added]

76 This test was adopted by the High Court in *Koon Seng Construction Pte Ltd v Chenab Contractor Pte Ltd and another* [2008] 1 SLR(R) 375 at [64] and *Chng Bee Kheng and another (executrixes and trustees of the estate of Fock Poh Kum, deceased) v Chng Eng Chye* [2013] 2 SLR 715 ("*Chng Bee Kheng*") at [53]. We respectfully agree with this analysis of the sham doctrine and find that the legal basis for the courts not enforcing a sham agreement lies in the absence of an intention to create legal relations, which is an essential element of finding the existence of a contract (see the decisions of this court in *Oei Hong Leong and another v Chew Hua Seng* [2020] SGCA 78 at [10] and *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 at [46]). For the avoidance of doubt, we clarify that the sham doctrine as it relates to contracts is a *specific doctrine* distinct from, although ultimately related in the present context to, the doctrine of intention to create legal relations.

77 That being the case, where the allegation is that the agreement was a sham, this is a question that goes to the very *existence* of the contract – if proved,

the existence of a sham means that the agreement was not intended to create enforceable legal obligations but was intended to deceive third parties. It follows, therefore, that the issue of whether there is a sham is *prior to* and *will necessarily not engage* s 93 and, accordingly, s 94 of the EA.

78 The outcome of this approach is consistent with the approach taken in prior cases where similar issues arose, even if the EA was not specifically discussed. In *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd and others and another appeal* [2012] 1 SLR 32 at [30]–[31], we held that evidence *other* than the written documents could be examined to determine "the true nature of the transaction", where the issue was not "in construing the wording or terms used in the [written instruments] *per se*, but in determining whether the real agreement between the parties was that expressed in those instruments". In *Chng Bee Kheng* at [55], the High Court held that the court may have regard to a "wider category of evidence" than is usually available for the interpretation of documents (and, we would add, the proof of the terms of the documents) in order to show whether the parties intended that the agreement or certain provisions thereof would not be given legal effect.

79 In this case, the allegation is that the LFA was a sham. As we have explained, this is an allegation that the parties had a common intention for the LFA to give the *impression* of creating legal relations which did not reflect the *true* legal relations between the parties. In other words, the parties did *not* have the intention of creating legal relations by virtue of the LFA. This is an allegation that goes to the very *existence* of the contract and, therefore, ss 93 and 94 of the EA do not apply and a wider range of evidence can be considered by the courts in determining what the status of the LFA was between the parties. As the Judge had based his reasoning primarily on the parol evidence rule, we

find that this is an appropriate case for us to re-examine the evidence with a view to making a finding as to whether the LFA was a sham.

Do the facts disclose a sham?

The applicable law

80 The principles which apply in considering whether there is a sham are not disputed in this case. The burden of proving a sham lies on the party alleging that a document is a sham. There is also "a very strong presumption" that parties intend to be bound by the provisions of an agreement that they enter into (see *Chng Bee Kheng* at [51]). There must be a *common intention* to mislead (see *Chng Bee Kheng* at [52]), and the question turns on the subjective intentions of the parties (see *Chng Bee Kheng* at [53]).

Analysis of the facts

81 Ms Jiang's position was essentially that the LFA was intended to represent to third parties (Mdm Chong, Mr Toh's company, friends and employees) that the moneys that had already been transferred as well as any further moneys that would be transferred were loans rather than gifts. This had the following purposes: (a) to placate Mdm Chong with a view towards a divorce and division of assets; (b) to obtain a sum of $2m from Mr Toh's company to purchase 9 Hillcrest Road; and (c) to improve Mr Toh's standing before his family and friends.

82 We acknowledge that there are certainly arguments going both ways. However, on the particular facts of this case, we are of the view that there was a common intention by Mr Toh and Ms Jiang that the LFA *not* create the "legal

rights and obligations which [it] give[s] the appearance of creating" (see *Snook* at 802E). Let us elaborate.

(1) Presumption against intention to create legal relations

83 We first address Ms Jiang's argument that the presumption against an intention to create legal relations in social relationships would assist her argument that the LFA was a sham. In our view, this presumption does not have a significant role to play in this case, given the existence of the written agreement, the use of lawyers, the multiple drafts, and the nature of the purported agreement. Apart from the argument that there had been a sham, the presumption here would be easily rebutted. Notwithstanding that, the *facts* concerning the parties' relationship would be relevant in determining if there was a sham, and other factors that render a sham improbable in other contexts may not apply with full force here (see, *eg*, the High Court's observation in *Pender Development Pte Ltd and another v Chesney Real Estate Group LLP and another* [2009] 3 SLR(R) 1063 ("*Pender Development*") at [27] that "[c]ommercial parties do not, in the normal course of events, prepare and executed detailed written contracts that are not what they purport to be").

(2) Context of the prior gifts

84 An important element of the context in which the LFA is to be assessed is the finding that Items 2 to 12 were, on the facts contemporaneous with the transfers, *gifts* from Mr Toh to Ms Jiang. While Mr Toh argued that the LFA ought to influence the court's findings on Items 2 to 12, rather than the other way around, we were of the view that the correct approach was to first consider the status of what the parties *had done prior to* the LFA *and independently of* the LFA before turning to the LFA itself. That was because, as observed above, the question of whether a transfer was a gift was to be determined on the basis

of the transferor's intention at the time of the transfer. As such, the existence of prior gifts was an important part of the *context* in which the parties came together to negotiate and agree upon the LFA, and which would shed light on the parties' true intentions in relation to the LFA. Against the background of the numerous gifts and the parties' romantic relationship, the introduction of the LFA as a formal commercial agreement appears to us to be *incongruent*. In our view, this was one major factor in favour of considering the LFA to be a sham.

(3) Terms of the LFA

85 The LFA commences with a recital that the borrower, Ms Jiang, was "desirous of investing in property and, in particular" 9 Hillcrest Road. The loan facility under the LFA was for a sum of up to S$2m. In cl 2.4, it is expressly stated that the purpose of the loan facility was for the purchase of 9 Hillcrest. However, by cl 2.2, the sum of $1,128,000 is identified as having been disbursed in advance. It is not disputed that this sum refers to the transfers at Items 1 to 15 (*ie,* the General Transfers as well as the sums for the option fee, the balance of 4% of the purchase price, and a sum of $250,000). This gives rise to the following issues.

86 First, there was no reason why the transfers from Items 1 to 12 (*ie*, the General Transfers) should be included in the LFA and treated as part of the $2m loan facility. It is not disputed that those earlier transfers were for various purposes *unconnected with* purchasing 9 Hillcrest Road. The moneys so transferred had already been spent on other purposes. There was no good reason to recharacterise them as loans for the purpose of purchasing 9 Hillcrest Road, as that was *obviously false*. The fact that cll 2.2 and 2.4 attempt to do so suggests that parts of the LFA were *not* intended to reflect the *reality* of the transactions

between Mr Toh and Ms Jiang, but were part of an attempt to give the transactions between them a different spin. In our view, this is a very significant factor which already gives the LFA an air of unreality.

87 Second, the history of the drafting of the LFA shows that the prior transfers were not included in the LFA from the outset. Reference to prior disbursements was first made in the draft dated 14 March 2017, but there, the sum referred to was $1m. After receiving this draft and noticing the inclusion of cl 2.2, Ms Jiang claimed that she did not wish to sign the LFA. However, after discussing the agreement with Mr Toh on 20 March 2017, she agreed and this sum was updated to $1,128,000 around 21 March 2017 in a letter from Ms Jiang's lawyers. This supports Ms Jiang's case that (a) she believed that a total of $2m was to be given to her for the purpose of purchasing 9 Hillcrest Road (which explains why the LFA first referred to $2m); and (b) the inclusion of the prior transfers as advances on the loan facility was at Mr Toh's behest around 20 March 2017.

88 Furthermore, Ms Jiang's explanation for including the prior transfers is revealing. She claimed that this inclusion was necessitated by the fact that Mdm Chong had caught onto the existence of the prior transfers and she needed to be convinced that the prior sums were transferred as loans. This was in fact corroborated by Mdm Chong's own evidence that she discovered the existence of these transfers in March 2017. In this regard, we consider Mr Toh's evidence in his AEIC to be unbelievable – he claimed that Ms Jiang had asked for a loan of $1,122,000 from the outset, yet the first draft of the LFA refers to a loan of $2m, and no subsequent draft provided for $1,122,000 as the loan amount. On balance, therefore, we accept Ms Jiang's explanation as to why cl 2.2 was included in the LFA. It supports her case that the LFA was drafted in such a

way as to present the prior transfers as loans to Ms Jiang in order to placate Mdm Chong and other parties.

89 It bears noting that it was Ms Jiang's *belief* at the time that the moneys that she had received from Mr Toh prior to the LFA were gifts. Given that belief, for her to accede to the request to include a clause like cl 2.2 calls for an explanation, as it would have been, at least from her perspective, an undertaking to pay back moneys that she thought were gifts and which she had already used. For her to agree to such a clause must have required some kind of assurance from Mr Toh that she would not be prejudiced.

(4) Parties' intention to purchase 9 Hillcrest Road

90 Mr Toh also maintained that the purchase of 9 Hillcrest Road was purely for investment, as reflected in the recital to the LFA. We find that the Judge correctly rejected this contention and his findings on this point at [42]–[45] and [78] of the Judgment should not be disturbed. Mr Toh considered Ms Jiang to be his wife and was already referring to her as his wife from as early as 1 January 2017. They had expressed the intention to set up home together and various WeChat messages also referred to 9 Hillcrest Road as their "home".

91 This is relevant in two ways. First, it further aids Ms Jiang's case that the moneys to be transferred for the purchase of 9 Hillcrest Road were not intended as loans, since both parties were to benefit from having 9 Hillcrest Road together as a home (any argument of resulting trust notwithstanding, since that was never pleaded). Second, it contradicts the recital in the LFA and further shows that the LFA did not correspond to reality. Both of these points support Ms Jiang's case that the LFA was a sham.

(5) Timing and context of the LFA

92 The timing of the LFA's emergence and the context surrounding the decision to enter into the LFA are also significant.

93 The first set of facts concerns Mr Toh's relationship with his wife, Mdm Chong. Around 25 January 2017, Mr Toh told Ms Jiang that his wife was consulting lawyers for a possible divorce. By this time, Mdm Chong had discovered Mr Toh's relationship with Ms Jiang. On 31 January 2017, Mr Toh attended at a lawyer's office to discuss a possible divorce – upon cross-examination, he admitted that this was because he had the intention of divorcing his wife. Mr Toh also had plans to borrow $1.2m from the Bank of Singapore to reduce the assets that he would have to share with Mdm Chong upon a divorce.

94 Ms Jiang also alleged that Mdm Chong was demanding shares in Mr Toh's company at around this time, resulting in Mr Toh's transfer of 400,000 shares in his company to Mdm Chong in April 2017. In response, Mr Toh admitted that he had told Ms Jiang that his wife was insisting on a 20% shareholding in his company, but he claimed that this had nothing to do with any intended divorce. Regardless, it is clear from the above that there were serious rifts in Mr Toh's relationship with Mdm Chong. Together with Mdm Chong's discovery in March 2017 of the moneys that Mr Toh had already transferred to Ms Jiang, this corroborates Ms Jiang's claim that the LFA was needed to placate Mdm Chong so that the purchase of 9 Hillcrest Road could move forward.

95 This broader context also formed the backdrop to the process of purchasing 9 Hillcrest Road. As noted above, Ms Jiang received the option to

purchase upon paying the option fee of $30,800 (which was funded by Mr Toh) on 26 January 2017. Mr Toh then gave Ms Jiang two cheques for $500,000 and $620,000, respectively. When she tried to cash in the cheques, however, they were dishonoured at the bank, on 1 and 2 February 2017, respectively, apparently because Mdm Chong had discovered their relationship. This evidence was not challenged by counsel for Mr Toh in cross-examination.

96 At around this time, the parties began discussing how to proceed with the purchase of 9 Hillcrest Road. Three proposals were considered but rejected:

(a) On 7 February 2017, Ms Jiang asked if Mr Toh "was still thinking of buying our house at Hillcrest Villa". She suggested that she could take a loan from Mr Toh for $1m and enter into a written loan agreement for that purpose. This was the first proposal. However, Mr Toh rejected this idea. While Mr Toh disputed Ms Jiang's claim that this was because he did not want her to owe him any money, he did not offer any other reason for rejecting that proposal.

(b) On 23 February 2017, Ms Jiang offered to give Mr Toh a 30% interest in 9 Hillcrest Road and a 20% interest in 13 Prome Road in exchange for $2m, which was the second proposal. Mr Toh rejected this proposal on the basis that he did not want to be seen as taking advantage of Ms Jiang.

(c) They also decided not to purchase 9 Hillcrest Road in the name of one of Mr Toh's sons (the third proposal), even after Ms Jiang asked on 24 February 2017 for the vendor's consent for the name of the purchaser to be changed.

97 At around this time, on 16 February 2017, Mr Toh provided a cheque for $123,200 and Ms Jiang exercised the option to purchase 9 Hillcrest Road. On 20 February 2017, Ms Jiang's lawyers wrote to lawyers for the vendor of 9 Hillcrest Road stating that she no longer wished to proceed with the purchase of the property. On 22 February 2017, the vendor's lawyers wrote stating that the cheque of $123,200 issued by Mr Toh had been countermanded, and demanded payment of that sum. There was some debate during trial about what "countermanded" meant, but as a matter of usage, it is clear that "countermand" refers to "[a] contradictory command that overrides or annuls a previous one" or "[a]n action that has the effect of voiding something previously ordered" (see *Black's Law Dictionary* (Thomson Reuters, 11th Ed, 2019) at p 442). However, this point was not pursued in the cross-examination of Mr Toh and we place no weight either way on this fact.

98 After the rejection of the three proposals at [96] above, around 23 February 2017, one of the parties proposed entering into a written agreement for a loan. There was some dispute over whether it was Mr Toh or Ms Jiang who first proposed entering into this agreement – however, we note that when Mr Toh was confronted during cross-examination with Ms Jiang's claim that *he* was the one who proposed the agreement, he did not object. Further, even on his own account, he was the one who proposed the idea of a written agreement. On balance, it does appear that it was Mr Toh's idea to enter into the written agreement, which again supports Ms Jiang's allegations. Following that, on 27 February 2017, Ms Jiang instructed Mr Yong to prepare a draft agreement. She informed Mr Toh on 28 February 2017 that she had done so.

99 By a cheque dated 27 February 2017, Mr Toh transferred $123,200 to Ms Jiang. Ms Jiang's lawyers then enclosed a cashier's order for that sum in favour of the vendor's lawyers in a letter dated 2 March 2017. In that letter,

Ms Jiang "request[ed] to complete the purchase of the property on 1 June 2017" as she needed time to arrange financing for purchase of the property.

100 On 23 March 2017, the vendor's lawyers replied stating that completion was fixed for 11 May 2017 and provided some of the documents as part of the purchase process. The LFA was signed on 24 March 2017 and the cheque for $872,000 was given to Ms Jiang. However, on 31 March 2017, Ms Jiang's lawyers wrote to the vendor's lawyers stating that she was unable to proceed with the purchase as she was unable to obtain a housing loan. Ms Jiang explained in her AEIC that whereas she had been told that she would be able to obtain a bank loan of $1,540,000 if she deposited $250,000 into her bank account, on 26 March 2017, she was informed that she would have to pledge either $880,000 or show funds of $2.89m in order to obtain that loan. As she did not have that money, she was unable to obtain a bank loan and so told her lawyers to inform the vendors of the same. According to her, Mr Toh was having difficulty raising the balance of $1,128,000 ($2m less the $872,000 that he had given her) and told her not to proceed with the purchase of 9 Hillcrest Road. Further, as Mr Toh did not contact her from 12 April 2017 onwards, she decided to terminate the transaction. In addition, on 29 April 2017, Mr Toh allegedly instructed her not to continue with the purchase of the property.

101 In our view, the above events justify the following inferences.

102 First, by the time the idea for the LFA emerged, Mr Toh was already considering divorcing Mdm Chong, and had already taken steps towards a loan arrangement with the Bank of Singapore which he intended to use to reduce the value of the assets available to Mdm Chong upon a divorce. In this context, Ms Jiang's claim that the LFA was similarly intended to get around Mdm Chong's objections to further transfers of money is very plausible. This

purpose was also attested to by Mr Yong, who testified under cross-examination that he was told that the LFA would assist Mr Toh in negotiations with his wife. While not evidence of Mr Toh's purpose, Mr Yong's evidence shows that Ms Jiang, at least, believed that that was what Mr Toh was doing at the time.

103 Second, coming after Mr Toh's rejection of the other proposals for Ms Jiang to take a loan from him, or for him to obtain an interest in 9 Hillcrest Road and 13 Prome Road, and in the absence of any evidence to show any significant change of heart, it can be inferred that Mr Toh continued in his wish not to place any burdens on Ms Jiang when they decided to enter into a written agreement.

104 Third, the agreement was a response to issues arising from (a) Mdm Chong's knowledge of their relationship; (b) the consequent restrictions on Mr Toh's finances (as evidenced by the dishonoured cheques in early February 2017); and (c) the need for Mr Toh to significantly assist Ms Jiang in the purchase of 9 Hillcrest Road. In that regard, given that the two cheques for $500,000 and $620,000 were given before any question of such an agreement arose, it appears from the facts that Mr Toh would have been *willing* to let Ms Jiang have that money without a written agreement. This supports Ms Jiang's contention that the LFA was intended to get around the difficulties posed by Mdm Chong and that the transfers of moneys were independent of the LFA.

105 Fourth, Ms Jiang's need for assistance was demonstrated starkly by the fact that she was unable to obtain a housing loan and, consequently, could not proceed to complete the purchase of 9 Hillcrest Road. This supports her points that (a) she needed Mr Toh's funding; and (b) she had expected that Mr Toh would give her more than $872,000 as part of that arrangement.

(6) Mr Toh's conduct

106 There are two aspects of Mr Toh's conduct which Ms Jiang referred to in support of her case.

107 First, she claimed that at around the time they were thinking of entering into the LFA, Mr Toh stated that he would not sue her. In this regard, we do not think that the WeChat messages cited by Ms Jiang go so far – most of them were just general pronouncements of love and affection. The only reference to a legal suit at around that time was a message on 21 February 2017, as follows: "I will always [help] you and will not put you in harm's way. Won't have any law suit". Mr Toh explained in cross-examination that this was a reference to a potential suit from the vendor of 9 Hillcrest Road. We find that this is plausible, given that it was apparently only after 23 February 2017 that they considered entering into a written agreement, and there was the issue of the balance of 4% of the purchase price to be paid to the vendor at around that time.

108 However, apart from these messages, as the Judge also found and as Mr Toh admitted to during cross-examination, the parties had a mutual understanding that the LFA would not be enforced against Ms Jiang. Mr Toh has provided no reason for us to depart from the Judge's finding to that effect.

109 Ms Jiang's second argument was that the WeChat messages sent by Mr Toh on and after 5 April 2017 belied his claim to have been "cheated" by Ms Jiang. On his own evidence, he had discovered that Ms Jiang had misled him as to the terms of the LFA on 5 April 2017 after hearing from Ms Chong. However, based on the messages sent after that date, Mr Toh admitted that he had continued to treat Ms Jiang "normally". He also admitted that if he had been truly cheated, he would not have (a) continued engaging in intimate conduct

(like sending messages of an explicit nature) with Ms Jiang, which he did; (b) gone on to discuss other investment opportunities; and (c) called her "truthful" and "most truthful". While Mr Toh tried to explain that he trusted her to pay him the money earlier, this does not adequately explain the continued intimacy shown in the messages or his concessions at trial. This undermined Mr Toh's claim that he believed that Ms Jiang had misled him. Mr Toh's credibility is accordingly weakened. In addition, his nonchalance suggested that he was not actually concerned with the terms of the LFA and was content to leave them as they were, or that he knew the terms of the LFA and his later allegations were an afterthought. Both of these made Ms Jiang's claim appear more plausible.

(7) Mr Toh's decision not to ask Ms Chong to be present at the signing

110 Another key fact relating to the circumstances under which the LFA was signed is that Mr Toh did not ask his solicitor, Ms Chong, to attend the signing on 24 March 2017. There is some dispute over why he chose not to do so. Mr Toh claimed that he trusted Ms Jiang and she told him that he did not have to bring his lawyer along. However, Ms Jiang claimed that Mr Toh had told her that he was going to discharge Ms Chong and that he had also informed Mr Yong that he had discharged his solicitors "as he considered the Loan Agreement to be a private matter between" the parties. This is corroborated by Mr Yong and was recorded in a contemporaneous attendance note as follows: "Andy [*ie*, Mr Toh] said he discharged Pamela".

111 Although Ms Chong's own evidence is that she was not discharged until 5 April 2017, we find that Ms Jiang's and Mr Yong's evidence should be accepted. Whether or not Mr Toh *actually* discharged Ms Chong on or before 24 March 2017, the evidence shows that he had *told* Ms Jiang and Mr Yong that

he had done so. Mr Toh has given no explanation for this. Further, we observe that Mr Toh had kept Ms Chong in the dark concerning his relationship with Ms Jiang: it is hence not entirely surprising that he did not inform Ms Chong about attending the signing on 24 March 2017. This supports Ms Jiang's case that Mr Toh did not want to have his lawyer with him. This decision, when considered with all the other circumstances, reveals something of his attitude towards the LFA.

(8) Countervailing factors

112 In fairness, we observe that there were a number of factors that could be said to go against a finding of a sham. However, on a closer analysis, we find that these factors can either be explained in a manner that is consistent with a sham, or that they are not sufficiently probative so as to displace the factors identified above in favour of finding a sham.

113 First, both parties engaged lawyers to assist in the drafting and negotiation of the LFA, a factor which counsel for Mr Toh and the Judge emphasised. However, this particular factor should not be over-emphasised. Ms Jiang's explanation that they wanted to make the LFA look as legitimate as possible is an entirely sensible one. Indeed, in order for a sham to be as effective as possible, it is not implausible that parties would seek legal advice and assistance. A related point is that both parties included terms in the LFA that appeared to protect their interests, and one might ask why they would do so if they believed that the LFA was a sham. In our view, the same explanation – that the LFA was to appear as realistic as possible – is a plausible one. Further, it cannot be ruled out that the parties, especially Ms Jiang, wished to protect their respective interests in the event that the LFA was sued upon by a party who was

not aware of the sham. This eventuality was in fact dealt with in the LFA by the clause which treated the debt as extinguished if Mr Toh passed away.

114 We observe here that it is in the nature of a sham that the parties may not be entirely open in what they communicate to their lawyers. For example, the fact that Ms Jiang's lawyers wrote to Mr Toh's lawyers stating that they had agreed that the sum of $1,128,000 had been advanced by Mr Toh to Ms Jiang at her request is not, in the context of Ms Jiang's allegations, proof that the parties did *not* have the subjective intention to create a sham.

115 Second, it appears that Mr Toh had acted upon the LFA when he delivered a cheque for $872,000, the exact sum described by cl 2.2 of the LFA, after signing the LFA on 24 March 2017. In this regard, GP Selvam JC in *TKM* at [48] observed that one element of the inquiry is whether the parties did in fact act "according to the apparent purpose and tenor of the documents". At first glance, the payment of the $872,000 appears to be evidence that Mr Toh was acting in accordance with the LFA (see also *Pender Development* at [29]). However, in our view, close attention must also be paid to what the underlying or "hidden" transaction was intended to be – in this case, the alleged sham was intended to cover up the nature of the transfers of money (rather than to hide their *existence*), so that the mere fact that moneys were transferred and that there was compliance with the mere *form* of the LFA (the amount and the means of payment) do *not necessarily* mean that the LFA was not a sham.

116 Third, there is no evidence that the LFA was actually used for the purposes that Ms Jiang alleged it was for. However, we are not inclined to place much weight on the absence of evidence that the LFA had its intended effect – a *failure* to achieve some ulterior purpose is quite a different question from whether the parties *had* such an ulterior purpose in creating the document in the

first place. Further, at least according to Ms Jiang, Mdm Chong ultimately did not believe that the LFA was a real document, which undermined its efficacy.

117 Fourth, on a related note, Mr Toh argued that the LFA as drafted would not have achieved the purposes alleged by Ms Jiang, a point that the Judge also made (see the Judgment at [110]). We find, however, that of the three purposes alleged by Ms Jiang (see [81] above), two of them *could* have been achieved by the LFA, namely, (a) convincing Mdm Chong that the moneys would be repaid; and (b) improving Mr Toh's image. Describing the substantial transfers as loans to assist Ms Jiang to purchase an investment property would, it seems to us, be preferable to simply acknowledging that the transfers were love gifts given to a mistress with whom he had fallen in love within a short time. The purpose which would not have been apparently served by the LFA was that in relation to obtaining funds from Mr Toh's company. Since it was stated that there was already an amount disbursed, the LFA would not have been sufficient to justify withdrawing $2m from the company's accounts. However, we do not give much weight to this in the final analysis, as this purpose *would* have been achievable by the LFA in its *original form* which provided that $2m would be advanced without accounting for any prior transfers. Ms Jiang testified that this was the original intent of the LFA but changed when Mdm Chong discovered the existence of the prior payments. In any event, we are not convinced that this is sufficient to displace the considerations already discussed above.

118 It is convenient at this juncture to deal with Mr Toh's contention that Ms Jiang had failed to properly plead the purposes for which the sham was allegedly entered into. The major difficulty is that Ms Jiang had not pleaded that one of the purposes of the sham (or "ploy", in the words used in the Statement of Claim) was to convince Mdm Chong that the moneys would be repaid and thereby to convince her not to take shares in the company or to seek further

assets in a divorce. However, even if Ms Jiang could not raise these specific allegations since they were not pleaded (and we do not rely on this argument in our analysis in any event), it would not have had a significant effect on the analysis above. Whatever the *specific purpose* alleged, the central facts identified above would remain the same and point towards a sham. Ms Jiang has been consistent from the beginning that the LFA was intended to give the impression of a loan to others, including Mr Toh's wife, company, employees and friends, and whether it was also for the purpose of the divorce does not change any of the inferences to be drawn from the circumstances. A distinction should be drawn between the *purposes* that parties may have *for* the sham and the *common intention* that the document would not truly reflect the parties' legal relationship, *ie*, the *purpose* that the document would conceal the true relations between the parties. While the *specific* purposes are *relevant* to the factual question of whether there is a sham, they are *not*, logically speaking, an *essential* requirement for finding that the agreement was a sham.

119 Fifth, the existence of the Draft Deeds appears at first glance to be an acknowledgement by Ms Jiang that the LFA was a legally binding agreement, in relation to which Mr Toh had to execute a deed to release her from her obligations. As noted above, after Ms Jiang had loaned $150,000 to Mr Toh, she had Mr Yong draft a Deed of Gift, which went through three drafts. The Judge pointed out that a recital in Draft Deed 3 referred to the $2m as a loan amount, and that it provided that Mr Toh "*hereby*" [emphasis added] gifted the amount to Ms Jiang, suggesting that the sum was not a gift before (see the Judgment at [122]–[123]). Mr Toh adopted a similar argument on appeal. Having considered all the facts surrounding these Draft Deeds, we do not place much weight on these documents. As it transpired, Ms Jiang did not in fact have Draft Deed 3 executed – she explained that she believed it to be unnecessary as

Mr Toh's assurances that the $2m was a gift were enough. Further, it cannot be ruled out that Ms Jiang was seeking to protect her interests *in the event* that Mr Toh reneged on their understanding that the LFA was a sham (as he indeed later did). There is also the fact that it was Mr Yong's advice to have the loan of $150,000 recorded in a document, and the references to the sums under the LFA were, in Mr Yong's words, included "out of an abundance of caution". Finally, Mr Yong's evidence was that, based on what Ms Jiang had told him, what was captured in Draft Deed 3 was the actual position of the parties at the time of the LFA, *ie*, that the $2m was intended as a gift. While the Judge found this to be a "curious statement" (see the Judgment at [124]), we do not think that it is entirely odd – what this statement expressed was Mr Yong's understanding of the parties' intentions at the time of the LFA, which he considered to be the same as that expressed in the terms of Draft Deed 3.

120 Sixth, Ms Jiang appeared to refer to the sums under the LFA as loans or having been "lent" by Mr Toh at various times. Mr Toh relied first on an audio recording sent by Ms Jiang to Mr Toh on or around 3 April 2017 (which was recorded by Mdm Chong on 4 April 2017):

> One thing at a time, you promised you will return $150,000 to me by 15 May, so you have to make an oath to say that you will return $150,000 to me in May. If not, the money you lent to me previously, the $2 million contract, will be gone.

We are unable to give much weight to this recording. First, it is not clear what the context is. Second, in so far as this is in reference to the $150,000 and the Draft Deeds, it is also the case that the Draft Deeds were not executed because, as Ms Jiang testified, she was satisfied that Mr Toh had treated the money as a gift – her impressions of the effect of the LFA appear to have undergone various changes at various times. Third, even if she believed that the agreement was enforceable at the time, her later belief (whether mistaken or not) as to the legal

status of the LFA is distinct from whether she shared a common intention with Mr Toh that the LFA would not create the legal relations that it gave the impression of creating.

121 Mr Toh also relied on messages which Ms Jiang insisted at the trial that she did not send. These messages appeared to show Ms Jiang referring to the moneys transferred by Mr Toh as loans. These were presented to the court by way of photographs that Mdm Chong had allegedly taken of Mr Toh's phone, and evidence was led by both parties concerning the authenticity of these photographs and the messages therein. Even if these messages were authentic, we would not give these messages much weight. First, the photographs of these messages were presented without context. Apart from the date and time of the photographs taken, there is no indication of when the *messages* were actually sent. The only evidence in that regard was Mr Toh's claim that he would delete his messages every day, suggesting that the photographs would only capture the messages from the day before. However, this was a very flimsy basis on which to date these messages, since there is nothing *in the photographs themselves* that would assist in that process. Second, the evidence of when the photographs were actually taken appeared to contradict Mdm Chong's evidence in her AEIC that these photographs were taken in March 2017. Third, assuming that the timings of the messages put forward by Mr Toh are correct, and comparing those messages to the messages between parties at around the same period, there is a distinct incongruity in tone and in what it reveals about the parties' relationship. Fourth, the photographed messages are shown without the context of the preceding discussion, and Mr Toh's replies are not captured. We agree with Ms Jiang that it would, in the circumstances, be unsafe to place too much weight on these uncontextualised messages.

122 Even if these messages are relied upon, they would not serve to show that the LFA was not a sham. In so far as there are references to loans in the messages, these appear to be Ms Jiang's attempts to convince Mr Toh of her goodwill or trustworthiness by stating that she would comply with the written agreement to repay the loan. However, that is distinct from whether or not the parties intended for the LFA to be enforceable. In the context of very emotionally charged messages, these statements do not show what the parties' common intention was at the time of the LFA.

123 Seventh, while Mr Toh emphasised that the parties had recorded the various sums in the February and March Notes (see [63] above), this conduct is equally consistent with the parties ensuring that the LFA would adequately account for all of the sums in order to function as a sham.

Conclusion on the allegation of sham

124 In order for the LFA to be found to be a sham, Ms Jiang must show that she and Mr Toh shared a common intention that the LFA would not in fact create the legal relations that it had the appearance of creating (*ie*, that the sums referred to therein were loaned to Ms Jiang and were due for repayment on the terms of the LFA), but was entered into to give the *impression* to other parties of doing so. In our judgment, the evidence clearly establishes that *Ms Jiang* had the subjective belief that the LFA was only used to give a certain impression to third parties, but that there was actually no real loan under the LFA. The question is whether Mr Toh shared this intention, and we find that the evidence shows that he did. The fact remains that since Ms Jiang had that belief, she must have thought that the LFA, especially cl 2.2, would have been prejudicial to her interests. Her decision to enter into the LFA in any event must have been compelled by some other factor. Further, her belief that the LFA was not to be

enforced must have originated from somewhere. The source of that belief and the motivation for her to enter into the LFA can be traced only to Mr Toh. The various factors identified and elaborated at [82]–[111] above justify the finding that the parties shared the common intention that the LFA would not reflect the true position as between the parties. While there are some indications otherwise, for the reasons identified at [112]–[123] above, we do not ultimately find that any of these factors is sufficiently persuasive to displace the considerations supporting Ms Jiang's argument.

125 Mr Toh cited the High Court decision of *Eka Tjipta Widjaja v Fifi* [2002] SGHC 38 in support of his argument that Ms Jiang ought to be held to the LFA. In that case, the defendant had taken a sum of $700,000 from the plaintiff to purchase a property. They were in a romantic relationship at the time. The plaintiff argued that the sum was intended to be a loan. The defendant argued that the document entitled "Acknowledgement of Debt" which both parties signed and which described the $700,000 as a loan was only intended to evidence the source of the funds and was not intended to reflect a loan between the parties (at [51]). Tay Yong Kwang JC (as he then was) rejected the defendant's argument, finding that she was not under any pressure to sign the document, or that the document had to be signed in any hurry (at [54]). Tay JC found that the defendant was not told that the clauses in the Acknowledgement were not intended to be acted upon – the purpose of the document, to show that the sums came as a loan, was in fact achieved (at [55]). Further, there was no reason why the parties would have had to disguise their transaction, and if it were a gift, the document could simply have reflected that (at [56]). As a result, the court granted summary judgment against the defendant for the sum of $700,000. This case, however, can be distinguished on the facts. In the present case, Ms Jiang has offered a plausible explanation for why the sums referred to

in the LFA had to be characterised as loans. There is also sufficient circumstantial evidence to support Ms Jiang's claim that she was told by Mr Toh that the LFA was only intended to give a certain impression to other parties. The circumstances in which the LFA was entered into are consistent with Ms Jiang's assertions.

126 We therefore find that the LFA was, in truth, a sham. Both parties accept that, as a consequence, the LFA would not be enforceable by Mr Toh against Ms Jiang. On this basis, we reverse the Judge's finding that the sums of $250,000 and $872,000 (Items 15 and 16) were loans to Ms Jiang and that she has to repay those sums in accordance with the LFA (see the Judgment at [130] and [133]). Further, it follows that the LFA would also not have any relevance in determining if Items 2 to 12 were gifts. Mr Toh's arguments against the Judge's findings in this last-mentioned regard therefore also fall away.

The counterclaim

127 Mr Toh appealed against the Judge's decision to allow Ms Jiang to recover (a) $95,000; and (b) $150,000 from Mr Toh.

128 In relation to the $95,000, it is not disputed that Ms Jiang did make transfers in January and February 2017 amounting to that sum. Mr Toh's case is that the Judge had failed to consider that the $95,000 was reflected in the March Note and was deducted from the transfers made by Mr Toh to Ms Jiang to arrive at a "net" value which was then reflected in the LFA (together with the $250,000 paid out around that time). However, as the March Note was made for the purposes of drafting the LFA which we have found to be a sham, not much weight can be placed on that note. Other than the $200,000, the other transfers were not loans and so no "repayment" could have been made. Mr Toh has also

not shown that the payments of $95,000 were directed to repaying the sum of $200,000. In our view, Mr Toh has not shown any reason why the Judge's finding at [154] of the Judgment should be disturbed.

129 As for the $150,000, the only argument raised by Mr Toh is that it ought to be set off from the $2m. Since the $2m under the LFA was not actually a loan, that argument is not viable any longer. We deal with any issue of set-off of the claim and counterclaim below. Further, Mr Toh has not adequately explained why his clear admission under cross-examination that the $150,000 was a loan should not be relied upon. The Judge's conclusion that the $150,000 was a loan that Mr Toh had to repay cannot be impugned.

130 We therefore find no basis for reversing the Judge's findings on Ms Jiang's counterclaim.

Conclusion

131 Our findings above also mean that there is no longer any need to address (a) Mr Toh's argument on the caveatable interest in 13 Prome Road, which was entirely based on the LFA; (b) the issues pertaining to the vitiating factors raised by Mr Toh; and (c) Mr Toh's appeal against the Judge's costs order.

132 In conclusion, we uphold the Judge's findings that Ms Jiang owed $200,000 (Item 1) to Mr Toh, and that Mr Toh owed $245,000 to Ms Jiang. Setting off these sums (as pleaded by Ms Jiang), Mr Toh is to pay $45,000 to Ms Jiang. This order is the same that the Judge made below (see the Judgment at [156]), but the difference in outcome concerns the sum of $1,122,000 which the Judge had found Ms Jiang was to repay in accordance with the LFA and which we hold were gifts to Ms Jiang as the LFA was, in truth, a sham. Ms Jiang has succeeded in CA 73 and has substantially (although not entirely given our

findings in relation to Item 1) succeeded in CA 74. She is therefore entitled to the costs of the appeals on the principle that costs follow the event. Having regard to the parties' respective costs schedules, we award Ms Jiang costs of $75,000 (all-in), noting that the issues in both CA 73 and CA 74 overlapped substantially. The usual consequential orders will apply.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Debbie Ong
Judge of the High Court

Lee Hwee Khiam Anthony and Wang Liansheng (Bih Li & Lee LLP) for the appellant in CA/CA 73/2020 and respondent in CA/CA 74/2020;
Mahesh Rai s/o Vedprakash Rai and Wong Wan Kee Stephania (Drew & Napier LLC) for the respondent in CA/CA 73/2020 and appellant in CA/CA 74/2020.