IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-002398

BETWEEN	VICKY HARISH NARAYAN First Appellant
AND	BIJAY NARAYAN AND SAROJNI NARAYAN Second Appellants
AND	SAMEETA NARAYAN (AKA SAMEETA PAL) Respondent

Hearing: 13 August 2009

Appearances: G A Keene and R K Nand for the First Appellant
S R Shankar for the Second Appellant
A A Hall and K J Kyle for the Respondent

Judgment: 9 October 2009 at 3:00pm

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
on 9 October 2009 at 3:00pm pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

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[1] This is an appeal from a reserved decision given by Judge J G Adams in the Family Court at Manukau on 30 March 2009.

[2] The appeal raises a number of issues:

a) Were monies advanced by the parents of the husband a gift or a loan?

b) Who was the gift or loan to?

c) If it was a loan, to one party only, did it become a relationship debt?

Background

[3] All parties to these proceedings are Fijian Indians. Mr and Mrs Narayan senior reside in Fiji. Vicky and Sameeta Narayan live in Auckland.

[4] On 27 December 2000, Mr and Mrs Narayan senior gifted $25,000 to Vicky Narayan and Sameeta Pal – as she was then known. The couple were not at the time married, but they were due to be married only a few days later. Mr and Mrs Narayan senior also gifted $15,000 to each of Vicky Narayan's three siblings. Sameeta Pal was not present when the moneys were gifted. She was told about the gift either at or shortly before the wedding.

[5] Vicky Narayan married Sameeta Pal in Auckland on 30 December 2000.

[6] There was one child from the marriage – A – who was born on 7 December 2003.

[7] In December 2004, at A's first birthday party, Mr and Mrs Narayan senior discussed advancing money to Vicky and Sameeta Narayan to enable them to purchase a house.

[8] On 18 March 2005, Mrs Narayan senior was in New Zealand. She transferred $95,000 to a joint account held by Vicky and Sameeta Narayan. She

gave $5,000 in cash to Vicky Narayan. Vicky Narayan was present. Sameeta Narayan was not.

[9] On the same day, Mrs Narayan senior and Vicky Narayan signed what was described as an "irrevokeable document". Mr Narayan senior was not in New Zealand at the time. He signed the document when he was in New Zealand a few days later on 23 April 2005. The document reads as follows:

> IRREVOKEABLE DOCUMENT
>
> I, Mr VICKY HARISH NARAYAN, F/N BIJAI NARAYAN off 22 Beaumonts Way, Manurewa, Auckland, New Zealand hereby admit and acknowledge receiving the sum of NZD $125,000.00 (New Zealand One Hundred and Twenty-five Thousand Dollars) from Mr and Mrs Bijai Narayan of 34 Ravouvou Street, Lautoka, Fiji.
>
> The NZD $25,000.00 has been given to me as a gift whereas the other amount, the NZD $100,000.00 is being loaned to me today, the 18th of March, 2005 at the interest rate of 12% p.a.
>
> I have agreed to pay the above amount will full interest within 5 years of time.
>
> The conditions under which I am granted the loan is:
>
> 1. I will buy a house with the loaned amount
> 2. The house will be titled under the following names:
> Bijai Narayan, Sarojni Narayan, Vicky Harish Narayan and Sameeta Narayan
> 3. The lenders will have the right to occupy a room in that house whenever they come to New Zealand.
> 4. The lenders will void the above clauses 2 & 3 upon the full payment of the loaned sum with interest within the agreed time
> 5. If the borrower fails to comply with the above first three clauses (1, 2, & 3), the lenders have the right to demand immediate payment of the loaned sum with interest

[10] On 4 October 2005, Vicky Narayan signed an agreement for sale and purchase in respect of a property in Stellata Court, Manurewa.

[11] On 11 November 2005, the agreement was settled, and Vicky and Sameeta Narayan purchased the property in their joint names. They obtained finance from Westpac to enable them to complete the purchase. Their cash contribution was

$92,725.71. These funds were drawn from the joint bank account into which the $95,000 had been deposited in March 2005. Neither the bank nor the solicitor who handled the conveyancing on behalf of Vicky and Sameeta Narayan were told about the loan/gift. As far as they were concerned, the $92,725.71 was beneficially owned by Vicky and Sameeta Narayan.

[12] The parties separated initially on 14 December 2005. Sameeta Narayan left the family home. Shortly thereafter the joint bank account was closed and both opened separate bank accounts.

[13] In mid-January 2006 the couple reunited. Sameeta returned to live at Stellata Court.

[14] Mr and Mrs Narayan senior sent a letter of demand to the couple on 19 April 2006. It was addressed to both Vicky and Sameeta Narayan. It read as follows:

> We Mr. Bijay Narayan and Mrs. Sarojni Narayan of 34 Ravouvou Street, Lautoka, Fiji Islands hereby demand the sum of $100,000 (One hundred thousand dollars only) with interest loaned to you for the deposit towards purchasing a Dwelling House.
>
> If the amount with interest is not returned within 21 days from date of this letter, your authorities will have to transfer the property on our name from where we will take over the repayments, and your authorities will be allowed to rent the premises.
>
> Thanking your authorities and looking forward to your cooperation.

[15] Vicky and Sameeta Narayan separated finally on 27 May 2006.

[16] On the same day, Mr and Mrs Narayan senior's solicitor, Mr Shankar, sent a further demand to the couple. Again it was addressed to both Vicky and Sameeta Narayan. It read as follows:

> NOTICE OF DEMAND
>
> Mr Bijai Narayan and his wife Mrs Sarojni Narayan on or about 18t March 2005 lent you the sum of $125,000.00 by way of personal loan to enable you to purchase a house. Of this $25,000.00 was a gift and the $100,000.00 was loan at 12% interest. They wanted to see you both live happily with your son and return the money to them after you were able to free your debt. Unfortunately you have now separated and are desirous of selling the property you both bought.

> In the circumstances your parents and parents in laws respectively demand the repayment of the $100,000.00 from the proceeds of the sale of this property. Please advise within 7 days, in any case before the sale of the property, that you both unequivocally undertake to repay this loan with interest at 12% from 19 March 2005 until it is fully repaid. On or about 19 April 2006 you were given a demand notice from my above named clients. You have acknowledged the debt but have not made any attempt to satisfy my client how you propose to pay the said loan.
>
> Please also take notice that if you do not give an undertaking in writing my instructions are to lodge a Caveat against the said property. If it was done you will experience problem with transferring the property to an intended purchaser. If I hear nothing you then I will advise my clients to immediately lodge the caveat.
>
> PLEASE TAKE FURTHER NOTICE that demand is made of the repayment of the money so lent with interest at 12% pa from 19.03.05. From 19.03.05 to 18.03.06 the amount is $112,000.00. From 19.03.06 to 18.05.06 total is $114,000.00 and from 19.05.06 to 06 June 2006 further interest if $32.88 daily until it is paid.
>
> DATED at Auckland this 6th day of June 2006.

[17] The Stellata Court property was sold on 28 November 2006. The net proceeds of sale were $109,931.73. This does not take account of the loan/gift.

[18] As from 5 April 2007 Vicky Narayan started making payments of $250 a week to Mr and Mrs Narayan senior.

[19] Sameeta Narayan applied to the Family Court under the Property (Relationships) Act 1976 seeking orders in respect of the couple's relationship property.

[20] Mr and Mrs Narayan senior are demanding the sum of $100,000 together with interest at the rate of 12% as from 19 March 2005. If the advance was a loan and they are entitled to make demand, there will be no relationship property.

Family Court decision

[21] Judge Adams reviewed the relevant factual background. He recorded that determination of the case had involved careful sifting of the evidence and that his assessment of the parties had assisted him in determining the facts.

[22] I have taken my summary of the background set out at [3] to [20] above in large part from the Judge's findings of fact. I will not repeat the same. There are however some additional findings of fact made by Judge Adams which should be noted. His Honour found:

a) That Sameeta Narayan did not regard the "irrevokeable document" as having any validity. Her case was advanced on the basis that the documentation and subsequent demand had been concocted after the event, because of the collapse of the marriage.

b) That the "irrevokeable document" was prepared and signed on the dates noted on the face of it. Judge Adams recorded that he was satisfied as to this fact on the balance of probabilities, and having listened closely to the evidence.

c) That Mr and Mrs Narayan senior are not sophisticated in business matters such as those which were before the Family Court, and which are before this Court on appeal.

d) That Vicky Narayan was also quite unsophisticated in business matters.

e) That Mrs Narayan senior and Vicky Narayan regarded Sameeta Narayan as "a mere cipher" and that she was left "out of the loop" in relation to family financial matters.

f) That Sameeta Narayan did not know that the $100,000 was said to be a loan and that she was told by Vicky Narayan that it was a gift.

g) That it suited Vicky Narayan to tell Sameeta Narayan that the money was a gift even though he had signed a document which suggested something different.

h) That Sameeta Narayan had no knowledge of the "irrevokeable document" until after the parties had separated. Nor did she have any warning of the stance being taken by her parents-in-law.

[23] Judge Adams then discussed the applicable law, noting that in order for there to be a valid gift of a chattel *inter vivos*, there has to be:

a) an expression of the intention of the donor to make a gift;

b) the assent of the donee to the gift; and

c) the actual or constructive delivery of the chattel to the donee.

He noted that in the present case, there was no issue about the delivery of the funds, and that there was no real issue about the assent of the donees. He considered that it was the expression of the intention of Mr and Mrs Narayan senior which was in issue and that that was a matter of evidence. He expressed the opinion that the "irrevokeable document", which recorded that the $100,000 was a loan was a significant feature, but that it was not determinative, and that the evidence had to be considered in the round.

[24] Judge Adams then considered various authorities, before turning to discuss whether the money was a gift or a loan. He highlighted the various aspects in the evidence, suggesting that the monies were a loan, and then the various factors suggesting that the monies were a gift. Those suggesting the transaction was a loan were:

a) the lack of prior notice to Vicky Narayan;

b) the different practice between the $25,000 gift and the $100,000 advance;

c) that $100,000 is a large sum; and

d) the "irrevokeable document".

Factors suggesting that the loan was a gift were listed as follows:

a) timing, and the fact that the money was advanced before execution of the "irrevokeable document";

b) muddled terms, muddled thinking, and a lack of sophistication in the documents;

c) the interest rate detailed in the "irrevokeable document";

d) that the "irrevokeable document" was regarded by Mrs Narayan senior as a form of security;

e) that the bank and the conveyancing solicitor were not told about the loan;

f) that Sameeta Narayan was not told that it was a loan and that she was told that it was a gift;

g) the failure by Vicky and Sameeta Narayan to comply with the terms of the "irrevokeable document".

[25] His Honour concluded on the balance of probabilities that the advance of $100,000 was a gift; that at least $95,000 was a gift to Vicky and Sameeta Narayan jointly, and that the balance of $5,000 well may have been a gift directly to Vicky Narayan. He found that no conditions attached to the gift and that the "irrevokeable document" was "prepared for the purpose of using [it] in the very circumstances that arose, namely the separation of the parties". His Honour found that it was of no legal effect.

[26] His Honour then went on to consider various other items of relationship property, and directed that all items of relationship property – including the net proceeds of sale of Stellata Court – should be divided equally between Vicky and Sameeta Narayan.

Notice of appeal

[27] The first respondent has appealed Judge Adams' decision. He has asserted that the Judge erred both in law and in fact in holding that the monies were a gift and therefore relationship property. The notice of appeal asserted that Judge Adams failed to give sufficient weight to the evidence in favour of the advance being a loan, and in the alternative, that he gave excessive or unreasonable weight to the evidence suggesting that the advance was a gift made by Mr and Mrs Narayan senior.

[28] It is noteworthy that there has been no appeal or cross-appeal by Sameeta Narayan.

Submissions

[29] Mr Keene made it clear that the appeal is limited to that part of the Family Court judgment that found that the advance of $100,000 by Mr and Mrs Narayan senior to Vicky and Sameeta Narayan was a gift and not a loan. He acknowledged that he was asking me to reverse various findings of fact made by Judge Adams. He submitted that the decisive factor as to whether the advance was a gift or a loan was the intention of the donors – Mr and Mrs Narayan senior – and that their intention could not have been clearer. He noted that on the evidence they went to a great deal of trouble to draft, type, and have executed in front of a witness the "irrevokeable document". The document made it clear that the advance was a loan to the husband to enable him to purchase a home. He submitted that Mr and Mrs Narayan senior's conduct, and that of Vicky Narayan, was consistent with the monies being treated as a loan, and that there was no proper basis on which Judge Adams could treat the "irrevokeable document" as a sham. He submitted that in any event the evidence fell well short of establishing that the "irrevokeable document" was a sham, and that unless it can be categorised as a sham, the advance cannot be categorised as a gift. He submitted that none of the factors supporting Judge Adams' conclusion that the parents intended a gift pointed in the direction of the deed being a sham.

[30] Mr Keene then dealt with those factors that influenced Judge Adams – in particular his finding that the real purpose of the document was not to record the terms of the loan, but to provide a lever for the parents and the husband, in the event that the marriage failed. He referred to the evidence in some detail and submitted that the Judge had erred in interpreting the same.

[31] As an alternative, Mr Keene submitted that if Mr and Mrs Narayan senior intended to make a gift rather than a loan, the gift was a conditional gift. He submitted that the intention of the parties expressed in the "irrevokeable document" was to provide for the situation where the marriage failed, and that if the marriage failed, the gift was to be treated as a loan.

[32] As a further alternative, Mr Keene submitted that there were "extraordinary circumstances", such that to grant Sameeta Narayan an equal share in the relationship property would be repugnant to justice.

[33] Mr Shankar on behalf of Mr and Mrs Narayan senior adopted Mr Keene's submissions. Further he noted that Mr Vicky Narayan accepted that the monies were advanced by way of loan. He submitted that Judge Adams erred both in law and in his analysis of the facts, and that he failed to recognise that Mr and Mrs Narayan senior wished to be fair to all of their children, and that the "irrevokeable document" was an honest attempt by lay people to record what had transpired, and to protect Mr Vicky Narayan's siblings. Like Mr Keene, he went through the evidence supporting the proposition that the advance was a loan rather than a gift in some detail.

[34] Mr Hall appearing for Sameeta Narayan dealt first with the applicable principles under the Property (Relationship) Act 1976. He then dealt with what was the appropriate approach on an appeal of this kind, and he noted that the findings of fact of the Family Court – particularly on issues of credibility – should be given appropriate weight.

[35] Mr Hall accepted that the intention of the donor was a factor, but submitted that Judge Adams had correctly analysed the evidence in weighing the competing

factors. He submitted that the issue of credibility was crucial in deciding whether the advance was a loan or a gift, and that the role of Mr Vicky Narayan was both central and critical. He noted that Judge Adams preferred the evidence of Sameeta Narayan, and he referred to the Judge's observations that Mr Vicky Narayan had told Sameeta Narayan what had suited him to tell her. He suggested that various aspects of Mr Vicky Narayan's evidence were unsatisfactory and, like other counsel, he took me through the evidence in some detail.

[36] He submitted that in determining the advance was a loan or a gift, that the evidence had to be analysed in its entirety. He pointed out that Sameeta Narayan was not shaken in her evidence, and that whether or not the funds advanced were a loan or a gift is a question of fact, which turns upon findings as to the intention of the person or persons making the advances at the time the advance was made. He noted that Sameeta Narayan was not a party to the "irrevokeable document" and he submitted that there were various unsatisfactory aspects to that document. He noted that the terms of the document were not met, and that Judge Adams made the correct findings in light of the evidence including credibility where it was relevant. He particularly referred to the fact that the Judge found that Sameeta Narayan remained unaware of the "irrevokeable document" until 27 May when the couple separated and she moved out of the family home.

Approach to appeal

[37] The appeal is brought pursuant to s 39(2) of the Property (Relationships) Act 1976. The High Court Rules and ss 74 to 78 of the District Courts Act 1947 apply. It follows that the appeal is by way of rehearing.

[38] The nature of such appeals was recently discussed by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141. The following principles can be derived from that decision:

a) the appellant bears the onus of satisfying the appeal court that it should differ from the decision under appeal – see [4];

b) it is only if the appellate court considers that the appealed decision is wrong that it is justified in interfering with it – see [4];

c) the appeal court has the responsibility of arriving at its own assessment on the merits of the case – see [5];

d) no deference is required beyond the customary caution appropriate when seeing the witnesses provides an advantage because, e.g. credibility is important – see [13]; and

e) the appellate Judge is entitled to use the reasons of the first instance decision maker to assist him or her in reaching his or her own conclusions, but the weight the Judge places on them is a matter for the Court – see [17].

[39] The position is summed up in the judgment of Elias CJ at [16] as follows:

> Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

[40] Here, that part of the Family Court judgment under appeal does not involve the exercise of a discretion. It follows that the *Austin Nichols* approach applies to the appeal.

Analysis

[41] I am acutely aware that Judge Adams treated the issue as one of fact, and that he expressly observed that his assessment of the parties when they gave oral evidence assisted him in determining the relevant findings of fact – see [4]. Given Judge Adams' observations, I have read the affidavits which were filed, and the transcript of evidence, in full.

[42] At common law, a gift *inter vivos* is a gratuitous transfer of property of any kind to another by a living donor, not make in contemplation of, and conditional upon, the donor's death. It is a voluntary transfer from the owner to another made with the intention that the subject matter is not to revert to the donor – see *The Laws of New Zealand – Gifts* at para 1. In contrast a loan is a thing lent for the borrower's temporary use, such as a sum of money lent at interest – see *Black's Law Dictionary* (9ed, 2009), at 1019.

[43] A gift *inter vivos* may be made by delivery where the subject matter is open to delivery – *The Laws of New Zealand – Gifts* at para 4, and see *Cochrane v Cochrane* (1890) 25 QBD 57 at 76.

[44] Given the fact that the subject of the gift/loan was money, I agree with Judge Adams at [38] that an appropriate starting point in the present case is the judgment in *Williams v Williams* [1956] NZLR 970. In that case, North J observed that for there to be valid gift of a chattel *inter vivos*, three things are necessary:

a) the expression of the intention of the donor to make a gift;

b) the assent of the donee to the gift; and

c) the actual or constructive delivery of the chattel to the donee.

North J observed that even in the case of a gift to a member of the donor's family, there must be some overt act on the donor's part which can be treated as evidence of the delivery of the subject of the gift to the donee.

[45] I also agree with Judge Adams at [39] that, in the present case, there is no issue about the delivery of the funds. It is not in dispute that $95,000 was credited into Vicky and Sameeta Narayan's joint bank account on 18 March 2005, and that $5,000 was advanced direct to Vicky Narayan. Nor is there any issue about assent by Sameeta Narayan to the gift (if that is what it was). Express acceptance by a donee is not necessary to complete a gift, and the acceptance of a gift by a donee is to be presumed until dissent is signified, even though the donee is unaware of the

gift: *Butler & Baker's Case* (1591) 76 ER 684, and generally *The Laws of New Zealand – Gifts* at para 49. In any event Sameeta Narayan clearly takes the view that the monies were advanced by way of gift, and she has not dissented in any way from accepting the same. Vicky Narayan does not however accept that the monies were advanced by way of gift. He takes the view that they were advanced by way of loan. I accept that the fact that the recipient regards the thing given as lent and intends to treat it that way does not prevent the transaction being effective as a gift: *Dewar v Dewar* [1975] 1 WLR 1532. Nevertheless, the dispute in the present case turns primarily on the expression of the intention of Mr and Mrs Narayan senior as donors. What intention did Mr and Mrs Narayan senior have when Mrs Narayan senior deposited $95,000 into the couple's joint bank account, and handed over $5,000 to Mr Vicky Narayan on 18 March 2005?

[46] There is a presumption that the transfer of property from parents to their children is a gift. I refer to *Warren v Gurney* [1944] 2 All ER 472 at 473 where Morton LJ noted:

> It is well established that when a parent buys a property and has it conveyed into the name of his child, there arises a presumption that the parent intended to make a gift or advancement to the child of that property. Of course, that is a presumption which can be rebutted by evidence that that was not the [parent's] intention.

In that case, the Court held that oral declarations made by the donor at the time when the property there in issue was brought were sufficient to rebut the presumption of gift or advance: see generally, *Halsbury's Laws of England* (4ed, 1973), Vol 20(1), Gifts at para 45. I note also the discussion in *Young v Young* [2000] NZFLR 128 at 131-134. With respect to Judge Sommerville, it is in my view premature to conclude that the presumption of advancement is a legal anachronism, although I acknowledge that in other jurisdictions the view has been expressed that the presumption is outdated – see Butler (ed), *Equity and Trusts in New Zealand*, (2ed, 2008) at para 12.5.4.

[47] The presumption of advancement can be rebutted by evidence showing that there was no intention to benefit the alleged donee by way of gift. A contemporaneous act or declaration by the alleged donor will suffice. Acts or

declarations by the donor subsequent to the purchase or transfer, unless so connected with it as to be reasonably contemporaneous, are not admissible in favour of the donor to rebut the presumption – see *The Laws of New Zealand – Gifts*, at para 47 and cases there cited; *Halsbury's Laws of England* (4ed, 1973*)* Gifts, Vol 20(1) at para 48.

[48] In the present case, there is direct evidence establishing Mr and Mrs Narayan senior's intention. There is the "irrevokeable document". Mrs Narayan senior gave evidence in relation to the preparation of the document. She stated that she and her husband discussed the document. He decided what clauses to put in it. They wanted to record that they had given Vicky Narayan $25,000 as a gift and $100,000 as a loan. Mrs Narayan senior drafted the document in Fiji. Her daughter typed it up in New Zealand. It was signed in the presence of a legal secretary who witnessed its execution. Mrs Narayan senior and Vicky Narayan signed it on the same day that $95,000 was paid into the joint bank account, and $5,000 was paid to Vicky Narayan. It was signed by Mr Narayan senior a few days later, again in the presence of the legal secretary.

[49] Judge Adams was, at [20], satisfied on the balance of probabilities that the "irrevokeable document" was prepared and signed on the dates noted on the face of it. Having read the affidavits and the transcript, I am satisfied that Judge Adams' finding was correct on the materials before him.

[50] I note that notwithstanding that it was Sameeta Narayan's case that the document had been prepared and signed after the event, and only because of the impending collapse of the marriage, there has been no cross-appeal by her against the Judge's findings in this regard.

[51] Mr and Mrs Narayan senior's description of the transaction is not conclusive as to gift or no gift. The Court can in appropriate cases look at the totality of the transaction: see *Esso Petroleum Co Limited v Customs & Excise Commissioners* [1973] 1 WLR 1240 at 1246 to 1247, reversed on another point, [1975] 1 WLR 406, and further appeal dismissed, [1976] 1 WLR 1. Nevertheless in my judgment, there is no need to go behind the description of the transaction recorded in the

"irrevokeable document". It clearly recorded that as between Mr and Mrs Narayan senior and Vicky Narayan, the $100,000 advance was a loan, and not a gift. The document is clear evidence of Mr and Mrs Narayan senior's intentions at the time the advance was made.

[52] The "irrevokeable document" made between Mr and Mrs Narayan senior and Vicky Narayan cannot be ignored. I refer to the decision of the Court of Appeal in *Mills v Dowdall* [1983] NZLR 154, and in particular to the observations of Richardson J at 159. I also refer to *NZI Bank Limited v Euro-National Corporation Limited* [1992] 3 NZLR 528 at 539 where Richardson J observed as follows:

> The legal principles are well settled. First the true nature of a transaction can only be ascertained by careful consideration of the legal arrangements actually entered into and carried out. It is not to be determined by an assessment of the broad substance of the transaction measured by the overall economic consequences to the participants. The forms adopted cannot be dismissed as mere machinery for effecting other purposes. At common law there is no half-way house between sham and characterisation of the transaction according to the true nature of the legal arrangements actually entered into and carried out. A document may be brushed aside if and to the extent that it is a sham in two situations. The first is where the document does not reflect the true agreement between the parties in which case the cloak is removed and recognition is given to their common intentions. The second is where the document was bona fide in inception but the parties have departed from their initial agreement while leaving the original documentation to stand unaltered. Once it is established that a transaction is not a sham its legal effect will be respected. For recent discussions in this Court it is sufficient to refer to *Re Securitibank Ltd (No 2)* [1978] 2 NZLR 136; *Buckley & Young Ltd v Commissioner of Inland Revenue* [1978] 2 NZLR 485; *Marac Finance Ltd v Virtue* [1981] 1 NZLR 586; *Mills v Dowdall* [1983] NZLR 154; and *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694.

[53] Unless the "irrevokeable document" can be set aside as a sham, it cannot be dismissed as mere machinery for effecting another purpose. As was noted by Richardson J in *NZI Bank*, a document may be set aside as a sham in two situations. The first is where the document does not reflect the true agreement between the parties, in which case the cloak is removed and recognition is given to their common intention. The second is where the document was *bona fide* in inception, but the parties have departed from their initial agreement while leaving the original document to stand unaltered.

[54] Judge Adams did not find that the "irrevokeable document" was a sham. Rather he found that it was prepared for the purpose of using it in the very circumstances that arose, namely the separation of the parties. He also found that it was of no legal effect at [71]. With respect I have difficulty in reconciling those two findings.

[55] Judge Adams reached his conclusion that the document was of no legal effect for a number of reasons.

a) His Honour considered the terms of the "irrevokeable document" were muddled. He note that the document recites the receipt of $125,000, bundling the earlier $25,000 gift in with the $100,000 provided in March 2005 (at [56]). In context, I do not regard this part of the document as being muddled. While the $25,000 had been advanced at an earlier date, the position was explained by Mrs Narayan senior in evidence. She wanted to record that she and her husband had given Vicky Narayan $25,000 as a gift, and $100,000 as a loan. In my view, that is what the document achieves. The Judge correctly observed that later documents were muddled, but I do not see that those documents assist in ascertaining what Mr and Mrs Narayan senior's intention was when the advance was made. To my mind, there was force and logic in Mrs Narayan senior's assertion in evidence that $100,000 "is not peanuts", and that:

> … we thought we have to make some documents, just any type of documents in writing to – for – to keep it in our records that we have given Vicky the loan and this loan will be returned to us. Nobody can give $100,000 just any how to anybody even to ... children, so it's a loan, we have to secure our loan.

b) His Honour was also influenced by what he called the "heavy" interest rate recorded in the document. That interest rate was 12% per annum. He observed, at[62], that in March 2005, home mortgage interest rates were generally below 9%, and it struck him as incredible that Mr and Mrs Narayan senior would burden their much loved son and his wife with such an excessive rate of interest. With respect,

those observations are in large part speculation. The first mortgage granted by Vicky and Sameeta Narayan to the bank was at a fixed interest rate of 7.99% up to $200,000, at 8.50% for the next $40,000, and at 8.99% for the last $10,000. This was as at late October 2005. There is nothing else in the evidence suggesting that home mortgage rates in March 2005 were generally below 9%. In any event the "irrevokeable document" was an acknowledgement of debt. Although it called for Mr and Mrs Narayan senior to be registered as joint proprietors of the property, the loan was not secured against the property. A higher interest rate is understandable given that fact. Further there is no evidence as to what interest rates were at the time in Fiji. These various issues were not put to Mrs Narayan senior when she gave evidence. In my view, there was no proper basis on which the Judge could call into question the validity of the "irrevokeable document" because of the interest rate contained in it.

c) His Honour considered, at [63], that because Mrs Narayan senior indicated that the purpose of the document was to give her and her husband security, the document was intended to create a gift, in the event that something went sour in Vicky and Sameeta Narayan's marriage. With respect, I cannot follow his reasoning in this regard. Such transactions are perfectly normal. Frequently those advancing monies to those close to them take an acknowledgement of debt. Otherwise they render themselves liable to pay gift duty. The debt remains a loan, even if the lender gifts off either interest or principal over time, until the total sum lent has been extinguished by gifts or it has been forgiven by the lender in his or her will.

d) His Honour considered, at [64], that the manner of delivery of the funds, and the provision in the "irrevokeable document" that the same were to be used to acquire a house in all four names, was an outcome that cannot have been credibly expected. Again, with respect, I cannot follow this reasoning. The loan evidenced by the "irrevokeable document" was made on the express basis that Vicky

> Narayan was to buy a house with the monies. The house was to be registered in the names of Vicky and Sameeta Narayan and Mr and Mrs Narayan senior. Mr and Mrs Narayan senior were to have the right to occupy a room in the house whenever they came to New Zealand. Clause 5 provided that if Vicky Narayan failed to comply with any of these provisions, Mr and Mrs Narayan senior were to have the right to demand immediate repayment of the loaned sum together with interest. In the event, the majority of the monies were used to purchase a house. The house was not placed in the names of all four parties. The reasons for that were explained by both Vicky Narayan and Mrs Narayan senior in evidence. The fact that the house was not placed in the names of all four parties does not compel the conclusion that the document does not evidence a loan.

[56] With respect to Judge Adams, I cannot agree with his conclusion that the "irrevokeable document" was of no legal effect.

[57] Having read the evidence I have concluded that there is no proper basis for concluding that the "irrevokeable document" was a sham. An allegation of sham, being akin to an allegation to fraud, should not be lightly made. Those engaging in a sham are in reality seeking to deceive others as to the true nature of what they have agreed and are intending to achieve: see *Ben Nevis Forestry Ventures Limited v Commissioner of Inland Revenue* [2009] 2 NZLR 289 at [39]. There is nothing in the present case to suggest anything of that kind.

[58] If the document was not a sham, then its legal effect should be respected – see *NZI Bank* at 539. It seems to me that Mr and Mrs Narayan senior's intention was patently clear, and that it was expressed in the "irrevokeable document". The legal effect of the document was to record a loan to Vicky Narayan.

[59] Judge Adams found at [35] to [36] that Sameeta Narayan was not told about the loan and that Vicky Narayan told her the advance was by way of gift. This does not affect the position. In large part the advance was used to buy the property at Stellata Court. The property was registered in the couple's joint names. The loan is

therefore a relationship debt pursuant to s 20(1) of the Act. Relevantly that section provides as follows:

> …
>
> **relationship debt** means a debt that has been incurred, or to the extent that it has been incurred,—
>
> (a) by the spouses or jointly; or
>
> (b) in the course of a common enterprise carried on by the spouses or whether alone or together with another person; or
>
> (c) for the purpose of acquiring, improving, or maintaining relationship property; or
>
> (d) for the benefit of both spouses or in the course of managing the affairs of the household; or
>
> (e) for the purpose of bringing up any child of the marriage, civil union, or de facto relationship.

[60] It will be noted that the definition distinguishes between debt that has been incurred by the spouses jointly, and debt acquired for the purpose of acquiring relationship property. Debts that are incurred to acquire relationship property need not be incurred jointly to be relationship debts: see *S v C* [2007] NZFLR 472; *Bergner v Nelis* HC AK CIV 2004-404-149, 19 December 2005; *Moore v Moore* HC AK HC 99/97, 20 November 1997.

[61] Section 20(2) is also relevant. It provides as follows:

> To avoid any doubt, for a debt to fall within paragraph (c) of the definition of "relationship debt" in subsection (1), it is not necessary that, at the time at which the debt was incurred, the property for which it was incurred was relationship property, as long as the property later becomes relationship property.

This subsection reinforces the view that debts that were incurred by one party to a relationship become relationship debt where the debt was incurred to acquire property that becomes relationship property.

[62] Here $92,725.71 of the monies advanced by Mr and Mrs Narayan senior were used to purchase the Stellata Court property. In my view this sum is a relationship debt. It falls squarely under s 20(1)(c).

Conclusion

[63] In my judgment, the "irrevokeable document" is decisive. It records Mr and Mrs Narayan senior's intention at the time the advance was made. The document is not a sham and it must be given its intended effect. The intended effected was to record the loan from Mr and Mrs Narayan senior to Vicky Narayan. The other considerations taken into account by Judge Adams can not undermine that legal effect. In accordance with the "irrevokeable document" Vicky Narayan used the monies in large part for the purpose of acquiring relationship property. To the extent that the advance was used to acquire relationship property – $92,725.71 – the resulting debt is a relationship debt, and it must be taken into account in determining the extent of the parties' relationship property. The balance may or may not be relationship debt depending on what it was used for. There is insufficient information available to determine that issue.

[64] The appeal is allowed to this extent. As a result of this decision, it follows that Judge Adams' order made in [72] of his decision must also be set aside. So must His Honour's ruling as to costs because that order turned on the loan/gift issue. Other orders made by the Judge in relation to cars, superannuation, chattels, and jewellery are not affected by this decision.

Costs

[65] In the circumstances of this case, it is my preliminary view that each party should bear his, her or their own costs. If any party disagrees with this view, then a memorandum seeking costs is to be filed and served within 10 working days from the date of this judgment. Any party contesting any claim to costs is to file and serve a response within a further 10 working day period. I will then deal with the issue of costs on the papers unless I require the assistance of counsel.

Wylie J