

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO. 258 OF 2008
(ON APPEAL FROM HCMP NO. 4073 OF 2003)

IN THE MATTER of the trusts of the Will dated
26th October 2002 of KWANG SHU WU alias
WU KWANG SHU [吳光叔] late of 30
Waterside Plaza, County, City and State of New
York, USA, deceased (“the Deceased”)

and

IN THE MATTER of various accounts
maintained with the Bank of East Asia in Hong
Kong in the names of Good Harvest Capital
Limited, Hacienda Pacific Limited and Vacha
Limited

and

IN THE MATTER of Order 85 rule 2 of the
Rules of the High Court, Cap.4

BETWEEN

YUNG SHU WU	Plaintiff
Executor of the Estate of the Deceased	
and	
VIVIENNE SUNG WU alias	1 st Defendant
WU SUNG PING VIVIENNE	
GERALDINE AMBER WU	2 nd Defendant
CHRISTOPHER CHARLES WU	3 rd Defendant
SEAN EDWARD WU	4 th Defendant
GOOD HARVEST CAPITAL LIMITED	5 th Defendant
HACIENDA PACIFIC LIMITED	6 th Defendant
VACHA LIMITED	7 th Defendant
THE BANK OF EAST ASIA LIMITED	8 th Defendant

Before: Hon Rogers VP, Le Pichon JA and Poon J in Court

Dates of Hearing: 19 & 20 May 2009

Date of Handing Down Judgment: 16 June 2009

J U D G M E N T

Hon Rogers VP:

1. This was an appeal from a judgment of Deputy High Court Judge L Chan given on 26 June 2008. The matter before the judge had commenced as an application for the construction of one clause in a will. By the time the matter came to be heard, there was a full witness action and counterclaim. The plaintiff sought not merely construction of the particular clause but also an order that the first defendant (“Vivienne”) do return monies which had been removed from accounts of three companies, namely the fifth, sixth and seventh defendants.
2. By her counterclaim Vivienne sought a declaration that the monies and securities in the bank accounts of those three defendants, as more particularly set out in the schedule to the amended defence and counterclaim, had since late December 2001 belonged to Vivienne wholly to the exclusion of the deceased and his estate, after his death.
3. The judge found in favour of Vivienne on the counterclaim and made the declarations sought. At the conclusion of the hearing of this appeal judgment was reserved which we now give.

Background

4. The deceased, Kwang Shu Wu, alias Wu Kwang Shu, (“KS”) died in Hangzhou on 19 December 2002. His last will was made on 26 October 2002 and there is no dispute as to its validity. The dispute centres upon the ownership of funds held in the names of the fifth, sixth and seventh defendants and the effect of the particular clause in the will relating thereto. Although the ultimate issue in this case turns upon one point, it is appropriate to give an outline of the history leading up to this case.
5. KS’s first wife died in 1981. The second defendant, Geraldine, was then aged about seven years old and KS made a will, in New York where they were living, leaving everything to Geraldine. Two years later KS married the first defendant, Vivienne. At that time KS was 46 years. In the words of his elder brother, the plaintiff, KS was a seasoned businessman with business contacts in Taiwan, China and the United States. He was a US citizen and worked for Ebasco Engineering

Consultant Company. After the marriage the plaintiff worked for that company in Hong Kong for a time.

6. Vivienne was some 15 years younger than KS. She was born and raised in Shanghai. Her parents had died some years earlier and she had come to Hong Kong in 1979. The judge makes reference to some of her background in paragraphs 32 and 33 of the judgment. Indeed, it would seem from her witness statement that her background was not typical of what might have been expected of one who grew up during the cultural revolution. Apparently, she was able to continue her education in private and that included having English lessons. When her parents died in 1968 and 1971 she inherited RMB600,000 which was said to be equivalent of US\$420,000. In addition there was a property in Shanghai.

7. Vivienne describes herself as having cultivated and maintained good connections both in Hong Kong and China. KS left Ebasco and in 1988 or 1989 set up his own engineering consulting business. Vivienne attributed much of her husband's success in business as being due to her work in generating business. She describes herself as being the perfect hostess/companion when KS was engaged in business entertainment. Whereas that might otherwise be regarded as hyperbole, it cannot be wholly discounted having regard to the photographs of KS and Vivienne at their wedding together with the former Chairman of the Communist Party of the P.R.C. and, later, with their families together at various stages. One is left with the impression that Vivienne must have been accustomed to an unusual position from an early time and had access to spheres of influence which would not normally be possible.

8. The fifth and seventh defendants are Liberian companies. They were acquired in 1984 and 1986 respectively. In respect of each company Vivienne and KS each owned one share. Vivienne was intimately involved in setting up these companies. Vivienne said that the two companies were used as nominees to hold the couple's shares in their joint business ventures with others and as time went by they tended to use the seventh defendant for transactions of the engineering consultancy business and the fifth defendant for saving the rewards of their business. It suffices to say that although the seventh defendant did make investments and can be said to have carried on business, both companies appear to have been used by KS and Vivienne as a repository of the money which was earned by him. Vivienne said she regarded herself as having an equal share in the assets held by these companies. It is also right to say that although both KS and Vivienne had signing rights in respect of those companies' accounts, the accounts were to a large extent operated by Vivienne.

9. On 29 May 1986 KS made a codicil in New York to his will. It is unnecessary to dwell at any length on the terms of that. It suffices to say that by giving Vivienne one third of the income to be derived from his estate, KS made minimum provision under New York law for her. In addition, the codicil states that KS had in mind that a child was to be born to Vivienne but made no provision for that child.

10. That all was, perhaps, not well with the marriage can also be gleaned from the fact that in July 1986 KS contacted his New York lawyer wanting to know the various merits of the divorce law in the state of New York as compared to Hong Kong.

11. It might also be mentioned that it is clear that Vivienne never was on good terms with Geraldine. Although Vivienne and KS lived in New York for a time after their marriage, it was soon agreed that Geraldine would not live under the same roof as Vivienne. Vivienne describes the difficulties between the two of them as being that Geraldine regarded her as a "wicked stepmother". Whatever the rights and wrongs of that situation, Geraldine thereafter stayed in New York living with a housekeeper and her father used to visit her at Christmas and Easter

12. KS and Vivienne had two children. Christopher, the third defendant, was born in August 1986 and Sean, the fourth defendant, was born in October 1988.

13. In November 1989 KS made a second codicil in New York. By the terms of that, the provision in the first codicil that Vivienne would merely have a minimum amount was made not to apply to any property located in Hong Kong. The exclusion of Christopher, who had been born in 1986, was removed and Vivienne, Christopher and Sean were given the Hong Kong property save and except for the home in Hong Kong, namely a flat in South Bay Road which was said to be given to the first defendant. It may be noted here that KS's interest in that flat would have passed to Vivienne on his death in any event because it was held by them as joint tenants. Mr Frey, the New York attorney who prepared that codicil, said in evidence that he thought that at that time KS's assets in Hong Kong and New York were more or less equal "to the best of his recollection".

14. At some stage, probably in about 1995, KS worked for the First Sino Bank in Shanghai. In 1997 the couple bought a vacation home in Honolulu.

15. At some stage the sixth defendant was acquired and there is no dispute that at all material times the KS held some of his personal savings, stocks and shares and other investments in that company. Vivienne says that he did so and operated that company on his own in much the same way as she operated Cardinal Pacific Limited, which was her personal company.

16. In October or November 2001 KS transferred a total of US\$0.25 million to Geraldine. That was shortly before he was diagnosed as having liver cancer. That happened in December 2001. At the time, it appears that Vivienne and KS were in Hong Kong. They wished to have a second opinion and made arrangements to travel to the United States on 29 December 2001.

The December 2001 gifts

17. Central to this case is whether or not KS made gifts of his interests in the bank accounts and other assets held by the fifth, sixth and seventh defendants. The evidence of the making of the gifts is by no means clear. In paragraph 33 of her witness statement Vivienne said in relation to the seventh defendant:

"In addition, by reason of the arrangements made by K. S. which I will mention in a moment, K.S. had made a gift of his half share (which was also USD 2.25 million) to me."

18. A little further on at paragraph 38 of her witness statement Vivienne said:

"38 (1) Although we did not want to accept defeat and immediately made arrangements to leave for the USA on 29 December 2001 for a second opinion on K.S.'s condition, K.S. wanted to be prepared for the worst.

(2) Having made financial provisions for me as aforesaid through Good Harvest and Vacha and our other jointly owned properties, K.S. was concerned that his children should also be adequately provided for.

(3) We discussed how he should divide the assets under his name. We agreed that he should leave everything he had in New York to Geraldine (who was then in her late 20's and living in New York and studying for a doctorate degree at the University of Colombia) and his estate outside New York to Christopher, Sean and myself through gifts to me."

19. Vivienne went on to say that KS then added Vivienne as a signatory to the sixth defendant's bank accounts with authority to operate them on her own. She said that while the sixth defendant remained KS's company he:

".. made a gift to me of the monies that were, or were to come, into Hacienda's accounts with the wish that I could and would continue to ensure the welfare and education of Christopher and Sean after his death. My being added as a signatory with authority to singly operate Hacienda's bank accounts was to allow me to obtain this and any other monies therein as my own monies."

20. As regards the fifth and seventh defendants she said that:

"K.S. simply told me that he gave his shares in the monies to me."

21. Apart from making Vivienne a signatory to the sixth defendant's bank accounts the only other matter relied upon by Vivienne was set out in paragraph 41 of her witness statement where she said:

"Just in case K.S. had omitted to do anything necessary to give effect to his intention and agreement to give his estate outside New York to me, K.S. appended his signature to 3 blank pieces of paper, true copies of which are now produced as Annex 7 to this Statement, and gave them to me so that I could use these instruments to complete the outstanding formalities for K.S, where necessary."

22. This court's attention has not been drawn to any evidence of specific words of gift, nor did the judge refer to any in his judgment. Although the judge was critical of some aspects of the first defendant's evidence he nevertheless reached the conclusion that KS had given the balance of the corporate bank accounts to Vivienne. In paragraph 116 of the judgment he said:

"116. I come to the conclusion of gifts of moneys by KS to Vivienne more because of my analysis of the relationship between KS and Vivienne, the way that KS had dealt with his assets in his various wills and codicils and the unchallenged evidence of Vivienne's witnesses. They gave tremendous support to Vivienne's own evidence."

23. After the diagnosis of liver cancer had been confirmed on 28 December 2001, KS and Vivienne went to Honolulu. On 28 and 31 December 2001, KS transferred a total of US\$250,000 to Geraldine from the sixth defendant's foreign currency account in Hong Kong. The prognosis that KS received in Hawaii was, if anything, worse because he was told that he had a stage four liver cancer. That confirmation came on 11 January 2002. Whilst in Hawaii, KS made a second will. It would appear that by that stage Vivienne had not been aware of the first will or the 2 codicils. That second will was prepared by Mr Thomas Mui, who was a lawyer practising in Honolulu. As well as the will, the attorney prepared what was called a Durable Power of Attorney and a Durable Power of Attorney regarding Health Care decisions and a Declaration of Kwang Shu Wu which is sometimes called a "living Will". The second will made Vivienne KS's personal representative. It provided that the Citibank checking account in New York should be given to Vivienne. In this respect it seems to be accepted that this was to enable the Honolulu property to be kept up. It also provided that:

"All of the rest, residue and remainder of my property, whether real, personal or mixed, wheresoever situate and of whatever nature, including any properly over which I may have any power of appointment, hereinafter called my "residuary estate", to my daughter GERALDINE AMBER WU, of New York City."

24. Clearly this will was drafted in somewhat of a hurry. Indeed, it is clear from the covering letter from the attorney, dated three days before the date of the will, that there might have been some confusion. In the second paragraph of that letter he stated:

“In regards to your Last Will and Testament, you have informed me that all of your American assets, except for your checking account at Citibank is in joint name or with designated beneficiaries. Accordingly, I have made your Will a simple one as the other assets would be distributed outside of the will, that is, it would automatically go to the beneficiaries without a direction from the will. In the case of Citibank account, you have designated your wife Vivienne as the sole beneficiary.”

25. It would appear from that that as far as the American assets were concerned, the attorney had understood that they were already “with” designated beneficiaries. As far as the other assets were concerned it would appear that the attorney had understood that they “would be distributed outside of the will” and “would automatically go to the beneficiaries without a direction from the will”. Without, perhaps, reading too much into the contrasting wording of the two sentences, it is clear that this latter statement with regard to “other assets” is referring to a future distribution rather than a notion that KS had already distributed and divested himself of all his assets. Given the fact that the second will revoked all previous wills and codicils, it might have been thought that any major assets of KS were held jointly with Vivienne and would automatically go to her or they would fall to be distributed on intestacy. On either basis Vivienne would clearly be a major beneficiary and if the assets were to be distributed on an intestacy, depending on the size of the estate, the children would also take an equal share to that of the surviving spouse. If that had been the rationale, rather than confirming that KS had already given all his interest in everything relating to the fifth, sixth and seventh defendants to Vivienne, that statement would be consistent with KS considering that at least half would go to Vivienne with 1/6 part to each of the children including Geraldine. On that footing KS would be justified in considering that he had made proper provision for his wife and the two boys because the bulk of his estate in Hong Kong would go to them when he died.

26. However, the judge considered that the proper interpretation of the facts leading up to the second will was that KS had already given all the accounts and other assets of the fifth, sixth and seventh defendants to Vivienne. Given the fact that Vivienne was not intended to be left destitute, that might be a conclusion if the will had been properly considered, but it is clear from Vivienne’s oral evidence that that was not the case. She said that, at the time, she and KS were concerned with finding the right doctors. They were in a hurry and leaving for California on 16 January. From what she said in evidence, it would seem that neither KS, nor herself, really looked at the will to any extent: (see Transcript pages 284-5).

27. On 16 January 2002 KS went to San Francisco with Vivienne and Geraldine arrived on the same day. On 27 February Vivienne withdrew almost US\$100,000 from the sixth defendant’s, Hacienda’s account to pay for KS’s medical expenses and the family’s living expenses. On 14 March KS had an operation to have the right lobe of his liver removed but it was discovered that the cancer had already spread to the left lobe. At the end of March, KS and Vivienne went to Shanghai in order for him to continue his treatment.

28. Both the sons were also in Shanghai in March and the again in the summer of 2002. At the time they were both studying in the United States. Christopher was at school in Boston and Sean was at school in Hawaii. In his witness statement Christopher said that he had had two conversations privately with his father, one in March and one in the summer. He said that his father had reassured him that no matter what the outcome of his medical treatment was Christopher would not have to worry about his future and provision. His statement went on:

“He explained to me that he had already made financial arrangements with my mother to secure the future of Sean and me. He told me that my mother had at least half of the family assets and on top of that, he had already given her more to make sure that we could continue our education and to maintain our lifestyle.”

29. KS transferred US\$2,202,459.10 from an account of the sixth defendant to an account of the seventh defendant on 17 April 2002. The judge held that he did so for the purpose of making a gift of it to Vivienne. In June of that year KS and Vivienne moved into an apartment owned by Vivienne’s elder brother.

30. At that stage, it is not clear exactly how good or bad the relations between KS and Vivienne were. From Vivienne’s evidence and from what was said by others it would appear that Vivienne did devote her energy to looking after KS. At the same time, she was no doubt concerned about the future financial position, given the fact that KS’s health was precarious, to say the least. Perhaps the matter which concerned her most in that regard was the fact that Christopher and Sean were young and had many years of education ahead of them. Furthermore, they were at school in the United States and the couple estimated that they would need approximately US\$60,000 per year for each child.

31. It is, thus, understandable that the strain caused by KS’s illness and having to cope with that, coupled with worry as to the future, caused tension. The judge appears to have accepted, without expressly saying so, that KS and Vivienne had a major quarrel on 21 July. The plaintiff attributed that to the fact that KS had remitted a total of US\$15,000 in two parts to Geraldine, one on 28 June and the other on 4 July. That quarrel was said to have lasted anything up to 6 hours. At the end of July, KS remitted 2 further sums of US\$7,500 each to Geraldine. Geraldine returned that money, apparently, to reduce the pressure which was placed on KS in respect of it.

32. There is no doubt that there was considerable tension between Geraldine on the one part and Vivienne and Christopher and Sean on the other part. For example, at page 294 of the transcript of her evidence, Vivienne spoke about KS giving Geraldine “the best kind of watch”. She considered that her sons should get the same. She also made reference to Geraldine having a first-class ticket round the world each year. Indeed, Christopher also made reference to air tickets, in the context of mileage upgrades, in an e-mail which will be referred to later. In his evidence, Christopher said that Geraldine’s presence in Shanghai in the summer of 2002 caused tension. A small thing was given as an example, namely the fact that Geraldine was prepared to scratch her father when he complained of itching although the doctors had warned against this because of the risk of infection. In summary, it is impossible at this stage to attribute blame to one party or another. There is no doubt that Vivienne tried to look after KS as best she could, but she also wanted to protect her own and her sons’ future position. There is also no doubt that KS was very fond of Geraldine. Both Christopher and Vivienne said in their evidence that they considered that KS was a very fair man. They said that in the context of his division of his assets amongst the family.

33. It was against this background that the events in the autumn of 2002 arose. At the end of August, Vivienne left Shanghai to accompany Christopher and Sean back to school. The following day, the plaintiff went to Shanghai. In the course of his conversations with KS he said that KS told him that Vivienne had started to abuse him in about April of that year and had wanted him to divulge all his financial information. KS was angry at this and had responded that the money belonged to him and he could do whatever he liked with it. There was mention of possible divorce if he recovered and that he and Vivienne had behaved as a loving couple in front of others in order to preserve face.

34. It was the plaintiff's case that, when Vivienne learnt from the servant that the plaintiff was staying with KS and Geraldine in her flat in Shanghai, she said that both the plaintiff and Geraldine should leave before she returned to Shanghai. The upshot was that the plaintiff promptly left Shanghai and KS left the apartment with Geraldine. When Vivienne returned to Shanghai later that month she was unable to find KS and, indeed, she never saw him again.

35. Whatever the circumstances, that was no doubt a very disquieting thing to happen. Amongst other things, that caused Christopher to send an e-mail on 22 September in which he was highly critical of his father's conduct in disappearing. He refers to arguments between KS and Vivienne and he shows some underlying resentment for Geraldine. Indeed he says towards the end of the e-mail:

"Sean and i still has many years to go before we can get jobs thus I think we need more money that her and not an equal amount."

36. Shortly thereafter, KS spoke to his New York lawyer, Stephen Frey, who had drafted his first will and codicil. The judge recorded that it had been a 23-minute conversation and Mr Frey had kept notes. KS had also told Mr Frey that his marriage to Vivienne had not been good for many years.

"After KS had become ill, Vivienne "hi-jacked" him and abused him. He also said that he had moved out of Vivienne's apartment and he did not want Vivienne to know of his whereabouts."

37. KS had an operation there on 27 October 2002 that had been unsuccessful. The day before his operation he made his last will. He commenced by revoking all previous wills and codicils. All his assets in New York including accounts at Fidelity Investments, Empire Investments, Citibank and Chase were given to Geraldine. Christopher and Sean were given the bank account at the Bank of East Asia in Hong Kong after all the medical expenses had been paid from that account. They were also given the proceeds of the bank account in the Standard Chartered Bank in Hong Kong. The condominium in Honolulu was given to Geraldine, Christopher and Sean. The flat in South Bay Road was also given to Geraldine, Christopher and Sean. Those two properties, however, were held as a joint tenant with Vivienne and, hence, it would appear that those bequests were invalid. The clause which gave rise to this case read as follows:

"I give, devise and bequeath unto my three children, GERALDINE AMBER WU, CHRISTOPHER CHARLES WU and SEAN EDWARD WU, in equal shares, the corporate accounts maintained by me at the Bank of East Asia in Hong Kong, including an account for Good Harvest Capital Limited, with an estimated worth of U.S. Dollars Four Million One Hundred Thousand (US\$4,100,000), an account for Hacienda Pacific Limited, with an estimated worth of U.S. Dollars Five Hundred Thousand (US\$500,000), and an account for Vacha Limited, with an estimated worth of U.S. Dollars Two Hundred and Seventy Thousand (\$270,000)."

38. KS died in Hangzhou on 19 December 2002.

39. What is at issue in this case is whether KS could, indeed, make the bequest set out above. In short it is Vivienne's case that because the balances of the bank accounts of the 3 companies had been given to her prior to their departure for Honolulu, it was no longer in KS's power to make that bequest. The judge upheld that and held that KS had simply been trying to undo what he had previously done.

40. The issue in this case is therefore quite simply, whether or not a valid gift had been given. As already noted, there is, seemingly, no reliable evidence of words of gift used. Certainly the judge did not find any precise words had been used. In so far as Vivienne's evidence is concerned it would seem that he did not altogether trust it as being sufficient. Apart from Vivienne the only witness who spoke of everything in Hong Kong having been given to Vivienne, was Vivienne's own sister-in-law, Chu Wai Fuk. She was, of course, not present when any gift was said to have been made.

41. Margaret Zee, also known as Ms Tsui Lik Yung, whom the judge described as Vivienne's good friend, lives in Honolulu. She said that KS told her, when he was there before he left for San Francisco, that he would leave everything to Vivienne, so that the sons' future could be adequately provided for. That, if anything, is a contradiction of any assertion that KS had already given everything to Vivienne before he left for Hawaii. It is simply a statement that he would be leaving everything to Vivienne.

42. Although KS had told Professor Zhang Cun-Hui "he had made arrangements so that Vivienne, Chris and Sean would be financially secure no matter what the result of the treatment would be". That, certainly, does not amount to a statement that he already given everything to Vivienne. The same can be said of what Dr Rosenthal was able to say. The judge was rightly rather sceptical of the evidence given by Chui Yuk Har Lydia. What he said was summarised in paragraph 57:

"She admitted that her boss Madam Ng and Vivienne had been friends for many years. Her oral evidence that they made Vivienne the owner of Hacienda by making her a signatory of the accounts of Hacienda is of importance to Vivienne's case. But this evidence did not appear in her witness statement. Her witness statement only said KS wanted Vivienne to operate and handle the company accounts of Hacienda. Since she was only told about this by her boss, her boss could also have come and give this evidence for Vivienne. There is also evidence that when the plaintiff's solicitors were making enquiry from her company in relation to these companies, her company did not appear to be co-operative. For these reasons, I have to consider her oral allegation on the purpose of making Vivienne an additional signatory of Hacienda with more care."

43. One important factor was that the judge said at paragraph 95 of the judgment:

"Indeed Mr Miu for the plaintiff has pointed out that Mr Frey, the long time attorney of KS, had also said that the Hong Kong assets and New York assets of KS were of more or less equal value."

44. Unfortunately, that was a misreading of Mr Miu's skeleton closing submissions. What was referred to was Mr Frey's evidence of the assets in New York and Hong Kong in 1989, referred to in paragraph 13 above. Counsel clarified that there had been no evidence at the trial as to KS having any significant's assets in New York in 2001-2. It is quite understandable that, in 1989, given that KS's previous history and the circumstances than pertaining, that he might well have had an equal amount of assets in New York and in Hong Kong. Given, however, his residence in Hong Kong, his work in Shanghai commencing in the mid-1990s and the change which had occurred in relation to the economy in the Mainland and circumstances in Hong Kong by 2001, it could be anticipated that the geographic distribution of his assets would have been very different.

45. In those circumstances, in the absence of clear words of gift I doubt whether the judge's conclusion as to a gift of the balances of the bank accounts of the fifth, sixth and seventh defendants is supportable. As already noted, the judge relied very much upon his analysis of the relationship between KS and Vivienne, the way that KS had dealt with his assets in his various wills and codicils and the evidence of Vivienne's witnesses. It has to be noted that the judge gave his

judgment some 18 months after he had heard the evidence. It could hardly have been fresh in his mind at the time of giving judgment. As noted above, the only witness who supported Vivienne's evidence as to a total gift to her was Vivienne's own sister-in-law. The other witnesses' evidence did not demonstrate that a gift had already been made. At best their evidence was that a gift or, more likely, adequate provision would be made. As to the relationship what has to be borne in mind is that clearly KS was not disposed to cut Geraldine out altogether and whilst he was concerned to provide for his sons, he was appreciated by Vivienne and Christopher, in particular, as being a fair man, who clearly, still wished to provide in some part for Geraldine.

46. I would also add that I have approached the matter on the basis that KS and Vivienne were equally entitled to the balances of the accounts held by the fifth and seventh defendants. This matter was challenged by Mr Miu on behalf of the plaintiff, but whilst observing that it would be usual to treat the bank balances as belonging to the companies, given the particular circumstances, I would not disturb the judge's findings in this respect.

47. I would, however, also observe that a gift of something that is to come into being in the future can only take effect if it is supported by valuable consideration. Insofar as it is asserted that the future balances of the bank accounts were given to Vivienne, it would appear that for that reason alone no such gift could have been effective. See *Snell's Equity* 31st edition, pages 43-44.

48. Quite apart from the above, it is clear law that for a gift to be effective not only must the donor have done everything in his power to effect such a gift but there must be delivery for the gift to be complete. There is a long line of cases which establishes that there must be delivery for a gift of personal property to be complete. Whilst not dissenting from that, Ms Wong SC, who appeared on behalf of the first respondent, relied upon what was said in the judgment in *Rowlandson and others v National Westminster Bank Ltd* [1978] 798. In that case, however, it is clear that there was delivery of the 4 cheques which were paid into a bank account which was held by a person who was held to be a trustee. In those circumstances the decision of Mr John Mills QC in no way undermines the requirement that there should be delivery. In my view, in this case there was no delivery.

49. Making Vivienne a signatory to the Hacienda accounts, in the circumstances in which KS was immediately after being diagnosed as having serious cancer, is not an unequivocal indication of gift. It is something which would be done in order for the recipient to have the power to be able to handle the affairs relating to that account. It is quite understandable that somebody who can expect to be in hospital for a long time and, perhaps, in a state where he or she may not wish to be troubled by making bank transfers and the like, may wish to facilitate others to look after the day-to-day running of an account.

50. The only other matter relied upon as constituting delivery were the 3 sheets of blank paper which KS had signed. In my view that cannot be held to be delivery of the balances of the bank accounts and the 3 companies.

51. I would therefore allow this appeal and grant the plaintiff the relief sought in paragraphs (1), (3) and (4) of the prayers sought in the notice of appeal.

52. For completeness I would add that there was an application to adduce further evidence namely a letter before action dated 29 July 2008, a copy of the statement of claim in High Court Action 1447 of 2008 and an amended summons under Order 12 rule 8 of the Rules of High Court. It has been unnecessary to refer to those matters in this judgment. Although they demonstrate that there may be other assets available to Vivienne and that there are certainly more disputes between

Vivienne and the plaintiff, I do not consider that the admission of that evidence was necessary for the purposes of this action.

53. I would accordingly make an order *nisi* of costs of the appeal and the proceedings below in favour of the plaintiff. I would make an order *nisi* of costs of the application to admit that further evidence in favour of the first defendant.

Hon Le Pichon JA:

54. I agree.

Hon Poon J:

55. I agree.

Hon Rogers VP:

56. There will accordingly be an order in terms of paragraphs 51-53.

(Anthony Rogers)
Vice-President

(Doreen Le Pichon)
Justice of Appeal

(J. Poon)
Judge of the Court of First
Instance

Mr Nelson Miu, instructed by Messrs Lee Chan Cheng, for the Plaintiff/Appellant

Ms Lisa K Y Wong SC, instructed by Messrs Stevenson, Wong & Co., for the
1st Defendant/Respondent