

SUPREME COURT OF QUEENSLAND

CITATION: *Fang v Yao* [2026] QSC 237

PARTIES: **LINA FANG**
(first plaintiff)
NAXI AGRICULTURE INVESTMENT PTY LTD
ACN 634 072 209
(AS TRUSTEE FOR THE NAXI AGRICULTURE INVESTMENT TRUST)
(second plaintiff)
NAXI @ TROUGHTON PTY LTD
ACN 634 070 698
(AS TRUSTEE FOR THE NAXI PROPERTY INVESTMENT TRUST)
(third plaintiff)
NAXI (CHINA) PTY LTD
ACN 616 666 749
(fourth plaintiff)
v
WENLIANG YAO (ALSO KNOWN AS WILLIAM YAO)
(first defendant)
LIANRU ZHAO
(third defendant)
NEW AUS GROUP PTY LTD
ACN 165 555 733
(fourth defendant)
W HOLDING GROUP PTY LTD
ACN 619 024 341
(fifth defendant)
BRISBANE VALLEY INVESTMENTS PTY LTD
ACN 623 094 306
(BOTH IN ITS OWN RIGHT AND IN ITS CAPACITY AS TRUSTEE FOR THE BRISBANE VALLEY INVESTMENTS TRUST)
(sixth defendant)
THE COMMISSIONER OF TAXATION
(ninth defendant)

FILE NO: 13370 of 2022

DIVISION: Trial Division

PROCEEDING: Hearing

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 2 October 2026

DELIVERED AT: Brisbane

HEARING DATE: 28 September 2026

JUDGE: Muir J

ORDER:

- 1. The order made by Justice Hindman on 19 August 2026 granting leave for the first defendant to give evidence via audio-visual link is set aside.**
- 2. The application to set aside the orders made by Justice Hindman on 19 August 2026 granting leave for the third defendant and Ms Chen to give evidence via audio-visual link is refused.**
- 3. I will hear the parties as to costs.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENT AND ORDERS – AMENDING, VARYING AND SETTING ASIDE JUDGMENTS AND ORDERS – where orders were made granting leave to the third to sixth defendants to call evidence from three of their witnesses by audio-visual link from Hong Kong at the trial of this proceeding – where the plaintiffs apply to have the orders set aside – where the plaintiffs rely on r 667(1), 667(2)(b) or, in the alternative, r 668(1)(b) of the Uniform Civil Procedure Rules 1999 (Qld) – whether the plaintiffs’ application on the basis of those rules can succeed – whether there is jurisdiction to set aside the orders – whether the orders should be set aside

Uniform Civil Procedure Rules 1999 (Qld), r 5, r 430, r 660, r 667, r 668

Autodesk Inc v Dyason (No 2) (1993) 176 CLR 300

De L v Director General, NSW Department of Community Services (No 2) (1997) 190 CLR 207

Frith v Schubert [2010] QSC 444

Hodge v Perpetual Trustee Company Ltd & Another [2026] QSC 129

Jonesco v Beard [1930] AC 298

Re J (an infant) [1960] 1 All ER 603

Re Juson Pty Ltd (1992) 8 WAR 13

COUNSEL: D de Jersey KC with S Scarlett for the plaintiffs
A O’Brien KC for the first, third, fourth, fifth and sixth defendants
N Hanna for the ninth defendant

SOLICITORS: Clayton Utz for the plaintiffs
Bartley Cohen for the first, third, fourth, fifth and sixth defendants
McInnes Wilson Lawyers for the ninth defendant

Introduction

- [1] This proceeding is managed on the Commercial List by Justice Hindman. It is currently listed for a six-week trial to commence on 26 October 2026.
- [2] On 29 July 2026, the first and third to sixth defendants filed an application for leave to call evidence at the trial, from three of their witnesses, namely the first defendant Mr Yao, his mother (the third defendant Ms Zhao), and Ms Chen, a non-party witness, by way of audio-visual link (**AVL**) from Hong Kong (the **AVL Application**). The AVL Application was heard by Hindman J on 19 August 2026 together with a directions hearing. In open court, Hindman J stated that she acceded to the application in the absence of objection (**AVL Orders**). Relevantly, the lack of objection to Mr Yao giving his evidence remotely was based on a late hearsay affidavit from Mr Cohen, the solicitor for Mr Yao, exhibiting a Diagnosis Certificate from the Tianjin Medical University Cancer Institute and Hospital dated 17 August 2026, the effect of which was that Mr Yao had pancreatic cancer and was receiving treatment for that condition which meant he was unable to travel around the time of the trial.
- [3] It is uncontroversial that no formal orders reflecting Hindman J's decision on the AVL Application were ever taken out or filed.
- [4] By an application filed on 26 August 2026, the plaintiffs now apply to set aside the orders (that were not taken out) pursuant to r 667(1) and/or r 667(2)(b) or in the alternative, r 668 (1)(b) of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**), or in the further alternative in the inherent jurisdiction of the Court.
- [5] The application is made on two bases:
 - (a) First, that there is fresh evidence which, had it been before Hindman J at the time of the AVL Application it would have resulted in her Honour not granting the relief sought.
 - (b) Second, that the orders were obtained by fraud.
- [6] The application was heard before me on Monday this week and was hotly contested. The nub of the defendants' opposition being that there is no admissible evidence that the Diagnosis Certificate was fake.
- [7] Before turning to that evidence, it is necessary to say something about the relevant legal principles.

Relevant legal principles

- [8] The starting point is that r 430(2) of the UCPR permits an affidavit for use in an application for relief other than final relief to "contain statements based on information and belief if the signatory for the affidavit states the sources of the information and the grounds for the belief". It is accepted that neither the AVL Application nor the present application finally determine the rights of the parties. It follows that hearsay evidence is admissible.
- [9] The UCPR also contains express rules relating to the setting aside or variation of an order.

[10] The following rules are relevant:

“667 Setting aside

- (1) The court may vary or set aside an order before the earlier of the following—
 - (a) the filing of the order;
 - (b) the end of 7 days after the making of the order.
- (2) The court may set aside an order at any time if—

...

- (b) the order was obtained by fraud;

...

668 Matters arising after order

- (1) This rule applies if—

...

- (b) facts are discovered after an order is made that, if discovered in time, would have entitled the person against whom the order is made to an order or decision in the person’s favour or to a different order.

- (2) On application by the person mentioned in sub-rule (1), the court may stay enforcement of the order against the person or give other appropriate relief.

- (3) Without limiting subrule (2), the court may do one or more of the following—

...

- (b) set aside or vary the order;

...”

[11] Where these provisions of the UCPR speak of the making of an order, that is to be understood by reference to r 660 of the UCPR, which provides that (generally) an order is made by being pronounced in court by the person making the order: *Frith v Schubert* [2010] QSC 444 at [12].

[12] The current application by the plaintiffs was filed and heard without the AVL Orders having been filed and perfected, and therefore the power under r 667(1)(a) of the UCPR is applicable. The application was also filed within seven days of the orders being made, and therefore r 667(1)(b) of the UCPR is also applicable.

[13] It is instructive to note that the exercise of the powers found in r 667(2) and in r 668(1)(b) of the UCPR depend upon the satisfaction of stated conditions. No such conditions are identified for the exercise of the power conferred by r 667(1) of the UCPR, as Peter Lyons J observed in *Frith v Schubert* [2010] QSC 444 at [15], it

would seem to follow that r 667(1) of the UCPR confers a general discretion on a court to vary or set aside an order, the exercise of which is not confined by the conditions set out in r 667(2), or r 668(1) of the UCPR.

- [14] That position is different in relation to the specific power conferred by r 667(2)(b) of the UCPR. As Burns SJA observed in *Hodge v Perpetual Trustee Company Ltd & another* [2026] QSC 129 at [19], the power to set aside a perfected judgment or order on the ground of fraud is enlivened only upon proof of actual fraud. Such fraud must be distinctly alleged and established by strict proof; mere suspicion, however strong, is insufficient. It must be demonstrated by admissible evidence that the successful party was responsible for fraud “which so taints the judgment under challenge that it must be set aside”: *Hodge* at [19] citing *Jonesco v Beard* [1930] AC 298, 301–3.
- [15] Conversely, r 668(1) of the UCPR permits the Court to relieve a party from an order where facts have arisen since the order was made, or where facts have subsequently been discovered which, had they been known at the time, would have entitled the party to a different order: see *Hodge* at [21].
- [16] The distinction is significant. Rules 667(2)(b) and 668(1) of the UCPR prescribe specific, more limited, circumstances in which relief may be granted and impose corresponding requirements upon an applicant seeking to invoke those provisions. Those requirements do not, however, condition the exercise of the general discretion conferred by r 667(1) of the UCPR. It is therefore necessary to turn to the considerations governing the exercise of that discretion.

Principles governing the exercise of the discretion under r 667(1) of the UCPR

- [17] In *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300, the High Court recognised the Court’s inherent power to recall a judgment before its formal entry was an exceptional step to be taken only where the interests of justice so require, at 303 the Court relevantly observed that:

“What must emerge, in order to enliven the exercise of the jurisdiction, is that the Court has apparently proceeded according to some misapprehension of the facts or the relevant law and that this misapprehension cannot be attributed solely to the neglect or default of the party seeking the rehearing. ...”

- [18] Later, in *De L v Director General, NSW Department of Community Services (No 2)*, (1997) 190 CLR 207, 215 a joint judgment of five members of the High Court recognised the broad jurisdiction of the Court to recall a judgment before formal entry but noted that it was a heavy burden and an exceptional course and that the applicant must show that such a course is required without fault on his part. Relevantly at page 215 the Court observed that: [footnotes omitted]:

“The Court may do so if it is convinced that, in its earlier consideration of the point, it has proceeded ‘on a misapprehension as to the facts or the law’, where ‘there is some matter calling for review’ or where ‘the interests of justice so require.’”

- [19] Relevantly again in *Frith v Schubert* at [16], the Court observed that considerations relating to the public interest in the finality of litigation are relevant to the discretion conferred by r 667(1) of the UCPR.

- [20] It follows that the Court has a broad and general discretion to set aside orders under r 667(1) of the UCPR, with that discretion unfettered by the conditions set out in rules 667(2) and 668(1) of the UCPR. But the exercise of discretion must be guided by whether there was a misapprehension of the facts or the relevant law and what the interests of justice so require; bearing in mind the public interest in the finality of litigation and the applicant showing that there was no fault on their part.

The AVL Application

- [21] With these principles in mind, I turn first to the circumstances in which the AVL Order was made.

- [22] The AVL Application, as it concerned most relevantly Mr Yao, was underpinned by the fifteenth affidavit from Mr Yao's solicitor, Mr Cohen. This affidavit was based on information and matters communicated to him by Mr Yao about his ill health and medical condition, particularly Mr Yao's continued treatment for a malignant tumour in his pancreas. Mr Cohen also exhibited a "Diagnosis Certificate" (in Chinese) from the Tianjin Medical University Cancer Institute and Hospital dated 9 July 2026 that Mr Yao told him he had obtained from the Hospital. There was no evidence of what department of the Hospital provided this certificate or the name of any individual person from the Hospital who provided the certificate. The certified translation from Chinese to English of that certificate reveals that it is signed by a physician within the Hospital's department of pancreatic oncology named Tiansuo Zhao. The certificate otherwise provides that:

"Name: Wenliang YAO Sex: Male Age: 40 years

Outpatient No.: 8012559602

Impression: Malignant Pancreatic Tumour

Medical Advice:

1. The patient is currently undergoing chemotherapy and radiotherapy for a pancreatic tumour and has bone marrow suppression, reduced immunity, anaemia, fatigue, abdominal pain, and an increased risk of thrombosis.
2. Factors associated with air travel, including low cabin pressure, reduced oxygen levels, prolonged sitting, and cabin turbulence, may worsen hypoxia, trigger pain, increase the risk of deep vein thrombosis, bleeding, and infection, and may lead to rapid deterioration of the patient's condition.
3. Comprehensive assessment: The patient's current medical condition is not suitable for air travel on a commercial passenger aircraft. It is recommended that air travel be avoided throughout the course of treatment. Air travel should only be reconsidered after treatment has been completed, the condition has stabilised, and a follow-up assessment confirms fitness to fly."

- [23] Based on this evidence, the AVL Application was initially opposed by the plaintiffs. At least as far as Mr Yao's evidence was concerned. Primarily because it was argued

the first certificate was unattributed hearsay and that the evidence did not establish that Mr Yao could not travel around the time of the trial.

[24] But then, on 18 August 2026, Mr Cohen affirmed a further affidavit (his sixteenth affidavit) stating that Mr Yao told him, and he believed, that his treating oncologists at the Tianjin Medical University Cancer Institute and Hospital were Dr Ping Wang and Dr Qiang Li who he is only able to see when admitted as an inpatient for treatment with the next inpatient treatment due on 12 October 2026. Mr Cohen also affirmed that Mr Yao told him, and he believed, that in early July and on 14 August 2026 he had appointments to assess his ability to travel to Australia with the on call or duty oncologist at the Hospital and that following the first appointment the Hospital provided him with the Diagnosis Certificate of 9 July 2026 and then following the second appointment, which according to Mr Cohen was on 18 August 2026, again some unknown unidentified person from “the Hospital” provided Mr Yao with another Diagnosis Certificate in Chinese. Due to the timing of the hearing of the AVL Application, Mr Cohen’s evidence was that a person called Mr Thompson used WeChat on his mobile to translate this certificate.

[25] The second Diagnosis Certificate as translated is dated 17 August 2026 (the day before Mr Cohen said he was told the appointment was) and again is signed purportedly by a physician with the department of pancreatic oncology at the Tianjin Medical University Cancer Institute and Hospital named Tiansuo Zhao. This certificate addresses the period around the trial by stating that:

“Name: Yao Wenliang Gender: Male Age: 40 years old

Outpatient No.: 8012566528

Impression: Malignant pancreatic tumor, currently undergoing radiotherapy and chemotherapy treatment

Medical advice:

1. Starting from October 12, proceed with planned radiotherapy and chemotherapy for anti-tumor treatment, regularly recheck blood routine, liver/kidney function, and imaging examinations.
2. After starting radiotherapy and chemotherapy on October 12, avoid flying; do not recommend air travel or long-distance trips; prefer stable ground transportation for travel.
3. Rest at home adequately, enhance nutritional support, closely monitor physical condition, and seek medical attention immediately if any discomfort occurs.”

[26] Based on this further evidence, the plaintiffs did not oppose the AVL Orders being made for Mr Yao. It is instructive that upon being told of there being no opposition to Mr Yao giving his evidence remotely, Hindman J observed that was “not her preliminary view of the world having read the material”. But she was persuaded by Senior Counsel’s submission that Mr Yao was unable to travel, that travel would be contrary to the medical advice that Mr Yao had received and, it seems, the lack of resistance by the plaintiffs to the orders being made.

Background to the present application to set aside the AVL Orders

- [27] The day after the orders sought in the AVL Application were granted, that is 20 August 2026, the solicitor with carriage of the proceeding for the plaintiffs, Mr Jones, instructed his employed solicitors to make enquiries as to whether the two “Diagnosis Certificates” are genuine. The assertions in the second “Diagnosis Certificate” did not sit well with him because the “Diagnosis Certificate” did not state matters in “medical” terms and that prompted Mr Jones to become concerned as to whether the “Diagnosis Certificates” are genuine.
- [28] It is the hearsay affidavit evidence from Mr Deane, a solicitor acting for the plaintiffs under the supervision of Mr Jones, investigating these enquiries, that the defendants object to for a myriad of reasons. Before turning to the objections, is it instructive to set out the relevant parts of this evidence.
- [29] The affidavit of Mr Deane exhibited a number of letters which were sent to the two treating oncologists referred to in Mr Yao’s solicitor’s affidavit affirmed 18 August 2026 (Dr Wang and Dr Li), and the doctor who purportedly issued the two “Diagnosis Certificates”. There is no evidence of any response from Dr Wang and Dr Li. One email bounced back and the other remained unanswered.
- [30] The critical evidence of Mr Deane was that a Dr Tiansuo Zhao was located via published medical academic articles after searches were conducted by Ms Greig, one of the solicitors under the instruction of Mr Jones. Dr Zhao was named as the author of a number of articles with his contact details listed at the Department of Pancreatic Cancer Tianjin Medical University Cancer Institute and Hospital with the email address as zhaotiansuo@tjmuch.com.
- [31] At 3:59 pm on 21 August 2026, Ms Grieg emailed Dr Zhao at the address she had obtained providing him with copies of two “Diagnosis Certificates”. The letter sent to Dr Zhao noted that the “Diagnosis Certificates” had been made publicly available by being tendered in Court and requested “your assistance to please verify that the Medical Certificates were issued by Tianjin Medical University Cancer Institute and Hospital.”
- [32] At 9:12 pm on 21 August 2026 Dr Zhao replied to that email stating:
- “Dear Ciaran Greig,
- These medical certificates issued by Tianjin Medical University Cancer Institute and Hospital are forged.”
- [33] On 24 August 2026 Mr Deane then emailed Dr Zhao as follows:
- “Dear Dr Zhao,
- My name is Tony Deane. I am a senior lawyer at Clayton Utz, and I work with Ciaran Greig on this matter.
- Thank you very much for your prompt response to our email below.
- I would be most grateful to discuss the following questions with you, at your earliest convenience. I would be willing to communicate with

you in any way that is convenient to you, such as by telephone call or video link at any time that suits you, or alternatively by email.

I have attached further copies of the two documents each titled “Diagnosis Certificate” and dated 9 July 2026 and 17 August 2026, for ease of reference.

1. In your email dated 21 August 2026 you said that these documents are forgeries. Would you please explain why you say these “Diagnosis Certificates” are forgeries?
2. Your name, in Chinese characters, appears to be handwritten on each of the “Diagnosis Certificates.” Is that your handwriting, or your signature, on each document?
3. Did you issue these “Diagnosis Certificates”? Did you get someone else to issue them on your behalf?
4. Do you issue “Diagnosis Certificates” like these? Do you know whether Tianjin Medical University Cancer Institute and Hospital issues “Diagnosis Certificates” like these?
5. Without seeking to infringe upon doctor/patient confidentiality, but noting that Mr Yao Wenliang has made these “Diagnosis Certificates” available publicly as exhibits to affidavits filed in the Supreme Court of Queensland, are you able to say whether you have treated a patient named Yao Wenliang?

We would be most grateful for any assistance you are able to give. Please do not hesitate to let me know if we can assist in any way in making arrangements to speak with you. Alternatively, we would be grateful for any response you are able to give by email.”

[34] Dr Zhao responded to that email as follows at 10:28 pm on 24 August 2026:

- “1. First of all, I have never had contact with the patient “Yao Wenliang”, nor have I treated any illnesses for him;
2. There are multiple errors in the diagnosis certificate, (1) The Hospital’s system would not have names in “pinyin”, only has names in “Chinese Characters”, (2) The “outpatient numbers” on the two diagnostic certificates are inconsistent, this is incorrect, should be the same, (3) The hospital’s seal should be “Tianjin Cancer Hospital”, instead of “Tianjin Medical University Cancer Hospital”, (4) My signature is incorrect, this is an imitation, not my signature.
3. I did not issue these two diagnostic certificates, nor did I sign them, I have never treated this patient, therefore I was unaware of this from beginning to end, probably a scam.

Finally, I’d like to say, I’ve already reported this matter to the Legal Affairs Office of the Medical Administration Department, If there are any further questions, you can contact the Legal Affairs Office of the Medical Administration Department.

Thank you!”

- [35] On 25 August 2026, Dr Zhao emailed the telephone number of the Legal Affairs Office of the Medical Administration Department to Mr Deane.
- [36] The emails referred to above were translated by Ms Tam, a mandarin speaker employed by the plaintiffs’ solicitors. The defendants initially objected to the translation being unauthorised, but that objection was not maintained.
- [37] The hearsay evidence of Mr Deane was that Ms Tam contacted the Legal Affairs Office of the Medical Administration Department by telephone and an unidentified person provided an email address (zlyyywc@163.com) for the relevant legal officer (Mr Zhang). With “zlyyywc” representing the English translation for the Pinyin spelling of “Medical Affairs Department, Cancer Hospital”. An email was sent to that address enquiring whether the Tianjin Medical University Cancer Institute and Hospital issued the “Diagnosis Certificates”.
- [38] The Tianjin Medical University Cancer Institute and Hospital emailed the plaintiffs’ solicitors at 6:03 pm on 10 September 2026 as follows:

“Tony Deane:

Hello, following inquiry, the diagnosis certificate you provided is fake, and the physician’s signature was also not personally signed by a physician of our hospital. Within our medical institution (Tianjin Cancer Hospital), no record of this diagnosis certificate was found, nor was any consultation record found for this patient (family name: Yao, given name Wenliang).

If you have related questions or follow-up issues, you may contact 022-233359983, or Email: zlyyywc@163.com.

Tianjin Cancer Hospital Medical Affairs Department

10 September 2026”

Basis of opposition

- [39] The defendants submitted that the onus is on the plaintiffs to establish a basis for the AVL orders to be set aside. I accept that as correct.
- [40] The defendants also submitted that nothing in the plaintiffs’ material calls for an answer from Mr Yao because each of the alternative routes for the plaintiffs require the same proof: a finding that the Diagnosis Certificates are false or a finding that Mr Yao forged documents before the Court.
- [41] The crux of the opposition to the admissibility of the plaintiffs’ evidence is therefore underpinned by the notion that the plaintiffs are required to prove fraud to succeed on the application to set aside the AVL Orders and that to prove fraud, direct evidence is required. I accept the second argument of the defendants about the high standard required to prove fraud and that the evidence falls well short of the standard necessary to establish that the Diagnosis Certificates are forgeries or that Mr Yao has committed a fraud.

- [42] But I reject that the plaintiffs must establish fraud or forgery of the Diagnosis Certificates by Mr Yao to have the unperfected orders set aside under r 667(1) of the UCPR.
- [43] It is unnecessary to dissect each and every one of the objections made by the defendants because in my view they do not engage with the primary basis of the plaintiffs' case. But it is important to note that the defendants' submissions overlook that on an application to set aside an order under r 667(1) of the UCPR it is not necessary for there to be direct primary evidence placed before the Court (even if available). Evidence based on information and belief is admissible.
- [44] The defendants argued that the emails received from both Dr Zhao and the Tianjin Cancer Hospital Medical Affairs Department are of no or little weight because the emails are not signed off by a natural person and that "[e]ach link between the emails and Dr Zhao or the hospital is hearsay or opinion and, in any case, not strong". But I do not accept this submission.
- [45] First, (and again) on an application such as this it is permissible to adduce hearsay evidence. The submission also overlooks that the original email that was received from Dr Zhao on 21 August 2026 is in English and it states expressly in the email signature that it is from his email address, zhaotiansou@tjmuch.com. That email says in English the Diagnosis Certificates "are forged". It replies in the chain to an email that commences "Dear Dr Zhao". The irresistible inference is that the reply is from Dr Zhao.
- [46] The defendants argued that the emails from the Hospital are not attributable to the natural person who clearly sent them (i.e. Mr Zhang) but this submission overlooks that each of these emails consists of a reply, by email, to an email which was expressly addressed to Mr Zhang by commencing with the words "Dear Mr Zhang". The email chains are in evidence and the replies clearly appear in the email chain replying to the respective email from Mr Deane. There is a sufficient connection to afford some weight to the authenticity of these emails coming from Mr Zhang.
- [47] Further, each of the emails that is relied on by the plaintiffs addressed to Dr Zhao or to Mr Zhang opened with "Dear Dr Zhao" and "Dear Mr Zhang" respectively. Mr Zhang did not sign off his reply "Yours sincerely, Mr Zhang", but where an email is expressly addressed to a person (as these were) and the person replies by engaging with the substance of the email (as they did), then there is a reasonable inference that the reply has come from Dr Zhao or Mr Zhang, as the case may be.
- [48] Otherwise, in the ordinary course of things and as the plaintiffs submitted, a reply would have been received that said words to the effect of:
- (a) "you have sent this email to the wrong person, I am not Dr Zhao";
 - (b) "you have sent this email to the wrong person, I am not Mr Zhang";
 - (c) "wrong person";
 - (d) "I don't know what you are taking about"; or
 - (e) "check the address this seems to be intended to be sent to someone else".
- [49] It is somewhat ironic that many of the criticisms made of Mr Deane's evidence are equally applicable to the evidence of Mr Cohen relied upon by the defendants at the

AVL Application. Albeit I accept the defendants' evidence was admitted without objection. For example, Mr Cohen does not affirm that he believes what is stated in the Diagnosis Certificates regarding the advice that Mr Yao's not to travel to be true – just that they were provided to him by Mr Yao who obtained them from the Hospital. This is not a criticism of Mr Cohen – quite properly as with Mr Deane – he could not know if the contents of the certificates were true or not. It is also instructive that Mr Yao obtained certificates from an unidentified person from the Hospital and not from Dr Zhao the apparent author of the certificates.

- [50] Some of the inadequacies identified by the defendants as to the absence of a sworn basis for belief were rectified by Mr Deane's twenty third affidavit tendered during the course of the hearing. Otherwise, the other issues identified by the defendants go to the weight or the value of the evidence not so much to its admissibility. Regardless, where objection is taken to affidavit material on the ground it is inadmissible the Court retains a complete discretion as to whether or not to admit that evidence: *Re J (an infant)* [1960] 1 All ER 603; *Re Juson Pty Ltd* (1992) 8 WAR 13, 15.
- [51] The contested evidence of Mr Deane should be admitted subject to a consideration of the weight it is to be afforded.
- [52] The admissible evidence does not prove the Diagnosis Certificates are forgeries or that Mr Yao has perpetrated a fraud. But I am satisfied that the extent of the evidence is of sufficient weight to cast a real doubt on the authenticity of the Diagnosis Certificates.

Reasons why the AVL Order as it concerns Mr Yao should be set aside

- [53] Notwithstanding the significance of the public interest in the finality of litigation, there are a number of factors which favour the AVL Order as it concerns Mr Yao being set aside under r 667(1) of the UCPR.
- [54] First, the order was not made due to any fault of the plaintiffs. It is not suggested by the defendants that the plaintiffs did not exercise reasonable diligence in investigating the probity of the second Diagnosis Certificate. That is understandable as that certificate was only provided at the 11th hour. Indeed, the plaintiffs' conduct in not opposing the AVL Order was in keeping with the overarching philosophy of r 5 of the UCPR. But, the defendants contend that reasonable diligence was not exercised by the plaintiffs because the plaintiffs did not investigate the probity of the first Diagnosis Certificate. I do not accept this submission. There was no need to investigate whether the first Diagnosis Certificate was issued by Dr Zhao, because the first Diagnosis Certificate was inadequate in any event, as it did not show that Mr Yao was unable to give evidence in person.
- [55] Until the second Diagnosis Certificate was received by the plaintiffs, the application was opposed on that basis that the first Diagnosis Certificate was inadequate. The second Diagnosis Certificate was the decisive one. The plaintiffs did not show lack of diligence by not examining the probity of evidence which was in any event inadequate as there was no need to investigate the evidence at that time.
- [56] Second, the AVL Application was not opposed and was granted by Hindman J based on the hearsay evidence adduced by the defendants as accepted and not objected to by the plaintiffs. Both the plaintiffs (in not opposing the AVL Orders) and Hindman J

(in making the AVL Orders), proceeded on the mistaken factual basis that there was no issue about the authenticity of the second Diagnosis Certificate. But if the hearsay evidence of the exchanges between Dr Zhao and Mr Zhang and the solicitors for the plaintiffs had been before Hindman J it is obvious that the AVL Orders would have been contested and this evidence would have cast sufficient doubt on the authenticity of the second Diagnosis Certificate such that it is highly likely that the AVL Order, in favour of Mr Yao, would not have been made.

[57] Third, the plaintiffs having acted immediately and promptly to enliven r 667(1) of the UCPR, I am satisfied that in the unusual and exceptional circumstances of this case the interests of justice warrant the AVL Orders allowing Mr Yao to give his evidence at the trial from Hong Kong to be set aside.

[58] The application to set aside the orders as they concerned the other two witnesses was underpinned by the notion of fraud infecting the whole body of the judgment: *Jonesco v Beard* [1930] AC 298, 301–302. Given my findings pursuant to r 667(1) of the UCPR and the evidence not rising to the level of supporting a finding of fraud, it follows that I refuse to set aside the balance of the AVL Orders permitting the evidence of the third defendant and Ms Chen to be given by AVL.

[59] I will hear the parties as to costs.