

Status:  Positive or Neutral Judicial Treatment

Chow Kwan Yee v Leung Mei Yin May

Date of Judgment: 13 December 2019

Court of First Instance

CFI

High Court Action No 1260 of 2017

HCA 1260/2017

Citations: [2019] HKCFI 2998  
[2019] HKEC 4085

Presiding Judges: Deputy Judge MK Liu

Phrases: Civil evidence - claim for repayment of alleged loan - counterclaim for sums allegedly owed and for return of bangle

Counsel in the Case: Mr Alan Kwong & Mr Joseph Wong, instructed by William K W Leung & Co, for the plaintiff  
Mr Tony TF Ng, instructed by Lee & Wu, for the 1st and 2nd defendants

Cases cited in the judgment: [Chen Tek Yee v Chan Moon Shing \(CACV 136/2015, \[2016\] HKEC 484\)](#)  
[Cheung Lai Mui v Cheung Wai Shing \(HCA 1562/2012, \[2017\] HKEC 740\)](#)  
[Connaught West Ltd v Global Fiduciary Solutions Ltd \(HCA 525/2017, \[2019\] HKCFI 2441, \[2019\] HKEC 3302\)](#)  
[Eugene Chuang v Kevin Ho \[2002\] 4 HKC 245](#)  
[Hsu Ming Chi v Lam Shu Chit \(HCCL 8/2013, \[2014\] HKEC 1748\)](#)  
[Mary Lee v Ngai Yee Chai \[2006\] 1 HKC 157](#)  
[South China Securities Ltd v Lam Kwen Yuen \[2012\] 5 HKLRD 524](#)  
[Star Glory Investment Ltd v Kai Tui \(HK\) Technology Co Ltd \(HCA 3523/2002, \[2005\] HKEC 2378\)](#)  
[Telings International Hong Kong Ltd v John Ho \(CACV 10/2010, \[2010\] HKEC 1606\)](#)  
[Ting Kwok Keung v Tam Dick Yuen \(2002\) 5 HKCFAR 336](#)  
[Tradepower \(Holdings\) Ltd v Tradepower \(Hong Kong\) Ltd \(2009\) 12 HKCFAR 417](#)

#### JUDGMENT:

Deputy Judge MK Liu

1. This case is a dispute between family members. The plaintiff ("P") is suing her daughter (the 1st defendant, "D1") and her son-in-law (the 2nd defendant, "D2") (collectively "Ds") for the outstanding balance of an alleged loan lent by P to Ds. D2 is counterclaiming against P for 2 sums which are

allegedly owed by P to D2, ie HK\$200,000 and HK\$32,280, and for the return of a bangle ("the Bangle"). I would first set out the parties' respective cases.

#### P's CASE

2. P is the mother of the D1, and D1 is P's 1st child. The relationship between them is rather aloof throughout the years.

3. In around early December 2010, P was in Canada. P received a telephone call from D1. D1 told P that that she had gone bankrupt and was in financial need, and she sought P's financial assistance for purchasing a property in Tai Po as her matrimonial home.

4. Out of sympathy and with a view to help D1 to acquire her own property, P agreed ("the Oral Loan Agreement") to lend a sum of HK\$2,000,000 to Ds to assist them to purchase a property as their matrimonial home, which should be repaid by Ds by monthly instalment of HK\$8,000 without interest.

5. On 21 December 2010, pursuant to D1's request, P provided the loan of HK\$2,000,000 ("the Loan") to D2 by a cashier order ("the Cashier Order").

6. As a result of the financial assistance provided by P, D1 was able to sign a sale and purchase agreement to purchase a floor in a small house in Tai Po ("the Tai Po Property") at HK\$1,990,000 on 23 February 2011.

7. Pursuant to the Oral Loan Agreement, starting from September 2011, Ds made monthly repayment to P at the beginning of each month by transferring or depositing sum into the HSBC account ("the Account") jointly held by P and P's 2nd child, Mr Leung King Chuen Robert ("Robert Leung"). The sum transferred or deposited into the Account each month usually is HK\$8,000, but sometimes the amount would be slightly less than HK\$8,000. In P's statement of claim, it is stated that the repayment stopped after January 2014. However, Mr Alan Kwong (together with Mr Joseph Wong), counsel for P, in the final submissions mentions that on the basis of the records of the Account disclosed by P ("the Account Records"), there should be further monthly repayments in February, March and April 2014, and the repayment in fact ceased after April 2014.

8. P is seeking an order compelling Ds to repay the outstanding balance of the Loan.

9. In respect of D2's counterclaim for the return of HK\$200,000 and HK\$32,280:

(1) P accepts that when P was purchasing a property on the Hong Kong Island ("the HK Property") for Robert Leung in early 2011, D2 paid the initial deposit of HK\$200,000 on behalf of P. P would need D2's assistance in paying the initial deposit because P was not in Hong Kong but was in Canada at the time. Subsequently, when P returned to Hong Kong in about February 2011, P has repaid the HK\$200,000 to D2.

(2) In any event, in respect of the HK\$200,000 claimed by D2, the claim has been time-barred when D2 first raised this claim against P.

(3) P accepts that D2 had paid some money on her behalf to the contractor doing the renovation work of the HK Property. However, P has already reimbursed D2.

10. In respect of D2's claim for the return of the Bangle, P has through her solicitors' letter dated 1 November 2019 invited D2 to collect the bangle in P's possession. D2 did not give any reply to that invitation before the commencement of the trial. At the beginning of the trial, I requested P to bring the bangle in her possession to the court and pass the same to D2. Later, I was told that P had brought the bangle in her possession to the court, but D2 refused to accept that bangle. D2 claimed that the bangle returned by P was not the Bangle.

#### Ds' CASE

11. Ds' case is that the HK\$2,000,000 provided by P was given to D2 as a gift. Originally, P intended to give the money to D1 for the following purposes: (1) remedying her failure to take care of D1 in the past; (2) giving her assets to her children; and (3) evading Canadian tax. D1 was unwilling to accept the money. P then gave the money to D2, reminding D2 to look after D1 and to treat her well.

12. Ds deny that they have ever made any repayment to P. They claim that upon P's request, D2 transferred money to the Account from September 2011 to February 2012 for the purpose of enabling

P to purchase some nourishing food and paying the funeral expenses of D1's father ("Leung Senior").

13. D2 counterclaims against P for the HK\$200,000 and the HK\$32,280 set out in paragraph 9 above. D2's case is that it was agreed between him and P that the said sums were to be repaid upon the resale of the HK Property. The HK Property was sold in April 2013, but P has never repaid the said sums to D2.

14. D2 also seeks an order requiring P to return the Bangle, which is a jade bangle, to him. According to D2, in or about February or March 2011, P borrowed the Bangle from him, which was given to D2 by D2's mother. P has failed to return the Bangle to D2.

## P's SUMMONS

15. Before going into the evidence, I have to deal with a summons taken out by P on 21 November 2019 ("P's summons") for leave to amend P's pleadings. The proposed amendments are as follows:

- (1) adding a paragraph 16A in the statement of claim:  
"The aforesaid conducts of the Defendants <sup>1</sup> amounted to repudiatory breach of the Loan Agreement, which the Plaintiff has duly accepted by commencing the present Action."
- (2) adding a paragraph 1A under the prayer in the statement of claim:  
(1A) "Alternative to (1) above:-
  - (a) A sum of HK\$560,000 (ie payments of HK\$8,000 per month for the 70 months' period from February 2014 to December 2019); and
  - (b) An order that the 1st and 2nd Defendants do pay HK\$8,000 per month to the Plaintiff on the first calendar day of each month until the entire Loan Amount of HK\$2,000,000 is fully repaid."
- (3) Adding the following sentence in paragraph 6(c) of the amended reply and defence to counterclaim:  
"In any event, the Defendants' claim for repayment of alleged "2nd Loan" has been time-barred already prior to the commencement of the proceedings under the Counterclaim herein by virtue of Section 4(1) of the Limitation Ordinance."

16. Mr Tony Ng, counsel for Ds, opposes the application. Mr Ng submits that P's application is an extremely late application and there is no explanation for the delay in bringing the application. Mr Ng submits that the application, if allowed, would cause prejudice to Ds.

17. After hearing submissions concerning P's summons, I direct that the proposed amendments be read on de bene esse basis, and I will make a determination on the summons in the judgment to be handed down after the trial. I would now set out my decision on the summons in the paragraphs below.

18. With respect to Mr Ng, apart from criticizing the lateness of P's application, Ds have not shown any prejudice to them if the application is allowed. That being the case, I cannot refuse to give leave to P simply on the ground that P's application is a late application. This point is well supported by the authorities.

- (1) In *Hsu Ming Ching v. Lam Shu Chit* HCCL 8/2013 <sup>2</sup>, Peter Ng J said:  
16. "Absent any real prejudice, an application for amendment, albeit, must be decided upon the general principle that a court of law seeks to adjudicate on the real issues and disputes between the parties and, if possible, technical rules should not stand in the way of allowing the parties to raise their real claims or defences before the court for adjudication ....."
- (2) In *Connaught West Ltd v Global Fiduciary Solutions Ltd & Others* HCA 525/2017 <sup>3</sup>, Recorder Eugene Fung SC stated:-  
18(1)(c) "..... However blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however late the application for leave to make such amendment may have been, the application should, in general, be allowed, providing that allowing it will not prejudice the other party.  
(2) Further, the burden of showing prejudice is on the party opposing the amendment and not on the party applying for leave to amend: *Kwan Shiu Cheong Charles v Ferrari SpA* [1994] 2 HKC 179 at 185B - G (Nazareth JA (as he then was))."

19. I am of the view that the proposed amendments set out in paragraph 15(2) and paragraph 15(3) above would facilitate the adjudication on the real issues and disputes between the parties. I would allow these amendments. However, as to the proposed amendment set out in paragraph 15 (1) above, I do not think that proposed amendment would add anything to P's case. If P's case on the Oral Loan Agreement is accepted by the court, the relief given to P should have the effect of putting P back to the position as if the Oral Loan Agreement had been duly performed, no more and no less. So the proper relief would be an order in terms of the new paragraph (1A) under the prayer in the amended statement of claim or in similar terms. With or without the proposed amendment set out in paragraph 15(1) above, the situation would be the same. Since that proposed amendment mentioned in paragraph 15(1) above would not serve any useful purpose, I would disallow that proposed amendment.

20. There be an order on P's summons in accordance with the aforesaid ruling. There be leave to P to file and serve the amended statement of claim and the re-amended reply and defence to counterclaim within 7 days. Costs of P's summons be to Ds in any event, to be taxed if not agreed.

## THE PRINCIPLES

21. In this case, I have to make factual findings to resolve factual disputes among family members. The following principles are relevant in this context.

(1) In assessing credibility, the court should test the witnesses' testimony against (a) inherent probability and (b) the incontrovertible evidence, and it would be dangerous to rely on the demeanour of the witness in isolation from inherent probability <sup>4</sup>.

(2) In *Star Glory Investment Ltd v Kai Tui (HK) Technology Co Ltd* HCA 3523/2002 <sup>5</sup>, Chung J said:-

12. "The assessment of a witness's credibility and/or reliability is a task frequently undertaken by the court in litigation (in fact, very often an essential task). I consider the following to be the appropriate test to adopt:-

'There are two objective tests for assessing a witness's credibility regarding a matter to which he has testified:-

(a) whether that part of his testimony is inherently plausible or implausible;

(b) whether that part of his testimony is, in a material way, contradicted by other evidence which is undisputed or indisputable (an example often given of such evidence is contemporaneous documents).

Further, where it is shown that a witness has been discredited over one or more matters to which he has testified (using the above tests), this fact is relevant to the assessment of his overall credibility. Likewise, regard may be had to a witness's motive for deliberately not giving truthful testimony. For example, telling the truth may prejudice his interest, or a just determination of the litigation may affect his interest'.

(See, for example, the decisions in *Chiu Chi Tong v. Lau Chong Sai & Another*, HCA 765/2002 (para. 28) and *Yu Ming Investment Ltd. v. Pang Ru Chuan*, Richard HCA 814/2002 (para. 13))."

(3) In respect of disputes between family members in *Chen Tek Yee & Others v. Chan Moon Shing* CACV 1356/2015 <sup>6</sup>, Yuen JA said:-

29. "..... when the parties are in a personal relationship (as contrasted with parties in a commercial transaction), it would be unrealistic to expect written records of assurances ... .."

(4) Similarly, in *Cheung Lai Mui v. Cheung Wai Shing & Others* HCA 1562/2012 <sup>7</sup>, Wilson Chan J said:

95. "..... Members of the family dealt with each other on the basis of trust, not mistrust. They could not have envisaged litigation in the future, and they would not have generated records to protect themselves out of the blue."

22. When a party without a proper explanation fails to call a witness whom the party might reasonably be expected to call, or to disclose documents in respect of which the party is obliged to disclose, the court may draw an adverse inference against the party that the evidence of the witness or the document may not help the party's case.

(1) In *Telings International Hong Kong Ltd v John Ho & Others* CACV 10/2010 <sup>8</sup>, Le Pichon JA said:

78. "I turn now to consider the question of the effect of the plaintiff failing to call any

witnesses. In his written submissions, [counsel] took the bold stance that '[n]o adverse inference could be drawn from the fact that the witnesses were not called. If the witness is not called, these statements are simply disregarded.'

79. I cannot accept [counsel's] submission. It is contrary to the well-established maxim, *omnia praesumuntur contra spoliatores*, sometimes referred to as the principle in *Armory v Delamirie* (1722) 1 Str 505. In *Hong Kong and Shanghai Banking Corporation v Chan Yiu Wah* [1988] 1 HKLR 457, Fuad JA expounded that principle (at 467). That passage is quoted in full in my judgment in *Tullett & Tokyo International Securities Ltd v APC Securities Co Ltd* [2001] 2 HKC 713 at 723B-E:

285. ' Failure to produce evidence, as indicating unfavorable tenor of evidence: (1) In general . . . The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.

The non-production of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause. Ever since the case of the *Chimney Sweeper's Jewel* [*Armory v. Delamirie* ] this has been a recognised principle.'

See also *Li Sau Keung v Maxcredit Engineering Ltd* [2004] 1 HKC 434 at 443I-444B.

80. While the judge referred (at §73) to

"the practice that where a litigant chooses not to call evidence, the court is entitled to be bold and can draw from the facts or reasonable inferences as to what facts may have been withheld"

and professed to have borne that in mind, it would appear that he did not find it necessary to apply the maxim by reason of his rejection of the testimony of the defence witnesses.

81. However, in thus rejecting the testimony of the defendants, the judge appears to have evaluated their evidence in isolation, without weighing it against any reasonable adverse inference to be drawn from the failure of the plaintiff to call any oral evidence on any particular matter or issue. Using what appears to be a broad brush approach, the judge simply rejected the defendants' evidence in its entirety. In a case such as this, where the plaintiff has failed to call relevant witnesses to give evidence notwithstanding the highly complex and at times wholly unexplained factual backdrop, such an approach serves to emasculate the evidential maxim and cannot be correct. In my view, every reasonable inference adverse to the plaintiff and in favour of the defendants should be drawn in determining each and every disputed fact."

(2) See also *South China Securities Ltd v Lam Kwen Yuen* [2012] 5 HKLRD 524<sup>9</sup>, in which DHCJ Lisa Wong SC (as she then was) said:-

7 "I was reminded by Mr Leung, and I take note, of the principle that where a person without explanation fails to call as a witness a person who he might reasonably be expected to call, it is open to the Court to infer that that person's evidence would not have helped that party's case. See, eg *Li Sau Keung v Maxcredit Engineering Ltd* [2004] 1 HKC 434, 443E - 444C, per Le Pichon JA citing *O'Donnell v Reichard* [1975] VR 916, 929, per Newton and Norris JJ. The same principle would apply to a failure without proper explanation to produce a document or other real evidence that a party might reasonably be expected to disclose."

23. With these principles in mind, I turn to the evidence in this case.

## ANALYSIS

24. P was born in 1935. She struck me as an honest witness. Despite her old age and the emotional stress, she could vividly recall the major events. In the light of the contemporaneous evidence and the undisputable facts, I am of the view that her evidence on the major events is reliable. She is also fair and has made concessions on some matters. She is no longer able to recall some minute details due to the lapse of time. This is understandable and would not affect the reliability of her evidence on the major events.

25. D1 and D2 are untruthful witnesses. Their evidence is inherently improbable and contradicted by documents on various material aspects. Further, there is non-disclosure of some material banking documents on their part, in respect of which no credible and satisfactory explanation has been offered. Taking all these into account, save and except the matters accepted by P, I reject their evidence in its entirety.

### The Oral Loan Agreement

26. I would first set out the facts shown in the documents, which are relevant to P's claim.

- (1) On 26 May 1999, D1 was declared bankrupt.
- (2) On 26 May 2003, D1 was discharged from bankruptcy.
- (3) On or about 22 June 2010, D1 signed a tenancy agreement ("the TA"), renting a floor in a small house in Tai Po ("the rented property") to be used as the matrimonial home for her and D2. The term of the tenancy was from 5 July 2010 to 4 July 2012. There was a stipulation in the TA that the parties must complete the first year of the tenancy. Thereafter, either party may serve a one-month written notice on the other party to terminate the TA.
- (4) On 10 October 2010, D1 was married to D2.
- (5) On 21 December 2010, P applied for and obtained a cashier order payable to D2 in the sum of HK\$2,000,000 ("the Cashier Order"). On the same date, the cashier order was deposited into D2's account.
- (6) On 13 February 2011, D1 entered into a provisional sale and purchase agreement for purchasing the Tai Po Property. The purchase price as stated in the provisional agreement was HK\$1,990,000.
- (7) On 23 February 2011, D1 entered into the formal sale and purchase agreement for purchasing the Tai Po Property.
- (8) On 8 April 2011, the assignment concerning the Tai Po Property was executed.

27. In the statement of claim and in P's witness statement, P claims that D2 has deposited the following sums into the Account as monthly repayment in performing the repayment obligation under the Oral Loan Agreement:

Date	Repayment Sum (HK\$)
2.9.2011	8,000
3.10.2011	8,000
1.11.2011	7,554
1.12.2011	5,500
6.12.2011	2,500
1.2.2012	8,000
1.3.2012	8,000
3.4.2012	8,000
2.5.2012	8,000
1.6.2012	8,000
4.7.2012	8,000
3.8.2012	7,514
3.9.2012	8,000
3.10.2012	8,000
2.11.2012	7,514
3.12.2012	8,000
2.1.2013	8,000
1.2.2013	7,514
1.3.2013	8,000
27.3.2013	8,000
3.5.2013	7,460
3.6.2013	8,000
2.7.2013	8,000
1.8.2013	7,460

Date	Repayment Sum (HK\$)
3.9.2013	8,000
2.10.2013	7,470
1.11.2013	8,000
3.12.2013	8,000
3.1.2014	8,000
	Total: HK\$220,486

28. In his final submissions, Mr Kwong submits that the Account Records also show the following further repayments ("the Further Repayments"), which has been overlooked inadvertently:

Date	Repayment Sum (HK\$)
3.1.2012	7,555
4.2.2014	7,460
3.3.2014	8,000
26.3.2014	4,569
1.4.2014	3,000
	Total: HK\$30,584

29. In P's evidence, P said the following:

(1) In or around early December 2010, while P was in Canada, she received a telephone call from D1. D1 told P that D1 was in financial need as she had gone bankrupt. She was paying HK\$9,500 to rent a property in Tai Po. D1 told P that she had married to D2 recently. Such marriage, to P's understanding, was the 3rd marriage of D1.

(2) Knowing that D1 was in financial need and was just married, P asked D1 the approximate amount of purchasing a floor in a small house in Tai Po, and D1 told P that the figure was about HK\$2,000,000. Out of sympathy, P proposed to lend HK\$2,000,000 to D1 to assist D1 to purchase a floor in a small house as her home. P told D1 that once she had purchased the property, she should start to repay P HK\$9,500 per month without interest, until the entire loan was fully repaid. D1 counter-proposed a monthly repayment of HK\$8,000, and P accepted this counter proposal.

(3) D1 told P that D1 had no bank account for she had gone bankrupt. D1 asked P to liaise with D2 who had a bank account, and the HK\$2,000,000 should be paid to D2.

(4) In or around late 2010, D1 arranged a lunch meeting with P in a restaurant in Pioneer Centre. P met D1 and D2 in that lunch meeting. P met D2 for the first time in that meeting. Prior to that, P did not know D2 at all. In this lunch meeting, D2 and P agreed to meet a few days later at the Des Voeux Road Branch of Hang Seng Bank for the purpose of providing the HK\$2,000,000 to D2. Subsequent, D2 and P agreed to meet on 21 December 2010 in the Des Voeux Road Branch of Hang Seng Bank.

(5) On 21 December 2011, P went to the Bank of East Asia to apply for and obtained the Cashier Order. P then went to the Des Voeux Road Branch of Hang Seng Bank, and D2 was waiting for her there. P gave the Cashier Order to D2, and D2 deposited the Cashier Order into his Hang Seng Bank account.

(6) Shortly thereafter, D1 purchased the Tai Po Property. D1 told P that D1 had to continue to pay rent under the TA until August 2011, and D1 sought P's permission for starting to repay the Loan in September 2011. P agreed to this.

(7) Ds started to repay the Loan in September 2011. P would go to the bank to update the passbook in the middle of each month. Usually, she would find that Ds had paid a sum of HK\$8,000 into the Account at the beginning of that month. However, sometimes she would find that the sum paid into the account was slightly less than HK\$8,000. In this situation, she would call D1. Each time, D1's explanation was that she had some financial difficulties in that month. In her evidence, P said that the repayment stopped after January 2014. However, after being referred to the Account Records, P agreed that there were some further repayments after January 2014.

(8) Before the commencement of these proceedings, P continuously asked Ds to continue to repayment the Loan, but Ds refused to do so.

30. Ds' evidence concerning the HK\$2,000,000 is as follows:

- (1) In about early December 2010, D1 received a telephone call from P. P told D1 that the Canadian government was investigating P's overseas assets, and P was planning to give her assets to her children. P told D1 that she wanted to give D1 HK\$2,000,000 as a gift to remedy her failure to take care D1 in the past. In that telephone conversation, D1 had not agreed to accept the gift.
- (2) In about mid-December 2010, P, D1 and D2 had a lunch meeting in a restaurant. D1 introduced D2 to P. P was impressed by D2 and told D1 that D2 was an honest and reliable man.
- (3) On 21 December 2010, P contacted D2 by phone and asked D2 to give his bank account number to P. P told D1 that she intended to give HK\$2,000,000 to D1 as a gift, but D1 had not yet agreed to accept due to some emotional reason. P wanted D2 to take the money and looked after D1 by using the same. D2 then gave his Hang Sang Bank account number to P, and P deposited the Cashier Order into his account. Thereafter, upon P's request, D2 went to Mongkok to meet P, and P gave a deposit slip to D2. P reminded D2 to treat D1 well.
- (4) A few days later, D2 told D1 the aforesaid.
- (5) In 2010 and 2011, Ds had stable jobs, and each of them had substantial saving, ie over HK\$1 million. They had no financial problem at all. They could purchase the Tai Po Property even without the HK\$2,000,000 from P.
- (6) Leung Senior passed away in April 2011. Before and after that, Ds have made payments to P for the medical and funeral expenses of Leung Senior. The total of these payments was about HK\$70,000 or HK\$80,000. Among which, HK\$30,000 was paid by D1 in one go.
- (7) In respect of the sums paid into the Account, only the payments made on 2 September 2011, 3 October 2011, 1 November 2011, 1 December 2011, 6 December 2011, and 1 February 2012 ("the 6 Payments") were from D2. These sums were given to P for paying the funeral expenses of Leung Senior and for P purchasing some nourishing food for herself. In respect of the 6 Payments, each time P would give a call to D2 and told D2 to deposit how much into the Account, and D2 would do in accordance with the instruction given by P. Save and except these 6 payments, all the other payments shown in the Account Records were not related to Ds.
- (8) P borrowed the Bangle from D2 in February 2011. At that time, P promised that she would bring the Bangle to Canada and show it to her friends there, and would return the Bangle to D2 when she came back from Canada to Hong Kong. However, P has never returned the Bangle to D2.
- (9) The Bangle was a gift given by D2's mother to D2 when D2 married D1. The Bangle was of a great sentimental value to Ds. D2's mother passed on 12 July 2015. To Ds, it was most unfortunate that D2 could not get the Bangle back when D2's mother was alive.
- (10) In late 2015 ("the 2015 Gathering"), in a family meal gathering attended by P, D1, D2, and D1's uncle ("the Uncle") and aunt ("the Aunt"), D2 requested P to return the Bangle and the HK\$232,280 to him again. P refused and cursed the marriage between D1 and D2. After that, Ds decided to cease to have any contact with P.
- (11) Starting from late 2016, P started to ask Ds to repay money allegedly owed by them to P.

31. Having heard the evidence, in respect of the HK\$2,000,000, I prefer P's case to Ds' case. I am of the view that P is telling the truth, and Ds have told an untrue story to try to exonerate themselves from the liability of repayment.

32. First, save and except Ds' tax returns in 2011/12, Ds have not disclosed any other documents concerning their financial situation at that time. Ds claimed that they were financially healthy and had substantial savings in 2010 and 2011. Ds also claimed that they could purchase the Tai Po Property even without the HK\$2,000,000 from P. The tax returns disclosed by them could not tell how much savings were in their bank accounts at the material time. If there is any truth in Ds' claim, their bank statements would show the same. However, neither D1 nor D2 has disclosed a single piece of bank statement. Ds have been legally represented at all times in these proceedings and they must know the disclosure obligation. No satisfactory explanation has been offered in respect of the non-disclosure of documents concerning their assets in 2010 and 2011. I draw an adverse inference against Ds that all the allegations made by Ds concerning their financial situation in 2010 and 2011 are not true.



33. Second, D2 said that he was sure that only the 6 Payments were made by him, because he had checked his own bank statements and found out this answer from those statements. D2 was asked why he did not disclose those bank statements, and D2 was unable to provide any satisfactory explanation. Mr Ng submits that apart from the 6 Payments, other sums as shown in the Account Records which are allegedly repayments made by Ds are cash deposits, and D2's own bank statements would not shed any light on whether these sums are from D2's bank account. Mr Ng submits that therefore no adverse inference should be drawn against Ds as a result of the non-disclosure by D2 of his own bank statements. With respect, these submissions cannot be correct. If the other sums are in fact cash deposits made by D2, there would be corresponding cash withdrawals in D2's bank account. If D2 has nothing to hide, it is inexplicable why he did not disclose his bank statements. I find that the true reason for D2 not disclosing his own bank statements, which have been examined by him before he signed his own witness statement, is to suppress evidence showing that there was a pattern of paying about HK\$8,000 into the Account by D2 from September 2011 to April 2014. That pattern is clearly in support of P's case and against Ds' case.

34. Third, in respect of the 6 Payments, Ds' evidence is inherently improbable.

(1) Leung Senior passed away in April 2011. It is contrary to common sense that P did not ask Ds to make any contribution to the funeral expenses in April or at a time shortly after April 2011, but only started to ask Ds to make contribution in September 2011. Ds claimed that the contributions paid by them were used to buy a graveyard for Leung Senior. However, if there is any truth in Ds' case, Ds should have made their contribution in one go (bearing in mind that Ds were financially healthy in 2011, according to Ds' case), or by some fixed-amount instalments.

(2) According to Ds, the other purpose of these payments was money to P to buy some nourishing food for herself. If that is true, there is no reason why such payments would completely stop after February 2012. Bearing in mind that according to Ds' case, the relationship between P and Ds only broke down in the 2015 Gathering. There is no reason for stopping the payment of any food money to P before the 2015 Gathering.

(3) If the purposes of these payments are the same, it is inexplicable that P would request for different sums at different times, and would even request for the odd sum of HK\$7,554 on or about 1 November 2011.

35. Fourth, D2 said that he would discuss matters with D1, just like what other normal couples would do. D2 alleged that when he first heard of the proposed gift of HK\$2,000,000 in the telephone call made by P to him on 21 December 2010, he gave his bank account number to P to enable P to deposit the money into his bank account, without having any prior discussion with D1. According to D2, P also told D2 in that telephone call that D1 was unwilling to accept the money. HK\$2,000,000 is a significant amount. Bearing all these in mind, it is inherently improbable that D2 would act in the way alleged by him in his evidence.

36. Fifth, the 2015 Gathering has significance in Ds' case. In this gathering, D2 demanded P to return the Bangle and the HK\$232,280 and this infuriated P. The 2015 Gathering led to the complete breakdown of the relationship between P and Ds, as well as the change of stance of P on the HK\$2,000,000. P only started to claim that the HK\$2,000,000 was a loan to Ds after the 2015 Gathering. The 2015 Gathering was witnessed by 2 independent witnesses who have no personal interest in these proceedings, ie the Uncle and the Aunt. Ds have never invited the Uncle and the Aunt to give evidence in these proceedings. When D2 was asked why Ds did not adduce evidence from the Uncle and the Aunt, there was a lengthy dead-silence on his part. His eventual explanation was that the Uncle and Aunt were 80 odd years old. In my view, this cannot be a satisfactory explanation for not adducing any evidence concerning the 2015 Gathering from the Uncle and the Aunt. P is also in her mid-80s and is able to give evidence in the trial. There is no allegation, let alone evidence, suggesting that the Uncle and the Aunt have any difficulty in giving evidence. I draw the adverse inference against Ds that the 2015 Gathering as alleged by them is untrue.

37. P's case is supported by the Account Records. P said in her evidence that although some other people would deposit money into the Account, only D2 would regularly deposit HK\$8,000 or a figure close to HK\$8,000 into the Account each month. Looking at the payment pattern as shown in the Account Records, I accept P's evidence.

38. Further, P's case is supported by the fact that before Ds obtaining the HK\$2,000,000 from P, Ds were only living in the rented property. Shortly after obtaining the HK\$2,000,000, on 13 February

2010, D1 signed a provisional sale and purchase agreement and purchased the Tai Po Property, and the purchase price was very close to HK\$2,000,000.

39. I note that in the statement of claim, it is pleaded that the repayment of Loan should commence "from around January 2011". However, in P's oral evidence, P said that she agreed to D1's proposal and allowed her to only start to repay the Loan in September 2011. That was because D1 said she had continued to pay rent until August 2011. I am of the view that P's evidence is true, for her evidence is supported by the TA. According to the terms of the TA, the earliest time for D1 to serve a one-month written termination notice on the landlord was in July 2011, and the earliest time for D1 to stop to pay rent would be August 2011. The P's pleaded case is that the repayment should commence from around January 2011, not in January 2011. In my view, there is no material discrepancy between P's pleaded case and P's evidence.

40. I also note that P has omitted to mention the Further Payments in the statement of claim and in her witness statement. Mr Kwong submits that these are inadvertent omissions. I agree. In any event, taking the Further Payments into account would only be beneficial to Ds. I would take the Further Payments into account in assessing the outstanding amount to be repaid by Ds.

41. Mr Ng submits that even if P succeeds on the alleged Oral Loan Agreement, P still has no basis to sue D2, for the alleged Oral Loan Agreement is an agreement between P and D1 only. With respect, I am unable to accept these submissions. According to P's pleaded case, the Loan was provided to both D1 and D2<sup>10</sup>, and D1 and D2 (who are wife and husband) are mutual agents of each other<sup>11</sup>. In P's evidence, P said that she knew that D1 had married to D2, and the purpose of the Loan was to help them to purchase a matrimonial home. At all times, D2 was involved in the matters relating to the Loan. He was the person obtaining the Loan from P. He was also the person making monthly repayments to P from 2011 to 2014.

42. Ds also raise a limitation defence against P's claim. In my view, this limitation defence must fail. According to P's pleaded case, Ds committed a breach of the Oral Loan Agreement since around February 2014 by failing to make the monthly repayment of HK\$8,000<sup>12</sup>. P commenced these proceedings on 29 May 2017. Clearly, P's claim was made within the 6-year period after the alleged breach of the Oral Loan Agreement.

43. In my judgment, P's claim must be allowed. I order that:

- (1) Ds do forthwith repay the total of the monthly repayments under the Oral Loan Agreement from May 2014 to December 2019 ("Pre-Judgment Monthly Repayments") to P, being HK\$8,000 per month;
- (2) there be interest on each of the Pre-Judgment Monthly Repayment from the 1st day of the relevant calendar month to the date of this judgment at 1% above the best lending rate of HSBC;
- (3) Ds do make a monthly repayment of HK\$8,000 to P on the 1st day of each calendar month, starting from 1 January 2020, until the full payment of the Loan;
- (4) there be interest on any sum which is now due and unpaid on the judgment rate from the date of this judgment until full payment of the same.

The HK\$200,000 and the HK\$32,280

44. As set out in paragraph 9 above, P accepts that D2 paid HK\$200,000 on her behalf as the initial deposit in the purchase of the HK Property. P also accepts that D2 on her behalf paid some money to the contractor doing the renovation work of the HK Property.

45. In her evidence, P said that in early 2011, Leung Senior was very sick in Canada, and she had to travel back to Canada from time to time to look after Leung Senior at that time. Therefore, P needed D2's assistance in paying the initial deposit and paying some fees to the contractor.

46. In his evidence, D2's claimed that after he had paid these sums, it was agreed between him and P that these sums would be repaid by P to him after the resale of the HK Property. In my judgment, this alleged repayment agreement is untrue.

- (1) The alleged repayment term is contrary to common sense. If P or Robert Leung decided not to sell the HK Property, the two sums would be never repayable.
- (2) In early 2011, P had just provided the Loan of HK\$2,000,000 to Ds to help them to

purchase their own matrimonial home. She just needed D2 to help her to pay these relatively small amounts (ie, the HK\$200,000 and some renovation fees) in relation to the HK Property because she was in Canada looking after Leung Senior. There would be no reason for P not to reimburse D2 as soon as practicable and to take advantage of the D2 by depriving him of the cash paid by D2 indefinitely.

47. In respect of the HK\$200,000, P said that she had repaid the same to D2 by a cheque before the completion of the sale and purchase of the HK Property on 10 March 2011. She said that she had tried but was unable to find the record of the said cheque. D2 denied that the HK\$200,000 had been repaid. However, D2 has not produced any record of his bank account to refute P's evidence.

48. On the question of whether the HK\$200,000 has been repaid, neither P nor D2 has produced documentary evidence on the point. On balance, I prefer P's evidence on this issue.

(1) D2's evidence on the HK\$2,000,000 in P's claim is blatantly untrue. This cast a serious doubt on the overall credibility of D2's evidence.

(2) Bearing in mind that P had just provided the Loan of HK\$2,000,000 to Ds to help them to purchase their own matrimonial home in late December 2010, there would be no reason for P to deprive D2 of HK\$200,000 in early 2011, jeopardizing Ds' plan to buy their own matrimonial home.

49. In respect of the sums paid by D2 on behalf of P to the contractor, there is no clear documentary evidence showing that the total of such sums is HK\$32,280. While there are documents showing the renovation fees paid to the contractor, the documents can only show that among those fees, HK\$17,100 and HK\$2,750 were paid by D2 to the contractor. In her evidence, P said that she had paid a deposit of HK\$8,000 to the contractor. Further, she had pre-paid HK\$20,000 by a cheque to D2 to enable D2 to pay the necessary fees to the contractor. As to whether P has paid HK\$20,000 to D2 as claimed by P in her evidence, I note that neither P nor D2 has produced any bank document to support or to refute this claim. For the reasons set out in paragraph 48 above, I prefer P's evidence on this issue. The total of the amounts paid by D2 on P's behalf to the contractor, which are supported by documentary evidence, are HK\$17,100 + HK\$2,750 = HK\$19,850. P has pre-paid HK\$20,000 to D2. According, P does not owe D2 anything in relation to the renovation of the HK Property.

50. In any event, even if the HK\$200,000 or any renovation fee has not yet been repaid by P to D2, D2's counterclaim for the return of these sums would had been time-barred when the counterclaim was raised on 24 July 2017.

51. Since I have rejected the alleged repayment term put forward by D2, in respect of these sums, the obligation to repay is immediately after the loan is made, and the cause of action against the borrower for the repayment of the loan accrues once the loan is made <sup>13</sup>. According to D2, he paid the HK\$200,000 on behalf of P as the initial deposit in the purchase of the HK Property on 24 January 2011, and he paid the sums on behalf of P to the contractor (the total of which being HK\$32,280) in the period from 2 April 2011 to 1 June 2011. By 24 July 2017, more than 6 years have elapsed.

52. For the reasons above, D2's counterclaim for these 2 sums must be dismissed.

### The Bangle

53. As said in paragraph 10 above, P is prepared to return a bangle to D2. According to P, the bangle shown by her to D2 is the Bangle in question. However, D2 disagrees and is of the view that the bangle produced by P is not the Bangle. In these circumstances, I have to consider whether I can make the order concerning the Bangle claimed by D2 in his counterclaim, ie an order requiring P to deliver the Bangle to D2.

54. I have tremendous difficulties in giving the order claimed to D2, for the reason that the appearance and the characteristics of the Bangle have not been sufficiently pleaded and shown in the evidence. In D2's counterclaim, the only description concerning the Bangle is that the bangle is a jade bangle. In D2's evidence, the only description concerning the Bangle is that it is a "龍鳳玉鐲". No photo of the Bangle has ever been produced. In my view, there is no sufficient evidence before me enabling me to make an unambiguous delivery up order in favour of D2 and against P.

55. The delivery up order sought by D2 in fact is a mandatory injunction. In respect of any order made

by the court, there is a certainty requirement. As said in *Gee*, Commercial Injunctions (6th edition), para 4-001:

"The Certainty Principle

There is a general principle that an order must be expressed in unambiguous language so that the defendant knows exactly what is forbidden or required by the order. Contempt proceedings will not succeed when the order is unclear or ambiguous.

The principle applies to all injunctions. This is a matter of fairness to the person enjoined. It goes not only to the drafting of an injunction when in principle the decision has been made to grant it, but also to the decision itself on whether to grant an injunction or specific performance. The degree of certainty required should be considered with the possibility of contempt proceedings in mind and whether the injunction would be enforceable in such proceedings. An injunction should not be granted in terms which leave it to be argued out in contempt proceedings what it does and does not require. ...."

56. Based upon the evidence before me, I am unable to make an unambiguous delivery up order. The dispute between the parties is that P is now saying that the bangle produced by her is the "the jade bangle 龍鳳玉鐲", D2 is saying otherwise. In these circumstances, if I make the delivery up order sought by D2, it can be said for sure that the order would not be enforceable due to lack of precision.

57. In my judgment, D2 has put not put forward sufficient evidence in support of the delivery up order claimed by him. In these circumstances, I have to dismiss his counterclaim for the delivery up order.

#### DISPOSITION

58. For the reasons above, I allow P's claim and dismiss D2's counterclaim, and make the order as set out in paragraph 43 above.

59. In my view, costs should follow the event. The time spent on P's claim and the time spent on D2's counterclaim in these proceedings are approximately in 80% and 20%. I make a costs order nisi that 80% of the costs of these proceedings (including all costs reserved) be paid by Ds to P, and the remaining 20% be paid by D2 to P. All costs are to be taxed if not agreed. Mr Kwong does not seek a certificate for 2 counsel.

60. At the time of the commencement of these proceedings, P's claim exceeded the then jurisdiction of the District Court<sup>14</sup>. So there was nothing wrong for P to commence the proceedings against Ds in the High Court. D2 chose to raise his counterclaim in these proceedings. At all times, Ds were contended to contest these proceedings in the High Court, and no application has been made to transfer the proceedings to the District Court. In the circumstances, I am of the view that costs should be taxed on the High Court's scale.

61. Lastly, it remains for me to thank counsel for the assistance rendered to the court.

<sup>1</sup> Ds' repeated failures in making the monthly repayments to P in accordance with the Oral Loan Agreement

<sup>2</sup> HCCL 8/2013, 22 October 2014

<sup>3</sup> HCA 525/2017, 11 October 2019

<sup>4</sup> *Tradepower (Holdings) Ltd (in Liquidation) v. Tradepower (Hong Kong) Ltd & Others* (2009) 12 HKCFAR 417 *Ting Kwok Leung v Tam Dick Yuen* (2002) 5 HKCFAR 336, [140] - [141]. See also, [37] - [38]

<sup>5</sup> HCA 3523/2002, 13 August 2005

<sup>6</sup> CACV 1356/2015, 29 February 2016

<sup>7</sup> HCA 1562/2012, 10 April 2017

<sup>8</sup> CACV 10/2010, 22 October 2010

<sup>9</sup> [2012] 5 HKLRD 524

<sup>10</sup> Statement of Claim, [4]

<sup>11</sup> Amended Reply and Defence to Counterclaim, [1]

<sup>12</sup> Statement of Claim, [15]

<sup>13</sup> *Eugene Chuang v. Kevin Ho* [2002] 4 HKC 245 *Mary Lee v Ngai Yee Chai* [2006] 1 HKC 157, [15];

, [10]  
<sup>14</sup> The civil jurisdiction of the District Court only increased to cover monetary claim up to HK\$3,000,000 on 3 December 2018.

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