

HONG KONG / JUDGMENT

CHEONG SHING LTD v. YU KWAN

COURT

Court of Appeal

DECIDED

14 December 2007

CASE / FILE NUMBER

CACV319/2006

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bjbj cacv 319/2006 AND CACV 348/2006 in the high court of the hong kong special administrative region court of appeal civil appeal noS. 319 of 2006 AND 348 OF 2006 (on appeal from hca NOS. 12021 of 1998 AND 2183 OF 2001 (CONSOLIDATED)) HCA 12021/1998 BETWEEN CHEONG SHING LIMITED Plaintiff YU KWAN Defendant HCA 2183/2001 AND BETWEEN N gP N gP dant KONG KAI CHEUNG Defendant LEE WAI KEUNG Defendant CHEONG SHING LIMITED Defendant (Consolidated by the Order of Deputy High Court Judge Muttrie dated 6 March 2002) Before: Hon Rogers VP, Le Pichon JA and A Cheung J in Court Dates of Hearing: 26-30 November 2007 Date of Handing Down Judgment: 14 December 2007 J U D G M E N T Hon Rogers VP: This was an appeal from a judgment of Burrell J given on 15 August 2006 following a trial that had taken some 24 days with 21 days of evidence. The judge gave judgment in favour of the plaintiffs against the first, third and fifth defendants in the sum of \$28,260,000 with interest from 17 May 2001. He dismissed the claim against the fourth defendant as well as the counterclaims by the third and fifth defendants. The action against the second defendant had been discontinued some time previously. At the conclusion of the hearing of this appeal, judgment was reserved which we now give.

Background

As the judge pointed out in the first paragraph of the judgment, the claim in this case arises from the fact that Mr Yu Kwong (Mr Yu), who was the general manager and director of the second plaintiff, passed a cashier order in the sum of HK\$38.76 million obtained with the plaintiffs funds to the wife of the first defendant at the Kowloon Tong Club. The second plaintiff was a subsidiary of the first plaintiff, Mr Yu also having an interest in the second plaintiff. The plaintiffs pleaded case was that the sum was provided as a loan to the first, third and fourth defendants who were partners. At their direction the bank draft was made payable to the fifth defendant. The first and fifth defendants defence was that the bank draft was paid pursuant to a joint venture agreement whereby Mr Yu himself would purchase from the fifth defendant 38% of some 60 million shares in KPI Company Ltd (). It was said that the price was thus \$1.70 per share for 22,800,000 shares. The joint venture agreement was said to be a joint venture whereby the fifth defendant would hold 62% of shares held in KPI and Mr Yu would hold 38%. The fifth defendant would continue to

purchase shares and warrants from the market until the shares held would reach 50% of the issued share capital of KPI. It was then that a general offer would be made to acquire all the KPI shares. The third defendant's defence was that he was not involved in any financial dealing as alleged by the plaintiffs; the only thing that he had done was to introduce Mr Yu to the other defendants and that in so far as he signed documents it was solely to assist Mr Yu and the plaintiffs in obtaining funds. The plaintiffs case was that although originally the proposal had been put that the plaintiffs, or at least one of them, should take part in a joint venture with the defendants to purchase KPI shares, after Mr Yu had consulted the first plaintiff in Xian, in particular Mr Shi, it was made clear that the plaintiffs would not take part in any joint venture. Nevertheless, the plaintiffs were prepared to use money that was available from the proceeds of a letter of credit to finance the first, third and fourth defendants. The plaintiffs relied upon two written agreements, one, which was termed a loan agreement numbered KY-001, and the other, referred to as a guaranteed return agreement numbered KY-002, as evidencing the loan agreement. It was then said in the statement of claim that the terms of the agreement were varied to being a loan of HK\$38.76 million. That variation was said to have been reached orally and contained in or evidenced by a photocopy of the bank draft that was signed by the third defendant. Although the loan was never repaid in full, credit was given for partial repayment in two sums namely \$6.5 million and \$4 million. At the trial, and indeed on the hearing of this appeal, the parties were in agreement that the issues in the case were almost entirely issues of fact. There was an issue of law raised at the trial as to whether the provisions of the Moneylenders Ordinance, Cap. 163 would prevent the plaintiffs from recovering the money paid. In short the judge held against the argument and the matter was not argued on this appeal. There was also a question as to whether the repayment of the \$4 million had been made by the third defendant under duress. The judge held that the incident which resulted in the third defendant making that payment did not reflect well upon the plaintiffs but did not hold that there had been duress such as would require the payment to be repaid. Again that matter was not argued on this appeal. The judge considered that there were three main series of events that required to be considered. The first concerned the events prior to the time when the bank draft for \$38.76 million had been handed over, the second concerned the events which took place at the time when that bank draft was handed over and the third the various events which took place after the bank draft had been handed over and the money received. The judge came to the conclusion that he could not rely on any of the witnesses having told the whole truth. He also considered that on many of the issues raised in the course of the trial it was impossible to make a reliable finding of fact. He summarised his conclusions in this respect in paragraph 8 of the judgment where he said:

8. Apart from the complexities and uncertainties surrounding the issues themselves a further difficulty has been the fact that I do not think any of the seven witnesses who gave evidence (two for the plaintiffs, D1, D1's wife, D3, D4 and a Mr Wong) told the whole truth. Where the 24 July events and the post 24 July events are capable of being construed as being consistent with both a loan and a joint venture, sifting the truth from falsehoods has been particularly troublesome. Moreover, neither do I think that the entire truth could be found within the

entire pool of evidence even if it were possible to miraculously separate truth from lies. In other words not even everything that has been said which is true reveals the whole picture. Chain, who appeared on behalf of the third defendant, contended that given that the judge held all witnesses to be unreliable he did not seek to challenge the adverse finding against his client. Mr Chan SC, who appeared on behalf of the first and fifth defendants, argued that the judge had not considered the plaintiffs evidence with as much thoroughness as the other witnesses, possibly because there was a gap of over one year in the course of the trial. As regards the defendants witnesses he sought to argue that the judge had made observations which he challenged and that in the light of that the judge's holding of unreliability could not stand. In my view, there was quite sufficient reason for the judge to hold that the evidence given by the defendants witnesses could not be relied upon. Indeed, having considered those parts of the transcript that were drawn to our attention it would not seem possible for the judge to have held otherwise. The first and most important finding of fact by the judge was that the bank draft of \$38.76 million made payable to the fifth defendant was handed over to the first defendant's wife at the Kowloon Tong Club on 24 July 1997 and the proceeds were credited to the account of the fifth defendant. That having been established, it was then necessary to determine the basis upon which the money had been paid into that account. In considering the events prior to the handing over of the bank draft, there was little dispute that initially the suggestion had been made to Mr Yu on behalf of the plaintiffs that there should be some form of joint venture involving the purchase of KPI shares. Mr Yu was introduced to the first and fourth defendants by the third defendant. The third defendant was an architect who had had business dealings with both the first defendant and with the first plaintiff. The fourth defendant was a medical doctor who worked in a hospital in Hong Kong. The judge said that he had a deep interest in stocks and shares. It would appear that he had a close association with the first and third defendants, no doubt contributing his suggestions as to investments rather than providing heavy capital contributions. The first defendant appears to have been the central figure amongst the defendants. The judge described him as a wealthy businessman who claimed that in 1997 he had assets exceeding HK\$1 billion. The judge said that he had a style of business that was significant as regards this case. He owned and controlled a large number of small private companies and he rarely, if ever, conducted business in his own name. One of the companies which he controlled was the fifth defendant. Although the first defendant's wife was often a shareholder or a director of companies which the first defendant controlled, the judge held that it was the first defendant who was the dealer, the controller, the decision-maker, the money, the boss. Although some criticism was made of the judge's remark that the first defendant treated the third defendant as a junior partner who was put on stage whilst Mr Lo pulled the strings from the wings that comment appears to be substantially borne out by the impression given by various parts of the transcript to which this court's attention was drawn. The proposal to purchase the KPI shares centred around a suggestion that if those shares became associated in the public mind with the plaintiffs, the shares would be dyed red. The extent to which the proposal was fully thought out is by no means clear. Indeed, the first defendant's oral evidence confirms that lack of clarity as to whether it

was intended that the benefit should be taken immediately from the rise in value of the shares, and it was hoped or suggested that they might rise in value by nearly 100% within two or three months, or whether the ultimate proposal was that a general offer would be made with a view to the company being taken over. Those are, of course, quite different propositions and would have involved different strategies. It is unnecessary to examine the matter to any great length because the judge held, very clearly, at a very early stage in the judgment that he was satisfied that the plaintiffs had turned down the suggestion that they should be involved as parties to a joint venture in the purchase of the KPI shares but being shrewd businessmen they were prepared to enter into an agreement to loan money because they were permitted to do that and it would not involve them directly in the business of Hong Kong share transactions and would eliminate any risk. Later in the judgment, the judge went on to consider the first defendant's evidence and was satisfied that it did not support the pleaded agreement. Again, having considered the various parts of the transcript that were drawn to this court's attention, I consider that the judge was amply justified in the conclusion to which he came in this respect. Quite simply the defendant's evidence did not support the existence of a joint venture along the lines pleaded. On the oral evidence the judge was entitled to make the findings that he did. For those reasons alone the defence raised must fail. The judge also considered the evidence from the first defendant's wife. In paragraph 64 he drew attention to one patent instance which demonstrated that she was an unreliable witness. Mrs Lo had produced tables which were relied upon by the first and fifth defendants as showing that shares had been purchased in pursuance of the alleged joint venture. In paragraph 65 of the judgment, the judge rejected that evidence saying that the tables were far from complete and included transactions which could not have been part of an alleged joint venture. Although Mr Chan attempted to rely on other tables as demonstrating that KPI shares had been purchased in pursuance of the alleged joint venture, the tables merely showed that various amounts of shares had been purchased and sold in the names of different companies through a number of brokers. It appears that at least on one occasion a substantial parcel of shares was sold at a loss. A consideration of those tables could, in no way, establish that there had been transactions referable to the alleged joint venture. Furthermore, there is no suggestion that the plaintiffs and Mr Yu were made aware of the transactions at the relevant time. It was argued that the judge had overlooked the notes which Dr Lee had made during the course of meetings prior to 24 July when the bank draft was passed over. To the contrary, the judge clearly considered them. He may not have said a great deal about them, but it would have been particularly surprising if he had come to any other conclusion than that they were of little assistance to the defendants since although they may have reflected Dr's impressions of agreements that might have been reached, they did not establish any agreement which was consistent with the defendant's pleaded case. Mr Chan submitted that whatever else the notes showed, they demonstrated that there were more meetings than the single meeting referred to in paragraph 32 of the judgment at which the joint venture, as opposed to a loan, was discussed. It is true that there are more than one proposal and outline of a draft joint venture agreement, whether there was more than one meeting or whether the proposals

were drafted outside any meeting is quite another point. In any event, even if there were more than one meeting that would not undermine the judge's conclusion as to the plaintiffs not agreeing to enter a joint venture. Neither could it be said that the judge had overlooked the terms of a receipt which had been handed to Mr Yu on 24 July 1997 at the time that the bank draft had been handed over to the first defendant's wife. Indeed that had been the focus of the initial claim which had been made on behalf of the plaintiffs in the letter dated 22 June 1998 from Fred Kan and Co. which had been sent on Mr's behalf claiming the return of the \$38.76 million. That letter had put the claim on the basis that Mr Yu had purchased 22,800,000 shares in KPI and not on the basis of a loan by the plaintiffs. Indeed the matter went further to the extent that a writ, HCA 12106 of 1998, was issued on that basis. That action never proceeded. The judge accepted Mr's explanation that the introduction to that solicitor's firm had been made by the third defendant who had also made the suggestion that the claim should be put upon the footing that the plaintiffs had contracted to purchase shares. The judge accepted that Mr Yu was desperate to get the money back. Indeed that appears to have been the case since it would seem that Mr Yu was under pressure from the first plaintiff. He may, indeed, have been held personally responsible by the plaintiffs for the failure by the plaintiffs to be able to receive their money. Then it was said that the judge had failed to take proper account of the fact that there had been a cheque of \$2 million paid to Victory Grand Investments Ltd which was a company owned and controlled by Mr Yu. It was said by the defendants that this was the repayment of a deposit in relation to the purchase of KPI shares. Mr Yu, for his part, had claimed that the cheque was paid as part of the profits which he enjoyed from what has been termed the Eastland Tower transaction. That was a purchase and sub-sale of a property of that name. A company owned by Mr Lo, with others, had apparently purchased that property for \$180 million but had managed to find a buyer for some \$266 million. The deal had been introduced by the third defendant, who had, apparently, been given a 5% share. The third defendant had in turn shared his part equally with Mr Yu and a Mr Wong Wai Shan. The judge referred to the evidence relating to the Eastland Tower transaction in 2 parts of the judgment in paragraphs 96 to 98 and in paragraphs 114 to 115. It is quite clear from the judgment that this is one of the aspects where the judge considered it was impossible to make unequivocal findings of fact since the evidence was far from conclusive and precise. This court was taken through the various documents and parts of the transcript that related to the Eastland Tower transaction and in my view the judge was correct in his approach to the matter. Despite best efforts, the matter did not lend itself to a clear conclusion. Counsel provided a note attempting to analyse the financial aspects of the transaction. That merely showed that some money had changed hands but the precise figures could not be rationalised. In the end, therefore, the argument that the judge had failed to consider that the payment of \$2 million by cheque to Victory Grand Investments Ltd. was referable to a repayment of a deposit for the purchase of the shares was not something which this court could rely upon to undermine the judge's conclusion. Whilst it was argued that the receipt which Mr Yu was given on 24 July must, if the plaintiffs case were correct, have been fraudulent and that was not put in cross-examination to the defendants witnesses, the fact remains that it was never, and even in the

this court it was not, the first defendant's case, or that of any of the other defendants, that the payment of \$38.76 million was for the purchase of shares as such, as opposed to the joining in of a joint venture. Hence, without any disrespect to the arguments that have been raised, that receipt cannot, of itself, assist the defendants' case. In relation to the plaintiffs' case, the defendants took the point on this appeal that the judge had not accepted the plaintiffs' pleaded case in relation to the KY-001 and KY-002 documents. Indeed he held that those documents, which had been prepared by Mr Yu, did not reflect the terms of any agreement which had been reached. On this appeal the plaintiffs did not seek to overturn that ruling. There was, however, ample evidence for the judge to hold that the money had been paid as a loan and the judge was prepared to accept that the two documents were relevant to the extent that there had been a loan. In this respect Mr Chain, in particular, sought to argue that the judge should not have held in favour of the plaintiffs because the pleaded case as to the terms of the loan were different from those which he found. In my view this argument was fallacious as it was based upon a misunderstanding of the effect of the pleadings in this respect. Once it has been pleaded that money has been paid on the basis that it was a loan, it is for the defence to establish, if it so chose, that the transaction was not a loan but some other form of transaction, be it the purchase of shares or the entry into a joint venture. Once that defence failed, the inevitable conclusion is that the money fell to be repaid. As Mr Tong SC, who appeared on behalf of the plaintiffs, pointed out, the jurisprudential nature of the basis of that claim was for the most part irrelevant. What mattered was that the defendants had no basis for resisting a claim for repayment. Short of establishing terms of the loan that would preclude an early repayment, the money would be repayable on demand. The fact that the judge did not accept all the pleaded terms in relation to the loan did not alter the fact that a liability to repay arose. The only remaining question is as to which parties were liable to repay the amount. Here again, on the basis of the oral evidence the judge came to the conclusion that it was the first and third defendants who were acting together and that the fifth defendant had been used as the vehicle to receive the money. In those circumstances I cannot see any reason why judgment should not be entered against all three defendants. The judge was not satisfied on the evidence that Dr Lee, the fourth defendant, had been a party together with the first and third defendants in securing the loan. In my view he was fortunate but there was no appeal against that and hence the judgment against the first, third and fifth defendants was apposite. Mr Chain took the further point that his client had been prejudiced by the judge's ruling that the third defendant was not permitted to give evidence as to what took place at the meeting at Fred Kan & Co. between Mr Yu and Mr Wu the solicitor handling the matter in 1998. The third defendant had been present at that meeting and had sent a fax thereafter the details of which are unnecessary to expound upon. It suffices to say that Mr Chain accepted that it did not reflect well upon the third defendant. As already referred to, Mr Yu had already given evidence that the strategy of using the receipt given to Mr Yu by the first defendant's wife when the bank draft was handed over on 24 July to claim that there had been a purchase of shares was one that the third defendant had urged upon him. Mr Yu was cross-examined about that. From the transcript of the third defendant's evidence it would appear that the

judge did not prevent the third defendant from giving evidence to contradict Mr Yu and to the effect that he, the third defendant had not instigated Mr Yu to make a claim based on the alleged purchase of shares. Rather, what he did was to prevent the third defendant giving evidence as to what took place at the meeting at the solicitor's office. Since that was clearly covered by privilege and the privilege was that of Mr Yu and the plaintiffs, that approach must in principle have been correct. The evidence that had already been given when Mr Yu gave evidence did not go into the details of any advice given to Mr Yu or the plaintiffs by the solicitor. In those circumstances I do not consider that privilege had been waived. The third defendant's argument was based on the judge's statement, when he ruled that the third defendant could not give evidence as to the meeting, that he would ignore all the evidence. In saying that I do not consider that a fair reading of it was that he intended to ignore the evidence that related to the fact that the third defendant had introduced the solicitor's firm to Mr Yu and the plaintiffs and had instigated Mr Yu to claim on the basis of the receipt. One of the points which was raised in this court as well as in the court below was the argument that because the first defendant was a very wealthy man he did not need to borrow money and, hence, could have financed the purchase of KPI shares himself without the need to borrow money, particularly at the high interest rate which would be apparent from KY-001 and KY-002. The judge clearly had the point in mind since he referred to it in paragraphs 102-3 of the judgment. Nevertheless he made no specific comment in relation to it. In my view it was simply an argument which the court had to bear in mind when coming to an overall conclusion as to whether the plaintiff succeeded or not. That the judge did. I do not consider that even if the first defendant was a very wealthy man and had sufficient ready cash at his disposal to carry out transactions that he contemplated this would necessarily mean that the first defendant would have arranged matters so that there would be no borrowing in respect of any transactions with which he were connected. Successful businessman frequently arrange borrowings in order to facilitate their commercial transactions. On the footing that the \$38.67 million was a loan it did have the attraction of being a substantial sum with no security. A similar point arose in relation to the attendance by Mr Yu at meetings with Fan Mitchell and Co. in September

1997. It was pointed out that that was prior to the market crash which commenced in the latter half of October 1997, albeit the share price of KPI shares does appear to have languished in the region of approximately \$1.48 to \$1.60 at the time. Here, again, the judge noted the point. He noted also that the invoices for the meetings were sent to the third defendant and not the first defendant or his wife and that the invoices were paid by the fifth defendant. The judge considered this was one of the matters that was arguably consistent both with the plaintiffs and the defendants' cases. What is important from the point of view of this appeal is that the judge had it in mind as part of the matters which he had to consider in his weighing operation. The point is far from conclusive in the defendants' favour and there is no basis for this court to upset the judge's conclusion. The judge also considered what have been referred to as the November and December proposals. These were made following the stock market crash in October

1997. In my view, it is unnecessary to set out the details of the proposals. It is clear that they were never implemented. As the judge pointed out it appears that the third defendant seemed to be taking a leading role with regard to putting them forward. In my view the judge's approach in paragraph 117 in saying that it would be unsafe to rely on them as support for a joint venture to the exclusion of a loan, puts the matter as favourably as it could have been in the defendants favour. Reference was also made to what was referred to as the Xian incident. In August 1998 the third defendant was invited to Xian to discuss the matter with the first plaintiff. It appears that he expected to be in Xian for one day but was, in the event, kept there for 4 days and allowed to leave only after he had arranged to make payment of \$4 million. The judge held, as he was entitled to, that this payment was a partial repayment of the loan. The judge deprecated the method by which that money was extracted from the third defendant. He considered that the third defendant's discomfort was because of his inability to pay out rather than because of any denial of liability on his part. The judge's finding that the first and third defendants were in it together as a syndicate to obtain the loan from the plaintiffs to speculate in KPI shares was, given the totality of the evidence, a finding which he was clearly justified in making. Since the first and third defendants had arranged for the monies to be deposited into the fifth defendant's account because the bank draft was made payable to the fifth defendant, it would appear that the judgment against all three defendants was clearly correct. I would therefore dismiss both appeals with an order nisi of costs in favour of the plaintiffs in each case. Hon Le Pichon JA: I agree. Hon A Cheung J: I agree. (Anthony Rogers) Vice-President (Doreen Le Pichon) Justice of Appeal (Andrew Cheung) Judge of the Court of First Instance Mr Ronny Tong SC, Mr Peter Ng SC and Mr Norman Nip, instructed by Messrs Gallant Y.T. Ho & Co., for the 1st & 2nd Plaintiffs and Defendant by Counterclaim/Respondents Mr Edward Chan SC and Mr Godfrey Lam (26-27 November 2007), instructed by Messrs Cheung, Chan & Chung, for the 1st & 5th Defendants and Plaintiff by Counterclaim/Appellants in CACV 319/2006 Mr Benjamin Chain, instructed by Messrs Chui & Lau, for the 3rd Defendant/Appellant in CACV 348/2006 PAGE - A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk 2QX[2QX[2QX[2QX[H; < jFen & 6" ABC-Final (fair)1.dot setup Microsoft Word 9.0 r&jo< Judiciary Title Source Erica Microsoft Word Document MSWordDoc Word.Document.8

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