

HONG KONG / JUDGMENT

LAM CHEUNG PING v. CHAN LAI PING, QUEENIE

COURT

Court of First Instance

DECIDED

5 June 2007

CASE / FILE NUMBER

HCA2167/2004

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bjbj HCA 2167/2004 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE ACTION NO. 2167 OF 2004

BETWEEN LAM CHEUNG PING Plaintiff and CHAN LAI PING, QUEENIE Defendant

Before: Deputy High Court Judge L. Chan in Court Dates of Hearing: 17, 18 and 21 May 2007 Dates
of Filing Written Closing Submission: 23 and 25 May 2007 Dates of Filing Reply Submissions on
Law: 30 May and 1 June 2007 Date of Judgment: 5 June 2007

J U D G M E N T

The plaintiff claims the defendant for repayment of a number of loans totalling \$1,111,614.13. A sum of \$17,000 was abandoned in the course of the trial. The net sum claimed is at \$1,094,614.13. There are also alternative claims of resulting trust and money had and received. One such claim has been withdrawn in the course of the trial. The defendant denies the claim. The plaintiff and the defendant were lovers and had been in cohabitation between December 1997 and April 2000. The defendant admits that the plaintiff had in the course of their cohabitation given her some monies, but she cannot recall the amounts or dates of payment. However, she said these were not loans but were gifts made by the plaintiff to her out of love and affection. Since the defendant has not confirmed the amounts or dates of payments, the plaintiff has the burden of proof for each and every payment. The Plaintiff's Evidence The plaintiff has adopted his witness statement and supplemented it would oral evidence. He came to know the defendant in January 1994 when they were working in the same office of an estate agency. He fell in love with her in February 1996. They started cohabiting in late 1997 in his flat in Heng Fa Chuen, Chai Wan. In February 1998,

they moved to a larger flat in South Horizons. The plaintiff was all along responsible for the rental and the household expenses. The defendant at that time owned another flat in South Horizons. She bought it in around June 1997 at about \$5.3 million as an investment. It was subject to mortgage and she had to pay about \$36,000 per month mortgage instalment. The flat was at that time producing a rental of \$18,000 per month. In 1997, the defendant had earned about \$6.6 million commissions for her employer. She ranked the 8th in terms of performance amongst a workforce of about 3,000. However the real property market in 1998 was not good and her income was reduced and had become irregular. She obtained some overdraft facilities from her mortgagee bank, the Standard Chartered Bank, to pay the mortgage instalments when her income was low. Since about May 1998, the defendant had asked him for loans as she could not afford the mortgage payments. S could not sell the flat at that time because the price had collapsed and it had become a negative asset. She told him that she needed the loans to repay her mortgage, her tax, her overdraft facilities and for her personal use. He advanced the loans to her based on mutual trust and confidence. However, he had made it to her clear every time he advanced money to her that she had to repay the same to him when she had the ability to do so and when he saw the need for the same. He advanced her three sums of \$50,000 each in 1998. They were advanced on 28 May 1998, 15 December 1998 and 30 December 1998. He said when he lent money to the defendant, he had told her that if she should have difficulty, he would help her out, but mortgage and tax were personal matters, he could not just give the money to her to pay them, he could only lend her money to pay them. She agreed to this. Though he did not give her money gifts, he did occasionally buy her gifts like flowers, trifle toys and birthday cakes. He had also given her a watch on her birthday anniversary in 1997 and her estimate of its value was at about \$20,000. In December 1998, as the property market was not good, he planned to go to the United States to study for a degree. This was his lifelong dream. He appeared to have come from a modest background. His father had little education and his mother was illiterate. He had been saving up money for this purpose since about August 1988 when he entered the estate agency career. He managed to save up about \$2.6 million by about May 1998. He told the defendant his plan in December 1998. The defendant said she also wanted to quit her job and go with him to the United States to study. She said she could not get along with her colleagues and the business was bad. They then applied to the United States Government for visas in January 1999 and their applications were allowed in March 1999. The defendant was worried about her mortgage, living expenses and school fees if she should go to the United States. He then offered to take care of her living expenses. He also promised to lend her a sum of money for her to pay the mortgage instalments and school fees. He also paid her plane ticket. In 1999, and before they set out for the United States, he had advanced her a few more loans. They were \$60,000 on 1 February 1999 and \$20,000 on 12 April 1999 (both for paying her mortgage instalments), \$80,000 on 15 April 1999 (for paying her overdraft facilities) and \$146,614.13 by way of three cheques all dated 14 May 1999 (for paying her mortgage instalment, salary tax and school fees for her study in the United States). Before leaving for the United States on 2 June 1999, he also advanced her \$200,000 on 24 May 1999 to cover about eight months of her mortgage payments. Her flat was then producing a rental of \$9,500 per month. He expected the price of real property to improve by the end of that year and she could then sell the flat within about eight months. Whilst they were in the United States, the

plaintiff had also paid all their rental and living expenses. However, her flat was not sold in eight months and she had exhausted the \$200,000. On 31 December 1999 and 3 January 2000, she borrowed from him \$13,000 and \$7,000 respectively to pay her mortgage. The first cheque was drawn payable to her elder sister Chan Chor Yung to facilitate clearing. On 13 February 2000, she borrowed another \$43,000 from him to pay her mortgage. This cheque was again made payable to Chan Chor Yung. On 28 February and 30 March 2000, he lent her two more loans of \$26,000 each to pay her mortgage. They were close to the monthly mortgage installment of \$36,000 less the rental of \$98,500. In February to April 2000, they had some discussions on whether she should come back to Hong Kong to find a job to subsidize her mortgage payments and outgoings. She agreed to come back and he bought the plane ticket for her to come back on 7 April 2000. A few days before she came back, an estate agent phoned them from Hong Kong making an offer to buy her flat. However, the proposed price was below the amount due on the mortgage by about \$740,000. The flat was a negative asset. Her family was willing to lend her \$440,000. She asked him to lend her the remaining \$300,000. He agreed to this. He thought if she could not sell the flat, she would have to borrow money from him to pay the mortgage. This was however a large sum and he had already lent her over \$600,000. This sum would bring the total to about \$1 million. It brought great pleasure on him. He therefore asked her for a loan agreement. She agreed, but when she was about to write the agreement, she cried and said that he did not trust her and did not regard them as being in a family. He therefore did not insist on having the loan agreement. He then lent her \$323,000 by a cheque dated 3 April 2000. The additional sum of \$23,000 was for her living expenses in Hong Kong as requested by her before he gave her the cheque. After her return to Hong Kong, they still maintained their relationship. She did sell her flat at South Horizons and relieved herself of the mortgage. She wanted to look for a job, but would like to have a pleasure trip to South Africa before starting working. He thus sent her a cheque dated 8 April 2000 for \$10,000 as a gift for her to pay for the pleasure trip. On 9 April 2000, he drew another cheque for \$7,000 to pay her living expenses. Though these two sums are listed as loans in the Amended Statement of Claim, he in his evidence in chief voluntarily withdrew them from the action. Thereafter, despite her further request, he did not lend her any more money as he was under financial pressure. At that time, he still had to study in the United States for three more years and he had no income. In about August 2000, she asked him for another loan of \$20,000. He at first promised her on the phone but later declined it by e-mail. One week later, which was mid-September, she told him on the phone that she wanted to separate from him as she had been dating a new boyfriend for one to two months and he had not treated her as one of his family. Upon hearing that, he asked her to repay the loans. She said she would make repayment if she had the money. He then said that he would ask someone to collect the repayment from her. He later regretted of having said this. In cross-examination, he said every time when he lent her money, he had told her that when she had the money and he had the need, she should repay him. However, no time of repayment was fixed. Interest was also not mentioned. On the study in the United States, he said he had planned to go by himself to fulfil his dream. The defendant offered to go with him. He had not considered what would have happened to their relationship if he should have gone without her. He knew that if the defendant should go with him, she would still have to discharge her financial responsibilities in Hong Kong. He agreed with her to pay her

living expenses in the United States. He had also agreed to lend her a lump sum of \$200,000 for her to discharge her financial responsibilities in Hong Kong. He denied that he had promised to give her another \$200,000 on top of this lump sum. Whilst in the United States, they had quarrels over money. At times, the quarrels developed into fisticuffs. But he had not earnestly asked her to repay until September 2000 when she said she wanted to separate from him. He did not previously ask her to repay because he thought she had no money. He also agreed that if he should have married her, he would not have asked her to repay. In April 2000 when he asked her to write a loan agreement, he had reservation as to her ability to repay because the total amount outstanding was close to \$1 million. In the telephone conversation in October 2000, he again asked her for a written loan agreement but she declined. She only promised to repay the loans to him. In Christmas of 2000, he came back here and had a meeting with her. He casually mentioned to her about the loans but did not say when she had to repay. His next demand was made at the end of a long and passionate letter that he wrote on 1 April 2001. After this, he did not make any further demand until January 2003 as he was then studying in the United States for his degree. He thought that any further demand by letter or e-mail would be of no use. He intended to wait until after his return to Hong Kong. He came back here in January 2003 which was his last vacation before graduation. He had a meeting with her on 10 January. He tried to record this conversation with her for the purpose of obtaining her admission to the loans. The attempt was not successful. He telephoned her on 12 January and tried to record her admission again, but the transcript has not been produced as evidence at the trial. On 3 March 2003, she sent him an e-mail saying that she would repay him after her receipt of commission. Between 17 January and 26 May 2004, he had repeatedly invited her to a meeting. He wanted to sort out the details of the loans with her. However, she declined all his invitations. He thus thought that she had no intention of repaying him. He therefore decided to sue her. He has produced his cheque stubs and bank statements to prove each of the loans. He had written on the cheque stubs the defendant's name or, in a few instances, the name of her elder sister Chan Chor Yung. He had also written down on most of the stubs the purpose of the loan. He had also written down the total outstanding sum on a number of the stubs, but there was an error in his calculation and the total as written down from time to time was less than the actual sum by \$10,000. He had also referred to his bank statements to show that each of the cheques had been honoured. The Defendant's Evidence The defendant also adopted her witness statement and supplemented it with oral evidence. She referred to their dating since February 1996. Later on they became investment partners as well. In February 1997, they together with two other friends invested in a unit in South Horizons. This investment was disposed of in March 1997 with profits. In June 1997, the two of them purchased another unit in South Horizons and they intended to use it as their matrimonial home. The purchase price was \$5.2 million. However, owing to economic downturn, they and the vendor cancelled the agreement and they lost the 10% deposit on this purchase. She said she lost over \$100,000 in this transaction and the rest was borne by him. Apart from investing with the plaintiff and other partners and the intended purchase of a matrimonial home, she had also purchased another unit in South Horizons at \$5.18 million as her own investment. This flat was mortgaged to the Standard Chartered Bank and she had to pay the bank about \$36,000 every month under the mortgage. She said her monthly liabilities in 1998 was at about

\$50,000 which included her contribution to her mother's living expenses, her mortgage payment, her motor car hire-purchase payment, her credit card payment and her overdraft. She was a salesperson in an estate agency. In 1997, she was on the average earning \$90,000 per month. In 1998, her average earnings were reduced to about \$60,000 per month. However, the property market continued to deteriorate in the latter half of 1998. The plaintiff thus started giving her money to subsidize her outgoing since May 1998. She further said that he had in fact paid her money between January and May 1998 for her to discharge her liabilities but she could not recall how much he had paid her. She said he would ask her in casual conversations whether she had financial problems. After hearing her problems, he would offer her money to help her out. Instead of saying that he was lending her money, he would just ask whether she was happy with the money he gave her. He never mentioned that she had to repay him. Regarding the study in the United States, she said he had requested her to accompany him but she was hesitant. The reason being that she had to quit her job and would be unable to discharge her financial obligations and her living expenses in the United States. In order to persuade her to go with him, he promised to discharge her then financial obligations and her living expenses in the United States. Her financial obligations at the time were about \$50,000 per month and he was aware of that. When she agreed to go with him to the United States, she planned to stay there for one year and he planned to stay there for two years or more. He also promised to give her \$200,000 before leaving Hong Kong. However, he did not honour this promise before they left on Wednesday, 2 June 1999. Regarding the cheque for \$200,000 and dated 24 May 1999 (which was cleared in the plaintiff's bank account on Friday, 28 May 1999 as shown in the plaintiff's bank statement), she said she could not recall if she had received this sum of money. However, she said even if she had, she would have used it to pay her accrued tax and debts and not much would have been left for her use in the United States. When they were in the United States, he suggested that she could just default on the mortgage and be adjudged a bankrupt, but she refused to do so. He then paid her part of the mortgage money but in unhappy circumstances. Owing to his failure to provide the full amount of money for the mortgage instalment, she had to write to the Standard Chartered Bank to ask for reduction in the instalment amount, but she has not produced any copy of her letter to the bank. At the end of 1999, they also had many quarrels and fights over her mortgage instalments. His failure to abide by his words and his hitting her were the causes of their separation. On the sale of her flat, her story is slightly different. She said they were all along aware of the market price of her flat. She needed \$740,000 to pay the bank in order to sell the flat. He promised to help her with \$300,000. After her family had confirmed to lend her \$440,000, she then put the flat on the market. When she got his cheque, she found that it was for \$323,000. He then asked her whether she was surprised. He also said that the extra \$23,000 was for her living expenses in Hong Kong. He also asked her if she was happy with the extra sum. He had indeed asked her to write a loan agreement, but since he had promised to help her before leaving for the United States, he had never told her that he was lending her money and he had promised to help her with the \$300,000, she therefore refused to give him the loan agreement. She came back to Hong Kong in April 2000 as he had breached all his promises. The Standard Chartered Bank was chasing her for payments and he had hit her more often. Their relationship became strained at the end of 1999. She therefore decided to come back earlier. She told him over the phone in

August 2000 (which was September according to her letter to the plaintiff cited below and according to the plaintiff) that she wanted to separate from him. He became emotional and said that she owed him over \$1 million. He scolded her very severely and said something like she had cheated his money. She felt bad and told him that in future if possible, she would give him back \$300,000 as he had given her \$300,000 to help her. But she reiterated that she did not owe him any money. She admitted that about one month before this conversation, she had asked him for a sum of \$20,000 odd to solve her financial p 0& St^4 0FOvQ [fW}v }8^(W`O FO/f XU} N1`OT{ 0FO(W }8^-r5T }8^ \ \ `O1Y ``OT{ ` N/fhQ l g" f}7u \4x"u U} N/f `OvuBf l g6eeQ `O\_N v/f O`Ok^ O`O g&T bk^ `ObT b k`O }JT4 P&N N/f 0`O g`O T|U|U YB}k^ p`O&N N/f(W b `O t1u/f FOvQ WOU`O &Nf} `OSbu f} `O virmi `Ok^ NKNMR v k>k FO`O \ f} `OBf `O N b N/f /f(W g `O P`Ogqg / fU} N NJT4 `O&N\*g NJS f} `O 1\ N 0& N(W9 SJTyY RKb&N 0`OvuBf b k1 N!knmw N/f N k%R vu6q 0& N}Y}Y|vU\ f} `O 0 0 onditions did not permit it. She was excited and grateful to him for his promise to shoulder her expenses and her mortgage payments. She was disappointed because they had frequent quarrels over money in that year and he always treated her with brute force. She thought he had not performed all that he had promised her. She however realized that what was involved was not a small sum. He at that time had no income and did not know what to do. He had more concern over and was more thorough with money. If he should have treated her as his wife, they should shoulder her burden together. Nevertheless he had all along been reckoning how much she owed him. That already made her feel that they were not in a family. Each of them took care of their respective possessions. He did give her a lot of help on money after repeated weeping and sniffing. But she was really unhappy as he did not do so very willingly or unconditionally. That was why she told him that she would return to Hong Kong in advance as she wanted to earn some money. She felt bad when she had to ask him for money and was hit by him. After repeated consideration, she decided to come back to Hong Kong in advance so that she could support herself and repay money to him. She was grateful for his lump sum which paid off the arrears and the deficiency to the bank, but when he told her that it was a loan to her and she had to repay it as soon as she could manage, she again felt that there was a clear demarcation of what each of them owned. She wished one day she could quickly repay him, so that it would not damage their relationship. When she telephoned her in September telling him of her decision to separate and she already had a new boyfriend, he reacted seriously and asked her to immediately repay the loans and write him a loan agreement. He said she owed him \$1,170,000 and he would ask people to collect it from her if she should fail to repay. Her bad feeling then came back again. She knew that that was not a small sum and money owed to a friend had to be repaid. She ended the letter by saying that she hoped she could repay the money to him as early as possible. On 1 April 2001, he wrote her a long and passionate reply. He also dealt with their lives in the United States and the nature of the monies he gave her. I cite below the relevant parts: 0& g~^!k f}yY 0R}Y /f(W0W N Y_N N ~^!k _!qHY0W N!k 0 V/n0R l gf} b/f g k)R S NN b&N N #jZP Y_N g #jZP Y/fiQ Y_N/f _N/f g NyY N N(u &T/f OvuiQ p+YfZBf 9h,g &N N [/f" g N/f b_N g & 0 d he had the right to ask her to repay. He also said that if their relationship should become better and should they get married, he would not ask her to repay. Finally, he expressed his wish that when she had the means, she would repay him voluntarily as that was her promise. The defendant also sent the plaintiff an e-mail on 3 March 2003. She said: Also, I am still waiting for my commission

coming. On December, 2002, the Landlord promised to pay [her employer] commission on March or April. I hope this time they won't delay anymore. Then I can pay back to you as soon as possible. When she was asked about her letter and e-mail in her evidence in chief, she said she wrote these regarding the plaintiff's assertion that she owed him over \$1 million. This assertion was made for the first time in the phone conversation in August 2000 when she said she wanted a separation. When she reflected on this assertion, she knew that he had all along reckoned how much she owed him. She also said that she knew that he was not helping her willingly and unconditionally, because he told her in that conversation that she owed him money. On the offer of repayment in her letter, she said she was referring to the \$300,000 that he had given her to help her sell her flat. She said she had also told him verbally in July 2002 that she would pay him \$300,000 in future. That was in response to his demand for repayment. However, he just repeated his total figure for the loans which differed from time to time and ranged from \$900,000 to \$1.07 million. Regarding her e-mail of 3 March 2003, she said she was referring to the \$300,000. In cross-examination, she said apart from the cheque for \$323,000, she did not know which of the other cheques particularized in the plaintiff's claim she had received. She had lost all her banking records and could not check whether she had received these sums. She also did not know she should approach her banker for reissue of copies of her bank statement and her lawyers had not advised her to do so. She also said that after her e-mail of 3 March 2003, she had offered to pay him by instalments, but he said it was unnecessary and he did not want her money. The relevant legal principles Both parties agree with the legal position as set out in para.38-220 of Chitty on Contract, 29th edn.: 38-229 Proof of loan. If money is proved, or admitted, to have been paid by A to B, then in the absence of any circumstances suggesting a presumption of advancement, there is prima facie an obligation to repay the money; accordingly if B claims that the money was intended as a gift, the onus is on him to prove this fact (*Seldon v Davidson* [1968] 1 WLR 1083) See also *Mak Ka Hing v Pang Ming Chung*, CACV 215/2002 at para.23. The parties also agree that there is nothing in this case that would give rise to the presumption of advancement (see para.23-06 of *Snell's Equity*, 31st edn. and para.45 of *Halsbury's Laws of England*, 4th edn. reissue Vol. 20(1)). I also note that the presumption, even if it exists, may be of slight probative value only and the court should always strive to determine the real intentions of the parties (see para.23-05 of *Snell's*). ANALYSES AND FINDINGS Has the defendant received the payments? Since the defendant has not admitted the receipt of any of the specific cheques as pleaded in the Amended Statement of Claim save the cheque of \$323,000, I have to resolve this issue first. The plaintiff has referred to his cheque stubs which all bore the particulars of the payees and the amounts paid. Invariably, the cheques were made payable to the defendant or her elder sister. The monthly statements show that they had all been cleared. Counsel for the defendant submitted that the particulars in the cheque stubs did not contain as much details as the plaintiff has said. However, I note that the essential details are there and I do not think the insufficiency if any, can cause doubt as to whether the cheques of the amounts recorded had indeed been paid to the defendant or her sister on her behalf. Counsel also argued that the last two sums as claimed were abandoned at the hearing and the plaintiff was therefore confused as to what he should claim. I do not think so. The reason for abandoning the \$10,000 cheque marked for South Africa was because it was a gift for the defendant to have a pleasure trip before her resumption of work. The last sum of \$7,000

was abandoned because it was for her initial living expenses upon resumption of work. There is nothing in his case to suggest that he had made any other money gift to the defendant. I do not think the plaintiff was confused at all as to what he was claiming. The plaintiff's evidence of payment is simple and straightforward. There is no reason for me to doubt it. If the defendant should have desired to challenge it, she could have done so with ease. She could have produced her bank statements and those of her sister. She had not done so. Though the burden of proof is on the plaintiff. I see no reason why she should have refrained from rebutting the plaintiff's case if it can be rebutted. I also do not believe the defendant's evidence that she did not know that she could obtain new copies of the statements from her banker or that her lawyers had not advised her to do so. It is something that is too common for her not to know and too elementary for her solicitors to overlook. I also agree with the submissions of counsel for the plaintiff that the bank statements of the defendant and those of the sister are obviously relevant documents which should be disclosed. To the extent of the non-disclosure of the defendant's own bank statements, I am of the view that the defendant has defaulted in her discovery obligation (see *Ngai Chu v. Lau Ping Chun* trading as Yau Pong Construction CACV 402 of 2002 at paras. 1, 16 and 17). Having considered the plaintiff's evidence and the lack of any challenge to it by the defendant, I find that the plaintiff has proved on a balance of probability that he has paid the defendant the sums of money as particularised in his Amended Statement of Claim totalling \$1,111,614.13. Since the plaintiff is not pursuing the last two sums of \$10,000 and \$7,000 respectively, the total sum claimed is \$1,094,614.13. Were the payments gifts or loans? I now turn to the question of whether the payments were loans or gifts, the same issue applied to all the payments totalling \$1,094,614.13 and the burden is on the defendant to prove that they were all gifts. The plaintiff was straightforward in his evidence. His answers were always prompt, direct and to the point. He was also consistent in what he said despite a thorough cross-examination. He is a man with a vision for his own future and he worked diligently towards its accomplishment. He was employed in the field of estate agency from 1988 to 1999. He had also made some money from investments in real properties and shares. I accept that he had accumulated some \$2.6 million by May 1998. That was a substantial sum of money. He and the defendant had always maintained their finances separately. They also had joint and separate investments. It was in fact the defendant's own investment in a flat in South Horizons that caused most, if not all, of their disputes. It is also undisputed that when they were in the United States, they had frequent quarrels over money. The payments he gave her were at times quite frequent and the amounts involved were substantial. The payments were not made on her birthday anniversaries or valentines days. The dates of payment were dictated by her financial needs. The payments were just to ease her needs and not to acquire any joint investment. The total sum paid was more than 40% of his \$2.6 million savings. He said all these were loans to the defendant. The defendant said in her letter that he was not generous to her. There is no dispute that they had frequent quarrels over money at the end of 1999 when they were in the United States. She also said in her letter that he was very concerned about and thorough with money. He was thrifty. They were keeping their assets separate and distinct. However, she also said in evidence that all the sums in question were given by him to her as gifts without any request or prompting from her. He just asked her in casual conversations if she had any financial difficulty. Upon hearing her difficulty, he would volunteer

her a cheque to ease her problem and would further ask her if she was happy with the money. This happened time and time again. The sums he gave her were not small. The 1st payment was a sum of \$50,000 on 28 May 1998. That was almost his monthly income at that time. The real property market in 1998 was not good. On 15 and 30 December 1998, he gave her two sums of \$50,000 each. The total sum was more than his then monthly income. On 1 February 1999, which was just one month later, there was another sum of \$60,000. If all these were gifts, then the plaintiff was very very generous to the defendant. But this picture of a very generous plaintiff is inconsistent with the other picture of a thrifty plaintiff also painted by her. Furthermore, her case on the \$200,000 does not sound real. The cheque for \$200,000 dated 24 May 1999 was presented for payment on Friday, 28 May. They left for the United States on the following Wednesday, 2 June 1999. That \$200,000 were obviously the lump sum that he had promised to give/lend her before their departure to the United States. If he had not given her the \$200,000 as promised but had given her another \$200,000 which she had used to discharge her indebtedness in Hong Kong, she would not have forgotten about it. The simple reason is that it was a substantial sum. I note from the plaintiff's claim that he had only given her \$200,000 once. Furthermore, I do not believe her evidence that even if she had indeed received this \$200,000 at the end of May 1999, she had used the bulk of it to pay her Hong Kong indebtedness and not much was left for her use in the United States. If that were the case, her then Hong Kong indebtedness apart from her mortgage must have been very substantial and she could not have planned to go the United States without arranging for their settlement. However, there is no evidence of any arrangement by her to settle them. The \$200,000 as paid by the plaintiff did not feature as such prior arrangement as there is no evidence of any prior promise by the plaintiff to pay this \$200,000 in addition to the \$200,000 which she said he had defaulted. I also do not think that the plaintiff would have paid her this extra \$200,000 which he had never promised but defaulted in the \$200,000 which he had promised. I find that this \$200,000 was in fact the lump sum that the plaintiff had promised. The fact that there was no payment by the plaintiff to her in the next seven months supports this finding as she must have been relying on this sum and the monthly rental of \$9,500 to pay her mortgage during those months. I therefore also disbelieve her evidence that when they arrived at the United States, he initially did not pay her any money to pay her mortgage and later only paid part of it under unhappy circumstances. There is in fact no evidence of any payment by him in the seven months after 24 May 1999 as she had the \$200,000 with her. She had also said in her letter of 14 February 2001 that he had not performed all that he had promised her. However, I do not think she was referring to his failure to pay her the promised \$200,000 as such failure would have been a grave default and it would have been particularly serious as it was committed at the start of their study trip. If he should have so defaulted, I think her complaint in her letter would have been more specific and blasting. I think this complaint was about living expenses and mortgage payments after the \$200,000 was exhausted. The two payments at the end of December 1999 and January 2000 of \$13,000 and \$7,000 respectively were small but very close together. Perhaps the plaintiff should have paid the two sums at one go. It is possible that they had some arguments between these two payments. I also note that they had quarrels over money at the end of 1999. I also do not accept the defendant's explanation regarding her letter of 14 February 2001. She said she only learnt from the August (or September) 2000 phone conversation that he was all

along treating the payments as loans whilst she had all along treated them as gifts. She explained that when she referred to these loans in her letter, she was only reflecting to what he said in the conversation. However, the contents of her letter do not concur with her explanation. If it only dawned on her in that conversation that he had treated all payments as loans, then it would have been a nasty surprise and she would have said so in her letter. I also expect that she would have denied that there was any loan and she would have done so vehemently. However, she did not say anything like this in her letter. Her letter instead said that he was more concerned with money and he had all along reckoned how much she owed him. This is inconsistent with her case that he had only referred to the payments as loans for the first time in the conversation in August/September 2000. She also said in the letter that each of them took care of what they respectively owned and despite his giving her a lot of help (which were after a lot of weeping and sniffing), she was really unhappy as he was not helping her willingly and unconditionally. She also said that it was after repeated consideration that she decided to come back here in advance. Part of the reason for that was to make repayment to him. All these show that she knew that the payments were loans when she received them. Regarding the sum of \$323,000, her letter also made it abundantly clear that it was a loan from him and he wanted it to be repaid as soon as possible. Her letter also reveals why she had gone to the United States. She said in evidence that she went because of his request and he had made various promises to persuade her to go with him. However, her letter said that it was also her dream to go to the United States to study and she went there with excitement. In any event, even on her case, she was going to stay in the United States for one year only and he would stay there for two or more years. She was not saying that he wanted her company throughout his stay there and hence made these costly promises for such purpose. Regarding her e-mail of 3 March 2003, I also do not accept that it was only an ex gratia offer to cover the \$300,000 only. The e-mail did not deny any indebtedness, nor did it say that her offer to repay was an ex gratia one. It also did not limit the repayment to any figure. Read as a whole, the e-mail simply said that if the commission was not further delayed, she could pay him back as soon as possible. I also refer to the plaintiff's letter of 1 April 2001. It was a long and passionate letter. It was a sincere pouring out from his heart. He referred to the payments as loans to her. Counsel for the defendant referred to the plaintiff's witness statement where he said that the loans were repayable on demand. Counsel then referred to the plaintiff's oral evidence where he said he had told the defendant that the loans were repayable when the defendant had the means to repay and also when the plaintiff had found it necessary to have the repayment. I think repayable on demand is just an abbreviation of what the plaintiff has said in oral evidence. I do not think his evidence means that the repayment of the loans was subject to a contingency that the defendant should have the means to repay. I think if the plaintiff should have said so to the defendant, that was merely to assure her that there was no imminent need to repay and thus to put her at ease. Both of them contemplated that she could not repay within the then foreseeable future. I do not think the loans as portrayed by the plaintiff were subject to any contingency for repayment except that they were repayable on demand. Counsel also questioned why the plaintiff said that the insistence on the written loan agreement would have strained their relationship but not an oral agreement. I think an oral agreement showed more of his faith and trust in her words and in her as a person of honour. The plaintiff has also said in evidence that if

he should have insisted on written loan agreements, then the defendant would feel very unhappy and upset. That was why he did not insist on a written loan agreement in April 2000 when he advanced her the sum of \$323,000. Counsel further submitted that it was incredible that the plaintiff should have requested for a loan agreement or acknowledgement of debt in writing in April 2000 when all along he had never made any formal demand for repayment and he was still sending the defendant love letters soon after her return to Hong Kong in April 2000. However, I do not think it incredible because there is no dispute that he did make such a demand at that time when she needed \$300,000 from him. Furthermore, with the additional loan of \$323,000 (including \$23,000 for her living expenses), the total amount lent was in excess of \$1 million. It would not have been unreasonable for the plaintiff to become concerned about the defendant's ability to repay. The fact of his demand for a loan agreement from her indicates his intention to advance her a loan and not to make a gift of money to her. Since he was a thrifty person, I do not think it likely that when she did not want to write out a loan agreement, he would just let her take the money as a gift. It was more likely that he just took her word of honour and did not insist on a written loan agreement. Counsel also submitted that if the plaintiff and the defendant should have married, the plaintiff would not have demanded repayment from his wife. However, that does not mean that the payments were not loans. Counsel also referred to the plaintiff's inaction between April 2001 and January 2003. However that was a period during which the plaintiff was studying in the United States and I accept the plaintiff's explanation that while he was studying in the United States, any further letter or e-mail of demand would be of no use. However, it is undisputed that in January 2003, the plaintiff had on two occasions tried to record his conversation with the defendant with the view to record her admission to the loans. That is clear evidence that the plaintiff was keen to have repayment from the defendant. I also accept the plaintiff's evidence that every time he lent money to the defendant, he had told her that it was a loan and she should make repayment when he had the need and when she had the means to do so. I do not find it surprising that he should have said so on every such occasion as he is a thrifty person and is careful with money. It would avoid any misunderstanding if he should expressly say that it was a loan whenever he lent her money. Counsel also submits that the plaintiff's love and affection for the defendant had sadly turned to antagonism which led to this action. I do agree with that. I think the plaintiff just wants to have repayment of the loans that he had advanced to the defendant. This need not have anything to do with love or hatred. Litigation is a proper means to enforce one's rights if such rights are outstanding. Counsel for the defendant also asks me not to take the defendant's stance on her receipt of payments into consideration on the defendant's credibility. Counsel said the defendant merely put the plaintiff to strict proof. I do not think such is a correct approach and I repeat my reference to Ngai Chu above. However, even if I brush that issue aside, the defendant's evidence on the whole is still fraught with problems as highlighted in the analysis above. The plaintiff's evidence on the other hand is clear, to the point and straightforward. Judging from his background, I do not think it unreasonable for him to have lent and not given her as gifts all these monies. He only had \$2.6 million and the loans constituted more than 40% of what he had. After consideration of the evidence of the plaintiff and that of the defendant, I accept the plaintiff's version whenever it conflicts with that of the defendant.

Judgment

I find that the defendant has not proved that the monies were gifts to her. She has failed by a wide margin. I find that they have agreed on each occasion when he gave her money, which is subject to this action, that the money was a loan repayable on his demand. Since there is no dispute that the loans had been used to pay the defendant's tax and mortgage and that the mortgaged property has been disposed of at a loss, I therefore would not make any order on the plaintiff's claim for account of profit or tracing of assets. They are based on resulting trust and money had and received. In the premises, I allow the plaintiff's claim to the extent of \$1,094,614.13. Since the loans were made without interest, I would only order interest to run from the date when the writ was filed. I therefore order the defendant to pay the plaintiff interest on the said sum at the judgment rate from the day when the writ was issued. I also made an order nisi that the defendant do pay the plaintiff the costs of this action. There is also a counterclaim which has not been pursued at the trial. I formally dismiss it with an order nisi that the defendant do pay the plaintiff its costs. I also make an order nisi that the defendant's own costs be taxed in accordance with the Legal Aid Regulations. (L. Chan) Deputy High Court Judge Mr Dennis Kwok, instructed by Messrs Wong & Chan, for the Plaintiff Mr Richard Khaw, instructed by Messrs Boase, Cohen & Collins, for the Defendant Postscript: Counsel for the defendant started his closing submissions by quoting: As the best wine doth make the sharpest vinegar, so the deepest love turneth to the deadliest hate. (The Anatomy of Wit by John Lily.) Counsel for the plaintiff ended his closing submissions by quoting: Thought does not crush to stone. The great sledge drops in vain. Truth is never undone; Its shafts remain. The Adamant by Theodore Roethke.) I would qu 1udk 1udk L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V)0J" (#p# i\$&`G L. Chan-HCA.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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