

HONG KONG / JUDGMENT

NG CHEUNG v. MAN YING MUI**COURT**

District Court

DECIDED

13 August 2007

CASE / FILE NUMBER

DCCJ3626/2005

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bjbj DCCJ 3626/2005 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION FORMTEXT CIVIL ACTION NO. 3626 OF 2005

BETWEEN NG CHEUNG Plaintiff and MAN YING MUI Defendant

Coram: Deputy District Judge Abu B. bin Wahab Date of Hearing: 18, 19, 20, 23 April, 16 May and
25 June 2007 Date of Decision: 13 August 2007

JUDGMENT

The Plaintiff claims against the Defendant for payment of outstanding loans and a declaration of interest (either sole ownership or 488/688 interest) in property known as 1st Floor of Man On Building, No. 79A Tai Po Road, Kowloon (the Property). The Defendant counterclaims for amounts paid to the Plaintiff (\$60,100) and a declaration of interest in the Property (either sole or joint ownership).

2. The Plaintiff alleges that loans were made to the Defendant as follows: Date Amount 2004 9 August \$10,000 (1st Amount) 15 September 5,000 (2nd Amount) 6 October 10,000 (3rd Amount) 22 December 10,000 (4th Amount) 28 December 30,000 (5th Amount) 2005 31 January 15,000 (6th Amount) 21 February 50,000 (7th Amount) 24 March 29,000 (8th Amount) \$159,000
3. The Plaintiff says that the Defendant had repaid a total sum of \$65,100 leaving an outstanding balance of \$93,900. Alternatively, the Plaintiff claims the outstanding loan to be in the sum of \$293,900 (see paragraph 5 below).

4. The Defendant admits receiving only the 2nd, 3rd, 4th and 6th Amount. She says, however, that the money represented gifts by the Plaintiff. The Defendant says she had paid money to the Plaintiff pursuant to a money-saving scheme devised by the Plaintiff and not by way of repayment of loans. Despite what is stated in the Defence, the Defendant said in evidence that she could not recall or tell the amount she had thus paid to the Plaintiff. She was willing to accept such amount as being that stated by the Plaintiff.
5. Save for \$4,000 (deposit) paid by the Defendant, the purchase price of \$688,000 of the Property was paid by the Plaintiff. The Property was registered in the names of both the Plaintiff and the Defendant as joint tenants. The Defendant, in her pleadings, maintained that the whole of the Property was a gift to her from the Plaintiff. The Plaintiff, however, maintained that he was the sole owner. Alternatively, the Plaintiff said that he was entitled to 488/688 interest in the Property and the Defendant was indebted to him for an additional \$200,000. This was on the basis that the Defendant had originally agreed to pay \$200,000 towards the purchase price. The Defendant ultimately failed to raise the money and the Plaintiff paid this \$200,000 as well. The Plaintiff treated the \$4,000 deposit paid by the Defendant as part of her repayment of loans made by the Plaintiff. This claim for 488/688 interest was in case the Court held that the \$200,000 was merely a loan from the Plaintiff and that the Defendant was still entitled to 200/688 interest in the Property.
6.
 - a) Save for matters stated herein, I prefer and accept the evidence of the Defendant. I dismiss the Plaintiff's claims.
 - b) I find that interest in the Property was gifted by the Plaintiff to the Defendant by making the Defendant a joint owner. Given such a finding, the Plaintiff is not entitled to turn the joint ownership into a tenancy-in-common in equal shares by way of a Notice of Severance of Joint Tenancy (Notice . See Trial Bundle page 123 to 124) pursuant to Section 8 of the Conveyancing and Property Ordinance, Cap. 219. To allow the Plaintiff to do so will deprive the Defendant of the perfected gift of her right to the Plaintiff's share on death of the latter. I make a declaration that the Notice is invalid. I also make a declaration that the Property is jointly owned by the Plaintiff and the Defendant. I order the Plaintiff to pay the Defendant \$61,000 with interest at judgment rate from 8 October 2005 (date of Defence and Counterclaim) until payment in full. The Counterclaim is for \$60,100. The Plaintiff admitted receiving \$65,000 from the Defendant. It is clear, however, that \$4,000 was in payment of deposit for purchase of the Property (see also paragraph 35 below). I hold that the amount the Defendant gave the Plaintiff for saving purposes was \$61,000. I make the award for the extra \$900 pursuant to the prayer for relief for (F)urther and/or other relief in the Counterclaim.
 - d) I make an order nisi that the Plaintiff is to pay the Defendant's costs in this case with certificate for Counsel. The Defendant's own costs will be taxed in accordance with legal aid regulations.

7. I will now state the reasons for my decision. I start by describing in more detail the case of each party.
8. Plaintiff's case The Plaintiff is a septuagenarian. He was about 76.5 years old when he gave evidence before me. The Plaintiff used to be employed to sell pork in a market. He has retired for about 2 decades. He is married but lives alone at Ma On Shan. His wife suffers from Alzheimer's disease and has been living separately in an Old Age Home since around 1998. The Plaintiff lives on his own savings (the bulk being \$800,000 placed on fixed deposit in the bank), investments in certain shares, old age subsidies by the government and money given him by his children. His monthly expenses amount to about \$6,000: \$3,000 for himself and \$3,000 for his wife at the Old Age Home.
9. Sometime in March 2004 the Plaintiff first went to the Defendant's workplace in Ki Lung Street, Sham Shui Po, for massage and sexual services (it is the Plaintiff's case that the Defendant operated a one-woman brothel). Since that time, the Plaintiff patronised the Defendant every 15 to 20 days. They exchanged mobile telephone numbers. On occasions, the Plaintiff asked for masturbation services. The Defendant would spend nights at the home of the Plaintiff where they had sex. On occasions, the Plaintiff would go to the Defendant's workplace for sex.
10. On the morning of 9 August 2004, the Plaintiff and the Defendant had morning tea together. The Defendant mentioned that her mother suffered from cancer. Despite the Defendant pawning all her jewellery and using all her savings, the Defendant still needed another \$10,000 to pay for her mother's operation. The Defendant asked the Plaintiff for a loan in that amount promising to repay \$1,000 every week. The Plaintiff pitied the Defendant and paid her the 1st Amount. After this loan, the Plaintiff and the Defendant became friends. They began having morning tea together every other day or so.
11. On 15 September 2004, the Defendant told the Plaintiff over morning tea that her close friend was getting married. The Defendant needed to attend and wear some of her pawned jewellery. The Defendant asked the Plaintiff to lend her \$5,000 to redeem some of the jewellery. The Defendant promised to repay \$1,000 per week. The Plaintiff agreed and gave the Defendant the 2nd Amount.
12. A day or 2 prior to 6 October 2004, the Defendant suggested to the Plaintiff over morning tea to lend her close friend \$10,000 to earn \$1,000 interest. The Defendant mentioned that deposits in banks were not really attracting (much) interest. The Defendant assured the Plaintiff that her close friend would repay the Plaintiff. The Plaintiff therefore paid the 3rd Amount on 6 October.

13. A day or 2 prior to 28 December 2004, the Defendant told the Plaintiff over morning tea that her partner/ colleague lost money in Macau and owed money to loan-sharks. In order to help her partner/ colleague out of a difficult situation, the Defendant had again pawned her own jewellery to raise money to repay the loan. The Defendant asked the Plaintiff to lend her \$30,000 to redeem her jewellery. Thus on 28 December, the Plaintiff paid the Defendant the 5th Amount.
14. On 17 February 2005 the Plaintiff and the Defendant opened a joint bank account (Joint Bank Account) at the Bank of China. The bank passbook was retained by the Plaintiff.
15. A day or 2 prior to 21 February 2005, the Defendant asked the Plaintiff to lend her \$50,000 so that she could in turn lend it to her son to do business. On the 21 February, the Plaintiff collapsed his fixed deposit of \$300,000 with the Bank of China (see Trial Bundle page 103) and paid the Defendant the 7th Amount.
16. On 8 March 2005 and over tea, the Defendant broached the idea of investing in real property. The Defendant mentioned that banks were not paying much interest on deposits and that it was better off investing in real property. The Defendant took the Plaintiff to a real estate agency and they were led to view various premises. The Property, with the price of \$688,000, was finally selected. The Plaintiff indicated that he could only afford \$500,000. The Defendant said she could afford \$200,000 and the rest of the purchase price would be paid by the Plaintiff. The Defendant further mentioned that she could pay monthly (mortgage) instalments of \$17,000 and that she would get a mortgage from a bank for \$200,000. The Plaintiff thus agreed to purchase the Property together with the Defendant and to rent out the Property to earn income. On the same day, the Plaintiff and the Defendant signed the Provisional Agreement for Sale and Purchase (the Agreement) of the Property (Trial Bundle page 106). The deposit was \$5,000 the Plaintiff did not have enough cash and only paid \$1,000. The balance of \$4,000 was paid by the Defendant. The Plaintiff then waited at the real estate agency office for the Defendant and the real estate agent to go and arrange mortgage for the Defendant. About hour later, the Defendant returned to say that she failed to secure mortgage from the bank. Since the Agreement had already been signed, the Plaintiff agreed with the Defendant that:
 - a) the Plaintiff would pay first the \$200,000 being the share the Defendant had agreed to be responsible for;
 - b) the Plaintiff would pay expenses incidental to purchase of the Property i.e. legal fees and commission for the real estate agent;
 - c) the Defendant had to repay the Plaintiff \$5,000 each month plus \$400 daily. Such payments would first be used to extinguish amounts still owing to the Plaintiff under previous loans and then towards the \$200,000 and

- d) The Property would be rented out but only by agreement of both the Plaintiff and the Defendant. The Plaintiff duly paid for the Property (see Trial Bundle pages 107 to 112). The Property was assigned to the Plaintiff and the Defendant as joint tenants by a deed of assignment dated 15 March 2005 (Trial Bundle 113 to 119). The keys of the Property were kept by the Defendant to facilitate her showing the Property to prospective tenants (or buyers). This was because the Defendant worked at Sham Shui Po area. A day or 2 after the assignment of the Property, the Defendant told the Plaintiff that she had rented out certain rooms and that she as well as her daughter had moved into part of the Property. The Plaintiff did not raise any objection or voice any views.
17. On 24 March 2005, the Defendant told the Plaintiff that her son had asked her to invest further in the son's business. The Defendant had thus pawned her jewellery to raise the money. The Defendant asked the Plaintiff for a loan of \$29,000 to redeem the jewellery. The Plaintiff thus paid the Defendant the 8th Amount by withdrawing \$25,000 from his own bank account and \$4,000 from the Joint Bank Account. (The Plaintiff's evidence was not too clear on the circumstances in which he paid the 4th and 6th Amount. See his witness statement in Trial Bundle pages 61 to 74, in particular paragraph 14 at page 65. See also his evidence in re-examination.)
18. Defendant's case The Defendant was a masseuse by occupation and plied her trade from an address at Ki Lung Street, Sham Shui Po. She did not provide sexual services to her customers.
19. The Plaintiff patronised her in June 2004. The Plaintiff courted her and the 2 became intimate with one another. They enjoyed a sexual relationship and the Defendant had spent nights at the Plaintiff's home. They were like husband and wife.
20. The Plaintiff made gifts to the Defendant. These included the 2nd, 3rd, 4th and 6th Amount. In September 2004 when the Defendant spent her first night with the Plaintiff, the Plaintiff gave her a diamond ring (Diamond Ring) as a token of his love and said he would look after her for life. Other gifts included a Rolex watch (Rolex Watch), a gold necklace and a gold bracelet. The necklace and bracelet were gifted sometime before the Chinese New Year. (The Defendant's evidence was not too clear as to when the Rolex Watch was given her. The Plaintiff admitted making this gift. The Plaintiff said, however, that he was not willing to buy the watch but did so because the Defendant insisted. The Plaintiff's evidence was to the effect that he purchased the watch in December 2004 as a birthday present for the Defendant.)
21. In September 2004 the Plaintiff suggested that the Defendant should save money through him. The Plaintiff said that for every dollar the Defendant so saved, he would contribute a dollar by way of gift. The Plaintiff said that the Defendant could withdraw her savings at any time. The idea of the Joint Bank Account proceeded from the Plaintiff and it was to be used in connection with this savings-scheme. The Defendant did pay money to the Plaintiff for saving purposes. She was not certain as to amounts paid (or when paid). She did not really

keep track of such payments because she regarded her relationship with the Plaintiff as akin to that of husband and wife. She trusted the Plaintiff and did not consider that clear lines needed to be drawn regarding her money transactions with the Plaintiff.

22. 7 March 2005 was the birthday of the Defendant by lunar calendar reckoning. She spent the night with the Plaintiff at his home. The Plaintiff mentioned he wanted to buy a set of premises for the Defendant so that she could live there with her daughter. The Plaintiff further said that the Defendant could even let out the unit for rental income. The next day, the 2 went flat-hunting and ended up purchasing the Property. 23 Someone from the solicitor's office had explained clearly the concept of joint ownership before assignment of the Property.
24. Sometime in June 2005, the Plaintiff told that the Defendant that his sons objected to their relationship. The Plaintiff terminated their relationship and asked for return of share of the Property.
25. Matters considered Counsel for the Plaintiff tried to present the Plaintiff as a senile person and a gudgeon. Having listened to and observed the Plaintiff, I am satisfied that he is neither. I found certain aspects of his evidence mere affectations of naivety and helplessness, for example:
 - a) The Plaintiff professed a certain amount of ignorance as to the nature of a joint bank account however, he admitted that he had been operating for some time in Hong Kong a joint bank account with his daughter who resided in the United States of America;
 - b) The Plaintiff said the Defendant kept insisting on the Rolex Watch. He therefore bought it for her. This Rolex Watch cost over \$30,000, not really a bagatelle particularly in view of the Plaintiff's financial circumstances (see paragraph 8 above). Purchase of the Property meant committing practically the whole of the life's savings of the Plaintiff. The Plaintiff's case was that the Defendant merely satisfied his carnal desires and they had meals together. The Defendant was not someone special to him - I do not believe that the Plaintiff would have bought the Rolex Watch and the Property if there was no special/intimate relationship between the 2 of them as the Defendant maintained. I do not find the Plaintiff the simpleton he tried to portray himself and
 - c) The Plaintiff said he passed a jewellery shop one fine day about 8 to 9 years ago. He was looking at the shop-window. Before he knew it, he was persuaded to enter the shop and committed himself to buy the Diamond Ring. He did not have the money then and returned to the shop the next day to pay for it. He had no particular reason to make the purchase I find this evidence farcical. I note that the Diamond Ring is not a trinket. I refuse to accept that the Plaintiff would purchase it for no apparent reason particularly in view of his financial resources.

26. The Plaintiff's evidence was that the Joint Bank Account was to be used by him to better monitor repayments of the Defendant. The Plaintiff said that he had already become a bit confused over money transactions with the Defendant. Why the need of a joint bank account for this purpose? Earlier on, I already mentioned the Plaintiff professing certain ignorance about joint bank accounts. Why did the Plaintiff not just open a separate bank account in his name only for the Defendant to pay into? This is a simple enough exercise that I consider the Plaintiff capable of if the object of the exercise is as the Plaintiff put it. The Plaintiff also said that it was the Defendant who initiated the idea of a joint bank account. That may be so but there is no reason for the Plaintiff to go along with the idea. The Plaintiff's case is that the Defendant is really a rogue, preying on the Plaintiff, milking him of his money. If the Defendant was really such a vile predator, one wondered why she would propose a joint bank account so that the Plaintiff could see more clearly transactions between the two of them - obfuscation is usually a powerful weapon in the arsenal of any fraudster.
27. The Defendant did not repay the 1st Amount as promised. The Plaintiff went on to lend her the 2nd Amount. The Plaintiff explained that he did so because the Defendant was repaying something and he thought that unless he continued to lend, the Defendant might stop repayment altogether. I find such reasoning hard to understand or accept particularly when, as the Plaintiff put it, there was no special relationship between the two of them. I note also that the Plaintiff said in evidence that he was quite willing to forego the 1st Amount and treat it as contribution towards charity. In any event, though the explanation may apply to the 2nd Amount, it cannot rationalise payment of the subsequent amounts. As already indicated, I do not find the Plaintiff a naive or stupid person.
28. The evidence of the Plaintiff was that no one at the solicitor's office explained to him the nature of joint ownership when he signed documents relating the purchase/ assignment of the Property. I find this inconceivable. The Plaintiff admitted that prior to the assignment, he had mentioned that if he died then the Property would go to the Defendant. The Plaintiff continued to say (in evidence) that such mention did not mean it was his real or true intention. If so, one can ask why the mention at all? One must remember that the Plaintiff's case is that there was no special relationship between the Plaintiff and the Defendant and the 2 of them were purchasing the Property as joint investment. I consider that the Plaintiff was speaking tongue in cheek in insisting that such mention did not reflect his true intention. The Defence pleaded and the evidence of the Defendant in her witness statement (Trial Bundle pages 86 and 87, paragraphs 13, 19 and 20) were that the Plaintiff made a gift of the whole of the Property to the Defendant. When giving evidence in Court, the Defendant said that someone from the solicitor's office had explained clearly and in full to herself and the Plaintiff the meaning of joint ownership. The Defendant said to the effect that joint ownership accorded with her intentions. The assignment was, of course, to the Plaintiff and the Defendant as joint owners (Trial Bundle page 113 to 119). I find that the parties intended to hold the Property as joint owners.

29. The Plaintiff explained the circumstances the Property came to be purchased (see paragraph 16 above). As far as the Plaintiff was concerned, the Defendant worked as a prostitute. The Defendant was impecunious, hence the many loans from the Plaintiff. Why would the Plaintiff believe that the Defendant could raise \$200,000 for the Property? On what basis did the Plaintiff think that the Defendant could get a mortgage or pay/ repay \$17,000 per month? Since the Plaintiff and the Defendant were going to be partners in this joint investment in the Property, why did the Plaintiff not accompany the Defendant to secure mortgage? I do not think the fact that the Plaintiff has no experience in the purchase and sale of real property provides any answer. I do not believe the Plaintiff's version of how the Property came to be purchased.
30. The Plaintiff explained that Exhibits P1 to 3 were records made by him to keep track of repayments by the Defendant. They were made at a later stage. The Plaintiff could not recall when he first made them but it would seem to be around March 2005. I do not think these records add anything to the Plaintiff's case these records are only as good as the Plaintiff's own words or evidence.
31. PW2, one of the sons of the Plaintiff, was called to give evidence. It is clear that he relied on what the Plaintiff told him. I do not think his evidence added anything to the Plaintiff's case.
32. I consider that the Plaintiff was smitten with love for the Defendant. He went on to adopt the role of a white knight and treated the Defendant as a damsel in distress. This explains his behaviour towards the Defendant as told to me by the Defendant. This also explains such matters as why there was nothing in writing to record the alleged loans or the agreement with the Defendant in relation to purchase of the Property. I think that somewhere along the line, the Plaintiff had a change of heart towards the Defendant. He considered that their relationship could not really work out. He proceeded to try to claim back some of the gifts he had made to her.
33. I think the Defendant did not tell the truth when she denied being in the business of providing sexual services. I also think she did not tell the truth when she pleaded ignorance of a legal action against her by a Lee Kit Sum (Trial Bundle pages 152 to 155). The Defendant was at least equivocal when she gave evidence concerning her public housing unit in Tsing Yi. In assessing the Defendant's evidence, I took into account all such considerations.
34. The Defendant did not keep any record of amounts she gave the Plaintiff for saving purposes. She was not even clear as to the amounts she had thus paid over (or even the relevant dates). The Defendant said she treated herself and the Plaintiff as a husband-and-wife team. The Defendant said she trusted the Plaintiff. I accept such evidence of the Defendant. The Plaintiff had, after all, promised to look after her for life and had been showering her with gifts (even on the Plaintiff's evidence, he had made gifts of the Rolex watch, the Diamond Ring and 2 items of gold jewellery). As I understand the Defendant, the \$4,000 deposit for the Property that she paid was not with a view to the Plaintiff reimbursing her. On the Defendant's evidence, I do not think there was any intention to create legal

relations when the Plaintiff said he would contribute one dollar for every dollar the Defendant saved through him. Indeed, there is no counterclaim for this. This is a civil dispute. I assess the evidence against the yardstick of probabilities. I have the right to prefer the evidence of one witness to that of another. I prefer and accept the evidence of the Defendant over that of the Plaintiff. Hence I make the decision and orders stated in paragraph 6 above. (Abu B. bin Wahab) Deputy FORMTEXT District Judge Representation: Miss Cecilia Liang instructed by Messrs. Or, Ng and Chan for the Plaintiff Mr. Alex S. W. Lai instructed by Messrs. Liu, Chan and Lam for the Defendant PAGE - PAGE A B C D E F G H I J K 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 A B C D E F G H I J K 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 vsvs &`#\$ @\\Hc-oa-ws-656\\HP LaserJet 1200 Series PCL 6 Ne00: winspool HP LaserJet 1200 Series PCL 6 \\Hc-oa-ws-656\\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) \\Hc-oa-ws-656\\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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