

HONG KONG / JUDGMENT

YIP PO LIN v. YEUNG MAN YEE

COURT

District Court

DECIDED

16 February 2007

CASE / FILE NUMBER

DCCJ5716/2004

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bjbj DCCJ5716/2004 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION CIVIL ACTION NO. 5716 OF 2004 BETWEEN YIP PO LIN Plaintiff and YEUNG MAN YEE Defendant Coram: H H Judge H.C. Wong in Court Date of Hearing: 16 February 2007 Date of Delivery of Judgment: 16 February 2007 J U D G M E N T The plaintiff, Madam Yip Po-lin, claims against the defendant, Mr Yeung Man-yee, for damages and for the return of deposit for breach of an agreement for sale and purchase of a 50 % interest in a property situated at Flat A, 5th Floor, Tonnochy Towers, 272 Jaffe Road, Hong Kong (the said property). The agreement was entered into between Madam Yip and Mr Yeung on 8 July 2004 for a consideration of \$357,000, being half of the purchase price of \$714,000 (the agreement). Mr Yeung alleges in his defence that the agreement was entered into on the misrepresentation of the plaintiff and her estate agent, Mr Kam. Alternatively, the defendant claims that there was a common mistake between the parties as to the essential terms of the agreement.

Background

Madam Yip first met Mr Yeung at the Wanchai Branch of Liu Chong Hing Bank in March 2004. They came to know each other by chance when they were handling their respective affairs at the bank. At that meeting, they expressed a common interest in stocks and share investments and they exchanged telephone numbers. They had one telephone conversation subsequent to that first meeting. They met again by chance on 6 July 2004, at the ground floor office of Luk Fuk Property Company (Luk Fuk). Mr Yeung was visiting Luk Fuk in order to obtain information for the sale or lease of the said property, which was registered in his name but had been used by his son Lincoln, as his residence. Because Lincoln had failed to settle the management fees and rate payments for a number of months exactly how many months were outstanding was unknown to Mr Yeung at the time Mr Yeung was anxious for assistance in the matter. Upon visiting Luk Fuk and obtaining advice after investigation by Luk Fuk, Mr Yeung was told there was an order for outstanding payments registered against the said property in the Land Office. The Plaintiff's Case Madam Yip gave evidence and admitted that she had introduced the proprietor of Luk Fuk, Mr Kam, to Mr Yeung on 6 July 2004. She admitted having told Mr Yeung she knew Mr Kam well. Her familiarity with Mr Kam was such that she referred to him as her kai jai or godson in the loose

sense. She further informed Mr Yeung that she had recently conducted two property transactions through Luk Fuk. On the same day, Mr Yeung took Madam Yip and the staff of Luk Fuk, Mr Mok, to visit the said property. Because Mr Yeung did not have a key to the said property they were not able to gain entry into the said property. On the next day, 7 July 2004, Mr Yeung and Mr Mok together with Madam Yip and a locksmith went to the said property and the locksmith successfully opened and replaced the lock at the said property. It was Madam Yip's evidence that while she, Mr Yeung and Mr Mok were discussing about the property outside the said property, a Mr Chan, whom Madam Yip understood to be a property investor, had entered the said property and inspected the inside of the said property. Madam Yip said she did not go into the said property, neither did Mr Yeung because the said property was full of rubbish and waste, which included furniture and papers. According to Madam Yip, she was told by Mr Mok that the investor, Mr Chan, after inspecting the inside of the property, offered the sum of \$850,000 for the purchase of the said property. The party then returned to Luk Fuk to discuss further. At Luk Fuk, Mr Yeung was informed by Mr Kam that it would cost about \$144,000 to \$146,000 to lift the encumbrances before he could sell the said property. The encumbrances were registered against the property because of the outstanding management fees and rate payments. It was Madam Yip's evidence that Mr Yeung and herself left Luk Fuk after a discussion with Mr Kam over the offer made by the property investor, Mr Chan, and Mr Yeung asked her over a cup of tea at a nearby McDonald's for her opinion. According to Madam Yip, Mr Yeung further inquired if Madam Yip would be interested in purchasing the said property. Madam Yip said she turned it down because she found the asking price too high. This was in the light of the fact that Mr Kam had, at the time when they were still at Luk Fuk, called up the property investor, Mr Chan, and asked him to increase his offer. According to Madam Yip, Mr Chan had increased his offer to \$858,000 and that was why Mr Yeung told Mr Kam he would think about the offer. At the meeting at McDonald's, Madam Yip and Mr Yeung had a lengthy discussion as to what Mr Yeung should do about the property. Madam Yip recalled that Mr Yeung had informed her that after deduction of the costs of vacating the encumbrances, he would be left with around \$700,000-odd if he sold the property to Mr Chan at \$858,000, he expressed that he was reluctant to sell the said property. Madam Yip claimed that Mr Yeung then offered to sell to her 50 % of the said property so that he could authorise her as a co-owner of the said property to talk to his son Lincoln to vacate the said property. At Lincoln's departure, Madam Yip would refurbish the said property and lease it out for rental income, and when the property market improved they would then sell the said property for a higher price and share out the profits equally between them. Madam Yip recalled that she had told Mr Yeung she did not have \$400,000-odd to purchase a 50 % interest in the said property but she would consider paying \$300,000 for a half share. Madam Yip also recalled that Mr Yeung told her that he had no cash to pay off the \$144,000 to lift the charges against the property and that he would need to use the money from the sale of the half-share interest in the said property to pay off those costs. According to Madam Yip, Mr Yeung offered to reduce the purchase price by \$144,000 and that Madam Yip needed only to pay half of the \$858,000 purchase price after deducting \$144,000. That came to approximately \$357,000 as the consideration for her half interest in the property. Madam Yip claimed that she accepted Mr Yeung's offer, they then agreed to go to the solicitor's office to execute an agreement on those terms. Madam Yip

informed Mr Yeung that she had been using the firm of Messrs N.K. Tsang & Co. in her two previous property transactions, and they agreed to meet early next day to go to Messrs N.K. Tsang & Co. According to Madam Yip, Mr Kam had consulted the same firm of solicitors on the encumbrances registered against the property and Mr Kam had received faxes on the details of the land search of the said property from the same firm. On the next day, 8 July 2004, Madam Yip and Mr Yeung met with Mr Lawrence Chan, a legal executive at Messrs N.K. Tsang & Co., at the office of Messrs. N.K. Tsang & Co. They executed a sale and purchase agreement. After the execution of the sale and purchase agreement, Mr Yeung further executed a power of attorney giving Madam Yip authority to handle various matters concerning the said property. Madam Yip claimed that at the office of Messrs N.K. Tsang & Co., Mr Chan was informed the purchase price for the said property was \$714,000, and that Mr Yeung as the vendor would transfer the said property to himself and Madam Yip as tenants in common in equal shares. She then paid \$10,000 to Mr Chan as costs on account which she claimed she had paid on Mr Yeung's behalf. After the visit to Messrs N.K. Tsang & Co., they went to a bank where Madam Yip transferred \$20,000 to Mr Yeung's account as the balance of the \$30,000 deposit under the said sale and purchase agreement. According to Madam Yip, the \$10,000 paid to Mr Chan and the \$20,000 paid to Mr Yeung at the bank constituted the \$30,000 deposit. In mid-July 2004, Mr Yeung called her up and told her that the property investor, Mr Chan, had offered to purchase the said property for \$860,000. Madam Yip claimed that Mr Yeung asked her to pay him 50 % of \$860,000 as consideration for her share of the purchase of the said property. At first, she refused to do so because she said that they had signed a sale and purchase agreement with different terms. However, she eventually agreed that she would accept double deposit payment in return for her foregoing the agreement between them. On the evening of 2 August 2004, Madam Yip visited Mr Yeung at his home and informed him she would not object to Mr Yeung selling the property to the property investor, Mr Chan, if he agreed to pay a compensation of \$60,000 from the deposit he would receive from the intended purchaser. Madam Yip claimed that Mr Yeung accepted the condition and she then called Mr Kam to set up a meeting between Mr Chan and Mr Yeung at Luk Fuk. The parties met at Luk Fuk that same evening and a provisional sale and purchase agreement was signed between Mr Yeung and Mr Chan for the sale of the said property at a consideration of \$860,000. On the next morning, Madam Yip met Mr Yeung at Lai Do Restaurant for tea before proceeding to Messrs N.K. Tsang & Co. to execute the cancellation of the agreement between them and to give instructions for the execution of a formal sale and purchase agreement between Mr Yeung and the new purchaser, Mr Chan. However, at the restaurant, Mr Yeung informed her that he had changed his mind about selling the property to Mr Chan and he would not pay the sum of \$60,000 to Madam Yip as a compensation. On 12 August 2004, Madam Yip was informed by Mr Lawrence Chan of Messrs N.K. Tsang & Co. that Mr Yeung had retained a firm of solicitors which purported to give formal notice to Madam Yip through Messrs N.K. Tsang & Co. that Mr Yeung would not be transferring the 50 % interest of the said property to her. Madam Yip claimed that since Mr Yeung revoked the agreement, and had dealt with the said property as the sole owner purporting to sell to the prospective purchaser for a consideration of \$860,000 in August 2004, she is therefore entitled to a half-share of the profits as a 50 % owner of the said property in equal shares with Mr Yeung under the agreement. Furthermore, she claims

for the return of the \$30,000 deposit. The Defence Case The defendant, Mr Yeung, is now 75 years old. He was a graduate of Zhongshan University Buildings and Architecture Department in 1952. He moved to Hong Kong in the late 1950s, working as an assistant in civil engineering firms. In 1980, he worked at the estate department of the American International Assurance () until his retirement in 1999. Mr Yeung admitted that he, his wife and son had emigrated in the 1980s to the US, but he found he could not adjust to living in the United States, he returned to Hong Kong alone after a few months and continued to work at AIA until his retirement in 1999. He and his wife divorced in 1990. Mr Yeung had purchased the said property in 1985 as his own residence. In the mid-1990s, his son Lincoln returned from the United States to live in Hong Kong and Mr Yeung allowed Lincoln to stay in the said property, while he himself moved to live in a property owned by a close friend who had emigrated to Canada. Mr Yeung claimed that he seldom saw his son because they do not share a close relationship and he had communicated with his son mainly by telephone. In or about June or July 2004, Mr Yeung came to learn from Lincoln that he had moved out of the said property and had been living in Shenzhen with his girlfriend for the last four or five years. He then paid a visit to the said property but was not able to gain entry because he did not possess a key to the said property. He had, however, learned from the management office that Lincoln had failed to pay management fees and rates for many months or maybe years. Consequently, he decided to put the property on the market. On the morning of 6 July 2004, he visited Luk Fuk. Upon entry to Luk Fuk, he found Madam Yip alone. She told him that she frequented Luk Fuk and the proprietor, Mr Kam, was like a godson to her. She told him Mr Kam could be trusted and is a reliable person. When Mr Kam returned to Luk Fuk, Madam Yip introduced Mr Yeung to him. Mr Yeung admitted he had taken Madam Yip and Mr Mok to the said property the same day, but they could not gain entry into the property. He further admitted that they returned with a locksmith the next day to open the door to the said property. He was given a new key to the said property, he claimed he had given this key to Madam Yip to facilitate Madam Yip bringing prospective purchasers or tenants to view the property. Mr Yeung recalled that Mr Kam had checked the Land Office records and informed him that the said property was charged with encumbrances, but said he could not ascertain the exact amount without further investigations. He claimed that Mr Kam told him the property market was soft and the interior of the said property was old and it would be difficult to sell in the market. He was told the best price he could get for the said property was between \$850,000 to \$860,000. Mr Yeung was given a previous sale transactions record sheet by Mr Kam on Tonnochy Towers showing sale transactions of between \$400,000 to \$880,000, which Mr Kam told him were the latest sale transactions record on Tonnochy Towers. Mr Yeung said he trusted Mr Kam and decided to appoint him as his agent to put the said property up for sale at \$860,000. He said the appointment of Mr Kam as his agent was oral and made in the presence of Madam Yip who had enthusiastically taken part in the discussion. It was Mr Yeung's evidence that Madam Yip contacted him later and informed him that she was interested in purchasing the said property but she did not have enough funding to purchase the whole of the property. She told him that she had enough money to pay 50 % of the purchase price, she then offered to pay \$430,000 to Mr Yeung for a half-interest in the said property. She also told him that as a co-owner she would persuade Mr Kam to find a purchaser offering a higher purchase price, such as \$900,000 or above.

She suggested that they would share a higher profit as they could sell it at over \$900,000. She further promised Mr Yeung that she would take prospective purchasers to view the flat after she helped him to dispose of the rubbish and waste in the said property. She even offered her own property which she purchased not too long ago for temporary storage. Mr Yeung claimed that it was on the aforesaid basis, and Madam Yip had agreed she would be paying half of the management fees and rates as a 50 % owner that he agreed to transfer 50 % share of the said property to Madam Yip. He further claimed that it was on that basis that Madam Yip telephoned Mr Lawrence Chan at Messrs N.K. Tsang & Co., to draft the transfer documents. They attended the office of Messrs N.K. Tsang & Co. the next morning to execute the transfer. Mr Yeung claimed that Madam Yip informed Mr Chan at his office on 8 July 2004 that the value of the property was \$860,000 and she would be purchasing a half-share in the said property from Mr Yeung. She further informed Mr Chan that the said property had an encumbrance of \$144,000-odd, due to unpaid management fees and rates. Mr Yeung claimed that it came as a surprise to him to learn when Madam Yip told Mr Chan that the charges against his property was around \$144,000 because he had only learned of the charges from Mr Kam after viewing the property on 7 July 2004 and Mr Kam had only told him later on that he estimated the charges were roughly about \$100,000. The figure of \$144,000 was foreign to him. Even Mr Kam said he was not sure of the exact amount, he wondered why Madam Yip should mention the figure of \$144,000? That was why at the meeting he asked Mr Chan to find out how much it would cost to clear the charges registered against the said property. Mr Yeung further claimed that he understood at the time that Madam Yip and he would share the cost of the lifting of the charges. That was why he said nothing when Madam Yip instructed Mr Chan to deduct \$144,000 or \$146,000 from the sale price of \$860,000. Mr Yeung claimed that because he did not read English and he had received no formal English education he could not read and did not read the sale and purchase agreement. He claimed he was told by Mr Chan that since the cost for lifting of the encumbrances was deducted from the sale price he would not be required to pay it. He claimed it was Mr Chan who convinced him that \$714,000 was the right sale price after deduction of the estimated costs of lifting the charges from the sale price of \$860,000. He was rather confused at the time and did not understand completely, but Mr Chan assured him that that was the instruction he received from Madam Yip. He was further told the agreement he was asked to sign was a provisional sale and purchase agreement only and for the moment it would suffice for transactions between relatives. Again, he was rather puzzled because he was not related to Madam Yip, even though he heard Madam Yip had introduced him to Mr Chan as a clansman. So far as he understood, a formal sale and purchase agreement would be signed at a later stage. He claimed he accepted Mr Chan's words and that he had only come to know he would be solely responsible for the cost of discharging the encumbrances on the said property after he had consulted another lawyer a few days later. Mr Yeung claimed he did not agree the \$10,000 costs Madam Yip paid to Mr Chan should come from the deposit of the \$30,000 he should be receiving from Madam Yip. He said he was not told the \$10,000 would be deducted from the deposit of \$30,000. He was only told by Madam Yip at the bank when she withdrew \$20,000 from her bank account to pay him that the balance of \$10,000 was paid to Mr Chan as costs on account. Even though he disagreed with it, she promised him it would be sorted out at a later stage. Mr Yeung admitted that he executed the

power of attorney to Madam Yip so that she could access the said property to remove the rubbish and other stuff from the property, and it would also facilitate her to refurbish the property for leasing or for sale at a later stage and meanwhile to bring prospective tenants or prospective purchasers to view the property. A few days later, he visited another estate agent and was given the latest 2004 sales transactions on Tonnochy Towers. He discovered that property prices had gone up in 2004 and that the information he received from Mr Kam were 2003 figures and they were not up to date. He then consulted the solicitor on duty at the Senior Citizen Centre in Wanchai, which he frequented. Upon the solicitor explaining the contents of the sale and purchase agreement to him, and at his advice, he retrieved the title deeds that he had left with Mr Chan on 24 July 2004. He admitted that full instructions were not given to his present solicitor until 10 August 2004. Mr Yeung claimed that he then talked to Madam Yip, telling her that he no longer wished to transfer a half-share of the said property to her. She refused to accept the unilateral repudiation and suggested he should pay double deposit to her in return for her forfeiting the agreement. She further told him she would find a purchaser for the said property so that he would be able to pay her the \$60,000 from the deposit that he would be receiving from the prospective purchaser. He claimed that although he did not agree he had no choice but to go along. Mr Yeung admitted that on 2 August 2004 late evening, he was told by Madam Yip that a purchaser had been found and he should go to Luk Fuk immediately. He claimed that it was closed to midnight when he arrived there. He was confronted by Mr Kam, Madam Yip, Mr Mok, and a couple introduced to him as Mr and Mrs Chan at Luk Fuk. He claimed he was pressured and induced by Mr Kam and Madam Yip into signing the provisional sale and purchase agreement which Mr Kam had already written out (the 2nd agreement). Mr Yeung claimed that he was reluctant to do so, but he was not allowed to leave the premises because Mr Kam had locked up the front door and he was left with little choice. Mr Yeung further claimed that under the remarks column at Clause 2 of the 2nd agreement, Mr Kam had inserted three subclauses which Mr Yeung had initialled against. However, he was not given a copy of this agreement that night because Madam Yip had taken it away. When he met Madam Yip the next day for tea she gave him a copy of the agreement in which he found a further subclause under Clause 12 had been added to the remarks column without his consent. He immediately crossed out his own signature and went to Luk Fuk to inform Mr Kam and in the presence of Madam Yip he was repudiating the 2nd agreement. He further told them, that he had lost all trust in them. He claimed he did not receive any deposit money from the purchaser under the 2nd agreement and neither did he at any time authorise Mr Chan of Messrs N.K Tsang & Co. to receive it on his behalf. On 10 August 2004, Mr Yeung instructed a firm of solicitors and executed a formal revocation of the power of attorney to Madam Yip. Mr Yeung claimed that the actual outstanding management fees and rates that formed the subject of the charges on the said property were only \$85,000-odd. With the assistance of his current solicitors, all the outstanding charges were paid and the encumbrances lifted against the said property. He retained the ownership of the said property to date, it is now let out to a tenant for rental income. The Issues The issues in this action are:

- (a) what was agreed by the plaintiff and the defendant before they signed the said agreement at the office of Messrs N.K. Tsang & Co; and
- (b) whether the agreement reflected what the plaintiff and the defendant agreed. Madam Yip's claim is based on the agreement of 8 July 2004 that Mr Yeung and Madam Yip signed at the office of Messrs N.K. Tsang & Co. However, this sale and purchase agreement was not executed by a solicitor at Messrs N.K. Tsang & Co., neither was it witnessed or attested. Furthermore, there was no interpretation clause, even though it was written in the English language. This 2-page document bore no traces that it was drafted by a solicitor or by a staff at Messrs N.K. Tsang & Co., because the firm's name did not appear on the document or on the backsheet. There appeared to be a chop with the name and address of Messrs N.K. Tsang & Co. on page 3 of the document together with the Land Registry record and Memorial No. 9336812 dated 27 September 2004, and the Land Registry office staff's initials. Mr Chan admitted in court that the chop of Messrs N.K. Tsang & Co. was endorsed because it was required by the Land Registry before the agreement could be registered. It was only endorsed when the agreement was taken to the Land Office for registration in September 2004, which was over 2 months after the agreement was signed. Madam Yip claimed that Mr Yeung refused to transfer 50 % of the said property to her shortly after signing the agreement for the consideration of \$357,000. She claimed that Mr Yeung demanded 50 % of \$860,000 as the transfer price. She refused. He queried why there was a double payment to clear the charges on the said property under the agreement when the sale price to Madam Yip was half of \$860,000 minus \$146,000, and yet, under Clause 8 of the agreement he should be solely responsible for the payments of vacating the encumbrances. After this conversation, Madam Yip regarded Mr Yeung to have repudiated the agreement. She then demanded the payment of double deposit from him and she claimed he had orally agreed to compensate her for the repudiation. At the hearing, Miss Wong, counsel for Madam Yip, informed me that Madam Yip is not enforcing the oral agreement of a payment of \$60,000, the so-called double deposit compensation. Madam Yip is claiming for damages, and the damages consist of 50 % of the difference in the market value assessed at \$860,000 and the agreed sale price of \$714,000, which came to \$73,000. Under the prayer of the statement of claim, the plaintiff is further claiming for the return of the deposit of \$30,000. Mr Yeung's defence is based on misrepresentation by Madam Yip and, alternatively, the common mistake of both parties to the agreement. Counsel for Mr Yeung, Mr Hui, submitted the misrepresentations were false and/or fraudulent and/or negligent. The misrepresentations were as follows: the first representation, according to Mr Hui, was at the office of Messrs N.K. Tsang & Co. in early July 2004. In order to induce the defendant, Mr Yeung, to sell one half-share interest in the said property, Madam Yip represented to Mr Yeung that:
- (a) the record of past sale transactions was a genuine record showing the then updated transactions of units of the building, relying on which the best price of the property should be \$860,000;
- (b) that Madam Yip and Mr Kam had good connections with a number of property speculators;

- (c) Madam Yip had her own method to sell the property at a price higher than \$860,000 in a short period of time had she become interested in the property;
- (d) Madam Yip would agree to pay Mr Yeung \$430,000 in return for one half-share of the interest in the said property, on the basis that the value of the property was \$860,000;
- (e) if she become a half-share owner of the said property, after the property was successfully sold at a price exceeding \$860,000, then the surplus which is the difference between the actual selling price in future and the agreed value of \$860,000 would be shared between Madam Yip and Mr Yeung in equal shares. The second representation was:-
 - (a) at the office of Messrs N.K. Tsang & Co., in the presence of Mr Yeung, Madam Yip told Mr Chan that the property was subject to charges and encumbrances, being arrears of management fees, rates and government rent in respect of the property;
 - (b) the amount due was in the sum of \$146,000. The third representation was:- At the office of Messrs N.K. Tsang & Co., in order to induce Mr Yeung to sign and execute the power of attorney, Madam Yip explained and represented to Mr Yeung that the power of attorney was merely to enable her to deal with the property, particularly to carry out and conduct negotiations with property speculators and prospective purchasers, to remove the personal belongings and property left behind by Mr Yeung's son to another flat owned by her in Wanchai for temporary storage. Mr Hui submitted that it was only later discovered that the encumbrances were not ascertained at the time of the said agreement, and the transaction records given to Mr Yeung by Mr Kam did not reflect the up-to-date 2004 transactions of Tonnochy Towers. They were only transactions between July and October 2003. Mr Hui further submitted the following:-
 - (a) the said agreement was entered under a common mistake of Madam Yip and Mr Yeung that:
 - (i) the total amount of encumbrances at the material time was ascertained by Mr Kam to be \$146,000; and (ii) the consideration of \$714,000 had already taken into account the payment of encumbrances;
 - (b) Madam Yip had failed to pay the \$30,000 deposit to Mr Yeung as stipulated in Clause 5(i) of the said agreement and this constituted a repudiation of the agreement. Findings After hearing witnesses giving evidence in court and observing their demeanour, I find Mr Yeung to be an honest man. He did not seem to be worldly, he admitted he was a trusting person. His age did not give him much advantage so far as property transactions are concerned. He became a prey to the much more streetwise and speculation-conscious Madam Yip, who was 25 to 30 years his junior. Mr Yeung was close to 73 years old in July 2004. Madam Yip was active speculating in the property market in Wanchai. She had admitted to two property transactions at the time. Mr Yeung claimed she was sitting at Luk Fuk Property Company in the taipan chair by herself when he met her the second time on 6 July 2004. He had mistaken her for the boss at Luk Fuk and addressed her as such, she told him she was there often but she was not the boss. At their first meeting at the bank in March 2004, Madam Yip had told

Mr Yeung she was a housewife and that she had offered voluntary help to elderlies in Wanchai. Mr Yeung was obviously impressed by her friendliness and her knowledge and experience dealing in the property market in Wanchai, so much so that he confided in her his relationship with his son and the state of the said property left by his son. I accept Mr Yeung's evidence that he had discovered that his son had not been living in the said property and he had visited the said property and found his son had left outstanding management fees and rates unpaid for many months. I also accept that he had paid the current outstanding expenses to the new management company at the management office. It was there that he discovered his son had left many months of management fees, rates and government rent unpaid. He decided to put the property on the market because his son was no longer living there, and there were outstanding management fees and rates that had to be settled. So when Madam Yip offered to purchase a half-share of the said property from him it would provide him the opportunity to use the purchase money to settle the outstanding management fees and rate payments. That seemed to him to be an attractive proposition. I find Mr Yeung did believe at Mr Kam's advice that the price of the said property the open market value was \$860,000, and that, on that basis, he agreed to transfer 50 % interest in the said property to Madam Yip. He believed the price he would receive from Madam Yip would be half of \$860,000, that is, \$430,000, which would enable him to settle the outstanding charges. It was at the office of Messrs N.K. Tsang & Co. that he was told the sale price should be deducted by the \$146,000 and he did not object immediately to it because he thought Madam Yip would be jointly liable in equal shares to pay off the outstanding charges and whatever was required after full investigation by Mr Chan. As Mr Yeung did not understand English, he did not read the agreement, unfortunately the agreement was not translated to him by Mr Chan. Mr Chan in his own evidence admitted he did not explain to Mr Yeung Clause 8 of the agreement regarding Mr Yeung's obligation to be solely responsible for the costs of vacating the two memorials registered against the said property. Mr Chan gave the explanation that he did not do so because he believed Mr Yeung had emigrated to the USA and therefore understood English. I find this explanation rather feeble. That he should fail to explain the contents of the agreement written in legal English to Mr Yeung is totally unacceptable for a legal executive at a solicitor firm. Mr Chan's reason for his failure was completely unsatisfactory. Mr Chan as a legal executive at Messrs N.K. Tsang & Co. should possess the knowledge that the agreement was written in a language foreign to Mr Yeung. He had also failed to include an interpretation clause in the agreement. However, when he executed the power of attorney he had included a clause of interpretation. The power of attorney was also attested by Mr Chan and executed by a solicitor at Messrs N.K. Tsang & Co. Mr Chan failed to explain the difference in the execution of the two documents. He admitted they are of equal importance and he claimed the agreement was intended for close relations under the Conveyancing and Property Ordinance. He seemed to be saying that it was allowed under the law. When cross-examined on whether Madam Yip and Mr Yeung fell into the specified categories of close relations under the Ordinance, he quickly shifted his answer and said the property transacted was under \$1 million. He then claimed it was signed as a provisional sale and purchase agreement and therefore he did not put in the firm

s name or sign as a witness to the agreement. I am not impressed by Mr Chan s evidence. I find him most unreliable. He had clearly failed to perform his duty as a legal executive to a firm of solicitors in the execution of this agreement. His handling of the agreement was totally unprofessional. As to his evidence on the purpose and application of the \$10,000 costs on account, he was totally inconsistent and evasive. Turning to the two letters that he wrote on behalf of Messrs N.K. Tsang & Co. exchanged with the defendant s solicitors, he had failed to explain the \$10,000 costs received; whether it was costs for the transaction or costs for lifting the charges or for both. It is clear in the first letter he had specified the \$10,000 was to cover disbursements and charges of the transaction which clearly meant it was to cover all the charges, including the transaction and the charges for the investigation of the charges and for lifting the charges. There was no evidence as to whether he had opened a client s account for Mr Yeung or for Madam Yip, or in both Madam Yip and Mr Yeung s joint names. According to Mr Chan, he claimed at one stage that the agreement he drafted was a formal sale and purchase agreement and that it is binding on both parties. At a later stage in his evidence, he said it was only a provisional agreement like those prepared by estate agents. If it was a formal sale and purchase agreement the terms were incomplete. e.g. the agreement failed to mention the costs of the transaction between Madam Yip and Mr Yeung.

The Intention of the Defendant I am satisfied that Mr Yeung had intended, when he visited Messrs N.K. Tsang s office and when he signed the agreement, to transfer 50 % interest in the said property to Madam Yip at \$430,000 ,because he had already received an offer the night before from Mr Chan, through Mr Kam, of \$858,000. It was only because he was persuaded by Madam Yip that she could get him a better sale price of over \$900,000 if she possessed an interest in the said property and she would work harder to find a prospective purchaser. It does not make sense that he should forego an offer of \$858,000 to sell half of the interest of the said property to Madam Yip just so that he could get a couple of thousand dollars more for the property. It meant that he would be losing half of the profits to Madam Yip if he would transfer to her 50 % the interest of the said property at \$357,000. There would be no profits to gain by doing so after costs were deducted. Even if at a later stage the property was sold at \$900,000 through Madam Yip s persistence, the two of them would share only the sum of \$40,000 to \$45,000 more than the \$858,000 he would have received had he accepted Mr Kam s offer on behalf of the speculator. Why would he wish to sell a half share at a discount of \$70,000 to Madam Yip in order to get \$20,000 to \$22,500 more? Madam Yip claimed the instructions to Mr Chan, that the cost of lifting the charges on the property was \$144,000 or \$146,000, was obtained by Mr Kam from Mr Chan. However, according to Mr Chan s evidence, he denied such knowledge. It is clear that Madam Yip s evidence and Mr Chan s evidence were inconsistent. I find both witnesses to be untruthful and unreliable. It is clear to me based on the evidence before me that Mr Yeung and Madam Yip entered into the agreement at cross-purposes. I am satisfied that Madam Yip knew she was getting a bargain at Mr Yeung s expense when she signed the agreement at Mr Chan s office, while Mr Yeung was under a misunderstanding or a mistake that Madam Yip would be jointly liable for the charges if \$146,000 was to be deducted from the sale price. There was clearly a miscommunication leading to a mistake on his part, and it was because Mr Chan had failed

to explain and translate the full terms of the agreement to Mr Yeung.

- (i) I find the parties clearly were not *ad idem* when they entered into the agreement, therefore the agreement should fail because the parties were not entering into the same agreement from what they understood of the agreement. (ii) Further, Madam Yip and Mr Chan had misrepresented to Mr Yeung at Mr Chan's office, which induced Mr Yeung to enter into the said agreement. I refer to Chitty on Contracts, Vol 1, paragraph 6-031: It is essential, if the misrepresentation is to have legal effect, that it should have operated on the mind of the representee. I am satisfied that the representations made by Madam Yip and Mr Chan had clearly operated on the mind of Mr Yeung. The representation had induced him into entering the agreement. (iii) I find the written agreement between Madam Yip and Mr Yeung also fails because Mr Yeung did not know what he was signing, the contents were not explained to him, the terms and conditions having been written in English, a language foreign to him. (iv) The agreement was not fair and was not what Mr Yeung had intended. I refer to Chitty on Contracts, paragraph 1 025 at page 20 of Vol 1: General considerations of fairness are relevant to the way in which English Courts treat the consequences of making contracts in several different ways. First, the fairness or reasonableness of the result reached is clearly relevant to the interpretation of the express terms which the parties have made. The courts have long made clear that in general they should look to the intention of the parties, rather than the strict letter of the contract's stipulations, and in interpreting their intention the courts look at the factual matrix of the contract. Modern principles of construction require the court to have regard to the commercial background, the context of the contract and the circumstances of the parties, and to consider whether, against that background and in that context, to give the words a particular or restricted meaning would lead to an apparently unreasonable and unfair result. As Lord Reid earlier observed, The more unreasonable the result, the more unlikely it is that the parties can have intended it. Here, the agreement was clearly unfair to Mr Yeung, because it would mean he had the purchase price reduced by the cost for the lifting of the encumbrances. And, after only receiving half of the reduced price, he would under Clause 8 be solely responsible for payment of vacating the memorials registered against the property. As Mr Yeung himself remarked after he discovered the full meaning of the terms of the agreement, he will be double-charged for the cost of lifting of the encumbrances. That cannot be right. For the aforesaid reasons, the said agreement is not enforceable against Mr Yeung. As to the second agreement entered on 2 August, it was clearly not supported by considerations. The cheque exhibited the payee to be Messrs N.K. Tsang & Co. However, Mr Chan admitted in Court he had never received this cheque, neither was it paid to Mr Yeung. It was therefore not supported by any consideration. I refer to Professor Farrand's book, Contract and Conveyance, under the chapter on Deposit Non-Payment of Deposit Where there is an express term for payment of a deposit but the purchaser fails to comply there is authority for the proposition that in general such a payment constitutes a condition precedent to a binding contract: *Myton Ltd. v SchwabMorris* [1974] 1 WLR 331, where the purchaser's cheque was not met... Warner J has reconsidered the cases and concluded that a provision

for payment of a deposit is not the condition precedent but in general a fundamental term, in the case of *Millichamp v Jones* [1982] 1 WLR 1422. It is either a condition precedent to a binding contract or a fundamental term of the contract. The failure of payment of the deposit to Mr Yeung constituted a breach of the contract, consequently the second agreement is not binding on Mr Yeung. One of the plaintiff's claims in the prayer is the return of the \$30,000 deposit. I find Madam Yip had only paid Mr Yeung \$20,000, not \$30,000. This \$20,000 that Mr Yeung received should be returned to Madam Yip. Therefore, I give judgment in the sum of \$20,000. So far as the \$10,000 balance is concerned it was never paid to Mr Yeung. Madam Yip claimed it was paid to Mr Chan as costs. However, according to the evidence, it was paid to Mr Chan without Mr Yeung's consent as part of the deposit that should go to Mr Yeung. Neither did the payment have the consent of Mr Yeung as costs on account. It was costs paid by Madam Yip, I have no doubt she should be able to retrieve it from Mr Chan. As to the defendant's counterclaim, I give judgment to the defendant on his counterclaim and declare the agreement to be null and void. I would also order that the registration of the sale and purchase agreement in the Land Registry under Memorial No. 9336812 and 9370489 should be vacated. (Discussion on Costs) I agree with Mr Hui that the plaintiff's case is to enforce the agreement, and that instead of specific performance the plaintiff had asked for damages. The damages should cover the deposit itself, because if the plaintiff did not pay for the purchase of the 50 % share she would not receive the benefit of the transfer. The plaintiff did not ask for the return of double deposit for she was not relying on the oral repudiation. She placed her reliance on the agreement to be effective. The plaintiff cannot have both; either the agreement was effective and enforceable or it was not. I find the agreement not enforceable, on that basis, any deposit that the plaintiff paid the defendant should be returned. On that basis, the defendant shall have all the costs to be borne by the plaintiff with certificate for counsel. There shall be payment out to plaintiff of \$20,134 from defendant's payment in. (H C Wong) District Court Judge Miss Becky Wong, instructed by Messrs K.H. Yuen & David Cheung, for the Plaintiff Mr Hui Tai-wai, instructed by Messrs Fung Wong Ng & Lam, for the Defendant PAGE - PAGE CRT8/16.2.2007/GTT DCCJ5716/2004/Judgment 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 &`#\$ Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong SAR Title Microsoft Word Document MSWordDoc Word.Document.8

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