Chow Kwan Yee v Leung Mei Yin May

Date of Judgment: 15 April 2021

Court of Appeal

CA

Civil Appeal No 20 of 2020

CACV 20/2020

Citations:	[2021] HKCA 497 [2021] HKEC 1464
Presiding Judges:	Cheung and Au JJA and Lam J
Phrases:	Civil procedure - appeal - appeal against judgment allowing plaintiff's claim against two defendants for repayment of loan and dismissing D2's counterclaim for repayment of disbursements - dismissed in respect of D1; allowed in respect of D2, with judgment entered against plaintiff on counterclaim
Counsel in the Case:	Mr Alan Kwong and Mr Joseph Wong, instructed by William K W Leung & Co, for the Plaintiff Mr Tong Ng, instructed by Lee & Wu, for the 1st and 2nd Defendants
Cases cited in the judgment:	Big Island Construction (HK) Ltd v Wu Yi Development Co Ltd (2015) 18 HKCFAR 364 China Gold Finance Ltd v CIL Holdings Ltd (CACV 11/2015, [2015] HKEC 2529) Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1 Seldon v Davidson [1968] 1 WLR 1083 Sino Wood Investment Ltd v Wong Kam Yin (2005) 8 HKCFAR 715 Star Glory Investment Ltd v Kai Tuo (HK) Technology Co Ltd (HCA 3523/2002, [2005] HKEC 2378)

JUDGMENT:

Lam J:

Introduction

1. This is a dispute between the plaintiff on the one hand, and her daughter (the 1st defendant) and son-in-law (the 2nd defendant) on the other. By the action below the plaintiff claimed against both defendants for the repayment of the unpaid balance of an alleged loan of $2 million, while the 2nd defendant counterclaimed against the plaintiff for repayment of the sums of $200,000 and $32,280 disbursed on behalf of the plaintiff, and for the return of a jade bangle (" Bangle "). Deputy High Court Judge M K Liu (" Judge ") gave judgment, after trial, in favour of the plaintiff on her action, and dismissed the 2nd defendant's counterclaim (" Judgment "). [1] The defendants now appeal to this

court.

The background

The loan of $2 million

2. The 1st defendant is the plaintiff's first child but grew up in the care of her paternal grandmother and aunt. Her relationship with the plaintiff was not close. Between 1999 and 2003, the 1st defendant was in bankruptcy. In June 2010, she rented a floor in a small village house in Tai Po to be used as her matrimonial home with the 2nd defendant. In October 2010, the 1st defendant married the 2nd defendant.

3. On the loan of $2 million, the plaintiff's case and evidence, which the Judge accepted, was essentially this. In around early December 2010, the plaintiff, whilst in Canada, had a telephone conversation with the 1st defendant. The 1st defendant told the plaintiff that she had recently been married to the 2nd defendant and that she had been bankrupted and was in financial need. The plaintiff asked her about the amount needed for purchasing a property in a small village house in Tai Po. The 1st defendant replied it would take about $2 million. Out of sympathy, the plaintiff proposed lending $2 million to her for purchasing such a property as her matrimonial home. The loan was to be repaid by monthly instalments of $8,000 each without interest. The 1st defendant told the plaintiff that because of her bankruptcy, she had no bank account, and asked the plaintiff to liaise with the 2nd defendant, who had a bank account, on the transfer of funds.

4. Some days later, the plaintiff and the defendants had lunch together in a restaurant. It was the first time the plaintiff met the 2nd defendant. They agreed to go to a bank a few days later for the purpose of providing $2 million to the 2nd defendant.

5. On 21 December 2010, the plaintiff first obtained a cashier's order for $2 million from her bank and then went to a branch of Hang Seng Bank where she gave the cashier's order to the 2nd defendant, which he deposited into his account at Hang Seng Bank.

6. With this financial support, the 1st defendant signed a provisional agreement on 13 February 2011 for the purchase of a floor in a small village house in Tai Po ("Tai Po Property") at the price of $1,990,000. The sale and purchase was completed on 8 April 2011, and the Tai Po Property was acquired under the 1st defendant's sole name.

7. The plaintiff agreed with the 1st defendant that the repayment need not start until September 2011, as the 1st defendant had to pay rent under her existing tenancy agreement up to August 2011. Starting from September 2011, the defendants made monthly repayment to the plaintiff at the beginning of each month by transferring or depositing a sum into an account jointly held by the plaintiff and her second child, Robert Leung. The sum was usually $8,000, but sometimes slightly less. When it was less, the plaintiff would call the 1st defendant and each time she would explain that she had some financial difficulties that month.

8. The plaintiff's pleading and witness statement contained a list of the repayment sums up to January 2014, which the Judge set out in §27 of the Judgment. She accepted in oral evidence, however, that the disclosed bank account records showed that there were in fact the following further repayments (" Further Repayments "), which had been overlooked.

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

9. The repayment ceased after April 2014. The plaintiff repeatedly asked the defendants to continue their repayment but they refused. The plaintiff issued the writ in these proceedings on 29 May 2017.

10. In upholding the plaintiff's claim, the Judge rejected the defendants' evidence regarding the $2 million. They claimed that the sum was a gift that the plaintiff wanted to give the 1st defendant to make up for the plaintiff's failure to take care of her in the past, and that the plaintiff herself deposited the cashier's order into the 2nd defendant's Hang Seng Bank account, telling him to treat the 1st defendant well. They had stable income, and substantial savings of over $1 million each, in 2010 and 2011, and could purchase the Tai Po Property even without the $2 million from the plaintiff. Of the monthly sums deposited into the plaintiff's joint account, only 6 payments between 2 September 2011 and 1 February 2012 were made by the 2nd defendant, and were sums given to the plaintiff for the funeral expenses of the 1st defendant's father and for the plaintiff herself for tonic food. They said that the monthly payments other than these 6 sums were unrelated to them.

The sums of $200,000 and $32,280

11. There is no dispute that in early 2011, when the plaintiff purchased a property on Hong Kong Island (" HK Property ") for Robert Leung, the plaintiff was not in Hong Kong and the 2nd defendant helped to pay the initial deposit of $200,000 on her behalf. It was also common ground that the 2nd defendant had paid some money on the plaintiff's behalf to the contractor engaged to renovate the HK Property. The 2nd defendant claimed he spent $32,280 for this purpose. The 2nd defendant claimed that he had agreed with the plaintiff that the sums of $200,000 and $32,280 were to be repaid to him upon the resale of the HK Property, but that despite it was sold in April 2013 the plaintiff never repaid him.

12. The Judge rejected the 2nd defendant's evidence, and preferred the plaintiff's evidence that she had repaid the $200,000 by cheque before the completion of the purchase of the HK Property in March 2011. On the renovation expenses, the Judge noted that while there were documents showing the renovation fees paid to the contractor, the documents only showed that $19,850 of those fees were paid by the 2nd defendant. The Judge accepted the plaintiff's evidence that she had paid a deposit of $8,000 to the contractor and also pre-paid $20,000 to the 2nd defendant by cheque to enable him to pay the contractor.

13. The Judge also held that the obligation to repay arose immediately upon the loan being made. Since the $200,000 was paid by the 2nd defendant on 24 January 2011 and the sums paid to the contractor were paid in the period from 2 April to 1 June 2011, any claim by the 2nd defendant would be time-barred. (More accurately, since a counterclaim relates back to the date of the writ by virtue of section 35(1) & (2) of the Limitation Ordinance (Cap 347), any claim accruing from payments made after 29 May 2011 would not be time-barred. Nothing, however, turns on this in this appeal.)

The Bangle

14. The 2nd defendant also counterclaimed against the plaintiff for the return of a jade bangle engraved with dragon and phoenix pattern (龍鳳玉鐲) (" Bangle "). The defendants' evidence was that the Bangle was gifted by the 2nd defendant's mother to the 1st defendant upon their wedding. The plaintiff saw it, admired it and repeatedly asked to borrow it. Eventually the 2nd defendant took it and lent it to the plaintiff in February 2011. The plaintiff failed or refused to return it despite repeated demands. Accordingly, the 2nd defendant counterclaimed for an order for the delivery up of the Bangle.

15. The plaintiff's pleaded case in her Re-Amended Reply and Defence to Counterclaim was that the 1st defendant gave the Bangle to the plaintiff on condition that it was returnable and would be returned only upon the plaintiff's death. The plaintiff denied that the 2nd defendant was entitled to the relief counterclaimed.

16. The plaintiff did not give any evidence relating to the Bangle in her witness statements. In the plaintiff's written opening submissions for trial dated 11 November 2019, it was asserted that the plaintiff's solicitors had written a letter dated 1 November 2019 inviting the defendants to collect the Bangle from them, and that there was therefore no live issue in relation to the Bangle.

17. In light of the plaintiff's position as stated, at the beginning of the trial, the Judge asked the plaintiff to bring the Bangle to court and pass it to the 2nd defendant. Later that day, however, the Judge was told by counsel that the 2nd defendant considered that what the plaintiff had since brought to court was not the Bangle and declined to accept it.

18. In his judgment, the Judge declined to make an order for delivery up on the ground that there was insufficient evidence of the appearance and characteristics of the Bangle to enable the court to make an unambiguous order for delivery up. As a result, the Judge also dismissed the 2nd defendant's counterclaim for the Bangle.

The appeal

19. On this appeal, the defendants challenge all 3 aspects of the Judgment summarised above, which we shall deal with in turn below.

The loan of $2 million

20. Two grounds have been raised in relation to the $2 million loan. First, it is contended that the Judge erred in his analysis of the evidence in finding for the plaintiff on her case on the oral loan agreement. Secondly, it is contended that even if the oral loan agreement existed, the Judge erred in finding that the 2nd defendant was party to and liable on it.

Whether the Judge erred in finding the oral loan agreement

21. The defendants seek to impugn the Judge's findings by attacking the adverse inferences he drew against the defendants. First, the Judge drew an adverse inference against them in relation to their allegations about their financial situation in 2010 and 2011 because they had not disclosed any documents relating to their financial condition at that time except their tax returns in 2011/12. [2] Mr Ng submits that even on the plaintiff's case, the 1st defendant did not make the telephone call to the plaintiff in early December 2010 in order to ask for money to purchase the Tai Po Property. It was the plaintiff herself who initiated lending $2 million to the 1st defendant to buy a property. The defendants' financial circumstances were therefore irrelevant to the issue.

22. We do not accept this submission. The plaintiff's evidence was that she proposed to advance money to the 1st defendant because she was "in financial need" and having a difficult life, and that the plaintiff decided to lend money to her "out of sympathy". At trial the defendants themselves prayed in aid their allegedly sound financial condition. The 1st defendant stated that she did not need to borrow money from the plaintiff (see, in particular, the 1st defendant's second witness statement, § 21). They also disclosed their tax returns. The financial condition of the defendants had plainly been put in issue as part of the factual matrix against which the plaintiff agreed to part with the $2 million. The Judge was in our view quite entitled to draw the inference he did.

23. Secondly, Mr Tony Ng submits on behalf of the defendants that the Judge was wrong to infer from the absence of the 2nd defendant's bank statements for the years 2011 to 2014 that the reason for the failure to disclose was to suppress evidence showing that there was a pattern of paying about $8,000 into the plaintiff's joint account between September 2011 and April 2014. [3] It is argued that because other than the 6 payments admittedly paid by the 2nd defendant, the rest of the deposits were cash deposits, the 2nd defendant's bank statements would not have assisted either party's case.

24. This submission is to be rejected, for it in our view unjustifiably assumes that nothing would be revealed by the bank statements. Without seeing the bank statements, one cannot conclude that they would not, for example, show that there were corresponding cash withdrawals from the 2nd defendant's account shortly before the cash deposits made into the plaintiff's account, which would have supported the plaintiff's case.

25. Thirdly, the defendants gave evidence that in a family meal gathering in late 2015 attended by the plaintiff, the defendants and the 1st defendant's uncle and aunt, the 2nd defendant requested the plaintiff again to return the Bangle and repay $232,280 to him, but the plaintiff refused and cursed the defendants' marriage. The Judge drew an inference from the fact that the defendants did not call the uncle and aunt to give evidence, that the defendants' evidence about the gathering was untrue. [4] It is submitted on behalf of the defendants that the Judge was wrong to do so because that gathering, on the defendants' evidence, only related to the issue concerning the Bangle, which the plaintiff conceded at trial, and had nothing to do with matters concerning repayment. Further, those two persons were also the plaintiff's relatives and could have been called by her.

26. We reject this submission. It is plain from the defendants' witness statements that the gathering in 2015 was relied upon not only in relation to the Bangle. It was said that at that gathering, the 2nd defendant demanded not only the return of the Bangle, but also repayment of the $232,280, and that the plaintiff said she regretted having gifted $2,000,000 to the 2nd defendant (see §§56-57 of the 1st defendant's witness statement and §31 of the 2nd defendant's witness statement). These are positive averments about that gathering which, if established, would have advanced the defendants' case on those sums of money. The Judge was, in our view, entitled to question why the uncle and aunt were not called by the defence and to draw an adverse inference against the defendants accordingly.

27. Mr Ng has also raised a number of miscellaneous criticisms of the Judgment, which we mention below. We find these points singularly unimpressive, as they seem to us to be no more than regurgitations of the arguments made to the Judge at trial and rejected by him, without showing any palpable error giving rise to grounds for intervention by the appellate court: see China Gold Finance Ltd v CIL Holdings Ltd & Others CACV 11/2015 (27 November 2015), §§11-16.

28. First, there are a number of months between 2011 and 2014 where the deposits into the plaintiff's account were in odd sums a little above or below $7,500. Mr Ng submits that it was obvious that they could not have been the alleged monthly repayments of $8,000 each, and that the plaintiff had failed to provide any sensible reason for the discrepancies. In fact, the plaintiff in her oral evidence explained that each time, she would call the 1st defendant, who explained that she had some financial difficulties in that month. [5] The judge believed the plaintiff and accepted her explanation. The defendants have been wholly unable to point to any appealable error.

29. Next, Mr Ng points to a discrepancy in the plaintiff's case in that in her pleading, it was said that the defendants started making repayment from around January 2011, but according to her evidence, the repayment started in September 2011. The Judge heard the plaintiff's explanation as to why she allowed the defendants to begin repayment only in September 2011 (ie because the 1st defendant still had to pay rent for a rented property up to August 2011) and accepted that evidence. [6] The Judge was entitled to conclude that this discrepancy had no material adverse impact on the plaintiff's credibility.

30. Thirdly, it is said that the Judge failed to consider the omission of the Further Repayments in the plaintiff's pleading and witness statement. As is evident from the Judgment, however, the Judge specifically noted the discrepancy but, having heard the plaintiff, accepted that they were inadvertent omissions. [7] Mr Ng has been wholly unable to articulate any specific error in this conclusion.

31. Fourthly, Mr Ng says there is not a single document or letter showing that there was the alleged loan of $2 million or that demands were made for repayment. The Judge was no doubt conscious of that fact, but he was also alive to the fact that it was a dispute between family members and that, in this context, documentary records could not sometimes realistically be expected. [8] This is again simply a repetition of the argument made below without identifying any real error in the Judge's reasoning.

32. Finally, Mr Ng refers to the plaintiff's evidence in her witness statement (at §26) that she asked a friend of hers in December 2016 to ask the 1st defendant to meet the plaintiff in person in order to discuss the repayment of the balance of the $2 million loan, but the 1st defendant was reluctant to do so and said she would not make any further repayment. Mr Ng submits that all the above points together with the plaintiff's failure to call her friend to testify in the trial make her version all the more unbelievable. As Mr Kwong points out on behalf of the plaintiff, however, the plaintiff was not asked at trial why she had not called the friend to give evidence. In the circumstances, the Judge was entitled not to place much weight on the fact that the friend had not been called.

33. For these reasons, we find that the defendants have not shown any appealable error in the Judge's finding that the $2 million was advanced by the plaintiff pursuant to the oral loan agreement she alleged.

Whether the Judge erred in finding the 2nd defendant liable on the oral loan agreement

34. The other point raised in relation to the loan of $2 million is that the Judge erred in finding that the 2nd defendant was a party to and liable on the loan agreement. It is said that the finding was not supported by any evidence and was even contradicted by the plaintiff's evidence at trial.

35. According to the Amended Statement of Claim, it was the plaintiff and the 1st defendant who entered into the oral loan agreement, although it was averred that the terms included that the loan was to be provided to the defendants and that the defendants were to make monthly repayment. The plaintiff's Re-Amended Reply and Defence to Counterclaim averred that during the whole course leading to the loan agreement and the monthly repayments, the defendants were "acting in concert and/or as mutual agents each for the other".

36. The plaintiff's case was that the oral loan agreement was reached in the telephone conversation with the 1st defendant in early December 2010. In her witness statement the plaintiff said that during that conversation, she proposed to lend $2 million "to the 1st Defendant as a loan for the purpose of purchasing a Tai Po Ding House. … The 1st Defendant counter-proposed to repay the Loan in the amount of HK$8,000.00 per month and then I agreed and the loan agreement was so reached". [9] The plaintiff also said that the 1st defendant requested her to liaise with the 2nd defendant and that the loan amount was to be paid to the 2nd defendant's bank account as the 1st defendant had no bank account due to her previous bankruptcy, and that at the subsequent lunch meeting, it was arranged that she and the 2nd defendant would later meet at the bank in order to advance the loan into his bank account. [10] The plaintiff stated that when the cashier's order was handed to the 2nd defendant, he knew that it was the loan amount under the oral loan agreement as agreed between the plaintiff and the 1st defendant in the telephone conversation. [11] In the plaintiff's supplemental statement, she said that she had "only lent (instead of making gift) the HK$2 million to D1 through my payment to D1 via D2". [12] It seems to us that the plaintiff's witness statements did not suggest that she had any contract with the 2nd defendant.

37. Nor did the plaintiff's oral evidence suggest that there was any loan agreement with the 2nd defendant or any legal obligation on his part to repay the loan. On the contrary, the whole tenor of her evidence was that the money was lent to the 1st defendant, not to both defendants. In one particular exchange the plaintiff said she lent $2 million to the 1st defendant but asked the 2nd defendant to disburse $200,000 on her behalf for the purchase of the HK Property, stressing that they were different persons. [13] To another question, where it was specifically put to the plaintiff that, on her case, the $2 million was lent to the 1st defendant and not related to the 2nd defendant, the plaintiff said the oral loan agreement was with the 1st defendant although the money was deposited into the 2nd defendant's account (" D1我口頭講，就係話借畀D1，但係佢入數，D2都有份入嘅，入落戶口係D2入嘅 " and " 口頭就借畀D1 "). [14] The Judge summarised the plaintiff's evidence to the same effect, as follows: [15]

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

38. Mr Kwong relies on the plaintiff's statement that the terms were that the 1st and 2nd defendants would need to repay $8,000 per month. But this has to be read together with the oral evidence of the plaintiff as accepted by the Judge which negated any loan lent to the 2nd defendant. In any event, the key issue is the party with whom the plaintiff had a contract. It is axiomatic that a person is not bound by a contract to which he is not party. If the contract was only between the plaintiff and the 1st defendant, then even if it contained a term that repayment was to be made by both defendants, it would be the obligation of the 1st defendant alone to procure that repayment be made by both defendants, and the plaintiff would have no cause of action in contract against the 2nd defendant.

39. The Judge, however, found the 2nd defendant liable, stating in §41 of his Judgment:

" Mr Ng submits that even if P succeeds on the alleged Oral Loan Agreement, P still has no basis to sue D2, for the alleged Oral Loan Agreement is an agreement between P and D1 only. With respect, I am unable to accept these submissions. According to P's pleaded case, the Loan was provided to both D1 and D2 [16] , and D1 and D2 (who are wife and husband) are mutual agents of each other [17] . In P's evidence, P said that she knew that D1 had married to D2, and the purpose

of the Loan was to help them to purchase a matrimonial home. At all times, D2 was involved in the matters relating to the Loan. He was the person obtaining the Loan from P. He was also the person making monthly repayments to P from 2011 to 2014." (the footnotes are those in the Judgment)

40. In our view, there is no evidence to support the finding made by the Judge. As the Judge noted, agency was merely a plea put forward on the plaintiff's behalf. It was not part of her evidence. Nor was there any evidence from the defendants that they were mutual agents, or that the 2nd defendant acknowledged a personal obligation to repay when the money was advanced through his account. Indeed, Mr Kwong fairly accepted that he did not put to the defendants in cross-examination that they were mutual agents of each other, or put to the 2nd defendant that he was a party to the loan agreement. As far as we can see, what was in fact put to the him by Mr Kwong was that the $2 million was borrowed by the 1st defendant from the plaintiff. The facts mentioned by the Judge were equally consistent with the 2nd defendant simply being the husband and companion of the 1st defendant and being prepared to let his bank account be used as a conduit for receiving the loan and to help make repayments. As such they cannot found an inference that the 1st defendant was acting as the 2nd defendant's agent (as well as on her own behalf) in contracting with the plaintiff. It should also be noted that the Tai Po Property was in fact acquired in the 1st defendant's sole name.

41. For these reasons, the 2nd defendant's appeal against the Judgment in relation to the plaintiff's action succeeds.

The counterclaim for $200,000 and $32,280

42. There are 5 points raised by Mr Ng against the Judge's dismissal of the 2nd defendant's counterclaim for the sums of $200,000 and $32,280. First, he submits that the burden rested on the plaintiff to prove that she had reimbursed the 2nd defendant, and since neither side had produced documentary evidence on that issue, the Judge should have held that the plaintiff had failed to discharge her burden of proof.

43. There is nothing to show that the Judge was mistaken about the burden of proof. Although there was no documentary evidence from either side, there was nothing to prevent the Judge from coming to a decision based on oral evidence. The fact that the plaintiff had the burden did not mean that her evidence had a higher hurdle to overcome before it could be accepted. As stated by Tang PJ in Big Island Construction (HK) Ltd v Wu Yi Development Co Ltd (2015) 18 HKCFAR 364 at §64, "a judge should resolve conflicting versions of fact by deciding which is more probable uninfluenced by any consideration of who has the burden of proof". Although his Lordship dissented in that case in relation to the status of Seldon v Davidson [1968] 1 WLR 1083 , we do not think this affects the validity of the above dictum. The lack of documentary evidence is a matter for the Judge in weighing up the evidence.

44. Secondly, it is said that the Judge "should have considered/resolved" the discrepancies between (i) the plaintiff's Re-Amended Reply and Defence to Counterclaim which stated that the sum of $32,280 was for the refurbishment of the defendants' own property, (ii) her supplemental witness statement which stated that the $32,280 had been repaid by her to the 2nd defendant on a date in June 2011, and (iii) the amendment to her supplemental witness statement to the effect that she had pre-paid a sum of $20,000 odd to the 2nd defendant.

45. There is nothing in this point. In her oral evidence, the plaintiff admitted she made a mistake in her pleading, and that it was true that the money was spent on renovations for the HK Property. This was relied upon by the defence in the closing submissions at trial. There is nothing to suggest that the Judge had failed to consider it. The Judge was entitled to prefer the plaintiff's evidence to that of the 2nd defendant, notwithstanding that discrepancy, for the reasons given in the Judgment.

46. Thirdly, Mr Ng argues that the Judge should have assessed the credibility of the 2nd defendant's evidence on his counterclaim for the two sums separately from his other evidence and should not have solely relied on his analysis of the 2nd defendant's evidence on the oral loan agreement to reject his counterclaim.

47. We do not accept this argument. In the first place the Judge did not base his conclusion on the counterclaim "solely" on the credibility of the 2nd defendant's account relating to the oral loan

agreement. He also referred to the failure of the 2nd defendant to produce any bank account records to refute receipt of the repayment of $200,000 [18] and the inherent improbability that the plaintiff would have withheld $200,000 from the defendants in early 2011. [19] Furthermore, given that the Judge considered that the 2nd defendant had "told an untrue story" [20] over a central issue (ie the $2 million loan) which was "blatantly untrue", [21] he was entitled to take that into account in assessing his overall credibility including the reliability of his evidence on his counterclaim: see Star Glory Investment Ltd v Kai Tuo (HK) Technology Co Ltd & Others HCA 3523/2002 (13 August 2005), §12.

48. Fourthly, Mr Ng criticises the Judge's reasoning that it was improbable that the plaintiff would have withheld $200,000 from the defendants as she had just advanced $2 million to help them purchase a property. He submits that there was no evidence or suggestion that without the $200,000, the purchase would be jeopardised, and that to the contrary, the plaintiff's evidence was that she did not think asking the 2nd defendant to disburse $200,000 on her behalf would adversely affect the purchase of the Tai Po Property.

49. It is true that there was nothing to suggest that the purchase of the Tai Po Property would be jeopardised if the plaintiff failed to repay $200,000 to the 2nd defendant. What the Judge seems to us to be saying is that, given that the plaintiff had just advanced $2 million, there was no reason for her not to reimburse the $200,000 to the 2nd defendant. It was in the circumstances not a strong pointer one way or the other. The Judge might have gone a little too far in suggesting that non-repayment of the $200,000 would jeopardise the defendants' plan to purchase a matrimonial home, but this alone is hardly sufficient to undermine his acceptance of the plaintiff's evidence and rejection of the 2nd defendant's.

50. Fifthly, Mr Ng attacks the Judge's reasoning in rejecting the alleged term that the sums expended by the 2nd defendant would be repaid to him after the resale of the HK Property. The Judge thought that the term was contrary to common sense because if the plaintiff or Robert Leung decided not to sell the HK Property, the two sums would never be repayable. [22] Mr Ng submits that there was no evidence or suggestion that the HK Property would not be resold, and that it was in fact re-sold in April 2013.

51. In our view, this is not a valid criticism. The point is that at the material time in 2011, it would not be sensible for the 2nd defendant to agree that the money he had paid out would only be repayable as and when the HK Property was sold in future, when he did not know and had no control over whether, and if so, when, it would be sold. The fact that, as it transpired, it was subsequently sold in April 2013 is neither here nor there. The Judge was entitled to think that the alleged term was highly improbable.

52. For all these reasons, we consider that no ground has been made out to disturb the Judge's findings on the 2nd defendant's counterclaim for the two sums.

The Bangle

53. As mentioned above, the plaintiff gave no evidence at all to support her plea that the Bangle was only returnable upon her death. The defendants both gave evidence that the Bangle was lent by the 2nd defendant to the plaintiff in around 2011, that they had since made repeated demands to the plaintiff for its return, but that she had failed to return it. That evidence was unchallenged. [23] As such, there is no defence to the 2nd defendant's claim, which is essentially one in detinue brought by a bailor against the bailee, for the return of the article bailed.

54. The Judge, however, dismissed the counterclaim, for the reason that the appearance and characteristics of the Bangle had not been sufficiently pleaded or shown in the evidence to enable the court to make an unambiguous order for delivery up against the plaintiff. We have some difficulty with this reasoning because, as stated in Gee, Commercial Injunctions (6th ed) at §4-001, cited by the Judge, and as stated in cases such as Sino Wood Investment Ltd v Wong Kam Yin (2005) 8 HKCFAR 715 §§22-23, the law requires precision and particularity in an order so that the recipient knows exactly in fact what he has to do. But there was no suggestion here that the plaintiff was in doubt, such as that she had in her possession more than one bangle that met the description and she was unsure which one was that borrowed from the 2nd defendant.

55. The level of precision required has to be gauged in context. As Lord Hoffmann said in Cooperative

Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1 at 14D:

" Precision is of course a question of degree and the courts have shown themselves willing to cope with a certain degree of imprecision in cases of orders requiring the achievement of a result in which the plaintiffs' merits appeared strong …"

The particularity with which an order needs to be expressed also depends on the attitude of the person targeted. In the present case, a judgment requiring the plaintiff to deliver up the jade dragon-and-phoenix-patterned bangle that she had undisputedly borrowed from the 2nd defendant would not in our view be prima facie uncertain. There is no basis to think that it would leave the plaintiff in doubt as to what she had to do.

56. What occurred below was not a doubt but an apparent disagreement. It was suggested that the plaintiff had already done what the order sought would have required her to do, for, it is said, she had brought the Bangle to the trial, but the defendants refused to accept that it was the Bangle. If the plaintiff was right, that would of course be a defence to detinue. The problem, however, is that the plaintiff did not plead it, even as she sought leave during the trial to re-amend her Reply and Defence to Counterclaim in other respects. [24] If it were pleaded, then the parties and the court would have focused upon what the real issue was, and then resolved it by hearing evidence and making a determination whether the article offered to be returned was in fact the Bangle. Unfortunately, without such pleading, there was no investigation at all into this aspect of the case, and no evidence adduced. None of the witnesses was asked about the article produced by the plaintiff and rejected by the defendants. The Judge was merely told by counsel (which was perhaps second-hand hearsay) that the plaintiff had brought a bangle in her possession to the court but the 2nd defendant refused to accept it. [25] There is no evidence whatsoever whether what was brought up by the plaintiff was actually a jade bangle engraved with a dragon-and-phoenix-pattern, or why the 2nd defendant said it was not the Bangle.

57. The result of the Judge's decision is that a claimant with a well-founded and undefended claim in detinue has been sent away empty-handed with his claim entirely dismissed, based on a perceived difficulty in formulating an order for delivery having regard to some supposed identity issues over the Bangle that were not in evidence. We do not think this is right. In our opinion, the Judge misdirected himself in considering that the problem lay with formulating the order. There should, in our view, be judgment entered against the plaintiff for the delivery up of the jade bangle engraved with a dragon-and-phoenix-pattern that the 2nd defendant lent her in 2011, with liberty to apply. It may be that ultimately, if the plaintiff, in seeking to comply with the judgment, delivers up something which is a jade dragon-and-phoenix-patterned bangle, but which the 2nd defendant says is not the Bangle, there will be a dispute, but this dispute can be resolved by reference to the parameters stated in the order and, if necessary, by receiving evidence.

Disposition and orders

58. For the above reasons:

(1) The 1st defendant's appeal is dismissed.

(2) The 2nd defendant's appeal is allowed to the extent that:

(a) the judgment on the plaintiff's action as against him and the order requiring him to make monthly repayment of $8,000 until full repayment of the loan will be set aside; and

(b) judgment is entered against the plaintiff on the 2nd defendant's counterclaim for the delivery up of the jade dragon-and-phoenix-patterned bangle that the 2nd defendant lent her in 2011, with liberty to apply to a different judge of the Court of First Instance.

59. On a nisi basis:

(1) For the costs below, we consider that (a) the 1st defendant ought to pay the plaintiff the costs of the action against her, and the plaintiff ought to pay the 2nd defendant the costs of the action against him; and (b) there ought to be no order as to the 2nd defendant's counterclaim as between the plaintiff and the 2nd defendant. As such, based on the apportionment of time adopted in the Judgment at §59, we order that the 1st defendant do pay the plaintiff 40% of the costs of the proceedings below, and that the plaintiff do pay the 2nd defendant 40% of the costs of the proceedings below.

(2) For the costs of the appeal, the 1st defendant do pay the plaintiff 50% of the costs of the appeal, and there be no order as to costs as between the 2nd defendant and the

plaintiff.

[1] [2019] HKCFI 2998 .
[2] See Judgment, §32.
[3] See Judgment, §33.
[4] See Judgment, §36.
[5] See Judgment, §29(7).
[6] See Judgment, §39.
[7] See Judgment, §§29(7) & 40.
[8] See Judgment, §21(3) & (4).
[9] The plaintiff's witness statement, §9.
[10] The plaintiff's witness statement, §§10 & 11.
[11] The plaintiff's witness statement, §13.
[12] The plaintiff's amended supplemental witness statement, §14.
[13] Page 105 of the transcript; page 464 of Appeal Bundle C.
[14] Page 121 of the transcript; page 480 of Appeal Bundle C.
[15] Judgment, §29(2).
[16] Statement of Claim, [4].
[17] Amended Reply and Defence to Counterclaim, [1].
[18] Judgment, §47.
[19] Judgment, §48(2)
[20] Judgment, §31.
[21] Judgment, §48(1).
[22] Judgment, §46(1).
[23] When the plaintiff's counsel sought to question the 1st defendant's account about the Bangle, he was, quite rightly, stopped by the Judge: see transcript at Appeal Bundle D, p 513.
[24] See Judgment, §§15-20.
[25] See Judgment, §10.