

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NOS 1722 OF 2017 AND 714 OF 2018

BETWEEN

CHAN WAI HON ALAN (陳維漢) 1st Plaintiff

ETERNAL ELEGANCE LIMITED 2nd Plaintiff

and

CHAN YUK FOEBE (陳昱) Defendant

(Consolidated pursuant to the Order of Master Chow dated 10 October 2019)

Before: Deputy High Court Judge Kent Yee in Court

Dates of Hearing: 22, 24, 27 May, 11 and 17 June 2024

Date of Judgment: 13 September 2024

J U D G M E N T

Introduction

1. Mr Chan (“Alan”) and Madam Chan (“Foebé”) were once in love with each other. Romance aside, they had some monetary transactions from 2011 to 2015 and each of such transactions involved a sizable amount. Alan and his company, Eternal Elegance Limited (“EEL”), commenced

these proceedings against Foebe to recover three loans in the respective amounts of HK\$20,000,000, HK\$15,000,000 and HK\$4,200,000 allegedly extended to her from 2012 to 2013 with interest thereon.

2. Foebe denies liability. She maintains that the first sum of HK\$20,000,000 was a gift to her, the second sum of HK\$15,000,000 has been repaid in full and the third sum of HK\$4,200,000 was actually given to Mr Chan Yuen Tung (“YT Chan”), her ex-boyfriend, and has nothing to do with her.

3. Foebe further alleges that Alan and EEL were money lenders within the meaning of section 2(1) of the Money Lenders Ordinance, Cap.163 (“the MLO”) at the material times and by reason of their lack of the requisite licence, they are debarred from enforcing any loan agreements in any event.

4. At the trial, Alan and EEL were represented by Mr Wan and Mr Au. Mr Pun SC leading Mr Wong and Mr Wang appeared for Foebe. Apart from the disputes about the three alleged loans, there is an issue of costs arising from Foebe’s absence on the first day of the trial, and I shall deal with this at the end of the Judgment.

Brief background facts

5. It is imperative to give an introduction of the key players and set out the undisputed background facts relevant to the factual issues.

6. Alan is a professional accountant practising in Hong Kong and he has his own firm of accountants. He has incorporated some companies in the British Virgin Islands to handle his investments. Such companies include

EEL, Business Good Limited (“BGL”), Brainchild Global Limited (“Brainchild”) and Grandport Investment Limited (“Grandport”).

7. Alan is the sole director and shareholder of each of EEL, BGL, Brainchild and Grandport.

8. Foebe graduated from a university in Australia with a degree in accounting. At the material times, Foebe was the Chairlady and Chief Executive Officer of a public company known as Xinyang Maojian Group Limited previously known as China Zenith Chemical Group Limited (“China Zenith”) listed on the Main Board of the Stock Exchange of Hong Kong Limited (stock code: 362). She also held some shares in China Zenith.

9. At the material times, YT Chan was a substantial shareholder of China Zenith holding 29.13% of its shareholding as of 11 May 2015. He was the former Chairman of China Zenith and Foebe was his immediate successor.

10. Alan and Foebe were very close to getting married in 2012. Alan proposed to Foebe with a 2-carat diamond ring (“the Diamond Ring”) and after Foebe accepted his proposal, Alan bought a pair of engagement rings for their intended marriage.

Parties’ respective cases

11. The parties’ respective case on the three alleged loans can be outlined as follows.

12. Alan alleges that in July 2012, Alan and Foebe reached an oral agreement (“the First Agreement”) that Alan agreed to lend and Foebe agreed to borrow a sum of HK\$20,000,000 free of interest (“the Alleged

First Loan). The repayment term of the oral agreement is that the Alleged First Loan should be repayable by Foebe to Alan on demand. Pursuant to the First Agreement, Alan caused Brainchild to transfer the sum of HK\$20,000,000 to Foebe's HSBC bank account on 20 July 2012.

13. Foebe admits that she received the sum of HK\$20,000,000 from Brainchild. She denies that the First Agreement has ever existed and the Alleged First Loan was just a gift made by Alan to her. Thus, there is no issue of non-repayment of the same.

14. She claims in the alternative that Alan was an unlicensed money lender and he could not recover the First Alleged Loan from her in any event.

The Second Loan

15. EEL relies on a written agreement dated 4 December 2012 (**“the Second Agreement”**) in which EEL agreed to lend Foebe a sum of HK\$15,000,000 (**“the Second Loan”**).

16. The express terms of the Second Agreement include:

- (1) Foebe should repay the sum of HK\$15,875,000 covering the principal of the Second Loan together with interest on or before 4 July 2013;
- (2) A default interest is chargeable at 1% per month.

17. To perform the Second Agreement, Alan delivered by courier a bearer cheque dated 4 December 2012 in the amount of HK\$15,000,000 to Foebe. It was later found out by Alan that the bearer cheque was deposited into the account of YT Chan.

18. Alan claims that Foebe has failed to repay the Second Loan.

19. Foebe's pleaded case on the Second Loan is that whilst admitting the existence of the Second Agreement and that YT Chan received a cheque from EEL drawn in his name, she alleges that she has fully repaid the same in 2015.

20. First, she paid EEL through Alan a sum of HK\$8,200,000 ("the 1st Repayment Sum") by a cheque dated 30 April 2015 drawn in his favour. Secondly, she paid EEL through Alan a sum of HK\$8,783,539 ("the 2nd Repayment Sum") by a cheque dated 22 May 2015 drawn in his favour.

21. Again, her alternative case is that EEL is an unlicensed money lender and so the Second Agreement is illegal, void and of no effect. She has made no counterclaim to recover the Repayment Sums though.

22. In reply, Alan says that the two Repayment Sums were paid to him upon the termination of a share agreement as explained below.

23. EEL denies ever carrying on any business as a money lender and the Second Loan was an one-off transaction.

The Third Loan

24. The case of Alan is that in February 2013, it was orally agreed between Foebe and him that he would, via one of his companies, lend Foebe a sum of HK\$4,200,000 ("the Alleged Third Loan") repayable within 1 month at the same interest as applied between the parties previously, that is 10% per annum ("the Alleged Third Agreement"). A default interest of 1% per month would be chargeable.

25. For the purpose of the Alleged Third Agreement, Foebe prepared a written agreement dated 26 February 2013 (“**the 26/2/2013 Agreement**”) for Alan to sign.

26. Alan, however, refused to sign the 26/2/2013 Agreement because the lender was stated to be Grandport instead of him. He insisted that he was the lender and he merely utilised his funds in the account of Grandport to make the advancement of the Alleged Third Loan to Foebe. As a result, there was no written agreement embodying the Alleged Third Agreement.

27. Pursuant to Alleged Third Agreement, Alan delivered to Foebe by courier a signed cheque dated 26 February 2013 issued by Grandport from its bank account in the amount of HK\$4,200,000 as the Alleged Third Loan (“**the Third Loan Cheque**”). Alan did not specify the payee in the Third Loan Cheque. It was found out that YT Chan was named as the payee in the Third Loan Cheque, which was subsequently deposited into the account of YT Chan.

28. Foebe has refused to repay the Alleged Third Loan.

29. Foebe has a different version of events. She claims that in February 2013, there was an oral agreement between Alan for and on behalf of Grandport and her (“**the Grandport Agreement**”) whereby Grandport agreed to lend to her a sum of HK\$4,200,000. Alan was not a party and has no locus to sue on the Grandport Agreement.

30. Foebe proceeded to prepare the 26/2/2013 Agreement to embody the Grandport Agreement with some additional terms. She sent Alan a signed copy of the 26/2/2013 Agreement for the execution of the same by

Grandport. However, Grandport failed to sign the 26/2/2013 Agreement and returned the same to Foebe.

31. Foebe claims that Grandport breached the Grandport Agreement and refused or failed to advance the sum of HK\$4,200,000 to her. She alleges that the Third Loan Cheque has never been delivered to her and she has never received the Third Loan Cheque.

32. One of the alternative cases of Foebe is that the Alleged Third Loan was not advanced to her and she was never enriched.

33. Lastly, again Foebe alleges that Grandport and/or Alan were at the material times an unlicensed money lender and by reason of section 23 of the MLO, they are debarred from recovering any loan extended to her.

34. After Foebe has refused to repay any of the Alleged Loans and the Second Loan despite the formal demands of Alan through his former solicitors, Alan and EEL commenced the action under HCA1722/2017 on 21 July 2017 (“the First Action”) to recover the Alleged First Loan and the Second Loan. Alan started another action under HCA 714/2018 in respect of the Alleged Third Loan on 28 March 2018 (“the Second Action”).

35. Pursuant to the Order dated 10 October 2019, the First and Second Actions were consolidated and the parties were directed to file consolidated pleadings.

Key issues to be determined

36. The following issues call for resolution:

- (1) Whether the Alleged First Loan was a loan extended to Foebe pursuant to the Alleged First Agreement or was it a gift made by Alan to Foebe;
- (2) Whether the Shares Agreement existed and whether the 1st and 2nd Repayment Sums paid by Foebe were for the settlement of the same or for the repayment of the Second Loan;
- (3) Whether the Alleged Third Agreement existed and if so whether Alan or Grandport was the lender thereunder;
- (4) Whether Foebe received the Alleged Third Loan by way of the Third Loan Cheque pursuant to the Alleged Third Agreement;
- (5) Whether Alan and/or EEL was a money lender within the meaning of section 2(1) of the MLO;
- (6) If so, whether it would be inequitable to deny any of them recovery of the loan extended to Foebe under section 23 and 22(2) of the MLO.

37. The issues identified by this court very much turn on the credibility of Alan and Foebe. In this connection, this court finds the following review of the general principles relating to the determination of credibility of witnesses recently made by Cheng J in *Cheung Hon Kin v Chubb Life Insurance Company Ltd.* [2024] HKCFI 1313 (§§81-83) to be helpful:

“81. ... In assessing the evidence, I have had regard to the principles summarised in *Hui Cheung Fai v Daiwa Development Ltd*, unreported, HCA 1734/2009, 8 April 2014 at [77] to [83], per Deputy High Court Judge Eugene Fung SC. In particular:

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81.1 contemporaneous written documents and documents which came into existence before the problems in question emerged are of the greatest importance in assessing credibility;

81.2 in deciding whether to accept a witness' account, importance should also be attached to the inherent likelihood or unlikelihood of an event having happened, or the apparent logic of events;

81.3 regard should be had to the consistency of the witness' evidence with undisputed or indisputable evidence, and the internal consistency of the witness' evidence;

81.4 care should be taken in drawing conclusions about truthfulness and reliability solely or mainly from the appearance of a witness or from the assessment of a witness' character;

81.5 witnesses' credibility should be tested by reference to the objective facts proved independently of their testimony, and regard should be had to their motives and to the overall probabilities.

82. I have also had regard to the summary of relevant principles made by HH Judge Simon Barker QC in *Northampton Borough Council v Cardoza and others* [2019] BCC 582:

“36. As to the considerations applicable to evaluating evidence, a useful starting point is Goff J's (as he then was) observation as to resolving conflicts of evidence in *Armagas Ltd v Mundogas SA* (The Ocean Frost) [1985] 1 Lloyd's Rep 1 at p.57:

‘... Where there is a conflict of evidence ... reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth’.

37. Factors relevant to the evaluation of a witness's evidence were identified by Lewison J (as he then was) in *Painter v Hutchinson* [2007] EWHC 758 (Ch) at [3] when addressing the unsatisfactory nature of the defendant's approach to giving evidence. These included: evasive and argumentative answers, tangential speeches avoiding the question, blaming legal advisers for pleading, disclosure and evidence shortcomings, self-contradiction, internal inconsistency, shifting case, new evidence, and

selective disclosure. This was not intended to be an exhaustive list, but it is important and very helpful.

38. A useful recent reminder or guidance on the approach to the evidence of factual witnesses, and expanding on the guidance given by Goff J in *The Ocean Frost*, was given by Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm). After noting that human memory is fallible and that the process of litigation and preparing for trial tends to interfere further with the reliability of human memory, particularly where a lawyer has had a hand in drafting a witness's evidence and the witness's memory has been refreshed by reading documents, Leggatt J concluded that the best approach for a judge to adopt at the trial of a commercial case is to base factual findings on documentary evidence and known or probable facts and the inferences to be drawn therefrom. Witness evidence, written and oral, is not without purpose; but, its principal uses are to subject the documentary record to scrutiny and to evaluate the witness's motivations, personality and working practices.

In similar vein, in the recent case of *Freemont (Denbigh) Ltd v Knight Frank LLP* [2014] EWHC 3347 (Ch) reference was made to an article written by Bingham J (as he then was) entitled "The Judge as Juror: The Judicial Determination of Factual Issues" published in [1985] 38 *Current Legal Problems* 1-27. Bingham J considered the approach to deciding upon the reliability of a witness's evidence and regarded the following to be helpful indicators of where the truth lies: the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred; the internal consistency of a witness's evidence; and, the consistency of a witness's evidence with what (s) he has said or deposed on other occasions. Bingham J considered that the credit of a witness in matters not germane to the litigation was of less assistance, and that the demeanour of a witness was on the whole not a reliable pointer to a witness's honesty."

83. The observations of DHCJ Jin Pao SC in *Leung Chin Sing, Rabo v Ko Chun Hay, Kelvin* in [2021] HKCFI 2242 at [42] are also relevant:

It is rare in modern commercial litigation to encounter a claim based on an agreement which is not only said to have been purely by word of mouth but of which there is no contemporaneous documentary record of any kind. The prevalence of e-mails, text messages and other forms of electronic communication is such that most agreements or discussions which are of legal significance, even if not embodied in writing, leave some form of electronic imprint: *Blue v Ashley* [2017] EWHC 1928 (Comm) at [65] per Leggatt J (as he then was); *Music Holdings Property HK Ltd v Ooi Lean Choo* [2020] HKCFI 1312 at [58] per Ng J. Because the value of a written record is understood by anyone with business experience, its absence may, depending on the circumstances, tend to suggest that no contract was concluded: *Blue v Ashley* at [49]; *Wing Hing (1956) Co Ltd v Nissin Foods Co Ltd* [2021] HKCFI 638 at [56] per DHCJ Abraham Chan SC.”

38. In the present case, I should pay particular attention to the manner in which the respective cases of Alan and Foebe were developed and how their evidence was adduced.

39. Whilst the evidence of each of the Alleged First and Third Loans and the Second Loan has to be considered separately, the assessment of their credibility on one issue can have a significant effect on their credibility on the other issues.

40. It is clear that the disputes between Alan and Foebe are very much factual. Only Alan and Foebe testified and they called no other witnesses. Both of them were extensively cross-examined.

41. No doubt both Alan and Foebe are intelligent and well-educated. Alan’s liquidity is extraordinary and he should be a shrewd investor. On the other hand, Foebe is an able and successful businesswoman in her own right.

A She assumed the highest position in China Zenith and handled its
B transactions involving huge sums.

C
D 42. Alan impressed me as a forthcoming witness and he was eager
E to tell the truth. He sounded candid in his oral testimony. He even, without
F hesitation, disclosed the legal advice he received from his former solicitors
G in respect of the Alleged Third Loan.

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I 43. In fact, the bulk of Alan's evidence relating to his transactions
J with Foebe was evidenced by uncontroversial documents. Alan was not
K eloquent and sometimes made mistakes about minor details. He was ready
L to be corrected and made apologies. He did not try to make up excuses.

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N 44. Alan's evidence was not materially shaken under the skilful
O cross-examination of Mr Pun. Overall speaking, Alan's evidence is credible
P and reliable.

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R 45. Foebe was a big contrast as a witness. As with her evidence in
S her witness statements, she was decidedly reserved and careful not to give
T away much. Her evidence can hardly instill confidence in this court.

U
V *The Alleged First Loan – a loan or a gift?*

46. There is no contemporaneous document shedding light on the
nature of the Brainchild's transfer of the Alleged First Loan to Foebe.
Unfortunately, there is not even a text or voice message evidencing the
dialogues exchanged between Alan and Foebe relating to this transfer.

47. Foebe dealt with this issue with remarkable simplicity. She
mostly relies on the close relationship between Alan and her at that time to
suggest that the Alleged First Loan was a gift during the courtship. In her

witness statement, she says the minimum about the Alleged First Loan. Foebe simply asserts that it was a gift after she had indicated to Alan that she was unhappy to miss an investment opportunity requiring HK\$20,000,000 due to her lack of fund.

48. Given their romantic relationship, I do not doubt that Alan might have bought Foebe gifts. However, making a cash gift to a successful businesswoman is quite another matter and might not be a good idea at all. I also note that apart from the Diamond Ring and the engagement rings, which were related to their intended marriage, there is no evidence that Alan has spent lavishly on Foebe and bought her anything of significant value.

49. In the premises, I do not think their intimacy at the material time necessarily supports the contention of Foebe.

50. On the contrary, Alan's evidence is full of details supported by undisputed documentary evidence and appears to be convincing.

51. Alan explained that there were actually other transactions in connection with the First Agreement. Prior to the First Agreement, Alan extended a loan to China Zenith at the request of Foebe. Alan produced a written loan agreement dated 19 December 2011 ("the China Zenith Loan Agreement").

52. Alan explained that Foebe had asked for a loan to China Zenith in the sum of HK\$34,600,000 because of its cash flow problem. He agreed to do so through one of his companies. Eventually, BGL became the lender under the China Zenith Loan Agreement. Alan and Foebe executed the China Zenith Loan Agreement on behalf of BGL and China Zenith respectively.

53. The China Zenith Loan Agreement provided that the loan of HK\$34,600,000 should bear interest at the rate of 6% per annum with a default interest rate of 1% per month. It should be repaid by a payment of HK\$35,292,000 being the principal and interest thereon on or before 18 April 2012.

54. Pursuant to the same, a cheque of HK\$2,400,000 and another cheque of HK\$32,200,000 both dated 16 December 2011 drawn with the personal bank account of Alan were delivered to Foebe.

55. China Zenith made the repayment in the sum of HK\$35,811,000 to Alan by a remittance into the bank account of Brainchild on 20 July 2012.

56. When Foebe told Alan that China Zenith would repay the loan soon in early July 2012, she asked Alan to extend two loans in the total amount of HK\$40,000,000 to her after the repayment made by China Zenith.

57. First, Foebe wanted HK\$20,000,000 cash to purchase the shares in China Zenith in her own name. Secondly, Foebe wanted Alan to help her to take up an investment opportunity with the purchase of HK\$20,000,000 worth of shares in China Zenith (“CZ Shares”).

58. Alan acceded to her request and hence the First Agreement and another oral share purchase agreement (“the Shares Agreement”) were made.

59. Pursuant to the First Agreement, soon after the repayment of China Zenith to Brainchild, Alan caused Brainchild to pay Foebe a sum of HK\$20,000,000 as the Alleged First Loan.

60. For the Shares Agreement, Foebe asked Alan to assist her financially to purchase HK\$20,000,000 worth of CZ Shares with an account in VC Brokerage Limited (“VC”) to be opened in his own name (“the VC Account”). Alan should hold the CZ Shares on trust for her and should trade the same in accordance with her instructions to be given from time to time. The VC Account should allow trade on margin and Foebe should be responsible for settling any margin call.

61. In July 2012, to perform the Shares Agreement, Alan opened the VC Account (Account No.: 01877780015) and deposited a sum of HK\$15,000,000 and another sum of HK\$5,000,000 on 25 July 2012 and 29 August 2012 respectively pursuant to the Shares Agreement.

62. Alan traded in the CZ Shares until April 2015 in accordance with Foebe’s instructions.

63. One of such trading activities is the sale of 40,000,000 CZ Shares to one Mr Mak Wing Chun (“Mak”) on or about 28 May 2013 (“the Mak Sale”). To complete this sale, on 22 May 2013, Alan first withdrew 40,000,000 CZ Shares from the VC Account and placed them into his account with Kim Eng Securities (Hong Kong) Limited (“Kim Eng Account”) as per the instruction of Foebe. Then, on or about 27 May 2013, Alan and Mak executed the bought and sold note and the consideration was stated to be HK\$10,400,00.00. The Mak Sale was completed on 28 May 2013.

64. Alan did not know Mak personally. He did not receive any part of the purchase price of the 40,000,000 CZ Shares.

65. In or around late March or early April 2015, Alan and Foebe agreed to terminate the Shares Agreement. Then, in the VC Account, there remained a total of 112,360,000 CZ Shares (“the Remaining Shares”) with a margin liability of HK\$3,157,341.97 (“the Margin Liability”).

66. For the closure of the VC Account, Foebe made the following proposal to redeem the Remaining Shares in three tranches:

- (1) Foebe would deposit a cheque of HK\$6,200,000 into the VC Account to settle the Margin Liability and as a consideration for Alan’s transfer of 30,000,000 shares of the Remaining Shares. Alan should then be entitled to withdraw such cash as may be remaining in the VC Account;
- (2) Foebe would pay Alan a sum of HK\$8,200,000 for the transfer of 40,000,000 shares of the Remaining Shares; and
- (3) Lastly, Foebe would pay Alan the final balance of what she owed him.

67. Pursuant to the Shares Agreement, on 13 April 2015, Foebe deposited a cheque in the sum of HK\$6,200,000 dated 9 April 2015 into the VC Account (“the Foebe’s Deposit”) and Alan caused 30,000,000 of the Remaining Shares to be transferred to Foebe.

68. In a Form 3A of Hong Kong Exchange and Clearing Limited (“Form 3A”), Foebe, as a director of China Zenith, made disclosure of her acquisition of the 30,000,000 CZ Shares completed on 16 April 2015.

69. After the Foebe’s Deposit and the settlement of the Margin Liability, the cash balance in the VC Account stood at HK\$3,032,058.03

(“the Cash Balance”), i.e. the Foebe’s Deposit minus the Margin Liability minus HK\$10,600 being fee charged by VC for the withdrawal of physical share certificates.

70. On 15 April 2015, Alan withdrew the Cash Balance from the VC Account and received a cheque in the amount of HK\$3,016,461.96 (“the VC Withdrawal”) from VC drawn in his name dated 15 April 2015. There was a shortfall of HK\$15,596.07 being the accrued interest charged by VC.

71. On 30 April 2015, Foebe delivered to Alan a cheque in a sum of HK\$8,200,000 dated 30 April 2015 for the transfer of 40 million shares of the Remaining Shares.

72. In another Form 3A, Foebe duly made disclosure of her acquisition of the 40,000,000 CZ Shares completed on 28 April 2015.

73. On or about 5 May 2015, Foebe deposited HK\$30,000 into the VC Account for the outstanding service fees for the 2nd tranches transfer and the service fees for the 3rd tranche transfer.

74. After making the two payments for the two tranches, Foebe owed to Alan HK\$8,783,539 (HK\$20,000,000 – HK\$8,200,000 – HK\$3,016,461) under the Shares Agreement. Therefore, on 22 May 2015, Foebe delivered to Alan a cheque in a sum of HK\$8,783,539 dated 22 May 2015 for the transfer of 42,360,000 of the Remaining Shares. The transfer was effected on 11 May 2015.

75. In another Form 3A, Foebe made disclosure of her acquisition of the 42,360,000 CZ Shares completed on 19 May 2015.

76. In other words, in July 2012, apart from the HK\$20,000,000 loaned to Foebe pursuant to the First Agreement, Alan advanced another sum of the like amount to Foebe under the Shares Agreement. And it was repaid by the VC Withdrawal (HK\$3,016,461.96), the 1st Payment Sum and the 2nd Payment Sum totaling HK\$20,000,000.96.

77. The repayment of the China Zenith Loan and the Alleged First Loan were made on the same day, immediately followed by Alan's performance of the Shares Agreement. This lends credence to Alan's case.

78. Foebe said very little about the China Zenith Loan Agreement in her 2nd witness statement despite all the details provided by Alan. She actually mentioned it in the context of the alleged moneylender business of Alan only. She did not explain why the repayment of the China Zenith Loan and the Alleged First Loan fell on the same date. This cannot be a sheer coincidence.

79. Foebe alleges that the Alleged First Loan was given to her so that she did not miss a good investment opportunity which required HK\$20,000,000. This, in a way, tallies with the case of the Shares Agreement whereby Alan agreed to open the VC Account for Foebe's trade in the CZ Shares with his own fund in the amount of HK\$20,000,000.

80. As regards the Shares Agreement, Foebe was totally silent on this in her 1st witness statement. Her silence is deafening when the details of the Shares Agreement had been fully pleaded in the Re-Amended Consolidated Reply long before she filed her 1st witness statement. Even in her 2nd witness statement, she merely makes a bare denial and alleges that she became aware of the Mak Sale only after discovery made in these

proceedings. If the VC Account had nothing to do with her, there is no reason why she is particularly concerned about this transaction.

81. It transpired that Mak was the subordinate of Foebe in China Zenith. Alan did not know Mak personally and this is not challenged. I am convinced that on a balance of probabilities, Alan completed the Mak Sale on the instruction of Foebe in accordance with the Shares Agreement.

82. In fact, Alan's case of the Shares Agreement including some important transactions, well supported by ample documentary evidence, is overwhelming. There is no challenge to the authenticity of such supporting documents. Some of such transactions involved Foebe personally.

83. Foebe only offered some explanations for her dealings in relation to the VC Account for the first time under cross-examination. As submitted by Mr Wan, her version was not even put to Alan in cross-examination. Her explanations are unbelievable on the whole.

84. For example, she alleges that the Foebe's Deposit was for the purchase of all the Remaining Shares in the VC Account from Alan. However, the value (HK\$6.2 million) was way too low for the Remaining Shares. According to the Shareholding Disclosure Record of the Hong Kong Exchanges and Clearing Limited, Foebe managed to sell 24.55 million CZ Shares for more than HK\$21 million from 20 April to 22 April 2015. It is incredible that Alan would agree to sell 11.326 million CZ Shares to Foebe at HK\$6.2 million only.

85. Foebe seeks to explain the exceptionally low purchase price. She said that Alan was unable to sell the Remaining Market as a whole in

A the open marker himself. This was not raised with Alan in cross-examination.
B I am unable to understand, let alone accept, her reason.
C

D 86. The China Zenith Loan Agreement is uncontroversial. The
E dealings in the Shares Agreement especially those done for the purpose of
F the closure of the VC Account are complicated. There is no reason why Alan
G would choose to add complexity to his simple loan recovery claim by the
H fabrication of the Shares Agreement with all the transactions pursuant thereto.

I 87. Mr Pun made a lot of criticisms about Alan's explanation for
J the activities under the Shares Agreement and the closure of the VC Account.

K From hindsight, of course Alan could have done differently to protect his
L financial interest. But I should bear in mind that he performed the Shares
M Agreement when he and Foebe were still in courtship and he might not act
N most rationally. What matters is that the contemporaneous documents do
O support the existence of the closure of the VC Account involving Foebe and
P hence the Shares Agreement. Foebe's failure and inability to provide any
Q plausible explanation for her involvement including the subsequent transfers
R of CZ Shares to her from the VC Account is alarming.

S 88. In the circumstances, I accept the evidence of Alan in its
T entirety and I accept that the First Agreement and the Shares Agreement were
U made together. I find as a matter of fact that the Alleged First Loan is a loan
V and not a gift.

89. There is a debate about burden of proof. Mr Wan submits that
if a gift is claimed, the burden is on the donee to prove the gift, relying on
Ng Kit v Wu Tsun Hua [2021] HKCFI 877 per DHCJ Paul Lam SC at §33(a).

90. Mr Pun refers to *Big Island Construction (HK) Ltd v Wu Yi Development Co Ltd* (2015) 18 HKCFAR 364 per Sir Anthony Mason NPJ at §91. It was pointed out that in a case which the denial of the loan alleged was the essential ingredient in her cause of action as pleaded, the fact that the defence pleaded was a gift or, in the alternative, a loan on different terms cannot alter the onus of proof arising from the denial of the loan alleged by the plaintiff. Mr Pun submits that the onus of proving the loan remains to be on Alan.

91. Mr Pun further relies on *Yau Lai Wah v Wong Kan Yu* [2021] 3 HKC 237 to support his submission. There, Cheung JA referred to the foregoing observations of Sir Anthony Mason NPJ in *Big Island*.

92. As Tang PJ said in *Big Island* at §64, disposal of a claim on the burden of proof should be rare and exceptional. 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. One should look to the burden for help as a last resort.

93. In light of my findings, the debate about onus of proof is really academic and unnecessary. I believe that I have resolved the factual disputes in accordance with the guidance of Tang PJ.

The Second Loan – full repayment already made?

94. Alan did not know YT Chan personally. I accept his evidence that he delivered a bearer cheque by courier to Foebe for her to fill in the name of the payee though Alan should have been more careful. I believe his evidence that the name of the payee appearing in the bearer cheque was not

written by him. Eventually the bearer cheque went to the bank account of YT Chan.

95. Foebe makes the simple and convenient assertion that the two Repayment Sums were paid to settle the Second Loan. As rightly pointed out by Mr Wan, the outstanding amount together with interest thereon far exceeded the amount of the two Repayment Sums.

96. In her witness statements, Foebe did not even try to explain why the two sums sufficed to repay the Second Loan with interest. In particular, she did not try to justify the amount of the 2nd Repayment Sum, which was an odd figure.

97. It was not until her cross-examination that she explained that Alan and she had an agreement that interest payable on the Second Loan should be fixed at HK\$2,000,000 and Alan asked her to issue two cheques with the two figures suggested by him. I cannot accept this late explanation, which was not put to Alan in cross-examination.

98. The explanation of Alan that the two Repayment Sums together with the VC Withdrawal constituted her full repayment of the sum of HK\$20,000,000 advanced by Alan for the VC Account under the Shares Agreement is far more convincing and I accept Alan's evidence in this regard.

99. In light of my acceptance of Alan's evidence relating to the Shares Agreement and his performance thereof, I hold that the Repayment Sums were paid to Alan for Foebe's redemption of the Remaining Shares in the VC Account as evidenced by the relevant Forms 3A and not for Foebe's alleged repayment of the Second Loan.

100. In other words, I reject Foebe's assertion that she has ever repaid the Second Loan and I conclude that the Second Loan remains outstanding. Foebe must be liable for repayment of the same.

The Alleged Third Loan

101. This issue is straightforward. I should start with the allegation of Foebe that she had not received the Third Loan Cheque. I have no hesitation in rejecting her account. Foebe cannot be truthful. The Third Loan Cheque was in fact presented on 27 February 2013 on the following day after its delivery and the delivery of the 26/2/2013 Agreement.

102. YT Chan was the payee in the Third Loan Cheque. If Foebe had not received the Third Loan Cheque and caused YT Chan to be marked as payee on the same, no other person would have possibly done so.

103. Foebe should have complained or raised query with Alan if she had not received any loan despite the oral loan agreement alleged by her. It is inexplicable that she would keep silent without receiving any amount from Alan or his companies. She must be in need of the amount in the Third Loan Cheque; otherwise she would not have asked Alan to lend her money and she would not have taken the trouble to draft the 26/2/2013 Agreement.

104. And it is impossible that she was not aware that YT Chan had actually received the Alleged Third Loan by way of the Third Loan Cheque. If Foebe had failed to receive anything from Alan, she should have told YT Chan so that YT Chan should have looked for alternative sources for fund. On the other hand, it is only normal that YT Chan told Foebe that he had received the Third Loan because it was secured by Foebe. They must have talked about the receipt of the Third Loan.

105. I do not believe her allegation that Alan entered into a private loan agreement with YT Chan in the absence of her knowledge. I accept Alan's evidence that he does not know YT Chan personally. Further there is no reason why Alan would contact YT Chan and gave him the Third Loan Cheque without telling Foebe immediately after he received the 26/2/2013 Agreement, which he refused to sign. Foebe's version is beyond belief and defies logic.

106. Foebe confirms that she is still in good terms with YT Chan and he could be her witness but it was too late to ask him to do so. I cannot accept her explanation. Her legal advisors should undoubtedly have procured YT Chan to be her witness if YT Chan could give supportive evidence.

107. Given my factual finding that Foebe had received the Third Loan Cheque form Alan, she has no credibility on this issue. She even denies the undeniable.

108. I prefer Alan's evidence that he insisted that the lender in the Alleged Third Agreement should be him personally and not Grandport and this was the reason why he did not sign the 26/2/2013 Agreement. I accept that the Alleged Third Agreement was orally made between Foebe and him personally and the Third Loan Cheque (without the name of the payee specified) was delivered to Foebe pursuant thereto.

109. On the part of Foebe, I do not believe that she would insist that Grandport should be the lender. There is no reason why she preferred Grandport to be the lender. She had had no dealings with Grandport before. All she wanted was the Third Loan Cheque. In the First Agreement, she was happy to receive the Alleged First Loan from Brainchild though the actual

lender was Alan. I fail to see why she would adopt a different position on the identity of the lender in regard to the Alleged Third Agreement.

110. There is a dispute whether or not the payee of the Third Loan Cheque was written by Alan himself. I accept Alan's evidence that he did not do so. There is no reason for him to lie. Even on the evidence of Foebe, when asking for the loan, she told Alan that YT Chan needed the loan whilst she was willing to be the borrower. She signed the 26/2/2013 Agreement as the borrower and a signed copy of her ID card was attached thereto. Eventually the Third Loan Cheque was cleared in the account of YT Chan.

111. Whoever wrote the name on the Third Loan Cheque is not a matter of concern. What really matters is Foebe did receive the Third Loan Cheque and YT Chan did receive the Alleged Third Loan pursuant to the Alleged Third Agreement.

112. I should add that the printouts of the Whatsapp messages exchanged between Alan and Foebe from June 2015 to March 2017 show that Alan had repeatedly chased Foebe after the repayment of the Second Loan and the Alleged Third Loan. A copy of the Third Loan Cheque was sent to Foebe too. Messrs. CT Chan & Co ("CTCC"), the former solicitors of Alan, sent two demand letters to Foebe respectively dated 15 March 2017 and 5 April 2017. Foebe never replied to those chasers and the demand letters. Nor did she make any denial.

113. She explained to this court that she did not even bother to read Alan's text messages at all because she was of the view that Alan was merely angry out of poverty and his allegations were baseless. She claimed that she had sought legal advice from her solicitors in respect of the two letters of CTCC but her solicitors advised her to have a discussion with Alan in private.

She alleged that she had called Alan with a view to a discussion but was unable to reach him.

114. I cannot accept her explanation. She simply had no answer to Alan's claims and that is why she did not give any response. Her present defence is questionable and her factual allegations appear to be newly invented for the purpose of avoiding liabilities in these proceedings only.

115. Having accepted the evidence of Alan and rejecting those of Foebe concerning the Alleged Third Agreement, I conclude that Alan (and not Grandport) and Foebe had made the Alleged Third Agreement and Alan had performed the same by delivering to Foebe the Third Loan Cheque. Foebe then caused the Third Loan Cheque to be deposited into the bank account of YT Chan. Foebe has never repaid any part of the Alleged Third Loan.

116. I come to this conclusion notwithstanding the fact that in the letters of CTCC, Grandport, and not Alan, was claimed to be the lender in the Third Loan Agreement. I can see that CTCC referred to the 26/2/2013 Agreement, which is not signed. I believe that the correct position is that Alan should be the lender in the oral agreement made between Foebe and him concerning the Alleged Third Loan.

Alan and/or EEL – an unlicensed money lender?

117. I now turn to the defence of money lender. First, I should set out the relevant provisions in the MLO.

118. Section 2(1) of the MLO gives the following definition of a money lender: "every person whose business (whether or not he carries on

any other business) is that of making loans or who advertises or announces himself or holds himself out in any way as carrying on that business.”

119. Section 23 provides,

“No money lender shall be entitled to recover in any court any money lent by him or any interest in respect thereof or to enforce any agreement made or security taken in respect of any loan made by him unless he satisfies the court by the production of his licence or otherwise that at the date of the loan or the making of the agreement or the taking of the security (as the case may be) he was licensed: Provided that if the court is satisfied that in all the circumstances it would be inequitable if a money lender who did not satisfy it that he was licensed at the relevant time was thereby not entitled to so recover such money or interest or to enforce such agreement or security, the court may order that the money lender is entitled to recover such money or interest or to enforce such agreement or security to such extent, and subject to such modifications or exceptions, as the court considers equitable.”

120. The crux of the secondary case of Foebe based on the MLO is that Alan and his companies including EEL and Grandport were money lenders within the meaning of section 2 of the MLO and due to their lack of a licence, by virtue of section 23 of the MLO, they could not enforce the Alleged First and Third Loans and the Second Loan in any event unless the proviso in section 23 is invoked.

121. The burden of proof lies squarely on the defendants to prove that, on a balance of probabilities, the plaintiff did, at the material time, carry on a business of money lending which required a money lender’s licence under section 2 of the MLO: *Chan Yuk Bun v Tsoi Yan Yee Lily and Anor.* (HCA1153/2014, unreported, 15.8.2017) per DHCJ William Wong SC (at §12).

122. The deputy judge went on to refer to *Chitty on Contracts, Hong Kong Specific Contracts*, 5th Ed at 9-048 (at §14) where the learned editors stated,

“The identity of the borrower and its relationship with the moneylender has also been a factor considered relevant by the courts in determining whether someone is a moneylender. In *Cheung Chow v Cheung Ng Sheong Steven*, the plaintiff had advanced a loan to his brother. The court rejected the submission that any loan by a person to another irrespective of his relationship with the borrower and the circumstances in which the loan was made would be caught by the MLO. Accordingly, one would not become a moneylender requiring a licence if one made a loan to a friend or relative free of interest and without security.”

123. In *Chow Wun Sing Winston v Yiu Chun Luk* (CACV 295/2006, unreported, 6.3.2008), Tang VP (as he then was) upheld the trial judge’s finding that the plaintiff was not a money lender and Tang VP said this (at §§15-16),

“15. ... the learned judge correctly pointed out that the test for determining whether a person was carrying on the business of a money lender was whether at the time of the loan, the business of the person was that of making loans, which is a question of fact to be decided by reference to the facts and circumstances of each case. *Conroy v Kenny* [1999] 1WLR 1340.

16. Then she correctly pointed out that the fact that there was a certain degree of system and continuity was a relevant factor but not determinative.”

124. Tang VP went on to quote the following observations of the trial judge (Chu J , as she then was) with approval (at §18),

“She then concluded that the facts were consistent with an individual making an investment by lending at remunerative interest rates and with proper security. She concluded that the defendant has failed to prove by direct or indirect evidence that the business of the plaintiff at the material time was making loans.”

125. In *Link Excellent Limited v Ruijun Technology Limited* (HCA1993/2016, unreported, 6.11.2017), Lisa Wong J reviewed the case law on the definition of “money lender”. The judge first noted that (at §20) the carrying on of a “business” requires a degree of repetition, system and continuity. Accordingly, a single loan, or even several isolated loans, is generally insufficient to cause a lender to be treated as a “money lender” within section 2(1) of the MLO.

126. The judge then referred to *Litchfield v Dreyfus* [1906] 1 KB 584 where Farwell J (as he then was) held that the plaintiff was not a money lender as defined in section 6 of the English Money-lenders Act 1900 (“**the Act**”). The judge said at §22,

“Farwell J (as he then was) held at 589-590 that generally speaking, one carries on a money-lending business if he is “ready and willing to lend to all and sundry, provided that they are from his point of view eligible” and that the Act “was intended to apply only to persons who are really carrying on the business of money-lending as a business, not to persons who lend money as an incident of another business or to a few old friends by way of friendship.”

127. Mr Pun highlights to this court the decision of Mr Registrar K.W. Lung in *Chan Miu Chu Zoe v Choi Chiu Yuk* (HCA698/2012, unreported, 21.2.2014) in which the Registrar referred to the following dicta of Kennedy LJ in *Conroy v Kenny* [1990] 1 WLR 1345H,

“The number of transactions made by the lender is not the determining factor. The court has to look at all the relevant facts of the case. Even one transaction may be sufficient if there is evidence to show that the lender was a money-lender at the time of the transaction.”

128. With these principles in mind, I examine all the relevant circumstances in the present case to determine whether at the material times from 2012 to 2013, Alan carried on the business of money-lending and fell within the meaning of section 2(1) of the MLO.

129. In the first place, I have to point out that Foebe has failed to plead any material facts with full particulars to support her plea that Alan was a money lender. She merely pleaded that in each of the Alleged First and Third Loans and the Second Loan, Alan was an unlicensed money lender.

130. In her 1st witness statement, she added that Alan once extended loan on another occasions. In around June and July 2011, Victor Cheung who was their common friend had liquidity problem and required financial assistance. Alan agreed to lend him a sum of HK\$10,000,000 through one of his overseas companies (“the Victor Cheung Loan”). Foebe knows nothing further about this loan. In cross-examination, Foebe admitted that she acted as the middle-man to procure the Victor Cheung Loan for Victor Cheung.

131. Next, in her 2nd witness statement, Foebe referred to the China Zenith Loan Agreement mentioned by Alan and said that it was another transaction in his money lender business. She claimed that Alan was very excited to learn that China Zenith required a loan and he was happy to extend a loan to China Zenith to earn some interest.

132. For the following reasons, I am of the view that Foebe has failed to discharge the burden of proof, on a balance of probabilities, that Alan and/or EEL was a money lender within the meaning of section 2(1) of the MLO.

133. Firstly, all of the loans made by Alan in the present case including the China Zenith Loan Agreement, the Victor Cheung Loan and the Shares Agreement were extended at the request of Foebe. Alan did not solicit such loans and I accept his evidence that he made these loans obviously out of his friendship or love for Foebe.

134. Secondly, the Alleged First Loan and the loan under the Shares Agreement were even interest free and unsecured. Making unsecured loans to one's lover without charging any interest can hardly be counted as a business activity.

135. Thirdly, there is no evidence that Alan or EEL has ever advertised or held out as a money lender.

136. Fourthly, EEL only made the Second Loan and there is no evidential basis to suggest that it was a money lender at the time of the Second Loan. Further, I accept Alan's explanation that for the unsecured loan under the China Zenith Agreement, the interest rate of 6% was quite low.

137. Fifthly, there was no discernible degree of any system, continuity and repetition in these loans. They were all procured by Foebe.

138. For completeness, I should mention that in the middle of cross-examination of Alan, Mr Pun showed to this court an Indorsement of Claim issued in another High Court action under HCA700/2024 ("the Other Loan Enforcement Action"). From this document, it can be seen that Alan and another company are suing one Mr Heung for recovery of some loans in the aggregate amount of HK\$22,880,000. Mr Pun seeks to rely on these loans to prove that Alan was a money lender.

139. This is most undesirable to adduce new evidence in the course of the trial though I accept the explanation of Mr Pun that the defence team had just managed to discover the Other Loan Enforcement Action. In any event, I do not think that it can assist Foebe at all.

140. In the Other Loan Enforcement Action, the alleged loans were orally made between 2017 and 2019, some years after the Alleged Third Loan. In addition, Alan managed to explain that Mr Heung was his business partner. Mr Heung was the chairman of a listed company known as Allurefem Holding Limited and Alan was its executive director.

141. More importantly, the pleaded case of Alan about the alleged loans is that they were made interest free. If anything, it shows that Alan made loans to his acquaintance not for financial gains and this negates the allegation that he was a money lender within the meaning of the MLO.

142. In the premises, I hold that neither Alan nor EEL was a money lender and required a licence under the MLO to make the loans in question. All other complaints made under the MLO by Foebe are devoid of validity. Alan and EEL are entitled to enforce the Alleged First and Third Loans and the Second Loan and Foebe must be liable to repay such loans with interest thereon.

Costs of the 1st day of the Trial

143. The trial was scheduled to start on 20 May 2024. By summons dated 7 May 2024, Foebe sought an adjournment of the trial on medical grounds. She had an operation for excision of right ear pinna cyst under local anaesthesia on 20 May 2024 and the admission time was 5:00 p.m. on that day. She was told that one night hospitalisation was required.

144. On 14 May 2024, I heard the summons and dismissed the same. I, however, changed the commencement date of the trial to 22 May 2024 and found two new days for the trial as to allow Foebe to stay in the hospital and to have a bit of rest after her operation on 20 May 2024.

145. On 22 May 2024, when the trial was supposed to commence, Mr Pun informed the court that Foebe was still in hospital and was unable to attend the trial. Mr Pun asked for an adjournment of the trial. There was no medical proof of her condition.

146. I could only allow an adjournment albeit a short one. The trial was postponed to 24 May 2024 for Foebe to appear with her medical report with costs of the adjournment reserved.

147. On 24 May 2024, Foebe appeared and was ready for the trial. Mr Pun handed up a letter dated 23 May 2024 issued by Dr David Ho, the treating doctor of Foebe. In the letter, Dr David Ho said that Foebe had a bad wound pain after the operation and to ease her pain antibiotics were prescribed to her but she felt nauseous after taking.

148. I am convinced that Foebe felt unwell after the operation. However, I am not sure whether she was really unable to bear her pain and to attend court on 22 May 2024.

149. Mr Wan draws my attention to *Elijah Saatori v Raffles Medical Group (Hong Kong) Limited* (HCMP 3224/2016, unreported, 13.9.2017) per Chu JA (as she then was) at §45

“Under Order 35 rule 3, a judge has wide discretion to decide whether to adjourn on terms and on what terms. The court invariably orders costs thrown away by the adjournment of the trial to be paid by the party who brings about the adjournment. In appropriate cases, the court may also order the party responsible for the adjournment to pay to the other party or to bring into court the amount of costs owing from him to the other party. It is therefore within the Judge’s discretion to order the plaintiff to pay to the defendant outstanding taxed costs and to pay into court amount approximating the amount of costs previously ordered against him and the costs thrown away by the adjournment.”

150. Further, in *Lam Hon Keung Keith v Lam Chi Tat Anthony* [2021] HKCFI 1282, Wilson Chan J ordered the plaintiff (represented by his executors) who asked for the vacation of the trial by reason of the recent death of the plaintiff to pay costs of thrown away by the adjournment. The judge noted that the plaintiff was given an indulgence and the defendants were not at fault in any way and so it was only right and proper that the plaintiff should pay such costs.

151. On these authorities, I see no reason why Foebe should not be ordered to pay Alan costs thrown away by the adjournment. I so order.

152. Mr Pun does not strongly oppose Alan's application for costs save that he reminds this court that only a refresher should be allowed for counsel fee. He must be right.

153. Mr Wan has provided a Statement of Costs for my summary assessment. The Statement is not helpful and it includes far too many disallowable items.

154. For costs thrown away due to the adjournment, I am only prepared to allow Alan a refresher of each of his two counsel (both Mr Wan and Mr Au) in the total sum of HK\$30,000 and the costs of the two solicitors on attending the trial on 22 May 2024 in the total sum of HK\$7,500. Thus, Foebe should pay Alan costs thrown away by the adjournment summarily assessed at HK\$37,500.

Conclusion and order

155. By reason of the foregoing analysis, I come to the conclusion that Alan and EEL must succeed in their claim against Foebe in respect of the Alleged First Loan, the Second Loan and the Alleged Third Loan. The

allegation that they were unlicensed money lenders is merely red herring and must be rejected.

156. Accordingly, I grant Alan and EEL judgment against Foebe. I order that Foebe do pay Alan the two sums of HK\$20,000,000 and HK\$4,200,000 and EEL the sum of HK\$15,875,000.

157. I should award Alan interest on HK\$20,000,00 at the rate of prime plus 1% for compensation for his loss of the use of such monies from the date of the Writ to the entry of judgment: *PT Asuransi Tugu Pratama Indonesia TBK v Citibank NA* [2023] HKCFA 25 at §6. Thereafter, the judgment rate applies until full payment.

158. For the Second Loan, EEL should be awarded pre-judgment interest at the contractual rate (1% per month) from 4 July 2013 until the entry of judgment. Likewise, Alan should be awarded pre-judgment interest on the Alleged Third Loan at the contractual rate (10% per annum) from 26 March 2013 until the entry of judgment. Thereafter, the judgment rate applies until full payment of the two sums.

159. Costs should follow the event. I make an order *nisi* that Foebe do pay Alan costs of this action including all costs reserved, to be taxed if not agreed. It is understandable that Alan requires the assistance of both Mr Wan and Mr Au. The defence has been strongly represented too. I am of the view that the amount at stake should justify the engagement of two counsel. Thus, I allow Alan certificate for two counsel.

160. The order *nisi* will become absolute in the absence of any application for variation by summons within 14 days.

161. It remains for me to thank Mr Pun, Mr Wong, Mr Wang, Mr Wan and Mr Au for their assistance in this matter.

(Kent Yee)
Deputy High Court Judge

Mr Patrick Wan and Mr Alan Au (absent on 17 June 2024), instructed by YTL LLP, for the 1st and 2nd Plaintiffs

Mr Hectar Pun SC, leading Mr Anson Wong Yu Yat and Mr Xizhen Wang, instructed by Wellington Legal LLP, for the Defendant