

IN THE DISTRICT COURT  
HELD AT AUCKLAND

NP No. 2505/99

BETWEEN

**LESLIE ZHU**

Plaintiff

AND

**JIA YI WANG**

Defendant

Date of Hearing: 11 February 2000

Date of Judgment: 11 February 2000

Counsel: B. Hayes for the Plaintiff  
M. Keall for the Defendant

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**ORAL JUDGMENT OF JUDGE RODERICK JOYCE Q.C.**

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Solicitors:

*B. Hayes, Barrister, Auckland for the Plaintiff*

*M. Keall, Barrister, Auckland for the Defendant*

Both the Plaintiff and the Defendant in this case are Chinese, so that English is their second language. However, the hearing of this case was much assisted by the availability of a most conscientious interpreter.

Issues of credibility can be rather less easy to resolve when the usual tongue of the protagonists is other than English. I did, however, have ample opportunity over two days carefully to observe both the Plaintiff and the Defendant.

With that advantage and given the alacrity and seeming accuracy of the interpreter's interventions I do not believe that in the end I was left materially short of fair room for such credibility assessments.

The Plaintiff (Mr Zhu) claims \$25,000 from the Defendant (Mr Wang). He pleads two causes of action. The first has been in the nature of a claim for money had and received, the second on account a mistaken payment. It needs to be recognised throughout that at the heart of the case, as the pleadings made clear, was the claim that Mr Wang was somehow accountable to Mr Zhu for the amount mentioned in respect of company shares.

Given merit in Mr Zhu's claim, restitutionary principles distinctly underly. The evidence was confined to that of the parties themselves and that taken before trial of a Mrs Kong who had been examined and cross-examined as a witness for Mr Zhu before the Registrar.

Although in some senses not a particularly complicated piece of litigation, the factual sequence was a little untidy. I will begin with a brief chronology.

It was Mr Zhu's case that in late November 1996 he lent Mrs Kong \$24,000. Then, in mid-December 1996, he and Mr Wang made an agreement for the sale and purchase of shares under which Mr Zhu was to pay \$25,000 for a bundle of same in Mr Wang's company; one for which subsequently Mr Zhu went to work.

A day or so after the making of this agreement Mr Zhu paid Mr Wang \$1,000 on account the share purchase leaving a balance outstanding of \$24,000. At no point were the shares in question ever transferred to Mr Zhu.

By April 1997, having worked a while for the company, Mr Zhu had become less interested in being part of its future than originally was the case. About that time he confided in Mrs Kong that he was no longer interested in purchasing the shares. A month or so after that he indicated to Mr Wang that he did not wish to remain with the company.

On 3 July 1997 Mr Wang and his sister-in-law entered into a Sale and Purchase Agreement in respect of 6 Mulgan Street with Mrs Kong and her daughter-in-law, who were then the owners of that property. That same day a piece of paper was signed, the apparent effect of which was that the purchase price recited in the Sale and Purchase Agreement would be "reduced" by some \$41,500 - this on

account the setting off of what was recited as a debt of that amount owed by the vendors to the purchasers.

On 11 July 1997 the previously made share purchase agreement was, by agreement between Mr Zhu and Mr Wang, discharged. Shortly afterwards Mr Zhu ceased to work for the company.

On 18 July 1997 settlement of the sale of 6 Mulgan Street to Mr Wang and his sister-in-law took place. In immediate cash terms that gained \$25,442.48 for Mrs Kong and her daughter-in-law.

Almost exactly a year later, on 14 July 1998, \$16,500 plus some interest (total \$17,000) apparently owed by Mrs Kong to a third party was paid off for her by Mr Wang.

That then is a basic chronology of events one which, however, does not of itself explain how this case arises. That will, however, very shortly emerge. As I remarked moments ago, the series of events was upon examination somewhat untidy if not apparently illogical. I might add that the actions of the parties, indeed their evidence – and this applies to each of them –sometimes seemed more than a little contradictory. That said, and in the end, the material essence of the case has been something which the Court, bearing in mind throughout the way the case has been pleaded - pursued, has found itself able to distil.



Having provided the chronology just recited I proceed by reference to what in the end seemed to me to be the really material issues. The seemingly odd arrangements (and I particularly refer to what went into and surrounded the house transaction) might well only appear that to a European; I am sure that some of our own commercial habits could strike an Asian as equally odd. What I do, however, accept as relevant to the first issue for decision – one to which I will in a moment turn – is that Mr Zhu said, and Mr Wang did not in his evidence seek to gainsay, that Chinese people will often keep quite substantial sums of money at hand instead of in the bank.

The first issue is whether in 1996 Mr Zhu lent Mrs Kong \$24,000. I accept that he did. Not only did he say that he did but so also did she, the debtor. These were not arrangements to which Mr Wang was immediately privy. My conclusion is that Mr Zhu was persuaded to lend by ties of friendship, perhaps a sense of loyalty or deference to one rather older than is he, and beyond that and very likely, by effective pressure tactics of Mrs Kong. That loan was from monies that really had been earmarked, in fair part anyway, for Mr Zhu's New Zealand education and he surely would not have parted with them with a high level of willingness.

That arrangement created a situation where it was not surprising that her name and presence should figure when, in mid-December 1996, Mr Zhu was persuaded into the share purchase with Mr Wang. The "i's" of this transaction were at no stage properly dotted, nor indeed the appropriate "t's" properly

crossed. There is no need, however, to dwell on legal niceties here. Subsequent events have made such effort redundant.

Suffice it immediately to record that the share price was agreed at \$25,000 of which, as I have said, Mr Zhu paid \$1,000 direct to Mr Wang a day or so later. As I said before too, no shares were actually transferred.

Mr Zhu then commenced to work for the company in question which in fact belonged equally to Mr Wang and a third party. It seems to be the case that the company was far from what Mr Wang may have claimed it to be, but discrepancy between description and reality does not matter here.

As observed, by April 1997 Mr Zhu's presumed December enthusiasm had waned somewhat; hence his indication to Mrs Kong, with whom he then flatted, of loss of interest and hence too, no doubt, his advice to Mr Wang about a month thereafter to the effect that he wanted to get out. Meantime, of course, he had only paid \$1,000 on account for shares.

I come then to 3 July 1997 and the matter of the Mulgan Street property. On the third of that month the Sale and Purchase Agreement earlier mentioned was made. The consideration for the purchase recited in the agreement was the sum of \$205,500. It appears from the agreement that the purchasers were to raise, and did raise, bank finance of \$164,000. That left \$41,500 to settle, for no deposit was paid at the time the agreement was made.

In the events that quickly ensued Mr Wang came to concede that he and his sister-in-law did not in fact have recourse to \$41,500. No doubt their bank had been led to think otherwise, but never mind. I herald here my acceptance of Mr Wang's evidence, that financial pressure faced by Mrs Kong rather than simply intentions on her part immediately to return to China was a real – indeed predominating – driving force in the events that ensued; whatever else, she still owed Mr Zhu his \$24,000.

It was in this state of affairs that a peculiar from any conventional viewpoint arrangement - one already touched upon - was reached between the vendors and the purchasers. A document dated the same day as the Agreement for Sale and Purchase, that is to say 3 July 1997, was signed by the relevant parties. It read as follows:

*"We, KONG FAN XIANG and ZHOU YUN PING hereby acknowledge that we owe the sum of \$41,500.00 to RU JIN and WANG JIA YI and that in consideration of us selling our property at 6 Mulgan Street, New Windsor (CT 2C/892) to the said RU JIN and WANG JIA YI we accept and acknowledge that the sum of \$41,500.00 will be deducted from the purchase price on transfer of the property by Mr G. G. Kanji, Solicitor in full payment of our debt".*

That acknowledgement then being signed by Mrs Kong and her co-vendor. The later, confirmed by her evidence, claim made by Mrs Kong was that \$25,000 of that "debt" thus "acknowledged" somehow represented the Zhu loan. Mrs Kong, so she and indeed the Plaintiff would have it, was instigating repayment of Mr Zhu's \$24,000; this to the end that it would now be Mr Wang's obligation to

account to Mr Zhu accordingly. This because, as pleaded, he somehow was said to owe \$25,000 back to Mr Zhu for the shares.

I interpolate by way of a little more detail to be added to that earlier proffered, that the remaining \$16,500 of the \$41,500 was to be accounted for as a loan of that sum in fact owed elsewhere by Mrs Kong; one which, so it was accepted, was cleared a year or so later by payment by direction and thus removed effectively from any relevant ledger.

Mr Zhu's claim self-evidently adopts, indeed is founded upon, the proposition that the \$25,000 "discount" results in a restitutionary liability of Mr Wang to pay that sum to him. That would give him the \$24,000 he has lent to Mrs Kong and, though Counsel never raised the point as such, the other \$1,000 could be held to equate what he actually paid on account for shares.

The thrust of Mrs Kong's evidence was that she made plain to Mr Wang that the net result should be that he was now so accountable to Mr Zhu for her debt to him and that he accepted this state of affairs and they dealt and settled accordingly.

Of course, the document collateral to the Sale and Purchase Agreement records nothing like this at all. This, however, was one part of the case where neither party sought to raise any parol evidence issues.

A by then fundamental point, however, was that Mr Zhu admitted in cross-examination that on 11 July 1997, that is to say a week before settlement of the house transaction, he had discussed with Mrs Kong the fact that that very day he and Mr Wang had brought the agreement for purchase of shares to an end. He had given the document recording that state of affairs directly to Mr Wang, but he had told Mrs Kong that he had quit the company. The passage of evidence in question, viewed in its surrounding context and indeed in the light of his evidence as a whole, plainly conveyed to the Court that Mrs Kong thereby learned for sure that all business relationships between Mr Zhu and Mr Wang had come to an end.

It thus made no sense for Mrs Kong to claim that through until 18 July 1997, when the sale and purchase of the house was settled, it was common ground between her and Mr Wang that he would re-pay her obligation to Mr Zhu. That idea makes even less sense when it is acknowledged, as it was, that Mr Zhu did not even know that Mrs Kong had sold the house until July or so 1998, that is a year later.

Following her return to New Zealand around that time, she was superficially a zealous supporter of, as I find them to have been, repeated efforts by Mr Zhu to get "back" \$25,000 in all from Mr Wang. I fear, however - would so find if it were necessary - that her motives were suspect and that she must have driven his demands. It is not essential to my present findings, but there is every indication

that Mrs Kong has been a powerful figure in Mr Zhu's life in New Zealand; but one the driver for which was really her own ends rather than his interests.

As to the demands consequently made of Mr Wang, Mr Zhu's evidence painted a picture of avoidance and prevarication. My own impression, having seen them both for appreciable periods and heard them both speak in English and through the interpreter, is that Mr Wang is a mild man who would not have dealt easily with a Zhu/Kong onslaught. Also a man who was for a time at least uncertain of his obligations and sought help from his accountant accordingly.

I am quite unpersuaded that his behaviour during the period of the repetition of these demands is to be identified as only consistent with awareness of a plain, indisputable obligation.

If, knowing as he did that the share deal was off (which was before the house deal was settled) and that beyond the \$1,000 no payment had ever been made for the shares, he thereby found the pursuit of him hard to handle, that should not surprise.

I should deal with a side issue that was promoted for Mr Zhu as a major one. It was effectively contended that Mr Wang, while employing Mr Zhu under a work subsidy scheme with Income Support, had defrauded the latter. The allegation was that in order to get a full subsidy he had paid monies to Mr Zhu that he had properly required be refunded to him.

It was accepted that over the period in question he had maintained PAYE obligations, but also accepted that for lack of funds Mr Zhu had not received his net salary or wages on anything like a regular basis. It was not, however, accepted that some fair part of Mr Zhu's earnings had gone back to Mr Wang, thereby making a lie of the two IR12 Certificates produced. Had that been so, it would of course have been a state of affairs arising with the distinct connivance of Mr Zhu, whatever his level of enthusiasm in that department.

Had this matter really impinged on credibility I might have had to pay it some more attention. Even then I would have to have reminded myself that people can be selective in their dishonesty (when that does occur) and that an allegation of this kind is a very serious, in fact effectively of criminal conduct, one - and so to be weighed very carefully indeed.

As it is, aspects of the chronology already recited and discussed make the credibility determination much simpler and dispense with any need to dwell further on this issue.

What Mr Zhu has really belatedly sought to say is that Mr Wang, by his words with or conduct towards Mrs Kong, had her surrender \$25,000 worth of the value of her house in terms that he would discharge her debt responsibility to Mr Zhu. Had that been the case the equitable implications would have made for a

quite fascinating foray, especially as Mr Zhu was until much later quite oblivious to the alleged arrangement.

As it is, conscious as I am of other bizarre aspects of the case, I find that claim to fly in the face of the known realities and associated common sense. True, at around the time the original 16 December 1996 share deal was struck, Mr Wang was aware that Mrs Kong was Mr Zhu's debtor and likely indicated, as would be quite natural, that who actually paid him for the shares mattered not. But by April 1997 or thereabouts both he and Mrs Kong knew that Mr Zhu had rather gone off the idea. Working for the company he no doubt now saw it more realistically and by 11 July all concerned knew for sure, whatever Mrs Kong's contrary protestations, that the share sale was off.

That being so, and Mr Wang having by then received but \$1,000 from Mr Zhu, that Mr Wang would agree to, or by his conduct effectively accept responsibility for the, discharge of Mrs Kong's debt in the form of recompense for shares for which Mr Zhu had actually never paid (as is Mr Zhu's case) falls to pieces even on his own evidence.

To that is to be added Mr Wang's evidence which I have no grounds to query, that the true reason for the "discount" I (as it was at one stage or another described) was that Mrs Kong was pressured financially and had to have a sale. That the agreement itself was not simply amended to show a purchase price of



\$180,500 is readily to be ascribed to a purchaser having in mind the next sale. Indeed Mr Wang was candid enough so to admit.

Had Mrs Kong said anything to Mr Wang as they worked through the house deal even merely suggestive of the idea that he should discharge her debt, then he would surely have protested that his business relationships with Mr Zhu were now at an end and that Mr Zhu was no longer buying the shares; most certainly that Mr Zhu had never paid for them.

Mrs Kong may have had her own ends in view. Certainly her story, one not sitting at all happily with Mr Zhu's own evidence, makes no objective sense. It follows that there was no basis upon which to argue that Mr Wang's conscience, was touched in a way that, had the facts been different, might have offered Mr Zhu a remedy.

It follows further that the only issue left for disposition is that of the \$1,000 actually paid. As is accepted, Mr Zhu and Mr Wang agreed to discharge the share agreement on 11 July 1997. The document written out by Mr Zhu acknowledging that is silent about the \$1,000. The plain effect was that Mr Wang no longer had any obligation to secure transfer of the shares to Mr Zhu and he, of course, no longer had an obligation to pay for them. But what about the prior part-execution represented by the \$1,000 payment?

My view of the evidence is that an officious bystander, aware of the salient facts, would regard the parties as by agreed that neither any longer owed the other anything. Had Mr Zhu considered otherwise, then surely he would have raised the matter of the \$1,000 at the time. He was, after all, leaving the company's employ and presumably really severing altogether his relationship with Mr Wang.

It was to every appearance to have been, and in fact I hold it effectively to have amounted to, a final parting of the business ways whereby each party was released from any further obligation whether in the nature of one otherwise already arising or which might thereafter have arisen.

Thus I hold that the Plaintiff fails in all respects and give judgment for the Defendant accordingly.

I note simply for the sake of completeness that the equitable claim *in rem* was abandoned during the hearing. I invite Memoranda as to costs if Counsel cannot agree them, the Plaintiff's Memoranda to follow upon delivery of that of the Defendant.

  
Roderick Joyce Q.C.  
District Court Judge