

DCCJ015275/2000

## FOR REFERENCE

Contract - Guarantee - Loan - Consideration - Political Party - Election - Illegality - Sections 5 and 8A of Elections (Corrupt and Illegal Practice) Ordinance, Cap. 288.

T and L promised to abide by the constitution of HKADPL a political party that supported its members to run as candidates for elected offices in the District Board, Urban/Regional Council and Legislation Council. Before elections, HKADPL advanced monies to T as election expenses such monies to be refunded as debt due upon T resigning membership of HKADPL before the end of his term of elected office but otherwise not repayable. L signed written undertakings to guarantee repayment of "loans" being money paid by HKADPL for operating a "District Office" of HKADPL. By express provision in the constitution of HKADPL, T and L agreed at the time of joining HKADPL that they would make a fixed percentage of contribution from the honorarium granted by the government for the elected office they would hold. T and L refused to repay and failed to make the contributions promised.

HELD : (1) The advances for election expenses were illegal loans in contravention of sections 5 and 8A of the Elections (Corrupt and Illegal Practice) Ordinance, Cap. 288 and thus not recoverable. (2) HKADPL by its constitution and in practice made habitual loans without a money lender's licence, hence it is not entitled to enforce the guarantee for repayment of the loans to the "District Office"; (3) The promises to make contributions, if made in consideration of HKADPL support for candidacy, were illegal as being in contravention of section 5(c) and (d) of the Elections (Corrupt and Illegal Practice) Ordinance, Cap.288 and hence unenforceable. (4) Illegal contracts will not be enforced by first instance and appellate courts even though parties have not pleaded illegality in defence.

DCCJ015275/2000

## FOR REFERENCE



Defendant)  
AND  
LEUNG KWONG CHEONG                      Defendant

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Coram : H.H. Judge Li

Date of Trial Hearing : 11th and 12th June 2001

Date of Handing Down Judgment : 26 November 2001

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Judgment  
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1. The facts of these two cases are not exactly the same. But they raise similar legal issues. After discussion with counsel for the parties, for reasons that will become apparent I have decided that the legal issues, of some constitutional importance, be addressed first. The two cases were heard in June this year but it was only the 5 November 2001 that I received all the certified translation of relevant documents.

2. By way of background, the Plaintiff is suing as a representative of The Hong Kong Association for Democracy And People's Livelihood ("HKADPL"). It is common ground that the HKADPL registered under the Societies Ordinance was at all material times a political body - a body that sponsored candidates for elections for seats in the District Boards, the Urban Council, the Regional Council and the Legislative Council. The two Defendants were at all material times members of the HKADPL but have since resigned their membership.

3. The HKADPL has a document called the "Constitution and Standing Orders" ("the Constitution"). For the purposes of these two cases, the only significant provisions in the Constitution are Clauses 3, 8.1.1 and 8.1.3 :-

"3. Objectives

3.1 To promote a high degree of autonomy in Hong Kong under the sovereignty of China and to '(advocate) the implementation of the principles of "one country, two systems" and "Hong Kong People ruling Hong Kong".

3.2 To advocate democracy, promote direct election for all members of the Legislative Council, and protect the independence of Hong Kong's judiciary and basic human rights and freedom of Hong Kong People.

3.3 To maintain Hong Kong's stability and prosperity, and promote its economic development.

3.4 To advocate a rational distribution of social resources and improve the quality of life of the lower and middle stratum (of the society).

## 8. Obligations of Members

8.1 Basic Members shall fulfill the following obligations:

8.1.1 'Accept and fulfill' the objectives, beliefs, platform of the Association and other resolutions passed by the Members General Meeting;

8.1.2 Comply with the Constitution and Regulations of the Association;"

4. Before October 1994, there was another document issued by HKADPL with the title "Rights, Duties and Regulations of District Board Candidates of HKADPL". For ease of reference this document will be called "DB Regulations". In October 1994, a new document the first part of which bears the same title "Rights, Duties and Regulations of District Board Candidates of HKADPL" was issued by HKADPL; this later Regulations will be called "3-tier Regulations" because it purported to apply to members of HKADPL involved with the Legislative Council, the Urban/Regional Council or the District Boards either as candidates or elected members of those representative bodies. The two sets of Regulations are in fact identical except that certain Notes to the DB Regulations were incorporated with

additions into the main body of the 3-tier Regulation as Paragraph 4 thereof. The entire 3-tier Regulations is reproduced below :-

**"(1) RIGHTS, DUTIES AND REGULATIONS OF DISTRICT BOARD CANDIDATES OF HONG KONG ASSOCIATION FOR DEMOCRACY AND PEOPLES LIVELIHOOD ("HKADPL")**

**1. Rights**

1.1 Upon being selected by election at the Extra-Ordinary General Meeting of the Association, the member may get support from the Association, and the member shall represent the Association to stand as candidates in the election of Councils at different levels in Hong Kong.

1.2 Support in terms of manpower, resources and finance will be given by the Association to (enable the candidate to) participate in the election.

**2. Duties**

2.1 Candidates who participate in the election of Councils at different levels, must be selected by election at the Extra-Ordinary General Meeting, and must run for election in the name of the Association. Meanwhile, no support from other individual or societies maintaining a stance contrary to that of the Association is allowed. And no candidates can represent other local political parties in Hong Kong to participate in the election of Councils at different levels.

2.2 Identify and put into implementation the objectives, beliefs, platform pledges of the Association and other resolutions passed by the General Meetings.

2.3 Assist in promoting the affairs of the Association.

2.4 Candidates upon election as Councillors at different levels shall make monthly contribution to HKADPL, so as to assist in the promotion of affairs of the Association.

### 3. Regulations

3.1 Must accept supervision by the Association.

3.2 Cannot in the capacity as a number of the Association make public statements contrary to the stance of the Association.

3.3 Must set up a : Councillor's office, so as to promote related affairs.

3.4 Must provide services to have interviews with the public.

3.5 Must (not less than one and half year) publish the Councillor's working report on a regular basis.

3.6 Must establish channels and ways to collect opinions from the public, endeavour to reflect the opinions of the public.

3.7 Must pay keen attention to affairs relating to the people's livelihood in the district, strive to improve it.

3.8 Must enforce the spirit of democracy.

3.9 Must regularly attend all relevant meetings of Councils at different level, and maintain a high rate of attendance.

3.10 Must regularly attend the Councillors' group meeting.

### 4. Deployment of subsidy to the Councillors

#### 4.1 *Legislative Council Councillor*

Reimbursement for sums spent :

All sums are subject to the deployment of the central organ, the central organ will deploy not less than 55% of the sum for financing the services in the district.

### Salary received : Full time Councillors

- receive the whole salary, but according to the guidelines (set by ) the central organ allocate a certain amount to be used as election fund.

### Part-time Councillors :

- After amount due for payment of tax is reduced, half of the balance goes to the central organ and the other half goes to the Councillor.

### 4.2 *Urban Council/Regional Council Councillor*

One third of the Councillor's monthly honourarium is allocated services office in handwriting to the central organ of the Association, the central organ will remit not less than one-fourth of the said sum to finance the district community services office.

### 4.3 *District Board Member*

7% of the Councillor's monthly honourarium to be contributed to the central organ of the Association."

5. The 3-tier Regulations is not the most admirable model of draftsmanship. For instance, Paragraph 4 thereof covers elected Legislative Councillors and Urban/Regional Councillors, yet the title of the regulations still refers to only the *District Board* and *candidates*. I am not entirely happy with the English translation of the 3-tier Regulations even though it has been certified. For example, in Paragraph 3.1, the word "supervision" should be "monitoring". Nonetheless, taken as a whole, the meaning of the 3-tier Regulations is fairly clear.

6. Two more matters to note in connection with the 3-tier Regulations. First, the document issued by the HKADPL in October 1994 containing the 3-tier Regulations also has attached something called "The HKADPL 3-tier Representative Bodies Election Working Guidelines" ("the Guidelines"). The Guidelines has this paragraph :-

"2.1 Carrying out and promoting the following works to assist members in election affairs.

.....

2.1.8 Arrange loan to be provided to each candidate."

7. Secondly, although there is no serious dispute that the 3-tier Regulations was made by a competent authority of HKADPL, members of HKADPL were not required to formally acknowledge that they were bound by it. By way of contrast, select members of HKADPL were required to sign a statement in relation to the DB Regulations. Thus the Defendant Ting Yin Wah in DCCJ Action No. 15275 of 2000 signed an UNDERTAKING at the end of a copy of the DB Regulations in these terms :-

" UNDERTAKING

I, Ting Hin Wah agrees to represent Hong Kong Association for Democracy and People's Livelihood, to run for the Kwai Tsing District Board Election, and further undertake to comply with all the aforesaid rights and regulations of a candidate.

Sign : sd-

Date : 25.7.94

Address : Room 1104, Sunbeam Commercial Building, 469-471 Nathan Road, Kowloon, Tel : 2872 2699 and Fax : 2782 3137"

But the Defendant Leung Kwong Cheong in DCCJ Action No. 15281 of 2000 has never signed such undertaking.

*DDCJ 15275*

8. In DCCJ 15275 of 2000 ("the Ting case"), it is undisputed fact that the Defendant Ting Yin Wah ("Ting") was already an elected District Board



member and Regional Councillor before joining HKADPL. After joining HKADPL, Ting again got elected as a member of The Regional Council for the term 1995-1999. In 1995, Ting also ran for the Legislative Council but was unsuccessful. He left HKADPL on or about 9th April 1996.

9. According to the Amended Statement of Claim, HKADPL says that the following sums are due from Ting :-

(a) \$4,422 being monthly contributions pursuant to the 3-tier Regulations and the Constitution at 7% of the honorarium granted by the government to Ting as a District Board member;

(b) \$26,812,50 being outstanding balance of monthly contributions pursuant to the 3-tier Regulations and the Constitution at 1/3 of the honorarium granted by the government to Ting as a Regional Councillor;

(c) \$60,000 being an amount provided by HKADPL to Ting as election fund for the 1995 Legislative Council election, Ting having undertaken in writing to refund this amount upon leaving HKADPL;

(d) \$40,000 being another amount provided by HKADPL to Ting as election fund for the 1995 Legislative Council election, Ting having undertaken in writing to refund this amount upon leaving HKADPL; and

(e) \$4,845 being a loan to Ting for air faire, hotel accommodation and cash allowance for a trip to Beijing in April 1994 to present a petition to the Chinese government.

Alternatively, HKADPL claims against Ting \$104,845 the aggregate of (c), (d) and (e) sums as money had and received by Ting from HKADPL.

10. The Amended Defence raises a number of factual and legal issues. For present purposes, I am concerned with the following parts of the Amended Defence :-

"14. Further and in the alternative, if (which is denied) the said document signed by the Defendant constitute undertakings as alleged in paragraph 11 and 13, the agreements were agreements to offer an advantage to the Defendant as an inducement for the Defendant to stand as a candidate at the Legislative Council

Election in 1995 within the meaning of Section 8(A) of the Elections (Corrupt And Illegal Practice) Ordinance, Cap. 288.

15. By reason of the aforesaid matter the agreement is illegal and unenforceable as against the Defendant.

16. By reason of the matters pleaded in Paragraphs 11 to 13 of this Defence, the Plaintiff and the Association are not entitled to ask for repayment of the said funds from the Defendant.

17. Paragraphs 14 and 15 are therefore denied.

18. Paragraph 16 is admitted save that the Defendant has made a cash advance of HK\$4,845.00 to the Association for expenses to be incurred during the visit to Beijing, which was an official visit of the Association by its representatives, including the Defendant. The Defendant therefore claims to set off the said sum of HK\$4,845.00 from the amount claimed by the Plaintiff in paragraph 16.

19. Further and in the alternative, if (which is denied) the said loan agreement constitute undertakings as alleged in Paragraph 16, the agreement was an agreement to present a petition to the Chinese Officials regarding a jailed Ming Pao Daily reporter. The presentation a petition was at all material times prohibited by the Chinese Law and contrary to the conditions of entry to the Mainland China.

20. By reason of the aforesaid matters the alleged agreement was unenforceable and void as being contrary to public policy and international comity."

In short, the issues which the parties place before me in relation to Ting are the legality or illegality of the bases of claims (c), (d) and (e).

*DCCJ 15281*

11. In DCCJ 15281 of 2000 ("the Leung case"), according to the Amended Statement of Claim as modified by the Reply, HKADPL says that the following sums are due from the Defendant Leung Kwong Cheong ("Leung"):-

- (a) \$24,848 being outstanding balance of monthly contributions pursuant to the 3-tier Regulations and the Constitution at 7% of the honorarium granted by the government to Leung as a District Board member;
- (b) \$55,660.5 being outstanding balance of monthly contributions pursuant to the 3-tier Regulations and the Constitution at 1/3 of the honorarium granted by the government to Leung as a Regional Councillor;
- (c) \$200,000 (10 monthly payments of \$20,000 each) being total funds provided by HKADPL to Leung under an agreement to operate an office in Kwai Ching to provide community service, Leung having undertaken by a series of agreements to refund upon leaving HKADPL; and
- (d) \$20,000 being an amount provided by HKADPL to Leung as election fund for the 1994 District Board election, Leung having undertaken in writing to refund this amount upon leaving HKADPL.

Alternatively, HKADPL claims against Leung \$220,000 the aggregate of (c) and (d) sums as money had and received by Leung.

12. The Amended Defence raises a number of factual and legal issues. For present purposes, I am concerned with the following parts of the Amended Defence:-

"10. Save the Defendant has been asked by the Association to sign certain documents purporting to be receipts and/or evidence of the said payment made by the Association, Paragraph 10 is denied.

Further and in the alternative, if (which is denied) the said document signed by the Defendant constitute undertakings as alleged in Paragraph 10, the Defendant aver that the documents were signed after the said payment made by the Association was advanced.

.....

13. Further and in the alternative, if (which is denied) the said document signed by the Defendant constitute undertakings as alleged in paragraph 10, the agreement was an agreement to offer

an advantage to the Defendant as an inducement for the Defendant to stand as a candidate at the Legislative Council Election in 1995 within the meaning of Section 8(A) of the Elections (Corrupt And Illegal Practice) Ordinance, Cap. 288.

14. By reason of the aforesaid matters the agreement is illegal and unenforceable as against the Defendant.

.....

18. By an agreement reached between the Association and the Defendant sometime during May to July 1995, the Association agreed to sponsor the Defendant in the indirect election for the 1995 Legislative Council election and to pay three quarters of his campaign expenses thereof. The Defendant incurred a total of HK\$32,000.00 of such campaign expenses. Pursuant to the said agreement, the Association is therefore liable to reimburse the Defendant with a sum of HK\$24,000.00. The Defendant now claims to set off the said sum of HK\$24,000.00 from the claims of the Plaintiff and the Association under Paragraph 13 of the Amended Statement of Claim.

19. Further and in the alternative, the aforesaid agreement was an agreement to offer an advantage to the Defendant as an inducement for the Defendant to stand as a candidate at the Legislative Council Election in 1995 within the meaning of Section 8(A) of the Elections (Corrupt And Illegal Practice) Ordinance, Cap. 288.

20. By reason of the aforesaid matters the agreement is illegal and unenforceable as against the Defendant."

In short, the issues the parties place before me in relation to Leung are: (1) whether the written guarantees are enforceable for past consideration, (2) whether claims (c) and (d) are based on legal or illegal contracts.

*The Elections (Corrupt and Illegal Practice) Ordinance, Cap. 288*

13. The Elections (Corrupt and Illegal Practice) Ordinance, Cap. 288 has been abolished and replaced in 2000 by the Elections (Corrupt and Illegal Conduct) Ordinance, Cap. 554. The two ordinances are similar but not

identical. Obviously the new ordinance does not apply to the two cases before me. All references herein to "the Ordinance" means the old Elections (Corrupt and Illegal Practice) Ordinance, Cap. 288. According to defence pleadings the following provisions in the Ordinance are relevant:-

"5. No person shall directly or indirectly by himself or by any other person on his behalf-

(a) give, lend or agree to give or lend, or offer, promise or promise to procure or endeavour to procure, any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce any voter to vote or refrain from voting, or on account of such voter having voted or refrained from voting at any election;

(b) give or procure, or agree to give or procure, or offer, promise, or promise to procure or endeavour to procure, any office, place, or employment to or for any voter, or to for any person on behalf of any voter, or to or for any other person, in order to induce such voter to vote or refrain from voting or on account of any voter having voted or refrained from voting at any election;

(c) make any such gift, loan, offer, promise, procurement, or agreement as aforesaid, to or for any person, in order to induce such person to procure or endeavour to procure the return of any person to serve on any body to which this Ordinance is applied by section 3 or the vote of any voter at any election;

(d) upon or in consequence of any such gift, loan, offer, promise, procurement, or agreement, procure, or engage, promise or endeavour to procure the return of any person to serve on anybody to which this Ordinance is applied by section 3, or the vote of any voter at any election;

(e) advance or pay, or cause to be paid, any money or valuable consideration to or to the use of any other person with the intent that such money or valuable consideration or any part thereof shall be expended in contravention of the provisions of paragraph (a);

(f) before or during any election, directly or indirectly, by himself or by any other person on his behalf, receive, agree or contract for any money, gift, loan, or valuable consideration, office place or

employment, for himself or for any other person, for voting or agreeing to vote, or for refraining for agreeing to refrain from voting any election;

(g) after any election, directly or indirectly, by himself or by any other person on his behalf, receive any money or valuable consideration on account of any person having voted or refrained from voting, or having induced any other person to vote or refrain from voting at any election;

Provided that the provisions of paragraphs (a), (b), (c), (d) and (e) shall not extend or be construed to extend to any money paid or agreed to be paid for or on account of any legal expenses bona fide incurred at or concerning any election.

8A. (1) No person shall directly or indirectly by himself or by any other person on his behalf bribe or intimidate another person-

(a) to stand;

(b) to refrain from standing; or

(c) having been nominated as a candidate, to withdraw, as a candidate at an election.

(2) For the purposes of this section-

(a) a person bribes another if he does any of those activities referred to in section 5 in relation to a person standing as a candidate;

(2) For the purposes of this section -

(a) a person bribes another if he does any of those activities referred to in section 5 in relation to a person standing as a candidate;"

### *Defence Arguments in the Ting case*

14. Part of the claims against Ting is for \$100,000 being funding for the 1995 Legislative Council election. Mr. Yam's "skeleton" is reproduced

below:-

*"1st Legal Issue:*

Whether the agreement between the P and the D is illegal and therefore unenforceable as the advancement of HK\$60,000 and \$40,000 is illegal?

1. The Plaintiff will support its members to participate in all level of Councils' elections.
2. It is an undisputed fact that the P made the two advancements to D as funds for running the election of Legislative Council in 1995.
3. Section 8A of Cap 288: Bribery or intimidation in relation to standing as a candidate.
4. See s. 8A (2) (a).
5. Also, see s. 5 (c), (d), (e).
6. Unless the two advancements are donations (reportable under s. 29 (1) of Cap. 288), they are subjected to the provisions of s. 5 (c), (d) and (e).
7. The first advancement of \$60,000 was reported as donation by both the P and D. If the P now tries to claim it back, it will amount to a false declaration to the government on the part of the P in 1995.
8. The second advancement of \$40,000 was never reported as the money had not been received by the D. But if the P claims it back now, again it will amount to a false declaration to the government on the part of the P in 1995.
9. According to the principles of the case of "Innovisions Ltd", in determining the issue of illegality; two questions to be considered:
  - a. Whether the conduct in question was illegal or immoral;
  - b. Whether the affording of relief to the plaintiff, on the facts of the case, would affront the public conscience or

shock the ordinary citizen

10. Also see "Euro-Diam".

11. And in "Re: Leung Kam Ho", it was held that "the object of the limitation on election expenses was to put all candidates in an election on an equal financial footing to prevent political candidates from obtaining support from their candidature with lavish expenditure of money and not their own merits of the justice of their cause which was a foundation of a fair, just and open election".

12. And in the same case on appeal, it was further held that "It was not necessary to imply the word 'corruptly' into the section or to establish an antecedent agreement to reward as a necessary ingredient".

13. To constitute the offence there must be proved the act of giving money or valuable consideration "to or for any voter (person)".

14. Further and in the alternative, according to "Madam Chung Mui Teck & others", the Deed (agreement) between the P and the D is plainly unenforceable on public policy grounds because performance according to its terms necessary involves the swearing of false declarations and the making of misrepresentations to government.

15. As reference, s. 7 (1) of Cap 554 prohibit anyone to offer an advantage to another person as an inducement for the other person to stand at the election. Advantage is defined as any valuable consideration, gift or loan (s. 2 (a) of Cap 554)

16. Furthermore, as a reference, the US Federal Election Commission' Guide refer to a contribution as anything of value given to influence a federal election. A loan is considered as a kind of contribution

17. The agreement for the two advancements are not enforceable.

### *2nd Legal Issue*

Whether the loan agreement of HK\$4,845 for the trip to Beijing is



illegal and unenforceable?

1. This is well established legal principle as stated in the case of "Oriental Minerals Co Ltd": "a contract would not be enforced if enforcement involved doing an act in a foreign and friendly state which violate the law of that state".

2. Also see the legal opinion made by Mr. James Wong

3. The loan agreement of the \$4,845 is not enforceable."

15. As I understand it, so far as claim (c) for \$60,000 and claim (d) for \$40,000 are concerned, Mr. Yam sets up 2 lines of defences:-

(i) the amounts were "advantage" in contravention of section 8A of the Ordinance; and

(ii) the arrangement between the parties relating to these amount would involve the swearing of false declarations.

16. Both lines of defences can be disposed of fairly simply. First, it was indeed an offence under the Ordinance to bribe a person to stand as a candidate. The meaning of "bribe" or "bribery" has been defined by section 8A (2)(a) of the Ordinance as the doing any of the those activities referred to in section 5 thereof in relation to a person standing as a candidate. The activities referred to in section 5 are so widely defined as including the making of any gift or loan. Thus, the combined effect of sections 5 and 8A is that giving or lending money to a candidate was prohibited. By virtue of section 4 of the Ordinance, it was an offence to give or lend money to a candidate. However, the giving and receiving of money to meet election expenses was obliquely but expressly sanctioned by the Ordinance for section 29 (2) and (3) thereof provided for filing of return of "donation" received by the candidate. In short, there is little doubt that the giving and receiving of money by way of donation to meet election expenses was not illegal nor an offence.

17. The problem in this case is that the money, total \$100,000 for Ting, was not an out and out donation. The written undertakings signed by Ting that form the basis of HKADPL's claim for repayment are in these terms:-

*"Candidate's undertaking for 1995 Legislative Council Election*

I, *Ting Hin Wah* (Identity Card Number: *D054748(5)*), is subsidized by the Hong Kong Association for Democracy and People's Livelihood 0 Ten Thousand Hong Kong Dollars and is given a loan of 6 Ten Thousand Hong Kong Dollars as my election campaign fund, to run for the direct election at the Legislative Council *New Territories South-west*; I hereby undertake, if I am elected, I will repay the aforesaid loan of 6 Ten thousand Hong Kong Dollar in full before 30th day of November 1995 to Hong Kong Association for Democracy and People's livelihood ("HKADPL"), if the loan cannot be repaid in schedule, I am willing to pay 5% interests per annum. If there is delay in repayment, HKADPL can through legal proceedings to claim recovery of the debt from me.

I undertake that I will perform duties as a representative of HKADPL during the tenure of current Legislative Council Election, strive to implement the Platform pledges of HKADPL which is to "Advocate Democracy, Improve People's Livelihood". I also undertake that no matter elected or not, during the tenure of the member of the 1995 Legislative Council, if I without consent from HKADPL and for other reasons resign from HKADPL or is terminated of the membership by HKADPL, I shall return to HKADPL all the subsidies and loan that I received therefrom.

Hereby declared!

Representative of  
the Exco of HKADPL:

\_\_\_\_\_  
Signature of the  
Representative of Exco:

Date: \_\_\_\_ day of \_\_\_\_  
1995

Name of person making  
the undertaking: *Ting Hin  
Wah*

\_\_\_\_\_  
Signature of Person  
making the  
undertaking:

number of cheque received: *Transfer*

Date: \_\_\_\_ day of \_\_\_\_  
\_\_\_\_ 1995

18. Since the \$100,000 is repayable under certain circumstances, the aggregate sum cannot be regarded as a donation. There is nothing in the Ordinance that sanctioned funding for election expenses short of out and out donation. Thus I have little difficulty in coming to the conclusion that the aggregate sum of \$100,000 provided by HKADPL to Ting in terms agreed by the parties was illegal and hence not recoverable.

19. Mr. Yam referred to **Re Leung Kam Ho**, MP No. 2357 of 1994 and Criminal App. No. 286 of 1993. I do not think the decision in that case at first instance is relevant because here there is no suggestion of the \$100,000 affecting the limit on election expenses that could be incurred by Ting. The decision on appeal, however, does re-inforce my view that the provision of funding otherwise than by way of donation to a candidate was an offence and illegal.

20. Mr. Yam also alluded to false declarations or untrue returns under election laws relating to the nature of the \$100,000. I think it is at least arguable that at the time of the making of the declarations both HKADPL and Ting thought that the aggregate sum \$100,000 was a donation (i.e. not repayable). The aggregate sum of \$100,000 became a criminal and illegal advantage only when HKADPL sought to recover it from Ting.

21. As to the advancement of \$4,845 by HKADPL for Ting to travel to Beijing, both parties conceded that the legality or illegality turns on "foreign" law at the time. Towards this end, the written opinion of an expert on the law of the People's Republic of China has been tendered as evidence. The relevant parts of this written expert opinion are reproduced below:

"d. No assembly, parade for demonstration is allowed within an area of 10 meters to 300 meters (in depth extending from) the perimeter of the following areas, except those for which approved has been obtained from the State Council, or the People's government of the Province, Autonomous Region, or Directly-Governed City concerned: (1) The location of the Standing committee of the National People's Congress, the State Council, the Central Military Commission, the Supreme People's Court or the *Supreme People's Procuratorate* ... (Article 23 of the Demonstration Law)."

.....

"Conclusion:

1. Assuming that the contents reported in the Hong Kong newspapers and the photos taken at the scene and published in the Hong Kong newspapers are true (quoted from Ming Pao dated 27 April 1994): "..... After the representatives of the Hong Kong Association For Democracy and People's Livelihood arrived at Dong Jiao Min Xiang of Beijing, they alighted at about 30 metres away from the Reporting Centre of the Supreme (People's) Procuratorate. Then they walked to the destination, holding in their hands 3 document envelopes with citizens' signatures inside and 3 big rectangular pieces of cloth covered with citizens' signatures", it is suspected that they had contravened Article 23 of the Demonstration Law. The legal consequence is that they were punishable under Articles 2 and 19 of the Public Order Regulations, Article 28 of the Demonstration Law and Article 296 of the Criminal Law.

2. By logical deduction, any agreement (no matter in writing or oral) between the demonstration organisation and its members relating to any arrangement about the demonstration is likely to be invalid because it is in breach of the laws and administrative regulations."

22. Since the expert opined that "it is suspected that", I do not think it is conclusive, whether by the criminal standard or civil standard of proof applied by courts in Hong Kong or by the standard of proof applied by courts in Mainland China, that the representatives of HKADPL including Ting contravened Chinese law. It is not disputed that Ting and his party were detained by the authorities in Beijing for a while (less than one day) but none of them was actually prosecuted or tried, much less convicted, for any offence under the laws of the People's Republic of China.

23. It may be argued that I, as a judge sitting in Hong Kong, may determine whether the representatives of HKADPL contravened Article 23 of the Demonstration Law. The difficulty is that the expert does not set out the meaning of "parade" or "demonstration" in Article 23 of the Demonstration Law nor does he state the principles of interpretation applicable to that Law. For instance, it is not clear how many people moving in what way would constitute a parade? Does a small party walking from one place to certain government offices constitute a demonstration? In the premises, there is insufficient material for me to determine whether the representatives of HKADPL conducted a "parade" or "demonstration".

*Defence Arguments in the Leung case*

24. HKADPL's claims against Leung comprise, inter alia, refund for \$200,000 being ten \$20,000 instalments paid by HKADPL for operation of an office in Kwai Ching and \$20,000 being funding for election expenses for the 1994 District Board election.

25. In respect of the \$20,000 funding for election expenses, Mr. Yam appears to make no specific submission in defence. Leung did sign a document, called "Loan Agreement", which is unlike the undertakings signed by Ting for similar funding. The Loan Agreement is as follows:-

[ Hong Kong Association for Democracy and People's Livelihood

*Loan Agreement*

I *Leung Kwok Cheong* (Identity Card number: *E629832(3)*) will participate in the District Board Election in September 1994, now apply for a loan of \$20,000.00 from the Hong Kong Association for Democracy and People's Livelihood, and I agree that if I am elected as a Councilor, the loan will be fully repaid in 3 installments within the period from 1st October 1994 to 31st December 1994, hereby make this agreement as evidence. If the loan is not fully repaid by 31st December 1994, the outstanding loan shall be repaid with an interest at an annum rate of 5%.

Representative of the  
Executive Committee HK  
ADPL

Signature: \_\_\_\_\_

Name: \_\_\_\_\_

Date: \_\_\_\_\_

Borrower:

Signature: *(Sd) illegible*

Name: *Leung Kwok Cheong*

Date: *7/9/97* ]

26. Clearly, the \$20,000 was money lent by HKADPL to Leung for election expenses. It was in no way a donation. For reasons already given in the case of Ting, any funding otherwise than an out and out donation was not sanctioned by the Ordinance. The loan was a blatant contravention of

section 8A of that Ordinance. Since the loan was illegal, the court will not enforce the repayment obligation.

27. In respect of the ten \$20,000 payments, Mr. Yam repeats exactly the same submissions he makes in respect of the \$60,000 and \$40,000 funding for Ting. In addition, since Leung signed 10 written guarantees all in the same terms undertaking to repay the ten \$20,000, Mr. Yam contends that the undertakings are unenforceable because they were signed after payments had been made and thus were based on past consideration.

28. The written guarantees signed by Leung are in terms as follows:-

[ To: Hong Kong Association for  
Democracy and People's  
Livelihood  
Room 1104, Sunbeam  
Commercial Building

Re: *Guarantee*

For value and regular monthly subsidy received from the Hong Kong Association for Democracy and People's Livelihood ("the Association") to *Kwai Ching District Office of the Association ("the District Office")* for the calendar month of *Dec, 93* for the sum of Hong Kong Dollars Twenty Thousand only (HK\$20,000) ("the said subsidy"), I, *LEUNG KWOK CEHONG (梁廣昌)*, holder of Hong Kong Identity Card No.*E629832(3)*, of [*address given*] HEREBY PROMISE UNDERTAKE AND GUARANTEE to pay to or to the order of the Association ("the Lender") the said subsidy and interest thereon at the rate of 5% per annum on receiving demand from the Lender. I further PROMISE GUARANTEE AND UNDERTAKE to make good in default on the part of the District Office in payment of any sums of moneys and subsidy advanced to the District Office by the Lender as aforesaid and interest thereon at the rate of 5% per annum or in performance and observance of the terms covenants and conditions contained in this Guarantee.

I HEREBY DECLARE that I fully understand that the said subsidy shall be used for the expenses in relation to community services delivery in *Kwai Ching* AND I shall deal with the said subsidy with utmost goodfaith and have duty to ensure and

guarantee that the said subsidy be used for for prescribed purpose only AND I PROMISE GUARANTEE AND UNDERTAKE to return the said subsidy together with interest thereon from the date hereof until payment at the rate of 5% per annum forthwith to the Association in the event that I, the said *Leung Kwok Cheong*, have withdraw from the Association or been decline or ceased membership qualification by the Association to be its full member on or before the 30th day of September 1999.

Dated this 1st day of

\_\_\_\_\_.

SIGNED SEALED AND )  
 DELIVERED by )  
 the Guarantor, *LEUNG* ) (sd) illegible  
*KWOK CHEONG* )  
 holder of Hong Kong Identity )  
 Card No. )  
*E629832(3)* )  
 In witness to the above )  
 signature by: )  
 [*no witness signature*] ]  
 (Italics added)

29. It is immediately apparent on the face of the guarantees that the ten \$20,000 payments were made to the "District Office of HKADPL" months before Leung entered the 1994 District Board election. Although one cannot rule out absolutely, without hearing evidence, that the 10 payments had no connection with Leung's candidature, Mr. Yam's case of illegal payments based on the Ordinance is highly questionable.

30. I have so far resisted the temptation to comment on Mr. Yam's handling of this case. I think now is the time to point out some inadequacies. There is a simple defence to the claim by HKADPL based on the guarantees. All the written guarantees signed by Leung are plainly secondary liability guarantees. They are not indemnities. It is trite law that a secondary guarantor is not liable and cannot be sued until recourse to the primary

debtor, in this case the District Office of HKADPL (possibly HKADPL itself), has been exhausted. However, the Amended Defence does not plead this point.

31. There is another defence, based on the doctrine of illegality, that can be raised. The ten \$20,000 payments were, as is apparent on the written guarantees, loans with interest over a course of ten months. In other words, HKADPL habitually and regularly lent out money. Moreover, Regulation 1.2 in the 3-tier Regulations provides that HKADPL "will" provide financial support to its members running in elections. The Guidelines quoted supra also expressly states "loan to be provided to each candidate". HKADPL had therefore made it one of its many functions or businesses to lend money.

32. The following provisions in the Money Lenders Ordinance, Cap. 163 becomes relevant:-

## 2. Interpretation

### ┌ (1)

"loan" (貸款) includes advance, discount, money paid for or on account of or on behalf of or at the request of any person, or the forbearance to require payment of money owing on any account whatsoever, and every agreement (whatever its terms or form may be) which is in substance or effect a loan of money, and also an agreement to secure the repayment of any such loan, and "lend" (貸出) and "lender" (貸款人) shall be construed accordingly;

"money lender" (放債人) means 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, but does not include -

- (a) a person specified in Part I of Schedule 1; or
- (b) as respects a loan specified in Part 2 of Schedule 1, any person who makes such loan;

## 7. Restricted on carrying on of Business of money lender



- (1) No person shall carry on business as a money lender -
- (a) without a licence;
  - (b) at any place other than the premises specified in such licence; or
  - (c) otherwsie than in accordance with the conditions of a licence.
- (2) A licence shall be in the prescribed form.

### 23. Loan etc. not recoverable unless money lender licensed

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 satisfied 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. ]

33. *Ex facie*, the ten \$20,000 payments were loans in contravention of the Money Lenders Ordinance, Cap. 163. Unless HKADPL can produce a valid money lender's licence or show that it would be inequitable to refuse recovery of the whole or part of the \$200,000, this part of the claim against Leung must fail. So far, there is no redeeming evidence from HKADPL.

Moreover, the written guarantees relied upon by HKADPL show that the 10 payments were paid to "The District Office" of HKADPL, not to Leung direct. If Leung is no more than a guarantor, I think it is at least arguable that HKADPL cannot rely on the proviso in section 23 of the Money Lenders Ordinance, Cap. 163 to salvage the guarantee agreement for that proviso may be construed as applying to discretionary recovery of loan against the principal debtor only.

34. It may be argued that since the Amended Defence has not prayed in aid the prohibitive Money Lenders Ordinance, Cap. 163, the court is not entitled to have regard to the effects of that Ordinance on this case. The answer to that is in Paragraph 17-196 (p.943) of *Chitty on Contracts, General Principles*, 28th Edition:-

[ *Pleading of illegality*. Where a contract is *ex facie* illegal, the court will not enforce it, whether the illegality is pleaded or not; secondly, where the contract is not *ex facie* illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded; thirdly, where unpleaded facts, which, taken by themselves, show an illegal object, have been put in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it; but fourthly, where the court is satisfied that all the relevant facts are before it and it can clearly see from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not. It has been said that the counsel is not acting improperly in inviting the court to consider the possible, though unpleaded, illegality of a transaction but that on the contrary counsel's duty is to prevent the court from enforcing illegal transactions. ]

It should be noted that the rule enabling a court of first instance to refuse to enforce an illegal contract without specific pleading applies to appellate courts as well. See **Snell v. Unity Finance Ltd.** [1964] 2 Q.B. 203.

*Money had and received*

35. As an alternative cause of action, HKADPL also claims against Ting and Leung for the various sums so far considered as money had and received. In my view, illegal payments made under whatever pretence or arrangement are not recoverable as a matter of policy. Such policy is applicable irrespective of the cause of action. It would be absurd if the court rules that an illegal loan is irrecoverable and yet allows a plaintiff to succeed on a tortious claim for conversion against the debtor. Thus, once the court holds that funds passed to Ting and Leung are tainted by illegality, the same are not recoverable as money had and received or under any other cause of action.

### *The Contributions*

36. Claims (a) and (b) against Ting and Leung are for contributions under the DB Regulations or the 3-tier Regulations on account of honoraria granted by the government to Ting and Leung as respectively Regional Councillor and District Board member. The contributions were fixed by the DB Regulations or the 3-tier Regulations as a percentage of the relevant honorarium.

37. Two of the defences relied upon by both Ting and Leung vis-à-vis the claims for contributions is that the DB Regulations and the 3-tier Regulations containing provisions for the contributions are *not intended* by the parties "to have the effect alleged in the Amended Statement of Claim or any contractual effect at all". See Paragraph 7 of Ting's Amended Defence and Paragraph 4 of Leung's Amended Defence. In so far as want of intention to create legal relationship is concerned, I doubt very much if any court would lightly come to the conclusion that the parties who went so far as to band together as a political body and frame constitutional rules for the political body did not mean to create enforceable legal relationship. There is, however, more substance in the defence that the Constitution and/or the Regulations have no contractual effect at all.

38. It is trite law that a promise, in this case the promise to make contributions, is not binding as a contract unless it is supported by some consideration. See Paragraph 3-001, *Chitty on Contracts, 28th Edition, Volume 1*. The Amended Statements of Claim do not plead any consideration for the promise by Ting and Leung to make contributions. In cases of this kind, there is no presumption of consideration. In fact, Paragraph 2.4 of the 3-tier Regulations says that the contributions were "so

as to assist in the promotion of affairs of the Association". So, *prima facie*, the alleged promises by Ting and Leung to make contribution were not supported by any consideration and thus not enforceable.

39. It may be argued that there was consideration moving from HKADPL in that Ting and Leung would enjoy the facilities or services provided by HKADPL. However, every member (including those who would not become member of District Boards, Urban/Regional Council or Legislative Council) by definition enjoyed the same consideration of facilities and services. Why should Ting and Leung be held liable for an additional promise to make contribution when they as ordinary members already could enjoy the facilities and services of HKADPL? In other words, since HKADPL was already contractually bound to provide facilities and services to Ting and Leung qua ordinary members, no fresh consideration was furnished by HKADPL for the extra or new promise by Ting and Leung to make contributions. Paragraphs 3-060 to 3-064 in *Chitty on Contract, 28th Edition, Volume I*, discuss in depth the theoretical bases of such problem and concluded that in any case the extra or new promise would not be enforceable.

40. Paragraphs 3-065 to 3-066 in *Chitty on Contract, 28th Edition, Volume I*, acknowledge that the promisee (in this case HKADPL) may prove other consideration to support the extra or new promise to render the promise enforceable. I cannot see what "other consideration" HKADPL could have provided except perhaps "support in terms of manpower, resources and finance will be given by the Association to (enable the candidate to) participate in the election" pursuant to Clause 1.2 of the Constitution.

41. If the extra or new promises to make contribution were made in consideration of support for election, it would be illegal because Ting and Leung would be making and HKADPL would be accepting "promise ... or agreement ... to procure the return of any person to serve on anybody ...". See Sections 5(c) and (d) of the Ordinance. Such promise being illegal must be unenforceable.

42. During at least two separate interlocutory hearings I have pointed out to the parties that the arrangement for contribution out of honoraria for elected offices may well be objectionable. Falling short of a direct invitation to Ting and Leung to amend pleadings, I have done my utmost to warn all parties that they should address the issue of the legality of contributions out of honoraria for elected offices. However, no step has been taken by any party to place the issue before the court. If the parties believe that the issue

can be taken out of the purview of the court by silence in the pleadings and submissions, they must be wrong. It has already been shown that the court is entitled to refuse to enforce any arrangement that is prohibited by law or legal policy.

43. In the premises, whether on the ground of want of consideration or illegality, the alleged promises by Ting and Leung to make contributions are unenforceable. I would hold that claims (a) and (b) against Ting and Leung must fail too.

44. I have not gone into the question of whether public policy would endorse an arrangement whereby a member of a political party pledges after his election to office to make contribution to party funds out of honorarium from his elected office. Such pledge, arguably not a contravention of Section 5(c) or (d) of the Ordinance, may be regarded as leading to certain undesirable results. But the two cases before me do not involve *ex post* election pledges.

45. In conclusion, all claims (except for \$4,845 against Ting) should be dismissed. However, since this is my ruling on preliminary issues, I would invite counsel for the parties to make further submission on the terms of final judgment or further conduct of this action and consequential matters.

( Z.E. Li )  
District Judge

Representation:

Mr. Lawrence Ng instructed by Messrs. Yip, Tse & Tang for the Plaintiff  
(in both cases)

Mr. Stephen Yam instructed by Messrs. Yolanda Fan & Co. for the  
Defendant (in both cases)

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CORRIGENDUM  
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Please note that in page 14, paragraph 13, line 20 from the top of the page, delete the repeated subsection (2) of section 8A. There should be one subsection (2) within the quoted section 8A.

Dated this 26th November 2001

(Y.K.Chan)  
Clerk to His Honour Judge LI