



IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

(COMMERCIAL DIVISION)

[SUIT NO: D-22-1673-2008]

BETWEEN

LEONG CHOOI PENG

...

PLAINTIFF

AND

**TEE YAM
(NO K/P: 580307-10-5485)**

...

DEFENDANT

THE JUDGMENT OF JUDICIAL COMMISSIONER

LEE SWEE SENG



Prologue

Does the Moneylenders Act 1951 as amended by the Moneylenders (Amendment) Act 2003 prohibit an individual from lending and charging interest on the so-called friendly loan given to another individual in need? We have heard so often that a friend in need is a friend indeed. Or does Parliament dictate and direct that in so helping one must be completely altruistic with no expectation of a larger sum being repaid? What if a larger sum is volunteered-does the whole transaction become unenforceable?

This judgment shall explore some of the questions we have always wanted to ask on moneylending but perhaps have no occasion to explore.

Parties

The Defendant was in need of money. The Defendant knows the Plaintiffs husband. The story transpired that the Plaintiff had borrowed a sum of RM2 million as a friendly loan from the Plaintiff. The Plaintiff said that the Defendant promised to pay back very fast within 3 to 4 months. The loan was given on 8 October 2003. The Plaintiff prepared a Promissory Note dated 8 October 2003 for the Defendant to sign. Basically it states that the Defendant agrees to pay to the Plaintiff RM2 million on or before 8 April

2004 with interest of RM1.00 The above is set out in paragraph 3 and 4 of the Statement of Claim.

Problem

The next day according to the Plaintiff, the Defendant volunteered to pay interest and so he gave a cheque for RM40,000.00. The Plaintiff said that there were 6 monthly payments of RM40,000.00 all in dates as follows: 9 October 2003, 9 November 2003, 9 December 2003, 9 January 2003, 9 February 2003 and 9 March 2003. The Plaintiff said that this represented the Defendant's payment of interest of RM40,000.00 per month until full payment of the loan by 8 April 2004 which the Defendant freely volunteered to pay without the Plaintiff ever asking for it.

The Defendant said the payment of RM40,000.00 per month was never an interest payment but a repayment towards reducing the loan. He said this in his Defence and in his affidavit filed to successfully resist summary judgment by the Plaintiff. He said he would not have agreed to an amount of interest which worked out to 2% per month or 24% per annum!

The Defendant defaulted after 9 March 2004. From time to time he did make some payments. Whilst in the pleadings there appear to be some disputes as to the amount that the Defendant had paid the Plaintiff, at the

submission stage the parties agreed that the Defendant had paid the Plaintiff all in a sum of RM1,390,000.00. The only dispute was whether these payments were towards reduction of the loan of RM2 million or whether as the Plaintiff claimed, the sum of RM240,000.00 being interests paid so far and a further sum of RM1,150,000.00 being towards principal.

The claim was made less convoluted by both parties agreeing to take the payment of the Plaintiff towards a unit of condominium developed by a company controlled by the Defendant out of the equation for this loan repayment.

Prayer

The Plaintiff had prayed for the following:

- (a) the balance of the principal amount of RM850,000.00;
- (b) interest per month as volunteered by the Defendant himself from 9 October 2003 for RM2,065,000.00 (as at 9 July 2008 and continuing);
- (c) costs on a full indemnity basis as between solicitor-client and
- (d) such further and other reliefs as deemed fit and necessary by the Court.

The Defence of the Defendant is that the interest of RM40,000.00 per month was never volunteered by the Plaintiff and that the interest is excessive and bad in law and the loan transaction is illegal.

Parol Evidence and Principles

Whether the Defendant did volunteer to pay the Plaintiff interest on the friendly loan.

As the fact of the loan of RM2 million from Plaintiff to Defendant is not in dispute this Court will focus on the true nature of the payments of RM1,390,000.00 received, the last payment of RM100,000.00 having being made on 18 April 2008.

The Plaintiff was severely cross-examined by the Defendant's counsel, Dato' Rabinder Singh. She said she did not know how her husband came to know the Defendant.

"Q: Yet you gave Defendant RM2 million?

A: Yes.

Q: RM2 million belong to who?

A: To me. I am a housewife. I have a Form J for a maid application. I have income from rental of 8-9 properties.

Q: Can you explain how you have the monies?

A: My husband gave me the monies. He is a businessman in Hong Kong. He is a Hong Kong resident and into restaurant and real estate business.

Q: Put that this was never a friendly loan to begin with. This was a loan shark transaction.

A: Disagree.

Q: The monies you have loaned out are monies frequently used for monthly lending transactions.

A: Disagree."

Learned counsel for the Defendant said he was not unaware of the dicta of his Lordship Mokhtar Sidin JCA in *Tan Aik Teck v. Tang Soon Chye*, [2007] 5 CLJ 441 at page 451-452 where his Lordship remarked:

"....The defendant contended that from the evidence of the plaintiff himself, the plaintiff met the defendant about two or three times before the loan was given and as such it could not be a friendly loan. ...A friendly loan is opposed to the normal borrowing from a moneylender or financial institution. **A friendly loan is a loan**

between two persons based on trust. There may be an agreement such as an I.O.U. or security pledged to repayment but most important there will be no interest imposed.

....In my view, a friendly loan is a loan given by the lender to the borrower based on mutual trust whereby the borrower was to repay the loan amount within the specified time with no interests charged..."

(emphasis added)

Whilst the element of trust and the absence of any interest charged are what qualify a loan to be a friendly loan, one must not discount the fact that human nature being what it is, the bigger the loan the deeper the degree of trust which trust comes from a deeper degree of personal knowledge that the lender has of the borrower. Otherwise it does not make sense as there is no interest chargeable to lend so big an amount and risk the loan not being recoverable at all.

It is therefore not totally irrelevant to inquire into the kind of relationship that the lender has with the borrower. From the scant testimony of the Plaintiff of the nature of the relationship that her husband had with the Defendant one can be forgiven to conclude that with the Defendant it is even more

distant and detached; certainly not borne out of any bonding of shared experience.

I do not think I am exaggerating in saying our ears would prick up upon hearing that a borrower in a friendly loan of RM2 million would return the very next day to 'volunteer' to pay interest at the rate of 2% per month (24% per annum) for every month until the repayment of the loan in 3 to 4 month's time. Indeed a sum of RM40,000.00 per month was paid by the Defendant the very next day and subsequently for the 5 months to follow thereafter making a total sum of RM240,000.00.

Why would any borrower do that when the loan has already been taken and there was no need to pay until 8 April 2004 with an interest of RM1.00 as agreed and not disputed by the Defendant? It certainly does not make for commercial sense, let alone common sense.

The Defendant's contention in his Defence and in his affidavit to oppose successfully the summary judgment application of the Plaintiff is that the said sum of RM40,000.00 was payment towards the loan and not interest. If it was indeed interest, why were there no receipts to acknowledge that the payments received were interest as volunteered by the Defendant.

Learned counsel for the Plaintiff, Miss Shapna Rani, contended that as the Defendant chose to submit no case to answer, all that the Plaintiff gave in her evidence must be invariably accepted as true.

What happened after close of the Plaintiffs case was this as recorded in the notes of proceeding:

“Defendant's counsel says that his client is unable to come because he is undergoing medical treatment under a neurologist at the Ampang Puteri Specialist Centre.

In any event, the Defendant's counsel said that his client is prepared to accept that the property transaction (as pleaded) is a separate transaction not linked to this current (loan) transaction.

Therefore what remains is one issue of fact and law which is whether the RM240,000.00 paid from Oct 2003 to March 2004 *vide* 6 separate cheques of RM40,000.00 each all dated the 9th of every month is paid as interest at 2% per month on the principal sum or whether it was paid towards reduction of the principal.

The Defendant is prepared to leave that to the Court to decide after submissions made by both parties.

Defendant's counsel said: "What I am doing is tantamount to submitting no case to answer and I would not be calling any witnesses."

The medical certificate was produced to the Court. As the Defendant's counsel had submitted a no case to answer, all that remained for the Court to assess and evaluate is the evidence given by the Plaintiff and specifically the nature of payment of RM240,000.00 and the enforceability of interest of RM40,000.00 being interest at the rate of 2% per month until the repayment date of the loan.

I take the view that even though the Defendant had not given evidence, it does not mean that I must accept uncritically the evidence of the Plaintiff.

I find that the Plaintiff was trying to improve her position as a lender by saying that it was the Defendant himself who volunteered the interest payment at a whopping 2% per month!

Even if there was such a payment as interest, I hold that it was not freely volunteered by the Defendant but rather imposed unilaterally on the Defendant and more so when the Promissory Note signed by the Defendant is silent on such a monthly interest payment.

The Promissory Note dated 8 October 2003 signed by the Defendant which was not stamped until 15 December 2010 reads:

“FOR VALUE RECEIVED

I, Dato' Tee Yam....of City Growth Sdn Bhd at 41-1A, Jalan Pandan 2/3, Pandan Jaya, 55100, Kuala Lumpur HEREBY PROMISE to pay to Leong Chooi PengTwo Million (RM2,000,000.00) on or before 8th April 2004 with an interest of RM1.00.

Should default be made by the said Dato' Tee Yam in payment of the said sum of RM2,000,000.00 to the said Leong Chooi Peng be at liberty to commence legal proceedings forthwith for recovery of whole of the said sum RM2,000,000.00 together with interest at the rate to be determined by Leong Chooi Peng and the costs on an indemnity basis to such legal proceedings.

Dated this 8th day of October 2003."

There is yet another reason for rejecting the version of the Plaintiff that the Defendant had volunteered such an interest payment at such an exorbitant rate. It is after the loan contract had been concluded and any subsequent agreement on interest be it volunteered by borrower and accepted by lender is not supported by consideration. Policy wise it is dangerous for the

Court to accept such a proposition of the borrower having volunteered interest payment as it is always easy for the lender to say that as an after event and very difficult for the borrower to refute. There is much wisdom in the saying that the borrower is a servant to the lender, nay even a slave of the lender in some situations and there is little that the borrower can do to protest. It also operates as a debt of gratitude that has an overwhelming obeisance as one weighed down under its onerous burden.

At any rate it is not open to the Plaintiff to charge interest of any amount as the fact that the Plaintiff had described the loan as a friendly loan would mean on the authority of Court Of Appeal case of *Tan Aik Teck v. Tang Soon Chye (supra)* that no interest is chargeable on a friendly loan. That being the case, assuming for a moment that the Defendant did volunteer to pay interest which the Plaintiff gladly accepted, this Court is perfectly entitled to treat the so-called interest payment of RM240,000.00 as payments towards reduction of the principal loan sum as it would be unconscionable for the Plaintiff to retain the sums paid as interest.

It addresses too the temptation of a licensed moneylender to have as a front side of its business a moneylending in accordance with the Moneylenders Act 1951 whereby only an interest not exceeding 12% per annum shall be chargeable for a secured loan and as for an unsecured

loan not exceeding 18% per annum and a back side of the business where a loan is given from an individual (may be a support staff, spouse or servant of the boss of the licensed moneylender company) where interest at more than the stipulated rates are charged according to the needs of the borrower. Such an ill cannot be completely eradicated but perhaps can be contained if an individual who lends to another is not allowed to charge that kind of exorbitant interest that even a licensed moneylender would blush - all under the guise of the borrower having volunteered to pay the excessive and exorbitant interest. How easily the thin veneer of help can vanish and be replaced by a vampire of the venomous variety that would haunt the borrower until every single sen is paid!

Whether the Plaintiff in a friendly loan can be allowed to charge interest at all.

The loan agreement was entered into on 8 October 2003. Subsequent to that, on 1 November 2003, some major changes to the Moneylenders Act 1951 (MA) came into force. The changes brought about by the Moneylenders (Amendment) Act 2003 (MAA 2003) Act A1193 -PU(B) 332/2003 changed the terrain and topography of the law relating to loan transactions between individuals who are not licensed moneylenders.

The definition of "moneylender" was amended to read:

"moneylender" means any person who lends a sum of money to a borrower in consideration of a larger sum being repaid to him.

The MAA 2003 deleted Section 2A(1)(h) of the MA on "Persons Exempted" that reads:

"(h) any person *bona fide* carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money"

Section 3 of the MA was deleted by the MAA 2003 and so now there is a total absence of that section that used to read as follows:

"3. Certain persons and firms presumed to be moneylender

Save as excepted in section 2A(1) and (2), any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary be proved to be a moneylender."

The combined and cumulative effect of the various amendments highlighted is this: so long as one lends to another in consideration of a larger sum being repaid to him and that person does not have a

moneylender's license, then the transaction is an unlicensed moneylending transaction.

Section 15 of the MA is clear. It reads:

15. Contract by unlicensed moneylender unenforceable.

No moneylending agreement in respect of money lent after the coming into force of this Act by an unlicensed moneylender shall be enforceable.

One therefore must read with caution cases decided under the old regime before MAA 2003 came into force on 1 November 2003. There were many decided cases dealing with the whole issue as to whether a single transaction of the lender in charging interest on a friendly loan would amount to a moneylending transaction or whether it requires a series of transactions. The case of *Muhibbah Teguh Sdn Bhd v. Yaacob Mat Yim* [2005] 4 CLJ 853 was decided for instance under the old regime. The cases quoted therein in determining whether there had come into existence the "business of moneylending" are no longer relevant under the amendments introduced by MAA 2003 that had redefined the meaning of "moneylender", "moneylending", deleted section 2A(1)(h), deleted the presumption of moneylending by deleting section 3. It might be argued that

the presumption is no longer necessary as a single transaction of loan in consideration of a bigger sum to be repaid makes the transaction irrevocably and irrebuttably a business of moneylending.

Indeed the prohibition was so strict that the Minister in charged had to subsequent to the implementation of the MAA 2003 enlarged the list of persons in the First Schedule of the Act that are exempt from its application pursuant to section 2A(1). The list now includes:

"9. Any company who lends money to its related corporation as defined under the Companies Act 1965 [*Act 125*].

10. Any company who lends money to its director, officer or employee as a benefit accorded to such person under his terms of employment."

Therefore under the new regime introduced by the MAA 2003, we no longer have to tread the thin line between when and whether a single transaction is being excluded from being a moneylending transaction and a series of transactions evolving to be a moneylending transaction.

The dilemma under the pre-MAA 2003 era was captured in the words of Vincent Ng J (as he then was) in *Muhibbah Teguh's* case (*supra*) where his Lordship after referring to the two Federal Court cases in *Chellappah*

Rasadurai v. Selvadurai [1971] 2 MLJ 170 and *Chellappah v. Official Assignee* [1971] 1 MLJ 24 said:

“The question is, how do we resolve the above views of the Federal Court in the light of s. 2A(1)(h) read with s. 2 of the Act as elucidated by the Privy Council in *Chow Yoong Hong v. Choong Fah Rubber Manufactory* [1960] 1 LNS 17; [1962] MLJ 74 (on system and continuity) and *Esmail Sahib v. Noordin* [1951] 1 LNS 19; [1951] MLJ 98 (on system) and *Ngui Mui Khin* [1980] 1 MLJ 9 (FC) (the Act does not apply to moneylending transaction but only to moneylenders).

It is axiomatic that one or two moneylending transactions (even in consideration of a larger sum) does not make the lender a moneylender within the purview of the definition of 'moneylender' in s. 2 of the Act. It is also axiomatic that the Act is intended to apply to moneylenders exclusively and not to moneylending transaction or transactions *per se*. This statement of law was again affirmed by Federal Court in *Yeep Mooi v. Chu Chin Chua & Ors* [1960] 1 LNS 169; [1981] 1 MLJ 14 which I shall discuss later in this judgment. (See also *Cheong Kim Hock* [1992] 2 SLR 349, *Lek Peng Lung* [1992] 2 SLR 150 and *Subramaniam Dhanapakiam* [1991] 2 MLJ 447.)

In *Chow Yoong Hong* the Privy Council had this to say:

The Court of Appeal likewise dealt only with this question; and in dealing with it concerned themselves very closely with the true meaning and effect of section 3 of the Ordinance. This section is not in their Lordships' opinion in the circumstances of this case of great significance, but in view of the different approach by the Judges in the Federation of Malaysia, they think it desirable to make some comment on it.

Section 3 provides that 'any person who lends a sum of money in consideration of a larger sum repaid shall be presumed until the contrary be proved to be a moneylender'. The effect of this section has been considered by Thomson J (as he then was) in *Sandhu Singh v. Sellathurai* [1955] MLJ 117 in a judgment which their Lordships respectfully approve and adopt. To lend money is not the same thing as to carry on the business of moneylending. In order to prove that a man is a moneylender within the meaning of the Ordinance, it is necessary to show some degree of system and continuity in his moneylending transactions. If he were left to discharge this burden without the aid of any presumption, a defendant might frequently be in a

difficulty. He might have had only one or two transactions with the moneylender and he might find it difficult to obtain evidence about the business done by the moneylender with other parties. Section 3 enables a defendant to found his claim on proof of a single loan made to him at interest, it being presumed, in the absence of rebutting evidence, that there were sufficient other transactions of a similar sort to amount to carrying on of business.”

Learned counsel for the Plaintiff was at pains to put the point pungently across that as the loan was taken on 8 October 2003 before the amendments effected by the MAA 2003 on 1 November 2003, then the old regime applies and that a single loan transaction in this case of RM2 million is not caught by a subsequent charging of interest be it at 24% per annum. In any event the Defendant not having present himself to give evidence and to be cross-examined, was in no position and had not shown that the Plaintiff was in the business of moneylending.

However the intention of Parliament that is presumed not to have acted in vain can also be discerned from section 46 of the MAA 2003 which deals with the subject of 'Saving and transitional' where it is provided under section 46(5) as follows:

"Where on the appointed date an agreement, whether oral or written, exists between a moneylender and a borrower for the repayment of money lent by the moneylender to the borrower, the moneylender shall cause to be executed by him and the borrower, not later than thirty days after the appointed date-

(a) a moneylending agreement in the prescribed form in respect of the unpaid sums or instalments payable by the borrower to the moneylender, but such agreement is not required to be attested in accordance with the principal Act as amended by this Act; and

(b) the terms of the agreement shall be not less favourable to the borrower than the terms provided for under the principal Act as amended by this Act."

It can be said without fear of contradiction that even valid moneylending transactions already entered into prior to the MAA 2003, have with the coming into force of the amendment, to comply with the new requirements of the execution of a fresh agreement in the prescribed form for unsecured loan in Schedule J and for secured loan in Schedule K under the Moneylenders (Control & Licensing) Regulations 2003 with interest not exceeding 18% and 12% per annum as set out in section 17A of the MA as

amended by MAA 2003. Section 17A(3) MA further provides that if more interest than the prescribed rate is charged then that agreement shall be void and have no effect and shall not be enforceable. *A fortiori*, a friendly loan where interest is volunteered or imposed and agreed is no less affected by the new regime and hence not capable of being chargeable under the new regime as to allow that would contradict both the spirit and intent of Parliament.

See also a similar situation involving a franchise entered into before the Franchise Act 1998 came into force and which renewal was covered by the Franchise Act 1998 in *Noraimi Alias v. Rangkaian Hotel Seri Malaysia* [2009] 9 CLJ 815.

I therefore hold that the Plaintiff cannot charge any interest at all from the date of coming into force of the amendment to the MA *via* the MAA 2003 effective 1 November 2003.

Even if I were wrong in so holding, it is my finding of fact as earlier stated that there was no agreement on the interest at the rate that works out to be 24% per annum and that all payments of the so-called interest of RM240,000.00 is both excessive, exorbitant and unconscionable and ought to be treated as payment towards reduction of principal as contended by

the Defendant all along as having being paid to reduce the principal loan sum.

I am further fortified in my view by the reference in section 21(1) MA as amended by MAA 2003 to a situation where the money was lent before the commencement of the Act which states as follows:

"Where the proceedings are taken in any Court by a moneylender for the recovery of any money lent **after the commencement of this Act** or the enforcement of any moneylending agreement or security made or taken **after the commencement of this Act** in respect of **money lent either before or after the commencement of this Act**, he shall produce a statement of his account as prescribed in section 19." (emphasis added)

The vast powers of the Court in determining the dispute that comes before it for decision where the Plaintiff has charged excessive or exorbitant interest is captured in section 21(2) of the MA. Section 21(8) provides that for the purposes of this section, interest charged in respect of money lent by a moneylender is excessive where the rate of that interest exceeds the maximum rate of interest permitted under this Act. Section 17A sets the

interest for a secured loan to be not exceeding 12% per annum and that for unsecured loan to be not exceeding 18% per annum.

Section 21(2) reads:

"Where there is evidence which satisfies the Court that the **interest charged in respect of the sum actually lent is excessive** and that the **transaction is harsh and unconscionable or substantially unfair**, the Court shall reopen the transaction and take an **account between the moneylender and the person sued** and shall, **notwithstanding** any statement or settlement of account or any **agreement purporting to close previous dealings and create a new obligation**, reopen any account already taken between them and **relieved the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest and legal costs as the Court**, having regard to the risk and all the facts and circumstances of the case (including facts and circumstances arising or coming to the knowledge of the parties after the date of the transaction) **may adjudge to be reasonable**, and, if such excess has been paid or allowed in account by the debtor, may order the creditor to repay it and may set aside either wholly or in part or revise or alter any

security given or moneylending agreement made in respect of money lent by the moneylender and, if the moneylender has parted with the security, may order him to indemnify the borrower or other person sued:

Provided that nothing in this subsection shall prevent any further or other relief being given in circumstances in which a Court of equity would give such relief.” (emphasis added)

In other words the Court's hands are not tied where it is difficult to assess the true nature of the payments made. Whilst I have stated that there was no agreement reached on the payments of RM240,000.00 as interest, even if interest at the rate of 24% per annum had been volunteered by the Defendant and accepted by the Plaintiff as the Plaintiff would have us believe, that by itself does not prevent the Court from holding that the interest charged is excessive and that the transaction is harsh, unconscionable or substantially unfair.

The interest alone claimed from 9 October 2003 till 9 July 2008 is RM2,065,000.00 and continuing. The loan is only RM2 million. I need not say more to show that it is harsh and unconscionable!

Instead of making micro-measurement as to where the scale of justice should tilt, I hold that the sum of RM240,000.00 paid is to be treated as payment towards reduction of the principal of RM2 million.

Whether the charging of interest on a friendly loan would render the whole principal loan irrecoverable under section 15 Moneylenders Act 1951.

Section 15 MA as amended by the MAA 2003 provides that no moneylending agreement in respect of money lent after the coming into force of this Act by an unlicensed moneylender shall be enforceable.

The Plaintiff admits she is not a licensed moneylender. Her activity in demanding and charging interest at the rate of 24% per annum *albeit* she said the Defendant volunteered, made a her moneylender and an unlicensed one at that. The Promissory Note allows her to charge interest at a rate to be determined by her should the Defendant failed to pay in full on or before 8 April 2004. It would appear that she was quite content to charge interest at the rate of 24% per annum seeing that she had not pleaded a different interest rate after default nor given a different interest rate in her evidence.

Under the circumstances of the case where the loan was taken very near to the date of the amendments to the MA, being just 22 days before the

amendments, perhaps the Plaintiff may be forgiven for not having known the new regime introduced by the MAA 2003. Whilst everyone is presumed to know the law, the fact of the matter is that in reality this is not so as even lawyers do not know what the law is sometimes. In any event it does not appear to be a case where both parties are in *pari delicto*.

The first time the Defendant raised the issue of illegality was the response from his solicitors Messrs Rabinder Budiman & Associates dated 24 July 2008 to the Plaintiff's solicitors Messrs Shopna Rani Malakar & Co Letter of Demand dated 22 July 2008. The relevant part of the said letter reads:

We have been instructed that our client vehemently denies the exorbitant interest charged by your client amounting to 2% (per month). As you are aware the charging of interest on a purported friendly loan (which is denied herein) based on a promissory note is both illegal and unreasonable especially in the light of our client having paid over RM1,150,000.00 to your client.”

If it were otherwise this Court would have no compunction in declaring the whole amount under the agreement unenforceable being null and void for being illegal as in prohibited by law. This is a fit case for the application of section 66 of the Contracts Act 1950.

I can do no better than follow the precedent set by his Lordship Azmi L.P. in the Federal Court case of *Ng Siew San v. Menaka* [1973] 2 MLJ 154 where at page 156 his Lordship opined:

"Section 66 reads as follows:-

66. When an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it."

In deciding this question the learned judge firstly made the following findings:

that both parties had no knowledge of the illegality until the affidavit by Nachiappa Chettiar had been filed, and

there was no evidence upon which such knowledge could be imputed to either of them.

At page 157 his Lordship continued:

"24. The consideration or object of an agreement is lawful, unless-

(a) it is forbidden by law; or

- (b) it is of such a nature that, if permitted, it would defeat the provisions of any law; or
- (c) it is fraudulent; or
- (d) it involves or implies injury to the person or property of another; or
- (e) the court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

From the above provisions the agreement in the instant case being forbidden by law is thereby void. The principle is clearly stated by Parke B. in *Cope v Rowlands* [1836] 2 M & W 149 at p 157 in the following words:-

"It is perfectly settled that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the

statute inflicts a penalty only, because such a penalty implies a prohibition. And it may be safely laid down, notwithstanding some *dicta* apparently to the contrary, that, if the contract be rendered illegal, it can make no difference in point of law whether the statute which makes it so has in view the protection of the revenue or any other object. The sole question is whether the statute means to prohibit the contract.”....

The next question is whether section 66 of our Contracts Ordinance applies. I have already set out the grounds upon which counsel for Ng argued before us that section 66 could not apply to this case. In deciding this question in favour of Menaka the learned judge made two findings of fact namely, both parties were not aware of the illegality at the time of the execution of the documents and it was only discovered when the statement of defence was filed...

As to the effect of section 66, the learned trial judge cited the following passage from the judgment of Chandra Reddy C.J. in *Kanuri Sivararnakrishnaiah v. Vemun Venkata Narahari Rao* AIR 1960 And Pra 186 at p 188:

"It is manifest that in order to invoke this action, the invalidity of the contract or agreement should be discovered subsequent to the making of it. This cannot be taken advantage of by parties who knew from the beginning the illegality thereof. It only applies to a case where one of the parties enters into an agreement under the belief that it was a legal agreement, ie, without the knowledge that the agreement is forbidden by law or opposed to public policy and as such illegal.

The effect of section 65, (section 66 of the Malayan Contracts Ordinance) is that, in such a situation, it enables a person not in *pari delicto* to claim restoration since it is not based on an illegal contract but dissociated from it. That is permissible by reason of the section because the action is not founded on dealings which are contaminated by illegality. The party is only seeking to be restored to the *status quo ante*."

In the circumstances, I would say that the judge was right that Ng should restore the advantage he had received by returning the amount he received from Menaka. That is to say Ng has to return \$19,400 to Menaka.

Mr. Palasuntharam, however, argued that the learned judge should have awarded interest. He pointed out in the case of *Hamath Kaur v. Indar Bahadur Singh* LR 50 IA 69 the Privy Council awarded interest at the rate of 6% from the date of the institution of the suit in that case. I agree."

On further appeal to the Privy Council the decision of the Federal Court was affirmed in *Menaka v. Lum Kum Chum* [1977] 1 MLJ 91. Lord Fraser of Tullybelton in delivering the judgment of the Privy Council observed at page 94 the following:

"Mohamed Azmi J. gave effect to section 66 by finding that the advantage which the borrower had received under the contract was the sum of \$20,000 and that he should restore that sum to the appellant. But as he had made two payments of interest amounting together to \$600 the learned judge found that the \$600 was an advantage received by the lender and that it should be deducted from the \$20,000 leaving a balance of \$19,400 to be paid to the respondent who now represents the borrower. Leaving aside for the moment the question of whether any interest should also be payable, their Lordships agree with both Courts below that the principal sum of \$19,400 should be paid by the respondent to the

appellant. In that way effect will be given to section 66 under which each party is bound to restore any advantage which he has received to the person from whom he received it-see *Govindram Seksaria v. Radbone* [1947] LR 74 Ind App 295, 303 where Lord Morton of Henryton said:

“The result of section 65 of the Indian Contract Act was that, as from [the date on which the contract became void] each of the parties became bound to restore to the other any advantage which the restoring party had received under the contract of sale.”

Section 65 of the Indian Contract Act, 1872, is in terms identical with those of section 66 of the Contracts (Malay States) Ordinance, 1950. The principle underlying both sections is the same, and it is that

“a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation.”

See *Babu Raja Mohan Manucha v. Babu manzoor Ahmad Khan* [1942] LR 70 Ind App1, 10. ...”

Learned counsel for the Plaintiff referred my attention to the Court of Appeal case of *AEH Capital Sdn Bhd v. AM-EL Holdings Sdn Bhd And*

Another Appeal, [2008] 4 MLJ 487 where her Ladyship Zaleha Zahari, JCA, observed at page 502:

“The interest rate was 24.73% per annum (amounting to RM748,000) which amount was to be paid upfront on the date of drawdown of the loan. An 'Advisory Fe& at 4% flat amounting to RM160,000 was also imposed, which sum was to be paid upfront on the date of drawdown. AEH agreed to accept the securities offered by AM-EL as security for the loan. The offer letter expressly specified that the term loan was to be secured by a first party loan agreement for RM4,000,000 over the condominium units offered by AM-EL.”

Learned counsel for the Plaintiff said that by analogy if an interest rate of 24.73% per annum payable upfront was permissible in that case, then this Court should not interfere with the freedom to contract. However the facts can be distinguished. First it was decided under the pre-MAA 2003 regime and secondly the plaintiff was exempted from the rigours of the Moneylenders Act 1951 (Act 400) by virtue of s. 2A(2) of the said Act and that exemption had been gazetted in the *Government Gazette* No PU(B) 242 dated 15 May 1996 for a period of three years.

Having decided that the sum of RM1,390,000.00 paid by the Defendant is paid in reduction of the principal then there is a balance of RM610,000.00 that the Defendant should not take advantage of but restore it under section 66 of the Contracts Act 1950.

On the issue of interest on the balance sum of RM610,000.00 to be paid, my attention was drawn to the *dicta* of his Lordship Hashim Yeop A. Sani SCJ (as he then was) in *MBF Finance Bhd v. Malaysia Air Charter Co. Sdn. Bhd & Ors* [1987] 1 MLJ 718 at page 721:

"Reliance was placed on sub-paragraph (i) of section 16 of the Courts of Judicature Act 1964 which reads:

"16. Rules of Court may be made for the following purposes:

(i) for regulating the rate of interest payable on all debts, including judgment debts, or on the sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the court:

provided that in no case shall any rate of interest exceed eight per centum per annum, **unless it has been otherwise agreed between parties** (emphasis given);"

The main thrust of the submission was directed at the proviso and in particular the words in italics. It was the contention of learned counsel for the appellant that the italicized words in the proviso preserves the contractual rights of the parties and does not confer any power on the Rule Committee to interfere with the interest rate which the parties have agreed. And if a party had contracted to pay interest at the rate of 2% per month or 24% per annum this rate should *prima facie* be allowed by the court **unless a statute otherwise provides**. Learned counsel for the respondents conceded for the purpose of this appeal only that the appellant was entitled to charge interest at the agreed rate of 2% per month or 24% per annum up to the date of judgment under Section 11 of the Civil Law Act 1956 but objected to appellant claiming the same interest rate or any other rate in excess of the statutory limit of 8% after judgment had been entered. A recent decision of this Court [Lee Hun Hoe C.J. (Borneo), Wan Suleiman and Syed Agil Barakbah S.C.JJ.] in the case of *Supreme Finance (M) Bhd v. Koo Sin Ken* [1987] 1 MLJ 296 is cited in support of the proposition that "where a judgment is recovered in respect of a debt any other personal remedy for the same debt is extinguished or merged in the

judgment. In which case under Order 42 Rule 12 the interest will be at the rate of 8% per annum or such other rate not exceeding 8% per annum as the Court directs from the date of judgment until satisfaction...”

Here statute that is the MA as amended by the MAA 2003 prohibits the charging of interest for a friendly loan. As the last date of repayment was on 18 April 2008 I had exercised my discretion and ordered interest to run from 18 April 2008 to date of realisation.

Whether the Promissory Note dated 8 October 2003 and stamped on 15 December 2010 is admissible as evidence

The answer can be found in the *dicta* of his Lordship Salleh Abas FJ (as he then was) in the Federal Court case of *Malayan Banking Berhad v. Agencies Service Bureau Sdn Bhd & Ors* [1982] CLJ (Rep) 217 at pages 219 - 220:

"[Section 52(1) of the Stamp Ordinance 1949] No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered, or authenticated by any

such person or by any public officer, unless such instrument is duly stamped:

Provided that:

- (a) any such instrument shall, subject to all just exceptions be admitted in evidence on payment of the duty and the penalty, if any, chargeable in respect thereof under the provisions of s. 43 ors. 47 of this Ordinance:

It is clear that under this section except for certain types of instruments prohibition against admissibility of an instrument on account of not being duly stamped is not an absolute prohibition but conditional on payment of a duty or a penalty, if any, under ss. 43 and 47. The duty and the penalty required to be paid under s. 43 are those in respect of a bill of exchange or cheque or promissory note drawn outside Federation, whilst the duty and the penalty required to be paid under s. 47 are as regards instruments other than those stated in paras. (a), (b) and (c) of subsection (1) of the section namely:

- (a) a bill of exchange, cheque or promissory note drawn or made within the Federation; or
- (b) a receipt for money or other property the amount or value of which exceeds twenty dollars; or
- (c) a power or letter of attorney for the sole purpose of appointing or authorising a person to vote as proxy at one meeting only of a company or association,

Thus, it is clear that as to an instrument falling under any of these three categories the prohibition against admissibility is absolute. Unless it is stamped before or at the time of its execution as provided in s. 41 there is no way in which it could be admitted under proviso (a) to s. 52(1). In other words the prohibition is absolute or goes to the root or validity of the instrument. It is for this reason that in the case of *Navaradnam v. Suppiah Chettiar* [1973] 1 MLJ 173 no issue was raised or could possibly be raised that a promissory note rejected for lack of stamping should be impounded and admitted on payment of proper stamps. Proviso (a) to s. 52(1) simply does not cover such document. In the present case, however, the guarantee Exh. P2 is not a document which falls under any of the three

categories mentioned in subsection (1) of s. 47, and that being the case, Exh. P2 could be admitted in evidence in accordance with proviso (a) to s. 52(1) on payment of a penalty of RM25 under s. 47 of the Ordinance."

I have no doubt that the Promissory Note in question is inadmissible as evidence. Fortunately for the Plaintiff, the Defendant is not disputing that he had borrowed RM2 million from the Plaintiff and that he was to pay with RM1 interest on or before 8 April 2004. Thus though inadmissible the Promissory Note does not jeopardise the Plaintiffs claim in anyway save for the inability of the Court to know as no evidence was adduced as to interest at the rate to be determined by the Plaintiff in the event of default to pay and the enforceability of the term of costs on an indemnity basis in the event of a legal proceeding.

Pronouncement

Applying section 66 of the Contracts Act 1950 and as it is not disputed that the Defendant had paid RM1,390,000 towards the loan of RM2 million, the balance to be paid is RM610,000 which I so ordered and gave judgment to the Plaintiff with interest at 8% pa from 18.4.2008 (which was the date of last payment) to date of realisation.

Both the parties had at the outset agreed that the suit shall be determined without reference to the contra property.

I also ordered the Defendant to pay costs of RM30,000.00 to the Plaintiff.

Postscript

Perhaps Parliament has cast its net too wide in that in trying to stamp out the bad loan sharks it had also stymied the benign friends who can only be beneficial when in one's hour of need, help comes in a friendly loan where a borrower would not mind covering the cost of fund of the lender. Call it interest, call it a consideration of a larger sum being repaid - it is a harsh reality in a real world where the love of money is as much as the lack of money is a root of all kinds of evil.

There seems to be a change of heart in the Moneylenders (Amendment) Act 2010 (Act A 390) which came into force on 15 April 2011 *vide* P.U.(B) 174/2011. "Moneylender" has now been redefined to mean any person who carries on or advertises or announces himself or holds himself out in any way as carrying on the business of moneylending, whether or not he carries on any other business. A new section 100A now reads:

"Where in any proceedings against any person, it is alleged that such person is a moneylender, the proof of a single loan at interest made

by such person shall raise a presumption that such person is carrying on the business of moneylending, until the contrary is proved."

Being a rebuttable presumption, those cases that deal with the meaning of 'the business of moneylending' as referred to in *Muhibbah Teguh's* case (*supra*) might well prove relevant again in the future in resolving a once-off friendly loan transaction with interest.

Dated: 25 JULY 2011

Sgd
LEE SWEE SENG
Judicial Commissioner
High Court (Commercial Division)
Kuala Lumpur

COUNSEL

For the plaintiff - Shopna Rani; M/s Shopna Rani Malakar & Co

For the defendant - Rabinder Singh & Rosmah Rashi; M/s Rabinder Budiman & Associates

Date of Decision: 31 MAY 2011