

Dispute Resolution

Unlicensed Moneylending Agreements: Form vs Substance and Legal Implications of Purported Compromise

Introduction

Moneylending is a tightly-regulated business in Singapore. A contract for loan is peculiarly, and particularly, vulnerable to illegality challenges. A contractual framework may appear sophisticated, complex and layered but at times, once pierced to the core, could reveal a prohibited moneylending agreement. This was one of the key facets of the recent case of *Shanker s/o Neela Segaran and another v Right Angle Investment Holdings Pte Ltd and another (unreported)*. The Singapore High Court faced the question of whether in substance, as opposed to form, there was a triable issue of whether the transaction involved an illegal and unenforceable moneylending agreement.

The dispute concerned a series of written agreements in which the Plaintiffs purported to provide monies to the 1st Defendant. While the Plaintiffs contended that these were genuine investment agreements, the defence analysis was that these were, in substance, loans with exorbitant interest amounts prohibited under Section 14(2) of the Moneylending Act (Cap. 188, 2000 Rev Ed.) (“MLA”).

A summary judgment application for a claimed amount above S\$6 million, interest and costs was filed in the Court. At first instance, the High Court granted the Defendants unconditional leave to defend. An appeal by the Plaintiff from this decision was dismissed on 30 July 2017. The Defendants were successfully represented by lead counsel Rajah & Tann Singapore LLP’s Gregory Vijayendran assisted by Evelyn Chua (at first instance) and Pradeep Nair (on appeal).

Brief Facts

The Defendants submitted that the 2nd Defendant had been the recipient of illegal personal loans (with excessive interest) from the Plaintiffs, and that the Plaintiffs had subsequently sought to “convert” these loans into company contracts between the Plaintiffs and the 1st Defendant (a company whose shareholder was the 2nd Defendant).

The 1st Defendant and the Plaintiffs then entered into a series of contracts (the “**Purported Loan Agreements**”), pursuant to which the Plaintiffs purported to provide funds to the 1st Defendant. However, no fresh funds had been provided by the Plaintiffs. The Defendants contended that the Purported Loan Agreements was window-dressing to cloak the illegal personal loans. The parties later entered into a purported compromise, secured by a personal guarantee.

Dispute Resolution

High Court Claim

Ultimately, the Plaintiffs sued to recover S\$6.2 million, interest and costs against the 1st Defendant under the purported compromise and the 2nd Defendant under the personal guarantee.

At first instance on the Plaintiffs' summary judgment application, the Honourable Supreme Court Registrar Vincent Hoong found in favour of both Defendants, granting them unconditional leave to defend the action.

The Plaintiffs appealed against the decision of Registrar Vincent Hoong. The matter came before the Honourable Judicial Commissioner Hoo Sheau Peng.

Unlicensed moneylending

The starting point is where a contract for loan has been granted by an unlicensed moneylender, such activities are proscribed under section 5(1) MLA read together with section 14(2) MLA. The law is that where any contract for a loan has been granted by an unlicensed moneylender, or any guarantee given for such a loan, two consequences follow: (a) the contract for the loan and the guarantee (as the case may be) will be unenforceable; and (b) any money paid by or on behalf of the unlicensed moneylender will not be recoverable in a court of law: see section 14(2) of the MLA. The contract will be unenforceable.

In *Sheagar s/o TM Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524, the Singapore Court of Appeal outlined the following key principles involved in relying on an MLA defence:-

- (a) the borrower must prove that the lender is an unlicensed moneylender.
- (b) under the MLA, any person who lends money in consideration for a higher sum being repaid is presumed to be a moneylender.
- (c) the burden then shifts to the lender to rebut the presumption. The lender can do so by proving:-
 - (i) that he does not carry on the business of moneylending; or
 - (ii) he possesses a moneylending license; or
 - (iii) he is an exempt moneylender; or
 - (iv) he is an excluded moneylender.

If there is an issue as to whether the lender is an excluded moneylender, the legal burden of proving that he is not will fall on the borrower.

Summary of submissions

The Defendants submitted that the Plaintiffs were unlicensed moneylenders. They did not have a moneylending license and were neither excluded nor exempt moneylenders under the MLA.

The Plaintiffs contended that they were not moneylenders, submitting that the Purported Loan Agreements were "investments". They claimed that the language of the written agreements spoke of an "investment" with guaranteed "capital and returns" and a "bonus" calculated at a percentage of the investment per month.

In reply, the Defendants invited the court to hold that the true nature of the Purported Loan Agreements involved looking at the substance, not form, of the agreements. The label utilized by the Plaintiff was not decisive. The 1st

Dispute Resolution

Defendant was seeking funds for a short-term basis without granting the investors any equity. On an objective analysis, the purported “capital and returns” and “bonus” guaranteeing the repayment of a higher sum was a loan rather than an investment. Further, the Defendants submitted that the “bonus” was in substance “interest”. For instance, there were due dates on all purported advances and the interest amounts involved were exorbitant. When the written agreements were denuded, there were classic tell-tale signs of an unlicensed moneylending agreement.

One of the key arguments canvassed by the Plaintiffs was that the Court should look only at the compromise and that the settlement agreement should govern the dispute between the Plaintiffs. The Defendants’ case was that the compromise (not just the initial Purported Loan Agreements and their performance) would also be unenforceable. The consideration for the compromise in this case (i.e. forbearance to sue on an illegal contract) is itself illegal. The contract of compromise and concomitant personal guarantee were therefore logically and legally void and / or unenforceable for illegality and their enforcement would be contrary to public policy.

Having heard oral arguments and considered written submissions, in a reserved judgment, Hoo Sheau Peng JC dismissed the appeal and upheld Registrar Vincent Hoong’s order. The Suit is therefore proceeding to trial.

Concluding Observations

Contracts for moneylending loan come in different forms. The Courts continue to be vigilant to distinguish between genuine commercial lending and illegal moneylending. In some clear cases, the moneylending defence is spurious; nothing more than a fig leaf to stave off a claim for a bona fide loan. In some other cases, illegality lies at the heart of the transactions involved.

While this is not a definitive ruling on the merits of the case, the Supreme Court’s rulings on the summary judgment application and appeal are consistent with, and illustrative of, the judicial inquiry into the pith and substance of the transaction. Our courts will not content themselves with a cursory, superficial glance at a camouflaged illegal moneylending agreement that could conceivably fall foul of moneylending laws. The decision is also instructive in that a purported compromise of an illegal moneylending agreement could itself be infected with illegality from the underlying agreements.

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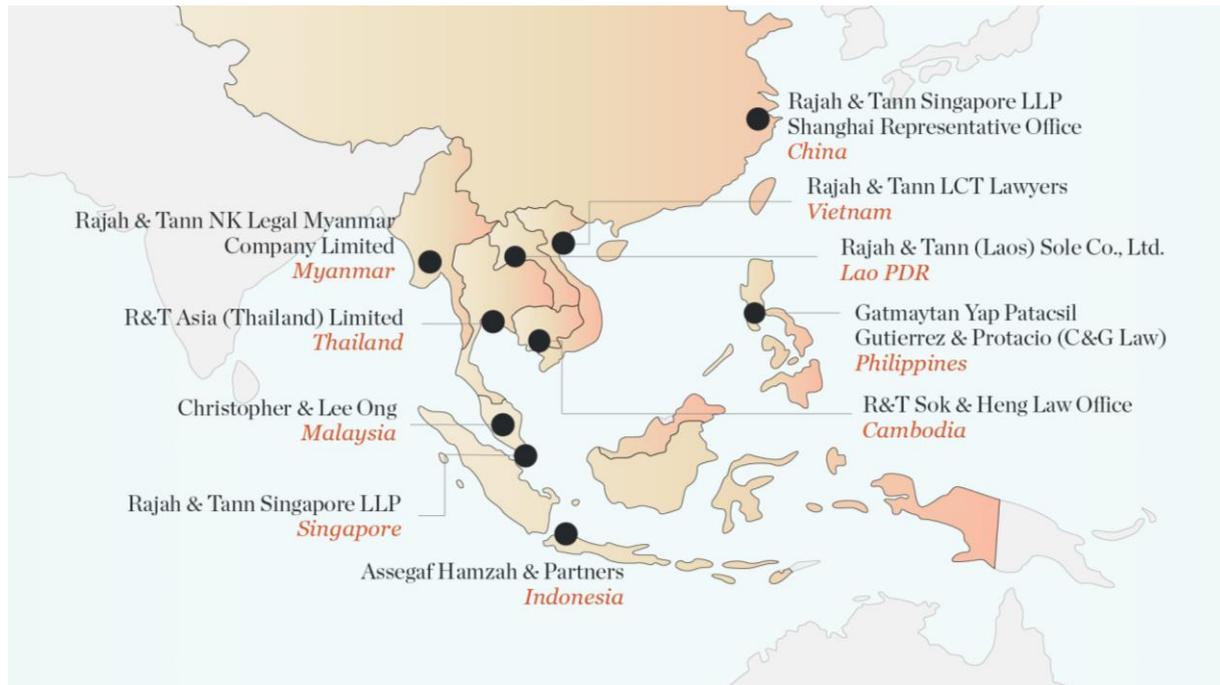
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