City Hardware Pte Ltd v Kenrich Electronics Pte Ltd
[2005] SGHC 24

Case Number : Suit 1108/2003

Decision Date : 31 January 2005

Tribunal/Court : High Court

Coram : V K Rajah J

Counsel Name(s) : Peter Gabriel, Ismail bin Atan and Calista Peter (Gabriel Law Corporation) for the plaintiff; James Goon Hoong Seng and Sham Chee Keat (Ramdas and Wong) for the defendant

Parties : City Hardware Pte Ltd — Kenrich Electronics Pte Ltd

Credit and Security – Credit sales – Whether transactions constituting sale of credit facilities – Whether transactions amounting to commission transactions for banking facilities

Credit and Security – Money and moneylenders – Illegal money-lending – Whether commercial transactions constituting illegal moneylending – Whether transactions structured to avoid Moneylenders Act – Section 2 Moneylenders Act (Cap 188, 1985 Rev Ed)

Personal Property – Passing of property – Whether purchaser needing to take possession of goods before delivery can be considered complete

Words and Phrases – "moneylending" and "loan of money" – Section 2 Moneylenders Act (Cap 188, 1985 Rev Ed)

31 January 2005 *Judgment reserved.*

V K Rajah J:

Introduction

1 In these proceedings, the defendant pleads that certain commercial transactions it has entered into with the plaintiff ought to be voided. It asserts that these transactions constitute *de facto* and *de jure* moneylending. The parties' rival contentions squarely bring into sharp focus the objectives and ambit of the Moneylenders Act (Cap 188, 1985 Rev Ed) ("MLA"). Is the MLA invariably contravened whenever the object of a transaction is to raise money?

2 The plaintiff is engaged in the business of selling and distributing sanitary fittings, in addition to other household goods and appliances. Its recent average annual turnover was in the region of $30m. Lau Chui Chew ("LCC") has been the managing director of the plaintiff since its incorporation.

3 The defendant used to trade in electrical appliances and electronic equipment. Since 2003, however, it has remained a dormant company. Goh Boon Chye ("GBC") was the managing director of the defendant while it conducted business.

4 LCC became acquainted with GBC in or around 1990 while GBC was an employee of Pertama Holdings Ltd ("Pertama"). Around this time, Thunderflash Enterprise Sdn Bhd ("Thunderflash"), a Malaysian company, whose managing director was an acquaintance of both LCC and GBC, proposed a trading relationship between the plaintiff and Pertama. Given that Pertama was averse to extending credit to foreign companies, Thunderflash could not obtain credit directly from Pertama for any electronic goods it sought. Thunderflash therefore proposed that the plaintiff purchase any such

goods from Pertama and subsequently resell these goods to Thunderflash at a profit. This arrangement proved to be beneficial to all the parties involved and subsisted uneventfully until about 1992.

5 In these transactions ("Thunderflash transactions"), the plaintiff would purchase the goods that were required by Thunderflash from Pertama by paying cash. The plaintiff would then resell the same goods to Thunderflash on credit. GBC would initially settle the particulars of the goods desired and invoices required after discussions with Thunderflash, and thereafter arrange for Pertama to issue invoices to the plaintiff. The plaintiff would then instruct its bank to make payment directly to Pertama. After Pertama's receipt of the moneys, GBC would arrange for delivery of the goods from Pertama directly to Thunderflash.

6 Subsequently, GBC left the employ of Pertama and incorporated his own company, Perdana Electronics Pte Ltd ("Perdana"). In late 1999, GBC proposed to the plaintiff that they initiate similar sub-sale arrangements for goods that Perdana intended to procure from overseas suppliers ("Perdana transactions"). The plaintiff was amenable to this proposal. GBC in turn liaised with the overseas suppliers directly. The overseas suppliers would thereafter address the invoices to the plaintiff; these invoices would be forwarded by the overseas suppliers to GBC who would then hand them over to the plaintiff, who subsequently arranged for its bank to issue letters of credit in favour of the various overseas suppliers. The plaintiff would then invoice Perdana for payment. Perdana would pay the plaintiff a marked-up price which the plaintiff contends included a profit for arranging the banking facilities and the delivery of the goods to Perdana by its forwarding agent, Confi Logistics Pte Ltd ("Confi").

The genesis of the claims

7 In February 2000, GBC approached the plaintiff and proposed a similar trading relationship between the plaintiff and the defendant, which he had recently incorporated. The overseas suppliers for this relationship were mainly from Hong Kong and Taiwan. The arrangement involving these overseas suppliers ("Overseas transactions") lasted from about February 2000 to January 2002. The structure of the Overseas transactions was conceptualised by GBC who would also determine the type and quantity of goods that were to be purchased. GBC directly negotiated with the overseas suppliers without reference to LCC. It also appears that GBC apparently held himself out, from time to time, to be a representative of the plaintiff. Various letters from overseas suppliers addressed to the plaintiff were expressly marked to his attention.

8 The invoices from the overseas suppliers, although addressed to the plaintiff, were again sent to GBC at his home. GBC would thereafter forward the invoices to the plaintiff. The plaintiff in turn would arrange for its bank to issue the letters of credit in favour of the overseas suppliers. When the goods arrived in Singapore, the plaintiff's port clearance agent, Confi, would arrange for the port clearance and deliver the goods to the defendant. The plaintiff would invoice the defendant for the goods with a mark-up, which it asserts signified its profit margin.

9 GBC would periodically visit the plaintiff's office to sign the plaintiff's invoices to confirm that the goods had been delivered to the defendant in good order and condition and that the invoiced amounts were correct. Payment of these invoices would be made in accordance with the credit period agreed between GBC and LCC for each transaction. The credit periods varied between the various transactions, ranging from one to three months.

10 Around March 2000, soon after the commencement of the Overseas transactions, GBC visited the plaintiff's office with a proposal. GBC desired to expand the defendant's trading relationship with

the plaintiff. He offered a cheque signed in blank ("the Cheque") to LCC in order to reassure the plaintiff of his personal commitment in the event of a default by the defendant. The plaintiff, through LCC, accepted the Cheque as security for any default by the defendant in meeting its payment obligations to the plaintiff. It is pertinent to note that the payee's name in the Cheque was left blank and the printed words "or bearer" were not deleted. The Cheque was a bearer instrument.

11 In or about June 2000, GBC again approached the plaintiff and proposed further transactions with another local supplier, Aloh Pte Ltd ("Aloh"). The negotiations apropos the goods to be purchased from Aloh were left, as in the earlier Thunderflash transactions, the Perdana transactions and the Overseas transactions, entirely to GBC. Again, GBC solely determined both the goods to be purchased and their prices, arranging for the invoices to be forwarded to the plaintiff. The plaintiff would then instruct its bank to make payment directly to Aloh. GBC would directly arrange for delivery of the goods from Aloh to the defendant ("Aloh transactions").

12 The plaintiff was aware that Aloh had a close working relationship with the defendant but denies any knowledge of the actual ownership and/or business operations of Aloh throughout the course of the trading relationship. In reality, Aloh was another front for GBC. It is only now established that GBC's brother-in-law and his wife, who were until May 2002 the ostensible directors cum shareholders of Aloh, had completely left the day-to-day management of that company to GBC. GBC's wife offered the following explanation for the charade:

> A: Because there are certain goods which, initially because Kenrich is solely under my name and my husband's name, so *Aloh is under my brother's name, so we can use Aloh to buy goods from certain suppliers*, because if they were to know that Aloh belongs to us, some of them might not want to supply goods, so we need Aloh to buy certain goods, then sell to Kenrich.
>
> Q: So some suppliers would not know that Aloh and Kenrich are controlled by the same people.
>
> A: Yes.
>
> [emphasis added]

13 I accept LCC's evidence that he implicitly trusted GBC and believed that Aloh was an independent supplier. The provision of the Cheque by GBC had also fortified his confidence in the viability of the business transactions and GBC's *bona fides*. Aloh and the defendant maintained different premises and had separate administrative staff. Indeed it was established, when GBC and his wife were cross-examined, that GBC had not only signed on behalf of Aloh all delivery orders and invoices but had used a wholly different signature when attesting to the Aloh documents. When queried why he employed different signatures, GBC's hesitant and unconvincing response revealed that he did not want his suppliers to know that Aloh was owned by him. That is not the whole truth. I accept that he similarly did not want the plaintiff to be aware of his actual relationship with Aloh. It also bears mention that until the Aloh transactions materialised late in the relationship, all the suppliers the defendant introduced to the plaintiff were independent entities. LCC, by dint of the hitherto successful and unblemished relationship with GBC, had absolute confidence in him. The Aloh transactions were carried out in a manner broadly similar to all the earlier transactions they had been involved in together.

14 The plaintiff would invoice the defendant for the goods inclusive of the mark-up which had been agreed to prior to each transaction. The defendant would sign the plaintiff's invoices to confirm that it had received the goods in good order and condition and that the price of the goods, inclusive

of the mark-up, was acceptable. It is incontrovertible that the transactions bore *ex-facie* all the adornments of regular sale and purchase transactions conducted at an arm's length.

15 The plaintiff facilitated the Aloh transactions by purchasing the goods for cash from Aloh and selling them on credit to the defendant. It is noteworthy that goods and services tax ("GST") was paid on each leg of the transactions, that is to say, in relation to the plaintiff's purchase from Aloh as well as the defendant's purchase of the same goods from the plaintiff. The structure of the relationship would not have struck one as a sophisticated subterfuge; nor was it an elaborate guise to evade the provisions of the MLA. It is clear, from the testimony given during the trial itself, that the parties did not view the transactions at the material time as moneylending transactions, although GBC now strenuously contends otherwise.

16 The defendant paid for all the transactions with the exception of those which form the subject matter of the plaintiff's present claim against the defendant, outlined as follows:

No	**Date**	**Plaintiff's Tax Invoice No**	**Amount (S$)**
1	27 February 2002	2594	134,140.19
2	3 April 2002	2602	139,528.93
3	26 April 2002	2605	118,529.05
4	7 May 2002	2609	104,165.64
5	29 May 2002	2612	116,230.16
	Less: Payment received between 25 January 2003 to 28 June 2003		(35,972.43)
	Balance due:		**576,621.54**

17 The plaintiff has in addition claimed the sum of $5,203.99 being transportation charges paid to Confi for the Overseas Trades.

18 Initially, the defendant disputed neither its liability to make payment nor the quantum claimed, issuing on the contrary, several post-dated cheques in the plaintiff's favour. Part-payment in the sum of $35,972.43 was made between January 2003 and June 2003. The final part payment of $3,500 was made on 28 June 2003. After failing to receive the balance of the outstanding amount from the defendant, the plaintiff proceeded in accordance with GBC's purported mandate to complete the Cheque for that amount. The Cheque was then deposited with the plaintiff's bank for clearance, but to no avail. When the Cheque was returned, the plaintiff made a personal claim against GBC. GBC denied any liability with regard to the Cheque and proceedings were then initiated by the plaintiff against GBC for failing to honour his liability on the Cheque. I deal with this claim separately in my judgment in *City Hardware Pte Ltd v Goh Boon Chye* [2005] SGHC 25.

The statutory objective of the MLA

19 Farwell J, in examining the *raison d'être* of the English Money-lenders Act 1900 (c 51) in *Litchfield v Dreyfus* [1906] 1 KB 584, observed at 590:

> The Act was intended to apply only to persons who are really carrying on the business of money-lending as a business, not to persons who lend money as an incident of another business or to a few old friends by way of friendship. *This particular Act was supposed to be required to save the foolish from the extortion of a certain class of the community* who are called money-lenders as an offensive term. [emphasis added]

20 The Singapore Court of Appeal in *Lorrain Esme Osman v Elders Finance Asia Ltd* [1992] 1 SLR 369 at 378, [39] endorsed these observations and stated "what he [Farwell J] said in respect of the English Money-lenders Act 1900 is equally true of the [MLA]".

21 A helpful conspectus of the views that the English Select Committee took into account in enacting the English Money-lenders Act 1900 is contained in the Crowther Committee's *Report on Consumer Credit* (Cmnd 4596, 1971) at para 2.1.22:

> … Much of the evidence given to the Committee, and to its successor appointed in 1898, was concerned with such victims of the rapacious moneylender as the widow forced to borrow on a bill of sale of her household effects, and the young son of the aristocracy who in the course of sowing his wild oats ran up large debts, at exorbitant interest, which his family were later blackmailed into paying to avoid the publicity of court proceedings. *The 1898 Committee took a wide and humane view of its task and in its report expressed grave concern as to the harmful social consequences of moneylending by professional moneylenders at high rates of interest*. *The Committee drew attention to numerous abuses – including extortionate rates of interest, concealment of the terms of the contract from the borrower and ruthless enforcement measures – and recommended widespread reforms*. The resulting legislation, namely the Money-lenders Act 1900, was the first enactment specifically regulating the business of moneylending otherwise than by pledge. [emphasis added]

22 A court has to bear in mind these crucial observations when interpreting and applying the provisions of the MLA. It cannot be denied that *ex facie*, its provisions have an extensive reach appearing to embrace a myriad of commercial situations. In my view, it would nonetheless be wholly inappropriate to apply the MLA to commercial transactions between experienced business persons or entities, which do not *prima facie* have the characteristics of moneylending. Having said that, I am constrained to observe that the position could be quite different if the parties had wilfully attempted to structure a transaction so as to evade the application of the MLA. For good measure, I also emphasise that a person or entity that carries on a business with the primary object of conducting unlicensed moneylending cannot avoid the severe consequences of an infraction of the MLA's provisions by pointing out the benefits the borrower has received or derived from the transactions. The court has no alternative but to give effect to the draconian consequences of an infraction in the event that the MLA is offended.

The task of the court

23 The MLA prohibits the business of moneylending and not the act of moneylending: *Subramaniam Dhanapakiam v Ghaanthimathi* [1991] SLR 432. While the MLA defines a moneylender as a person "whose business is that of moneylending", it does not assist in explicitly defining what constitutes lending or the loan of money. In this context, I find the discussion in Clifford L Pannam,

The Law of Money Lenders in Australia and New Zealand (The Law Book Company Limited, 1965) at p 6, to be of great assistance in both construing and applying the MLA. The learned author states:

> A loan of money may be defined, in general terms, as a simple contract whereby one person ("the lender") pays or agrees to pay a sum of money in consideration of a promise by another person ("the borrower") to repay the money upon demand or at a fixed date. The promise of repayment may or may not be coupled with a promise to pay interest on the money so paid. The essence of the transaction is the promise of repayment. As Lowe J. put it in a judgment delivered on behalf of himself and Gavan Duffy and Martin JJ.: "'Lend' in its ordinary meaning in our view imports an obligation on the borrower to repay." Without that promise, for example, the old *indebitatus* count of money lent would not lay. *Repayment is the ingredient which links together the definitions of "loan"* to be found in the *Oxford English Dictionary*, the various legal dictionaries and the text books. *In essence then a loan is a payment of money to or for someone on the condition that it will be repaid*. [emphasis added]

24 A loan need not be given directly to the borrower. It suffices that the borrower gives directions on the disbursement of the moneys. What constitutes lending must of course remain a question of fact in every case. Careful consideration has to be given to the form and substance of the transaction as well as the parties' position and relationship in the context of the entire factual matrix. It is axiomatic that if there has been no lending there can be no moneylending.

25 It ought to be stressed, however, that the court ought not to be overzealous in analysing or deconstructing a transaction in order to infer and/or conclude that the object of the transaction was to lend money. Salutary advice against adopting such an investigative factual witch-hunt is to be found in the seminal decision of *Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] AC 209 ("*Chow Yoong Hong*") at 216 where Lord Devlin stated with his customary clarity and authoritativeness:

> The fundamental error that underlies the defendants' case on both groups of cheques is that because they were, so they say, in need of ready cash, and because the plaintiff supplied them with it and made, if he did, a profit out of doing so, therefore there was a loan and a contract for its repayment. There are many ways of raising cash besides borrowing. One is by selling book-debts and another by selling unmatured bills, in each case for less than their face value. Another might be to buy goods on credit or against a post-dated cheque and immediately sell them in the market for cash. Their Lordships are, of course, aware, as was Branson J., that transactions of this sort can easily be used as a cloak for moneylending. *The task of the court in such cases is clear. It must first look at the nature of the transaction which the parties have agreed. If in form it is not a loan, it is not to the point to say that its object was to raise money for one of them or that the parties could have produced the same result more conveniently by borrowing and lending money*. But if the court comes to the conclusion that the form of the transaction is only a sham and that what the parties really agreed upon was a loan *which they disguised*, for example, as a discounting operation, then the court will call it by its real name and act accordingly. [emphasis added]

26 This brief overview of moneylending legislation would be incomplete if no reference is made to the oft-cited decision of Branson J in *Olds Discount Co Ltd v John Playfair Ltd* [1938] 3 All ER 275 at 280:

> Unless there was evidence upon which it would be proper for the court to act that the parties had deliberately entered into those documents knowing that they did not represent what had been agreed between them, but that what had been agreed between them was something quite

different, it seems to me that *the proper course for the court to take is to accept the formal agreements between the parties, and to decide their rights according to those agreements*. [emphasis added]

Judicial pragmatism

27 The common law courts have approached the application of the MLA and its progenitors with caution and pragmatism. It has been recognised that these statutory provisions have the salutary objective of proscribing rapacious conduct by unlicensed and unprincipled moneylenders. Nonetheless, it has never been the objective of these statutes to prohibit or impede legitimate commercial intercourse between commercial persons. Instances of this practical approach are recurrent and are exemplified in several judicial decisions such as:

(a) *Olds Discount Co Ltd v John Playfair Ltd*, where it was held that the sale of book debts is not a moneylending transaction;

(b) *Chow Yoong Hong*, where it was held that discounting cheques does not amount to moneylending;

(c) *A J Brush Ltd v Ralli Bros (Securities) Ltd* (1967) 117 New LJ 212, where it was held that investing is not moneylending; and

(d) *Frank H Wright (Constructions) Ltd v Frodoor Ltd* [1967] 1 All ER 433, where it was held that issuing houses do not conduct moneylending.

28 The Singapore courts have also invariably taken a pragmatic approach in determining whether a transaction offends both the letter and spirit of the MLA. Lord Devlin's *dictum* in *Chow Yoong Hong* has been consistently applied by the courts. If transactions are not loans in nature or in form, the law will be slow to infer or impute a relationship of moneylending. I shall briefly refer to some recent decisions. In *Nissho Iwai International (Singapore) Pte Ltd v Kohinoor Impex Pte Ltd* [1995] 3 SLR 268 at 273–275, [13] and [18], Lim Teong Qwee JC observed:

> In each case the arrangements must be considered as a whole and the substance looked at to see if the transactions can be categorized as moneylending transactions and whether any money was lent.
>
> … I think not a few importers who use the available letter of credit lines of banking facilities of their business associates from time to time would be surprised if they were told that they were borrowing money by doing that and that their business associates would require a licence under the Moneylenders Act. *The second defendant himself saw the transactions as credit sales and not loans and it was only well into the hearing before the senior assistant registrar that the Moneylenders Act defence was raised*. In my judgment there is no loan here at all. the plaintiff's bank pays the supplier under the letter of credit and looks to its own customer the plaintiff for reimbursement. *For arranging this and accepting liability to its bank the plaintiff charges a commission and reimbursement of the letter of credit amount and bank charges and interest. These transactions are not loans in nature or in form*. There is no payment of money or agreement to pay money as a loan to the first defendant or to any other party authorized by the first defendant. There is no promise of repayment.
>
> [emphasis added]

29 In *Tan Sim Lay v Lim Kiat Seng* [1996] 2 SLR 769 at 777, [23], Choo Han Teck JC (as he then was) had no hesitation in concluding that the practice of businessmen who extended their banking facilities to associates for a commission was not tantamount to moneylending:

> There is implicit in Lord Devlin's judgment that such transactions at least have the colour of a genuine commercial transaction other than pure moneylending. The defence there failed because the evidence adduced was inadequate to convince the court that the transactions were not only truly what they appeared. *Similar transactions may well include the extension by one party for the use of another the credit facilities at the disposal of the former in consideration of payment of a commission. Such transactions per se may not be moneylending*. In the present case, money was actually advanced which were [*sic*] to be repaid with interest fixed at an exorbitant rate. [emphasis added]

30 In *Ding Leng Kong v Mok Kwong Yue* [2003] 4 SLR 637, Woo Bih Li J had to determine whether certain advances for equity investment amounted to loans. In determining that the subject transactions did not amount to moneylending, Woo J astutely observed at [56]:

> While I agree with various pleaded defences that Ding had taken advantage of the situation, that does not necessarily make him a moneylender within the Act. *Neither does it make Ding's actions so unconscionable as to deny him the reliefs he seeks. The transactions were at arm's length between commercially-minded persons. After all, Ding was taking the risk that he might not be repaid even the principal, a risk which has become more real as developments have shown*. [emphasis added]

Analysis of the rival contentions

31 The correct approach to be taken in determining whether a business transaction amounts to moneylending has been accurately and helpfully set out in Pannam's treatise ([23] *supra*) at p 31:

> 1. In deciding whether an agreement constitutes a loan the first step is to carefully examine the nature of the agreement itself.
>
> 2. If the agreement does not constitute a loan then, providing it is genuine, it is irrelevant that:
>
> (a) it was prepared in that form for the express purpose of avoiding the money lenders legislation; or,
>
> (b) it could have achieved the same result by being prepared in the form of a contract of loan.
>
> 3. Once it is established that an agreement, which genuinely embodies the terms that the parties have agreed upon, does not constitute a loan that is the end of the question.
>
> 4. If however the evidence shows that an agreement is only a cloak or mask to cover the real nature of the transaction entered into between the parties then a court is entitled to go behind the form of the agreement.
>
> 5. The onus of adducing such evidence and of proving such an allegation lies on the person who makes it.

6. A court has power to declare that the real nature of the transaction so revealed is a loan despite the form of the agreement.

32 I should state at the outset that I found GBC a most unsatisfactory witness. Both his affidavit evidence and his oral testimony were inundated with glaring and jarring inconsistencies. His oral testimony was punctuated by long pauses and he was frequently unable to explain his departures from his earlier written testimony. He attempted to play down these differences by claiming he was not well educated and that he did not "fully understand what was in the affidavit". In spite of these claims, he came across as a shrewd business operator who was prepared to state whatever it took to stave off his current financial difficulties. His evidence was characterised by his ability and willingness to manipulate facts, real or fictitious. LCC, on the other hand, came across as a relatively straightforward businessman. While he was certainly not a naïve businessman, green at his gills, I was satisfied that he had implicitly trusted GBC, accepting what he told him at face value in connection with the Aloh transactions. The parties had a close and profitable trading relationship before the defendant's defaults occurred. It must also be borne in mind that throughout their decade-long relationship, GBC had honoured his commitments; furthermore, his related companies had been prompt and good paymasters. While there were a few creases in LCC's evidence, he came across, in the final analysis, as truthful on the material issues relevant to these proceedings.

33 GBC reluctantly conceded in cross-examination that he viewed the relevant transactions as "normal like business" until he received legal advice late in the day in relation to the plaintiff's claim for the outstanding amounts. In essence, the plaintiff's response to the defendant's defence of moneylending is that GBC could not directly obtain banking facilities because of his weak credit standing with financial institutions. The business arrangements the parties entered into allowed the defendant to utilise the plaintiff's banking facilities. The transactions were not shams. Each of them was underpinned by the actual sale and purchase of tangible goods. GBC acknowledged that the plaintiff was entitled to believe that actual goods were transacted:

Q: But what we are saying is that there were actual goods involved, and if you say there were no actual goods, I put it to you, the plaintiff was not aware of that; do you agree or disagree?

A: I agree.

34 The defendant has pleaded that the plaintiff's claim is unenforceable as it is grounded on moneylending. Curiously, however, it pleads that the purported moneylending was to Aloh and not to the defendant or GBC. When pressed, GBC had no alternative but to acknowledge that there were no documents to substantiate this contention. In truth the plaintiff never looked to Aloh for payment and there were no documents substantiating the existence of any loan to Aloh or any undertaking or assumption by Aloh to accept responsibility for any loan or dues to the plaintiff. While there is some evidence of GBC directing payment of some Aloh cheques to the plaintiff, this never resulted in a novated relationship between the plaintiff and Aloh. Indeed, GBC unwittingly conceded that there was "no point in invoicing Aloh, if you invoice Aloh, then Aloh have to invoice Kenrich again [*sic*]". This offers a significant insight into the standing and financial credibility of Aloh. Aloh was on any account a shell company that GBC had deployed to mask his interest in the front end of the Aloh transactions. The following testimony of GBC during the proceedings is pertinent:

Court: You see, Mr Goh, there are two types of transactions you had with Mr Lau; one was overseas trade … – two transactions were quite different, am I correct?

A: No, but you think – you know the overseas trade is only for a few bills after that I stop,

then I use Aloh to filter off, not to let him know where my supplier come from, because he not only dealt with me, he dealt with my former partner which is – both of us are competitors, that's why I had to use Aloh to filter off all the things not to let him know that, okay I'm buying from Newlane, I'm buying from different suppliers.

Court: You have not said all that on affidavit.

A: Yes, I never write in the affidavit, but that is our business way of doing, I can show you all the bills which I –

Court: So you did not want Mr Lau to know really who your suppliers were?

A: Yes, because until today he still dealt with my partners.

…

Q: So you want to stop that and you put Aloh into the picture?

A: Yes.

…

Court: Tell me Mr Goh, you say [you] did not want Mr Lau to know who your overseas suppliers were because you were concerned he would do business with them directly?

A: Yes, because, you know why, until today he still dealt with my partner, also electronic goods, same as what I dealt now.

Court: When you say Mr Lau would do business with them directly, he would engage – you were afraid, once he knew the names, of doing purchases directly from them.

A: Because there's a few occasions it happens, same product, different names. It happens to me; same products, everything the same except the brands, different, on my competitors in Malaysia, it happens to me.

Court: *Just let me follow up on this; you were concerned that Mr Lau would, if he knew who your suppliers were, do business with them directly?*

A: Yes.

Court: *But if he's just a moneylender, why would he want to do business* –

A : *Because he know a lot of electronics people*. Not only I'm lending from, there's many other people who is lending from him.

[emphasis added]

35 It is significant that GBC sought to shield the identities of his suppliers from the plaintiff. It cannot be gainsaid that the plaintiff was legitimately engaged in substantial and legitimate business activities. While it left all arrangements to GBC, the business being transacted was of a nature that had a close if not overlapping similarity to its principal business of being a distributor of household appliances and goods. I should also add that the defence did not adduce an atom of reliable evidence

to prove that the plaintiff conducted similar transactions with other parties or was otherwise engaged in the business of moneylending.

36 The pleaded defence raises two principal issues. Was any money lent to Aloh, and if so, was the plaintiff a moneylender as defined by the MLA? It cannot be credibly argued that there were loans or lending to Aloh by the plaintiff. As explained earlier at [24] above, the essence of lending is that it entails a corresponding obligation of repayment. There is no evidence (even on the basis that GBC's testimony is unquestioningly accepted) of Aloh having borrowed or having been lent any money by the plaintiff. The plaintiff had never invoiced Aloh for any of the transactions. The plaintiff has made no claim against Aloh. GBC never claimed that Aloh had been lent money until these proceedings were commenced. Indeed, prior to these proceedings the defendant accepted that the obligation to repay the outstanding amounts was its sole responsibility and had attempted to settle the outstandings directly through, *inter alia*, post-dated cheques. Given that the defendant now claims Aloh was a fig leaf, it is dubious how the defendant can now turn around and claim that Aloh was the principal that liaised with the plaintiff in arranging for the alleged moneylending and/or was the borrower. If there was any lending by the plaintiff, it was certainly not to Aloh, or at Aloh's behest. The plaintiff was dealing with GBC and the defendant. The plaintiff did not look to Aloh for repayment.

37 The defendant has not had the temerity to suggest, either in its pleadings or submissions, that the loan was to GBC. Clearly this contention is not open to it given the separate legal personalities of the corporate entities involved. Besides, the plaintiff has not made any claim against GBC on the basis of the Aloh transactions *per se*. The claim against GBC is grounded on the Cheque, which is an altogether different cause of action. While the Defence has not pleaded that the moneylending was at the behest of the defendant, I pause briefly to consider this point. It is crystal clear that the defendant did not ask the plaintiff to "lend" money to Aloh. If at all there was a "loan", the request to "lend" was made by GBC alone and not the defendant.

38 On the basis of the existing factual matrix, I determine that it would be wholly inappropriate to view the Aloh transactions as moneylending. It is incontrovertible that each of the transactions involved the purchase of real goods by the defendant. GST was paid for the subject goods both when the plaintiff purchased them from Aloh and when the defendant in turn re-purchased them from the plaintiff. The transactions were not structured or intentionally disguised to evade the MLA. GBC's wife also accepted that the suppliers to Aloh and the defendant would not have known that the transactions were "paper transactions", and an impression that they were "real transactions" prevailed.

39 It seems highly improbable to me that if these were true "loans" the plaintiff would have been satisfied with a relatively modest mark-up on the purchase price of the subject goods in each transaction. Each transaction was individually negotiated and there was no discussion, let alone agreement, for continuing interest to be paid in the event of any default by the defendant. It must be emphasised that the defendant had to pay the same agreed invoiced amount whether it was prompt or late in effecting payment. The plaintiff made no claim for accruing interest in these proceedings. It is significant that the highest mark-up tagged on by the plaintiff in the resales to the defendant was about nine per cent more than the original price. This would have included a reasonable profit after taking into account the bank charges and interest that it had to pay to its bank. The observations of Lord Devlin in *Chow Yoong Hong* ([25] *supra*) at 217 on what constitutes "interest" are salient in this context:

> Interest postulates the making of a loan and then it runs from day to day until repayment of the loan, its total depending on the length of the loan. ... It appears to their Lordships to be very improbable that if the plaintiff was truly a moneylender and there were truly loans for which the

post-dated cheques were only a form of security, he would have been content that the rate of discount which he considered remunerative should apply only until maturity of the cheques (never in any of the 16 cases longer than a month) and thereafter, if the security proved valueless, to take until repayment only such rate of interest as the court awarded.

40 Admittedly the plaintiff did not take possession of the subject goods and left the implementation of the contract administration to GBC:

Q: [I]t would be reasonable for the plaintiff to assume that you had made the arrangement, as in the case of Thunderflash, where there is no overseas supply, am I right? Agreed?

A: Yes.

Q: I put it to you, Mr Goh, that the plaintiff would not know whether or not any physical delivery of goods took place between Aloh and Kenrich; you would agree with me?

A: Yes.

41 It is trite law that a purchaser need not take possession for delivery to be complete. In practice many commercial transactions are effected without possession of goods changing hands as in the case of "string contracts". GBC could rightly be viewed as the plaintiff's agent in taking constructive possession of the subject goods. It also bears mention that other than in the Aloh transactions, the plaintiff's forwarding agent, Confi, took possession of the goods and delivered the same to the defendant. It would not be correct to view either these transactions or the Aloh transactions as sham transactions. As pointed out earlier at [25], it is immaterial that the object of the exercise was to raise money for the purchase of the goods. The crux of the matter is whether these transactions, which were supported by regular documentation and on which the relevant revenue duty was paid, were structured to avoid the MLA or had characteristics offensive to the MLA. The answer is no. Indeed, if any party was guilty of subterfuge, it was GBC on behalf of the defendant. The following exchange clearly explains why GBC adopted the Aloh structured transactions:

Q: If that is correct then this arrangement is not Mr Lau's idea.

A: That is not Mr Lau's idea. The first thing is not to let him know about my suppliers; secondly it is because I am buying stock from the agent.

Q: So you created Aloh to prevent him from knowing who your suppliers were.

A: Yes.

42 There may perhaps be another legal prism with which to view the subject transactions even if they are not accepted at face value. It is undisputed that the defendant could not obtain banking facilities, whereas the plaintiff, given its standing, had substantial banking facilities. The plaintiff facilitated the purchase of the goods by the defendant by making arrangements with its bank to pay directly for the purchase of the goods. It charged a fee for making these arrangements and absorbed the risk of a default by the defendant. These transactions could be viewed as a "sale of credit facilities" by the defendant. The arrangements can also be considered, without any gloss to the facts, as commission transactions for banking facilities which the defendant could not directly obtain on its own standing. The mark-up or the profit element was fixed without any provision for accruing interest in the event of default. Each of the transactions between the plaintiff and GBC and/or the

defendant was an arms-length transaction between experienced commercial persons. The mark-up by the plaintiff was negotiated on a transactional basis. The mark-up appeared to follow a standard formula and did not exceed nine per cent of the actual purchase price paid by the plaintiff. This mark-up was neither exorbitant nor unusual. GBC was a shrewd operator and had managed to profitably operate his business with these arrangements in place until he ran into his present financial difficulties. It is preposterous that he should now not only attempt to portray these transactions as acts of moneylending but that he should claim for restitution apropos the earlier transactions. As if defaulting on his contractual obligations to the plaintiff was not sufficient, he now makes an avaricious attempt to recoup a windfall. This must be denigrated as unprincipled and unseemly commercial conduct.

43 The plaintiff has in the alternative submitted that it comes within exception (c) in s 2 of the MLA. I agree with Woo Bih Li J's observation in *Ding Leng Kong v Mok Kwong Yue* ([30] *supra*) at [46] that this plea has to be expressly pleaded if a party intends to rely on it. I therefore hold that as the plaintiff has not pleaded this exception it is precluded from relying on it.

44 The defendant also disputes that the amount claimed by the plaintiff is correct. I note in this connection that the parties have had a running account for a substantial period. Until the present proceedings were commenced, the defendant did not take issue with the amount claimed, being content to ask for more time and issuing post-dated cheques in partial settlement of the outstanding amount. The defendant has not adduced any credible evidence or primary documents to contradict the invoiced amounts on which the plaintiff's claim is founded. The defendant's cheques that would purportedly show the payments made to the plaintiff were not produced in these proceedings. GBC's wife conceded in cross-examination that the amount claimed to have been paid by the defendant was "unsupported" by any primary documentary evidence. Finally, I also note that LCC was subjected to only a perfunctory cross-examination on this issue. LCC's testimony that regular monthly statements of account were furnished to the defendant was adamantine. He also resolutely maintained that the accounts were properly maintained and no objections had been raised by GBC or the defendant challenging the accuracy of the monthly statements.

45 In the circumstances, I am satisfied that the invoiced amounts accurately represent the agreements reached between the parties and that the defendant has no satisfactory evidence to show that the amounts stated therein have been incorrectly arrived at or should have been reduced because of previous payments. The plaintiff is entitled to judgment for the amount claimed, namely the sum of $576,621.54 with interest fixed at 6% from the date of commencement of these proceedings to date. The defendant's counterclaim for restitution is dismissed. The plaintiff is entitled to have the taxed costs of the proceedings subject to deductions arising from any previous order(s) of costs in the defendant's favour.

46 For completeness, I should add that I disallow the plaintiff's claim for $5,203.99 being the alleged freight forwarding charges paid to Confi for the Overseas transactions. There was no evidence of any agreement by the defendant to pay this amount. In any event, it appears to me that these charges were part of the services that the plaintiff rendered to the defendant in the subject transactions and were therefore already accounted for in the invoiced amounts. The defendant is entitled to the costs of the work incurred in resisting this claim, which I fix at $750.

Final observations

47 The defence of moneylending is often invoked in Singapore by unmeritorious defendants who are desperate to stave off their financial woes. Such defendants should not regard the MLA as a legal panacea. It should be viewed as a scheme of social legislation designed to regulate rapacious and

predatory conduct by unscrupulous unlicensed moneylenders. Its pro-consumer protection ethos was never intended to impede legitimate commercial intercourse or to sterilise the flow of money. It is not meant to curtail the legitimate financial activity of commercial entities that are capable of making considered business decisions. The court has always taken and will continue to take a pragmatic approach in assessing situations when this defence is raised. The MLA is not invariably contravened in transactions where the object of the transaction is to raise money. In the final analysis, the economic objective of an arrangement to provide credit should not be confused with its legal nature.

48 The viability of small businesses often depends on their ability to raise capital, to improve their liquidity and/or to obtain credit. They are often unable to obtain credit facilities from established financial institutions as a result of their lack of standing, unpredictable cash flow and higher risk profile. It is clearly not the objective or intention of the MLA to prevent or impede legitimate businesses from entering into legitimate arrangements for improving cash flow; nor is it the objective of the MLA to constrict the flow of financial liquidity in commerce among smaller businesses.

49 In this context the time may have come for a holistic review of the MLA. It is to be noted that similar legislation in England and Australia have long since been repealed. In their place now are more specific and carefully crafted legislation governing the provision of consumer credit. In my view, the MLA, while still serving an important, necessary and admirable social objective, requires considerable fine-tuning to meet the exigencies of the modern business environment. It is now a blunt instrument. The social and business environment has seen a sea change over the last century since the progenitor of the MLA was first enacted in 1902. Our present legislation is largely modelled upon the Straits Settlements Moneylenders Ordinance 1935 (No 6 of 1935) which in turn was closely fashioned on the English Money-lenders Act 1900. Should not the MLA be now reviewed against the wider backdrop of modern consumer credit policies currently relevant to Singapore?

50 Lamentably, desperate defendants counselled in turn by imaginative counsel frequently invoke the defence of "moneylending" in unmeritorious circumstances. Claims that ought to be decided summarily morph into inordinately long and protracted trials simply because "triable" issues have purportedly been raised, or more accurately, "created". As a result, even in relatively straightforward matters, the final and usually inevitable determinations in favour of legitimate claimants are delayed, and substantial and irrecoverable legal costs are also incurred – as amply illustrated in the present instance where the defendant has become dormant. It cannot be gainsaid that justice delayed is often justice denied. Furthermore, valuable judicial time is unnecessarily expended in the laborious effort required to winnow the wheat from the chaff. In the circumstances, there is a compelling case for the reform of the MLA to redress the currently unsatisfactory position in this area of the law.

Judgment in part for the plaintiff.

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