Letts Charles v Soh Kim Wat (alias Soh Kim Leng)
[2007] SGHC 202

Case Number : Suit 455/2006

Decision Date : 28 November 2007

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Harbajan Singh (instructed by Boey, Ng and Wan) for the plaintiff; L Kuppanchetti Nadimuthu with Christopher Buay Kee Seng (Alban Tay Mahtani & De Silva) for the defendant

Parties : Letts Charles — Soh Kim Wat (alias Soh Kim Leng)

Credit and Security – Money and moneylenders – Illegal money-lending – Whether loan was made to defendant personally or to company – Whether loan fell within scope of illegal moneylending if made to defendant personally

Credit and Security – Money and moneylenders – Interest – Whether additional fees charged amounted to interest on the loan – Sections 3 and 5 Moneylenders Act (Cap 188, 1985 Rev Ed)

28 November 2007 Judgment reserved.

Lai Siu Chiu J

1 In this action, Charles Letts ("the plaintiff") claimed from Soh Kim Wat ("the defendant") the sum of $338,981.74 ("the balance") being the balance of a friendly loan of $500,000 ("the loan") made to the latter on 5 December 2000. The defendant contended that the loan was not made to him personally but to LKE Electric (M) Bhd ("the company") a Malaysian company of which he was a director (together with his wife Tan Lee Siang) and principal shareholder. Alternatively, the defendant alleged that the plaintiff charged interest at 9% per annum on the loan and the transaction amounted to illegal moneylending in contravention of the Moneylenders Act (Cap 188, 1985 Rev Ed) ("the Act").

The facts

2 The plaintiff is an English gentleman who claimed to be an entrepreneur and is still working despite his advanced age (89 years). He and the defendant were colleagues at one time when the defendant was the managing-director of a Singapore company LK Electric Co. Pte Ltd ("the Singapore company") of which the plaintiff was a director. The parties were again colleagues when the defendant was the managing-director of a Malaysian company called LK-NES (M) Sdn Bhd and the plaintiff was a director.

3 It was common ground that the defendant approached the plaintiff in November 2000 for a loan. It was the defendant's case that he needed the loan to tide over the company's then cashflow problem. The plaintiff deposed in his affidavit of evidence-in-chief ("AEIC") that he knew the defendant to be a man of substantial means so he willingly offered the loan for one year (repayable on 5 December 2001). In return, the plaintiff alleged that the defendant agreed the loan would either be guaranteed or underwritten by one Kaare Vagner ("Vagner"), who was the chairman of the company at the material time.

4 As evidence that the loan was made to the defendant and not to the company, the plaintiff relied on a fax dated 29 November 2000 from the defendant (but on the company's letterhead) which

text I reproduce in full below:

> Dear Charles,
>
> Thank you very much for making available an interest free loan of SGD500,000 to me. I promise to pay back the full amount on time (12 months from the date the money transfer into my A/C). I have spoken to my Chairman Mr Kaare Vagner, he agree to undertake guarantee that I will pay back this money to you on time. He will be in Singapore on 15th Dec 2000 and look forward to have a lunch or dinner session with both of us. He will be sending me the letter in this few days time as he is on business trip in German now.
>
> My personal A/C in Singapore is DBS Bank Thomson Branch, A/C No. 01XXXXXX61. Once again, thank you very much for the trust and support.

It was however the defendant's case that the wording in the above memorandum was dictated to him by the plaintiff.

5 On 6 December 2000, the plaintiff received a handwritten undertaking ("the undertaking") from Vagner stating the following:

> Dear Mr Charles Letts,
>
> In my capacity as chairman of LKE (M), Mr Soh Kim Wat has brought to my awareness that you have made a friendly advance of SGD500,000 to my CEO Mr Soh Kim Wat for a 12 months period to support the LKE Electric (M) Sdn Bhd operations.
>
> The board of directors recognise the commitment given on behalf of LKE(M) to pay back the loan + interest by 5th Dec 2001.
>
> I thank you for the trust and confidence shown to Mr Soh and the company. Looking forward to meet you on 15th Dec in Singapore if convenient for you.

6 The plaintiff did not accept the undertaking; he wanted a fresh undertaking from Vagner based on wording he had drafted as follows:

> I was informed that you have made a friendly loan of SGD500,000 for a period of 12 months to Mr Soh Kim Wat for his LKE Electric (M) Sdn Bhd. operation. I *personally* guarantee repayment of the SGD500,000 loan by 5th December 2001… (emphasis mine).
>
> I thank you for giving the support to Mr K W Soh.

7 Not unexpectedly, Vagner refused to give the personal undertaking requested by the plaintiff. In an email to the defendant on 8 December 2000, Vagner explained:

> Dear Kim,
>
> I can not give a personal guarantee only on behalf of the company. I can however sign a letter of awareness. I leave for Bangkok now.

8 Hence, on 15 December 2000, Vagner gave another handwritten undertaking ("the revised

undertaking") (at 2AB51) on the company's letterhead to the plaintiff as follows:

> In my capacity as chairman of LKE (M) Mr Soh Kim Wat has brought to my knowledge that you have made a friendly advance of SGD500,000 to the company for a 12 months' period to support the operation.
>
> The board of directors recognise the commitment given on behalf of LKE (M) to pay back the loan latest by 5th December 2001 and LKE (M) guarantees the repayment of the advance accordingly.
>
> In my capacity as a director and chairman of LKE (M) I personally undertake to exercise my powers in order that you obtain repayment as scheduled.
>
> I thank you for the trust and confidence shown to Mr Soh and myself.

9 The plaintiff did not in his AEIC set out his response to Vagner's refusal to give a personal undertaking and to his receipt of the revised undertaking. Questioned on his omission by counsel for the defendant as well as the court (at N/E 72), the plaintiff testified (at N/E 73) that he did not reply when he received the revised undertaking from Vagner because he was "fed-up" and that it was pointless. The plaintiff's apparent lack of response to the revised undertaking was completely out of character. This can be seen from the fact that when the plaintiff received the undertaking (see *supra* at [5]) from Vagner on 6 December 2000, he immediately faxed (at 2AB46) to the defendant in Kuala Lumpur stating "Sorry but I require the wording I gave to you over the telephone" followed by the wording as set out in *supra* [6]. Could the plaintiff's failure to reply prove (as counsel for the defendant submitted), that he knew the loan was to the company? That would also explain why Vagner would not/could not give a personal guarantee.

10 In his AEIC, the defendant deposed that he subsequently disbursed part of the loan as payment to two Taiwanese suppliers ($124,000 and $306,000 to Hwa Shih Electric Co Ltd ("Hwa Shih") and YKY Lin Shyr Industrial Company Ltd ("YKY") respectively) from whom the company had purchased goods while the balance of about $70,000 was remitted to the company on 12 January 2001 together with the defendant's own funds of $70,000 as his advance to the company. In support thereof, the defendant produced a memorandum from the company's financial controller Nor Hasimah dated 6 December 2000 requesting him to disburse the funds in the manner he did.

11 Subsequently, the sum of $124,000 remitted to Hwa Shih was returned to the defendant's DBS account as the former refused to deliver the goods ordered by the company. The defendant set off his advance of $70,000 to the company against the sum returned and the net balance of $54,000 ($124,000-$70,000) was sent to the company's subsidiary called Cubic Electric (Shanghai) Co Ltd in China.

12 The company's board of directors passed a circular resolution on 4 January 2001 to accept the plaintiff's loan; the relevant portion of the resolution states:

> Resolved:
>
> That authority be hereby given to the Company to accept a personal loan of RM1,100,000.00 granted by Mr Lionel Edgar Charles Letts (British Passport No. 740173281) of 46A, Nassim Road, Singapore 258432 at an interest rate of 9.0% per annum and to be repayable on 5th December 2001.

13 Further, the loan which was equivalent to Malaysian Ringgit ("RM") 1,192,148.00, was entered

into the books and the audited accounts of the company for the year ending 31 December 2001, together with the interest rate of 9% per annum. In the audited accounts, the loan was included in the figure RM1,436,606 in the item "Other creditors and accruals" under the heading "Less Current Liabilities".

14 Bearing in mind that the loan was to have been repaid by 5 December 2001 and it was not, the company wrote to the plaintiff on 17 July 2002 ("the proposal") offering to settle the loan in five instalments ranging from RM200,000 to RM250,000 totalling RM1,199,000. The defendant was one of three signatories to the letter.

15 The company followed up on its proposal by remitting $92,250.92 and $69,188.19 to the plaintiff's Singapore bank account with Hong Kong & Shanghai Bank on 31 July 2002 and 30 August 2002 respectively (the sums were equivalent to RM200,000 and RM150,000). According to Nor Hasimah (DW2), the partial repayments were also entered into the books of the company.

16 The plaintiff testified (at N/E 79) that he did sign and return the duplicate copy of the proposal which meant he accepted the same. However, he sought to explain it otherwise; the plaintiff said (i) that anything was better than nothing when dealing with a person like the defendant and (ii) he laughed when he received the proposal because it was "nonsense" and added that the defendant could write anything the defendant wanted whereas he only wanted his money back. I shall return to the proposal later.

The pleadings

17 Surprisingly, the plaintiff waited a good four years until 14 July 2006 before commencing this action to recover the balance of the loan. I will revert to this fact later. I noted too that the claim would have been time-barred by 5 December 2006, that being six years from the date the loan was made. Prior to 14 July 2006, the plaintiff's solicitors had on 10 February 2006 made a demand (at 1AB8) on the defendant (which the defendant denied receiving) for payment after alleged repeated demands by the plaintiff which the statement of claim did not particularise. The plaintiff claimed (at N/E 74) that he walked out on the defendant on one occasion at a lunch to which he was invited. He had chased for payment of the loan but nothing serious was discussed. As the plaintiff could not give any timeframe despite remembering the meeting "vividly", I am entitled to ignore the event as having taken place at all. For reasons I will explain later, I very much doubt the plaintiff made any demands of the defendant for *only* the balance he is now claiming. If demands were indeed made, it was for a greater sum.

18 The plaintiff's statement of claim pleaded he had made a friendly interest – free loan to the defendant repayable within one year. He claimed the balance which breakdown is as follows:

5.12. 2000 Sum lent:		$500,000.00
Less repayments:		
(i) 1.8.2002	$92,230.92	
(ii) 2.9.2002	$68,787.34	$161,018.26
		$338,981.74

19 The defendant's defence was amended twice with the second amendment being made on the first day of the trial. In its final form, the defence pleaded that the loan was made with interest at 9% per annum to the company and not to the defendant. The defendant averred that the loan was credited to his personal account for convenience and as a conduit for the company's expenses.

20 The defendant originally pleaded that the first partial repayment of $92,250.92 included interest of $45,000 (9% x $500,000). I note that there is a difference of $20.00 between the plaintiff's figure ($92,230.92) and the defendant's figure ($92,250.92) for this first repayment; I assume the shortfall arose out of bank charges which were deducted from the remittance when the sum was credited to the plaintiff's bank account.

21 If it was found that the loan was made to him personally, the defendant pleaded that the plaintiff was an unlicensed moneylender and the plaintiff's claim was unenforceable by virtue of s 15 of the Act.

22 In support of his alternative defence of moneylending without a licence on the part of the plaintiff, the defendant's AEIC had deposed to previous loans the plaintiff had made to him or to the company in particular:

(a) a loan of $1.5m to the defendant/the defendant's wife in March 1994; and

(b) a loan of $1.2m to the Singapore company in April 1994.

The defendant deposed that the plaintiff had charged him and the Singapore company interest at 9% per annum on the above loans.

23 The defendant therefore accused the plaintiff of lying on oath in an affidavit filed on 3 November 2006 in support of the plaintiff's (unsuccessful) earlier application for summary judgment. The plaintiff had then deposed (in para 6 of his affidavit) as follows:

> I know the Defendant. As far as I can remember I had at the request of the Defendant given him 2 loans free of interest more than 10 years ago. I had not given any loans to any company. The defendant had not at any time requested any loan on behalf of any company.

Copies of the correspondence exchanged between the parties on the loans (see *supra* at [22]) appeared in the agreed bundles and were also exhibited to the defendant's AEIC together with the Singapore company's resolution accepting the loan (see *supra* at [22(b)]).

The issues

24 There are three issues for determination in this case viz:

(a) was the loan made to the defendant personally (as the plaintiff contended) or to the company (as the defendant contended)?

(b) regardless of who actually borrowed from the plaintiff, was interest at 9% charged on the loan?

(c) if interest was charged, did the transaction amount to illegal moneylending on the part of the plaintiff and render his claim unenforceable?

The findings

25 The plaintiff's AEIC was short on essential facts but long on arguments that would have been more appropriate as submissions. Instead of setting out the facts as they transpired (which the court extracted mainly from the AEICs of the defendant and the defendant's witnesses), the plaintiff devoted the greater part of his main and supplemental AEICs to:

(i) criticising the language used by the defendant in his fax dated 29 November 2000 (*supra* at [4]);

(ii) attacking the company's resolution (*supra* at [12]);

(iii) complaining that he had no knowledge of the manner whereby, or of the documents showing how, the loan had been utilised;

(iv) highlighting discrepancies in the loan and interest amounts as stated by the defendant at various times or as pleaded in the defence; and

(v) accusing the defendant of attempting to discredit him and prejudice his claim by the "sham" defence of moneylending.

26 In order to determine the veracity of each party's case, it was necessary to examine the documents produced in court and consider them in relation to the parties' past dealings.

(i) Was the loan made to the defendant or to the company?

27 In para 6 of his affidavit filed on 3 November 2006, the plaintiff had continued with the following sentence after making the statement in [23]:

> The Defendant had repaid monies borrowed from me. That would explain why I was prepared to make this loan to the Defendant.

If indeed that was the altruistic reason that prompted the plaintiff to make the loan, why then would he insist on a personal guarantee from Vagner?

28 I turn next to the loan made to the Singapore company. The defendant had produced the resolution passed by the Singapore company on 5 April 1994 (at 2AB13) accepting the loan. The relevant extract stated:

> Resolved
>
> That the company shall accept a personal loan of $1,200,000/- (SGD one million and two hundred thousand only) from Mr Charles Letts of No. 46A Nassim Road, Singapore 1026, subject to all the terms and conditions as stipulated in his letter dated 5 April 1994 which was addressed to both the Director and Manager of the Company Mdm Tan Lee Siang and Mr Soh Kim Wat respectively.

That as security for the said loan, the company shall provide the following:-

i a Confirmation of Deposit of Title Deed.

ii a Caveat lodged on the property known as 16 Ford Avenue subject to:-

a a satisfactory report on title on the property;

b the property not subject to rent control.

29 The evidence presented (see *supra* at [22], [23], [27] and [28]) supported the defendant's contention that the plaintiff had indeed been untruthful in his affidavit (para 6) filed on 3 November 2006 (*supra* at [23]) on at least two counts:

(a) in asserting he had not made any loan to the company previously; and

(b) in denying he charged the defendant interest on previous loans he had extended.

On (a), I noted that the plaintiff's 1994 loan to the Singapore company was secured by his lodgement of a caveat on the defendant's property at No. 16 Ford Road. If as the plaintiff professed in his AEIC (para 5.1), that the defendant was "a man of substantial means", why would he require Vagner to provide a personal guarantee? I surmise it was because the loan was not made *personally* to the defendant but to *the company*.

30 Above all, if the loan was not to the company, why did the plaintiff countersign and return the proposal (*supra* at [16])? The evidence showed that the plaintiff would immediately correct the defendant's memoranda or faxes to him if the plaintiff disagreed with the documents' contents. Why did he not do so in this case? He could and indeed should have qualified his acceptance of the proposal by writing thereon words to the effect of "without prejudice to my rights against Soh Kim Wat for this personal loan". As he failed to do so, whatever excuses the plaintiff sought to make for his omission cannot detract from the fact that he accepted what the company said in the proposal – it owed him the loan and asked to repay him by instalments which it did (twice at least).

31 My finding is supported by other documents found in the agreed bundles which included the undertaking and the revised undertaking. At 1AB6, the plaintiff had produced his fax dated 5 December 2000 to the defendant where he recorded he had extended the loan to the defendant and he said he looked forward to meeting the defendant and Vagner on 15 December 2000 "to finalise all arrangements reference guarantee covering and return of, this loan".

32 At para 5.2(d)(iii) of his AEIC, the plaintiff interpreted Vagner's refusal (*supra* at [7]) to give a personal guarantee as follows:

> It is quite clear therefore that the loan was not made to the company. Vagner had said that he can only give a personal guarantee on behalf of the company.

In para 16 of the plaintiff's submissions, the same interpretation was repeated. The plaintiff's interpretation was both strained and absurd. What Vagner clearly stated and meant was, he (Vagner) could not give a personal guarantee but only on behalf of the company and quite rightly so, because it was the company that was taking the loan. Why would any right-minded person personally guarantee a loan to a company of which he was not even a shareholder?

33 In his submissions (paras 10 to 14), the plaintiff also made much of the fact that the defendant failed to call Vagner to testify. It was further pointed out that Vagner did not sign the company's resolution (*supra* at [12]) above. In my view, Vagner's testimony was completely irrelevant. It was common ground that both the undertaking and the revised undertaking were not acceptable to the plaintiff. What would be the point of having Vagner testify? Without the benefit of seeing the company's articles of association, the plaintiff was not in a position to submit that a resolution signed

by three of the company's four directors was invalid. I should add that the plaintiff was also untruthful when he denied having met Vagner. It was the testimony (at N/E 208-209) of the company's export manager Lee Soo Sim (DW4) when questioned by the court, that the plaintiff had met Vagner on at least two occasions, once at the wedding dinner of the defendant's daughter in Singapore and subsequently in Zuhai, China (where the defendant had a factory).

34 The plaintiff had also criticised [in 25(ii) of his AEIC] the company's resolution (at 2AB53) because it used the future, when it should be, the past tense – the loan having already been extended a month earlier. What did that matter? A company can always ratify an earlier act. Unlike the plaintiff, English was not the native tongue of the defendant or his witnesses.

35 In the witness box, the defendant's command of the English language, (as with that of some of his witnesses in particular Nor Hasimah the financial controller) was obviously poor. The language, tense and grammar he (and his witnesses) used was often wrong, at times the defendant was garbled and at other times he was confused. An example of the defendant's poor English would be his frequent address of the court as "Your Honours" and sometimes as "my/your Lord". It would also explain the defendant's usage of the words "to me" in his fax to the plaintiff (*supra* at [4]) when he acknowledged the loan. The defendant explained (N/E 99) he had used the words loosely because he was writing the fax as the managing-director of the company.

36 The defendant had also explained (at N/E 152) why the plaintiff was keen to cultivate Vagner's acquaintance/friendship and which could well be the reason why the plaintiff thought (erroneously as it turned out) he could safeguard the loan by a guarantee from Vagner. Apparently, Vagner was the deputy president of a Danish company/group called ABB. The defendant testified that the plaintiff went to the extent of conducting his own search to verify that what the defendant told him about Vagner's credentials was true.

37 Another line of attack by the plaintiff was on the disbursement of the loan. The plaintiff's submissions dwelt at length with the payments the defendant allegedly made to Hwa Shih and YKY (*supra* at [10]) on the company's behalf. The plaintiff argued that the documents in the second agreed bundle only showed that the defendant remitted payment to Hwa Shih but not YKY. The other remittance made by the defendant was to an individual Lin Chao Tsung ("Lin"). (I should point out that the defendant had attempted to apply to court for leave to call Lin as a witness. In his affidavit filed on 31 July 2007 to support the application, the defendant had deposed that Lin was one of the owners of YKY). The plaintiff's counsel pointed to the absence of invoices from either company to prove that the company was indeed indebted to Hwa Shih and YKY; nor was Nor Hasimah's testimony on payments made to the suppliers consistent with the documents produced.

38 Granted, the documents produced did not include invoices from either Taiwanese company. Does the omission undermine the defendant's case? I think not. If the loan was personal to the defendant, then as the plaintiff rightly pointed out, it did not matter and it was of no concern to him who repaid the loan. Repayments could be made by the company on the defendant's behalf and it would not make one iota of difference to the defendant's liability for the loan. Why should the converse argument not apply to the company? If the loan was indeed made to the company as the defendant contended, it was of no concern to the plaintiff either how the loan was disbursed. The defendant's remittances to Taiwan were only relevant to explain why the defendant did not remit the loan to Kuala Lumpur. If he had remitted the loan to a Malaysian bank account first before sending the money to Taiwan, the company would have incurred bank charges and commission twice over.

39 The plaintiff had accused Nor Hasimah (as well as the defendant and his other witnesses) of lying. In court, Nor Hasimah had testified she wrote the memorandum of 6 December 2000 (*supra* at

[10]) requesting the defendant to remit the total sum of $430,000 to Taiwan, with which the defendant complied. Granted the language she used in the memorandum was poor but the purpose was crystal clear. She had stated:

> To avoid losses in exchange rate and additional bank charges therefore we hereby request you to t/t directly to the suppliers from you [sic] Singapore's account.

I reject the plaintiff's submission that the memorandum was not a contemporaneous document and did not exist at the material time. This was pure conjecture without any basis whatsoever.

(ii) Did the plaintiff charge interest at 9% on the loan?

40 For this second issue, I looked at past loan transactions between the parties. In relation to the loans (*supra* at [22]), the documents clearly showed that the plaintiff charged interest at 9% per annum. More significant was the fact that the plaintiff did not deny making the aforementioned loans to the defendant/the defendant's company.

41 In court, counsel for the defendant drew the plaintiff's attention to yet a third loan which the plaintiff had made to the defendant in May 1995 (see 1AB3) and which the plaintiff did not/could not deny. Although the loan was stated to be interest-free in the memorandum dated 16 May 1995 signed by both parties (which the plaintiff had selectively disclosed at 1AB3), the defendant produced a draft letter (at DB3) he had prepared and which he had asked the plaintiff to sign. The draft stated:

> Dear Mr Letts,
>
> As per our teleconversation today, this is to confirm that you agreed to advance me S$200,000 (Sin Dls two hundred thousand only) for the period of 10 (ten) weeks as from 19th May 1995 to 29th July 1995 and I shall give a post dated cheque for repayment purposes, as attached, Standard Chartered Bank No.
>
> The advance of S$200,000 is interest free and I shall pay for the transfer fees, procedure fees and other incurred expenses amounting to S$8,000 (Sin Dls eight thousand only) of which a cheque Standard Chartered Bank No. is attached.
>
> Once again thank you for your advance and support.

42 The plaintiff did not countersign the above draft to confirm his acceptance. Instead, according to a note on the draft, the draft had to be amended on the plaintiff's instructions and a fresh note was prepared which both parties signed; it stated:

> Dear Mr Letts,
>
> As per our teleconversation today, this is to confirm that you agreed to advance me S$200,000 (Sin Dls two hundred thousand only) for the period of 10 (ten) weeks as from 19th May 1995 to 29th July 1995 and I shall give a post dated cheque for repayment purposes, as attached, Standard Chartered Bank No. 020057 SCB.
>
> The advance of $200,000 is interest free.

43 On the same day, the defendant wrote a separate memorandum (wording dictated by the

plaintiff) to the plaintiff as follows:

> Dear Mr Letts,
>
> Reference to the advance of S$200,000 as referred to in our fax of today, this confirms I shall pay for the transfer fees, procedure fees and other incurred expenses amounting to S$8,000 (Sin Dls Eight Thousand Only), of which a cheque Standard Chartered Bank No. 020058 is attached. SCB.
>
> Once again thank you for your advance and support.

44 Both counsel for the defendant (at N/E 83) and the court (at N/E 91) had questioned the plaintiff on the reason for the charge of $8,000. His explanation (after some prevarication) that some legal expenses were involved was both lame and unconvincing. I had pointed out to the plaintiff that there should not be any legal expenses because no legal documentation was involved. Pressed further, the plaintiff took refuge in the excuse that he could not remember.

45 I am certain that the $8,000 paid by the defendant that was thinly disguised as "transfer fees and expenses", was in fact interest charged by the plaintiff on the loan of $200,000. As the loan was only for 10 weeks, the $8,000 payment was equivalent to a usurious interest rate of 20.8% per annum ($8,000÷ 10 weeks x 52 weeks per year = $41,600 ÷ $200,000 = 0.208 x 100%). The rate exceeded the 20% maximum prescribed rate of interest that licensed moneylenders can charge under s 23 of the Act. This was only one aspect of the questionable nature of the plaintiff's transactions with the defendant.

46 Far more significant was the evidence in paras 14 to 16 of the defendant's AEIC, that the loan was paid into his DBS account by the plaintiff because that was the plaintiff's preference, in order to avoid withholding tax in Malaysia for which, the plaintiff as a non-resident, would have been liable (according to what the plaintiff told the defendant). Those paragraphs together with para 15 (where the defendant deposed that the plaintiff was concerned that neither the defendant nor the company should disclose the fact that the plaintiff was a moneylender without a licence) was not challenged by the plaintiff or his counsel during cross-examination of the defendant. Instead, all that the plaintiff said (in para 8(b) of his supplemental AEIC) on paras 14 and 15 was that they were "unbelievable" and harped on the defendant's fax to him dated 29 November 2000 (*supra* at [4]) as evidence that the loan was made to the defendant personally. That is no answer to the defendant's allegation. Withholding tax on interest payable to non-residents of Malaysia is not fiction but a reality found in s 6(1) of the Malaysian Income Tax Act 1967 (Act 53) (taxed at 20% on the first RM500,000 in 2000). Singapore has similar legislation which requires withholding tax to be paid to our tax authorities on interest payable to non-residents (see s 45(1) of the Income Tax Act (Cap 134, 2004 Rev Ed). What is unbelievable is that the defendant with his understanding and standard of English could possibly concoct something relating to withholding tax unless it was told to him by the plaintiff. In any case, I disbelieved the plaintiff as his depositions on oath were discredited earlier (see *supra* at [29]).

47 I would add that in court (at N/E 149-153), the defendant painted a highly unflattering picture of the plaintiff as an autocratic and mercenary individual whose philosophy in life centred on two things (money and women), for whom friendship meant very little or nothing at all and who would squeeze the defendant even for $20.00 short payment arising out of bank charges. The defendant may have borrowed money time and again from the plaintiff but he did not regard the latter as a friend in the true sense of the word.

(iii) Did the loan transaction amount to illegal moneylending?

48 Under s 3 of the Act, "any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary is proved to be a moneylender". Instead of rebutting the presumption that the plaintiff was a moneylender by reason of his having made loans to the defendant and/or the defendant's companies charging interest at 9% per annum for this claim and previous loans, the plaintiff counsel's only response was to complain (at para 66 of the plaintiff's submissions and I quote) "references to the previous transactions is prejudicial and irrelevant and an abuse of the process of court". I disagree. I refer in this regard to s 11(2) of the Evidence Act (Cap 97, 1997 Rev Ed) which states:

> Facts not otherwise relevant are relevant –
>
> (b) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

49 The previous interest-bearing loans were therefore highly relevant to determine whether the transactions between the parties showed a system and continuity such as to constitute moneylending on the part of the plaintiff (per Chan Sek Keong J in *Subramaniam Dhanapakiam v Ghaanthimathi* [1991] SLR 432 at 434). The earlier loans were certainly not red herrings as the plaintiff contended in his supplemental AEIC. The test of system and continuity has been applied in subsequent local cases, including *Bhagwandas* v *Brookes Exim Pte Ltd* [1994] 2 SLR 431 (affirmed by the Court of Appeal at [1995] 2 SLR 13) and more recently in *Pankaj s/o Dhirajlal v Donald McArthy Trading Pte Ltd* [2006] 4 SLR 79 where the decision of Kan Ting Chiu J was affirmed by the Court of Appeal (see [2007] 2 SLR 321).

50 In *Subramaniam Dhanapakiam v Ghaanthimathi* as well as in *Loraine Esme Osman v Elders Finance Asia Ltd* [1992] 1 SLR 369, the court and the appellate court respectively followed *Litchfield v Dreyfus* [1906] 1 KB 584 and approved the following passage from Farewell J's judgment (at p 509):

> The Act [referring to the English Moneylenders Act 1900] was intended to apply only to persons who are really carrying on the business of moneylending 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. The particular Act was supposed to be required to save the foolish from the extortion of a certain class of the community who are called moneylenders as an offensive term.

Karthigesu J in *Loraine Esme Osman v Elders Finance Asia Ltd,* held at 378, that what Farewell J said "in respect of the English Moneylenders Act 1900 [was] equally true of the Act".

51 In this regard, s 15 of the Act states:

> No contract for the repayment of money lent by an unlicensed moneylender shall be enforceable:
>
> Provided that money lent on behalf of a principal through an agent who is licensed under the provisions of this Act to carry on the business of moneylending on behalf of that principal shall be deemed to have been lent by a licensed moneylender.

52 It bears remembering that what is prohibited by the Act is *not* moneylending *per se* but the business of moneylending. The question then arises did the plaintiff lend money as a business? I have little doubt he did. Although he claimed to be an entrepreneur, the plaintiff did not disclose what business(es) if any, he had or was engaged in.

The decision

53 Despite his poor command of the English language, his garbled explanations at times and his incoherency at other times, I find that the defendant was truthful in his testimony; he was not evasive. Neither were his witnesses. I note that one of his witnesses Tan See Hau (DW5) was the company's former group financial controller and I could see no reason for him to lie on the company's behalf as the plaintiff alleged although his evidence was not really material. This witness had testified the defendant handed him cash of $54,000 (*supra* at [11]) which he took to a moneychanger (accompanied by 2 staff of the company) to change into Chinese renminbi which the defendant then hand-carried to China and delivered to Cubic Electric (Shanghai) Co Ltd.

54 The plaintiff on the other hand, notwithstanding his superior command of English, was consistently evasive in his testimony. Where he could not and/or would not answer questions put to him in cross-examination or by the court, he prevaricated; he was untruthful. The plaintiff is 89 years of age, hard of hearing and needed to be helped into and out of the witness box. Yet, when the court inquired whether he was a "retiree", the plaintiff shot back (at N/E 8):

> No, I am not. I am 89 but I am going to work until I die.

55 A man with such an attitude is highly unlikely to have lent the defendant $500,000 out of the goodness of his heart. The plaintiff came across not only as shrewd but also calculating – I can well believe he could and did, squeeze the defendant, for a mere $20.00 shortfall in payment (see *supra* at [45]) due to bank charge deductions. The plaintiff's shrewdness was reflected in the manner in which he conducted his dealings with the defendant. The plaintiff would dictate the wording of letters he required the defendant to sign to evidence his loans. The plaintiff very cleverly avoided the usual practice (and pitfalls) of moneylenders of deducting interest payments upfront from their loans. There was always clear evidence of the loans he extended to the defendant. In this case, he credited the loan directly into the defendant's DBS account for his own reasons, one of which undoubtedly was to prove that the loan was made to the defendant personally.

56 Both the plaintiff and his counsel made much of the fact that the defendant's version of the loan kept changing and therefore cannot be true. The plaintiff pointed out that in the defendant's affidavit filed on 27 October 2006 to resist the plaintiff's application for summary judgment ("the O.14 affidavit), the defendant had deposed that the loan was inclusive of interest; this meant that the actual sum lent would by $455,000 ($500,000 – (9% x $500,000 = $45,000) which was contradicted by the sum paid into the defendant's DBS account.

57 In his (original) defence filed on 27 September 2006, the defendant (at para 7) averred that the first repayment by the company of $92,250.92 (see *supra* at [15]) was inclusive of $45,000 interest. However, in the O 14 affidavit (at para 21), the defendant changed his evidence again and deposed that the interest element was included in the company's second repayment of $69,188.19. Yet, in the proposal (see *supra* at [14]), the company only set out instalments to repay the principal loan equivalent to RM1,192,148. Nothing was said about interest payment let alone that the first two instalments (the aforementioned repayments) included the interest equivalent of $45,000. In his (second) amended defence, the defendant merely pleaded that the loan was with interest of 9% per annum.

58 There were undoubtedly discrepancies between the defendant's figures in his pleadings and in his affidavits. Despite his confusion, I believe what happened as the defendant attempted to explain (without much success at N/E 119) was, that the plaintiff wanted the defendant to pay the total interest of $45,000 upfront together with the first instalment payment, but the company failed to pay presumably because it lacked the funds to do so. The fact that no actual interest was paid does not detract from the fact that the plaintiff charged interest on the loan.

59 Earlier (*supra* at [17]), I had adverted to the lateness of the plaintiff's proceedings. I surmise it was because over the years, he must have attempted (presumably unsuccessfully) to recoup the interest element as well as the balance of the principal lent, either from the company and/or the defendant. The plaintiff sued as a last resort and had no alternative but to claim only the principal sum outstanding to hide the fact that it was a moneylending transaction.

Conclusion

60 I therefore find, on a balance of probabilities, that the loan was indeed extended by the plaintiff to the company and not to the defendant personally. That was why the plaintiff required a personal guarantee from Vagner.

61 Even if I am wrong on this finding, the evidence is overwhelming that the loan was a moneylending transaction. The plaintiff was systematically engaged in moneylending activities, charging interest usually at 9% per annum to the defendant and/or the defendant's companies for the advances he made to the latter since 1994. The plaintiff did not lend money as an incident of another business or to a few old friends by way of friendship. Neither were his loans one-off transactions but were reflective of a system and continuity. The plaintiff failed to disprove the presumption under s 3 of the Act (*supra* at [46]) that he was a moneylender.

62 Consequently, as he was/is not a licensed moneylender, the court should not lend its aid to help the plaintiff to recover a claim which is unenforceable under s 15 of the Act (*supra* at [51]).

63 Accordingly, I dismiss the plaintiff's action with costs to the defendant to be taxed unless otherwise agreed.