Agus Anwar *v* Orion Oil Ltd
[2010] SGHC 6

Case Number	: Originating Summons Bankruptcy No 29 of 2009 (Registrar's Appeal No 299 of 2009)
Decision Date	: 06 January 2010
Tribunal/Court	: High Court
Coram	: Lee Seiu Kin J
Counsel Name(s)	: Ng Soon Kai and Mario Tjong (Ng Chong & Hue LLC) for the plaintiff; Kelvin Tan Teck San and Natasha Nur Bte Sulaiman (Drew & Napier LLC) for the defendant.
Parties	: Agus Anwar — Orion Oil Ltd

credit and security – money and moneylenders

6 January 2010

Lee Seiu Kin J:

1 In this action, the plaintiff applied to set aside the statutory demand for the sum of $10.5m served on him by the defendant on 18 April 2009 ("the SD"). After hearing counsel for the parties on 7 August 2009, the assistant registrar granted the application and set aside the SD on the ground that the debt was disputed on substantial grounds, specifically, that there is a triable issue as to whether the defendant was a moneylender under the Moneylenders Act (Cap 188, 1985 Rev Ed) ("the Act"). The defendant appealed before me in registrar's appeal no 299 of 2009 and on 25 August 2009, I allowed the appeal and quashed the assistant registrar's order setting aside the SD. The plaintiff filed an appeal to the Court of Appeal and I now give the grounds for my decision.

2 The plaintiff did not dispute the fact that the defendant had given the plaintiff a loan of $10m. The plaintiff's position was simply that when the loan was made, the defendant was a moneylender within the meaning of the Act and as the defendant had not taken out a licence under s 5 thereof, the loan contracts were not enforceable pursuant to s 15. The question is whether there is any triable issue as to whether the defendant is a moneylender under the Act.

3 Section 2 of the Act defines a moneylender as follows:

> "moneylender" includes every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or as an agent but does not include —
>
> (a) any body corporate, incorporated or empowered by a special Act of Parliament or by any other Act to lend money in accordance with that Act;
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> (b) any society registered under the Cooperative Societies Act;
>
> (c) any person bona fide carrying on the business of banking or insurance or bona fide carrying on any business not having for its primary object the lending of money in the course

of which and for the purposes whereof he lends money;

(d) any pawnbroker licensed under the provisions of any written law in force in Singapore relating to the licensing of pawnbrokers;

(e) any finance company licensed under the Finance Companies Act;

(f) any person licensed under the Securities and Futures Act 2001; and

(g) any merchant bank which is an approved financial institution for the purposes of section 28 of the Monetary Authority of Singapore Act (Cap. 186)

…

4 Under s 3 of the Act, any person – other than one falling within paras (a) to (g) of the definition of "moneylender" – "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". As the loan provided for payment of interest of 20%, amounting to $500,000, the presumption was invoked and the burden fell on the defendant to rebut it.

5 In his affidavit filed on behalf of the defendant, Nai Song Kiat ("Nai"), a director of the defendant, deposed as follows. The defendant was an investment holding company which engaged in oil and other energy trading business, and it also invested in petroleum storage facilities. Nai was familiar with the plaintiff in business circles and in September 2008, the plaintiff approached him for a loan of $10m from the defendant. The plaintiff had been badly affected by the drastic fall in the stock market and the money was to enable him to pay some of his creditors. Following negotiations over security to be provided for the loan, the parties entered into a loan agreement on 22 September 2008 and a supplemental agreement on 24 September 2008, pursuant to which the plaintiff received $10m from the defendant. The loan contemplated repayment by 18 December 2008 (or such other date as parties may agree) along with interest of $500,000. Any late payment would attract interest at 20% per annum. The loan was to be secured, *inter alia*, by a mortgage on shares of Keppel Telecommunications and Transportation Ltd and a detached house at Ridout Road. Nai deposed that this was a one off loan to the plaintiff and that the defendant was not in the business of moneylending. Nai asserted that the defendant had never given a personal loan to any other individual. The plaintiff did not file any affidavit to dispute Nai's material assertions.

6 On the facts before me, I found that the defendant had rebutted the presumption s 3 of the Act. The definition of "moneylender" envisages a person:

(a) whose business is that of moneylending; or

(b) who carries on or advertises or announces himself or holds himself out in any way as carrying on the business of moneylending.

In relation to limb (a), Nai had positively asserted that the defendant was not in the business of moneylending but was an investment holding company engaged in oil and other energy trading business, including investing in petroleum storage facilities. Nai also stated that the defendant had never given a personal loan to any other individual. The plaintiff did not dispute these assertions. As for limb (b), there was no evidence adduced by the plaintiff that the defendant had carried on or advertised or announced or held itself as carrying on the business of moneylending. Indeed, the plaintiff did not dispute that it was he who made the approach to the defendant for the loan.

7 In *Ang Eng Thong v Lee Kiam Hong* [1998] SGHC 64, Lai Siu Chiu J formulated the following two-step test at [21]:

> What is the resulting position in Singapore? In my opinion, a two-step test can be utilised. The *Newton v Pyke* test of system and continuity is a crucial, initial consideration. Loans to one individual or to a restricted class do not negate the finding of a moneylending business so long as there is system and continuity. However, even if there is no such system and continuity, it is still possible in some factual circumstances for the transaction to be a moneylending transaction, as seen in the alternative test in *Litchfield*. Whether there are such circumstances depends on the particular facts of each case.

8 This was adopted by Belinda Ang J in *Mak Chik Lun v Loh Kim Her* [2003] 4 SLR 338 ("*Mak Chik Lun*") at [11]:

> Once a *prima facie* presumption is raised, it is for the lender to rebut the presumption by showing that it does not apply. He has to bring himself within one of the exceptions in s 2 or show that he is not a moneylender within the terms of the definition in s 2. In rebutting the presumption, the claimant, for instance, has to show that there was neither system nor continuity in moneylending. The local test of whether there is a business of moneylending is whether there was a system and continuity in the transactions. If no system or continuity is displayed, the alternative test (the *Litchfield* test) of whether the alleged moneylender is one who is ready and willing to lend to all and sundry provided that they are from his point of view eligible is used. See *Ang Eng Thong v Lee Kiam Hong* [1998] SGHC 64 (unreported); *Brooks Exim Pte Ltd v Bhagwandas* [1995] 2 SLR 13 where *Litchfield v Dreyfus* [1906] 1 KB 584 was followed.

9 The first of the two-step test is whether there is system and continuity. In *Ng Kum Peng v Public Prosecutor* [1995] 3 SLR 231, Yong Pung How CJ ("Yong CJ") considered the English decisions of *Newton v Pyke* (1908) 25 TLR 127 and *Edgelow v MacElwee* [1918] 1 KB 205 as well as the local decisions of *Subramaniam Dhanapakiam v Ghaanthimathi* [1991] 2 MLJ 447, *Esmail Sahib v Noordin* [1951] MLJ 98, *Cheong Kim Hock v Lin Securities (Pte) (in liquidation*) [1992] 2 SLR 349 and *Brooks Exim v Bhagwandas* [1995] 2 SLR 13. Yong CJ concluded as follows, at [38]:

> All the authorities indicate that there must be more than occasional loans. This is what is meant by continuity. The loans must be part of an ongoing and routine series of transactions made by the alleged moneylender. The requirement of system on the other hand has not been explicitly clarified. But it is evident that the need for system shows that there must be an organized scheme of moneylending. Some indicators of such a scheme would be fixed rates, the rate of interest being dependent on the creditworthiness and past conduct of the borrower and a clear and definite repayment plan. Such factors distinguish organized moneylending from occasional loans, which would be outside the mischief of the Act.

10 There was clearly no evidence before me of any system and continuity in the present case and certainly on the unrebutted evidence of the defendant, this particular loan was a one off transaction.

11 The second test is the *Litchfield* test (see *Litchfield v Dreyfus* [1906] 1 KB 584), which is, to borrow the formulation in *Mak Chik Lun*, "whether the alleged moneylender is one who is ready and willing to lend to all and sundry provided that they are from his point of view eligible". That cannot be said to be the situation in the present case where the loan to the plaintiff was the only one ever made by the defendant to any individual.

12 I conclude by citing V K Rajah J in *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005]

1 SLR 733 at [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 [Act] 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 [Act] 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.

The plaintiff rested his case solely on the presumption in s 3, which the defendant had successfully rebutted. This appeared to me to be a totally unmeritorious case in which the plaintiff tried to take advantage of the presumption in s 3 of the Act to escape his obligations, willingly undertaken at the time when he was desperate for cash, but which he did not want to repay for reasons best known to himself.