Lena Leowardi *v* Yeap Cheen Soo
[2014] SGCA 57

Case Number	: Civil Appeal No 55 of 2014
Decision Date	: 26 November 2014
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; Steven Chong J
Counsel Name(s)	: Isaac Tito Shane, Justin Chan Yew Loong and Neo Wei Chian Valerie (Tito Isaac & Co LLP) for the appellant; Ong Ying Ping, Lim Seng Siew and Susan Tay Ting Lan (OTP Law Corporation) for the respondent.
Parties	: Lena Leowardi — Yeap Cheen Soo

Credit and Security – Money and Moneylenders

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2014] SGHC 44.]

26 November 2014 Judgment reserved.

Steven Chong J (delivering the judgment of the court):

Introduction

1 This case concerns the classic tale of two innocent victims of a scam leading to the legal conundrum as to which of two victims ought to bear the legal consequences as a result of the actions of a fraudster. Many instances of such a situation in the common law of contract are often to be located in relation to the formation of a contract (of which the issue of mistaken identity is perhaps the most prominent).

2 This appeal, however, arises in a somewhat different and more unusual context – that of moneylending in general and the potential applicability of the Moneylenders Act (Cap 188, 2010 Rev Ed) ("the Act") in particular. It is not only a tale of fraud and trickery but also of sharp business sense and practice, all of which were wrapped up in the perhaps naïve optimism and desire on the part of the victims in seeking out their respective pots of gold at the end of their respective rainbows. As it turns out, neither of the victims found his or her pot of gold because those pots never existed in the first place. Indeed, the rainbows were conjured up by a fraudster and were utterly illusory. In their place, a legal storm occurred instead: one victim turned on the other in order to minimise the damage she suffered whilst the other sought to rely on the Act in order to resist the former, resulting in the legal proceedings that are before us.

3 In the simplest terms, these proceedings involved a fraudster who managed to persuade Lena Leowardi ("the Appellant") to lend him not insignificant sums of money on four successive occasions, from which one set of contracts arose ("the Loan Agreements"). The fraudster provided another set of contracts in which he promised "bonus payments" to the Appellant ("the Promissory Notes") upon the occurrence of an event. When these "bonus payments" are repayable if at all has a material bearing on the applicability of the Act. However, notwithstanding the promise of the "bonus payments", the Appellant would not have lent the sums to the fraudster without a *further* "inducement"; she would only lend the sums of money to the fraudster if the latter was able to procure someone to guarantee repayment of these sums. In came Yeap Cheen Soo ("the

Respondent") who guaranteed the repayment of two out of the four Loan Agreements. The Respondent similarly obtained separate promissory notes from the fraudster for agreeing to act as his guarantor. Two independent contracts of guarantee ("the Guarantees") were subsequently entered into between the Appellant and the Respondent (which are the contracts in issue before the court in these proceedings). The fraudster defaulted in the payment of the Loan Agreements and had the temerity or the guile to voluntarily declare himself a legal bankrupt. Not surprisingly, the Appellant (as already mentioned) sued the Respondent on the Guarantees. In essence, the Respondent resisted this claim, arguing that the Guarantees were not enforceable as the sums lent by the Appellant to the fraudster pursuant to the Loan Agreements were moneylending transactions that were proscribed under the Act. However, in order to make good his defence, the Respondent had a threshold hurdle to cross. In particular, he had to persuade the trial judge ("the Judge") that the Loan Agreements were *inextricably connected with* the Promissory Notes because it was the latter set of contracts that contained the alleged "bonus payments" that had to be repaid which (the Respondent argued) triggered the presumption of moneylending under s 3 of the Act. *If*, on the contrary, these two aforementioned sets of contracts were separate and independent of each other, though they may be connected, there would be no basis for the Act to apply in which event the presumption would not arise. The Judge agreed with the Respondent and proceeded to hold that the Act applied and that the presumption in s 3 of the Act had not been rebutted. In the premises, he held that the Respondent had made good his defence under the Act and therefore found in his favour (see *Lena Leowardi v Yeap Cheen Soo* [2014] SGHC 44 ("the Judgment")). The Appellant mounted the present appeal. What is interesting is that whilst the parties focused on the *application* of the Act in their respective cases before this court, it seems to us that what is crucial to the outcome of this appeal hinges, instead, on the *applicability* of the Act in *two* (related) aspects.

4 First (and bearing in mind that this case involved a submission of no case to answer), did *the pleadings* permit the Respondent to invoke *s 3* when *only s 5* of the Act was referred to? Secondly, even assuming that this pleading obstacle could be surmounted, were (as the court below held) the Loan Agreements *inextricably and necessarily connected to* the Promissory Notes such that the "bonus payments" were payable *together* with payment of the loan amounts? As already alluded to above, this was a *threshold* requirement in the present case *before* the Act could be invoked. However, as the *precise facts* of the present case are of the first importance, it is necessary to now turn to a more specific rendering of the same.

The Facts

5 We note that the parties are not disputing the facts as set out in the Judgment.

Parties to the dispute

6 The Appellant was an Indonesian businesswoman who stayed at Lucky Plaza apartments. She had a friend, Thomas Tan Boon Chai ("Thomas"), who owned a jewellery store in the same building. Thomas introduced the Appellant to Choong Kok Kee ("Choong") who eventually borrowed money from the Appellant. The Respondent was the guarantor for two of these loans. It should be noted that the Appellant did not know either Choong or the Respondent before Choong was introduced to her by Thomas.

Background to the dispute

7 On 29 November 2010, Thomas was introduced to Choong by his long-time friend Grace Soh. Ms Soh came to his store together with Choong and one Steven Pang Kia Boon. Choong informed Thomas that he was the beneficiary of the funds under his brother-in-law's estate in the United

Kingdom worth some US$7.2m ("the Funds"). Choong requested from Thomas a loan of $140,000 to pay the administrative fees required to release the Funds. He promised to repay the loan within three to four weeks together with a reward of $100,000. Thomas then lent $140,000 to Choong. Subsequently, Thomas lent further sums to Choong despite Choong not returning him any money. He lent to Choong $250,000 on 20 January 2011, $44,000 on 11 February 2011 and $25,000 on 25 April 2011 for the same purpose of releasing the Funds. According to Thomas' police report, he was promised a reward of $163,000 by Choong in return for all the loans.

8 In March 2011, Choong asked Thomas to lend him a further sum of $200,000 for the same purpose mentioned above but Thomas was unable to do so. Thomas then approached the Appellant and informed her of Choong's situation and asked if she could lend Choong the money. Thomas also informed her that he wanted to help Choong retrieve the Funds so that Choong could repay him the loan monies he had already advanced. However, the Appellant was suspicious and asked for more information. In response to the Appellant's query, Choong told her that the Funds had been sent to Bank Negara, Malaysia because it attracted a lower rate of tax in Malaysia. Among the documents provided by Choong to the Appellant was a "RELEASE ORDER FORM" purportedly issued by the London Metropolitan Police and signed by one "Dave Prebbel". To satisfy herself that the Funds were genuine, the Appellant actually contacted the London Metropolitan Police to speak to Dave Prebble but was told that he was not in. The Appellant informed Choong that she would only be willing to lend him the money if he could obtain a guarantee from a third party for the repayment of any loan advanced. The Appellant also requested for the loan agreement to be drawn up by a lawyer.

The First Loan Agreement

9 On 22 March 2011, the Appellant met Choong and the Respondent at the lawyer's office of Messrs Oliver Quek & Associates to execute the loan agreement ("the First Loan Agreement"). The Appellant met the Respondent for the first time on that occasion. The Respondent was the guarantor for this loan. Under the First Loan Agreement the Appellant agreed to lend $200,000 to Choong and he was to repay the sum within six weeks of the date of the agreement. There was no provision for any interest payment for the loan. The Respondent pledged his apartment at 3 Petain Road #03-02, Singapore as security for this Loan. Subsequently, the Appellant advanced the $200,000 to Choong.

10 On or about 22 March 2011, the Appellant signed a promissory note issued by Choong ("the First Promissory Note"). It stated that Choong was to pay the Appellant $400,000 within a month for her "investment" of $200,000. The Respondent was not aware of this promissory note.

The Second Loan Agreement

11 In April 2011, Choong requested more money from the Appellant and showed her a document purporting to prove that he needed to pay more money to secure the release of the Funds. The Appellant agreed to loan him a further sum of $380,000. Similarly, another loan agreement was executed at the office of Messrs Oliver Quek & Associates on 15 April 2011 ("the Second Loan Agreement"). Under the Second Loan Agreement, Choong promised to repay the $380,000 within six months. Like the First Loan Agreement, the Second Loan Agreement also had no provision for any interest payment. The Respondent was not a party to the Second Loan Agreement and it was Choong who pledged his Housing Development Board ("HDB") apartment at Block 212 Bishan Street 23 #06-249, Singapore as security for the Second Loan Agreement.

12 After the Appellant had advanced the sum of $380,000 to Choong, the latter issued her another promissory note which she duly signed on 18 April 2011 (the "Second Promissory Note"). Under this note, Choong agreed to pay the Appellant an additional $250,000 on top of the loan of $380,000

"within 3 weeks to one month".

The Third Loan Agreement

13 Choong asked for a further loan from the Appellant in May 2011. The Appellant, Choong and the Respondent then entered into another loan agreement on 25 May 2011 at the office of Messrs Oliver Quek & Associates ("the Third Loan Agreement"). The Appellant agreed to lend $340,000 to Choong who promised to return it within six months. There was, again, no provision for interest payment. The Third Loan Agreement provided that the Respondent would personally guarantee the repayment of this loan. Similar to the First Loan Agreement, the Respondent pledged his apartment at 3 Petain Road #03-02, Singapore as security for the Third Loan Agreement. The Appellant subsequently advanced the $340,000 to Choong the following day.

14 The Respondent was also unaware that Choong had given the Appellant a promissory note for this loan ("the Third Promissory Note"). The promissory note was signed by the Appellant and Choong on 26 May 2011. Under this note, Choong promised to pay the Appellant an additional $340,000 in addition to the loan amount "within 3 weeks to one month".

The Fourth Loan Agreement

15 On 7 June 2011 the Appellant gave a further loan of $120,000 to Choong ("the Fourth Loan Agreement"). The circumstances under which this loan was entered into were different. No formal loan agreement was executed. Instead, the loan was evidenced by a hand-written promissory note which stated that a "friendly loan" of $120,000 was advanced by the Appellant to Choong. There was no mention of any additional payment or reward. There was also no provision of a guarantee or security in the promissory note. However, the Appellant testified that Thomas verbally guaranteed the repayment of the $120,000. The Respondent was not involved in this loan.

16 The facts relating to the Loan Agreements are summarised as follows:

No	Date	Quantum	Security	Promissory Note
1	22 March 2011	$200,000	Respondent's guarantee and pledge of his apartment at 3 Petain Road.	$200,000 reward; dated 20 March 2011.
2	15 April 2011	$380,000	Choong's HDB apartment; Respondent not a party.	$250,000 reward; dated 18 April 2011.
3	25 May 2011	$340,000	Respondent's guarantee and pledge of his apartment at 3 Petain Road.	$340,000 reward; dated 26 May 2011.
4	7 June 2011	$120,000	None; Appellant alleges that an oral guarantee was given by Thomas.	No reward; loan itself took the form of a promissory note.

The aftermath

17 Choong never received the Funds which he supposedly inherited. He defaulted on all of the Loan Agreements and was declared bankrupt. The Appellant was also unable to enforce the security against the HDB apartment pledged by Choong under the Second Loan Agreement. The Appellant then

commenced the present proceedings against the Respondent as guarantor for the First and Third Loan Agreements. She seeks to recover from the Respondent *only* the loan monies amounting to $540,000 which she had advanced to Choong as the Guarantees only answer for the loan monies and *no more*.

Summary of pleadings

18 The Appellant pleaded that the Respondent was the guarantor of the First and Third Loan Agreements between herself and Choong. It was also pleaded that the Appellant would not have advanced the loans if the Respondent had not provided the Guarantees. Since Choong has failed to repay the loans, the Appellant claimed a sum of $540,000 against the Respondent which represents the total amount of money due under the two loan agreements.

19 The Respondent initially pleaded in his Defence dated 23 January 2013 that he had been induced into signing the Loan Agreements by Choong's misrepresentations. He also pleaded that Choong was acting on the instructions of the Appellant in making the misrepresentations. In the alternative, the Respondent pleaded that there was no consideration moving from the Appellant to support the Guarantees.

20 The Respondent's defence of moneylending was only raised some nine months later on 23 October 2013 in his Defence (Amendment No 2). At para 4A, the Respondent pleaded that the Loan Agreements were illegal and unenforceable for being contrary to s 5 of the Act. Critically, this amendment was still inadequate as it failed to refer to the presumption of moneylending in s 3 of the Act and the facts giving rise to the presumption. We shall elaborate on this particular aspect of the pleadings at [30]–[37] below.

Decision Below

21 The Judge found that there was no case for the Respondent to answer and dismissed the Appellant's claim:

(a) The loans under the Promissory Notes and the loans under their corresponding loan agreements were one and the same. The promise to pay a greater sum of money was in consideration of the loans advanced under the First, Second, and Third Loan Agreements. Both the Appellant and Choong had intended each loan agreement to be read together with its corresponding promissory note: at [35] and [36].

(b) The presumption that the Appellant was a moneylender under s 3 of the Moneylenders Act applied: at [38].

(c) The Appellant must have been aware of the Promissory Notes and the promises therein for the receipt of additional payments. The evidence suggested that she knew of the rewards in making the loans: at [39] and [40].

(d) Being a shrewd businesswoman, it was unbelievable that the Appellant would extend a total of $1.04m to Choong without any consideration. She must have been enticed by the very generous bonus rewards offered to her by Choong and she was not forced to sign the Promissory Notes: at [43] and [44].

(e) The close frequency of the four loans indicated that there was "continuity". There was also "system" in the way that the Appellant would meet Choong at the same law firm, the loans always provided for a guarantor and/or security and the Promissory Notes always provided for an

additional sum of money: at [54] and [55].

(f) The "all and sundry" test was also satisfied. The Appellant was prepared to lend a large sum of money to Choong who was a stranger to her if the loan was guaranteed and/or secured and additional money was promised. This was not a case where loans were made as an incident of business or friendship. It appeared that she would have lent money to any individual who met the above criteria: at [60].

The issues before this court

22 Two main issues arise for determination in this appeal:

(a) Can the Respondent rely on s 3 of the Act?

(b) Did the Appellant lend money in consideration of a larger sum being repaid within the meaning of s 3 of the Act?

A preliminary observation on the implications of a submission of no case to answer

23 At the trial below, the Respondent made a submission of no case to answer. The test of whether there is no case to answer is whether the plaintiff's evidence at face value establishes no case in law or whether the evidence led by the plaintiff is so unsatisfactory or unreliable that its burden of proof has not been discharged (see *Lim Eng Hock Peter v Lin Jian Wei and another* [2009] 2 SLR(R) 1004 ("*Lim Eng Hock*") at [209]). The Respondent relied on the former limb of the test.

24 Three important implications flow from this submission. First, the Appellant only had to establish a *prima facie* case as opposed to proving her case on a balance of probabilities (see *Tan Juay Pah v Kimly Construction Pte Ltd and others* [2012] 2 SLR 549 at [37]). Second, in assessing whether the Appellant has established a *prima facie* case, the court will assume that any evidence led by the Appellant was true, unless it was inherently incredible or out of common sense (see *Relfo Ltd (in liquidation) v Bhimji Velji Jadva Varsani* [2008] 4 SLR(R) 657 ("*Relfo*") at [20]). Third, if circumstantial evidence is relied on, it does not have to give rise to an irresistible inference as long as the desired inference is one of the possible inferences (see *Relfo* at [20]). The evidence adduced by the Appellant will be examined in accordance with these principles.

25 We also observe here that the Respondent in his no case to answer submission had relied in particular on the Promissory Notes adduced by the Appellant to establish his defence that the Loan Agreements were illegal and unenforceable pursuant to the Act. Although the Respondent's reliance on the Appellant's evidence to establish his own defence is not uncommon (see for example *Lim Eng Hock Peter* at [210]), his reliance on the Promissory Notes is problematic for other reasons that we shall elaborate upon below.

Our decision

The statutory regime in relation to unlicensed moneylending

26 The Act was enacted in 1959. It was intended as "a scheme of social legislation designed to regulate rapacious and predatory conduct by unscrupulous unlicensed moneylenders" (see *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] 1 SLR(R) 733 ("*City Hardware*") at [47] and *Sheagar s/o TM Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 ("*Sheagar*") at [29]). Although amendments were made to the Act in 2008 and 2012 to de-regulate commercial borrowing

and clarify certain provisions, it appears that the original purpose underlying the Act in protecting the interests of *borrowers* from the conduct of unscrupulous moneylenders still remains relevant today. In this regard, we should add that we have our doubts as to whether the defence would have been available to Choong had he raised it in legal proceedings against him. It appears to us that he was no *borrower* to begin with and that it was a scam from the outset. As this point did not arise in this appeal and we did not have the benefit of submissions from the parties, we would refrain from forming a definitive view on this issue at this stage.

27 It should first be noted that the Act prohibits the business of moneylending rather than the act of lending money (*City Hardware* at [23]; *Sheagar* at [30]). This can be seen from the provisions of the Act. The main prohibition of moneylending is found in s 5:

> **No moneylending except under licence, etc.**
>
> **5.**—(1) No person shall carry on or hold himself out in any way as carrying on the business of moneylending in Singapore, whether as principal or as agent, unless —
>
> (*a*) he is authorised to do so by a licence;
>
> (*b*) he is an excluded moneylender; or
>
> (*c*) he is an exempt moneylender.

Both criminal and civil repercussions flow from a contravention of the prohibition in s 5:

> **Unlicensed moneylending**
>
> **14.**—(1) Subject to subsection (1A), any person who contravenes, or who assists in the contravention of, section 5(1) shall be *guilty of an offence* …
>
> …
>
> (2) Where any contract for a loan has been granted by an unlicensed moneylender, or any guarantee or security has been given for such a loan —
>
> (a) *the contract for the loan, and the guarantee or security*, as the case may be, *shall be unenforceable*; and
>
> (b) *any money paid by or on behalf of the unlicensed moneylender* under the contract for the loan *shall not be recoverable in any court of law*.
>
> [emphasis added]

28 The term "unlicensed moneylender" is defined in s 2 of the Act while the presumption of being a moneylender can be found in s 3:

> "unlicensed moneylender" means a person —
>
> (*a*) who is presumed to be a moneylender under section 3; and
>
> (*b*) who is not a licensee or an exempt moneylender.

…

Persons presumed to be moneylenders

3. Any person, other than an excluded 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.

29 Therefore, the general approach to determine whether a person who has lent money has fallen afoul of the Act is as follows (adapted from *Sheagar* at [75]):

(a) To rely on s 14(2) of the Act, the borrower must prove that the lender was an "unlicensed moneylender".

(b) If the borrower can establish that the lender has lent money in consideration for a higher sum being repaid, he may rely on the presumption contained in s 3 of the Act to discharge this burden.

(c) The burden then shifts to the lender to prove that he either does not carry on the business of moneylending or possesses a moneylending licence or is an "exempted moneylender".

Can the Respondent rely on s 3 of the Act?

30 We first turn to the issue of whether the Respondent can rely on s 3 of the Act given that his pleadings fail to raise the contention that there was a repayment of a higher sum to trigger the presumption under s 3.

31 The Appellant's claim against the Respondent is a straightforward claim under the Guarantees given by the Respondent in respect of the First and Third Loan Agreements as a result of non-payment of the loans by Choong. The amounts covered under the Guarantees were identical to the loans extended to Choong under the First and Third Loan Agreements and did not extend to any further sums. Therefore, based on the Loan Agreements alone, there is no suggestion that a higher sum is to be repaid and consequently the presumption under s 3 of the Act is not in issue.

32 In contrast, a typical loan agreement usually provides for repayment of a higher sum by way of a fixed or variable interest rate on the principal loan amount or simply a higher lump sum. When the defence of moneylending is raised in relation to such a typical loan agreement, there would not be a need to look beyond the agreement to raise the s 3 presumption because the agreement already contemplates a larger sum being repaid.

33 Here, the spectre of moneylending only arises if the sums payable under the Promissory Notes are construed to be *part and parcel* of the First and Third Loan Agreements. The substance of this issue will be discussed in the next section.

34 In relation to the pleadings, it must be emphasised that there is nothing in the Respondent's pleadings to suggest that the loans were repayable with a higher sum by reason of the Promissory Notes and/or that the additional sums payable under the Promissory Notes were in essence the interest component of the First and Third Loan Agreements. This point was raised by the Appellant both at the trial below in her closing written submissions and on appeal at the hearing before us.

35 To elaborate, the Respondent in his Defence (Amendment No 2) makes no mention whatsoever of the Promissory Notes or of s 3 of the Act; it merely refers to the loans *per se* without explaining

why or how the loans infringed the Act. In our view, the failure to plead the Promissory Notes and the presumption in s 3 of the Act were material omissions because the Promissory Notes had a crucial bearing on the nature of the loans based on the Respondent's defence and consequently on the case that the Appellant had to meet. In this regard, we highlight O 18 r 8(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) which states as follows:

> **Matters which must be specifically pleaded (O. 18, r. 8)**
>
> **8.**—(1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality —
>
> (*a*) which he alleges makes any claim or defence of the opposite party not maintainable;
>
> (*b*) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (*c*) which raises issues of fact not arising out of the preceding pleading.

It seems to us that the Appellant was indeed taken by surprise by the Respondent's reliance on the presumption under s 3 of the Act and the Promissory Notes to trigger the presumption because both points had not been specifically pleaded as required under O 18 r 8(1) as "any fact showing illegality". It is important to bear in mind that the loans were not by themselves illegal because on the face of the Loan Agreements, the repayment was exactly for the same sums advanced under the loans. The illegality point only arises for consideration if the Respondent could show that the Appellant had extended the two loans in consideration of a larger sum being repaid. To do so, the Respondent had to and in fact relied on the First and Third Promissory Notes. This was however not pleaded and consequently the Appellant had no notice as to how the Respondent intended to make good his moneylending defence.

36 We further note that the Respondent would have had no difficulty amending his pleadings to include the Promissory Notes and the facts giving rise to the presumption under s 3 of the Act. The Appellant's first List of Documents dated 13 June 2013 listed the First and Third Promissory Notes while the Respondent only amended his defence to include the moneylending defence in Defence (Amendment No 2) more than four months later on 23 October 2013. It therefore appears that the Respondent had ample opportunity to inspect the promissory notes disclosed in the Appellant's List of Documents and amend his pleadings accordingly to include the Promissory Notes and the reliance on the presumption under s 3 of the Act. The Appellant's disclosure of the First and Third Promissory Notes in her List of Documents dated 13 June 2013 also suggests to us that the Judge erred in finding that the Appellant "tried to suppress the promissory notes" (Judgment at [47]).

37 What then is the consequence of the defects in the Respondent's pleadings? We are of the view that the defects are fatal to the Respondent's case on appeal. In *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609, this court (at [29]) cited the English High Court decision of *Edler v Auerbach* [1950] 1 KB 359 at 371 for the basic principles with regard to the proof of illegality:

> … first, that, where a contract is ex facie illegal, the court will not enforce it, whether the illegality is pleaded or not; secondly, that, where ... the contract is not ex facie illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded…

Here, the Loan Agreements were not *ex facie* illegal as it is common ground that the repayments were

for the same amounts as the loans extended. As such, on its face, there was no moneylending element in the First or Third Loan Agreements. As observed at [33] above, the loans only assume a moneylending character if evidence extraneous to the Loan Agreements, *ie*, the Promissory Notes are relied on. This finding is alone sufficient to dispose of the appeal but we go on for completeness to deal with the merits of the parties' submissions on the applicability of the presumption under s 3 of the Act.

Did the Appellant lend money in consideration of a larger sum being repaid within the meaning of s 3 of the Act?

38 The key issue of whether the Appellant lent money in consideration of a larger sum being repaid turns on the determination of three sub-issues, namely:

(a) Did the Appellant know of the bonus payments promised by Choong at the time she entered into the Loan Agreements?

(b) Was it agreed at the time the Loan Agreements were concluded or prior thereto between the Appellant and Choong that the issuance of the Promissory Notes was an integral term of the Loan Agreements?

(c) Were the bonus payments under the Promissory Notes payable on a contingent basis outside the control of the lender?

The Appellant's knowledge of the bonus payments promised by Choong

39 Before examining the merits of this key issue, we should express our reservations about the somewhat unusual circumstances under which the moneylending defence was invoked. It is pertinent to highlight that the claim against the Respondent is *only* under the Guarantees. What did he guarantee? The repayment of the exact amount payable under the First and Third Loan Agreements. Is there any moneylending element proscribed by the Act in these arrangements? On its face, no. To make good his defence, the Respondent sought to rely on the Promissory Notes, but omitted to plead this. This, we have found at [37] above is fatal to the Respondent's defence. The Respondent also faced a further challenge as the Guarantees, in the first place, did not cover the separate bonus payments payable under the Promissory Notes – this meant that *prima facie*, the requirement that a larger sum be repaid in consideration of the loan under s 3 of the Act was not fulfilled. Finally, the Respondent was not even aware of the existence of the Promissory Notes prior to the proceedings. As far as he was concerned, he always believed that his liability under the Guarantees was limited to the repayment of the identical sums payable under the relevant Loan Agreements. That is precisely the claim which is before this court and the claim which the Respondent is asked to answer.

40 The Judge found that the Appellant was aware of the "bonus payments" *prior* to entering into the Loan Agreements. This was a key finding based on four planks of evidence (see [39]–[41] of the Judgment):

(a) Thomas' police report exhibited in his affidavit of evidence-in-chief.

(b) Thomas' evidence that Choong told the Appellant that if she agreed to grant him the first loan of $200,000, Choong would pay her an extra $200,000 as a reward for assisting him (see [8] of Thomas' affidavit filed on 18 October 2013).

(c) The date of the First Promissory Note (20 March 2011) as compared to the date of First

Loan Agreement (22 March 2011).

(d) The Appellant's testimony in cross-examination that the Loan Agreements and the Promissory Notes should be read together.

We deal with the first two of these planks in this section and the last two in the next section of this judgement.

41 Turning first to the police report filed by Thomas, the Judge relied specifically on para 6 of the report which states as follows [note: 1]:

> [Choong] then continued to request for another SGD $200,000 however I was unable to provide anymore cash as such I approached [the Appellant] and informed her about the deal and she agreed to raise the fund for [Choong] and had passed a cash amount of SGD $200,000 on 22 March 2011 to [Choong] and was promised a bonus of SGD $200,000 by [Choong]. …

We observe that the paragraph in question does not actually say that the Appellant was promised the "bonus payment" *before* entering into the Loan Agreement. The paragraph speaks of a promise of a bonus without specifying when the promise was made, *ie*, before or after the loan. On the contrary, the sequence of the narration in the paragraph appears to suggest that Choong's promise of a bonus payment came *after* the loan had been disbursed. We should also point out that little weight should have been placed on Thomas' statement that he had "informed [the Appellant] about the deal" for two reasons. First, it is not entirely clear what Thomas was referring to when he mentioned "the deal". Second, and more importantly, the fact that Thomas had informed the Appellant about "the deal" does not lead inexorably to the conclusion that she had been promised a bonus payment by Choong *before* entering into the First Loan Agreement.

42 The next piece of evidence relied on by the Judge was Thomas' affidavit of evidence-in-chief ("AEIC") dated 17 October 2013. As mentioned above, Thomas' evidence was that Choong told the Appellant that if she agreed to grant him the first loan of $200,000, Choong would pay her an extra $200,000 as a reward for assisting him. The Appellant contradicted Thomas' testimony by giving consistent evidence under cross-examination that she had only received the First Promissory Note from Choong *after* she had passed him the loan money under the First Loan Agreement. [note: 2] The Appellant's evidence in this respect was not challenged by the Respondent during the course of cross-examination and the Appellant did not waver or retreat from her position on this issue. In particular, it was never suggested to the Appellant that her position was false in the light of Thomas' evidence at para 8 of his AEIC.

43 In these circumstances and in the context of a no case to answer submission, the Judge below should have assumed that the consistent evidence led by the Appellant was true since her account was neither inherently incredible nor out of common sense. This finding becomes clearer when the relationship between the Loan Agreements and the Promissory Notes are examined below in the next section.

44 Therefore, in our view, the Judge erred in relying on Thomas' police report and his AEIC to arrive at the conclusion that the Appellant was aware of the bonus payments *prior* to the execution of the Loan Agreements.

The relationship between the Loan Agreements and the Promissory Notes

45 The issue here is not whether the Loan Agreements were connected, inextricably or otherwise,

with the Promissory Notes. It is sufficiently clear that there is some link between the two groups of documents but this link is neither decisive nor pivotal to the pertinent issue at hand, *ie*, whether it was agreed at the time the Loan Agreements were concluded or prior thereto between the Appellant and Choong that the issuance of the Promissory Notes was an integral term of the Loan Agreements.

46 Turning again to the evidence, the Judge found that the Appellant admitted under cross-examination that the First Loan Agreement must be read together with the corresponding promissory note (see [36] of the Judgment). In our view, the Appellant's purported admission does not go very far because it does not necessarily follow from this that the parties had agreed to the bonus $200,000 payment as an integral term of the First Loan Agreement at the time or before the First Loan Agreement was concluded. Further, the Appellant's admission must be considered together with her unchallenged evidence that she only received the First Promissory Note after she had disbursed the loan money under the First Loan Agreement to Choong.

47 The final piece of evidence relied on by the Judge were the dates of the First Promissory Note (20 March 2011) and the First Loan Agreement (22 March 2011). Since the First Loan Agreement was dated two days after the First Promissory Note, the Judge concluded that the Appellant must have been aware of the First Promissory Note before she signed the First Loan Agreement. This finding was, with respect, erroneous or suspect at the very least.

48 The order in which the Promissory Notes were given to the Appellant is critical. The First Promissory Note was on its face dated 20 March 2011 but it referred to a $200,000 investment dated 20 March 2011. There was simply no such loan or investment on 20 March 2011 and the Judge appeared not to have considered the impact of this discrepancy. In view of the Appellant's consistent and unchallenged evidence that she only received the First Promissory Note after the loan was disbursed on 22 March 2011, the date of the First Promissory Note and the date of investment should have read "22 March 2011". As it transpired, the date of the First Promissory Note and the date of the investment were the same (*ie*, 20 March 2011) and this is in line with the Appellant's evidence that the First Promissory Note was only provided on the same day *after* the first loan was disbursed. In our judgment, the evidential value of the date of the First Promissory Note should have been regarded, at its highest, as neutral, but there was no evident basis for concluding that because of this the Appellant knew the First Promissory Note would be issued *before* the loan was disbursed.

49 In addition, the Appellant's evidence that the Promissory Notes were only provided after the loans were disbursed is also consistent with the sequence of events in relation to the Second and Third Loan Agreements. For the second loan, the Second Loan Agreement was dated 15 April 2011 while the Second Promissory Note was dated 18 April 2011 (the Respondent was not party to this Loan Agreement). Similarly, the Third Loan Agreement was concluded on 25 May 2011 while the Third Promissory Note was provided one day later on 26 May 2011. This sequence of events in relation to the Second and Third Loan Agreements was unfortunately not considered by the Judge below. Viewed as a whole, the above chronology provides considerable support to the Appellant's evidence that she only received the Promissory Notes *after* the loans had been disbursed. It should be noted that unlike the First Promissory Note, there were no discrepancies or errors in the Second and Third Promissory Notes.

50 Finally, there is no evidence that the Appellant proposed the idea of bonus payments for the loans or stipulated the quantum of the "bonus payments" which is alleged to be the interest component. It would appear from the evidence that those terms emanated from Choong. This supports the Appellant's case that the Promissory Notes were offered by Choong after the loans were disbursed.

51 In summary, the four planks of evidence relied on by the Judge does not, on closer scrutiny, support the Judge's conclusion that the Appellant knew and agreed to the bonus payments at the time the Loan Agreements were signed. In contrast, the Appellant's evidence that she had only received the Promissory Notes after the Loan Agreements were signed was neither inherently incredible nor out of common sense. While it is possible that the Appellant could have either known or anticipated by reason of the course of dealings from the various loans that every loan would eventually be accompanied by a *subsequent* promissory note or had even planned the receipt of the Promissory Notes after disbursing the loans in order not to trigger the presumption under s 3 of the Act, neither of these two case theories were ever put to the Appellant. The only other person who could have provided evidence on this point was the borrower, *ie*, Choong himself. It should be mentioned that Choong was subpoenaed by the Respondent to testify in his defence. However that did not come to pass because the Respondent elected to submit no case to answer and must therefore bear the consequences of his election.

Were the bonus payments under the Promissory Notes payable on a contingent basis outside the control of the lender?

52 This issue is pivotal because even if the Appellant was aware of and agreed to accept the bonus payments under the Promissory Notes *prior* to entering into the Loan Agreements, the moneylending element in the four loan transactions would fall away if the bonus payments were only payable on a contingent basis outside the control of the lender. To be fair to the Judge below, this critical argument was only raised and developed during the appeal arising from questions from the court.

53 In the First Promissory Note, Choong agreed to pay a sum of $400,000 to the Appellant "as soon as [he] settles [their] joint investment project in [o]ne month from [20 March 2011]" [note: 3]. The Second Promissory Note recorded Choong's promise to pay the Appellant $250,000 as a bonus reward "upon receive [*sic*] my fund within 3 weeks to one month from now" [note: 4]. The Third Promissory Note adopted the same phrase from the Second Promissory Note as a condition for payment of the bonus reward.

54 The common thread running through the Promissory Notes is that the bonus payments promised therein were only payable in the event that Choong received the Funds from the United Kingdom. In the light of this important pre-condition, the bonus payments cannot be regarded as part of the sums loaned under the Loan Agreements since the bonus payments are *not* repayable on demand (see *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] 1 SLR(R) 733 at [23]) but *only* upon the occurrence of a stipulated event, *ie*, on the receipt by Choong of the Funds from the United Kingdom. This was also the Appellant's understanding of the documents as seen in the following extract of her cross-examination [note: 5]:

> Q: … So my put is only if the borrower does not get the inheritance within the six weeks in the [First Loan Agreement], then the borrower need only repay 200,000 and not 400,000.
>
> A: Agree, according to the loan agreement.

It is curious to note that it was the Respondent's own counsel who put to the Appellant that only the original loan amount was payable if Choong failed to secure the release of the Funds. This was done probably because the Respondent was himself aware of the true effect of the Promissory Notes entered into between the Appellant and Choong since the Respondent was also promised a bonus payment on similar terms for agreeing to act as a guarantor in his own promissory note with Choong.

[note: 6] It was therefore entirely consistent with the evidence for the Respondent's counsel to acknowledge at the hearing before us that the bonus payments were only payable if and when the Funds were received by Choong.

55 We should add that the First Promissory Note described the loan as an "investment amount" and that this description of the loan is also consistent with the payment of the contingent "bonus payment". In that sense it was indeed an investment since it was only payable upon the occurrence of a contingent event, *ie*, the release of the Funds.

56 In the circumstances, the bonus payments were only payable upon a contingency basis and therefore it could not be said that the Appellant lent money in consideration of a larger sum being repaid within the meaning of s 3 of the Act. It follows that the Respondent's defence that the Guarantees were unenforceable because the loans were illegal moneylending transactions under the Act fails. There is therefore no necessity to consider whether the presumption under s 3, if it had been established, would have been rebutted by the Appellant.

Closing remarks

57 For the foregoing reasons, we allow the appeal. The costs of the appeal and of the trial below are awarded to the Appellant. These costs are to be taxed if not agreed. There will be the usual consequential orders.

58 We end with some observations on a matter that troubled us in the present appeal. On 16 August 2011, Choong filed Bankruptcy Application No 1402 of 2011. In the accompanying supporting affidavit verifying the statement of affairs, Choong declared that his liabilities amounted to $2,362,000 and cited the following reason as the cause of his bankruptcy:

> I have take a hugh [*sic*] lump sum of money from funders for my inheritance tax payment. The debtors are chasing me for money resulting I have to declare bankruptcy as I am unable to made [*sic*] payment.

A month later on 15 September 2011, a bankruptcy order was made and Choong was adjudged to be a bankrupt. This order was published in the Government Gazette, Electronic Edition, on 30 September 2011.

59 We note with some concern that Choong made his bankruptcy shortly after the fourth loan was disbursed to him on 7 June 2011. It is not entirely clear whether Choong received any letters of demand from the Appellant, Thomas or any other creditors before he filed for bankruptcy. The supporting affidavit for Choong's bankruptcy application also does not provide a breakdown of Choong's liabilities but merely states the total amount of his liabilities, *ie*, $2,362,000. Neither did he explain what had happened to the significant loans which were extended to him by the Appellant and Thomas. It seems to us somewhat bizarre that fraudsters such as Choong are able to utilise court processes by way of a timely bankruptcy application to insulate themselves from law suits arising from their own fraudulent scheme. This on its face amounts to a manifest abuse of court process.

60 We note with interest that a similar scam was reported in the Straits Times on 12 November 2014. Coincidentally it also concerned an elaborate ruse over a fake inheritance. The fraudster in that case has been charged and we request the Attorney-General's Chambers and the police to look into the facts presented in these proceedings.

[note: 1] See AEIC of Tan Boon Kai at TBC-1

[note: 2] Record of Appeal Vol 3 Part B at p 175, 215, 216, 257.

[note: 3] Appellant's Core Bundle Vol 2 at p 154.

[note: 4] Appellant's Core Bundle Vol 2 at p 166.

[note: 5] Record of Appeal Vol 3 Part B at p 193.

[note: 6] Appellant's Core Bundle Vol 2 at p 156.