Lena Leowardi *v* Yeap Cheen Soo
[2014] SGHC 44

Case Number : Suit No 931 of 2012

Decision Date : 11 March 2014

Tribunal/Court : High Court

Coram : Tan Siong Thye JC

Counsel Name(s) : S Gunaseelan (S Gunaseelan & Partners) for the plaintiff; Ong Ying Ping, Lim Seng Siew (OTP Law Corporation) for the defendant; .

Parties : Lena Leowardi — Yeap Cheen Soo

Credit and Security – Money and Moneylenders

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 55 of 2014 was allowed by the Court of Appeal on 26 November 2014. See [2014] SGCA 57.]

11 March 2014

Tan Siong Thye JC:

Introduction

1 The Plaintiff, Lena Leowardi, took out an action to claim two sums, namely $200,000 and $340,000, from the Defendant, Yeap Cheen Soon. These were loans advanced by the Plaintiff to the borrower, Choong Kok Kee ("Choong") and the Defendant guaranteed the repayment of these loans. Choong defaulted on these loans. The Plaintiff seeks to recover these two sums from the Defendant. The key issue in this case is whether the loans made by the Plaintiff to Choong constitute the business of illegal moneylending prohibited under the Moneylenders Act (Cap 188, 2010 Rev Ed) (the "Act"). If yes, it will render the guarantees by the Defendant unenforceable pursuant to s 14(2)(a) of the Act. Therefore, the Plaintiff's case must be dismissed. If no, judgement must be entered for the Plaintiff as the Defendant chose to submit a no case to answer at the close of the Plaintiff's case.

Facts

Introduction of Choong to the Plaintiff

2 The Plaintiff is an Indonesian business woman. She lives at 304 Orchard Road, Lucky Plaza Apartments, Singapore. She is acquainted with PW1, Thomas Tan Boon Chai, who owns a jewellery store known as "Boon Chai Jewellery" in the same building.

3 On 29 November 2010, PW1 was introduced to Choong by his long-time friend Grace Soh. Ms Soh came to his store together with Choong and Steven Pang Kia Boon. Choong informed PW1 that he was the beneficiary of funds under his brother-in-law's estate in the United Kingdom worth US$7.2m (the "Funds"). Choong also told PW1 that the Funds had already been transferred to Bank Negara, Malaysia so as to enjoy a lower tax rate. Choong requested from PW1 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. PW1 then lent $140,000 to Choong. Subsequently, PW1 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. These loans were also advanced to enable Choong to pay the alleged administrative fees so as to secure the release of the Funds.. According to PW1's police report, [note: 1] he was promised a reward of $163,000 by Choong in return for all the loans.

4 In March 2011, Choong asked PW1 to lend him $200,000 for the same purpose as mentioned above. However, PW1 was unable to do so. PW1 then approached the Plaintiff and informed her of Choong's situation and asked if she could lend Choong the money. PW1 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 Plaintiff was initially suspicious of the matter and requested for more information and proof.

5 Sometime in March 2011, PW1 introduced the Plaintiff to Choong. The latter told the Plaintiff about the Funds and how he needed money to secure their release. Choong also produced some documentary proof to verify his tale. The Plaintiff 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 Plaintiff also requested for the loan agreement to be drawn up by a lawyer.

The First Loan Agreement

6 On 22 March 2011, the Plaintiff met Choong and the Defendant at the lawyer's office of Messrs Oliver Quek & Associates to execute the loan agreement (the "First Loan Agreement"). The Plaintiff met the Defendant for the first time on that occasion. The Defendant was the guarantor for this loan agreement. Under this agreement the Plaintiff agreed to lend $200,000 to Choong. The latter was to repay the said sum within 6 weeks of the date of the agreement. There was no provision for any interest payment for the loan. The Defendant pledged his apartment at 3 Petain Road #03-02, Singapore as security for this Loan. Subsequently, the Plaintiff advanced the $200,000 to Choong.

7 Prior to the meeting on 22 March 2011, the Plaintiff had signed a promissory note issued by Choong on 20 March 2011. The promissory note stated that Choong was to pay the Plaintiff $400,000 in return for her "investment" of $200,000. The Defendant was not aware of this promissory note.

The Second Loan Agreement

8 In April 2011, Choong requested for more money from the Plaintiff and showed her a document purporting to prove that he needed to pay more money to secure the release of the Funds. The Plaintiff 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 6 months. Like the First Loan Agreement, the Second Loan Agreement also had no provision for any interest payment. The Defendant was not a party to the Second Loan Agreement and instead, it was Choong who pledged his HDB Apartment at Block 212 Bishan Street 23 #06-249, Singapore, as security under the Second Loan Agreement.

9 After the Plaintiff had advanced the $380,000 to Choong, the latter issued her another promissory note which she duly signed on 18 April 2011. Under this promissory note, Choong agreed to pay the Plaintiff an additional $250,000 on top of the loan of $380,000.

The Third Loan Agreement

10 Choong continued to ask for a further loan from the Plaintiff in May 2011. The Plaintiff, Choong

and the Defendant then entered into another loan agreement on 25 May 2011 at the office of Messrs Oliver Quek & Associates (the "Third Loan Agreement"). The Plaintiff agreed to lend $340,000 to Choong who promised to return it within 6 months. There was, again, no provision for interest payment. The Third Loan Agreement provided that the Defendant would personally guarantee the repayment of this loan. Similar to the First Loan Agreement, the Defendant also pledged his apartment at 3 Petain Road #03-02, Singapore as security for the Third Loan Agreement. The Plaintiff subsequently advanced the $340,000 to Choong the following day.

11 The Defendant was also unaware that Choong had given the Plaintiff a promissory note for this loan. The promissory note was signed by the Plaintiff and Choong on 26 May 2011. Under the promissory note, Choong promised to pay the Plaintiff an additional $340,000 in addition to the loan amount.

The Fourth Loan Agreement

12 On 7 June 2011 the Plaintiff 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 Plaintiff 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 Plaintiff said that PW1 verbally guaranteed the repayment of the $120,000. The Defendant was not involved in this loan.

The Aftermath

13 Choong never received the Funds which he supposedly inherited. He defaulted on all of the loan agreements and was declared bankrupt. The Plaintiff was also unable to enforce the security against the HDB apartment pledged by Choong under the Second Loan Agreement. The Plaintiff then commenced the present proceedings against the Defendant as guarantor for the First and Third Loan Agreements. She seeks to retrieve from the Defendant the loan monies amounting to $540,000 which she had advanced to Choong.

Defendant's submission of no case to answer

14 At the close of the Plaintiff's case, the Defendant made a submission of no case to answer. The Defendant argues that "accepting the plaintiff's evidence at its face value, no case has been established in law": *Bansal Hemant Govindprasad and another v Central Bank of India* [2003] 2 SLR(R) 33 at [11]. It is the Defendant's submission that the loan transactions were unlicensed moneylending activities prohibited by the Act. This is because the Plaintiff lent sums of money to Choong in consideration of a larger sum being repaid. Therefore, the plaintiff is presumed to be a moneylender under s 3 of the Act. The Defendant submitted that the Plaintiff has failed to rebut this presumption. Hence loan agreements including the guarantee are unenforceable pursuant to s 14(2)(a) of the Act. :

> 14(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 …

The Plaintiff's case

15 The Plaintiff argued that the presumption of being a moneylender does not apply to her as she had not lent Choong money in consideration of a larger sum being repaid. The Plaintiff maintained that the loans given to Choong were interest-free. She also submitted that she did not ask for the promissory notes. According to her, it was Choong who gave her the promissory notes after she handed him the monies. She said she could not object and signed the promissory notes as requested by Choong. Hence, the Plaintiff regarded the promissory notes as invalid. She maintained that she only regarded the loan agreements, which were drafted by a lawyer, to be valid and enforceable contracts. Thus, she is only claiming against the Defendant under the loan agreements and not under the promissory notes. Therefore, the presumption under s 3 of the Act does not arise and the Plaintiff has not contravened the Act.

16 The Plaintiff also argued that, in any event, even if the presumption applied to her, it was rebutted as she was not in the business of moneylending. She claimed she loaned the money to Choong to help her friend, PW1, to recover his monies. She was only prepared to grant loans to Choong provided each of these loans was secured by a guarantor or by property.

Issues

17 These are the issues for the court to decide:

(a) Does this case come within the ambit of the Act?

(b) Does the presumption of being a moneylender under s 3 of the Act apply to the Plaintiff?

(c) Is the presumption rebutted by evidence that the Plaintiff is not in the business of moneylending?

Submission of no case to answer

18 I bear in mind that the Defendant has made a no case to answer submission. This has important ramifications for the defendant. In *Tan Juay Pah v Kimly Construction Pte Ltd and others* [2012] 2 SLR 549, the Court of Appeal explained at [37]:

> It is important to note that because [the defendant] made a submission of "no case to answer" in the court below, the threshold against which the above questions are to be assessed is that of whether a *prima facie* case has been established by [the plaintiff] against [the defendant], and not that of whether a case against [the defendant] has been established on a balance of probabilities. …

19 Thus the Plaintiff only has to establish a *prima facie* case. I must assume that any evidence led by the Plaintiff is true unless it is inherently incredible or out of all common sense or reason: *Relfo Ltd (in liquidation) v Bhimji Velji Jadva Varsani* [2008] 4 SLR(R) 657 at [20].Therefore, as Chan Sek Keong CJ (delivering the judgment of the Court of Appeal) in *Lim Swee Khiang and another v Borden Co (Pte) Ltd and others* [2006] 4 SLR(R) 745 noted at [84], where the defendant elects not to give any evidence on a submission of no case to answer, the burden on the Plaintiff is simply to prove a *prima facie* case and such a burden "is not difficult to discharge".

20 However, even though the plaintiff only needs to establish a *prima facie* case, this does not relinquish the plaintiff of his burden of proof. The burden of proof still lies on the plaintiff to prove the essential elements of his claim based on the totality of the evidence that is presented, albeit subject to minimum evaluation. If the evidence adduced does not in any way establish a particular element of

the Plaintiff's claim, then the Plaintiff's claim must fail. It must be borne in mind that even though the Plaintiff is given certain leeway such that it may be easier for him to prove certain facts with evidence under minimum evaluation, those facts must nonetheless still be proven by the plaintiff. Bearing this in mind, I shall proceed to address the issues raised in this case.

Does this case come within the ambit of the Moneylenders Act?

21 The determination of this issue depends on the purpose and the scope of the Act. This will involve perusing the apposite provisions of the Act to ascertain whether the factual matrix of this case comes within the Act. This is a pivotal issue as the case stands or falls on the determination of this issue, *ie* whether or not the loan transactions were unlicensed moneylending activities under the Act. If the two loans in questions were not unlicensed moneylending transactions, judgement must be awarded to the Plaintiff. Conversely, if these were acts of unlicensed moneylending that are prohibited by the Act, I shall have to dismiss the Plaintiff's case given that she did not have a licence for carrying out the business of moneylending at the material time nor did her loan transactions come within the exemptions provided by the Act.

22 I have to ascertain the meaning of moneylending to decide whether the Act applies to this case. This will be further explained below.

Does the presumption of being a moneylender apply to the Plaintiff?

23 Under the Act there is a presumption of being a moneylender. This is under s 3 of the Act:

> 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.

24 If I come to the finding that the loan agreements, particularly the First and Third Loans which the Defendant had guaranteed, did not involve repayment of a sum of money greater than the sum loaned, then these loan transactions do not come within the scope of the Act. The Defendant submitted that the promissory notes signed by the Plaintiff should be read together with the corresponding loan agreements and that they are proof that the Plaintiff was promised considerations greater than the amounts she loaned *vis-à-vis* the First Loan Agreement, Second Loan Agreement and Third Loan Agreement. The Plaintiff submitted on the other hand that they should not be read together with the loan agreements. She argued that she only relied upon the loan agreements entered into at the office of Messrs Oliver Quek & Associates which were prepared by a lawyer and that she regarded the promissory notes as invalid and unenforceable. Although she did not object to the promissory notes and signed them as requested by Choong, she submitted that she had never requested for them to constitute consideration for the loans and that it was Choong who gave them to her without her asking for them. Therefore, to determine this issue, I must assess the promissory notes and determine their relationship with the loan agreements.

The promissory notes

25 Although the subject matter of the proceedings relate only to the first and third loans, all four loans must be looked at to provide a proper context for assessing the relevant promissory notes. Therefore, I shall also look at the second and fourth loans even though they are not related to the claims made by the Plaintiff.

26 The corresponding promissory note for the First Loan Agreement was dated 20 March 2011. This note was signed by the Plaintiff and Choong. The Defendant was not involved. In fact he was

not aware of this note. The First Loan Agreement was only signed two days later, *ie* 22 March 2011, by the Plaintiff, the Defendant and Choong. The promissory note for the First Loan Agreement states:

> This is to confirm that Ms Lena Leowardi I/C: $^{P}/_{P}$: U729548, has invested an investment amount of SGD 200,000/- with Mr. CHOONG KOK KEE dated 20th of MARCH 2011.
>
> And I, CHOONG KOK KEE, NRIC NO: S0003861/Z,
>
> Hereby Issue this written Promissory Note, agreed and guaranteed return the above Investor SGD 400,000/- as soon as I settle our joint investment project in One month from the above mentioned date.

27 The sum of $200,000 was not described as a loan under the promissory note. Instead, the promissory note stated that the Plaintiff had "invested an investment amount of $200,000" with Choong Kok Kee on 20 March 2011. The Plaintiff was described as an "investor" and Choong guaranteed to return to her $400,000 "as soon as [he] settle[d] [their] joint investment project in One month from [20 March 2011]". The "investment return" was double the principal amount and was to be repaid within a month. Despite this the Plaintiff's evidence was that the promissory note was a loan and not an "investment". The Plaintiff testified that she never regarded the advancement of $200,000 to Choong as anything other than a loan. I accept the Plaintiff's testimony and shall treat the promissory note as referring to a loan notwithstanding the language used.

28 The First Loan Agreement that was subsequently signed at the office of Messrs Oliver Quek & Associates on 22 March defers significantly from the contents of the promissory note. It was a loan to Choong repayable "within six weeks" instead of a month as stated in the promissory note. The Defendant was the guarantor who pledged his property at 3 Petain Road #03-02, Singapore as security for this loan. The promissory note did not have a guarantor and no security was provided. Interestingly, the First Loan Agreement is silent on interest payment.

29 The Second Loan Agreement dated 15 April 2011 provided for a loan of $380,000 payable within 6 months. The Defendant was not a party to this transaction. The Second Loan Agreement is again notably silent *vis-à-vis* the issue of interest payment.

30 Three days later the Plaintiff signed a promissory note on 18 April 2011. The promissory note does not make any reference to the sum loaned being an investment. Choong guaranteed to return the principal sum of $380,000 and an additional $250,000 as a "bonus reward". The additional sum of $250,000 was to be paid by Choong to the Plaintiff within three to four weeks.

31 The Third Loan Agreement involved the Defendant who personally guaranteed the loan and also pledged his apartment at 3 Petain Road #03-02, Singapore as security. The loan agreement dated 25 May 2011 was for the loan of $340,000. Similarly, this agreement is silent in relation to interest payment for the loan. The corresponding promissory note was signed on the following day, 26 May 2011. This promissory note is very revealing:

> To: LENA LEOWARDI P/P: U729548.
>
> Thank you for helping to raise a fund of S$340,000/-
>
> …
>
> I hereby guaranteed pay you S$340,000/- bonus reward upon receive my fund within 3 one

month from now.

The above amount will included good will repayment of your $81,000/- investment lost from helping me rise the previous amount of S$380,000/-.

The current total guaranteed loan return to you is: $340K + $340K=$680,000/-

…

32 Choong once again promised a "bonus reward" for the loan advanced by the Plaintiff. Under this promissory note, the "bonus reward" amounted to $340,000. The sum of $340,000 is inclusive of the $81,000 "investment lost from helping me rise (raised) the previous amount of $380,000". Furthermore, the promissory note also makes reference to the previous loans made by the Plaintiff to Choong. The aggregate of all sums owed under previous promissory notes, including the principal amounts and the additional amounts promised, was calculated and labelled "Grand total of all loan return to you" and amounted to $1.71m.

33 The fourth loan transaction which did not involve the Defendant is for the sum of $120,000. It is not embodied in a formal loan agreement. Instead, there is only a promissory note signed by the Plaintiff dated 7 June 2011. It was called a "friendly loan". This note does not have a bonus reward and is also silent on interest.

The relationship between the promissory notes and the loan agreements.

34 The Plaintiff submitted that the loan agreements did not provide for interest. Therefore, the loans were interest-free and were not given for a larger consideration. However, just because the loan agreements were silent as to interest payment does not mean that the loans were not made for a larger consideration *per se.* The larger considerations for the loan agreements here are embodied in the promissory notes in the form of "guaranteed return" *vis-à-vis* the first loan transaction and "bonus rewards" *vis-à-vis* the second and third loan transactions. This is because the promissory notes are related to the loan agreements.

35 It is clear that the loans under the promissory notes and the loans under their corresponding loan agreements are one and the same. Apart from the money under the loan agreements, the Plaintiff never advanced any additional amount of money to Choong pursuant to the promissory notes. Therefore it is clear that the promise to pay a greater sum of money is in consideration of each of the loans advanced under the First, Second and Third Loan Agreements.

36 Other than the Fourth Loan Agreement there was a corresponding promissory note for each of the other three loan agreements. The loan agreements and their corresponding promissory notes were signed within a few days of each other. It is very clear that the Plaintiff and Choong intended each loan agreement to be read together with its corresponding promissory note. In fact the Plaintiff acknowledged during cross-examination that the First Loan Agreement and its corresponding promissory note must be read together:

Q. … I put it to you that the March promissory note, where the borrower promised to return you $400,000 for a $200,000 loan, must be read with the March loan agreement where the defendant pledges his property, and the repayment is only $200,000 for the $200,000 loan.

A. Yes. [note: 2]

37 The Plaintiff submitted that when she said the promissory notes should be "read with" the respective loans, she might not have appreciated the legal implications of such a term. I am not convinced with this explanation. A layman would understand that if something should be "read with" something else, they must be associated in some way. In this regard, the Plaintiff must have meant that the additional payments promised under the promissory notes are in respect of the loans advanced under the loan agreements. Therefore, the Plaintiff's own evidence proves the undeniable correlation that exists between the promissory notes and their respective loan agreements..

38 When one looks at the loan agreements only, they do not appear to activate the presumption under s 3 of the Act as they appear to be interest-free. However, when the respective promissory notes are taken into consideration, the loan transactions clearly set off the presumption. The additional payments under the promissory notes actually constitute part of the loan transactions and form the larger consideration for the loans advanced by the Plaintiff. On this basis, the presumption that the Plaintiff is a moneylender under s 3 of the Act would apply. However, I must also deal with three other submissions made by the Plaintiff. The first is that she was unaware of the additional payments prior to entering into the loan agreements. The second is that she regarded the promissory notes as invalid. Third, she did not demand for the additional payments under the promissory notes.

Was the Plaintiff unaware of the additional payments?

39 The Plaintiff gave testimony to the effect that she was not aware of the promises to make additional payments prior to the execution of the loan agreements. I find it difficult to believe her evidence especially after all her efforts in distancing herself from the promissory notes (see [47] below). Further, based on other evidence adduced by the Plaintiff, I find this assertion by the Plaintiff inherently incredible. Firstly, the first promissory note was dated 20 March 2011. The First Loan Agreement was executed two days later, on 22 March 2011. Hence the Plaintiff must have been aware of the promissory note before she signed the First Loan Agreement and gave the money to Choong. The promissory notes for the subsequent loans were dated one to three days after the respective loans were signed. She must have been aware of these promissory notes given the precedent set by the first promissory note. Secondly, she also admitted during cross-examination that the First Loan Agreement must be read together with the corresponding promissory note (see [36] above). Thirdly, PW1 in his first affidavit filed on 18 October 2013 stated at paragraph 8 that Choong told the Plaintiff about the rewards at the very outset before the first loan was disbursed::

> The Borrower [Choong) also told Lena that, if she agreed to grant him the said loan, he would pay her an extra S$200,000 as a "reward" for assisting him.

40 Fourthly, in the police report lodged by PW1 on behalf of himself and the Plaintiff, PW1 stated at paragraph 6 that:

> [Choong] then continued to request for another SGD200,000 however, I was unable to provide anymore cash as such I approached [the Plaintiff] and informed her about the deal and she agreed to raise the fund for [Choong] and had passed a cash amount of SGD200,000 on 22 March 2011 to [Choong] and was promised a bonus reward of SGD200,000 by [Choong].

41 Therefore, I find it entirely incredible that the Plaintiff could say that she had no knowledge of the additional payments in the promissory notes prior to entering into the loan agreements.

Plaintiff regarded the promissory notes as invalid

42 In the course of cross-examination, the Plaintiff gave the following answers regarding the

promissory notes:

Q. So the last line is 340,000, followed by the 340,000 bonus reward; is that correct?

A. Yes, based on what was written here by him, I did not understand all this. He just asked me to sign on the promissory notes. To me, the most important thing is that the loan agreement is with the lawyer.

…

Q. Regarding the promise to repay 400,000 for the 200,000 loan

A. I would treat the March promissory note as invalid. To me, the most important thing is the loan agreement that is with the lawyer. [note: 3]

43 Thus, as far as the Plaintiff is concerned, the operative documents are the loan agreements entered into at the office of Messrs Oliver Quek & Associates as they were drafted by a lawyer and she considered the promissory notes to be invalid. To me, this is inherently incredible as well. Choong, the borrower, was a complete stranger to the Plaintiff before she agreed to lend her money. It was PW1 who told her about Choong's inheritance of US$7.2m and that the latter needed money to pay administrative fees required for that sum to be released. The Plaintiff claimed that she was prepared to lend money to Choong without any consideration in return so as to help PW1 to recovery his money. Being a shrewd business woman, I find it unbelievable that the Plaintiff would extend several sizeable loans to Choong, amounting to a total of $1.04m, without any consideration at all. Even the Plaintiff's own witness, PW1, candidly told the court that he would not have lent money to Choong if there were no incentive or bonus payments.

44 The Plaintiff must have been enticed by the very generous "bonus rewards" offered to her by Choong. Otherwise, she would not have given those loans. She said that she considered the promissory notes as invalid and that she could not object to the contents. The contents in the promissory notes were in her favour and I see no reason for her to object to it. In any event, she was not forced to sign it. Additionally, she testified that she treated the promissory notes as invalid because unlike the loan agreements, they were not drafted by lawyers. However, it is interesting to note that the Fourth Loan Agreement of $120,000 was premised on a promissory note only without a formal loan agreement. The Plaintiff seems to have taken no issue with the Fourth Loan Agreement being embodied solely in a hand-written promissory note. Therefore, she should not now say that she would not take seriously an agreement in the form of a promissory note. For these reasons, I find it very difficult to accept her evidence that she considered the promissory notes to be invalid.

Plaintiff did not demand for the promises of additional payments

45 The Plaintiff also argued that she did not demand for such promises of additional payments from Choong. However, this is immaterial to the fact that larger sums of money were promised by Choong in return for the Plaintiff's loans. There is no requirement that the lender must demand for or insist on a greater consideration under s 3 of the Act. Even if the promises to pay additional sums of money were offered to the Plaintiff, her acceptances of such offers by signing the promissory notes meant that such promises constituted consideration for her loans.

46 The Plaintiff seems to suggest that the case of *Subramaniam Dhanapakiam v Ghaanthimathi* [1991] 1 SLR(R) 164 ("*Subramaniam*") stands for the proposition that the larger consideration must be demanded by the Plaintiff instead of it being offered to and accepted by the Plaintiff for the

presumption under s 3 of the Act to operate. With the greatest respect, that is not what the case stands for. Chan Sek Keong J (as he then was) was dealing with friendly loans between two long-time friends in which interest was not asked for by the lender but offered by the borrower. He had to decide whether the presumption under s 3 of the Act was rebutted rather than whether the presumption applied in that case. By finding that the facts were sufficient to rebut the presumption, Chan J had impliedly accepted that the presumption under s 3 of the Act applied to the facts even though the interest was not demanded by the plaintiff and was instead offered. Hence, it does not matter that the Plaintiff in this case did not demand for the promises of additional payments.

Surreptitious circumstances

47 I find that the circumstances surrounding the four loan transactions very suspicious. The Plaintiff tried to suppress the promissory notes. These were only discovered very much later during these proceedings. Even when these were adduced as evidence she tried to distance herself from them when she gave her testimony in court, such as by saying that she regarded them as invalid and that she did not know of the promises of additional payment. This made her testimony in relation to the promissory notes incredible. Hence, her explanations about the promissory notes were unconvincing.

48 The contents of the promissory notes and the loan agreement were very different. The notes contain astronomical returns for the loans. Why two separate documents for the same loan? The loan agreements are silent on interest while the promissory notes provide exorbitantly high consideration. These and the surreptitious circumstances surrounding these loans give rise to a serious suspicion that the Plaintiff was attempting to evade the application of s 3 of the Act by separating the additional rewards from the loan agreements in the form of promissory notes.

49 Nonetheless, despite such suspicions, my only finding is that, for the reasons given above, the respective promissory loans and corresponding loan agreements should be construed together. The circumstances in this case clearly show that the Plaintiff lent money to Choong "in consideration of a larger sum being repaid" which gives rise to the presumption that the Plaintiff is a moneylender under s 3 of the Act.

Is the presumption rebutted?

50 Given that the presumption under s 3 of the Act is now operative in the Plaintiff's case, it falls on the Plaintiff to rebut the presumption that she is a moneylender. Under s 2 of the Act, "moneylender" is defined as follows:

> … "money lender" means a person who, whether as principal or agent, carries on or holds himself out in any way as *carrying on the business of moneylending* , whether or not he carries on any other business, but does not include any excluded money lender … [emphasis added]

51 Based on this definition, the Plaintiff can rebut the presumption under s 3 of the Act either by showing that she is "an excluded money lender" which is defined under s 2 of the Act or by showing that she was not in the business of moneylending. The Plaintiff has not pleaded that she falls within the category of an "excluded moneylender" and I do not have to consider it. The Plaintiff only seeks to rebut the presumption on the basis that she was not in business of moneylending.

Is the Plaintiff in the business of moneylending?

52 Has the Plaintiff shown that she was not in the business of moneylending? Belinda Ang J in *Mak*

Chik Lun and others v Loh Kim Her and others and another action [2003] 4 SLR(R) 338 ("*Mak Chik Lun*") explained at [11] that:

> To prove that a person is in the business of moneylending, the easiest way is to show that the rebuttable presumption in s 3 of the Act is applicable to the facts of the case. If the borrower can show that a person lends a sum of money in consideration of a larger sum being repaid, the person is presumed to be a moneylender. 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 of 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.

Therefore, the Plaintiff must show that there was neither "system nor continuity" in her moneylending. She must also show that she would not have lent to "all and sundry".

Is the "system and continuity" test satisfied?

53 Does the evidence adduced by the Plaintiff, taken at face value, reveal the "system and continuity" test first laid down in *Newton v Pyke* (1908) 25 TLR 127? Whether there was system and continuity is a question of fact and has been described by Yong Pung How CJ in *Ng Kum Peng v Public Prosecutor* [1995] 2 SLR(R) 901 ("*Ng Kum Peng*") at [38] as:

> 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 organised 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 organised moneylending from occasional loans, which would be outside the mischief of the Act.

54 In *Ng Kum Peng*, the accused had lent money on three occasions over a three-month period to a single borrower. Given the frequency of the transactions, Yong Pung How CJ found that the loans were not merely occasional loans and that there was continuity. Similarly, the Plaintiff's evidence in this case shows that she has lent money to Choong four times over a span of approximately three-and-a-half months on 22 March 2011, 15 April 2011, 25 May 2011 and 7 June 2011. This close frequency would indicate that there was continuity and that the loans were not merely occasional loans in accordance with the decision in *Ng Kum Peng*.

55 The indicators for whether system exists were left open by Yong Pung How CJ in *Ng Kum Peng*. However, it is clear that for there to be system, there must be a certain degree of organisation and regularity in the method by which the loans are transacted and their manner of operation. In this case, for the first three transactions, the Plaintiff would always meet with Choong at the office of Messrs Oliver Quek & Associates to sign the loan agreements. The Defendant would attend and sign the agreements if he was to act as guarantor and provide security. The loan agreements always provided for a guarantor and/or security. The promissory notes also included a provision for the repayment of an additional sum usually equivalent to 100% (except that it was approximately 66%

vis-à-vis the Second Loan Agreement) of the amount loaned. In *Ng Kum Peng* the interest chargeable was only 20%. Also, the deadline for repayment was always stipulated clearly. Therefore, all these factors that are established by the plaintiff's evidence go towards indicating that there was a system to the loan transactions.

56 The Plaintiff also seeks to rely on *Subramaniam*. In that case, the loans were friendly loans between two long-time friends. This is not the case here where the Plaintiff did not know Choong until she was introduced to him by PW1 for the sole purpose of the loan transactions. The Plaintiff also did not know the Defendant. In *Subramaniam*, the interest given to the lender by the borrower was based on the borrower's own good will and varied in accordance with the generosity of the borrower. There was a clear lack of system in that case. However, in this case, the amount to be repaid is stipulated clearly in the promissory notes with an agreed fixed time for repayment. *Subramaniam* does not assist the Plaintiff's case.

57 The Fourth Loan Agreement appears to be a friendly loan in which interest and "bonus rewards" were not mentioned. However, the plaintiff submitted that PW1 verbally guaranteed this loan of $120,000. Therefore, the Plaintiff's insistence on there being guarantee and/or security is also embodied in the Fourth Loan Agreement and together with the three other loans, it contributes to a finding of system and continuity.

58 Since the Plaintiff's evidence itself fails to show that there was neither system nor continuity to the loan transactions (it in fact shows that there was system and continuity), the Plaintiff has failed to show that she was not in the business of moneylending. Consequently, the presumption under s 3 of the Act is not rebutted.

Is the "all and sundry" test satisfied?

59 Once the system and continuity test is satisfied it suffices for this court to dismiss the Plaintiff's case. However, I decided to proceed to consider whether the "all and sundry" test has been satisfied. It appears that the facts of this case have also satisfied the other test of Farwell J in *Litchfield v Dreyfus* [1906] 1 KB 584 ("*Litchfield*") which is stated at 589:

> … But not every man who lends money at interest carries on the business of moneylending. Speaking generally, a man who carries on a moneylending business is one who is ready and willing to lend to all and sundry, provided that they are from his point of view eligible. I do not of course mean that a moneylender can evade the Act by limiting his clientele to those whom he chooses to designate as "friends" or otherwise: it is a question of fact in each case. …

60 This test was accepted locally in *Subramaniam*. The Plaintiff was prepared to lend a large sum of money to Choong who was a stranger to her as long as the loan was guaranteed and/or secured. This is not a case where the Plaintiff lent money "as an incident of another business or to a few old friends by way of friendship": *Litchfield* at 590. Furthermore, there were attractive interests in the form of "bonus rewards". The Defendant was also unknown to her at that time. Her eligibility criteria simply included "bonus rewards", third party guarantees or security, and perhaps a referral by a friend (PW1 in this case). It appears that she would have lent money to any individual who satisfied these criteria. Therefore, I find that, based on the Plaintiff's evidence taken at face value, even the "all and sundry" test is satisfied. The Plaintiff certainly failed at rebutting the presumption under s 3 of the Act.

Conclusion

61 This is an unfortunate case where the Plaintiff, the Defendant, PW1and others were defrauded by Choong. The scheme is a classic advance fee fraud with local flavour. Choong had represented to these people and others that he was a beneficiary of funds worth US$7.2m which purportedly belonged to his brother-in-law. He told them that he needed money to pay administrative fees for the release of the funds which had been transferred from UK to Malaysia on the purported ground of lower tax rates. The lure of extraordinarily large monetary rewards by Choong deceived the parties in this case to do his biddings, including providing him with loans of large sums of money. Choong was subsequently declared a bankrupt and the Plaintiff chose to recover her money from the Defendant to mitigate her losses. Although both parties are victims of this scam, I have an unenviable task to decide in favour of one and the other must bear the losses arising from this scam.

62 For the above reasons, I am of the opinion that, even taking the Plaintiff's evidence at face value, the Plaintiff has failed to make out a case against the defendant. She has failed to rebut the presumption under s 3 of the Act and is therefore presumed to be a moneylender. As the Plaintiff never had a licence for moneylending, the guarantees given by the Defendant under the First Loan Agreement and the Third Loan Agreement are unenforceable under s 14(2) of the Act as they are granted by an unlicensed moneylender. Although this may appear harsh given that the Plaintiff herself is a victim of a scam, "[t]he court has no alternative but to give effect to the draconian consequences of an infraction in the event that the [Moneylenders Act] is offended": *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] 1 SLR(R) 733 at [22]. I, therefore, find that there is no case for the Defendant to answer and accordingly dismiss the Plaintiff's case.

[note: 1] AB 46

[note: 2] Notes of Evidence, 17 December 2013, p 58 at lines 14 – 19

[note: 3] Notes of Evidence, 17 December 2013, p 51 at lines 6 – 11; p 57 at lines 7 – 11