IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC(A) 21

Civil Appeal No 58 of 2021

Between

North Star (S) Capital Pte Ltd

… *Appellant*

And

Yip Fook Meng

… *Respondent*

In the matter of Suit No 1148 of 2017

Between

North Star (S) Capital Pte Ltd

… *Plaintiff*

And

(1) Megatrucare Pte Ltd
(2) Yip Fook Meng

… *Defendants*

And Between

Yip Fook Meng

… Plaintiff in counterclaim

And

North Star (S) Capital Pte Ltd

… Defendant in counterclaim

EX TEMPORE JUDGMENT

[Contract] — [Illegality and public policy] — [Statutory illegality]
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See Kee Oon J (delivering the judgment of the court *ex tempore*):

1 The present appeal arises from a claim by the appellant, North Star (S) Capital Pte Ltd, to enforce a loan of $300,000 (the "Loan") to Megatrucare Pte Ltd ("Megatrucare"), with the respondent, Mr Yip Fook Meng, as the guarantor of the Loan.

2 At the second of two meetings on 22 June 2017, the following transactions were concluded (collectively, the "Transactions"):

(a) a Credit Facility Agreement (the "Loan Agreement") between the appellant and Megatrucare for the Loan of $300,000 by the former to the latter;

(b) a personal guarantee (the "Guarantee") that the respondent signed, in which he undertook to pay to the appellant, on demand, all

sums owing and payable by Megatrucare under the Loan Agreement; and

(c) a duly executed Letter of Authority (the "LOA") which assigned to the appellant $309,000 out of the sale proceeds of the respondent's property at 106 Rangoon Road (the "Rangoon Road Property") upon completion of its sale.

3 It was also agreed, *inter alia*, in the Loan Agreement that:

(a) the interest payable would be at a rate of 3% per month; and

(b) the tenure of the Loan would be one month and repayment of the Loan and interest was to be made by 27 July 2017.

4 The sale of the Rangoon Road Property was due to be completed on 30 June 2017, a mere eight days after the Loan was granted on 22 June 2017.

5 Megatrucare defaulted on payment of the Loan and had no assets to satisfy the judgment-in-default of appearance entered against it. The appellant then sought to enforce the Guarantee against the respondent in the proceedings below. The anticipated sale proceeds were never transferred because the sale of the Rangoon Road Property was eventually aborted.

6 In his judgment (the "Judgment"), the trial judge (the "Judge") dismissed the appellant's claim on the sole ground that the Guarantee was given in relation to an illegal personal loan pursuant to s 14(2)(*a*) of the Moneylenders Act (Cap 188, 2010 Rev Ed) ("MLA") (the "personal loan illegality defence"). The Judge found that the true borrower of the Loan was not its stated borrower, Megatrucare, but the respondent. Since the Loan was found to have been made to a natural person rather than a corporation, the appellant was not an "excluded

moneylender" under s 2 of the MLA. Having lent money while not an excluded moneylender in consideration of a larger sum being repaid, the appellant is presumed under s 3 of the MLA to be a "moneylender". Given this presumption, the Judge found that pursuant to s 2 of the MLA, the appellant was an "unlicensed moneylender". The appellant therefore carried on the business of moneylending in contravention of s 5 of the MLA. Section 14(2)(*a*) of the MLA provides that any guarantee given for a loan granted by an unlicensed moneylender is unenforceable. The Judge therefore found that the Guarantee was unenforceable by the application of this provision.

7 The Judge also made other findings in favour of the appellant, in *obiter*: (a) the appellant did not have actual or constructive knowledge of the respondent's mental incapacity, so the Guarantee was not annulled on this ground; (b) the Guarantee was not annulled under s 19(1)(*c*) of the Mental Capacity Act (Cap 177A, 2010 Rev Ed); and (c) the respondent had not adduced sufficient evidence in support of his plea of *non est factum*, which would render the Guarantee void if successful.

8 The present appeal only concerns the first issue in the proceedings below, *viz*, whether the Loan was illegal under the MLA and the Guarantee was given in relation to such an illegal loan.

9 In this regard, the three main issues in this appeal are: (a) whether the court could invoke illegality of its own motion; (b) whether the Loan Agreement was a sham; and (c) whether the presumption in s 3 of the MLA was unrebutted.

10 We turn now to the first issue.

Whether the court could invoke illegality of its own motion

11 Where illegality is not pleaded, the court is entitled to invoke illegality of its own motion where one or more of the following propositions set out in *Edler v Auerbach* [1950] 1 KB 359 at 371 ("*Edler*") (affirmed in *Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 ("*Ting Siew May*") at [29]) is satisfied:

> … [F]irst, that, where a contract is ex facie illegal, the court will not enforce it, whether the illegality is pleaded or not [the "***First Edler Proposition***"]; 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 [the "***Second Edler Proposition***"]; thirdly, that, where unpleaded facts, which taken by themselves show an illegal object, have been revealed in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it [the "***Third Edler Proposition***"]; but, fourthly, that, where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not [the "***Fourth Edler Proposition***"].
>
> [emphasis added in bold italics]

12 It is common ground that the First *Edler* Proposition is not satisfied in the present matter.

13 As regards the Second *Edler* Proposition, the appellant rightly submitted that the respondent did not plead that he was the true borrower of the Loan, which is an "extraneous [circumstance] tending to show that it has an illegal object". We agree with the Judge's reasoning (see the Judgment at [18]) that the phrase, "the [appellant] *purported* to have lent to [Megatrucare] a sum of money in consideration of a larger sum being repaid" [emphasis added], is unclear as to who the respondent contends the true borrower is.

14 However, the dearth of pleadings in relation to the personal loan illegality defence is not relevant to whether the court can invoke illegality of its own motion. As a matter of law, it is in the inherent nature of the Third and Fourth *Edler* Propositions that they operate in circumstances where the facts relating to the illegality at hand are *not* pleaded. Indeed, the Judge rightly explained as follows (see the Judgment at [21]):

> 21 To the extent that the allegation of personal loan illegality was never put to the plaintiff's directors, and only raised belatedly in the course of trial and in the second defendant's closing submissions… the plaintiff's frustration is understandable. However, such prejudice does not prevent me from ruling on the basis of personal loan illegality. Vinodh Coomaraswamy JC (as he then was) in *ANC Holdings Pte Ltd v Bina Puri Holdings Bhd* [2013] 3 SLR 666… at [98] (which was affirmed by the Court of Appeal in *Ting Siew May* at [31] and *Fan Ren Ray and others v Toh Fong Peng and others* [2020] SGCA 117 at [15]) explained as follows:
>
> > [i]f there is any judicial reluctance to allow a party to rely on illegality when that party has not pleaded it, the reluctance is attributable *solely to the court's concern that the court may have been* ***deprived of relevant facts*** and ***not*** *because of possible* ***procedural unfairness to the other party***. …
>
> [emphasis added in italics and bold italics]

15 Hence, applying the Third and Fourth *Edler* Propositions, the material issue is whether all the relevant facts relating to the personal loan illegality defence were before the Judge.

16 In our view, all such relevant facts were before the Judge for him to conclude that: (a) the respondent was the true borrower of the Loan; and (b) the appellant was in the business of moneylending.

17 As regards the identity of the Loan's true borrower, this question was put to Mr Ong Leng Hock ("Mr Ong"), one of three directors of the appellant,

during the trial. The Judge had thoroughly considered the following matters (see the Judgment at [36] and [39]–[43]):

(a) Mr Ong said that the appellant looked to the respondent for repayment from the outset as it was understood that the repayment would come from the sale proceeds of the respondent's Rangoon Road Property;

(b) Mr Ong could not adequately explain why the appellant did not bother to evaluate Megatrucare's creditworthiness, which in turn suggested that the appellant was suspiciously not concerned with Megatrucare's ability to repay the Loan; and

(c) Mr Ong knew that the appellant was prohibited from lending money directly to the respondent, as it would otherwise lose its "excluded moneylender" status under the MLA.

18 As regards whether the appellant was in the business of moneylending, we have considered that this relevant fact was before the Judge, especially since Mr Ong testified that the appellant had been in the business of moneylending at the material time. We elaborate on this below (at [37]–[39]).

19 Notably, the Judge had raised his concerns as to personal loan illegality defence in the course of the trial and directed the parties to address this point in their closing submissions. The appellant neither sought to recall any witnesses nor to adduce additional evidence pertaining to the personal loan illegality defence. We are satisfied that the court below could invoke illegality of its own motion and see no reason to disturb the finding that all the relevant facts were before it.

20 We turn now to the second issue.

Whether the Loan Agreement was a sham

21 In *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [41], the Court of Appeal stated that although the appellate court's power of review with respect to a finding of fact is limited, the appellate court can and should overturn any such finding where the trial judge's assessment is "plainly wrong or against the weight of the evidence". In this regard, the appellant submits that the Judge was plainly wrong in finding that the Loan Agreement was a sham.

22 The definition of a sham agreement has been set out by the Court of Appeal in *Toh Eng Tiah v Jiang Angelina and another appeal* [2021] 1 SLR 1176 (at [77]): "... the existence of a sham means that the agreement was not intended to create enforceable legal obligations but was intended to deceive third parties." In the present case, if the Loan Agreement was a sham, that means that the appellant and Megatrucare did not intend to create legally enforceable obligations with each other and had intended to deceive third parties or the court into thinking that the Loan was made to a corporation. Hence, the issue here is whether the respondent was the true borrower of the Loan instead of Megatrucare, the stated borrower in the Loan Agreement.

23 In examining this issue, the substance of the transaction and not its form is determinative (*Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 ("*Sheagar*") at [81]). Thus, evidence regarding who bore the obligation of repaying the Loan is instructive. In this regard, the Judge had considered the testimonies of: (a) Mr Ong, a director of the appellant; (b) Mr Elangovan s/o Meyyanathan ("Mr Elangovan"), the director of Megatrucare;

and (c) Mr Gary Koh, the broker of the Loan (see the Judgment at [29]–[46]). They indicate that the appellant and Megatrucare had always intended for the appellant to *solely* look towards the respondent for repayment of the Loan. Hence, the respondent was not treated by the parties to the Loan Agreement as a guarantor whose repayment obligations arise only where the borrower defaults. Rather, the respondent was treated as the foremost person who would have to pay the Loan, *ie*, its true borrower.

24 We also add that the Judge had considered that Mr Elangovan's testimony was credible since (see the Judgment at [32]–[34]):

(a) he was subpoenaed by the appellant but had ironically given evidence in the respondent's favour;

(b) there was corroborating documentary evidence from Mr Elangovan's written reply on behalf of Megatrucare to the appellant's letter of demand in respect of the Loan Agreement, in which he directed the appellant's solicitors to "look to [the respondent] to make payment of the Loan Amount" based on the appellant's "full knowledge of the mode of repayment as well as the personal guarantee"; and

(c) any interest he might have had in deflecting liability from Megatrucare was diminished by the fact that Megatrucare had already been examined as a judgment debtor.

25 There were also objective circumstances which corroborated the appellant's and Megatrucare's intention to treat the respondent as the Loan's true borrower.

26 First, the stated purpose of the Loan Agreement, which was to finance the working capital of Megatrucare, made no commercial sense. For such working capital, Megatrucare could have simply waited for the sale proceeds of the Rangoon Road Property just *eight days* after the Transactions were concluded, without having to incur a total interest of $9,000 (see the Judgment at [48]). Contrary to the appellant's contention that this assessment was merely the Judge's subjective view of commercial sense, it is eminently clear to us that his finding was logical and premised on simple common sense.

27 Second, the appellant knew of the respondent's suspiciously late appointment as a director of Megatrucare on 14 June 2017, just prior to the concluding of the Transactions on 22 June 2017 (see the Judgment at [49]).

28 In the circumstances, the Judge correctly characterised the appellant's obtainment of a judgment-in-default of appearance against Megatrucare as part of a charade to paint Megatrucare as the true borrower under the Loan Agreement (see the Judgment at [50]).

29 In view of the weight of evidence in the respondent's favour, we agree that even if additional adverse testimony from the appellant's other directors, *viz*, Mr Andri Simadiputra ("Mr Simadiputra") and Mr Quek Siew Cher, on this issue had been adduced, it would not have assisted the appellant's case (see the Judgment at [58]). Similarly, we also consider that additional adverse testimony from the respondent's caregiver and third parties to whom a portion of the Loan moneys was disbursed would not have made a material difference. We emphasise that the present issue only concerns whether the stated borrower in the Loan Agreement matches the Loan's true borrower. There is no need to consider facts relating to the exact nature and mechanism of the Loan.

30 It is therefore clear that the Judge had carefully considered the extant evidence in totality before concluding that all the relevant facts relating to the personal loan illegality defence were before him.

31 The Judge also did not err in applying the correct standard of proof. The appellant relies on *Seven Seas Supply Co v Rajoo* [1965–1967] SLR(R) 79 ("*Seven Seas"*) (at [29]–[32]) to argue that a judge must be certain that it was *impossible* that there were any relevant circumstances which were not before the court, when applying the Third *Edler* Proposition. In other words, the appellant claims that the Judge should have applied a standard of proof that was stricter than a balance of probabilities. This is a misreading of that case. In fact, the Malaysian Federal Court made no pronouncement to that effect about the relevant standard of proof. The only statement of the applicable legal principles, that a court should be "*quite certain* that all the relevant facts are in evidence" [emphasis added] (at [29]), does not suggest that a higher standard of proof ought to be applied. We therefore reject the appellant's argument, which is premised on its interpretation of *Seven Seas*.

32 The appellant has therefore not persuaded us that the Judge was plainly wrong in finding that the Loan Agreement was a sham because the respondent was the true borrower of the Loan.

33 We turn now to the last issue.

Whether the presumption in s 3 of the MLA was unrebutted

34 In *Sheagar*, the Court of Appeal summarised the principles to be adopted in relation to s 14(2) of the MLA (at [75]):

(a) To rely on s 14(2) of the MLA, 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 MLA 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".

(d) However, if there is an issue as to whether the lender is an excluded moneylender, the legal burden of proving that he is not will fall on the borrower.

35 Here, since the Loan Agreement was a sham and the respondent was the Loan's true borrower, the appellant is not a person who lends money solely to corporations. Hence, the appellant is not an "excluded moneylender" under s 2 of the MLA. The presumption under s 3 of the MLA applies and the appellant has to prove that it was not in the business of moneylending for it to exclude itself from the s 5 MLA prohibition.

36 In this regard, as stated by *Mak Chik Lun and others v Loh Kim Her and others and another action* [2003] 4 SLR(R) 338 at [11]–[12] (affirmed in *Law Society of Singapore v Leong Pek Gan* [2016] 5 SLR 1091 ("*Leong Pek Gan*") at [72]), there are two tests to determine whether a person is in the business of moneylending:

(a) The first test is whether there was a system and continuity in the transactions (the "first test").

(b) If the first test is answered negatively, the court applies the second test, *viz*, whether the alleged moneylender is one who is ready and willing to lend all and sundry provided that they are from his point of view eligible (the "second test").

37 But quite separately from and without resort to these legal tests, we are of the view that the question at hand can be answered simply by reference to the appellant's admission at trial that it was a moneylender at the material time.

38 Mr Ong knew of the legal restrictions against the appellant extending personal loans to individuals: he explained that because the appellant was an excluded moneylender, the appellant could not have lent to the respondent. Implicit in this explanation is an acknowledgment that the appellant was a moneylender at the material time, since he was questioned specifically on the Loan and whether it was made *to the respondent*:

Court:	---it appears to me that you were really looking for repayment from Mr Yip, not from Megatru.
Witness:	No, Your Honour, Sir, because on the onset, they already tell us that the repayment will come from the sales proceed of Mr Yip at---
Court:	And so---
Witness:	---part of the---
Court:	Yes, so---
Witness:	Yes.
Court:	---you were looking for repayment from Mr Yip---
Witness:	Yes.
Court:	---right from the very beginning?
Witness:	Yes, because it---they came to us very clearly that the repayment will come from Mr Yip sales proceed.
Court:	Now, why didn't you lend to Mr Yip?

> Witness: We can't lend to Mr Yip.
>
> Court: Why?
>
> Witness: Because we, as a---*as excluded moneylender, we only can lend to private limited company* and AI--
>
> Court: Alright.
>
> [emphasis added]

39 Admittedly, Mr Ong claimed that he was only in the appellant's employ since 2018, *after* the Transactions were concluded on 22 June 2017, raising the possibility that his testimony about the appellant's business did not pertain to the material time. But as the Judge found at [35] of the Judgment, Mr Ong was present at the 22 June 2017 meetings. This is also supported by affidavit evidence from Mr Simadiputra (a director of the appellant at the material time). The conclusion is that Mr Ong's testimony about the appellant's business is relevant: the appellant was in the business of moneylending at the material time, and Mr Ong's testimony confirmed that. On that basis alone, we affirm the Judge's finding that the presumption under s 3 of the MLA was not rebutted.

40 In any case, we also agree with the Judge's holding with regard to the first and second tests highlighted above (at [36]).

41 In respect of the first test, the Judge rightly held that it was not satisfied since there was only one loan extended by the appellant (see the Judgment at [53]). In respect of the second test, the Judge also rightly held that the Court of Three Judges in *Leong Pek Gan* at [78] confirmed that the second test may be satisfied by evidence of a single transaction (see the Judgment at [53]).

42 In the present context, the second test entails examining whether the appellant was willing to lend money to any borrower without discrimination, save that the borrower should be able to repay the Loan. In this regard, as the

Judge had noted, the appellant did not conduct any due diligence on the stated borrower, Megatrucare.

43 The appellant contends that the proper inquiry should have been whether it had conducted due diligence on *the respondent's* creditworthiness, which it allegedly did. This is misconceived. If the appellant had truly intended to treat the respondent as a guarantor, its chief concern would have been *Megatrucare's* ability to repay the Loan instead.

44 Moreover, in *Leong Pek Gan*, in holding that the second test was satisfied, the court stated that it was "especially significant" that the parties to the loan transaction did not know each other beforehand (at [84]). The Judge rightly noted that likewise, the appellant, the respondent and Megatrucare did not know one another beforehand, especially since the appellant was only presented with the Loan application about one week before the meetings on 22 June 2017 (see the Judgment at [55]).

45 In view of the above, we agree with the Judge that the appellant was ready to lend to all and sundry and was therefore in the business of moneylending.

46 Hence, the appellant could not rebut the presumption under s 3 of the MLA. This means that the appellant is a moneylender, and further, an unlicensed moneylender. Since the Guarantee was given for the Loan granted by such an unlicensed moneylender, it is unenforceable.

Conclusion

47 To sum up, we affirm the Judge's finding that the Loan Agreement was a sham. He was justified in invoking illegality on his own motion and finding that the presumption in s 3 of the MLA was unrebutted.

48 As the Judge pointedly observed at [63] of the Judgment, "the parties [had] deliberately interposed a corporate entity to disguise a personal loan as a corporate one". This was a calculated and cynical effort to evade the MLA. The appellant cannot expect any relief or assistance from the court in enforcing what is in substance a sham loan.

49 For the above reasons, we dismiss the appeal. We award $30,000 in costs (all-in) to the respondent. The usual consequential orders will apply.

Belinda Ang Saw Ean
Judge of the Appellate Division

See Kee Oon
Judge of the High Court

Chua Lee Ming
Judge of the High Court

Derek Kang Yu Hsien and Lim Shi Zheng Lucas (Cairnhill Law LLC) for the appellant;
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