Sheagar s/o T M Veloo *v* Belfield International (HongKong) Ltd [2014] SGCA 26

Case Number	: Civil Appeal No 127 of 2013
Decision Date	: 19 May 2014
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; V K Rajah JA
Counsel Name(s)	: Foo Soon Yien and Fatima Musa (Bernard & Rada Law Corporation) for the appellant; R Dilip Kumar (Gavan Law Practice LLC) for the respondent
Parties	: Sheagar s/o T M Veloo — Belfield International (HongKong) Ltd

Credit and Security – Money and Moneylenders – Illegal Moneylending

Contract – Illegality and Public Policy – Statutory Illegality

Contract – Illegality and Public Policy – Illegality under International and Foreign Law

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2014] 1 SLR 24.]

19 May 2014

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 This is an appeal against the decision of the High Court judge ("the Judge") in Suit No 876 of 2011 ("S 876/2011"). In that suit, Belfield International (Hongkong) Ltd ("the Respondent") claimed against Sheagar s/o T M Veloo ("the Appellant"), the sum of US$358,000 with contractual interest plus costs on an indemnity basis. The claim was made pursuant to a guarantee given by the Appellant in respect of a loan extended to Blue Sea Engineering Pte Ltd ("BSE") by the Respondent.

2 The Appellant raised defences based on illegality under the Moneylenders Act (Cap 188, Act 31 of 2008) ("the MLA"), the Business Registration Act (Cap 32, 2004 Rev Ed) ("the BRA") and the Hong Kong Money Lenders Ordinance (Cap 163) (HK) ("the HKMLO"). The Judge rejected these defences and judgment was entered for the Respondent. The Appellant appealed against the whole of the Judge's decision.

3 At the close of the hearing we dismissed the appeal. Our reasons for doing so, in brief, were as follows. First, as regards illegality under the MLA, we found that the MLA did not apply because the Respondent was an "excluded moneylender" under s 2 of that Act. Second, we found that the Appellant could not rely on illegality under the BRA because it had not pleaded this. Third, we found that the giving of the loans did not contravene the HKMLO. We now set out the grounds for our decision in full.

Facts

Parties to the dispute

4 The Appellant was the managing director of BSE at all material times. BSE was in the business of carrying out painting, piping and electrical works in the marine industry. It was a wholly owned subsidiary of Great Sea Holdings Pte Ltd ("GSH"). Apart from BSE, there were nine other companies in the GSH group. As he held more than 99% of the shares in GSH, the Appellant had effective control over BSE and its related companies.

5 The Respondent is a company incorporated in Hong Kong. Its directors are Henri Adriaan Hamelers ("Henri"), the managing director, and Gregorio Tolentino Ang Jr. The Respondent claims to be in the business of providing commodities brokerage and the structuring of trade finance services. In these proceedings, however, the Appellant took the position that the Respondent was also in the business of moneylending.

The background

6 Sometime in 2008, the Appellant needed a loan to overcome some cash-flow problems faced by the GSH group. He therefore approached Chandrasegar Chidambaram ("Chandra") seeking his assistance to procure a loan. Chandra is an advocate and solicitor. At that time he was also a director of BSE. Chandra introduced the Appellant to Govender Dayanandan ("Daya") who was then working with Bahrain Bank in Singapore. Daya in turn introduced the Appellant to Tan Yong Hong ("Eric") who was a retired banker. Daya and Eric were business associates of Henri and the Respondent.

7 According to the Appellant, he informed Daya and Eric that he needed a loan of US$348,000 for the various companies and projects he was involved in. After discussions between them, it was agreed between the Appellant, Daya and Eric that any loan would be made to BSE. On this basis Daya and Eric made a recommendation to the Respondent to extend a loan of US$348,000 to BSE ("the First Loan").

8 On 27 August 2009 the Respondent held a directors' meeting and passed a resolution to extend the First Loan to BSE. The First Loan Agreement, the First Subordination Agreement and the First Deed of Guarantee (collectively "the First Loan Documents") were signed on the same day. Pursuant to the First Deed of Guarantee the Appellant stood as guarantor for the First Loan. On 1 September 2009, the First Loan amount of US$348,000 was paid into BSE's bank account in Singapore.

9 Sometime in January 2010, the Appellant sought Daya's assistance to procure a further loan of US$358,000 from the Respondent ("the Second Loan"). The Respondent agreed to extend such a loan to BSE. The Second Loan Agreement, the Second Subordination Agreement and the Second Deed of Guarantee (collectively "the Second Loan Documents") were signed on 29 January 2010. The terms and conditions for the Second Loan were identical to the First Loan. Pursuant to the Second Deed of Guarantee, the Appellant stood as guarantor for the Second Loan. On 3 February 2010 the Second Loan amount of US$ 358,000 was paid into BSE's bank account in Singapore.

10 In 2010, legal proceedings were commenced against BSE in Singapore by various parties. On 26 August 2010 the Appellant was also sued in his personal capacity by another party. It was against this backdrop that sometime between 29 July 2010 and 20 October 2010, the Appellant arranged to sell BSE to Holcroft Finance Corporation ("Holcroft") and to step down as a director of BSE. There was some dispute concerning the precise dates on which this happened but this was not material in the context of the present appeal. In any event, BSE had been sold to Holcroft and the Appellant had relinquished his directorship by 20 October 2010. BSE was also placed in provisional liquidation on 11 October 2010.

11 The Appellant did not inform the Respondent of these developments. This constituted an event of default under the First and Second Loans (collectively "the Loans"). On 20 October 2010, the Respondent sent four letters of demand, two to BSE and two to the Appellant, in relation to the Loans. Thereafter, the Appellant met the Respondent's representatives to discuss the repayment of the Loans. The Appellant reassured them of his commitment to repay the Loans. He also signed two letters of undertaking dated 26 October 2010 ("the First and Second Letters of Undertaking") to fulfil his obligations under the First and Second Deeds of Guarantee by repaying the Loans by 15 December 2010 and 1 February 2011 respectively.

12 The First Loan, including all interest and management fees, was duly repaid in full on 16 December 2010. The Second Loan remained outstanding as at 1 February 2011. On 14 February 2011 the Appellant asked Eric for an extension of time to repay the principal amount of the Second Loan. He also proposed to repay the principal amount in instalments.

13 On 16 February 2011, the Appellant met Henri and Eric to discuss the repayment of the Second Loan. Although the Respondent acceded to the Appellant's request for an extension of time to pay, it imposed a 2% increase in the monthly interest rate, a restructuring fee of US$3,850 and legal fees of US$1,000. The Respondent also required the Appellant to execute a further letter of undertaking ("the Third Letter of Undertaking"). The Appellant agreed to do so at the meeting but then did not in fact execute the Third Letter of Undertaking.

14 On 11 March 2011, the Appellant's solicitors wrote to the Respondent stating that the Appellant was seeking legal advice on the draft Third Letter of Undertaking. On 14 March 2011, the Appellant met with Henri and Daya again to discuss a proposed repayment plan. After this meeting the Appellant did not make any further payments.

15 On 5 May 2011, the Respondent served a statutory demand on the Appellant. In response, the Appellant filed Originating Summons (Bankruptcy) No 21 of 2011 to set aside the statutory demand. It was then that the Appellant first alleged that the Respondent was a moneylender and therefore, that the Second Loan Agreement and the Second Deed of Guarantee were unenforceable under the MLA. The assistant registrar who heard the matter set aside the statutory demand on the ground that there was a substantial dispute of fact. On 29 November 2011, the Respondent filed S 876/2011 against the Appellant.

The Pleadings

16 For reasons which will become apparent in the course of these grounds, it is important that we first set out how the parties pleaded their respective cases. In its statement of claim, the Respondent sought repayment of the second loan plus contractual interest under the Second Deed of Guarantee. The Respondent pleaded that by reason of the matters which we have alluded to at [10]-[11] above, BSE was in default of the Second Loan Agreement and the principal loan amount plus interest had become due and payable by BSE as debtor and the Appellant as guarantor. Furthermore, under the Second Letter of Undertaking, the Appellant had undertaken to repay the second loan amount as guarantor on or before 1 February 2011.

17 In his defence, the Appellant pleaded that the Second Loan Agreement and the Second Deed of Guarantee were unenforceable pursuant to s 14(2) of the MLA on the basis that the Appellant was an "unlicensed moneylender". The Appellant relied on the fact of the first and second loans having been extended to contend that pursuant to the presumption contained in s 3 of the MLA, the Respondent was presumed to be a moneylender. Insofar as he alleged that the Respondent was carrying on a moneylending business, the Appellant said that the place of the business was both Hong Kong and

Singapore.

18 It was also the Appellant's pleaded case that the loans to BSE were in fact personal loans to him. He claims to have informed Daya and Eric that he needed money for the various companies and projects he was involved in. Daya and Eric had then suggested that it would be better if the loan was routed through a nominee company. This was to give the cosmetic appearance of a corporate loan when in truth the Appellant was the borrower. In an endeavour to circumvent the provisions of the MLA, BSE had been chosen as the nominee company to enable the Respondent to rely on paragraph (e)(iii)(A) of the definition of an "excluded moneylender" that is found in s 2 of the MLA.

19 The Appellant pleaded an alternative defence that it would be contrary to the public policy of Singapore to enforce the second loan as it was illegal under Hong Kong law and its enforcement would breach the principle of international comity. To establish that the Respondent was a moneylender under the HKMLO, the Appellant relied on the same particulars as for its claim under the MLA. As the Respondent did not possess a valid moneylending license in Hong Kong, the Appellant contended that second loan was unenforceable under s 23 of the HKMLO.

20 In its reply and defence to counterclaim, the Respondent denied that it was in the business of moneylending. It pleaded that the giving of loans was not its primary business; rather it was the provision of commodities brokerage and trade finance structuring services. The Respondent averred that it had only given a few loans to cash strapped companies during the global financial crisis. Furthermore, the Respondent denied that the loans to BSE were in fact personal loans to the Appellant disguised as corporate loans. Accordingly, the Respondent argued that even if it was a moneylender, it would fall within the definition of "excluded moneylender" under s 2 of the MLA as it had lent money to corporations only. On this basis, it contended that s 14(2) of the MLA was not engaged.

21 The Respondent also denied that the HKMLO applied. This was because the first and second loans were both signed and performed in Singapore. For each loan, the parties had expressly agreed that Singapore law was to govern the contract. As regards the principle of international comity, the Respondent denied that it applied the present case. The Respondent contended Hong Kong law could not govern a *bona fide* business transaction that was entered into in Singapore in accordance with Singapore law and that was valid under that law. Furthermore, the HKMLO did not have extra-territorial effect so as to apply in this case.

22 In closing submissions in the court below, the Appellant raised a further ground on which to base its contention that the Second Loan Documents were unenforceable. This was that the Respondent conducted the business of moneylending in Singapore but had not registered its business in contravention of s 5 of the BRA. As the Second Loan Documents were contracts in relation to the Respondent's business, the Appellant contended that these were unenforceable pursuant to s 21(1)(a) of the BRA. As will be apparent from what we have set out above, this defence did not feature in the pleadings at all; nor had any attempt been made to seek leave to amend the pleadings.

Decision Below

23 The grounds for the Judge's decision are found in *Belfield International (Hong Kong) Ltd v Sheagar s/o T M Veloo* [2013] SGHC 206. The Judge rejected all the Appellant's defences and entered judgment for the Respondent.

24 As regards the Appellant's defence of unenforceability under the MLA, the Judge held that the Respondent was an "excluded moneylender" under s 2 of the MLA. The Judge did not accept that the

Second Loan was a personal loan to the Appellant that had been disguised as a corporate one. She was satisfied that the Respondent lent money solely to corporations.

25 Although these had not been pleaded, the Appellant's contentions pertaining to the BRA were considered and ruled on by the Judge. The Judge held that the giving of the loans did not constitute a "business" under s 2 of the BRA as they lacked a sufficient degree of system, repetition and continuity as would give rise to a "business". Furthermore, the giving of loans did not relate to the Respondent's business of commodities brokerage and the structuring of trade finance services. Therefore, the disabling provision in s 21 of the BRA did not apply. The Judge went on to say that even if she was wrong on this point, she would have been minded to grant the Respondent relief against the disability imposed by s 21(1) BRA pursuant to ss 21(2) to (4) of the BRA.

26 Finally, the Judge held that the giving of the Second Loan was not contrary to the HKMLO because it was not done by the Respondent in the course of a moneylending business. Thus, the the principle of international comity, which the Appellant had relied on, did not apply in the present case.

The Issues before this Court

27 The issues before this Court were in essence the same as those before the Judge. The three broad areas of contention concerned:

(a) Whether the Second Loan Documents were unenforceable pursuant to the MLA;

(b) Whether the Second Loan Documents were unenforceable pursuant to the BRA;

(c) Whether the Second Loan Documents were unenforceable on the ground of international comity because of illegality under the HKMLO.

Illegality under the MLA

The statutory scheme

28 The MLA was introduced into our statute books in 1936 as the Moneylenders Ordinance (Cap 193, 1936 Ed). Broadly speaking, it was modelled upon the English Moneylenders Acts of 1900 (63 & 64 Vict, c 51) (UK) and 1927 (17 & 18 Geo. 5, c 21) (UK) (respectively "the English Moneylenders Act of 1900" and "the English Moneylenders Act of 1927"). The object of the law is well known. In *Litchfield v Dreyfus* [1906] 1 KB 584 *("Litchfield")*, Farwell J observed that the English legislation was intended "to save the foolish from the extortion of a certain class of the community who are called money-lenders as an offensive term" (at 590).

29 Farwell J's observation was echoed nearly a century later by V K Rajah J (as he then was) in *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] 1 SLR(R) 733 ("*City Hardware*") at [19] and [47]: see also *Lorrain Esme Osman v Elders Finance Asia Ltd* [1992] 1 SLR(R) 50 at [39]; *Donald McArthy Trading Pte Ltd and others v Pankaj s/o Dhirajlal* (trading as TopBottom Impex) [2007] 2 SLR(R) 321 ("*Donald McArthy*") at [7]. In *City Hardware*, Rajah J described the MLA as (at [47]):

> … a scheme of social legislation designed to regulate rapacious and predatory conduct by unscrupulous unlicensed moneylenders…

30 It is settled law that the MLA prohibits the *business* of moneylending rather than the act of lending money: see *City Hardware* at [23] and *E C Investment Holding Pte Ltd v Ridout Residence Pte*

Ltd and another (Orion Oil Ltd and another, interveners) [2011] 2 SLR 232 *("E C Investment")* at [135]. In this regard, the primary prohibition against the carrying on of the business of moneylending is provided by s 5 of the MLA which reads:

> **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 license;
>
> (*b*) he is an excluded moneylender; or
>
> (*c*) he is an exempt moneylender.
>
> [emphasis added]

To put this in positive terms, the business of moneylending may be carried out by those who are licensed to do so; or by excluded or exempt moneylenders.

31 Section 14(2) of the MLA renders unenforceable any contract for a loan or guarantee entered into by an "unlicensed moneylender". It reads:

> **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; 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.

32 "Unlicensed moneylender" is in turn defined in s 2 of the MLA as follows:

> "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.
>
> [emphasis added]

33 S 3 of the MLA provides as follows:

> **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*. [emphasis added]

It is evident from this that an excluded moneylender will not come within limb (a) of the definition of an "unlicensed moneylender" in s 2 of the MLA and hence will also not come within the ambit of

s 14(2) of the MLA.

34 This is also consistent with the definition of "Moneylender" in s 2 of the MLA as follows:

> "[M]oneylender" 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 moneylender;* [emphasis added]

35 Finally, for completeness, we refer also to the relevant part of the definition of an "excluded moneylender" in s 2 of the MLA, which states as follows:

> "[E]xcluded Moneylender" means –
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> ...
>
> (*e*) any person who –
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> ...
>
> (iii) lends money solely to –
>
> (A) corporations;
>
> ...

The burden of proof

36 Several issues pertaining to the statutory provisions we have set out above arise. A preliminary one relates to the burden of proof in proceedings where a borrower seeks to rely on the disabling provision contained in s 14(2) of the MLA. That provision applies to a lender who is an "unlicensed moneylender", which as noted above, refers to a person who is *presumed* to be a moneylender under s 3 of the MLA and, who does not have a licence and is not an exempt moneylender. The presumption in s 3 of the MLA is unique to Singapore. Prior to 2003, an identical presumption was found in the Malaysian legislation but that was repealed in 2003 and a new definition of "moneylender" inserted.

37 There is and was no equivalent of s 3 in the English or the Australian legislation. Absent a presumption, it was settled in England and Australia that the burden of proving that the lender is carrying on the business of moneylending falls on the borrower: see *United Dominions Trust Ltd v Kirkwood* [1966] 2 QB 431 ("*United Dominions*") at 442 for the English position; see *Austin Distributors Ltd v A H Paterson Car Sales Pty Ltd* (1941) 65 CLR 118 ("*Austin Distributors*") for the Australian position.

38 In our judgment, where it applies, s 3 of the MLA operates to shift the burden onto the lender to prove that he was *not* carrying on the business of moneylending. The rationale for such a presumption was explained by the Privy Council in *Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] AC 209 at 218 in the following terms:

> To lend money is not the same thing as to carry on the business of moneylending. In order to prove that a man is a moneylender within the meaning of the Ordinance, it is necessary to show some degree of system and continuity in his moneylending transactions. If he were left to discharge this burden without the aid of any presumption, a defendant might frequently be in a difficulty. He might have had only one or two transactions with the moneylender and he might

> find it difficult to obtain evidence about the business done by the moneylender with other parties. Section 3 enables a defendant to found his claim on proof of a single loan made to him at interest, it being presumed, in the absence of rebutting evidence, that there were sufficient other transactions of a similar sort to amount to carrying on of business.

39 We agree with these observations and add the further point that the scope of the lender's business operations would be a matter within the lender's knowledge. Therefore, the burden placed on the lender would not be an unduly onerous one.

40 There remains a question as to whether the lender also bears the burden of proving that he is an "excluded moneylender". Section 3 of the MLA is a presumptive provision and on the face of it, it may be argued that the presumption of moneylending does not arise if the lender is an "excluded moneylender". On this basis, it might be said that it is incumbent upon the borrower to first prove that the lender was not an "excluded moneylender" before he may rely on the presumption.

41 In the present case, the parties did not specifically address us on the issue of the burden of proof under s 3 of the MLA. Instead, the proceedings in both the court below and on appeal continued on the footing that it was for the lender to prove that he was an "excluded moneylender". Given the importance of this issue, as well as the lack of local authority on it, we ought to clarify the approach to be taken, though in the final analysis, as will become evident, nothing turns on this.

42 The case law in Singapore has not provided a clear answer to this question. In *Mak Chik Lun and others v Loh Kim Her and others and another action* [2003] 4 SLR(R) 338 Belinda Ang J appeared to suggest that the lender bears the burden of proving that he is an "excluded moneylender". Ang J said (at [11]):

> 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 in s 2… [emphasis added]

43 By "the exceptions in s 2" Ang J was referring to the exceptions to the definition of "moneylender" *before* the concept of an "excluded moneylender" was introduced in 2008. Ang J's approach was followed by Lee Seiu Kin J in *Agus Anwar v Orion Oil Ltd* [2010] SGHC 6 at [4] and more recently by Tan Siong Thye JC in *Lena Leowardi v Yeap Cheen Soo* [2014] SGHC 44 at [51]. Apart from these cases, there is a dearth of local authority on the question of who bears the burden of proving that the lender is an excluded moneylender. We thus turn to consider authorities from England and Australia.

44 In England, it is settled law that although the borrower bears the burden of proving that the lender is carrying on the business of moneylending, if the lender wishes to contend that he falls within one of the *exceptions* to the definition of "moneylender" then he bears the burden of proving this: Ian Stratton and Ian Blackshaw, *The Law Relating to Moneylenders* (Butterworths, 1991) at p 2. This was unanimously held to be the position by the English Court of Appeal in *United Dominions*. Lord Denning MR, who delivered the leading judgment, gave two reasons for this conclusion.

45 The first reason was based on the language and structure of s 6 of the English Moneylenders Act 1900 which provided as follows:

> The expression 'moneylender' in this Act shall include every person whose business is that of moneylending… but shall not include… (*d*) any person *bona fide* carrying on the business of banking.

In Lord Denning MR's view, this implied that every person whose business was moneylending fell within the definition of "moneylender" unless he could bring himself within one of the specified exceptions (at 441). The second reason was that the facts required to invoke one of the exceptions were within the knowledge of the lender and not the borrower (at 442). The latter resonates with our observations at [39] above.

46 The position in Australia is more nuanced. In *Austin Distributors*, the High Court of Australia considered s 3 of the Money Lenders Act 1938, No. 4625 of Victoria (Aus) ("the Victoria Money Lenders Act") which provided as follows:

> "Money lender" means every person whose business (whether or not he carries on any other business) is that of money-lending or who advertises or announces himself or holds himself out in any way as carrying on that business and who lends money at a rate of interest exceeding eight per centum per annum but does not include —
>
> …
>
> > (*d*) any person *bona fide* carrying on the business of banking or insurance or *bona fide* carrying on the business of financing pastoral pursuits or the business of stock and station agents or *bona fide* carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money; or
>
> …

Williams J, with whom Rich ACJ concurred, held that the burden was on the borrower to show that the lender did not come within one of the exceptions to the definition of money lender in s 3 of the Victoria Money Lenders Act (at 133). Williams J cited *Lapin v Heavner* (1929) 29 SR (NSW) 514 ("*Lapin*") as authority for this proposition. Starke J took the opposite view. He held that if there was evidence to show that the lender was a moneylender, it was for the lender to then bring himself within one of the exceptions (at 124).

47 The reasoning of Williams J in *Austin Distributors* has been criticised by Professor Pannam in his book *The Law of Money Lenders in Australia and New Zealand* (The Law Book Company Limited, 1965) at p 74. The author observed that *Lapin* does not in fact stand as authority for the proposition that Williams J cited it for. In *Lapin*, the trial judge had accepted the lender's contention that he fell within one of the exceptions in relation to some of the loans he had extended. The question then was whether, based on the remaining loans, the borrower had established that the lender was carrying on the business of moneylending. The trial judge found that he had not and his decision was affirmed on appeal. The question of the burden of proof in relation to the exceptions to the definition of a "moneylender" had not in fact arisen for determination in that case.

48 Professor Pannam suggests (at p 75) that the question of who bears the burden of proving whether the lender falls within the exceptions to the definition of moneylender should turn on whether the exceptions to the definition of moneylender are provisos to the primary definition or whether they are true definitional exceptions. If the latter, the onus of proof lies on the borrower. If the former, the onus lies on the lender instead. Professor Pannam further suggests that in determining this question, it is imperative that one looks at the substance of the statutory provision in question and not merely

at its form.

49 In our judgment, what this requires is a consideration of whether the primary definition applies in the first place. A proviso connotes that the activity in question falls within the primary definition, but that it may be removed from the ambit of the primary definition by invoking the proviso. In those circumstances, it seems evident why the burden of proving that it may invoke the proviso should fall on the lender — it is the lender who wishes to avoid the consequences that would flow from falling within the primary definition. On the other hand, where an activity falls within a true definitional exception, it does not come within the definition at all because the definition simply does not extend to that activity to begin with. On this basis, it is for the borrower to prove that the lender's activity is in fact caught by the definition and does not fall within the definitional exception(s). While this may be stated, it is often less easy to apply in practice.

50 In *Walton v Regent Insurance Ltd* [1966] NSWR 466 ("*Walton*"), the plaintiff claimed that certain mortgages he had entered into with the defendant were unenforceable because the defendant was an unregistered moneylender. The defendant admitted that it carried on the business of moneylending but claimed that it was not a "moneylender" because it was *bona fide* carrying on the business of insurance and lent money in the course of that business. The issue before Jacobs J then was whether the onus of proving this fell on the plaintiff borrower or the defendant lender. In this regard, the defendant was relying on s 3 of the Moneylenders and Infants Loans Act 1941 – 1948 (Aus) ("the Moneylenders and Infants Loans Act"), the material parts of which were as follows:

> "Money-lender" includes every person whose business (whether or not he carries on any other business) is that of money-lending, or who advertises or announces himself or hold himself out in any way as carrying on that business or who from time to time lends money at a rate of interest exceeding ten pounds per centum per annum whether or not he also lends money from time to time at a lesser rate of interest but does not include —
>
> …
>
> (*d*) any person bona fide carrying on the business of banking or insurance;
>
> …

51 In *Walton*, Jacobs J accepted (at 468 – 9) that the question of who bore the burden of proof turned on whether subsection (*d*) of the definition of "Money-lender" in s 3 of the Moneylenders and Infants Loans Act constituted, in substance, a proviso or an exception. In Jacobs J's view, it fell to be the latter. Jacobs J first noted that the form of the legislation was that of an exception and not a proviso. He further observed that the qualifying words were found in the definition of "Money-lender" and not as a proviso to any duty or liability imposed on money-lenders. He thus stated (at 469):

> …Therefore, before it can be said of a person that he is a money-lender within the meaning of the Act *not only the primary words of the definition but the qualifying words must be looked at*, for it is the whole of the definition which amounts to a statement by the Legislature of what is a money-lender within the meaning of the Act… [emphasis added in italics and underline]

Jacobs J accordingly held that the onus was on the borrower to prove that the exception did not apply.

52 The decision in *Walton* was overruled by the Full Court of the Supreme Court of New South Wales in *Neptune Oil Co Pty Ltd v Fowler* [1964] NSWR 251 ("*Neptune Oil*"). In *Neptune Oil*, it was

held (at 255) that the exclusion of certain classes of persons from the definition of "Money-lender" in s 3 of the Moneylenders and Infants Loans Act was by way of proviso rather than true definitional exceptions. The court reasoned that in the first part of the definition of "money-lender", the legislature had specified the activities which would render a person a "money-lender". In this regard, the various exclusions did not provide exculpatory exceptions to those activities; rather they exempted certain classes of persons from the consequences of carrying on such activities. Put another way, a person who fell within one of the exclusions would still bear the characteristics which would otherwise label him a "money-lender". In the court's view, the exclusions were thus introduced by way of proviso rather than by way of exception and it followed that the borrower was not required to prove that the exclusions did not apply to establish that the lender was a "money-lender" under the Moneylenders and Infants Loans Act.

53 Professor Pannam argues that the interpretation adopted in *Neptune Oil* is correct, observing as follows (at p 75):

> The policy as well as the form of the legislation leads to this result. The various exemptions all involve matters which are peculiarly within the knowledge of the person seeking to avail himself of their protection. These include registration under various Acts or carrying on businesses of particular types. It would place a heavy burden on a person alleging that another was a money lender if he had to negative all these exemptions as part of his case. Such a burden would seem to be inconsistent with the policy of the legislation.

54 In our judgment however, the reasoning adopted in *Neptune Oil* is not entirely satisfactory on this point and should not be applied uncritically in Singapore even though the definition of "moneylender" in Singapore prior to 2008 was identical to that under the Australian legislation interpreted in that case. Although the dichotomy between a proviso and a definitional exception can be a useful analytical tool in statutory interpretation, it may sometimes obscure more than it illuminates. One must not lose sight of the fact that the question of the burden of proof in such cases is to be resolved as a matter of substance and not form. As Diplock LJ said in *United Dominions* at 463, the burden of proof "follows common sense, not magic". We are of the view that what is required in the context of the MLA is a purposive and contextual reading of the entire statutory scheme to determine whether Parliament had intended for the lender to also prove that he was an "excluded moneylender" under s 2 of the MLA.

55 In broad terms, the MLA establishes a scheme for the licensing of moneylenders, the regulation of the business of moneylending, the creation of a number of offences and the imposition of various penalties and liabilities. Section 3 of the MLA is a pivotal provision which establishes a presumption that one who lends money for reward is a "moneylender", and who, by virtue of the definition of that term in s 2 of the MLA, is one who carries on the *business of moneylending*.

56 Section 5 of the MLA in turn prohibits a person from carrying on the business of moneylending unless he is licensed to do so; or is exempted from any of the provisions of the act; or is an excluded moneylender. It is clear to us that the provisions of the MLA unquestionably *do* apply to a licensed moneylender; but he is entitled to conduct that business by virtue of and in accordance with the terms of his license. Similarly, in the case of an exempt moneylender, the provisions of the Act do apply save to the extent that he has obtained an exemption under ss 35 or 36 of the MLA.

57 We find, however, that the entire scheme of the MLA does not apply to an excluded moneylender. The full definition of an excluded moneylender in s 2 of the MLA is as follows:

> "excluded moneylender" means —

(a) any body corporate, incorporated or empowered by an Act of Parliament to lend money in accordance with that Act;

(b) any person licensed, approved, registered or otherwise regulated by the Authority under any other written law, to the extent that such person is permitted or authorised to lend money or is not prohibited from lending money under that other written law;

(c) any society registered as a credit society under the Co-operative Societies Act (Cap. 62);

(d) any pawnbroker licensed under the Pawnbrokers Act (Cap. 222);

(e) any person who —

(i) lends money solely to his employees as a benefit of employment;

(ii) lends money solely to accredited investors within the meaning of section 4A of the Securities and Futures Act (Cap. 289);

(iii) lends money solely to —

(A) corporations;

(B limited liability partnerships;

(C) trustees or trustee-managers, as the case may be, of business trusts for the purposes of the business trusts;

(D) trustees of real estate investment trusts for the purposes of the real estate investment trusts,

or who carries on any combination of such activities or services; or

(*f*) any person carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money;

58 It is apparent that these are entities which have been empowered to lend money under other statutes; or are registered or regulated under other pieces of legislation; or that lend money as a benefit of employment or incidental to other businesses; or that lend only to commercial entities. The very nature of most of these categories takes them out of the natural sphere in which the MLA operates.

59 It should be noted that many of these categories had already been *excluded* from the definition of a moneylender prior to the introduction of the concept of an excluded moneylender by way of legislative amendments effected in 2008. Prior to 2008, s 2 of the Moneylenders Act (Cap 188, 1985 Rev Ed) ("the MLA 1985") defined "moneylender" as:

"moneylender" includes every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal

or as an agent but does not include —

(*a*) any body corporate, incorporated or empowered by a special Act of Parliament or by any other Act to lend money in accordance with that Act;

(*b*) any society registered under the Cooperative Societies Act;

(*c*) any person bona fide carrying on the business of banking or insurance or bona fide carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money;

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

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

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

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

…

60 The 2008 amendments therefore had two primary effects. The first was to expand the list of exceptions to the definition of "moneylender" under s 2 of the MLA 1985. The second was to classify persons falling within this new list of exceptions as "excluded moneylenders", the definition of which we have set out above at [57].

61 The impetus for the 2008 amendments, it would appear, was Rajah J's call for legislative reform in *City Hardware*. In that case, the plaintiff and the defendant entered into an arrangement where the plaintiff purchased goods requested by the defendant from third party suppliers for cash. The plaintiff then on-sold the same goods to the defendant on credit. The issue before Rajah J therefore was whether these transactions bore the features of moneylending.

62 In *City Hardware*, Rajah J cautioned against a court being overzealous in deconstructing a transaction in order to infer that its objective was in substance to lend money contrary to the scheme of the MLA. In this regard, Rajah J noted that the object of the MLA 1985 was to proscribe "rapacious conduct by unscrupulous unlicensed moneylenders" (at [47]). It was never intended to prohibit or impede legitimate commercial intercourse between commercial persons. With these principles in mind, Rajah J found on the evidence before him that the transactions in question were not loans. The MLA 1985 therefore had no application in that case.

63 However, Rajah J appeared to accept that if it was the lender's primary business to lend money, the MLA 1985 would bite even though the loans were entered into at arm's length, and between commercial parties. He emphasised at [22] that:

> …[A] person or entity that carries on a business with the primary object of conducting unlicensed moneylending cannot avoid the severe consequences of an infraction of the [MLA 1985's] provisions by pointing out the benefits the borrower has received or derived from the transactions. *The court has no alternative but to give effect to the draconian consequences of an infraction in the event that the [MLA 1985] is offended*. [emphasis added]

64 Rajah J went on to observe that the MLA 1985 was a "blunt instrument" and suggested that legislative reform would be desirable (at [49]):

> …[T]he time may have come for a holistic review of the MLA. It is to be noted that similar legislation in England and Australia have long since been repealed. In their place now are more specific and carefully crafted legislation governing the provision of consumer credit. In my view, the MLA, while still serving an important, necessary and admirable social objective, requires considerable fine-tuning to meet the exigencies of the modern business environment.

65 At the Second Reading Speech for the 2008 amendments (Singapore Parliamentary Debates, Official Report (18 November 2008) vol 85 at columns 1001 – 1004), such concerns were acknowledged by Associate Professor Ho Peng Kee, the then Senior Minister of State for Law:

> Sir, the Moneylenders Act was enacted in 1959, about 50 years ago. Amendments have been few and far between, primarily focusing on enhancing the provisions that tackle unlicensed moneylender or loansharking. The Act was intended as a piece of social legislation to safeguard what we would call "small-time borrowers" from unscrupulous moneylenders. Hence, its chief concern was the charging of exorbitant interests. The lenders then were also essentially small-scale operators.
>
> …
>
> Sir, as business modalities evolved, the framework of the Act became outdated. In response, the approach taken was to exempt some categories of lenders from its ambit. These are termed "exempt moneylenders" and include companies that lend solely to businesses or to their own staff. The number of exemptions given over the years has increased, standing at 188 at the end of last year.
>
> …
>
> Sir, in view of the comprehensive changes, the Bill repeals and re-enacts the Moneylenders Act. In general, these amendments will introduce a more flexible and progressive approach to the regulation of moneylending to keep pace with the modern credit economy, whilst taking into account the social policy on access to credit; in other words, *a modern framework that serves to strike a proper balance between regulating licensed moneylenders and safeguarding the interests of borrowers.* Specifically, they clarify the scope of moneylending activities to be licensed, modernise moneylending operations, enhance protection for borrowers, tighten the regulatory framework, giving the Registrar more powers to act against errant moneylenders and introduce new measures to tackle unlicensed moneylending.
>
> …
>
> Part I of the Bill clarifies the scope of moneylending. All moneylenders who grant secured and unsecured loans to members of the public will be licensed and regulated. Some of the moneylenders previously granted exemptions but who come within the scope of moneylending will now be regulated under the new licence regime. In addition, the list of excluded moneylenders has been expanded to cover, for example, lenders who grant solely staff loans or lend solely to corporations, limited liability partnerships, trustees of REIT, and accredited investors within the meaning of section 4 of the Securities and Futures Act. *Excluded moneylenders will not be required to apply for a licence or an exemption under the Act*.

…

[emphasis added]

66 In our judgment, in passing the 2008 amendments, Parliament had intended to de-regulate commercial borrowing by excluding this class from the MLA in addition to those already excluded prior to 2008. This was to ensure that the flow of credit in the business domain was not stifled. Furthermore, insofar as paragraph (e) of the definition of "excluded moneylender" in s 2 of the MLA is concerned, Parliament also regarded such borrowers, that is to say, corporations, limited liability partnerships, business trusts, real estate trusts and sophisticated investors as being a less vulnerable class of borrowers that did not need the protection afforded by a piece of social legislation. This in turn justified a lower degree of regulatory oversight over the activities of lenders who lent exclusively to such borrowers.

67 This background suggests that the MLA simply does not apply to lenders who fall within the definition of "excluded moneylender" under s 2 of the MLA and their activities therefore do not come within the regulatory ambit of the MLA at all. On this basis and to this extent, we do not agree with the view expressed in *Neptune Oil* (see [52] above) that the various classes of excluded moneylenders are merely excluded from the consequences of carrying on the business of moneylending.

68 It is also apposite to note in this context that "moneylender" is used in the MLA as a term of art. This was recognised in *Litchfield* when Farwell J said (at 590):

> The Act was intended to apply only to persons who are really carrying on the business of money-lending as a business, not to persons who lend money as an incident of another business or to a few old friends by way of friendship. This particular Act was supposed to be required to save the foolish from the extortion of a *certain class of the community who are called money-lenders as an offensive term* …[emphasis added]

The author of the *Law of Moneylenders in Malaysia and Singapore* (Sweet & Maxwell, 2003) similarly observes (at p 15) that:

> The Acts, as we have observed were introduced to *regulate the conduct of moneylenders*, and do not make the lending of money *per se* illegal or unenforceable, and are *directed at moneylenders*, not at the business of moneylending. [emphasis added]

It would be apparent from this that the MLA is only engaged if it is established that the lender is a "moneylender" within the meaning of the term in s2 of the MLA. It is not engaged simply because a person lends money or is in the business of making loans. In this regard, we think it pertinent to note that the definition of a "moneylender" in s 2 of the MLA contains an express exclusion in respect of an "excluded moneylender".

69 We return here to a point that we have alluded to earlier, namely that the scheme of the MLA is somewhat different from that which obtains in Australia and in England. There, as we have observed, the primary burden is on the borrower to prove that the lender is in fact engaged in the business of moneylending. The burden then shifts to the lender to prove that it is within a permitted exception. Under our framework however, the borrower has the benefit of a presumption and this has a material bearing on the burden of proof. It is to this we now turn.

70 The presumptive provision in question is s 3 of the MLA. As mentioned above at [36], this

provision is unique to Singapore; and for this reason also, we consider that the English and Australian authorities we have referred to above must be approached with caution.

71 In this regard, it is significant that the presumptive provision in s 3 of the MLA contains an express exclusion in the words "other than an excluded moneylender". This is pertinent because, *prima facie*, it appears to suggest that an excluded moneylender will therefore never fall to be an "unlicensed moneylender" as defined in s 2 of the MLA, for the purposes of s 14(2) of the MLA.

72 If, the concept of an excluded moneylender under the MLA is to be regarded, as in the *Neptune Oil* case, as a proviso rather than as a true definitional exception, it would mean that a borrower could invoke the presumption even in relation to a lender who, as it might later turn out, was an excluded moneylender and the burden would then fall on the lender to prove that he was an excluded moneylender and that the presumption therefore does not apply. This seems untenable to us for two reasons:

(a) To so hold would render the exclusionary words entirely otiose. The presumption could simply have said that any person who lends money for reward shall be presumed to be a moneylender. The lender would then have to rebut this by showing that he was not within the definition of a "moneylender" either because he was not carrying out such a business or because he was an excluded moneylender. This is because, as we have noted at [68] above, the definition of a "moneylender" in s 2 of the MLA has an express exclusion in respect of an "excluded moneylender";

(b) We would be hesitant even in ordinary circumstances to construe words in a statute as otiose but it is all the more so in a case such as the present where it is evident from the whole scheme of the MLA that it was not to apply to an excluded moneylender. It would thus be anomalous if a borrower could invoke the disabling provision under s 14(2) of the MLA and the presumptive provision under s 3 of the MLA without showing, in the first place, that the lender fell within the regulatory ambit of the MLA.

73 For these reasons, we are satisfied that the burden of proving that a lender is *not* an excluded moneylender falls on the borrower. To that extent, the authorities we have referred to at [42] and [43] above should not be regarded as correct on this point.

74 For completeness, we would observe that this does not place an unreasonable burden on the borrower. In most instances, the relevant information would be available from public record; or within the borrower's own knowledge as to whether or not it is itself within the class of borrowers to whom an excluded moneylender may lend money; or capable of being established by the straightforward administration of interrogatories or discovery.

75 For the avoidance of doubt, we summarise the principles to be adopted in relation to s 14(2) of the MLA.

(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.

Was the Respondent an "excluded moneylender"

76 We turn to the question of whether the Respondent was an "excluded moneylender" under s 2 of the MLA.

77 The Respondent contended that it was an "excluded moneylender" under paragraph (e)(iii)(A) of the s 2 definition because it had lent money only to corporations. At trial, the Respondent adduced evidence to show that from the time of its incorporation in 2006 until 2010, it had only made loans to four companies. These companies were: (a) Nordlinger Automation Pte Ltd; (b) PT Indonesia Cemerlang; (c) IRA International Ltd; and (d) BSE. The Respondent specifically denied having made loans to any individuals.

78 Both at trial and on appeal, the Appellant did not seriously dispute the Respondent's evidence relating to the loans it had made to companies other than BSE. In his Affidavit of Evidence in Chief filed on 21 December 2012 ("AEIC"), the Appellant alleged that Daya and Eric had informed him the Respondent was in the business of giving loans to individuals. This however was a bare assertion which was not borne out by any evidence adduced at trial. In any event, counsel for the Appellant, Ms Foo Soon Yien ("Ms Foo"), did not pursue this point before us.

79 Instead, the crux of Ms Foo's argument on appeal was that the two loans granted to BSE by the Respondent were sham corporate loans and this was the principal basis for discharging the burden of proving that the Respondent was *not* an excluded moneylender, which we have held, fell upon the Appellant. Ms Foo sought to establish that the loans were in fact personal to the Appellant. To the extent that Ms Foo argued that the question of whether the Respondent was an "excluded borrower" under paragraph (e)(iii)(A) was a question of substance over form, we agreed with her submissions. In *E C Investment* at [139(b)], Quentin Loh J observed that:

> [I] must not be taken to say that so long as a borrower is a corporation, no matter what the circumstances or nature of shareholding, the excluded moneylending exception would apply. Depending on the facts and circumstances, it may.

80 We also refer to this Court's dicta in *Donald McArthy* where it was said (at [14]):

> It is a question of substance and not of form, although the form of the transaction would *prima facie* reflect the substance of the transaction. In theory, as Rajah J noted in *City Hardware* at [22], if the parties had wilfully attempted to structure a transaction so as to evade the application of the MLA, the court could construe the transaction as being a loan of money.

81 In our judgment, to come within the definition of an "excluded moneylender", both the letter and spirit of the law must be complied with. We would emphasise, however, that in most, if not all cases, the form of the transaction would *prima facie* reflect its substance. The MLA must not be seen by desperate defendants as a "legal panacea" to stave off their financial woes. Accordingly, it was incumbent on the Appellant to place cogent evidence before us to make good its assertion that the First and Second Loans were sham corporate loans.

82 In support of her case, Ms Foo first argued that the Respondent had obtained legal advice

before giving the Loans and therefore knew how to evade the operation of the MLA. Ms Foo further argued that the Respondent had in fact attempted to do so. In our judgment, these arguments were tenuous and not sustainable. For a start, they were not based on any factual assertion but rather, they were speculative in nature. Fundamentally, they were based on nothing more than the illogical proposition that a person who had obtained legal advice prior to doing something must be taken to have done so in order to circumvent the law. Such a proposition has only to be stated, to be rejected.

83 Ms Foo's second argument was that on the evidence, it could be inferred that the First and Second Loans were personal loans to the Appellant. By a "personal loan", Ms Foo clarified that what she meant was that the Loans were intended to finance all the Appellant's business operations in the GSH group of companies and not those of BSE alone. According to Ms Foo, this was sufficient to take the Respondent outside the "spirit" of paragraph (e)(iii)(A) of the definition of "excluded moneylender" in s 2 of the MLA.

84 In our judgment, this again was misconceived. In particular, we disagreed with Ms Foo's characterisation of the First and Second Loans as "personal loans" to the Appellant. On this issue, it was the Appellant's own evidence at paragraph 18 of his AEIC that:

> Upon the currency crisis in 2008, all businesses were badly hit, with the marine industry no exception. There was no credit available anywhere. I then approached Chandra to see if he could introduce me to some banks *who would be prepared to offer credit facilities for my business operations*. As a close friend and fellow Director of Greatsea Holdings, Chandra knew that I had used my personal monies to fund the operations of my group of companies. [emphasis added]

85 It was plain to us that the First and Second Loans were in the nature of commercial, as opposed to personal, loans. Taking the Appellant's own case at its highest, the loans were intended to fund the business operations of the GSH group of companies. This was not a case where the Loans were granted to the Appellant for his own domestic or social expenses but were then routed through a nominee company to give the appearance of being a commercial loan to a corporation. Moreover, it emerged in the evidence that BSE had been selected because it had the strongest balance sheet in the group. This, in our judgment, was wholly consistent with the Respondent looking to BSE as its primary obligor.

86 We have observed above that in introducing the concept of an "excluded moneylender" in 2008, Parliament had intended to de-regulate commercial borrowing. In our judgment, the First and Second Loans bore the very features of such borrowing. These were loans entered into between commercial entities for commercial purposes. In the circumstances, we found that the First and Second Loans fell within both the letter and spirit of paragraph (e)(iii)(A) of the definition of "excluded moneylender". We were therefore satisfied that the Appellant had not discharged his burden of proof and it followed that the disabling provision in s 14(2) of the MLA did not apply.

87 Given this conclusion, it was not necessary for us to consider whether the Respondent had rebutted the presumption that it was carrying on the business of moneylending in Singapore, since as an excluded moneylender, the presumption did not apply at all.

Illegality under the BRA

88 We come to the Appellant's contention that the Second Loan Documents were unenforceable by reason of the BRA.

89 Before us, the Appellant relied on the five loans granted by the Appellant between 2009 and 2010 to contend that the Respondent was carrying on a moneylending business in Singapore and was therefore obliged to register this business. As the Respondent had not registered itself as a business, Ms Foo submitted that the Second Loan Documents were unenforceable by reason of s 21(1) of the BRA. Ms Foo further contended that the Respondent should not be granted relief against default under s 21(3) of the BRA because its failure to register its business was a deliberate one. In particular, she contended that the Respondent's failure to register its business was motivated by a desire to evade tax.

90 There were a number of difficulties with the Appellant's contentions in this regard. Most pertinently, the issue of illegality under the BRA was never pleaded by the Appellant. Instead the issue of business registration first surfaced during the cross-examination of the Respondent's witness, Henri. The Appellant subsequently raised the issue in closing submissions.

91 The Appellant also did not plead anything in relation to the loans granted by the Respondent to the other three companies. Insofar as its case under the MLA was concerned, this might have been less of an obstacle, if he had been able to clear the hurdle of establishing that the Respondent was not an excluded moneylender, because he could then have relied on the presumption under s 3 of the MLA. Quite clearly however, there is no such presumption under the BRA. It was therefore incumbent on the Appellant to plead facts which proved that the Respondent was carrying on a moneylending business in Singapore for the purposes of the BRA. Apart from pleading the first and second loans granted to BSE, the Appellant did not plead anything else.

92 Counsel for the Respondent, Mr Dilip Kumar ("Mr Kumar"), had not objected to the unpleaded point being raised at trial. Nor did he initially take the point in the Respondent's Case on appeal.

93 At the hearing of the appeal we drew Ms Foo's attention to the fact that she was relying on facts which the Appellant had not pleaded below. Ms Foo submitted that this should not preclude her from advancing her case. According to Ms Foo, the case before us was "exceptional". She therefore said that she should be allowed to pursue the point of illegality under the BRA as well as rely on evidence of the other loans granted by the Respondent.

94 We did not agree with Ms Foo's suggestion that she was at liberty to depart from her pleaded case. In an adversarial system such as ours, the general rule is that the parties, and for that matter the court, are bound by the pleadings: *Hadmor Productions Ltd and others v Hamilton and another* [1983] 1 AC 191 at 233. The pleadings serve the important function of upholding the rules of natural justice. They require a party to give his opponent notice of the case he has to meet to avoid his opponent being taken by surprise at trial. They also define the matters to be decided by the court.

95 Ms Foo was also incorrect in arguing that because the Judge had considered the BRA point as well as the loans to the other companies, she could raise these matters on appeal. In this regard, the authors of *Singapore Civil Procedure* (Sweet & Maxwell, 2013 Ed) have observed that (at p 274):

> If the plaintiff succeeds on findings of fact not pleaded by him, the judgment will not be allowed to stand, and the Court of Appeal will either dismiss the action…or in a proper case order a new trial if necessary…

We agree with this.

96 Ms Foo's alternative argument was that the Respondent had waived its right to object to the Appellant's failure to plead those issues. Ms Foo pointed out that at trial, Mr Kumar had not objected

to the questions asked by the Appellant's counsel at the trial in relation to the Respondent's failure to register its business. Mr Kumar also did not object to the Respondent raising the BRA issue or referring to the other loans in its closing submissions. Nor did he do so on appeal in the Respondent's Case.

97 Mr Kumar submitted that silence on his part could not amount to a waiver. He candidly admitted that he had not realised that the Respondent had not pleaded the issue of illegality under the BRA or the other three loans until we raised it. Absent knowledge of this fact, Mr Kumar said he could not have waived his right to object.

98 In *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at 882, Lord Diplock observed that the term "waiver" is often used in a loose sense to describe a number of legal grounds on which a person may be precluded from asserting a right which he once possessed or from raising a particular defence to a claim against him which would otherwise have been available. The pertinent point in these proceedings was that by relying on facts which were not pleaded, the Appellant had not complied with the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules"). In particular, the Appellant had failed to plead all the material facts which he intended to rely upon at trial. The Appellant also did not apply to amend his pleadings in circumstances where he ought to have done so.

99 In these circumstances O 2 r 1 of the Rules is germane and it provides:

> **Non-compliance with Rules (O. 2, r. 1)**
>
> **1.—(1)** Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
>
> (2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.
>
> …

100 Prior to the enactment of O 2 r 1, the law distinguished between "nullities" and "irregularities". A nullity referred to a step in the proceedings which was incurable by the Court and incapable of waiver by the parties: see *In re Pritchard, decd* [1963] Ch 502. In contrast, irregularities were steps which could be cured by the court or waived by the parties. O 2 r 1 had the effect of abolishing this distinction. As Lord Denning explained in *Harkness v Bell's Asbestos and Engineering Ltd* [1966] 2 QB 729 ("*Harkness*") at 735–6:

> … This new rule does away with the old distinction between nullities and irregularities. *Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice*. It can at last be asserted that "it is not possible for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation." … [emphasis

added]

101 On the one hand, O 2 r 1 recognises the need for some indulgence to be shown to a party who is in default of the Rules. If undue emphasis is placed on compliance with procedural requirements, there may be cases in which substantive justice may be undermined. However, the due administration of justice also requires that objections to an irregular step be made without undue delay. A party who is aware of an irregularity should not sit by and do nothing before raising an objection late in the day.

102 It is clear that O 2 r 1 clearly does not confer upon a party an unlimited right to breach the Rules in cases where his opponent does not object. In *Lee Hsien Loong v Singapore Democratic Party and others and another suit* [2008] 1 SLR(R) 757 at [35], we observed that *prima facie*, the Rules are meant to be complied with. We reiterate that principle here. Although non-compliance with the Rules does not render a nullity, any step that might have been taken, it nonetheless is *irregular* and the party in breach is generally obliged to take steps to regularise the position.

103 There is thus plainly a tension between the need to ensure compliance with the Rules and the need to ensure that objections are made in a timely manner. The question then relates to how a balance can and ought to be struck. This was the issue before the House of Lords in *Roebuck v Mungovin* [1994] 2 AC 224 ("*Roebuck*").

104 The plaintiff in *Roebuck* was injured in a road accident in 1984. A writ was issued against the defendant in 1986. A defence was entered, admitting liability but putting damages in issue and seeking further and better particulars of the statement of claim. Correspondence then ensued between the parties but the plaintiff did not take further steps in the action. In 1991, the defendant applied to strike out the plaintiff's claim for a want of prosecution.

105 In *Roebuck*, the English Court of Appeal had found that the plaintiff was guilty of inordinate and inexcusable delay. As a result, they accepted that there was a risk that a fair trial of the action was no longer possible. However, the Court of Appeal held that it had no discretion to strike out the claim because the defendant had subsequently urged the plaintiff to take steps to bring the matter to trial. Furthermore, the plaintiff had incurred some expense in doing so. In those circumstances, the defendant was held to be estopped from applying for the action to be struck out.

106 The defendant's appeal to the House of Lords was allowed. The House of Lords held (at 236 – 7) that the plaintiff's conduct was not an absolute bar to the striking out application. Instead it was only a relevant consideration to be taken into account in the exercise of the court's discretion to strike out the claim.

107 To the extent that the relevant principle was one based on estoppel, Lord Browne-Wilkinson noted (at 235) that in such cases, the representation made by the defendant related to his future conduct, namely, that he would allow the action to proceed. Such conduct therefore could only give rise to an equitable estoppel; a legal estoppel in contrast would have depended on a representation as to an existing fact. In this regard, Lord Browne-Wilkinson emphasised that an equitable estoppel would not constitute an absolute bar to the plaintiff's application. Rather it gave the court the discretionary power to do what was equitable in all the circumstances.

108 In the final analysis, Lord Browne-Wilkinson expressed the view (at 235–6) that it would be best to eschew the concepts of waiver and estoppel in this area:

> … If on the assumption made the defendant is equitably estopped, then the effect of that estoppel would be to give the court a discretion whether or not to strike out the action (possibly

upon terms) depending upon the balance between the harm done to the defendant by the plaintiff's delay and the expense or other detriment incurred by the plaintiff by reason of the defendant's representation. *Such a discretion is not materially different from that which the court would be exercising if it had an unfettered discretion whether or not to strike out a claim. Therefore the introduction into the law of striking out of concepts of waiver, acquiescence or estoppel is merely confusing.* [emphasis added]

109 We agree with these observations. For one thing, they cohere with the views which we expressed in *Mercurine Pte Ltd v Canberra Developments Pte Ltd* [2008] 4 SLR(R) 907. In discussing the principles to be applied in the setting aside of an irregularly obtained default judgment where a defendant had been guilty of undue delay, we said (at [76]):

> [W]here the procedural injustice occasioned to the defendant is not egregious, the court will generally be less inclined to adhere strictly to the ex debito justitiae rule, especially if the defendant has taken a fresh step in the proceedings after becoming aware of the irregular default judgment…*With regard to the defendant's undue delay…,we would reiterate that such delay, although potentially prejudicial to the defendant's chances of having the irregular default judgment set aside, is not invariably fatal*…
>
> [emphasis added]

110 As a matter of principle, the concepts of waiver and estoppel are not easily applied in the context of a breach of the Rules. This is because waiver and estoppel are usually invoked to preclude one party from enforcing his legal rights. As we have observed, apart from one party's right to object, there is the other party's failure to comply with the Rules.

111 This was also the view we took in *Pertamina Energy Trading Limited v Credit Suisse* [2006] 4 SLR(R) 273, where the respondent sought to raise an unpleaded matter on appeal. It argued that the appellant was estopped from objecting to this matter being raised on appeal as it did not object in the court below. The respondent also argued that it suffered detriment because it was denied the opportunity to amend its pleadings earlier. In dismissing that argument, we held (at [85]) that:

> First and foremost, the respondent omitted to plead this point in its defence. It is futile to argue, as counsel for the respondent has attempted to, that the appellant had failed to raise this point in the court below therefore denying it (the respondent) the opportunity to amend its pleadings. *The onus remains on the respondent (or any party for that matter) to plead its case fully and properly*. … [emphasis in original omitted, emphasis added in italics]

112 As a matter of policy, it would be undesirable to treat one party's delay in objecting to a breach of the Rules as an absolute bar to him raising an objection at a later stage. In our view, such an approach would run contrary to the nature of the court's discretion to cure irregularities under O 2 r 1 of the Rules. As we have already explained, in exercising this discretion, the court must ensure that prejudice is not occasioned to the party not in breach: see *Harkness* (at [100] above). The failure or delay of that party to raise an objection does not detract from this.

113 Conversely, we must not be taken as saying that a party's failure to raise timely objections is never relevant to the exercise of the court's discretion under O 2 r 1. Rather, it always is. Such a failure may indicate the lack of *bona fides* in an objection. Alternatively, an absence of prejudice may be inferred from one party's failure object in a timely way. Put simply, the court's discretion under O 2 r 1 should be exercised in light of all the circumstances of the case. These would include, the prejudice suffered by the party not in default, any delay by the party making an objection and the

reasons for that delay.

114 Turning to the case before us, the issue was whether the Respondent was precluded from objecting at the hearing to the Appellant being allowed to rely on the matters which it did not plead. Given the principles we have explained above, it was clear that he was not. In this regard, we accepted Mr Kumar's explanation that he did not object earlier because he did not realise that those facts had not been pleaded. We were also mindful of the fact that because the whole case founded on the alleged breach of the BRA had not been pleaded, it might not have been evident just where the Appellant was heading in the course of the cross-examination when these issues were first raised and this might have contributed to the point not having been taken earlier.

115 In these circumstances, Ms Foo made an oral application for leave to amend the pleadings at the hearing. Ms Foo said the proposed amendment would not prejudice the Respondent as all the relevant evidence was already before this Court. Furthermore, Ms Foo said that the Respondent fully knew of the Appellant's case on appeal and would not be taken by surprise.

116 We do not doubt that a court has a wide power to allow amendments to pleadings at any stage of the proceedings, including on appeal. As we held in *Wright Norman and another v Overseas-Chinese Banking Corp Ltd* [1993] 3 SLR(R) 640 at [6]:

> It is trite law that an amendment which would enable the real issues between the parties to be tried should be allowed subject to penalties on costs and adjournment, if necessary, unless the amendment would cause injustice or injury to the opposing party which could not be compensated by costs or otherwise…

117 In deciding whether to allow an amendment, there are two primary considerations which tend to pull in opposite directions. The first is whether the amendment sought would allow the real issues in the proceedings to be determined, thereby ensuring that the ends of substantive justice are met. The second requires that procedural fairness to the opposing party is maintained. Pertinently, in such cases, a just outcome requires that neither consideration be made clearly subordinate to the other.

118 We also accept that in making an application for amendment, delay alone would not prevent the amendment being allowed. Yet, we must emphasise that where such an application is made late in the day, especially after the trial of the matter has been concluded, it will usually be the case that the prejudice to the other party would be greater. This is because he may have been deprived of the opportunity to seek discovery, adduce evidence, or cross-examine, on the unpleaded issues.

119 Furthermore, in such cases, courts must also ensure that the party seeking to amend is not being given a second bite of the cherry: *Review Publishing Co Ltd & Anor v Lee Hsien Loong and another appeal* [2010] 1 SLR 52 at [113]. This in turn is consonant with the function of an appellate court which is to correct errors made at first instance and not to afford parties a re-hearing of their dispute on an entirely new basis.

120 Applying these principles to the case before this Court, we disagreed with Ms Foo's submission that the amendment sought would not prejudice the Respondent. First, the evidence adduced at trial on the other loans was very limited. Had these loans been pleaded, all the documents and facts relating to those loans would have been discovered and placed before the court. In the absence of those documents, it was not for us to speculate as to what they would have revealed.

121 Second, the issue of illegality under the BRA was entirely new. It was not incidental to the Appellant's case. The Respondent was taken by surprise to the extent that it never adduced evidence

as to the other loans or as to why it had not registered its business. Moreover, a contravention of the BRA was one that attracted penal consequences. The Respondent therefore ought to have been given a fair opportunity to respond to the allegations made against it.

122 Third, to allow an amendment at this stage would have necessitated the very serious course of ordering the case to be re-tried. We were not minded to do so. For a start, it would have prejudiced the Respondent to require it to prosecute its claim and defend itself against this new allegation after it had already succeeded in its claim. This would unquestionably have given the Appellant a second bite at the cherry by allowing it to raise an entirely new defence. Finally, apart from the interests of the immediate parties to the action, there was also the public interest that judicial proceedings be conducted efficiently and with finality: see *Ketteman and others v Hansel Properties Ltd and others* [1987] 1 AC 189 at 220.

123 For these reasons, we held that the Appellant was precluded from relying on the BRA in this appeal.

Illegality under the HKMLO

124 This brings us to the last of the Appellant's contentions, which is that the loans were unenforceable pursuant to the HKMLO. The Appellant's pleaded case was based on the principle of international comity established in *Foster v Driscoll and others* [1929] 1 KB 470 ("*Foster*"). Sankey LJ explained the principle in the following terms:

> ..an English contract should and will be held invalid on account of illegality *if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country* notwithstanding the fact that there may be, in a certain event, alternative modes or places of performing which permit the contract to be performed legally. [emphasis added]

This principle was accepted by us in *Peh Teck Quee v Bayerische Landesbank Giroztrale* [1999] 3 SLR(R) 842 at [45].

125 Ms Foo argued that as the Respondent was a Hong Kong registered company, it was subject to the provisions of the HKMLO. She further argued that the Respondent was carrying on the business of moneylending in Hong Kong. Therefore, the Second Loan, being a loan granted in the course of that business, was unenforceable under the HKMLO. Ultimately, it was her case that because the Respondent had contravened Hong Kong law in granting the Loans, this Court should refuse enforcement of them under the principle of international comity as laid down in *Foster*.

126 Mr Kumar on the other hand denied that the principle applied in the present case because in his submission the HKMLO did not apply to these transactions in the first place, as it did not have extra-territorial effect.

127 As to the position under Hong Kong law, the Respondent's expert on Hong Kong Law, Mr Simon Richard Deane ("Mr Deane"), cited the case of *Hong Kong Shanghai (Shipping) Ltd v The owners of the ship or vessel "Cavalry" (Panamanian Flag) and Ors* [1987] HKLR 287 ("*Cavalry*"). The plaintiff in *Cavalry* was a wholly owned subsidiary of a company incorporated in the Bahamas. The plaintiff entered into a loan agreement where loans were made to eight Panamanian companies. The loan agreements were negotiated in Hong Kong. They were also signed and drafted in Hong Kong. For each loan, the choice of law was English law but there was a jurisdiction clause specifying the courts of Hong Kong. When the plaintiff sought to enforce guarantee given under the loans the defendant

guarantors argued that the loans were illegal and unenforceable under the HKMLO.

128 In *Calvary*, Hunter J did not accept that the loans were unenforceable by reason of the HKMLO. From the outset, he observed that (at 294):

> [The HKMLO] is *plainly directed primarily to domestic transactions*. Its apparent social purpose is to *prevent the exploitation of Hong Kong citizens by Hong Kong loan sharks*…Section 3 positively *shout* domesticity. [emphasis added]

In Hunter J's view therefore, the HKMLO would not have applied to the loan agreements which were expressly stated to be governed by English law unless two conditions were satisfied. The first was that the plaintiff was carrying on the business of moneylending in Hong Kong. The second was that objectively assessed, the proper law of the contract was Hong Kong law.

129 *Cavalry* was cited with approval in *China Merchants Bank v Minvest International Ltd and Anor* [2001] HKCU 982 ("*China Merchants Bank*") at [19]–[26].

130 The Appellant did not adduce any cogent evidence to the effect that the HKMLO did have extra-territorial effect or that *Calvary* had been wrongly decided. At trial, the Appellant's expert on Hong Kong law was Mr Barry Hoy ("Mr Hoy"). In his expert report, Mr Hoy did not deal with the issue of extra-territoriality at all although it had been a live issue in these proceedings. When asked about this during examination in chief, Mr Hoy appeared to suggest that the HKMLO could have extra-territorial effect because in *Calvary*, Hunter J had said that the HKMLO was directed "primarily" at domestic transactions. Mr Hoy did not cite any other case in support of his proposition.

131 Mr Hoy's evidence on this point was not satisfactory. It is helpful here to reiterate the following principles enunciated by this Court in *Pacific Recreation Pte Ltd v S Y Technology Inc and other appeal* [2008] 2 SLR(R) 491 at [85]–[87] as regards the admissibility of expert evidence to prove foreign law. In summary, these include the following:

> (a) The expert cannot merely present his conclusion on what the foreign law is without also presenting the underlying evidence and the analytical process by which he reached his conclusion;
>
> (b) The function of the expert in these cases is to submit the relevant materials together with his reasoned analysis of these materials for the consideration of the court which will then make its own findings;
>
> (c) As provided in Order 40A r 3(2)(e) of the Rules where there is a range of opinion on the matters dealt with in the report, the expert must -
>
> (i) summarise the range of opinion; and
>
> (ii) give reasons for [the expert's] opinion ...
>
> (d) The expert should not attempt to conceal any adverse opinions which have come to his knowledge.
>
> (e) An expert is not an advocate for (or for that matter against) the party engaging him. Rather, at all times, he must be aware that his duty is owed primarily to the court.

132 Mr Hoy's failure to proffer any basis for his opinion that the HKMLO could have extra-territorial

effect meant that his evidence was valueless, if not inadmissible. In contrast, Mr Deane's opinion was reasoned and cited the relevant Hong Kong case law. We therefore proceed on the basis that the conditions laid down in *Calvary* had to be satisfied for the HKMLO to apply. We turn to consider whether they were.

133 On the first condition, Ms Foo sought to persuade us that the Respondent was carrying on a moneylending business in Hong Kong. Ms Foo's contentions were untenable in many respects. For a start, the Appellant's pleaded case rested purely on the first and second loans. It did not plead any other loans extended by the Respondent. For reasons which we have stated earlier, we were of the view that the Appellant was precluded from relying on evidence of any other loans on appeal. On the basis of the First and Second Loans alone, the Appellant plainly had not discharged its burden of proving that the Respondent was carrying on the *business* of moneylending much less that it was in Hong Kong.

134 Ms Foo submitted that because the Loans were disbursed from and repaid into the Respondent's bank account in Hong Kong, the place of its moneylending business was Hong Kong. As authority for this proposition, the Appellant cited *Cavalry* where Hunter J said (at 297) that "the conduct of the business of moneylending postulates both the lending of money and the repayment of money in Hong Kong".

135 In our judgment, Hunter J's judgment in *Cavalry* does not stand as authority for such a proposition. Hunter J held that the place of the business was *not* Hong Kong because money was not lent or repaid there; but he did not make the positive finding that the place of the lender's business was New York because the lending and repayment of money had occurred there.

136 At trial, Mr Deane's evidence was that applying *Cavalry*, the place of business would depend on all the facts of the case although he accepted, rightly in our view, that the place where the lender was and where repayment occurred would be a significant factor. Mr Deane's view finds support in *China Merchants Bank* at [24] and we agreed with it. In our judgment, the following undisputed facts suggested that the place of the Respondent's assumed business for the purposes of these transactions was not Hong Kong:

(a) The Respondent only had a name-plate existence in Hong Kong. All its business operations were done off-shore. Both its directors were resident outside of Hong Kong.

(b) The Respondent did not pay tax in Hong Kong.

(c) The borrower, BSE, was a company incorporated outside of Hong Kong.

(d) The guarantor for the loans, the Appellant, was not a Hong Kong citizen.

(e) The meetings, negotiations and preparation of the First and Second Loan Documents were done outside of Hong Kong.

(f) The first and second loans were disbursed to a bank account outside of Hong Kong.

(g) The first and second loans were expressly stated to be governed by Singapore law.

137 For the same reasons, we also found that the proper law of the contract was not Hong Kong law. Thus neither of the conditions laid down in *Cavalry* were satisfied and the HKMLO did not apply in the present case. It followed that the principle of international comity in *Foster* also did not apply.

Conclusion

138 For these reasons, we dismissed the appeal. We also held that the Respondent was entitled to its costs of the appeal, fixed at $15,000 plus reasonable disbursements. We also made the usual consequential orders.