IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 56

Suit No 238 of 2014

Between

(1) Ochroid Trading Limited
(formerly known as Orion
Trading Limited)
(2) Ole Prytz Rasmussen

… *Plaintiffs*

And

(1) Chua Siok Lui (trading as VIE
Import & Export)
(2) Sim Eng Tong

… *Defendants*

JUDGMENT

[Credit and security] — [Money and moneylenders] — [Illegal moneylending]

Ochroid Trading Ltd and another
v
Chua Siok Lui (trading as VIE Import & Export) and another

[2017] SGHC 56

High Court — Suit No 238 of 2014
Audrey Lim JC
6–8 September; 15–17, 22 November 2016; 16 January 2017

22 March 2017 Judgment reserved.

Audrey Lim JC:

Introduction

1 The plaintiffs claim against the defendants for breach of contract, unjust enrichment, fraudulent misrepresentation and conspiracy to defraud, arising out of a series of 76 agreements concluded between December 2007 and March 2008. These agreements fall into two categories – those entered into between the first plaintiff and the first defendant ("Orion Agreements"), and those concluded between the second plaintiff and the first defendant ("Ole Agreements").

2 The plaintiffs allege that they entered into a joint venture to invest in the defendants' wholesale food business (which was registered in the first defendant's name), and had advanced a sum of money to the first defendant pursuant to each one of the Orion and Ole Agreements to fund the business's

purchase and resale of food products overseas. The sum disbursed under each agreement was to be returned with profit by a stipulated date. The claim in contract and unjust enrichment is premised on the first defendant's failure to repay the plaintiffs as agreed. The plaintiffs also allege that the defendants had induced them to advance the moneys by falsely representing that the moneys were for the business purposes stated in the Orion and Ole Agreements when that was not the case, and that the defendants had conspired to defraud them. The plaintiffs claim a total of $10,253,845 comprising $8,909,500 advanced under the 76 Orion and Ole Agreements and $1,344,345 in profit.[1]

3 The defendants' primary defence is that the Orion and Ole Agreements were loans which are unenforceable as unlicensed moneylending transactions under the Moneylenders Act (Cap 188, 1985 Rev Ed) ("the MLA"). They have also pleaded that the Orion Agreements are unenforceable under the Business Registration Act (Cap 32, 2004 Rev Ed) ("the BRA") as the first plaintiff had carried on business without being registered under that Act. In addition, they deny that there was any misrepresentation or conspiracy to defraud the plaintiffs because, among other things, the plaintiffs knew that the agreements were improper.

Background and parties' respective cases

4 The second plaintiff ("Mr Ole") is the sole director and shareholder of the first plaintiff ("Orion"). He is an experienced businessman who has been involved in various businesses since the 1980s, primarily in the retail of beverages and fruit juices. Mr Ole is married to one Mdm Lai Oi Heng ("Mdm Lai"). Mdm Lai is not involved in her husband's businesses, but has been in

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[1] Statement of Claim (Amendment No 1) ("SOC"), Annex A.

charge of managing the couple's joint personal portfolio by using their wealth to invest in properties, shares, bonds and other investments since the 1970s. The second defendant ("Mr Sim") is an entrepreneur. He is the mentor of the first defendant ("Ms Chua"), who assists him in his business. They started a company, VIE Import & Export ("VIE") on 11 July 2003, with Ms Chua as its registered owner. VIE was in the business of general wholesale trade until it was de-registered on 3 November 2012.[2]

5 Mdm Lai first met the defendants around the end of 2003 when she obtained Mr Sim's help to settle a dispute. Mdm Lai and Mr Sim became good friends. Subsequently, from early 2005, Mdm Lai and VIE entered into a series of agreements. The agreements were recorded in writing. On their face, they were for Mdm Lai to provide "loans" to VIE for the purchase and resale of specified foods and food-related products overseas. The agreements provided that the funds were to be repaid with a "profit" on a stipulated date ("the Repayment Date"). Each agreement was also supported by a tax invoice from VIE stating the type, quantity and price of the goods which it related to.

6 On Mdm Lai's request, the party providing the funds under the agreements was changed from Mdm Lai to Orion around end 2007 (*ie*, the Orion Agreements), and then from Orion to Mr Ole from about end February to March 2008 (*ie*, the Ole Agreements). As noted above, 76 of the Orion and Ole Agreements concluded between December 2007 and March 2008 remain unpaid. They form the subject-matter of this Suit. In total, between 2005 to early 2008, there were 740 such agreements between Mdm Lai, Orion or Mr Ole (as the party providing the funds) and VIE under which more than $58m was disbursed ("the Agreements").[3]

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2 AEIC of Sim Eng Tong ("SET AEIC"), para 9.

7 Both parties accept that there is more to the Agreements than meets the eye. In particular, it is common ground that the tax invoices are not genuine documents and do not reflect actual transactions performed by VIE. Unsurprisingly, the plaintiffs' and the defendants' account of the true nature of the Agreements and of what transpired during the material period are starkly different.

The plaintiffs' case

8 According to the plaintiffs, Mr Sim called Mdm Lai sometime in January or February 2005 to inform her that he had committed to an order of frozen ducks ("the first order") which he was unable to fulfil due to insufficient funds. He asked Mdm Lai if she would enter into a joint venture with him and VIE on a "cost and profit sharing basis".[4] Mr Sim said to her that he knew many purchasers in Europe who required Asian food products for sale to restaurants. He further added that he had previously been involved in the wholesale food business for a few years and that it was very lucrative.

9 More specifically, Mr Sim informed Mdm Lai that she could invest $50,000 in the first order, being 60% of the cost of the frozen ducks, while he would bear the remaining 40% of the cost. He told her that she would receive a return of $50,000 within two months, with an additional $8,000 comprising 60% of the total profits which VIE would make on the resale of the ducks. VIE would receive the remaining 40% of the profits.[5] Mr Sim also explained to Mdm Lai that VIE was his Singapore vehicle to service European buyers,

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3 Exhibit C2 ("Revised Table C"); AEIC of Abuthahir Abdul Gafoor, exhibit "AAG-2" ("AAG Expert Report"), para 4.4.

4 AEIC of Lai Oi Heng ("LOH AEIC"), paras 25–26.

5 LOH AEIC, para 26.

and that if Mdm Lai invested in the business, the defendants would be able to increase her wealth.

10 Mdm Lai agreed to invest $50,000 in the first order. Before she released the money to VIE, Ms Chua faxed two documents to her.[6] The first was an undated agreement ("the First Agreement") from VIE as follows:

> AGREEMENT OF LOAN
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> The company VIE Import & Export took a loan of SGD50,000 from Mdm Lai Oi Heng as co-operation for frozen duck business under INV05/0201. As agreed by both parties, profit will be base (sic) on 15%. The due amount of SGD58,000 shall be paid on 15th May 2005.
>
> [Signed, and stamped with VIE's stamp]

11 The second document was a tax invoice 05/0201 ("the First Invoice") issued by VIE corresponding to the First Agreement. The First Invoice bore various particulars such as the invoice date (7 February 2005), the buyer of the goods (an alleged customer of VIE named "BAF Import & Export GmbH"), the buyer's address, the description and unit price of the goods, the quantity to be shipped and the total amount which the customer would pay (€51,840). The First Invoice also showed the date of shipment of the goods with the ports of shipment and destination. Finally, the First Invoice had VIE's stamp and the buyer's company stamp and/or a signature.

12 Around 12 May 2005, VIE repaid Mdm Lai $58,000 for her investment based on the First Agreement. Thereafter, she continued to invest in VIE's purported business through similar agreements between VIE and herself from early 2005 to December 2007 ("ML Agreements"). There were around 600 such ML Agreements concluded.[7] Each of them was worded in a

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6 LOH AEIC, exhibit "LOH-4".

similar manner to the First Agreement, save that the "loan" amount, type of goods, percentage of "profit", total amount to be repaid and the Repayment Date varied. Each ML Agreement was also accompanied by an invoice from VIE similar to the First Invoice. The "profit" for the ML Agreements ranged from 14% to 17% of the sum advanced by Mdm Lai, depending on the type of food product stated in the agreement.

13 Mdm Lai testified that her understanding of how each investment operated was as follows.[8] Mr Sim would first obtain an order from one of VIE's customers. The customer would confirm the order by signing on VIE's invoice *before* VIE sourced for a supplier.[9] At the end of each month, the defendants would fax to Mdm Lai a batch of the ML Agreements together with the corresponding invoices. These related to VIE's confirmed orders for the next month. VIE required Mdm Lai to then transfer moneys to it as per the ML Agreements, and these funds were used to purchase the goods needed to meet the orders.

14 The Repayment Date was typically about two months after Mdm Lai transferred the moneys to VIE. She said that Mr Sim had informed her that it took about two months for VIE to buy the goods from its supplier, ship them to its customer and for the customer to pay VIE so that it could repay Mdm Lai. She was also warned that if the money was not transferred to VIE on time, it would not be able to meet its customers' orders punctually and could be penalised for up to 30% of the purchase price.

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7 Agreed Bundle of Documents ("AB") vol 1, p 50–AB vol 5, p 1393; Revised Table C, S/Nos. 1–586.

8 Notes of Evidence ("NOE") for 6 September 2016, pp 56–59 and 76–78.

9 NOE for 8 September 2016, p 6.

15 For the ML agreements, VIE duly returned the sums advanced by Mdm Lai, with the stipulated profit. By 2006, the amount Mdm Lai and Mr Ole invested in VIE's purported business grew larger, and they allegedly became increasingly uncomfortable with investing in a sole proprietorship. They wanted their investments to be protected and were concerned about whether VIE was "properly paying its taxes".[10] These concerns were conveyed to Mr Sim, who agreed to transfer VIE's business to a company to be jointly owned by Mr Sim and Mdm Lai. Hence Orient Asia Holdings Limited ("Orient Asia") was incorporated in Hong Kong in August 2006. Mdm Lai held 60% of the shares in Orient Asia and Mr Sim's wife, Mdm Zhao Fei Yuan ("Mdm Zhao"), held the remaining 40% on his behalf. Despite Mdm Lai's insistence, the defendants failed to transfer VIE's business to Orient Asia as agreed. Mr Sim was evasive on the reason why this was not done. But to appease Mdm Lai, he made her a signatory to VIE's bank account with UOB Bank.[11]

16 Mdm Lai and Mr Ole then decided to channel their future personal investments in VIE's business through Orion. Orion was incorporated in Hong Kong in August 2007. According to the plaintiffs, Orion was initially incorporated to handle Mdm Lai and Mr Ole's investments in a German company called Brightstar International GmbH ("Brightstar"), and subsequently to transfer VIE's business to it.[12] I will return to the relevance of the agreements between Mdm Lai/Mr Ole and Brightstar ("Brightstar Agreements") later (see [43] below). At this point, it suffices to note that Brightstar was also run by the defendants and carried on a food trading

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10 LOH AEIC, para 48.

11 LOH AEIC, paras 53 and 54.

12 NOE for 8 September 2016, p 60.

business. Just as with Orient Asia, Mdm Lai held 60% of Brightstar's shares whilst Mdm Zhao held the remaining 40% on Mr Sim's behalf. Again, the defendants failed to transfer VIE's business to Orion.

17 Mdm Lai's request to change the investing party in the Agreements from herself to Orion was made at the end of 2007. From mid-December 2007 to February 2008, advances were made by Orion to VIE through 53 Orion Agreements amounting to $6,248,500. From about end February to March 2008, further advances were made to VIE from Mr Ole directly, through 23 Ole Agreements amounting to $2,661,000.[13] The investing party was changed from Orion to Mr Ole purportedly because the defendants failed to provide the necessary documents for Orion to open a bank account, and to give Mr Ole more control over the investments.[14] In all other aspects, the course of dealing described above (at [13] and [14]) remained unchanged.

18 In particular, all the dealings remained between Mdm Lai, who represented the plaintiffs, and Mr Sim, who managed VIE.[15] Mr Ole did not communicate with Mr Sim as Mr Sim spoke mainly in Chinese, and Mr Ole would rely on Mdm Lai to update him on their investments in VIE and her conversations with Mr Sim. Ms Chua was also not directly involved in the discussions. Mdm Lai mainly saw her as Mr Sim's assistant. Mdm Lai asserted that the Agreements and the supporting invoices were prepared by the defendants and that all the details contained in them were decided by Mr Sim, including the principal sums to be disbursed, the rate of "profit" and the Repayment Dates. Mdm Lai also claimed that she did not require any

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13 LOH AEIC, para 70.

14 LOH AEIC, para 67.

15 NOE for 8 September 2016, p 64.

supporting invoice to accompany each Agreement. As Mr Sim was a veteran of the wholesale food industry, Mdm Lai accepted the documents and the truth of the contents, and trusted that he knew the profit margin that VIE could obtain.

19 After VIE failed to repay the principal sums and the stipulated profit under the Orion and Ole Agreements, the plaintiffs engaged lawyers to claim the unpaid sums. Allegedly, it was only then that the plaintiffs and Mdm Lai discovered that the supporting invoices were not genuine as the customers reflected on the invoices either did not purchase goods from VIE or did not exist.[16] Subsequently, the present Suit was commenced against Ms Chua on 28 February 2014. The plaintiffs added Mr Sim to the Suit as a defendant in December 2014, for fraudulent misrepresentation and conspiracy to defraud. According to the plaintiffs, this delay in suing him was because they only found out that these torts had been committed when Ms Chua answered the plaintiffs' interrogatories on 29 August 2014.[17] Ms Chua, in her answer to the interrogatories, stated that although the moneys transferred to VIE were used to purchase food products for resale to VIE's customers, these were not the same customers reflected in the Agreements.[18] She also admitted that VIE had used some of the moneys from the later Agreements to repay the amounts owed under the previous Agreements. The plaintiffs submit that they did not know this and were defrauded by the defendants who were running an operation akin to a Ponzi scheme.[19]

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16 LOH AEIC, paras 87–93.

17 LOH AEIC, para 97.

18 LOH AEIC, para 98.

19 Plaintiff's Closing Submissions ("PCS"), para 1.

20 In response to the defendants' defences based on the MLA, the plaintiffs assert that the Orion and Ole Agreements were not loans, but were "investments" and therefore fall outside the scope of the Act. Even if the Agreements were loans, they argue that: (a) the moneys were lent in the course of a *bona fide* business, namely the investment in VIE, not having for its primary object the lending of money (exception (*c*) to s 2 of the MLA); and/or (b) the plaintiffs and Mdm Lai were not in the *business* of moneylending in Singapore. In addition, the plaintiffs submit that the BRA does not apply as there was no "business" carried out by Orion within the scope of the Act. In any case, they assert that the default in registration was inadvertent; so the court ought to grant relief against the disability imposed by s 21 of the BRA.

The defendants' case

21 The defendants' version of the events was narrated by Mr Sim. Ms Chua chose not to testify although she tendered an affidavit of evidence-in-chief ("AEIC"). Mr Sim acknowledged that he managed and ran VIE's business. He also accepted that he primarily dealt with Mdm Lai in relation to the Agreements, and did not speak to Mr Ole as he could not converse in English. His interactions with Mr Ole were limited to the occasional social meals with Mdm Lai and Mr Ole.[20]

22 Mr Sim's evidence was that it was Mdm Lai who approached him in early 2005 and offered to support VIE's business by lending money. He explained VIE's business model to her. Mr Sim's account of how the business operated, and in particular of how the tax invoices were ordinarily generated, was quite different from that of Mdm Lai (see [13] above). According to him,

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[20] SET AEIC, para 11.

VIE *first* required sufficient money in its bank account. It would then source for a customer who would inform VIE of its product requirements. Only thereafter could VIE obtain pricing for the goods from a supplier, and submit a quotation to the customer. The customer would accept the quotation by issuing a purchase order to VIE. VIE would then make payment to the supplier for the goods. Upon receipt of payment, the supplier would ship the goods and issue a bill of lading to VIE. It is only *after* shipment that VIE would generate a tax invoice to its customer for the payment of the goods. This is in contrast to Mdm Lai's evidence that the customer would sign the invoice even *before* VIE sourced for a supplier. In addition, Mr Sim emphasised that VIE could not source for a customer without sufficient funds. Otherwise, it could incur a penalty to the customer (of up to 30% of the price of the goods) if the goods could not be delivered after the purchase order was issued.[21]

23 Mr Sim testified that Mdm Lai offered to lend VIE money for a period of 60 days at an interest rate of 15% for that period. He initially objected as the interest rate was too high. But Mdm Lai explained that she was taking a high risk as the loan was unsecured. Eventually, Mr Sim accepted Mdm Lai's proposal as he reckoned that VIE would still be able to make a profit after repaying the loan, as its profit margin would be around 20% to 30%.[22] He was prepared to take the risk of a high interest rate in order to expand VIE's business. Mr Sim also discussed this matter with Ms Chua who agreed to take the loan.

24 In addition, Mr Sim asserted that Mdm Lai dictated the wording of the First Agreement to Ms Chua, which she recorded in Mr Sim's presence (as he

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21 NOE for 15 November 2016, pp 43, 45–50.

22 NOE for 15 November 2016, pp 65–66.

could not write English). It was to be used as a base template for all the subsequent Agreements. Crucially, it was Mdm Lai who insisted on a tax invoice to accompany each Agreement, so that they would not look like moneylending transactions. She knew that lending with such exorbitant interest rates was illegal. The defendants' position is that Mdm Lai would have also known that the information in the invoices were fabricated. As she was aware, there were no orders confirmed or suppliers secured at the time the Agreements were handed to her together with the invoices.[23]

25 Before each Agreement was prepared, Mr Sim would inform Mdm Lai of the amount VIE required for the next month, without reference to any specific transactions. He alleged that it was Mdm Lai who would then inform him of the applicable interest rate and the tenure of the loan. She would disburse the loan to VIE after the Agreement and invoice were sent to her. If there were multiple loans for a given month, the Agreements and invoices for that month would be faxed to Mdm Lai at the same time ahead of the first loan to be disbursed for that month.[24] She had full control of the lending decisions and the disbursements of funds to VIE under all the Agreements.

26 Around September 2005, Mr Sim asked Mdm Lai to reduce the interest rate as it was too high and VIE's business was not doing well. Mdm Lai refused the request. She felt that the interest rate was reasonable since it was a high-risk loan.[25] She informed Mr Sim that if the loans were not repaid, she would sue VIE and him. Hence VIE had no choice but to find ways to repay Mdm Lai. It started borrowing more money from Mdm Lai (and subsequently

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23 SET AEIC, paras 32–34.

24 SET AEIC, paras 45 and 46.

25 SET AEIC, para 47 and 60.

from Orion and Mr Ole) and used a substantial portion of the fresh loans to repay its earlier debts to Mdm Lai and the plaintiffs. VIE also continued to use part of the loans for its business.[26]

27 On why Mdm Lai was added as a signatory to VIE's UOB bank account, Mr Sim explained that this was done on her request as she wanted to ensure that she could take effective steps to reclaim her loan moneys from VIE's account should something untoward happen to Ms Chua. Mr Sim and Ms Chua did not object given that Mdm Lai was VIE's largest lender.

28 Mr Sim's evidence of how Brightstar was incorporated also differed from that of the plaintiffs. He said that Mdm Lai directed him and Ms Chua to incorporate Brightstar in Germany with the end goal of transferring VIE's business to it, and for Mr Sim and Ms Chua to be re-located there to run the food product business. Accordingly, Mr Sim and Ms Chua moved to Germany to manage Brightstar's operation after its incorporation in 2006.[27] Mdm Lai and Mr Ole extended numerous loans to Brightstar from 2007 to 2008 with exorbitant interest rates of about 25% (*ie*, the Brightstar Agreements).[28] VIE's business though was not transferred as originally contemplated and it continued to operate separately.[29]

29 Arising from the above narrative, the defendants' primary defence is that the Orion and Ole Agreements were unlicensed loans which are unenforceable under the MLA rather than purely "investments". They also

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26 NOE for 17 November 2016, pp 8–9.

27 SET AEIC, paras 99–104.

28 SET AEIC, para 105–106.

29 SET AEIC, paras 113–114.

argue that the plaintiffs' moneylending business had to be registered under the BRA, and that the court should not grant them relief because they had deliberately failed to register under the BRA to avoid the scrutiny of the regulatory authorities. Finally, there was no misrepresentation or conspiracy to defraud the plaintiffs – Mdm Lai and Mr Ole knew that the invoices were fabricated and that there were no real goods underlying each Agreement.

My decision

Nature of the ML, Orion and Ole Agreements

30 The first crucial issue is whether the Orion and Ole Agreements were contracts "for the repayment of money lent" within the scope of the MLA (see s 15). If there has been no lending, then there can be no business of moneylending. What constitutes lending or a loan is a question of fact in every case and the court has to consider carefully the form and substance of the transaction as well as the parties' position and relationship in the context of the entire factual matrix (see *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] 1 SLR(R) 733 ("*City Hardware*") at [24]).

31 More broadly, it is a question of how the transactions between the parties ought to be characterised. In *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd and others and another appeal* [2012] 1 SLR 32 at [61], the Court of Appeal held that the proper approach in determining the true nature of a transaction is to look at the substance, as opposed to the form, of the transaction. The Court of Appeal stated at [30]:

> We recognise that the court is not prohibited from evaluating evidence *other than* the transaction documents … to determine the true nature of a transaction. In other words, the crux of the [issue] lies not in construing the wording or terms used in the [instruments] *per se*, but in determining whether the real agreement between the parties was that expressed in those

> instruments. If the parties had adopted the arrangement set out in the [instruments] as a disguise for what was truly a loan, then their true intent, and not the form of the [instruments], will prevail …
>
> [emphasis in original]

32 The plaintiffs submit that the Orion and Ole Agreements were part of their genuine investments in VIE's business by way of a joint venture and were not "loans" at all. This submission is premised on a false dichotomy. The term "investment", without more, does not inform of the nature of a transaction. As the defendants point out, an investment may take many different forms, including that of a loan granted by the investor. The following definition of the word "investment" in A Krishnan, *Words, Phrases & Maxims – Legally & Judicially Defined* (LexisNexis, 2008) vol 9 at para I1061 (cited in *The Law Society of Singapore v Ong Teck Ghee* [2014] SGDT 7 at [73]) is illustrative:

> **INVESTMENT**
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> In common parlance, the term means the putting out of money on interest, *either by way of loan* or purchase of income producing property; a form of property viewed as a vehicle in which money may be invested (*Oxford Eng Dic*); *the loaning or putting out of money at interest, so as to produce an income* (*State v Bartley* 41 Nebr 277, 284). In its most comprehensive sense it is generally understood to signify the laying out of money in such a manner that it may produce a revenue, whether the particular method be a loan of the purchase of stocks, securities, or other property. …
>
> [emphasis added]

33 Thus even if the Orion and Ole Agreements were genuine investments in VIE, they could still be characterised as loan contracts within the definition of the MLA. Having said that, the issue of whether the Agreements were truly investments in VIE is still vital – if they were merely a cover for a series of extortionate loans, as submitted by the defendants, then that would indicate *a*

fortiori that the parties intended for the Agreements to be loans. The issue of whether the Agreements were part of a *bona fide* joint venture is also pivotal in determining whether the plaintiffs were moneylenders for the purposes of the MLA, which is the subject-matter of the next section (at [64]).

34 In determining the nature of the Orion and Ole Agreements, I have to take into account the ML Agreements and the entire course of dealing between Mdm Lai, the plaintiffs and the defendants. This is because the parties had transacted in the same manner throughout. Looking at the evidence as a whole, I find that the Orion and Ole Agreements were clearly loan contracts within the definition of the MLA for the following reasons.

35 First, there are the Agreements themselves. For now, I leave aside the issue of whether they were prepared solely by the defendants or were based on a template dictated by Mdm Lai, which I shall return to later (see [49] – [50] below). What is undisputed is all 740 of the Agreements were titled "Agreement of Loan". Each Agreement also expressly stated that VIE "took a loan" from either Mdm Lai, Orion or Mr Ole. So the language of the Agreements indicates that they were loan contracts. Mdm Lai and Mr Ole must have known and intended this. They are business savvy and boasted a wide experience in investing and business. Mdm Lai has a strong command of English, as evident from her testimony in court and her correspondence with the defendants.[30] She certainly knew what a "loan" meant. Hence, even if she did not dictate the wording of the Agreements, it is strange that she failed to query Mr Sim or Ms Chua on their language, nor sought to make any corrections to the documents if they did not truly reflect the nature of the transactions.

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[30] See, for example, 2nd Defendants' Bundle of Documents ("D2BD"), vol 1, p 69.

36 Mr Ole testified that he did not notice the word "loan" on the Agreements. I do not believe him. The word was in capital letters on the heading of each Agreement. In addition, each Agreement had only one paragraph and was an important document setting out the terms of the relationship between VIE, as the party receiving the funds, and himself, Mdm Lai or Orion. Mr Ole tried to explain that he only first noticed the word "loan" much later, after March 2008, and that even then, the word "[did not] mean anything" to him.[31] This was surprising and difficult to accept given that, in his own AEIC, Mr Ole acknowledged that he was "very familiar" with the ML Agreements and invoices as he had assisted Mdm Lai to calculate the sums transferred to VIE.[32]

37 Second, although the Agreements mentioned a "co-operation for" VIE's food product business and used the word "profit" instead of "interest", they were *in substance* contracts for the repayment of moneys lent. VIE was contractually obliged to pay the principal sum and the pre-determined "profit" (or "rate of return" to use a more neutral phrase) on the Repayment Date regardless of whether it actually got paid by its customer or made any profit. Mdm Lai admitted as much on the stand.[33] Mr Ole also acknowledged that the plaintiffs were entitled to make a claim against VIE as long as it failed to repay them, even if this was due to a customer's default.[34] In other words, there was no sharing of risk between the parties despite the purported joint venture on a "cost and profit sharing basis".

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31 NOE for 8 September 2016, pp 171–172.

32 OPR AEIC, para 19.

33 NOE for 6 September 2016, pp 38–51.

34 NOE for 8 September 2016, pp 146–147.

38 Against this, Mdm Lai claimed, unconvincingly, that she had somehow "bought" the goods through the invoices.[35] This was obviously not the case as neither she nor the plaintiffs owned a stake in VIE's business nor had any proprietary interest in its food products. She eventually conceded that the plaintiffs would not have been able to claim against VIE's customers if they refused to pay for the goods.[36] The reality was that she was not concerned with the business and left all the commercial decisions and financial affairs to Mr Sim and Ms Chua. Even on her own evidence, she never verified the authenticity of any of the transactions between VIE and its customers and suppliers. She also never looked at VIE's accounts, although she was a signatory of its UOB bank account (which was the main account used to deposit the moneys disbursed under the Agreements). This is remarkable considering that more than $58m was disbursed to VIE from 2005 to 2008 under the purported "joint venture". Put simply, Mdm Lai and the plaintiffs' lack of interest in the business casts doubt on the assertion that they were in a joint venture with the defendants. It is also glaring that there was no joint venture agreement or any other terms governing the relationship between the parties beyond the Agreement; and under the Agreements, VIE's sole obligation was to make repayment of the principal sums advanced together with the rate of return. These facts pointed to a purely lender and borrower relationship between the parties.

39 This case is thus similar to *Tan Sim Lay and another v Lim Kiat Seng and another* [1996] 2 SLR(R) 147. There, the plaintiffs alleged that they had advanced moneys purely as "investments" in the defendants' money changing business. The court rejected this submission and found that the advancements

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35 NOE for 8 September 2016, pp 10–12.

36 NOE for 8 September 2016, p 11.

were loans because there was, conspicuously, no detailed agreement as to the rights of the investors or the obligations of the defendants. The only terms of the arrangement were the amount of money required and the "profit" to be paid by the defendants to the plaintiffs. Also, the defendants were bound to pay the plaintiffs even if they did not make a profit (at [21] and [22]).

40 Third, it is telling that on 3 April 2008, which was shortly after the Orion and Ole Agreements were made and repayment was not forthcoming from VIE, Mdm Lai emailed VIE regarding "our loans to your company" and asked for it to "return these loans".[37] Mdm Lai's explanation that she had used the word "loan" in that email because she was merely copying the title of the Agreements is both unbelievable and insufficient. The email is further evidence that the parties had always intended for the Agreements to operate as loans.

41 To rebut this point, the plaintiffs point to several instances where the defendants used the word "investment" in relation to the Agreements. These included a letter dated 26 June 2008 from Mr Sim's then solicitors to the plaintiffs' solicitors.[38] In the letter, it was stated that "the arrangement was a series of investment proposals initiated by, or in the personal capacity of Mrs Lai up till late 2007", and that the "investments" in VIE were "in fact a partnership between Mrs Lai, Mr Sim and [Ms] Chua". The plaintiffs also rely on an affidavit dated 23 March 2012 filed by Ms Chua in Suit No 892 of 2011 ("Suit 892") – an action by Brightstar against, among others, Mr Sim and Ms Chua. In that affidavit, Ms Chua stated that Mdm Lai had "decided to invest

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37 D2BD, p 65 and NOE for 8 September 2016 pp 102–103; NOE for 7 September 2016, pp 21–23. 51.

38 AB vol 6, p 1718.

money in Vie's business" under which she "meant to receive a certain level of profit together with her principal, *whatever the outcome*" [emphasis added].[39] In my view, these statements do not undermine the defendants' case that the parties had always treated the Agreements as loans. In Mr Sim's AEIC for Suit 892, for instance, he stated that the transactions were investments "structured as loans" which is in line with the defendants' submission that an investment can take the form of a loan.[40] Similarly, Ms Chua's statement that Mdm Lai expected to get back the money she "invested" together with a profit "whatever the outcome" can only be construed as evidence that Mdm Lai intended for the Agreements to operate as loans.

42 Next, insofar as Mr Sim and Ms Chua's statements suggest that the loans were part of "investments" by Mdm Lai and the plaintiffs in VIE, it is important to keep in mind that these statements, on their own, cannot be determinative. They have to be weighed against the totality of the evidence which, in my assessment, clearly indicates that there was no real joint venture between the parties and that the relationship between the plaintiffs and the defendants was merely one of lender and borrower (see [60] below). Hence I accept Mr Sim's evidence in this Suit that the word "investment" does not accurately reflect the nature of the Agreements, which were purely loans to VIE.

43 In addition, I wish to make some brief observations at this juncture on the relevance of the Brightstar Agreements to the present matter. In her AEIC, Mdm Lai repeatedly referred to her advances to Brightstar as "investments" in Brightstar.[41] However she claimed in court that the Brightstar Agreements

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39 AB vol 7, p 1968 at paras 10–12.

40 AB vol 8, p 2126 at para 13.

were actually loans[42] as they expressly mentioned an "interest rate". She asserted that she had lent the moneys to Brightstar for it to buy goods.[43] I do not wish to delve into the issues regarding the Brightstar Agreements as they are the subject of a separate action by Mdm Lai and Mr Ole against the defendants in Suit No 1052 of 2014. I am also cognisant that the Brightstar Agreements were worded differently, and arose out of different circumstances. Unlike in the case of VIE, Mdm Lai had a 60% share in Brightstar. The point I wish to make is that Mdm Lai's claim that the Brightstar Agreements were loans which could also be characterised as "investments" indicates that she was aware that the two labels are not mutually exclusive.

44 Fourth, I am not persuaded by the plaintiffs' submission that the steps taken by Mdm Lai and Mr Ole to take control of VIE necessarily indicate that the relationship between the plaintiffs and the defendants was not one of lender and borrower. Starting with Mdm Lai and Mr Ole's desire to transfer VIE to Orient Asia (and then to Orion), Mdm Lai stated that they were very concerned about whether VIE was "properly paying its taxes" and "did not want to take any personal risks and/or be implicated".[44] This is perplexing given that they were not shareholders in VIE or directly involved in its business. Mr Sim, on the other hand, testified that Mdm Lai wanted to relocate VIE's business, along with the loans, to Hong Kong as she did not wish to pay taxes.[45] His explanation is more plausible. To my mind, the couple were actually concerned with the tax implications for themselves arising from their

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41 LOH AEIC, paras 161, 163–166.

42 NOE for 6 September 2016, pp 103–106.

43 NOE for 8 September 2016, p 89.

44 LOH AEIC, para 65.

45 NOE for 17 November 2016, p 59.

substantial advancements to VIE. It transpired in cross-examination that Mdm Lai had never declared to the tax authority the gains which she had made on the ML Agreements; she claimed that she did not know whether she had to declare these gains and that she had planned to do so (although in fact she did not).[46] This was likely a key consideration in her decision to first, require VIE to transfer its business to Orient Asia and Orion (both incorporated in Hong Kong) and second, to ask for the counterparty in the Agreements to be changed to Orion. As the plaintiffs confirmed, Orion did not conduct any other business apart from handling Mdm Lai and Mr Ole's advances to VIE.[47]

45 Mdm Lai's desire to exercise some control over and oversight of VIE would also have been driven by the fact that she was an unsecured creditor for very large sums. Mr Sim testified that Mdm Lai wanted to be a joint signatory to the UOB account as she was concerned about the moneys advanced to VIE. In my view, this was likely the reason why she was made a signatory to the UOB account. It is not unusual for the major creditors of a company to ask to be allowed to monitor or even be given a degree of control over its business and finances. So the attempts made by Mdm Lai and Mr Ole to gain some control over VIE and the fact that the defendants updated Mdm Lai on its management and operations do not undermine my finding that the plaintiffs and the defendants' relationship was that of lender and borrower.

46 I also reject the plaintiffs' argument based on the close relationship between Mdm Lai and Mr Sim. I accept that the two of them had over the years built up a business relationship through various enterprises in which they

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46 NOE for 7 September 2016, pp 120–121; NOE for 8 September 2016, pp 56–58, 72–75.

47 NOE for 8 September 2016, pp 33, 53 and 149–150.

were both shareholders. Mdm Lai attempted to show that, as with those other business ventures, her relationship with VIE was that of an investor rather than a lender. This was, at best, a neutral point. Unlike in the other business ventures, Mdm Lai was not a shareholder of VIE. More importantly, even where Mdm Lai and Mr Sim were shareholders in the same business, this did not prevent her from lending money to that business – Brightstar being a case in point. Indeed, Mdm Lai claimed that she does not have a practice of lending money, not even to friends or family,[48] yet by her own testimony she claimed to have lent money to Brightstar on numerous occasions.

47 Following on from the above, it is patently clear that the Orion and Ole Agreements were loan contracts *even* on the plaintiffs' own case that Mdm Lai and Mr Ole had no input in the terms or language of the Agreements and did not know that the invoices were fabricated. Even if that was so, both the objective language of the Agreements and the substance of the transactions between the parties still indicate that the Agreements were contracts for the repayment of the moneys lent. This conclusion is fortified by my assessment of the key factual dispute in this case – whether Mdm Lai and Mr Ole knew that the supporting tax invoices were fabricated and that there were no real goods or "profits" underlying any of the Agreements.

Did Mdm Lai and Mr Ole know that the invoices were fabricated?

48 The defendants' case on this key factual issue, as already outlined, is that the Agreements were based on a template dictated by Mdm Lai who insisted on an invoice (which she knew would be false) to accompany each Agreement so that the transactions would not look like moneylending

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[48] LOH AEIC, para 29.

transactions. After considering the witnesses' oral testimony and the objective evidence before me, I am satisfied, on a balance of probabilities, that this was indeed the case.

49 Starting with the Agreements, Mdm Lai's position was that she had no input in their wording and would always advance to VIE whatever amount was stipulated in each Agreement, without any prior discussion with Mr Sim on the amount or the rate of return, as she felt "obliged" to do so.[49] According to her, even if Mr Sim did not hear from her after he sent her an Agreement, he still would proceed to source for a supplier on the "assumption" that she would in due course disburse the money to VIE. By contrast, Mr Sim testified that it was Mdm Lai who determined the rate of return, although he vacillated on who determined the principal amount to be disbursed and the Repayment Date, stating that it was sometimes decided by her and sometimes by him. He also testified that although the rate of return was generally about 15%, Mdm Lai would sometimes increase or decrease the rate (by 1% or 2%) depending on her mood. However, he could not satisfactorily explain the instances where multiple Agreements were sent to Mdm Lai at the same time and she decreased the rate of return in one whilst simultaneously increasing the rate in another. Mr Sim also belatedly asserted that Mdm Lai dictated the contents of the First Invoice as well (and not just the First Agreement), but this was not mentioned in his AEIC.

50 In my analysis, these deficiencies in Mr Sim's evidence do not defeat the defendants' case on this issue. For one, I do not believe that Mdm Lai would have, on every occasion, willingly disbursed VIE money upon receiving an Agreement and accepted whatever rate of return determined by

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[49] NOE for 8 September 2016, pp 79–83.

Mr Sim. After all, she and Mr Ole were putting at risk funds from their own joint portfolio on an unsecured basis. Mdm Lai was also unable to satisfactorily explain why she "felt obliged" (as she claimed) to advance money to VIE. Next, the contention that Mr Sim would have determined the rates of return, which were continually set at a high rate, and voluntarily offered such short periods of time for repayment flies in the face of common sense. There is no reason why he would have acted to VIE's detriment in such a manner, particularly when its business was not doing well after a while. Hence, on balance, I find that Mdm Lai made the final determination on the amount to be disbursed, the Repayment Date and the rate of return under each Agreement. She was a seasoned investor and would not have lent VIE any amount it requested on its own terms. I also prefer Mr Sim's evidence that Mdm Lai had dictated the contents of the First Agreement which VIE subsequently used as a template for all the Agreements, including the Orion and Ole Agreements. It is not disputed that Mr Sim was not conversant in English, and his account of how the First Agreement came about is more than plausible. In any event, even if Mdm Lai had not dictated the actual language of the First Agreement, this still would not affect my view that she had a substantial input in the commercial terms of the Agreements.

51 Next, I turn to the evidence in relation to the invoices. According to Mdm Lai, she and Mr Ole never suspected that the invoices were fabricated. Allegedly, her understanding based on what Mr Sim told her was that VIE's customers would sign on the invoices upon confirming their order even before a supplier was sourced. VIE would then require Mdm Lai to transfer money to it for the purchase of the relevant food products from a supplier. It took two months thereafter for VIE to purchase the goods from and pay its supplier, ship the goods to its customer, obtain payment and repay Mdm Lai.

52 Her evidence was not credible. For one, the invoices – which Mdm Lai said were "very important to [her] and the Plaintiffs"[50] – clearly reflected something else. They were not merely confirmations of orders as alleged by Mdm Lai, but were pre-signed by VIE's purported customers and post-dated (many of them to the purported date of shipment). For instance, Mdm Lai would have received tax invoice 08/01117[51] in December 2007 after it had been signed by both VIE and the customer. But the invoice was post-dated 10 January 2008 (which was stated as the date of shipment). Both the ports of shipment and destination were already filled in as well. This is inexplicable. Ole admitted that it is unusual for an invoice to be pre-signed.[52] The fact that this was the case for over 700 invoices is incredible and would have been readily picked up by Mdm Lai and Mr Ole. Mdm Lai did not seriously dispute this, but her explanation that the invoices were "repeat orders" (*ie*, purchases which were already confirmed by VIE's customers) was unconvincing and contrived.[53] Mdm Lai and Mr Ole would also have realised, given their business acumen, that it did not make sense for VIE to have fixed the prices of the goods and the shipping dates in advance *before* obtaining funds, finding a supplier and when it could not possibly have known when the goods could be shipped to the customer.

53 Further, there are a substantial number of invoices in which the shipping dates were merely one or two days before, or on even the same day as,[54] the date on which the funds were disbursed to VIE.[55] If Mdm Lai truly

50 LOH AEIC, para 144.

51 LOH AEIC, p 242.

52 NOE for 8 September 2016, pp 162–163.

53 NOE for 7 September 2016, p 104–105.

54 See, for example, AB vol 6, pp 1680, 1682, 1684, 1686 (invoices no. 08/315 to 08/318), 1688, 1690, 1692, 1694, 1696 (invoices no. 08/326 to 08/330).

believed her account of VIE's business operations and was concerned, as she testified, to ensure that she paid Mr Sim "very promptly" as his "partner",[56] she would have realised that VIE would have had little time to purchase the goods and pay its supplier after receiving the money from her, let alone been able to arrange for the goods to be shipped to the customer on the stipulated shipping date. In fact, in some instances, the funds were disbursed to VIE *after* the shipping date.[57] This contradicted Mdm Lai's assertion that the moneys had to be transferred to VIE before it could purchase the goods from its suppliers.

54 Both Mdm Lai and Mr Ole alleged that they were not interested in the shipping details in the invoices. However, their evidence on this point was self-serving and difficult to reconcile with their assertions that that they paid "a lot of attention" to and were "very interested in the details" of the invoices.[58] Mr Ole even said that he made the time to look through every one of the Agreements and invoices.[59] It bears noting that Mr Ole himself is in the food business and the material particulars on the invoices would have been familiar to him. The irresistible inference is that Mdm Lai and Mr Ole did not query the obvious discrepancies in the invoices because they knew that the particulars in the invoices were concocted and so they did not rely on them when advancing moneys to VIE under the Agreements.

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55 Revised Table C.

56 NOE for 6 September 2016, p 57.

57 Revised Table C, S/No.s 32, 34, 66–68, 101, 401, 724–731; 2nd Defendant's Closing Submissions ("D2CS"), paras 32 and 89(b).

58 NOE for 6 September 2016, pp 14 and 19; NOE for 7 September 2016, pp 9 and 14; NOE for 8 September 2016, pp 121 and 132.

59 NOE for 8 September 2016, pp 138–139, 159.

55 The above analysis is bolstered by the fact that, although the plaintiffs claim that the purported "joint venture" was based on a profit sharing of 60:40 (or 80:20 in *exceptional* circumstances), a number of the Agreements indicate that the amounts to be repaid by VIE were well over 80% of the invoice amount.[60] In other words, the documents suggest that VIE would have made hardly any profit from these Agreements. Even if Mdm Lai and Mr Ole had not been interested in the shipping details in the invoices as they alleged, they must have noticed this departure from the parties' purported agreement as it would have raised doubts as to the viability of their joint venture in VIE. This is particularly so as they claimed to be interested in the type of products sold and to whom VIE was selling the products. The fact that this incongruity was never raised as an issue further supports the defendants' case that the purported "joint venture" was merely a cover for a series of extortionate loans.

56 As an aside, I record that in comparing the amounts to be repaid by VIE (which were in Singapore dollars) and the invoice amounts (which were in US dollars and Euros), I relied on the currency conversion rates provided by the defendants in Exhibit C2 ("Revised Table C"). The conversion rate was the average of the rates of the last five working days of the month preceding two months from the Repayment Date stipulated in the respective Agreements. The plaintiffs do not dispute the conversion rate, but argue that this rate is not an accurate reflection of what the actual conversion rate would be on the date when the customer actually makes payment to VIE, as the date of payment was indeterminable by Mdm Lai. Although this is true, Mdm Lai would have known that repayment would be made on a date between the time the funds were disbursed and the Repayment Date, which spanned no more than two

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[60] D2CS, paras 90(l) and 90(m). NOE for 6 September 2016, pp 153–161; AB vol 5, pp 1490–1491; Items in Revised Table C and the last column of it.

months. She would also have been aware that the conversion rate would not fluctuate significantly in that period such as to materially affect the calculation of the profit sharing ratios.

57 Returning to the invoices, the plaintiffs submit that they were rich in detail so that Mdm Lai and Mr Ole would not suspect their authenticity. For instance, in some invoices, multiple products were stipulated in the same invoice with a rate of return that varied depending on the product type. Eight of the Agreements were also each accompanied by two invoices.[61] I am not persuaded by this argument. While these details might fool a third party examining the invoices, any reasonable investor in the shoes of Mdm Lai and Mr Ole *at the time the funds were being disbursed* and with even a superficial understanding of VIE's business model would have immediately realised that there was something awry from the glaring fact that the invoices were post-dated yet signed, with complete pricing and shipping details, even though a supplier would not even have been sourced by then. In fact, the nature of the details which were fabricated is more consistent with the analysis that the invoices were intended to mask the true nature of the transactions from being perceptible by *third parties* rather than by Mdm Lai or Mr Ole.

58 Next, there were many occasions on which multiple Agreements and invoices were generated for the same month.[62] The plaintiffs submit that it would not have made sense for the defendants to have generated such multiple documents if both parties had known that the invoices were fabricated. If VIE had wanted to borrow money, it would have simply requested for one lump sum for a particular month *via* one Agreement and invoice. This point was, on

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61 PCS, para 269; NOE for 16 November 2016, pp 43–48.

62 NOE for 15 November 2016, pp 85–91.

its own, equivocal. I accept Mr Sim's explanation that in some months the amount VIE required was divided into various tranches disbursed at different points in the month as it did not require one large sum at the same time; there was no guarantee that it could find customers after having money in hand. He explained that VIE also staggered some of the borrowing in order to repay the earlier loans which were due at different times. In my view, these were plausible explanations. Given that it would have to repay any loan taken with a high rate of return in a relatively short period, VIE would not have wished to take on too much credit at one shot.

59 Finally, the plaintiffs submit that it did not make sense for each Agreement to be called an "Agreement of Loan" if Mdm Lai did not want the transactions to look like illegal moneylending activities. This submission overlooks the distinction between genuine commercial investments (which may be legitimately structured as loans without contravening the MLA (see [71] below)) and illegal moneylending – a distinction which Mdm Lai and Mr Ole seem to have been mindful of. The evidence suggests that they were trying to have their cake and eat it. They wanted to preserve the Agreements as loans so that they would not have to share in VIE's business risks and would obtain a fixed return regardless of VIE's profitability. At the same time, they wanted to give the impression that these loans, although at an extortionate interest rate, were not moneylending transactions but were part of a legitimate joint venture by including words such "co-operation" and "profit" in the language of the Agreements and by insisting on supporting invoices (which they knew would be fabricated).

60 On the whole, I found Mdm Lai and Mr Ole to be the most unsatisfactory and evasive witnesses. They are savvy investors and could articulate themselves well. Yet they could not give convincing explanations on

the material issues, tried to distance themselves from inconvenient facts by making implausible assertions and chose to downplay their involvement in the transactions. For instance, Mdm Lai claimed that she had never discussed the terms of the Agreements with VIE and advanced whatever amount at whatever rate of return asked for by Mr Sim. Mdm Lai also claimed that she never required invoices to accompany the Agreements, yet at the same time asserted that the invoices were "very important" to her and Mr Ole as they relied on the invoices to disburse money to Vie under the Agreements.[63] Equally incredible was Mr Ole's claim that the word "loan" in the Agreements did not mean anything to him. Undoubtedly there were flaws in Mr Sim's testimony and issues which he could not satisfactorily explain as well. Nevertheless, having tested the parties' oral evidence against the contemporaneous documents, I find, on balance, that the Orion and Ole Agreements were loan transactions and that Mdm Lai and Mr Ole always intended for them to be so. They also knew that the invoices were fabricated and that there were no specific sales by VIE in which they were "investing". There was therefore no real joint venture between the parties.

61 The factual matrix of this case is thus unlike *City Hardware*, which the plaintiffs rely on. In that case, each disputed transaction involved the purchase of real goods by the defendant and was supported by regular documentation. Thus the court found that the transactions were not structured or intentionally disguised to evade the MLA. The court also found (at [39]) that it was highly improbable that if the transactions were true "loans", the plaintiff would have been satisfied with a relatively modest mark-up on each purchase price of the subject goods (the highest mark-up being 9% more than the original price of

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63 LOH AEIC, paras 34, 142 and 144.

the goods). In addition, there was no continuing interest to be paid in the event of a default by the defendant.

62 This is unlike the present case where there were no real goods underlying each invoice (which were fabricated) and the rates of return averaged about 15%. This interest rate was exorbitant considering the short period of time of each loan. Although there was no default interest imposed, this fact alone does not affect my finding that the Orion and Ole Agreements were loan contracts falling within the scope of the MLA. Section 3 of the MLA provides that a person who lends a sum of money in consideration for a larger sum being repaid is presumed, until the contrary is proved, to be a moneylender. Section 2 of the MLA defines "interest" to include "*any amount by whatsoever name called in excess of the principal paid* or payable to a moneylender in consideration of or otherwise in respect of a loan" [emphasis added]. There is no requirement that, for a transaction to constitute a loan, there must be a default continuing interest rate; a one-off interest is sufficient.

63 To conclude on this issue, I am mindful of the words of V K Rajah J (as he then was) in *City Hardware* at [25] that "the court ought not to be overzealous in analysing or deconstructing a transaction in order to infer and/or conclude that the object of the transaction was to lend money". But as stated in *Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] AC 209 at 217, "if the court comes to the conclusion that the form of the transaction is only a sham and that what the parties really agreed upon was a loan which they disguised… then the court will call it by its real name and act accordingly". In the present case I find that what the parties had really agreed upon was a series of extortionate loans which they sought to disguise as being part of a joint venture investment.

Whether the plaintiffs are moneylenders under the MLA

64 Having found that the plaintiffs were lending money to the defendants under the Orion and Ole Agreements, I turn to: (a) whether they were excluded moneylenders falling within exception (*c*) to the definition of "moneylender" in s 2 of the MLA ("Exception (*c*)"); and (b) if not, whether they were carrying on the *business* of moneylending. It is well-established that the MLA prohibits the business of moneylending and not the act of moneylending *per se* (see *City Hardware* at [23] and *Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 ("*Sheagar*") at [30]).

65 Before I begin my analysis of these issues, I note that the applicable version of the MLA which applies to the Orion and Ole Agreements is the 1985 Revised Edition (*ie*, the Moneylenders Act (Cap 188, 1985 Rev Ed)) as the Agreements were entered into before the enactment of the Moneylenders Act 2008 (Cap 188, 2010 Rev Ed) ("MLA 2008"). Any references to "the MLA" is thus to the 1985 Revised Edition of the Act.

Exception (c)

66 Section 2 of the MLA defines a "moneylender" as follows:

> "moneylender" includes every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or as an agent but does not include —
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> …
>
> (*c*) any person … 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;

…

67 In *Sheagar*, the Court of Appeal held that the burden of proving that a lender is not an excluded moneylender (as defined in s 2) falls on the borrower (at [73]). Although *Sheagar* was decided on the MLA 2008, the defendants do not dispute that the court's observations apply to Exception (*c*). Thus the issue is whether the defendants have discharged their burden of proving that Exception (c) does not apply to the plaintiffs because the plaintiff's primary object was to lend money with a high rate of interest rather than to invest in VIE's food trading business.

68 I start with the following observations by Prakash J (as she then was) in *Lim Beng Cheng v Lim Ngee Sing* [2016] 1 SLR 524 ("*Lim Beng Cheng*") at [83]:

> There are no cases interpreting sub-para (*f*) of the *current* definition [under the MLA 2008] of an "excluded moneylender" [which is the corollary of and worded exactly the same as Exception (*c*)] but two older decisions are helpful. The first, *Premor Ltd v Shaw Brothers* [1964] 1 WLR 978, explains the test that must be satisfied. *For a loan to be made "in the course of" a business, it must be associated with a transaction of that business. Additionally, for a loan to be made "for the purposes of" a business, it must be made with the object of promoting that business.* It was insufficient that the loan kept a customer well-disposed towards the lender; *the purpose of the loan must be directly to help the business as distinct from, for example, getting a high rate of interest.*
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> [emphasis added]

69 The case of *Premor Ltd v Shaw Brothers (a firm)* [1964] 1 WLR 978 ("*Premor Limited*"), cited in *Lim Beng Cheng*, dealt with s 6(d) of the Moneylenders Act 1900 (63 & 64 Vict, c 51) (UK) ("the UK Act"), which is *in pari materia* with Exception (*c*). There, the plaintiff was a hire-purchase finance company which carried on *bona fide* hire-purchase transactions with the defendant who were motor car dealers. The parties entered into certain

"stocking transactions" whereby loans were made by the plaintiff to the defendant, some purporting to be on security of specified motor vehicles, others mentioning no vehicle at all. It transpired that the documents underpinning the stocking transactions were entirely fictitious. The English Court of Appeal found that the loans were not made in the course of the primary business of the plaintiff as they were not linked with any hire-purchase transactions. The loans were also not made for the purposes of the business as the purpose in that case was not to help the plaintiff's primary business but simply to lend money to a customer who was ready to pay a high rate of interest. Therefore the plaintiff had not brought itself within s 6(d) of the UK Act, and the court found that it was a moneylender, despite having a valid business. The loans were thus found to be unenforceable.

70 In the present case, Mdm Lai and Mr Ole confirmed that, apart from the Orion Agreements, Orion was "not trading anything" and a nil return was filed for its tax returns.[64] In fact Orion did not even have a bank account. Hence the loans under the Orion Agreements were not made for the purposes of any other primary business, since it had none. Mdm Lai stated that Orion was incorporated so that VIE's business could be transferred to it. This never materialised. As for the loans under the ML and Ole Agreements, Mdm Lai and Mr Ole advanced the sums in their personal capacity and the Agreements had nothing to do with any of their other businesses (see *Lim Beng Cheng* at [85]).

71 The only point which the defendants have to deal with, therefore, is the plaintiffs' argument that their primary object was to invest in VIE's business. I accept that investing is not moneylending (see *City Hardware* at [27(c)]) and

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64 NOE for 8 September 2016, pp 53 and 149.

that a loan granted as part of a commercial joint venture would not ordinarily offend the MLA. However, as I have found, there was no such joint venture in this case. The totality of the evidence indicates that Mdm Lai and Mr Ole knew that the invoices accompanying the Agreements were fabricated and that this was done to confer an air of legitimacy upon the series of loans granted by Mdm Lai and the plaintiffs to VIE. In other words, the plaintiffs' primary, and indeed sole, object was to lend money at a high interest. I therefore find that the defendants have discharged their burden of proving that Exception (*c*) does not apply in this case.

Whether plaintiffs were carrying on business of moneylending

72 Section 3 of the MLA provides as follows:

> Save as excepted in paragraphs (*a*) to (*g*) of the definition of "moneylender" in section 2, any person 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.

73 The Court of Appeal in *Sheagar* held at [38] that, where it applies, s 3 (in that case, of the MLA 2008) operates to shift the burden onto the lender to prove that he was not carrying on the business of moneylending. As the plaintiffs were lending money in consideration for a larger sum being repaid, the presumption under s 3 of the MLA is raised against them.

74 The applicable tests for determining if a lender was carrying on the business of moneylending was stated by Belinda Ang J's in *Mak Chik Lun and others v Loh Kim Her and others and another action* [2003] 4 SLR(R) 338 ("*Mak Chik Lun*") at [11]:

> In rebutting the presumption, the claimant, for instance, has to show that there was neither system nor continuity in moneylending. *The local test of whether there is a business of moneylending is whether there was a system and continuity in*

> *the transactions.* If no system or continuity is displayed, the *alternative test* (the *Litchfield* test) of whether the alleged moneylender is one who is ready and willing to lend to all and sundry provided that they are from his point of view eligible is used.
>
> [emphasis added]

As the above passage indicates, the primary test is whether "there was a system and continuity in the transactions". Whether the alleged moneylender is "one who is ready and willing to lend to all and sundry" is an *alternative test* which applies only if no system or continuity is displayed.

75 On the primary test of whether there was a system and continuity, the following passage from *Ng Kum Peng v Public Prosecutor* [1995] 2 SLR(R) 900 at [38], which was adopted in *Agus Anwar v Orion Oil Ltd* [2010] SGHC 6 at [9], is instructive:

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

76 Although the plaintiffs claimed that there is no evidence that they or Mdm Lai lent money to anyone else, loans to one individual or a restricted class do not negate the finding of a moneylending business so long as there is a system and continuity (*Ang Eng Thong v Lee Kiam Hong* [1998] SGHC 64 at [21]). In *Pankaj s/o Dhirajlal v Donald McArthy Trading Pte Ltd and others* [2006] 4 SLR(R) 79 ("*Pankaj*") at [31], Kan Tin Chiu J (as he then was) held

that a person who lends on a commercial basis to even only one regular borrower whom he trusts can nevertheless be carrying on moneylending as a business. Likewise, it has been held that "the test of system or continuity does not … rule out the possibility that one solitary transaction can, if the facts so justify, nevertheless amount to a moneylending transaction" (*Bhagwandas Naraindas v Brooks Exim Pte Ltd* [1994] 1 SLR(R) 932 at [51]).

77 In the present case, I find that the plaintiffs were carrying on the business of moneylending as there was a system and continuity in the transactions from the inception of the ML Agreements. First, there was an organised system under which the amount required by VIE for each month would be determined before the Agreements and invoices were sent to Mdm Lai. Under each Agreement, there was a fixed rate and a clear Repayment Date which was two months after the disbursement of the loans. There was also continuity as this was not a one-off transaction or occasional loans to a friend or acquaintance (see *City Hardware* at [19] and *Edgelow v MacElwee* [1918] 1 KB 205 at 206). There were 76 Orion and Ole Agreements, and 740 Agreements in total under which a sizeable amount of more than $58m was disbursed. The loans under the Orion and Ole Agreements were disbursed regularly over three months, and the entire course of conduct in relation to the Agreements spanned over three years.

78 It should also be noted that although Orion is a foreign company, its residence is immaterial as the MLA is concerned with moneylending activities in Singapore. Any moneylending transaction in Singapore is subject to the MLA (see *Mak Chik Lun* at [7]). In this case, the moneylending activities were clearly conducted in Singapore. VIE is a Singapore business and the transactions took place in Singapore with moneys disbursed from Mdm Lai and Mr Ole's joint account with the Singapore branch of ABN AMRO Bank.[65]

79 Accordingly, I find that the plaintiffs have failed to rebut the presumption that they were not carrying on the business of moneylending. I should also mention that I did not take into account the Brightstar Agreements in determining whether the plaintiffs were carrying on the business of moneylending.

Conclusion on the application of the MLA

80 It follows from the above that the plaintiffs were unlicensed moneylenders and that the Orion and Ole Agreements are unenforceable under s 15 of the MLA. In reaching this conclusion, I am mindful that the MLA is intended to apply only to persons who are really carrying on moneylending as a business and that it would be "wholly inappropriate to apply the MLA to commercial transactions between experienced business persons or entities which do not *prima facie* have the characteristics of moneylending" (see *City Hardware* at [22]). However, as V K Rajah J went on to state in that case, this principle cannot apply where the parties wilfully attempt to structure a transaction so as to evade the application of the MLA.

81 Indeed that is what happened in this case. The evidence indicates that Mdm Lai and Mr Ole had behaved in a rapacious manner throughout their transactions with VIE, and that their only concern was to increase their wealth by lending money at a high interest. Mdm Lai exploited the fact that VIE could not readily obtain credit facilities from a bank and insisted on charging high interest rates. She also insisted on invoices being produced in order to mask the nature of the transactions, and subsequently, despite Mr Sim

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[65] LOH AEIC, para 71.

informing her that the business was not doing well, refused to lower the interest rates.

82 It is true that Mr Sim was no babe in the woods. He initially accepted the high interest rate because he wanted to expand VIE's business, and optimistically reckoned that it could still make a profit of about 20% to 30% and repay the loans at the stipulated interest rate. He also went along with Mdm Lai's charade and produced the fabricated invoices to mask the true nature of the transactions. But as V K Rajah J also observed in *City Hardware* at [22], a lender that carries on a business with the primary object of conducting unlicensed moneylending cannot avoid the severe consequences of an infraction of the MLA's provisions by pointing out the benefits the borrower has received or derived from the transactions. In the present case, I have no alternative but to give effect to the draconian consequences of the MLA.

83 As a fall-back argument, the plaintiffs contend that they should be allowed to rely on the Orion and Ole Agreements even if they were illegal moneylending contracts because Mdm Lai and Mr Ole were not *in pari delicto* and were unaware that the Agreements were illegal and improper. My finding that it was Mdm Lai, with the knowledge of Mr Ole, who required the defendants to produce the invoices to mask the improper nature of the Agreements necessarily disposes of this argument.

84 Finally I should add that, as the Orion and Ole Agreements are unenforceable by reason of s 15 of the MLA, the plaintiffs' claim in unjust enrichment should also fail. This alternative claim is a backdoor attempt to enforce the Agreements. In every case involving an unlicensed and therefore unenforceable loan contract, it could similarly be argued by the lender that it

has a separate cause of action based on unjust enrichment because the consideration for the grant of the loan has wholly failed. If allowed, such a restitutionary claim would render s 15 of the MLA otiose. The position may arguably be different if the lender had entered into the illegal loan agreement as a result of a mistake as to the facts constituting the illegality or was not *in pari delicto* (see *Aqua Art Pte Ltd v Goodman Development (S) Pte Ltd* [2011] 2 SLR 865 at [23]–[25]). However, it is not necessary for me to determine this point because, as explained above, this is not such a case.

Registration under the Business Registration Act

85 The defendants plead, by way of an alternative defence, that the Orion Agreements are unenforceable under s 21 of the BRA as Orion had carried on business without being registered under the Act. Due to my finding that the MLA was offended, the applicability of s 21 of the BRA and the issue of whether relief should be granted to Orion under s 21(3) of the same Act need not be considered. Nevertheless I will briefly deal with this issue for completeness.

86 As a preliminary point, the relevant legislation is the BRA (*ie*, the Business Registration Act (Cap 32, 2004 Rev Ed)) although it has been repealed and replaced by the Business Names Registration Act 2014 (No 29 of 2014) as the Agreements were entered into before the enactment of the more recent Act. The parties have proceeded on this basis.

87 In the defendants' pleadings, the BRA is raised only in relation to the Orion Agreements, although they submit that s 21 of the Act should also apply to the Ole Agreements. A special ground of defence must be specifically pleaded (O 18 r 8 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed)). As the defence based on the BRA is pleaded solely against Orion and the issue was

raised in cross-examination in relation to Orion only, I find that the defendants are not entitled to rely on this defence against Mr Ole in relation to the Ole Agreements. The defendants have not shown me why the position should be otherwise.

88 Section 5 of the BRA requires a person, before carrying on business in Singapore, to be registered under the BRA. Orion was not registered and did not fall within the exemption in s 4. Thus the first question is whether Orion was carrying on a "business" which needed to be registered. The definition of "business" in s 2 of the BRA is no different from that under the MLA, which requires a degree of system and continuity (see *Belfield International (Hong Kong) Ltd v Sheagar s/o T M Veloo* [2014] 1 SLR 24 at [55]). As I have found, there was a sufficient degree of system, repetition and continuity in the manner in which the moneys under the Orion Agreements were disbursed. Hence even if the advancements were part of a genuine investment in VIE's business, it is likely that s 21 of the BRA would be engaged and the Orion Agreements would *prima facie* be unenforceable under the BRA. The issue then is whether the court ought to exercise its discretion under s 21(3) of the BRA which empowers the court to grant relief "on being satisfied that the default was accidental or due to inadvertence or some other sufficient cause, or that on other grounds it is just and equitable to grant relief".

89 It is worth noting that the defendants' submission based on the BRA is an alternative defence which presupposes that the Orion Agreements do not contravene the MLA. In such an instance, I would have granted Orion relief under s 21(3) of the BRA as I would have been satisfied that the default in registration was accidental and due to inadvertence. There was no real evidence to the contrary. Moreover, the mischief which the BRA seeks to prevent is to ensure that those who do business in Singapore disclose their

particulars by registering under the Act so as not to mislead those whom they do business with as to their real identity (see *Federal Lands Commissioner v Benfort Enterprise and another and other actions* [1997] 3 SLR(R) 895 at [13]). In the present case, the defendants clearly knew who they were dealing with and were not misled. Hence, if I had found that the Orion Agreements were enforceable notwithstanding the provisions of the MLA, I would have granted Orion relief under s 21(3) of the BRA. For completeness, I note that the same reasoning would apply to Mr Ole in relation to the Ole Agreements if the defence under the BRA had been pleaded against him.

Fraudulent misrepresentation and conspiracy to defraud

90 The essential elements for fraudulent misrepresentation have been authoritatively set out in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14] and subsequent cases, and bear no repeating here.

91 Having found that the Agreements were moneylending transactions and that it was Mdm Lai who insisted on the fabricated invoices to mask the nature of the Agreements, the claim for fraudulent misrepresentation must necessarily fail. While the plaintiffs submit that they are still entitled to maintain an action to recover damages for fraudulent misrepresentation even if the Orion and Ole Agreements are found to be illegal moneylending transactions, this presupposes that the elements of the tort are made out. This is not the case. As noted above, Mr Ole was also privy to the transactions and was very familiar with the Agreements and invoices. In addition, Mdm Lai would have updated him on the arrangement pertaining to the Agreements since there was little, if any, communication between the defendants and Mr Ole. Therefore there would have been no representation by the defendants to

Mdm Lai or the plaintiffs that the moneys advanced to VIE would be used to purchase the goods mentioned in the invoices, let alone any reliance placed by them on any such representation or on the invoices.

92 Likewise the claim for conspiracy to defraud must fail. There was no agreement between the defendants to do certain acts with the intent to cause damage to the plaintiffs. The manner in which the Agreements were structured with the accompanying false invoices was done with the full knowledge of Mdm Lai and the plaintiffs. The fact that VIE later used the moneys advanced under the Agreements to repay its earlier debts to Mdm Lai is irrelevant. Likewise, while the plaintiffs allege that VIE may have transferred some of the loan moneys out of its UOB account for purposes other than its business, it is difficult to see why this would indicate that there was a conspiracy to defraud the plaintiffs. While the Agreements did refer to specific transactions, Mdm Lai and Mr Ole knew that these were not genuine sales. Thus the moneys advanced under the Agreements were purely loans which VIE could use in the manner in which it saw fit. There were no terms limiting their use.

Limitation Act

93 The defendants also submit the plaintiffs' claims against Mr Sim are time-barred as he was joined as a defendant to this Suit only in December 2014. Given my findings against the plaintiffs on their claims against him, it is no longer necessary to deal with this issue.

Conclusion

94 In the circumstances, I dismiss the plaintiffs' claim against the defendants and award costs to the defendants to be taxed if not agreed.

Audrey Lim
Judicial Commissioner

Gary Leonard Low, Vikram Ranjan Ramasamy, Priya d/o Gobal and Yap Zhan Ming (Drew & Napier LLC) for the plaintiffs;
Alvin Tan Kheng Ann (Wong Thomas & Leong) for the first defendant;
Sarbjit Singh Chopra and Ho May Kim (Selvam LLC) for the second defendant.
