City Harvest Church *v* AMAC Capital Partners and another
[2015] SGHC 299

Case Number : Suit No 1077 of 2014 (Registrar's Appeal Nos 181 and 182 of 2015)

Decision Date : 17 November 2015

Tribunal/Court : High Court

Coram : Chua Lee Ming JC

Counsel Name(s) : Ong Su Aun Jeffrey and Yeo Lai Hock, Nichol (JLC Advisors LLP) for the plaintiff; A Rajandran (A. Rajandran) for the first and second defendants.

Parties : City Harvest Church — AMAC Capital Partners — Chew Eng Han

Civil Procedure – Judgments and orders – Setting aside judgment in default of appearance

Civil Procedure – Summary judgment – Conditional leave to defend

17 November 2015

Chua Lee Ming JC:

Introduction

1 The plaintiff, City Harvest Church, sued the defendants for $16,339,333 and accrued interest of $4,645,904, in connection with certain investments made by the plaintiff. The first defendant, AMAC Capital Partners ("AMAC"), was the plaintiff's investment manager. The second defendant, Chew Eng Han ("Chew"), was the sole director and majority shareholder of AMAC. Chew was sued as a guarantor for the payment of the sums due from AMAC to the plaintiff.

2 The plaintiff's claim for $16,339,333 and accrued interest of $4,645,904 comprised the following:

Tranche	Principal Owed	Interest Owed	Total
First Tranche Outstanding	$1,324,333	$612,514	$1,936,847
Second Tranche Outstanding	$3,000,000	$765,370	$3,765,370
Third Tranche Outstanding	$3,015,000	$820,020	$3,835,020
Fourth Tranche Outstanding	$9,000,000	$2,448,000	$11,448,000
Total	$16,339,333	$4,645,904	$20,985,237

3 On 22 October 2014, the plaintiff entered judgment in default of appearance against AMAC. AMAC applied to set aside the judgment. Separately, the plaintiff applied to enter summary judgment

against Chew. On 8 June 2015, the learned Senior Assistant Registrar ("SAR") set aside the judgment against AMAC and gave Chew leave to defend, in respect of all four Outstanding Tranches, on condition that the full amount claimed was paid to the plaintiff. AMAC and Chew appealed against the SAR's decisions.

4 I heard both the Registrar's Appeals and allowed the appeals in part:

(a) I allowed the appeals with respect to the First to Third Outstanding Tranches (total amount $9,537,237) and made the order setting aside the judgment against AMAC, and the order giving Chew leave to defend, unconditional.

(b) As for the Fourth Outstanding Tranche (total amount $11,448,000), I agreed with the SAR that the order setting aside the judgment against AMAC and the order giving Chew leave to defend, should be conditional. I imposed the condition that AMAC and/or Chew furnish security in the sum of $1.5m within six weeks of my decision.

5 AMAC and Chew have appealed against my decisions in respect of the Fourth Outstanding Tranche.

The facts

6 The plaintiff appointed AMAC as its investment manager in 2007. Sometime in March 2009, one Oh Chee Eng ("Chee Eng") approached Chew and asked if AMAC could arrange a three-month bridging loan of $5m for a corporate exercise by his company, Transcu Group Limited ("Transcu"). Chee Eng offered a "fee" of 5% for the three-month loan. The "fee" was equivalent to an interest rate of 20% per annum ("pa").

7 Chew was then a member of the Management Board ("the Board") of the plaintiff. He brought this opportunity to Tan Ye Peng ("Ye Peng") who was the Vice-Chairman of the Board. In his Blackberry message to Ye Peng on 8 March 2009 ("the BB message"), Chew informed Ye Peng about Chee Eng's proposal and suggested a profit sharing arrangement under which AMAC and the plaintiff would split the "fee" in the ratio 40:60. Chew said AMAC could specifically set up a fund "for deals like this". The fund would be called the Special Opportunity Fund ("SOF"). AMAC would issue a contract to the plaintiff stating that "whatever [the plaintiff] puts in is guaranteed with a 3 [percent] return after 3 months". AMAC would collect the fee of 5% from Transcu and pay the plaintiff 3%. Chew considered the deal to be "very safe" as it would be secured by more than 100m Transcu shares, which were then worth about $21m.

8 On 9 March 2009, the plaintiff's then Finance Manager, Ms Sharon Tan ("Sharon"), sent emails to the plaintiff's investment committee and Board seeking approval to make the investment based on Chew's proposal. The emails stated that the SOF would be offering a bridging loan to Transcu and that it would guarantee a return of 3% in three months. It would appear that the plaintiff's Board gave its approval as the plaintiff subsequently signed an agreement dated 17 March 2009 ("the SOF Agreement") to invest in the SOF.

9 Under the SOF Agreement, the SOF would operate in the following manner:

(a) AMAC would issue invitations to the plaintiff to subscribe to a tranche of the SOF "as and when opportunities arise".

(b) Each SOF tranche would be for a specific amount and a specific fixed period. The return

for each tranche would be fixed but the rate would depend on the nature of the opportunities that arise.

(c) The plaintiff had a right to participate in tranches of $1m or more.

(d) Payment of the principal sum and the fixed return to the plaintiff was guaranteed.

10 Between 17 March 2009 and mid-2010, AMAC issued invitations to subscribe to 18 tranches (described as Tranches 1 to 18) of the SOF. Tranche 1 involved a principal sum of $5m and was for a term of three months for a fixed return of 3% (*ie*, 12% pa). This was based on the loan that Chee Eng had requested and that led to the creation of the SOF. In short, the $5m loan requested by Chee Eng was the underlying loan for Tranche 1. Although the BB message suggested that the borrower was either Chee Eng or Transcu, Chew alleged that the loan was in fact made to Mr Akihiko Matsumura ("Akihiko") who was a major shareholder of Transcu [note:]. At any rate, at the end of the three-month period, the underlying loan was repaid by the borrower and AMAC paid the plaintiff its principal sum of $5m plus accrued interest of $150,000.

11 The documentary evidence showed that the plaintiff subscribed to at least 16 of the 18 tranches. [note: i] According to the defendants, there was an underlying loan for each tranche. In other words, the monies paid by the plaintiff for each tranche were used to make the underlying loan linked to that tranche. The principal amount in each of the 16 tranches [note: ii] ranged from $350,000 to $9m; in the majority of cases, the amount was at least $3m. Each tranche was for a period ranging from one week to four months; most of them were for a period of at least two months. The applicable interest rates for each tranche ranged from 5% pa to 24% pa except for two tranches, *ie*, Tranche 6 and Tranche 9. Tranche 6 was an investment of $1.5m for a mere one week and the interest rate was 3% for the one-week term (*ie*, about 156% pa)! [note: iii] Tranche 9 was an investment of $2.35m, also for one week; the interest rate was 1% for the one-week term (*ie*, 52% pa)! [note: iv]

12 As at 30 September 2010, AMAC had paid the plaintiff the principal sums and the accrued interest for all the tranches that the plaintiff had subscribed to except Tranches 13, 14, 16, 17 and 18. On 30 October 2010, the plaintiff agreed to a 6-month extension to 28 February 2011 for AMAC to make payment of the sums due under these tranches. The conditions for the extension of time included the following: [note: v]

(a) The coupon rates for Tranches 16, 17 and 18 will be increased by 2%.

(b) AMAC was to confirm that there was "an underlying loan of S$12,220,000 excluding accrued interest to Mr Akihiko Matsumura" for Tranches 13, 14, 16 and 17.

13 AMAC agreed to the conditions and the payment dates for Tranches 13, 14, 16, 17 and 18 were extended to 28 February 2011. [note: vi] AMAC also confirmed in writing that Tranches 13, 14, 16, and 17 were supported by an underlying loan of $12.22m to Akihiko. [note: vii]

14 AMAC did not manage to pay the plaintiff by 28 February 2011. On 11 May 2011, AMAC paid the plaintiff the outstanding balance for Tranche 17. [note: viii] Subsequently, the plaintiff agreed to extend the payment dates for the remaining Tranches 13, 14, 16 and 18 to 30 June 2012. The interest rates for these four tranches were increased to 8% pa with effect from 1 August 2011, and the interest accrued was to be paid on 31 December 2011, 31 March 2012 and 30 June 2012 [note: ix]

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15 It appeared that AMAC was unable to pay the interest that accrued on 31 December 2011, and on 25 January 2012, AMAC requested a further extension of time [note: x] Ye Peng sent Chew an email touching on several terms relating to a revised payment schedule. One of the conditions imposed by the plaintiff was a personal guarantee from Chew to the plaintiff for all the monies that AMAC owed the plaintiff. In his reply on 14 March 2012, Chew agreed to give the guarantee. [note: xi] On 30 April 2012, Chew signed a guarantee in favour of the plaintiff. And so it came to pass that Chew became liable to the plaintiff as a guarantor for AMAC's liabilities relating to the SOF.

16 According to the defendants, AMAC was unable to pay the plaintiff because the borrower had defaulted on the underlying loans. The defendants also had difficulty liquidating the Transcu shares (which were held as collateral for the underlying loans) within a short time frame due to market liquidity conditions. The problem became worse when trading of the Transcu shares was suspended.

17 The First, Second, Third and Fourth Outstanding Tranches in the plaintiff's present claim (see [2] above) represented the balance amounts still owing to the plaintiff in respect of Tranches 13, 14, 16 and 18 respectively.

18 Tranche 13 involved a principal sum of $2.92m. The initial term was for three months. There were two invitations to subscribe in relation to this tranche. One described the deal as one whereby "[the plaintiff] buys 29 million shares in Transcu Group Limited", and at the end of the three months, the plaintiff would be paid $2.9m plus 25% of the average value of the 29m Transcu shares. [note: xii] However, a second document simply referred to the principal sum of $2.92m and stated that the "targeted return" will be 1.5% for the three-month period. [note: xiii] Both these documents were signed by the plaintiff and AMAC. In its statement of claim, the plaintiff relied on the latter to assert its claim for payment of the monies due under Tranche 13. [note: xiv]

19 Tranche 14 involved a principal sum of $3m. The initial term was for six weeks. As with Tranche 13, there were two documents relating to this tranche. One described the deal as one whereby "[the plaintiff] buys 30 million shares in Transcu Group Limited", and at the end of the six weeks, the plaintiff would be paid $3m plus 25% of the average value of the 30m Transcu shares. [note: xv] A second document simply referred to the principal sum of $3m and stated that the "targeted return" will be 1% for the six-week period. [note: xvi] Again, both these documents were signed by the plaintiff and AMAC. In its statement of claim, the plaintiff relied on the latter to assert its claim for payment of the monies due under Tranche 14. [note: xvii]

20 Tranche 16 involved a principal sum of $3.3m for an initial term of four months and a return of 5% pa. [note: xviii]

21 Tranche 18 involved a principal sum of $9m for an initial term four months and a return of 5% pa. [note: xix]

The issues

22 The appeals before me were filed by the defendants. Since the plaintiff did not appeal against the SAR's orders, the only issue before me was whether the orders setting aside the default judgment against AMAC and granting Chew leave to defend, should be conditional or unconditional, and if conditional, what the condition should be. This in turn depended on the resolution of the following sub-issues:

(a) Whether the judgment in default of appearance against AMAC was a regular judgment. If the judgment was irregular, the starting position would be to set it aside with no condition imposed: *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 ("*Mercurine*") at [74]. If the judgment was regular, whether a condition should be imposed would depend on the answer to the sub-issue in (b).

(b) Whether the defence was "shadowy" or called for some demonstration of commitment on the part of the defendants to the claimed defence. A condition should be imposed if this was the case, but not otherwise.

Whether the judgment in default of appearance against AMAC was a regular judgment

23 As AMAC did not enter an appearance within the time specified under the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules"), the plaintiff proceeded to enter judgment in default of appearance. In accordance with O 13 r 7 of the Rules, the plaintiff filed a Request to Enter Default Judgment ("the Request") against AMAC on 22 October 2014 at 4.11pm. The judgment which the plaintiff sought to enter included accrued interest of $4,645,904 (see [2] above). On 24 October 2014, the Duty Registrar issued a direction to the plaintiff to provide documents to support the claim for the accrued interest, by 30 October 2014. On the same day (*ie*, 24 October 2014), the plaintiff's solicitor attended before the Duty Registrar with the relevant documents supporting the computation of the interest amount. The Duty Registrar was satisfied with the explanation given and the default judgment against AMAC was extracted. The judgment reflected the filing date and time as 22 October 2014 at 4.11pm.

24 On 27 October 2014, AMAC's attempt to enter appearance was rejected by the Registry since judgment had been entered against AMAC.

25 AMAC submitted that the default judgment should be set aside as of right because it was an irregular judgment. AMAC submitted that the default judgment was irregular because it was approved by the Duty Registrar only on 24 October 2014. According to AMAC, the plaintiff should have re-filed the default judgment after obtaining the approval from the Duty Registrar.

26 I disagreed with AMAC's submissions. There was no basis for AMAC's submission that the plaintiff had to re-file the default judgment after the attendance before the Duty Registrar on 24 October 2014. The plaintiff's claim against AMAC was for a liquidated demand. Under O 13 r 1 of the Rules, the plaintiff did not require the court's approval to enter judgment in default of appearance against AMAC. The plaintiff had complied with the Rules by filing the Request. The Duty Registrar was entitled to satisfy himself that the documents were correct. If, *eg*, there were mistakes in the documents, the Request could be rejected and the plaintiff would then have to rectify the mistakes and re-file the Request. However, in this case, the Duty Registrar was satisfied with the explanation given by the plaintiff's solicitor and he accepted the Request.

27 I agreed with the learned SAR that O 63A r 10 of the Rules applied in the circumstances. In summary, under O 63A r 10, where a document is filed using the court's electronic filing service, and is subsequently accepted by the Registrar, it shall be deemed to have been filed on the date and at the time that the electronic transmission is received in the computer system of the electronic filing service provider. In the present case, that date and time was 22 October 2014 at 4.11pm.

28 I therefore concluded that the default judgment against AMAC was a regular judgment.

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The legal principles

29 AMAC's case involved an order setting aside a default judgment under O 13 r 8 of the Rules. Chew's case involved an order granting leave to defend under O 14 rr 3 and 4. The test for setting aside regular default judgments is whether the defendant can show triable or arguable issues, and should not be any stricter than that for obtaining leave to defend in O 14 applications: *Mercurine* at [60].

30 However, an order granting leave to defend may be made conditional if the defence is shadowy or a sham or not *bona fide* or where the court is prepared very nearly to give judgment: *Singapore Civil Procedure Volume 1* (G P Selvam gen ed) (Sweet & Maxwell, 2015) ("*SCP 2015*") at para 14/4/12. The imposition of a condition will also be appropriate when "although it cannot be said that the claimed defence is so hopeless that, in truth, there is no defence, the overall impression is such that some demonstration of commitment on the part of the defendant to the claimed defence is called for": *Abdul Salam Asanaru Pillai (trading as South Kerala Cashew Exporters) v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 ("*Nomanbhoy & Sons*") at [44]. In principle, the same tests should apply in considering whether an order setting aside a default judgment should be made conditional.

The defences

31 Before me, the defendants raised the following defences:

(a) The plaintiff's claims were unenforceable as they were in fact loans extended to Akihiko which contravened the Moneylenders Act (Cap 188, 2010 Rev Ed).

(b) The loans extended by the plaintiff were in breach of the Charities Act (Cap 37, 2007 Rev Ed).

(c) AMAC and Chew were not liable in any event as they were acting as the plaintiff's agents at all material times.

(d) Chew's guarantee was not supported by any consideration.

Whether the plaintiff breached the Moneylenders Act

32 This was the defendants' main defence. The defendants contended that in subscribing to each tranche, the plaintiff was in fact using the SOF as its vehicle to make the underlying loans, and that these underlying loans contravened the Moneylenders Act. According to the defendants, the loans were disguised as investments in the SOF because the plaintiff, being a church, did not want to be seen to be carrying out moneylending activities. The defendants submitted that the plaintiff's claims against AMAC were therefore unenforceable and it followed that the plaintiff's claims against Chew on his guarantee were also unenforceable.

33 The law is clear. Section 5(1) of the Moneylenders Act prohibits anyone from carrying on or holding himself out as carrying on the business of moneylending unless the moneylender is licensed, or is an excluded or exempt moneylender. Under s 14(1) of the Moneylenders Act, it is an offence to contravene or assist in the contravention of s 5(1). Under s 14(2)(*a*), any contract for a loan by an unlicensed moneylender and any guarantee or security given for such a loan shall be unenforceable.

34 As interest was charged on the underlying loans, the defendants also relied on the presumption under s 3 of the Moneylenders Act that the plaintiff was therefore a moneylender.

35 The following evidence supported the defendants' contention that the plaintiff had used the SOF as its vehicle to make the underlying loans:

(a) The object of the SOF seemed to be to enable the plaintiff to lend money for high returns. The SOF was set up as a result of the initial request by Chee Eng for a $5m short term bridging loan, and Chew had proposed to Ye Peng that the SOF be set up "for deals like this". The plaintiff had agreed to Chew's proposal and had invested in Tranche 1 knowing that the monies provided by the plaintiff would be used to make the underlying loan. The plaintiff's knowledge was evident because Sharon's emails sent to the investment committee and the Board on 9 March 2009 (see [8] above) had linked Tranche 1 to the underlying loan.

(b) In her email dated 25 March 2009 to the Board, [note: xx] Sharon circulated Chew's proposal regarding a request (apparently from a major shareholder of Transcu) for a $10m loan for four months with a 5% yield (*ie*, 15% pa). Chew proposed a loan of $7m first, and remarked that "[t]his level of interest rates will not remain so high for long …. we should capitalise on it while it lasts". This email corresponded to the plaintiff's subsequent subscription to Tranche 2 which was for $7m for four months from 27 March 2009 at 5% for the four-month term (*ie*, 15% pa). [note: xxi]

(c) In an email dated 4 November 2009, Chew gave a proposal to the plaintiff regarding a loan of $1.2m to Chee Eng for three months (subsequently, this was changed to four months) at 12% pa. [note: xxii] Chew proposed structuring the loan as a purchase of Transcu shares from Chee Eng with an option to Chee Eng to buy back the shares in three months at a price that would include the interest component. As Chew had explained then, "[i]n effect these transactions lead to a collateralised loan of $1.2m to [Chee Eng] with repayment of the loan principal plus interest effected through him buying back the shares at a pre determined price". Chew's email was circulated to the plaintiff's Board. The plaintiff subscribed to Tranche 12 [note: xxiii] with the knowledge that the underlying loan was the collaterised loan to Chee Eng.

(d) On 23 November 2009, Ye Peng himself asked the Board to approve a $350,000 loan to one Charlie Lay for three months at 3% (*ie*, 12% pa). [note: xxiv] In his email to the Board, Ye Peng said that he had spoken to Chew and Pastor Kong Hee, the founder of the plaintiff. This loan was made using the SOF; the plaintiff subscribed to Tranche 15, [note: xxv] knowing that the underlying loan was the loan to Charlie Lay.

36 The defendants also suggested that the plaintiff was no stranger to moneylending activities, having previously extended loans to a company called Pacific Radiance Ltd ("PRL"). The plaintiff's chairman, Mr John Lam, was the chief financial officer of PRL. [note: xxvi] The defendants referred to an email dated 9 December 2008 [note: xxvii] in which Mr John Lam had sought (on behalf of PRL) a 30-day short term loan from the plaintiff. PRL offered to pay interest at 10% pa for the loan. Interestingly, in Chew's proposal circulated by Sharon on 25 March 2009 (see [35(b)]), Chew had also noted that PRL "does not need any financing till May, so we have more than enough to invest", [note: xxviii] suggesting that the plaintiff was then also providing, or considering to provide, financing to PRL.

37 The plaintiff claimed that it had looked to AMAC and had transacted only with AMAC with no

knowledge of the nature of the underlying transactions. However, the plaintiff's disavowal of any knowledge of the underlying loans was inconsistent with the documentary evidence, some of which were documents that originated from the plaintiff itself.

38 The plaintiff next referred to *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] 1 SLR(R) 733 ("*City Hardware*") and submitted that even if it could be said to have made the underlying loans, the Moneylenders Act was not intended to apply to such loan transactions. The plaintiff argued that the Moneylenders Act was not intended to be used by entities such as AMAC or sophisticated commercial men such as Chew to escape liability. The plaintiff relied on certain statements by the court in *City Hardware* at [19] to [22], [47] and [50] on the rationale behind the Moneylenders Act. In summary, the court in *City Hardware* emphasised that the Moneylenders Act should not be used to impede legitimate commercial intercourse or the legitimate financial activity of commercial entities. Suffice it for me to say that based on the evidence produced so far in the present case (which I deal with at [44] below), it would be questionable whether the plaintiff's participation in the underlying loan transactions could properly be described as the sort of legitimate financial activity envisaged in *City Hardware*.

39 Finally, the plaintiff submitted that even if it could be said to have carried on the business of moneylending, it was exempted from the need to obtain a licence under s 5(1) of the Moneylenders Act because it qualified as an "excluded moneylender" under s 5(1)(*b*) of the Moneylenders Act. The plaintiff argued that it fell within paras (*e*)(ii) and/or (*f*) of the definition of "excluded moneylender" in s 2 of the Moneylenders Act.

40 Under para (*e*)(ii), "any person who lends money solely to accredited investors within the meaning of section 4A of the Securities and Futures Act (Cap. 289)" would be an excluded moneylender. However, no evidence was produced before me to show that the borrowers were "accredited investors".

41 Under para (*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" would be an excluded moneylender. It was common ground that the plaintiff's primary object was not the lending of money. The question was whether the lending of money in this case could be said to be in the course of, and for the purposes of, the plaintiff's business as a church. The defendants referred to *Premor Ltd v Shaw Brothers* (*A Firm*) [1964] 1 WLR 978 ("*Premor*") and submitted that the plaintiff would not fall within para (*f*).

42 In *Premor*, the plaintiff, a hire-purchase company, and the defendant, a motorcar dealer firm, carried on a course of dealing in normal hire-purchase transactions. In addition, they entered into certain "stocking transactions" whereby the plaintiff gave loans to the defendants. Interest on these loans exceeded 60% pa. The plaintiff sued in respect of two such loans. The defendants raised the defence of illegal moneylending under the English Moneylenders Acts, 1900-27. The plaintiff argued that it was excluded from the definition of "moneylender" under an exception which was similarly worded as para (*f*) of the definition of "excluded moneylender" in our Moneylenders Act. The plaintiff's case was that the loans were made in the expectation that they would enable the defendant to acquire more cars, make more sales, and in doing so, increase the hire-purchase business which the defendant brought to the plaintiff. The English Court of Appeal held as follows:

(a) For the loans to be "made in the course of" the plaintiff's business, they had to be associated with a transaction of that business so as to be linked with it. In this case, the loans were not linked with a specific car, or with any hire-purchase transaction.

(b) For the loans to be made "for the purposes of" the plaintiff's business, the purpose of the loans must be to promote, or directly to help, the principal business of the plaintiff and not for obtaining profits on the loans (*per* Diplock LJ at 987). In this case, the principal object of the plaintiff was not to help its principal business but simply to lend money to a customer who was prepared to pay a high rate of interest (*per* Denning LJ at 983).

The court therefore concluded that the plaintiff did not fall within the exception.

43 I agreed with the defendants' submission. The decision in *Premor* is sound. In my view, the loans in the present case could hardly be said to have been made in the course of and for the purposes of the plaintiff's business as a church. The loans did not seem to have been associated with, and did not seem to have directly furthered or facilitated, the operations and activities of the church. It appeared that the purpose of the loans was simply to earn a high rate of interest.

44 The totality of the evidence suggested that the SOF was set up to enable the plaintiff to participate in the underlying loans. Each invitation to the plaintiff to subscribe to a SOF tranche (with the exception of Tranche 18 which will be dealt with in greater detail later at [46]–[47] below) was triggered by a request for a loan. Each underlying loan was for a short term and at a high interest rate, and the evidence suggested that the plaintiff was aware of the underlying loans and how they were linked to each tranche it was subscribing for. In my view, whether the plaintiff was using the SOF to make the underlying loans, and whether the plaintiff's actions contravened the Moneylenders Act, were triable issues. These issues clearly involved disputes of fact that ought to be decided at a trial.

45 However, a crucial part of the defendants' illegal moneylending defence was the existence of the underlying loans. The defendants' case was that the illegal moneylending arose from the plaintiff's participation in the underlying loans. It was not their case that the plaintiff was engaging in illegal moneylending by making loans to AMAC. For this reason, I concluded that with respect to the plaintiff's claim in the present action, the defence of illegal moneylending was only relevant to the First, Second and Third Outstanding Tranches (*ie*, Tranches 13, 14, and 16). The evidence suggested that these tranches involved underlying loans to Akihiko – see [12] and [13] above. In my view, the defence of illegal moneylending with respect to Tranches 13, 14 and 16 was far from shadowy.

46 The position was very different in the case of the Fourth Outstanding Tranche (*ie*, Tranche 18). There was no evidence of any underlying loan linked to Tranche 18. On the contrary, AMAC clarified in writing on 17 November 2011 that Tranche 18 carried a fixed return of 8% pa and explained to the plaintiff that:

> … Although the investment principal of $9m was used to purchase shares in Transcu Group Limited, those shares were purchased and owned in the name of AMAC Capital, which therefore undertakes the market risk on the purchased shares. [The plaintiff], by contracting to receive a fixed return, does not participate in the potential gains or losses arising from [the] price fluctuation of the shares, and neither does it own the shares. … [note: xxix]

47 AMAC's explanation showed that Tranche 18 was not connected to any underlying loan. Instead, AMAC had used the $9m to invest in Transcu shares for itself. I noted also that in its letter dated 30 October 2011, the plaintiff's request for confirmation of the existence of an underlying loan to Akihiko related only to Tranches 13, 14, 16 and 17 – see [12] above. There was no mention of any underlying loan in connection with Tranche 18. AMAC's confirmation in response to the plaintiff's request also did not mention any underlying loan for Tranche 18 – see [13].

48 The defendants' claim that Tranche 18 involved an underlying loan to Akihiko was a bare allegation. The defendants were not able to point me to any document that supported their contention. The defendants' own document showed that there was no underlying loan where Tranche 18 was concerned. In my view, the defence of illegal moneylending with respect to Tranche 18 fell within the realm of shadowy defences.

Whether the plaintiff breached the Charities Act

49 The defendants' only submission to me on this point was that if the plaintiff's conduct breached the Moneylenders Act, such conduct would also breach the Charities Act. No submissions were made as to the provisions that were breached nor whether any such breach necessarily meant that the plaintiff's claims were unenforceable. In the circumstances, it was unnecessary for me to dwell on this defence.

Whether the defendants were acting as the plaintiff's agents

50 The defendants argued that they were not liable to the plaintiff because they were merely acting as the plaintiff's agents at all material times. The defendants relied on the fact that the statement of claim pleaded the following:

(a) pursuant to an agreement dated 25 July 2007 ("the Appointment Agreement"), the plaintiff appointed AMAC "as its Investment Manager to manage the Plaintiff's investments according to the Plaintiff's investment objectives" (at para 4); and

(b) on 17 March 2009, AMAC "in its capacity as the Plaintiff's investment manager, solicited the Plaintiff to participate in [the SOF]" (at para 5).

The defendants pointed out that under the Appointment Agreement, AMAC shall not be liable for losses in the absence of negligence or wilful misconduct.

51 I disagreed with the defendants. In my view, the defendants' reliance on the Appointment Agreement was misplaced. The SOF was governed by the SOF Agreement and did not fall within the Appointment Agreement. Under the SOF Agreement, AMAC had guaranteed the repayment of the capital and interest in each tranche to the plaintiff. Even if AMAC was acting in its capacity as the plaintiff's investment manager when it solicited the plaintiff to participate in the SOF, in my view, that did not mean that the SOF could not be set up as a structure under which AMAC undertook principal liability to the plaintiff.

Whether Chew's guarantee was supported by consideration

52 I disagreed with the defendants' submission that there was no consideration for the guarantee given by Chew. The email from Ye Peng to Chew, which Chew replied to on 14 March 2012 (see [15] above) showed that the guarantee was one of the conditions for the revised payment schedule. The subject heading for the email itself was "Terms of reschedule". The email clearly supported the plaintiff's case that Chew's guarantee was given in consideration of the plaintiff forbearing to demand immediate payment of all sums due.

Conclusion

53 For the reasons set out above, I agreed with the SAR that the orders with respect to the Fourth Outstanding Tranche (*ie*, Tranche 18) should be conditional.

54 The plaintiff submitted that the condition should require the defendants to provide security in the sum of $9m which was the principal sum owing under Tranche 18. The defendants submitted that they were unable to put up any substantial amount as security, citing a criminal trial that Chew was involved in as one of the reasons. The defendants proposed security in the sum of $50,000.

55 It was common ground that the court should not impose a condition which the defendants would find impossible to meet: *Nomanbhoy & Sons* at [44]; *SCP 2015* at 14/4/12. In the present case, the defendants did not provide any evidence in this regard apart from the oral submission that they could only put up $50,000 as security. I decided that security in the sum of $1.5m would (to borrow the language used in *Nomanbhoy & Sons*) be reasonable demonstration of the defendants' commitment to the claimed defence.

[note:] Plaintiff's Bundle of Affidavits, p 537 at para 19; Chew's defence at para 21.

[note: i] Plaintiff's Bundle of Affidavits, p 57 at para 40; p 353 at para 71.

[note: ii] Plaintiff's Bundle of Affidavits, pp160-163, 402, 541-553.

[note: iii] Plaintiff's Bundle of Affidavits, p 544.

[note: iv] Plaintiff's Bundle of Affidavits, p 547.

[note: v] Plaintiff's Bundle of Affidavits, pp 89-91.

[note: vi] Plaintiff's Bundle of Affidavits, p 262.

[note: vii] Plaintiff's Bundle of Affidavits, p 406.

[note: viii] Plaintiff's Bundle of Affidavits, p 85.

[note: ix] Plaintiff's Bundle of Affidavits, p 84.

[note: x] Statement of claim, para 39.

[note: xi] Plaintiff's Bundle of Affidavits, pp 206-207.

[note: xii] Plaintiff's Bundle of Affidavits, p 551.

[note: xiii] Plaintiff's Bundle of Affidavits, p 160.

[note: xiv] Statement of claim, para 11.

[note: xv] Plaintiff's Bundle of Affidavits, p 552.

[note: xvi] Plaintiff's Bundle of Affidavits, p 161.

[note: xvii] Statement of claim, para 12.

[note: xviii] Plaintiff's Bundle of Affidavits, p 162.

[note: xix] Plaintiff's Bundle of Affidavits, p 163.

[note: xx] Plaintiff's Bundle of Affidavits, p 557-558.

[note: xxi] Plaintiff's Bundle of Affidavits, p 542.

[note: xxii] Plaintiff's Bundle of Affidavits, p 380.

[note: xxiii] Plaintiff's Bundle of Affidavits, p 397.

[note: xxiv] Plaintiff's Bundle of Affidavits, p 382.

[note: xxv] Plaintiff's Bundle of Affidavits, p 400.

[note: xxvi] Plaintiff's Bundle of Affidavits, p 350 at para 61.

[note: xxvii] Plaintiff's Bundle of Affidavits, pp 383-384.

[note: xxviii] Plaintiff's Bundle of Affidavits, p 557.

[note: xxix] Plaintiff's Bundle of Affidavits, p 83.