IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 216

Companies Winding Up No 200 of 2015
(Summonses Nos 4766 of 2016, 303 of 2017 and 2281 of 2017)

In the matter of the Companies Act (Cap 50)

And

In the matter of Ivy Lee Realty Pte Ltd

Between

MWA Capital Pte Ltd

… *Plaintiff*

And

Ivy Lee Realty Pte Ltd

… *Defendant*

(1) Leow Quek Shiong
(2) Gary Loh Weng Fatt

… *Liquidators*

GROUNDS OF DECISION

[Companies] — [Winding up]

[Credit and Security] — [Money and moneylenders] — [Interest]

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MWA Capital Pte Ltd
v
Ivy Lee Realty Pte Ltd (in liquidation)

[2017] SGHC 216

High Court — Companies Winding Up No 200 of 2015 (Summonses Nos 4766 of 2016, 303 of 2017 and 2281 of 2017)
Woo Bih Li J
24 April; 19 May 2017

30 August 2017

Woo Bih Li J:

Introduction

1 On 19 May 2017, I dismissed a challenge by two creditors of Ivy Lee Realty Pte Ltd ("the Company") against the decision of the liquidators of the Company to affirm the interest rates charged by another creditor, MWA Capital Pte Ltd ("MWA"), in MWA's proof of debt. MWA is a licensed moneylender. The two creditors are Evan Lim Industrial Warehousing Development Pte Ltd ("Evan Lim") and LR Properties Pte Ltd ("LR Properties"). I will refer to them collectively as "the Opposing Creditors". They have each filed an appeal against my decision.

Background

2 The Company was controlled by Lee Siew Noi Ivy ("Ivy Lee"). It was developing a condominium at 6, 8 and 10 Devonshire Road and at 130 Killiney Road. These various addresses have been collectively referred to as "the Devonshire 8 Property".

3 The project ran into financial difficulties. Although the Company had borrowed from United Overseas Bank Limited ("UOB"), it continued to borrow from others. The loan in question was the one granted by MWA.

4 On 4 July 2014, the Company signed a loan agreement with MWA for $10 million ("the Loan Agreement"). The Company also executed:

(a) an undated Deed of Assignment ("the Deed of Assignment") whereby it assigned all its rights, titles and interest in the Devonshire 8 Property (excluding unit #05-01) to MWA;

(b) an undated Option to Purchase in which the Company granted MWA the right to buy unit #05-01 at the Devonshire 8 Property; and

(c) a Note of Contract dated 4 July 2014 in relation to the loan.

5 Ivy Lee also executed a personal guarantee dated 4 July 2014 in favour of MWA.

6 On 10 December 2014, a charge was registered by MWA pursuant to the Deed of Assignment.

7 On 26 March 2015, MWA commenced Suit No 285 of 2015 ("Suit 285") against the Company following the Company's failure to repay MWA's loan.

8 On 27 March 2015, MWA commenced Suit No 289 of 2015 against Ivy Lee on her guarantee. Both suits were then consolidated (with a third action against another company, U-Asia Pte Ltd) in Suit 285.

9 On 3 August 2015, I granted MWA summary judgment on part of its claim against the Company with unconditional leave to the Company to defend the balance of MWA's claim.

10 As the Company failed to pay MWA the amount awarded under the summary judgment, the Company was ordered to be wound up on 9 November 2015. Suit 285 against the Company was stayed but continued against Ivy Lee and U-Asia Pte Ltd.

11 Subsequently, Ivy Lee and U-Asia Pte Ltd entered into a settlement agreement dated 25 January 2016 with MWA ("the Settlement Agreement") pursuant to mediation. The Company was not a party to the Settlement Agreement.

12 The liquidators of the Company have sold the Devonshire 8 Property and the sale was completed on 8 July 2016. The sale price was $25.9 million. The net sale proceeds, after full payment to UOB, the mortgagee, were $14,441,228.74. Another $18,431.84 was received by the liquidators from other sources. Therefore, the sum available for distribution to creditors was $14,459,660.58.

13 The liquidators received the following proofs of debts:

S/No	Name of Creditor	Amount
(1)	MWA	Original proof of debt: $20,096,551.75 First revised proof of debt: $23,025,181.95 Second revised proof of debt: $20,944,618.65
(2)	Ivy Lee	Original proof of debt: $2,548,696.06 Revised proof of debt: $10,748,696.06
(3)	Mdm Ong Hwee Yin	$ 1,100,000.00
(4)	Evan Lim	$ 4,115,031.00
(5)	LR Properties	$ 4,387,328.40
(6)	Legal Solutions LLC	$ 69,673.20
(7)	EPM Partners	$ 1,800.00
(8)	Hilborne Law LLC	$ 19,792.50
(9)	Commissioner of Stamp Duties (IRAS)	$ 253,603.00
	Total:	$41,640,542.81

14 On 30 September 2016, the liquidators filed Summons No 4766 of 2016 ("SUM 4766/16") in the winding up proceedings. The first prayer for relief sought an order that the liquidators be authorised to recognise the charge which MWA had registered.

15 The second prayer for relief sought an order that the liquidators be authorised to repay monies to MWA as a secured creditor out of the net proceeds of sale of the Devonshire 8 Property and monies received in relation to that property with any balance to be distributed as dividends to unsecured creditors.

16 On 20 January 2017, the liquidators filed Summons No 303 of 2017 ("SUM 303/17") in the winding up proceedings. The first prayer for relief was for an order authorising the liquidators to pay MWA $12 million out of the net proceeds of sale of the Devonshire 8 Property and monies received in relation to that property in full satisfaction of the proof of debt lodged by MWA.

17 The two summonses came for hearing before me on 24 April 2017. The hearing was then adjourned to 19 May 2017. Before 19 May 2017, Evan Lim filed Summons No 2281 of 2017 ("SUM 2281/17") on 18 May 2017. The third prayer for relief in SUM 2281/17 was for an order to reverse or modify the liquidators' decision to affirm the interest rates charged by MWA. All three summonses were heard on 19 May 2017.

18 Apparently the validity of the charge registered by MWA was initially in issue. This was because the Deed of Assignment was initially undated although it was executed on 4 July 2014. It was undated apparently because the Company had agreed with UOB not to create any other security over the Devonshire 8 Property without UOB's consent. Subsequently, MWA dated the Deed of Assignment on 8 December 2014 and registered the charge on 10 December 2014, more than 30 days after the date of execution (*ie*, 4 July 2014).

19 By the date of the first hearing before me (24 April 2017), the validity of MWA's charge was no longer in issue.

20 There was also a second issue as to whether previous payments made by the Company to MWA should have been applied towards payment of principal or interest. MWA had applied the payments towards interest and not principal. By the time of the first hearing before me, this was also no longer in issue, *ie*, it was accepted that MWA was entitled to apply the previous payments towards interest and not principal, subject to one qualification which I will mention later.

21 A third issue was whether LR Properties could claim a resulting trust for the monies it had expended. This claim was dropped at the first hearing before me.

22 A fourth issue was whether the interest rate stated in the Settlement Agreement was applicable to the Company. At the first hearing before me, the parties (*ie*, the liquidators, MWA and the Opposing Creditors) agreed that as the Company was not a party to the Settlement Agreement, it did not bind the Company.

23 By the date of the second hearing (19 May 2017), the remaining issue before me was whether the interest rates charged by MWA under the Loan Agreement should be upheld. The liquidators were of the view that they should. Naturally MWA was also of the view that the rates should be upheld. The Opposing Creditors disagreed.

24 Prayer 3 of SUM 2281/17 was therefore the prayer in contention. LR Properties supported the summons, which had been filed by Evan Lim. After

hearing submissions, I dismissed that prayer. Following from that, I allowed prayers 1, 2 and 3 of SUM 4766/16.

25 I also granted leave to the liquidators to withdraw SUM 303/17 since they were not proceeding with that summons.

26 As mentioned above, the Opposing Creditors have each filed an appeal against my decision to dismiss the challenge to MWA's interest rates under the Loan Agreement.

27 I come back to the qualification I mentioned at [20]. If I had reduced the interest rates of MWA, then a question might arise as to whether any of the previous payments or part thereof by the Company should be applied towards the principal if the payments made were more than enough to pay the reduced interest rates. As I did not reduce the interest rates, the question became academic.

The Moneylenders Act

28 The relevant provisions in s 23 of the Moneylenders Act (Cap 188, 2010 Rev Ed) ("MLA") state:

> **Re-opening of certain transactions**
>
> **23.**—(1) When proceedings are brought in any court by a licensee for the recovery of a loan or the enforcement of a contract for a loan or any guarantee or security given for a loan, and the court is satisfied that the interest or late interest charged in respect of the loan is excessive and that the transaction is unconscionable or substantially unfair, the court shall re-open the transaction and take an account between the licensee and the person sued.
>
> (2) In taking an account under subsection (1), the court may re-open any account already taken between the parties to the proceedings and relieve the person sued from payment of any

sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest and late interest as the court, having regard to the risk and all the facts and circumstances of the case (including facts and circumstances arising or coming to the knowledge of any party after the date of the transaction), may determine to be reasonable.

(3) In relieving the person sued under subsection (2), the court may, without prejudice to its power to grant any further or other equitable relief —

(*a*) order the licensee to repay any excess paid to him;

(*b*) set aside either wholly or in part, or revise or alter, any guarantee or security given or the contract for the loan; and

(*c*) if the licensee has disposed of the security, order the licensee to indemnify the borrower or other person sued for the loss of the security.

(4) Any court shall have and may exercise the powers referred to in subsections (1), (2) and (3) in relation to proceedings for relief brought by a borrower, a surety or other person liable to repay a loan to a licensee, notwithstanding —

(*a*) any provision or agreement to the contrary;

(*b*) that the time for repayment of the loan or any instalment thereof may not have arrived; and

(*c*) that the licensee's right of action for the recovery of the loan is barred.

(5) Where a licensee has filed, in the bankruptcy of a borrower or surety, a proof of debt arising from a loan granted by him, the Official Assignee may exercise such powers as may be exercised by a court under this section when assessing whether the debt or liability is proved and its value.

(6) Where in any proceedings in court referred to in subsection (1) or where proof of debt has been filed as referred to in subsection (5), it is found that the interest or late interest charged on any loan exceeds such maximum rate of interest or late interest as may be prescribed for the loan, the court or the Official Assignee, as the case may be, shall presume for the purposes of this section, unless the contrary is proved, that the interest or late interest charged in respect of the loan is excessive and that the transaction is unconscionable or substantially unfair.

> (7) Subsection (6) shall be without prejudice to the powers of a court under this section where the court is satisfied that the interest or late interest charged under the circumstances, although not exceeding such maximum rate of interest or late interest as may be prescribed for the loan, is excessive or that the transaction is unconscionable or substantially unfair.
>
> …

29 Under s 327(2) of the Companies Act (Cap 50, 2006 Rev Ed), the same rules with regard to the rights of creditors and provable debts in bankruptcies also apply in the winding up of an insolvent company. Thus, it was not disputed that the liquidators have the same power as the Official Assignee under s 23(5) MLA.

Did the Opposing Creditors have *locus standi* to object?

30 It will be recalled that under s 23(4) MLA, the powers stated in subsections (1), (2) and (3) may be exercised in relation to proceedings for relief brought by "a borrower, a surety or other person liable to repay a loan to a licensee".

31 In so far as the borrower was concerned, the liquidators of the Company were not objecting to the interest rates charged by MWA. Furthermore, the Opposing Creditors did not claim to be a surety or other person liable to repay the loan to MWA.

32 Nevertheless the Opposing Creditors relied on s 315 Companies Act, which states:

> **Appeal against decision of liquidator**
>
> **315.** Any person aggrieved by any act or decision of the liquidator may apply to the Court which may confirm, reverse or modify the act or decision complained of and make such order as it thinks just.

33 Their position was that by virtue of s 315, they were entitled to challenge the decision of the liquidators even though that would involve a challenge relying on ss 23(1), 23(2), 23(3) and 23(4) MLA.

34 Neither the liquidators nor MWA challenged the position of the Opposing Creditors in this regard and hence it was not necessary for the court to decide whether such a position was correct.

The exercise of the court's power under s 315 Companies Act

35 I will now refer to various cases which MWA relied on in respect of the exercise of the court's power under s 315 Companies Act.

36 MWA relied on the Court of Appeal decision in *Ho Wing On Christopher and others v ECRC Land Pte Ltd (in liquidation)* [2006] 4 SLR(R) 817 at [46] to submit that the court exercises supervisory jurisdiction over a liquidator under s 315. I note that the Court of Appeal also said that the court is conferred a broad power to supervise all aspects of a liquidator's conduct.

37 In *Leon v York-O-Matic, Ltd and Others* [1966] 1 WLR 1450 ("*Leon*"), Plowman J said at 1454 that "the court will not interfere unless the trustee is doing that which is so utterly unreasonable and absurd that no reasonable man would so act". That proposition also applied to the conduct of a liquidator.

38 Plowman J also cited with approval from *Re A Debtor (No 400 of 1940); Ex parte The Debtor v Dodwell (The Trustee)* [1949] 1 All ER 510 ("*Dodwell*") where Harman J said at 512C–D:

> I need not, I think, attempt to define what these circumstances are. They cannot, I think (in the absence of fraud) justify interference in the day to day administration of the estate, nor

> can they entitle the bankrupt to question the exercise by the trustee in good faith of his discretion, nor to hold him accountable for an error of judgment. Administration in bankruptcy would be impossible if the trustee must answer at every step to the bankrupt for the exercise of his powers and discretions in the management and realisation of the property.

39 Even then, I note that Plowman J did go on to consider the transaction in question before him and was not persuaded that an interlocutory injunction should be granted. He was not satisfied that a case had been made that an intended sale by a liquidator was at an undervalue.

40 In *Re Mohamed Yunus Valibhoy, ex parte Bank of Credit and Commerce Hong Kong Ltd* [1994] 3 SLR(R) 504 ("*Valibhoy*"), the High Court cited *Leon* and *Dodwell* with approval at [32].

41 In *Low Hua Kin v Kumagai-Zenecon Construction Pte Ltd (in liquidation) and another* [2000] 2 SLR(R) 689, the provisional liquidators of a company had sold certain shares *en bloc*. This sale was subsequently challenged in court. The Court of Appeal said at [48]:

> In our view, the propriety or reasonableness of the provisional liquidators' action in disposing of all the shares *en bloc* should not be judged with the benefit of hindsight, but in the context of the circumstances then prevailing. These circumstances have been discussed above and it is unnecessary to rehearse them here. Suffice here to say that in those circumstances, the provisional liquidators made a commercial decision and sold the shares *en bloc* in a married deal. Where such a decision is challenged, as was challenged here, the court must approach the matter on the basis that the provisional liquidators, being appointed by the court, are recognised as having both the qualifications and access to the multiplicity of information for making such a decision, and, except where bad faith is established, will treat the provisional liquidators' decision as a proper one, unless the court is satisfied that they acted in a way which no reasonable provisional liquidator should have acted: *per* McLelland J in [*Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd* (1990) 8 ACLC 39] at 44–45. It is thus not

> proper for the court to intervene and substitute its own decision for that of the provisional liquidators.

42 MWA relied on this case for the general propositions that a liquidator's decision should not be judged with the benefit of hindsight and that the court will treat the decision as a proper one unless bad faith is established or the liquidator acted in a way in which no reasonable liquidator should have acted.

43 However, in my view, MWA omitted an important qualification. The views expressed in that case were in the context of a commercial decision. This was similarly the case in *Leon* and *Dodwell* and also in the Australian case of *Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd* (1990) 8 ACLC 39, cited by the Court of Appeal. Although *Valibhoy* was a case involving a challenge to an adjudication of a debt, that case was not binding on this court.

44 Where a liquidator adjudicates on the validity or quantum of a debt claimed by a creditor, he is not making a commercial decision. He is exercising a quasi-judicial function. If a court's decision on a similar issue may be set aside on the basis that the decision was wrong, I see no reason why a similar approach should not be adopted for a liquidator's adjudication.

45 Looking at the issue from another angle, if the liquidators had rejected the interest rates charged by MWA, MWA would have been entitled to challenge the adjudication. It would then not have been necessary for MWA to establish that the liquidators' decision was in bad faith or that they had acted in a way in which no reasonable liquidator would have acted.

46 Also, there is no question of considering the liquidators' decision in the present circumstances with the benefit of hindsight.

47 Accordingly, I was of the view that, in the circumstances, the exercise of the court's power under s 315 Companies Act was not as circumscribed as MWA submitted.

The discontinuance of legal action

48 MWA also argued that as the liquidators had consented to MWA's discontinuance of Suit 285, the Company and the liquidators were precluded from challenging the interest rates charged by MWA as the enforceability of such rates had already been raised in that suit. Hence, MWA argued that it would be an abuse of process for the Company or the liquidators to raise the same issue again. *A fortiori*, the Opposing Creditors were not entitled to raise the same issue.

49 I was of the view that the shoe was on the other foot. If a plaintiff were to discontinue an action, it might be argued that the discontinuance precludes the plaintiff from making the same claim again (although it is doubtful that a bare discontinuance has that effect). But a discontinuance by a plaintiff does not, by itself, preclude a *defendant* from challenging the claim should the plaintiff raise it again. If, on the other hand, MWA meant that the discontinuance of the Company's counterclaim in Suit 285 precluded the Company and the liquidators from challenging MWA's interest rates, I was of the view that a bare discontinuance does not have such an effect.

The substantive arguments under the MLA

50 With effect from 1 June 2012, under r 11(2) of the Moneylenders Rules 2009 (GN No S 72/2009) ("MLR"), the maximum rate of interest referred to in s 23(6) MLA was:

(a) 13% per annum in the case of a secured loan granted to an individual whose annual income on the date of the grant for the loan was less than $30,000; and

(b) 20% per annum in the case of an unsecured loan granted to such an individual.

51 Under r 11(3), the maximum rate of late interest referred to in s 23(6) MLA for such an individual was the effective interest rate for the amount actually disbursed.

52 There does not appear to have been a maximum interest rate for an individual borrower whose annual income was not less than $30,000 or for a borrower which was a company.

53 With effect from 1 October 2015, amendments were made to the MLR. The previous r 11 was deleted. The new rr 11(1) and 11(3) state that the maximum rate of interest and late interest referred to in s 23(6) MLA are the nominal interest rate of 4% per month. The new rr 11(2) and 11(4) state how interest and late interest respectively are to be calculated. The special provision for a borrower who is an individual earning an annual income of less than $30,000 was removed. Also, the new r 12B states that the new rr 11(1) and 11(3) do not apply to a business loan and the new r 1A defines a "business loan" to include a loan granted to a company incorporated under the Companies Act.

54 In the case of MWA's loan, the Opposing Creditors stressed that the interest rate and default interest rate were 60% and 96% per annum respectively. The effective interest rate and default interest rate were 79.59% and 151.82% per annum respectively. They submitted that such rates were excessive and that

the transaction was unconscionable or substantially unfair within the meaning of s 23(1) MLA.

55 There was a dearth of local authorities on the point. Two were brought to my attention.

56 In *Kua Hui Li v Prosper Credit Pte Ltd* [2014] 3 SLR 1007 ("*Kua*"), the plaintiff and her husband were joint tenants of the property. In matrimonial proceedings between the plaintiff and her husband, the husband agreed to transfer his rights, title and interest to the plaintiff with no payment from her. The agreement was followed by an order of court which was based on the agreement. The agreement and the order were both made on 6 November 2012.

57 On 30 January 2013, a moneylender approved a loan to the husband for $5,000. This was due to be paid on 27 February 2013. On 4 February 2013, the moneylender approved a second loan to the husband for $3,000. This was due to be paid on 3 April 2013. The plaintiff was not aware of the loans.

58 On 28 March 2013, the husband was adjudged a bankrupt. He defaulted on the loans. The moneylender lodged a caveat on the property on 28 May 2013.

59 On 16 October 2013, the plaintiff obtained the court's sanction to transfer the husband's title in the property to her. She found that the moneylender's caveat stood in the way. Accordingly, the plaintiff commenced an action to have the caveat removed.

60 The moneylender alleged that it had the consent of the husband to lodge a caveat on the property and that it had a caveatable interest in land pursuant to "agreements" it had signed with the husband.

61 The High Court noted the maximum rate of interest allowed under r 11(2) of the MLR, which was the same provision applicable in the present case. In that case, the interest (or late interest) was said to be 791.61% per annum. Even if that figure was incorrect, it was at the very least 200% per annum. Therefore, even if the husband's annual income was more than $30,000 per annum, in which case the maximum rates would not have applied, the High Court concluded that the interest rate was undoubtedly excessive and that the transaction was not just substantially unfair but grossly unfair (at [12] and [14]).

62 In so far as the moneylender in that case was relying on "agreements", in the plural, between the husband and the moneylender which allegedly gave the moneylender a caveatable interest in the property, the High Court found that there was only one written agreement although two loans had been disbursed (at [10]).

63 In any event, in light of the exorbitant interest rate charged, the High Court set aside that agreement and allowed the plaintiff's application to remove the caveat.

64 As can be seen, the High Court's judgment in *Kua* was fact-specific and did not provide much assistance to either side. However, I mention one point in *Kua* involving the scope of s 23(4) MLA. In *Kua*, the plaintiff was not one of the persons specified in s 23(4), but the court concluded that she most closely resembled "any other person liable to repay a loan to a licensee" (at [13]). I reserve my views on this opinion, which did not in any event assist the Opposing Creditors as they were not in the same position as the plaintiff in *Kua*. Indeed, the Opposing Creditors did not rely on *Kua* to establish *locus standi*. I have addressed the question of their *locus standi* at [30]–[34] above.

65 I come now to the second case, *Unilink Credit Pte Ltd v Chong Kuek Leong* [2013] SGMC 3. There, the amount borrowed from a moneylender was $8,000. The tenure of the loan was 10 months. The interest rate was 72% per annum. The late interest rate was 240% per annum. The late payment charge was $80 per day. The moneylender brought an action for repayment of the loan as the borrower had defaulted. The borrower did not enter an appearance. The moneylender applied for leave to enter judgment in default as required under O 79 r 4 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

66 The Deputy Registrar exercised his power under s 23 MLA and re-opened the transaction. He eventually allowed the moneylender 18% interest per annum both for the principal and as late payment interest. The moneylender appealed. The interest rate was raised to 24% per annum on appeal, with the Magistrate taking the view that the contractual rates were excessive and unconscionable.

67 The Magistrate referred to the observation made by Lord James of Hereford in *Samuel and Another v Newbold* [1906] AC 461, 475–476 that, "The word 'excessive' applied to interest is, of course, a relative and elastic term, impossible of absolute definition." Lord James continued at 476:

> But we know the general rate of interest in commercial transactions, and in loans on perfect security. We know the rate of interest juries are in the habit of giving in cases of adjudging damages. But in respect of ordinary loans deviation from these guides, dependent upon the facts of each case, must doubtless be expected and ought to be allowed. But such deviation must be reasonable in relation to facts.

68 The Magistrate also said at [31] that even if the interest rate charged is excessive, the court must additionally examine whether the transaction is rendered "unfair or unconscionable" as required under s 23(1) MLA.

69 At the request of the Magistrate, the moneylender's counsel obtained information on interest rates charged by banks. Based on that information, the Magistrate noted that the highest interest rates charged for an unsecured loan for a year ranged from 15.44% to 32.33% per annum (at [41]). He noted that the average was 24% per annum (rounded to the nearest 1%) (at [50]).

70 Late interest charged by credit card companies was typically around 24% per annum (at [43]).

71 The Magistrate was of the view that 24% per annum was not excessive (at [51]).

72 The Magistrate also took guidance from the decision of the Court of Appeal in *Hong Leong Finance Ltd v Tan Gin Huay and another* [1999] 1 SLR(R) 755 ("*Hong Leong Finance*"). There, the finance company had imposed 18% per annum as default interest. The High Court disallowed this as it was a penalty. The Court of Appeal considered that rate manifestly extravagant. It was out of proportion to the greatest loss that could be proved.

73 The loan in that case was secured, as noted by the Magistrate. However, I noted that *Hong Leong Finance* did not involve the MLA. Hence, I was of the view that it might not be appropriate to use it as a guide. Indeed, the Opposing Creditors did not rely on *Hong Leong Finance* to support their submissions.

74 As for the Magistrate's consideration of interest rates charged by banks and credit card companies, it was not disputed that the interest rates charged by MWA in this case were much higher than those charged by banks.

75 After my decision on 19 May 2017, the parties appeared before me again on 28 July 2017 in respect of the intended appeals by each of the Opposing Creditors. The question arose whether they required leave of court to appeal to the Court of Appeal. I decided that no leave was required. I also mentioned that even if leave had been required, I would have granted leave. In the course of submissions, counsel for MWA and also counsel for the liquidators mentioned the case of *Ang Ai Tee v Resource Credit Pte Ltd* [2017] SGHC 159 for the proposition that under s 23 MLA, there are two issues to consider:

(a) whether the interest rate is excessive; and

(b) whether the transaction is unconscionable or substantially unfair.

76 In other words, a transaction may not be unconscionable or substantially unfair even if the interest rate is excessive. The parties did not dispute such a proposition in any of the hearings before me.

77 In the case before me, the Opposing Creditors provided some information as to the interest rates charged by banks, which ranged from 0.75% per annum to 5.25% per annum. It was undisputed that MWA's rates far exceeded that charged by banks. Its rates were clearly excessive in that sense, although this was not too surprising as there was no suggestion that moneylenders would charge interest rates close to that charged by banks. Indeed, as I will elaborate later, there was evidence that other lenders who are not banks were also charging the Company high interest rates. It was also telling that even the Opposing Creditors suggested that MWA should be entitled to an interest rate between 10% and 20% per annum since MWA's loan was secured. There was also an alternative suggestion of between 20% and 30% per annum. Such interest rates are much higher than what banks charge. The real question

before me was whether the transaction in question was unconscionable or substantially unfair having regard to all the circumstances of the case.

78 An affidavit was affirmed by Gary Loh Weng Fatt on 7 December 2016 on behalf of the liquidators. The relevant paragraphs said:

> 57. The records of the Company showed that it has borrowed large sums of money over a period of time from many different parties. The Company's records showed numerous repayment of loans which included the following:-

S/No	Date of Payment	Name of Lender	Amount Paid	Remarks
(1)	28.3.12	Than Yoong Foon	$ 675,000	
(2)	29.3.12	Wong Siew Fong (and/or Mark Goh Siew Koh)	$ 405,000	
(3)	2.8.13	Shirley Ong Hwee Yin	$1,400,000	
(4)	19.8.13	Gilbert Ong Peng Koon	$4,200,000	
(5)	16.9.13	Ivy Lee (Steven Soh)	$1,000,000	
(6)	21.9.13	Ivy Lee	$ 800,000	
(7)	8.10.13	Ivy Lee	$ 26,400	
(8)	22.10.13	Ivy Lee	$ 50,000	
(9)	22.11.13	Ivy Lee (Tan Nam Guan)	$1,000,000	
(10)	12.12.13	Ivy Lee	$ 500,000	
(11)	17.12.13	Ivy Lee (Loh	$1,020,000	

S/No	Date of Payment	Name of Lender	Amount Paid	Remarks
		Nee Lam)		
(12)	3.1.14	Ivy Lee	$ 100,000	
(13)	15.1.14	Ivy Lee	$2,300,000	
(14)	17.1.14	Ivy Lee	$1,500,000	
(15)	16.3.14	Ivy Lee	$1,100,000	Cheque butt indicating payment to Peter Loh
(16)	16.3.14	Loh Nee Lam	$ 600,000	Cheque made payable to Loh Nee Lam
(17)	29.4.14	U-Asia Pte Ltd	$16,055.47	
(18)	4.7.14	LR Properties	$2,000,000	Outgoing SWIFT message dated 4 July 2014
(19)	4.7.14	Ivy Lee	$ 15,000	Cheque made payable to Ivy Lee
(20)	4.7.14	Ivy Lee	$ 176,380	Cheque made payable to Ivy Lee
(21)	7.7.14	LR Properties	$2,600,000	Cheque made payable to LR Properties

S/No	Date of Payment	Name of Lender	Amount Paid	Remarks
(22)	10.7.14	Ivy Lee	$ 90,000	
(23)	11.7.14	Ivy Lee	$ 100,000	
(24)	11.7.14	Ivy Lee	$ 300,000	
(25)	17.7.14	Ivy Lee	$ 200,000	
(26)	18.7.14	Ivy Lee	$ 15,830	
(27)	4.8.14	Evan Lim	$2,000,000	Schedule of amounts owing to Evan Lim as at 18 September 2015
(28)	11.8.14	Ivy Lee	$ 700,000	
(29)	19.8.14	Ivy Lee	$ 50,000	
		Total	**$24,939,665.47**	

…

62. Based on the inflow and outflow of monies from the Company, it appears that at least $4.6 million of the loan from MWA Capital was used by the Company to repay a loan extended from LR Properties to the Company.

63. Further, as mentioned above, the Liquidators have found that the Company had entered into various other loan agreements at high interest rates. I will elaborate on this below.

Loans from Evan Lim

64. The Liquidators' investigations show that Evan Lim provided the Company funds amounting to $5,525,020. However, the Company's general ledgers reflected Ms Ivy Lee as the person who provided the funds. Evan Lim was not recorded as a creditor of the Company.

65. A joint venture agreement dated 25 May 2011 was executed between Evan Lim and the Company where the former provided funds amounting to $5,525,020 to the Company. Subsequently, a settlement agreement dated 18 June 2014 was executed between Evan Lim and the Company where parties agreed that the sum payable by the Company to Evan Lim was $7,735,028 (the "**First Settlement Agreement**").

66. In the First Settlement Agreement, the joint venture agreement was defined as a loan agreement and a sum equivalent to 40% of the loan was repayable by the Company in 3 years' time. The Company also requested an extension of 2 months to repay the monies owed and in consideration, the sum of $773,503 was paid by the Company to Evan Lim. This sum is equivalent to 5% interest per month. Therefore, for the extension of 2 months, interest of 10% for 2 months was paid to Evan Lim. This interest rate works out to 60% per annum.

67. A second settlement agreement dated 19 June 2015 was subsequently signed between Evan Lim, the Company, Ms Ivy Lee and Chua Choy Soon (the "**Second Settlement Agreement**"). Under this Second Settlement Agreement, default interest of 18% per annum was agreed to be paid.

68. The loan from Ms Ivy Lee was subsequently re-classified in the Company's accounts and Evan Lim was reflected as the creditor.

69. Based on the inflow and outflow of monies, it appears that at least $2 million of the loan from MWA Capital was used by the Company to repay Evan Lim.

70. …

Loan from Mdm Ong Hwee Yin Shirley

71. Another creditor of the Company is Mdm Ong Hwee Yin Shirley. According to an agreement dated 13 August 2013 signed between Mdm Ong and the Company, Mdm Ong lent $1,750,000 to the Company. In return, the Company agreed to pay Mdm Ong a sum equivalent to 40% of the amount lent within 15 months. …

Loan by the Company to Devonshire Suites Pte Ltd

72. The Liquidators have noted that a loan agreement dated 14 July 2015 was signed between the Company and Devonshire Suites Pte Ltd where the Company lent Devonshire Suites Pte Ltd a sum of $1 million at an interest rate of 4% per 30 days which is equivalent to 48% per annum. …

79 On the other hand, Lim Hwee Hoon, a director of Evan Lim, executed an affidavit on 17 May 2017 to elaborate that under a loan agreement between Evan Lim and the Company dated 25 May 2011, the Company had agreed to pay Evan Lim an additional 40% over three years. This worked out to 13.33% per year.

80 As for the payment of $773,503 to Evan Lim, Lim Hwee Hoon said that the Company had asked for an additional two months to pay an outstanding debt of $7,735,028 in return for payment of $773,503. Such a payment in consideration for the additional two months led to the mistaken belief that Evan Lim charged the Company an interest rate of 60%, *ie*, 5% per month as alleged by the liquidators. I did not think it was wrong to view that payment as being calculated on the basis of an interest rate of 5% per month.

81 I set out the arguments of the Opposing Creditors and the factors which they say the liquidators took into account, as stated in paras 15 and 16 of the written submissions from Evan Lim dated 19 May 2017:

> 15. Indeed, MWA's risk was low and/or was not commensurate with the excessive interest rates imposed by it under the agreement. This is because the loan was amply secured. The pertinent facts are as follows:
>
> (a) The Company granted MWA a fixed charge over all its rights, titles and interest in the Devonshire 8 Property;
>
> (b) The Company procured U-Asia to give a fixed charge over all of U-Asia's rights, titles and interest in the Devonshire 12 Property;
>
> (c) The Company procured Ms Ivy Lee to grant MWA a deed of assignment on her Eng Kong Garden property;
>
> (d) The Company granted MWA an irrevocable call option to require the Company to sell to MWA, Devonshire 8 at a price of $1,250 per square foot;

(e) The Company procured U-Asia to grant MWA an irrevocable call option to require U-Asia to sell to MWA, Devonshire 12 at an aggregate price of $4 million;

(f) The Company procured Ms Ivy Lee to grant MWA an irrevocable call option to require Ms Ivy Lee to sell her Eng Kong Garden property to MWA at an aggregate price of S$4.5m; and

(g) Ms Ivy Lee provided a guarantee for all monies due or owing or remaining unpaid pursuant to the Loan Agreement.

16. The Liquidators' position is that the interest and default interest rates are not excessive and that the Loan Agreement is not unconscionable or substantially unfair in relation to the interest rates. They advanced the following eight factors:

(a) The Loan Agreement between the Company and MWA was a business loan entered into at arm's length;

(b) At the material time, the Company was legally represented by solicitors and received the benefit of legal advice;

(c) The loan obtained by the Company from MWA and the interest agreed to be paid reflected the contractual wishes of the parties at the material time;

(d) There was no evidence of MWA asserting undue pressure or undue influence on the Company when the terms of the Loan Agreement were negotiated and agreed;

(e) The Company had previously entered into a number of other loan agreements with various parties at similarly high interest rates;

(f) The Company was fully aware of the interest rates and default interest rates applicable under the Loan Agreement given that Ivy Lee had signed the Note of Contract;

(g) The Company had accepted and acknowledged that high interest rates had to be offered to lenders in order to secure loans. This was particularly so in MWA's case where the sums borrowed were very substantial; and

(h) It appeared that but for such loans obtained from lenders, the Company would have become insolvent earlier and the Company was only able to

> continue operations for a period of time due to the large amount of loans obtained.
>
> [underline in original]

82 It seemed to me that many of the factors which the liquidators relied on overlapped. For example, the fact that it was a business loan overlapped with the factors that the loan reflected the contractual wishes of the parties and that there was no evidence of undue pressure or undue influence from MWA. These factors also overlapped with the factors that the Company was fully aware of the interest rates and had accepted them in order to continue operations for a period of time. The factor that the Company was represented by solicitors was not a strong reason to uphold the transaction as there was no suggestion that the solicitors had advised the Company whether to accept such rates.

83 I add that the absence of undue pressure or undue influence from MWA was also irrelevant to the consideration of the question of whether the transaction was unconscionable or substantially unfair under the MLA. Had there been undue pressure or undue influence, the loan agreement could have been challenged on grounds other than those stated in the MLA. In other words, considerations under the MLA come into play on the premise that the loan agreement is otherwise valid.

84 In my view, the main factor which would support the liquidators' decision was the fact that other lenders had also charged high interest rates to the Company.

85 I also considered two more factors. First, while the Opposing Creditors were challenging the interest rates of MWA, each of them had received some re-payment from money which MWA had lent to the Company. If MWA had

not made the loan, the Opposing Creditors might not have received any partial re-payment. In that sense, it did not lie in their mouths to challenge the interest rates of MWA.

86 Secondly, even if the Opposing Creditors had *locus standi* to challenge the liquidators' decision, it seemed that they were not the primary persons whom the MLA was intended to protect (see again s 23(4) MLA). That factor should be taken into account too.

87 On the other hand, I agreed that the liquidators should have taken into account or given more weight to the fact that MWA's loan was secured even though, in so far as the Devonshire 8 Property was concerned, UOB had a prior mortgage.

88 The fact that a licensed moneylender has some security is a factor to be taken into account, even though UOB's higher priority as a prior mortgagee should also be taken into account because MWA might not know how much money was owing to UOB from time to time.

89 On its part, MWA also stressed the huge amount of its loan and the risk it was taking over ten months, although to some extent this was mitigated by the various securities it had obtained.

90 All things considered, it seemed to me that this was quite a fluid and complex situation with many persons involved and variables which changed from time to time. While Ivy Lee claimed to have a low standard of formal education, it was not in dispute that she was a savvy businesswoman. Other lenders who charged high interest rates also appeared to have business experience, including the Opposing Creditors.

91 The burden was on the Opposing Creditors to establish that relief should be granted because the MWA transaction was unconscionable or substantially unfair. In the circumstances, they failed to discharge their burden.

Woo Bih Li
Judge

Benedict Teo and Zhang Yiting (Drew & Napier LLC) for the plaintiff;
defendant absent;
Michael Palmer and Jaime Lye (Quahe Woo & Palmer LLC) for the liquidators;
Gan Theng Chong and Andrew Tan (Lee & Lee) for creditor, Evan Lim Industrial Warehousing Development Pte Ltd;
Stephen Wong (Sterling Law Corporation) for creditor, LR Properties Pte Ltd.