IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 76

Civil Appeal No 109 of 2017

Between

Evan Lim Industrial / Warehousing Development Pte Ltd

… *Appellant*

And

(1) MWA Capital Pte Ltd
(2) Liquidators of Ivy Lee Realty Pte Ltd (in liquidation)

… *Respondents*

GROUNDS OF DECISION

[Credit and Security] — [Money and moneylenders] — [Moneylenders Act] — [Reopening of transactions] — [Section 23 Moneylenders Act (Cap 188, 2010 Rev Ed)]

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

[Statutory Interpretation] — [Construction of statute] — [Interpretation of "excessive", "unconscionable" and "substantially unfair"]

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Evan Lim Industrial / Warehousing Development Pte Ltd
v
MWA Capital Pte Ltd and another

[2018] SGCA 76

Court of Appeal — Civil Appeal No 109 of 2017
Sundaresh Menon CJ, Belinda Ang Saw Ean J and Quentin Loh J
2 August 2018

13 November 2018

Belinda Ang Saw Ean J (delivering the grounds of decision of the court):

Introduction

1 This appeal arose out of the liquidation of Ivy Lee Realty Pte Ltd ("the Company") following the acceptance by the second respondents, the Company's liquidators ("the Liquidators"), of the proof of debt lodged by the first respondent, MWA Capital Pte Ltd ("MWA"), for the unpaid principal and interest due under a loan agreement made between the Company and MWA on 4 July 2014 ("the MWA Loan Agreement"). The appellant, Evan Lim Industrial/Warehousing Development Pte Ltd ("Evan Lim"), a creditor of the Company, challenged the Liquidators' acceptance of MWA's proof of debt, contending that the interest and default interest rates charged by MWA were "excessive and unconscionable or substantially unfair" under s 23(1) of the Moneylenders Act (Cap 188, 2010 Rev Ed) ("the MLA"). This appeal focussed on whether Evan Lim had succeeded in proving that the requirements set out in

s 23(1) were met. We dismissed the appeal on 2 August 2018 with brief oral grounds, indicating that we would explain our decision in greater detail in due course. This we do now.

Background

2 In or around 2011, the Company was involved in developing a condominium at 6, 8 and 10 Devonshire Road and 130 Killiney Road (collectively referred to as "the D8 Property"). The development project was financed by United Overseas Bank Limited ("UOB"), which held a legal mortgage over, *inter alia*, the D8 Property. Subsequently, the development project ran into financial difficulties, and Lee Siew Noi Ivy ("Ivy Lee"), the sole director and shareholder of the Company, borrowed money from various non-bank sources in an attempt to tide the Company over these difficulties.

The loans extended to the Company from 2011 to 2013

3 Before we come to MWA's loan to the Company in July 2014, it is helpful to set out in brief the other loans extended to the Company from 2011 to 2013.

The loan from Evan Lim

4 On 25 May 2011, the Company entered into a joint venture agreement with Evan Lim under which Evan Lim was to contribute $5,528,433.45 towards the development of the D8 Property, and the Company was to repay Evan Lim that principal amount plus an additional 40% within three years. This worked out to interest of 13.33% per year. The parties subsequently clarified in a settlement agreement concluded on 18 June 2014 between the Company, Evan Lim and Ivy Lee ("the First Settlement Agreement") that the joint venture

agreement of 25 May 2011 "was intended to be a loan agreement" for the sum of $5,525,020. The First Settlement Agreement also confirmed that as at 25 May 2014, the Company owed Evan Lim the sum of $7,735,028 (*ie*, $5,525,020 plus the 40% uplift). As part of the First Settlement Agreement, Evan Lim granted the Company two additional months to repay the accrued debt of $7,735,028 in consideration for payment of an additional sum of $773,503, which was 10% of the accrued debt. In other words, Evan Lim wanted interest at the rate of 10% for two months (or 60% per annum) in return for granting the Company a two-month extension to repay the accrued debt. Default interest at the rate of 18% per annum was also payable under the First Settlement Agreement. Ivy Lee guaranteed the performance of the First Settlement Agreement.

5 As at 30 January 2015, the Company had paid Evan Lim only $4.6m, leaving a balance of $3,908,531 unpaid. As at 19 June 2015, interest amounting to $728,305.72 (calculated at the stipulated default interest rate of 18% per annum) was payable on this balance.

6 On 19 June 2015, the Company, Evan Lim, Ivy Lee and one Chua Choy Soon entered into a further settlement agreement ("the Second Settlement Agreement") under which the Company agreed to pay Evan Lim the sum of $4,115,031 (*ie*, the unpaid $3,908,531 plus default interest of $200,000 (which was lower than the actual default interest payable under the 18% per annum default interest rate stipulated in the First Settlement Agreement) and legal costs of $6,500) in two separate tranches. Default interest at the rate of 18% per annum was similarly payable under the Second Settlement Agreement. As no further payments were received under the Second Settlement Agreement, Evan Lim's proof of debt was for the sum of $4,115,031. Evan Lim did not claim any interest under the Second Settlement Agreement.

The loan from LR Properties Pte Ltd

7 On 19 August 2011, the Company entered into a written agreement with LR Properties Pte Ltd ("LR Properties") under which it was agreed that LR Properties would invest $3.29m in the Company in exchange for a 20% stake in the D8 Property. Subsequently, it became clear that this "investment agreement" was similarly a loan agreement. No interest was charged for this loan, and the loan was neither secured nor guaranteed. LR Properties' proof of debt against the Company was for the aggregate sum of $4,387,328.40.

The loan from Shirley Ong Hwee Yin

8 On 13 August 2013, the Company, Ivy Lee and Shirley Ong Hwee Yin ("Shirley Ong") entered into an agreement whereby Shirley Ong would invest $1.75m in the Company in exchange for a guaranteed return of 40% of the principal amount within 15 months, that is to say, in exchange for payment of $2.45m within 15 months. This worked out to interest at the rate of 32% per annum. Ivy Lee guaranteed the Company's obligations under this agreement. Again, whilst this agreement was couched in the language of an investment agreement, given the unconditional obligation of full repayment, it was not disputed that it was similarly a loan agreement.

MWA's loan in July 2014

9 As can be seen from [4]–[8] above, the Company had been borrowing money from various non-bank sources since 2011. In 2014, it decided to borrow $10m from MWA, a licensed moneylender, to settle some of its other debts. The contractual and default interest rates (collectively "the Interest Rates") stipulated under the MWA Loan Agreement were 5% and 8% per month respectively, and the effective interest rates were 79.59% and 151.82% per

annum respectively. Under the terms of the MWA Loan Agreement, the loan was to be repaid in full within six months from 4 July 2014, the date of drawdown of the $10m.

10 In connection with the MWA Loan Agreement, the Company executed a deed of assignment dated 4 July 2014 over the Company's rights, titles and interest in several properties, all of which were collectively known in the deed as "the D8 Property". MWA registered the deed as a charge on 10 December 2014 ("the Charge"). As a registered charge, the Charge ranked behind that of the first legal mortgagee, UOB. An added security for MWA's loan was a fixed charge granted by a related company, U-Asia Pte Ltd ("U-Asia"), under which U-Asia assigned all of its rights, titles and interest in several units at 12 Devonshire Road to MWA. Finally, Ivy Lee also executed a personal guarantee in favour of MWA. For completeness, U-Asia and Ivy Lee eventually settled their outstanding liabilities and obligations to MWA, and they paid the sum of $1m under the settlement.

11 On 3 January 2015, the Company defaulted on the MWA Loan Agreement. On 26 March 2015, MWA commenced Suit No 285 of 2015 ("Suit 285") against the Company. It obtained summary judgment for the undisputed principal sum of $6,741,310 on 3 August 2015, with the Company being granted unconditional leave to defend MWA's remaining claims for interest and default interest under the MWA Loan Agreement.

The winding up of the Company and the sale of the D8 Property

12 On 14 September 2015, following the Company's default on the sum due under the summary judgment made against it in Suit 285, MWA commenced winding-up proceedings against the Company. On 9 November

2015, the Company was ordered to be wound up. The Liquidators then sold the D8 Property for $25,900,000, and the net proceeds of sale available for distribution to the Company's creditors, after the redemption of UOB's legal mortgage and deductions for (amongst other things) the Liquidators' fees and legal costs, came up to $13,447,721.92 ("the D8 Proceeds").

13 The Liquidators adjudicated MWA's revised proof of debt as at 9 November 2015 and accepted MWA's claim in the total sum of $20,617,771.41. The validity of the Charge and, hence, MWA's status as a secured creditor of the Company was no longer an issue by the time the parties were before the High Court judge ("the Judge"). The prospect facing the general creditors (including Evan Lim) was that the whole of the D8 Proceeds would go to MWA.

14 On 30 September 2016, the Liquidators applied by way of Summons No 4766 of 2016 ("SUM 4766") for, *inter alia*, an order that they be authorised to: (a) recognise the Charge; and (b) repay monies to MWA as a secured creditor out of the D8 Proceeds. In response to the Liquidators' application, on 18 May 2017, Evan Lim filed Summons No 2281 of 2017 ("SUM 2281") to reverse or modify the Liquidators' decision to affirm the Interest Rates charged under the MWA Loan Agreement. SUM 2281 was filed pursuant to s 315 of the Companies Act (Cap 50, 2006 Rev Ed) on the grounds that the Interest Rates were "excessive and unconscionable or substantially unfair" under s 23 of the MLA. Whilst LR Properties supported SUM 2281, only Evan Lim appealed against the Judge's dismissal of the summons.

The decision below

15 The Judge dismissed SUM 2281 on the grounds that Evan Lim had not established that the MWA Loan Agreement was unconscionable or substantially unfair (see *MWA Capital Pte Ltd v Ivy Lee Realty Pte Ltd (in liquidation)* [2017] SGHC 216 ("the GD")). He held that the loan extended by MWA was a business loan, and that the burden was on Evan Lim and LR Properties to prove that the MWA Loan Agreement was unconscionable or substantially unfair under s 23(1) of the MLA (at [91]). They had not, however, succeeded in doing so. Consequently, the Judge allowed the Liquidators' application in SUM 4766. In so deciding, the Judge left the Interest Rates under the MWA Loan Agreement unchanged.

16 The Judge accepted that s 23(1) of the MLA set out two cumulative requirements which had to be satisfied before the court could reopen a loan transaction, namely: (a) the interest or late interest charged had to be excessive; and (b) the transaction had to be unconscionable or substantially unfair. However, the Judge dealt with requirement (b) alone, having come to the view that it was all-encompassing. He explained (at [76] of the GD) that it did not follow from a finding of an excessive interest rate that the loan transaction in question was therefore unconscionable or substantially unfair. With that view in mind, the Judge saw the "real question" before him as whether the MWA Loan Agreement was unconscionable or substantially unfair (see the GD at [77]). We will elaborate on the Judge's reasoning in the course of explaining our decision on this appeal.

The issues for determination on appeal

17 There were two main issues for our determination in this appeal:

(a) whether Evan Lim, as an unsecured creditor of the Company, had the *locus standi* to pray in aid of the court to step in and exercise its statutory powers under s 23(1) of the MLA; and

(b) whether, in respect of the MWA Loan Agreement, the requirements set out in s 23(1) of the MLA for reopening a loan transaction were met.

18 We will refer to issue (a) as "the Jurisdiction Issue" and issue (b) as "the "Section 23 Issue". For convenience, s 23(1) of the MLA reads as follows:

> **Re-opening of certain transactions**
>
> **23.**—(1) When proceedings are brought in any court by a licensee [*ie*, a licensed moneylender] 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. [emphasis added in italics and bold italics]

The Jurisdiction Issue

19 The Liquidators accepted that Evan Lim was entitled to rely on s 315 of the Companies Act to challenge their decision to affirm the Interest Rates charged under the MWA Loan Agreement. However, they contended that since Evan Lim did not fall into any of the classes of persons identified in s 23(4) of the MLA as being eligible to seek relief under s 23(1), it did not have the *locus standi* to bring its application in SUM 2281. Under s 23(4), the persons who have *locus standi* to seek relief under s 23(1) are: (a) borrowers; (b) sureties; and (c) other persons liable to repay the loan owed to the licensed moneylender concerned (in this case, MWA).

20 Clearly, Evan Lim was not "a borrower, a surety or other person liable to repay a loan to a licensee". However, this did not necessarily preclude the court from considering whether to reopen the MWA Loan Agreement under s 23(1) of the MLA as a result of Evan Lim's application in SUM 2281, which was made pursuant to s 315 of the Companies Act. In our view, the Liquidators unquestionably had the right to challenge the terms of the MWA Loan Agreement under s 23 of the MLA, and their decision not to make such a challenge was in substance the subject matter of Evan Lim's application. Evan Lim was ultimately concerned with the conduct of the Company's liquidation, an issue in which it had a direct interest as a creditor of the Company.

21 It is now a convenient juncture to set out s 315 of the Companies Act and s 23(5) of the MLA. Section 315 of the Companies Act reads:

> **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.

22 Section 23(5) of the MLA reads:

> 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.

23 Under s 327(2) of the Companies Act, the same rules with regard to the rights of creditors and provable debts in bankruptcies apply in the winding up of an insolvent company. As such, in assessing the proofs of debt filed by the Company's creditors, the Liquidators had the same powers as the Official Assignee under s 23(5) of the MLA; this point was not disputed in the proceedings below (see the GD at [29]).

24 Sections 23(5) of the MLA and 327(2) of the Companies Act make it clear that in assessing a proof of debt, a liquidator "may exercise such powers as may be exercised by a court under [s 23]". The language of s 23(5) of the MLA is prescriptive rather than mandatory. Accordingly, the Liquidators had the *discretion* to invoke s 23 of the MLA and determine whether the requirements for reopening the MWA Loan Agreement were met, and if so, to decide on the revised terms of the agreement. In this case, the Liquidators decided to affirm the Interest Rates charged under the MWA Loan Agreement without any changes. This necessarily meant that the Liquidators either decided not to invoke their powers pursuant to s 23(5) of the MLA or omitted to consider these powers. On either view, Evan Lim was entitled to rely on s 315 of the Companies Act to challenge the Liquidators' decision. In other words, where the Jurisdiction Issue was concerned, Evan Lim did have the *locus standi* to seek the court's intervention under s 23(1) of the MLA.

25 If the position were otherwise, the Liquidators' decision would be immune from challenge, and this would render nugatory the court's exercise of supervisory jurisdiction over "*all* aspects of a liquidator's conduct of the winding up" [emphasis in original] (see *Ho Wing On Christopher and others v ECRC Land Pte Ltd (in liquidation)* [2006] 4 SLR(R) 817 at [46]).

The Section 23 Issue

The two requirements in s 23(1)

26 We turn now to the Section 23 Issue. It was common ground that to succeed in its appeal, Evan Lim had to show that the MWA Loan Agreement came within s 23(1) of the MLA, which we have quoted in full at [18] above.

27 It is clear from the statutory language that s 23(1) contains two requirements which are to be read *conjunctively*. In other words, *both* requirements must be satisfied before a court will exercise its power to reopen a loan transaction and order an account to be taken between the licensed moneylender in question and the person sued. The two requirements (collectively, "the two limbs") are that: (a) the interest or late interest charged is "excessive" ("the first limb"); **and** (b) the loan transaction is "unconscionable or substantially unfair" ("the second limb").

28 Evan Lim's argument before us was that the presence of an excessive interest or default interest rate would in itself also lead to the conclusion that the loan transaction concerned was unconscionable or substantially unfair. The ramification of this argument was that a finding of an excessive interest rate would also satisfy the second limb of s 23(1). We had no difficulty rejecting Evan Lim's argument. As we pointed out in the preceding paragraph, the court's powers under s 23(1) will not be invoked if only one of the two limbs of this subsection is satisfied. This follows as a matter of the plain language of the statutory provision.

29 We now come to two local decisions where the requirements of s 23(1) did not appear to have been fully adhered to. These are the District Court's decision in *Unilink Credit Pte Ltd v Chong Kuek Leong* [2013] SGMC 3 ("*Unilink Credit*") and the High Court's decision in *Ang Ai Tee v Resource Credit Pte Ltd* [2017] 5 SLR 402 ("*Ang Ai Tee*"). We begin with *Unilink Credit*.

30 In *Unilink Credit*, Leslie Chew DJ correctly stated that the question of whether the interest rate before the court was excessive and whether the loan transaction concerned was unconscionable or substantially unfair must be

assessed with reference to the specific facts of the case. In discussing the interpretation of the two limbs of s 23(1), Chew DJ made the following observations, starting with the interpretation of the word "excessive":

> 29 … [T]he interest rate charged on the unsecured loan is excessive if it is 'more than necessary, normal or desirable'. There is another important aspect, however. Whether 'excessive' or not these interest rates can only be assessed in comparison to something or [some] other rate or measure. Here the observation made by Lord James in *Samuel and Another v Newbold [1906] 1 AC 461* [(*"Samuel"*)] is useful when he noted at pages 475 – 476 that, *"The word "excessive" applied to interest is, of course a relative and elastic term, impossible of absolute definition"*. That case arose from a moneylending transaction under the English Moneylenders Act, 1900 which used language similar to our present s 23, in section 1, subsection (1) of the English Act of 1900. If as Lord James observed, the term 'excessive' in the present context is *'relative'* it follows [that] 'excessive' must be measured or assessed relative to some yardstick. The question then becomes what is that yardstick?
>
> 30 The question here is therefore what is 'excessive' in the context of the present loan transaction under consideration? Once again, I find that the observations of Lord James in *Samuel* which I have referred to … [are] helpful. Having noted the relativity and elasticity of the term 'excessive', Lord James at p 476, went on to observe as follows:
>
> > "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."
>
> …
>
> 33 … [T]he next [thing] which the court when purporting to exercise its powers under s 23 of the [MLA] to reopen the transaction … must do is to ask whether the transaction is 'unconscionable or substantially unfair'. What therefore is the meaning of those words?
>
> 34 While we may resort to the dictionary for the meaning of those words, what is more useful is yet again to refer to *Samuel.* In *Samuel*, the court adopted a simple but in my respectful view,

> … workable meaning to be assigned to those words. In *Samuel*, Lord Hereford at p 473 of that case noted that ***"Excessive interest of itself is sufficient to render a contract harsh and unconscionable"***. I would adopt the same interpretation here. As to 'substantially unfair' again in my view, it is not entirely unreasonable to interpret 'unconscionable' as also amounting to 'substantially unfair'. It is, I believe, a matter of degree, 'unconscionable' being 'unfair having regard to the circumstances' whilst 'substantially unfair' could be 'unfair to a lesser degree'.
>
> 35 So having dealt with the language of the provision, I must now turn to the circumstances of the present case. ***The simple issue is whether the interest rates charged in the present case [are] excessive and therefore unconscionable or substantially unfair*** so that the court as [the deputy registrar at first instance] did, could re-open the transaction which came before the court.
>
> 36 Here I would adopt the approach taken by the House of Lords in *Samuel.* I would therefore examine the interest rates involved here relative to [the] general and other prevailing interest rates and allowing for a 'deviation' from these based on the particular facts of the present loan transaction.
>
> [original emphasis in italics; emphasis added in bold italics]

31 As can be seen from the above extract, in *Unilink Credit*, Chew DJ appeared to adopt the view (at [34]–[36]) that a finding of an excessive interest rate would in and of itself lead to the conclusion that the loan transaction in question was unconscionable or substantially unfair (see also *Unilink Credit* at [51(e)] and [63]). With respect, we disagree with this approach, which is misleading and also takes the House of Lords' decision in *Samuel and another v Newbold* [1906] 1 AC 461 ("*Samuel*") out of its proper context. The statutory provision considered in *Samuel* was the then Money-lenders Act 1900 (c 51) (UK), which provided a power similar to that in s 23(1) of the MLA as follows:

> **1.— Re-opening of transactions of money-lender.**
>
> (1.) Where proceedings are taken in any court by a moneylender for the recovery of any money lent after the commencement of this Act, or the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of

> money lent either before or after the commencement of this Act, and *there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is* ***excessive****, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that,* ***in either case****, the transaction is* ***harsh and unconscionable****, or is otherwise such that a court of equity would give relief, the court may re-open the transaction*, and take an account between the money-lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, 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 charges, as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent by the money-lender, and if the money[-]lender has parted with the security may order him to indemnify the borrower or other person sued. [emphasis added in italics and bold italics]

32 In *Samuel*, the House of Lords dealt with the question of whether an excessive rate of interest could in itself be evidence that the loan transaction concerned was "harsh and unconscionable". Whilst the House of Lords unanimously answered this question in the affirmative, the effect of its decision is *not* that a finding of an excessive interest rate would invariably lead to the conclusion that the transaction was "harsh and unconscionable". This much is clear from the leading judgment of Lord Loreburn LC (see *Samuel* at 466):

> … Under the Money-lenders Act, 1900, s. 1, sub-s. 1, a Court may re-open a transaction and take an account between the money-lender and the person sued ***upon two conditions***. ***The first condition*** is that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals or any other charges, are excessive. There cannot be any doubt that the interest charged in this case is, under the circumstances, excessive. ***The second condition*** is that the contract is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief. … [emphasis added in bold italics]

It is clear from the above passage that Lord Loreburn was well aware that there were two distinct conditions which had to be met in order to trigger the court's power to reopen a loan transaction. This is for good reason because if Chew DJ's suggestion that the second limb of s 23(1) of the MLA would be satisfied so long as the first limb is met is correct, the distinct inquiry involved under the second limb would be rendered nugatory. The two conditions also underscore the legal burden which the borrower has to discharge in order to persuade the court to reopen the loan transaction.

33 With regard to the more pertinent question of whether an excessive rate of interest could in itself be evidence that the loan transaction concerned was "harsh and unconscionable", the House of Lords merely noted that it ***could be***, and not that it would invariably be. This was made clear by Lord Loreburn at 467 (see also Lord Macnaghten's observations in *Samuel* at 470):

> … What the Court has to do in such circumstances is, if satisfied that the interest or charges are excessive, to see whether in truth and fact and according to its sense of justice the transaction was harsh and unconscionable. We are asked to say that an excessive rate of interest could not be of itself evidence that it was so. I do not accept that view. Excess of interest or charges ***may*** of itself be such evidence, and particularly if it be unexplained. … [emphasis added in bold italics]

34 Similar observations were made by the other law lords. For instance, Lord James of Hereford observed as follows (at 473–474):

> … Proof of excessive interest ***may*** of itself, therefore, be sufficient to entitle the debtor to relief. … When excessive interest is apparently established, any facts that tend to shew that such excess does not render the contract "harsh and unconscionable" should be proved in evidence by the lender. This burthen is on him. … [emphasis added in bold italics]

35 Lord Atkinson also noted, with regard to the inquiry into whether the loan transaction in question was "harsh and unconscionable", that "[i]t will, of course, be always competent for the lender to shew that, despite the excessive rate of interest, the transaction was in fact fair and reasonable" (at 477). In other words, the House of Lords saw it fit, upon there being evidence of an excessive interest rate, to place the evidential burden of proof on the lender to show that the loan transaction was *not* harsh and unconscionable. This is not the same as saying that the second limb of s 23(1) of the MLA would invariably be met once the first limb is satisfied, which is what Chew DJ's judgment in *Unilink Credit* appears to suggest. To avoid any doubt, we therefore reiterate, as was also noted by the Judge (see [76] of the GD, which we referred to earlier at [16] above), that it does not invariably follow from a finding of an excessive interest rate that the loan transaction in question would therefore be considered either unconscionable or substantially unfair.

36 Turning now to *Ang Ai Tee*, Tan Siong Thye J correctly stated in that case that the two requirements in s 23(1) of the MLA must both be satisfied before the court will reopen a loan transaction and examine its merits, *ie*, the court must be satisfied *both* that the interest charged is excessive *and* that the loan transaction is unconscionable or substantially unfair. Tan J then went on to construe the meaning of "excessive", "unconscionable" and "substantially unfair". He said:

> 40 These terms, *ie*, excessive, unconscionable and substantially unfair, are not defined under the MLA or the Interpretation Act (Cap 1, 2002 Rev Ed). Therefore we have to rely on the plain and simple dictionary meaning of these terms. The *Longman Dictionary of Contemporary English* (Pearson Longman, 6th Ed, 2014) ("the *Longman Dictionary*") defines "excessive" as "exceeding the usual, proper, or normal". Hence, the interest charged has to be above the normal rate of interest. In addition, the transaction must also be "unconscionable or substantially unfair". Again, the *Longman Dictionary* defines

> "unconscionable" as "not guided or controlled by conscience; unscrupulous; excessive, unreasonable; shockingly unfair or unjust". "Substantial" is further defined as "considerable" or "significant". Hence, not only must the interest charged be above the norm, but the transaction taken as a whole must *also* cause an average person to view the loan transaction by the moneylender as unscrupulous or dishonest. [emphasis in original]

37 Having considered the dictionary meaning of the words "excessive", "unconscionable" and "substantially unfair", Tan J articulated (at [40]) his understanding of the requirements in s 23(1) of the MLA by reference to a loan transaction that would be viewed by an average person as "unscrupulous or dishonest". It is evident from Tan J's subsequent analysis in his judgment that in assessing the circumstances and features of the loan in question, he rightly did not use the explanatory words "unscrupulous or dishonest" to replace the precise words used in the statute. However, and with respect, his explanatory words, together with his formulation involving an average person's view, appeared to lay down a catch-all test for the second limb of s 23(1), in that it gave the impression that the second limb consists of only one ground rather than two alternative grounds. In our judgment, it is clear from the wording of s 23(1) that the second limb spells out two alternative statutory grounds, namely, that the loan transaction concerned is "unconscionable *or* substantially unfair" [emphasis added]; it does not require both grounds to be satisfied. Each of these grounds has a different threshold: substantial unfairness is merely one indicia of unconscionability (see also *Unilink Credit* at [34]), and other factors may have to co-exist in order for the court to find that the loan transaction in question is unconscionable. Having said that, from a practical standpoint, a court that is asked to exercise its powers under s 23(1) of the MLA should conduct a holistic review of the entirety of the evidence presented to it, rather than adopt a narrow approach that pigeonholes the case at the outset into one or other of the two

alternative grounds under the second limb of s 23(1). With these considerations in mind, we turn to the first limb of s 23(1).

The first limb of s 23(1): Whether the Interest Rates were excessive

38 In order to satisfy the first limb of s 23(1) of the MLA, Evan Lim had to show that the Interest Rates charged under the MWA Loan Agreement were excessive.

Whether the Judge decided the first limb of s 23(1)

39 The parties differed as to whether the Judge had decided the issue of whether the Interest Rates were excessive. We agreed with the Liquidators and MWA that the Judge *could not* be said to have decided this issue. In the GD, the Judge went through the evidence of the interest rates put forth before him, and, after noting that those interest rates were inappropriate as comparators, he did not go on to decide whether the first limb of s 23(1) of the MLA was satisfied; instead, he went on to consider the second limb. This much was clear from the following passage of the GD (at [77]):

> In the case before me, the Opposing Creditors [*ie*, Evan Lim and LR Properties] 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 [those] 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 [those] 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 [of] 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.* [emphasis added in italics and bold italics]

40 We noted earlier (at [16] and [35] above) that the Judge rightly took the view that it did not follow from a finding of an excessive interest rate that the loan transaction in question was therefore unconscionable or substantially unfair. With this consideration in mind, coupled with the fact that the Interest Rates charged under the MWA Loan Agreement were much higher than bank interest rates, the Judge proceeded to decide what he saw as the "real question" before him, which was in fact the second limb of s 23(1) – *ie*, whether the MWA Loan Agreement was unconscionable or substantially unfair. With respect, this approach disregards the plain statutory language of s 23(1), which requires that there must first be a finding of an excessive interest rate under the first limb before the inquiry into the second limb is embarked upon.

What does "excessive" mean?

41 In our judgment, an "excessive" interest rate for the purposes of the first limb of s 23(1) of the MLA is one that is not merely high, but rather, one that is *significantly* higher than what other licensed moneylenders could or would *reasonably* have charged a borrower in a *similar* situation. As Chew DJ noted in *Unilink Credit*, the inquiry is a "relative" one, and the particular interest rate before the court must be assessed against the interest rates charged in other *similar* transactions (see [30] above). The inquiry under the first limb of s 23(1) accordingly entails more than a quantitative analysis, and requires an objective assessment of the facts. In determining whether the interest rate in question is excessive, the court should consider these two essential questions:

(a) What is the interest rate that is in fact being charged?

(b) Is this interest rate significantly higher than the interest rates that other licensed moneylenders could or would *reasonably* have charged a borrower in a *similar* situation?

42 Considering these two questions in the light of the facts before us, Evan Lim's case failed at the first limb of s 23(1). As noted at [9] above, the Interest Rates charged under the MWA Loan Agreement were 5% (the base interest rate) and 8% (the default interest rate) per month; these worked out to effective interest rates of 79.59% and 151.82% per annum respectively. Undoubtedly, these interest rates were high. However, the legal question was whether they were *excessive*. On this point, there was simply no evidence as to what interest rates other licensed moneylenders could or would reasonably have charged the Company for a loan similar to MWA's $10m loan to the Company in July 2014. If Ivy Lee had shopped around for a $10m loan for six months before deciding on the loan offered by MWA, evidence of what interest and default interest rates other licensed moneylenders wanted to charge the Company would have been relevant. Evan Lim did not, however, adduce any such evidence. Instead, it relied upon the interest rates charged by banks at the material time, which ranged from 0.75% per annum to 5.25% per annum (see the GD at [77]). In our view, these bank interest rates were not appropriate comparators. As MWA rightly pointed out, "the Company clearly did not have access to bank loans. If it did, it would not have made commercial sense to seek financing from a licensed moneylender such as MWA". From the viewpoint of a licensed moneylender, unsecured borrowers pose a higher risk of defaulting, and naturally, the moneylender would charge such borrowers interest rates which are much higher than bank interest rates. To compare prevailing bank interest rates with the interest rates charged by licensed moneylenders (such as MWA) would plainly be wrong.

43 Evan Lim and Shirley Ong, who were among the persons who extended loans to the Company, were not licensed moneylenders, and the interest rates charged by each of them would thus not be appropriate comparators for the Interest Rates charged by MWA. Be that as it may, it is worth nothing that the interest rates which they charged were significantly higher than bank interest rates and were as follows:

(a) under the First Settlement Agreement, Evan Lim charged the Company interest at the rate of 10% for two months (*ie*, 60% per annum) in return for granting the Company an additional two months to repay the accrued debt of $7,735,028 (see [4] above); and

(b) under the agreement between the Company, Ivy Lee and Shirley Ong, Shirley Ong charged the Company interest of 32% per annum, which took the form of payment of 40% of $1.75m (the principal sum loaned) within 15 months (see [8] above).

44 Evan Lim raised two arguments in support of its contention that the Interest Rates charged by MWA were excessive. First, it argued that the loan granted by MWA was for a short term, and was secured; MWA's risk was therefore low. Weighed against these factors, the Interest Rates were excessive. In our judgment, insofar as these considerations could be said to affect the interest rates charged by other licensed moneylenders in a similar situation, this argument had no merit given the quality of the security held by MWA. MWA's security had to be viewed in the context of the first legal mortgage which UOB had over the D8 Property. The various forms of security which the Company subsequently granted to MWA were all subject to UOB's mortgage. Weighing the junior ranking of the security held by MWA against the risk of the Company defaulting on repayment of the large loan of $10m extended by MWA, MWA

could not be criticised for taking the view that it was entitled to charge a higher interest rate than the prevailing bank interest rates to compensate for the risk it was assuming. It bears emphasis here that the position in July 2014 was that the Company faced severe financial difficulties, and had already sought and obtained alternative (*ie*, non-bank) sources of financing at high interest rates (see [4]–[8] above). This, coupled with its entry into a series of agreements that purported to be investment agreements but were in fact financing schemes, said much about: (a) the difficult financial straits which the Company was in at that time; (b) the constraints faced by the Company in offering security for any loans which it might be able to obtain, given that it had already charged its assets to UOB; (c) the risk proposition that the Company represented to potential lenders; and (d) the sort of "returns on investment" which the Company was willing to offer in order to obtain financing.

45 The second argument raised by Evan Lim in support of its submission that the Interest Rates were excessive was that they far exceeded the "statutory caps on the interest rates that were previously prescribed for secured and unsecured loans". Again, this argument was ill-founded. The statutory caps set out in the Moneylenders Rules 2009 (GN No S 72/2009) ("the MLR") at the time the MWA Loan Agreement was entered into in July 2014 applied only to *individual borrowers,* and not to corporate borrowers such as the Company.

46 To set the context, these statutory caps, if exceeded, would trigger the following presumption under s 23(6) of the MLA:

> 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.

47 At the time the MWA Loan Agreement was entered into, the applicable maximum interest rates set out in r 11(2) of the MLR for *individuals* were the following:

> (a) 13% per annum for a secured loan to an individual whose annual income was less than $30,000; and
>
> (b) 20% per annum for an unsecured loan to an individual whose annual income was less than $30,000.

48 Notably, as the Judge observed at [52] of the GD, r 11(2) of the MLR did not provide for any caps on interest as regards business loans and loans made to individuals whose annual income exceeded $30,000. Subsequently, the MLR was amended in 2015 to expressly provide in r 12B that the statutory caps did not apply to a "business loan", which was defined in the MLR as a loan granted to a company incorporated under the Companies Act (see r 1A of the MLR).

49 Against this backdrop, Evan Lim argued that the need for r 12B to expressly exclude "business loans" from the MLR in 2015 suggested that it was the understanding that the previous statutory caps in r 11(2) applied to loans to companies. In our judgment, there was no merit in this argument. The previous statutory caps under r 11(2) applied to "an *individual*" [emphasis added] whose annual income fell below the specified limit. In this regard, it is also instructive to note that s 23(8)(*b*) of the MLA states that:

> … the Minister *may* prescribe *different* maximum rates of interest to apply to *different* classes or descriptions of borrowers or loans. [emphasis added]

Notably, the ministerial discretion provided for in s 23(8)(*b*) was exercised in r 11(2) in relation to only a specific group of borrowers (*ie*, individuals with an annual income of less than $30,000) with reference to two different types of loans (*ie*, secured and unsecured loans). As such, the statutory caps in r 11(2) applied exclusively within these defined boundaries.

50 Further, it was expressly clarified by Parliament during the second reading of the Moneylenders (Amendment) Bill (Bill 4 of 2012) in March 2012 that (see *Singapore Parliamentary Debates*, *Official Report* (9 March 2012) vol 88 at p 2511 (Ms Sim Ann, Senior Parliamentary Secretary to the Minister for Law)):

> … we are extending the coverage of the interest rate caps to a larger group of borrowers, from applying only to borrowers earning less than $20,000 a year, to those earning less than $30,000 a year. … Borrowers earning $30,000 or more a year generally qualify for credit facilities, and are not dependent solely on moneylenders for credit. Thus, we have decided not to introduce any interest rate caps for them for now.

51 Plainly, Evan Lim's suggestion that the statutory caps in the MLR also applied to business loans was contrary to Parliament's intention in:

(a) narrowly circumscribing the class of persons who were intended to be protected through the statutory caps; and

(b) providing different statutory caps for different types of loans.

52 For these reasons, whilst the Interest Rates charged by MWA were high, we found that Evan Lim had failed to discharge the burden of proof which was on it to establish that these interest rates were excessive in the context of a $10m loan made by a licensed moneylender (*ie*, MWA) to a corporate borrower which was in dire financial straits (*ie*, the Company).

The second limb of s 23(1): Whether the MWA Loan Agreement was unconscionable or substantially unfair

53 Having found that the first limb of s 23(1) of the MLA was not satisfied, it was strictly not necessary for us to go on to deal with the second limb. Nonetheless, we make some observations on this limb since the Judge's decision concerned it.

54 As we stated earlier (at [28] above), Evan Lim was content to argue before us that a finding of an excessive interest or default interest rate would invariably satisfy the second limb of s 23(1) of the MLA. We have already pointed out above that this argument is contrary to the statutory language of s 23(1), which requires that the loan transaction concerned, in addition to charging an excessive interest or default interest rate, must also be "unconscionable or substantially unfair". Given the narrow confines of Evan Lim's contention, the parties did not specifically deal with the meaning of the terms "unconscionable" and "substantially unfair" in the statutory context, or the test for these two alternative statutory grounds in their submissions.

55 Section 23(1) of the MLA does not provide a definition of the terms "unconscionable" and "substantially unfair". The parameters of the "unconscionable" and "substantially unfair" grounds are also not prescribed in s 23(1), unlike some foreign statutory provisions which list the various factors that the court may have regard to in assessing the circumstances of the case before it and determining whether to exercise its powers of intervention. In the circumstances, the Judge's approach in the proceedings below was to assess the MWA Loan Agreement with reference to the facts and circumstances of this case.

56 In our judgment, in order for a court to find that a loan transaction is unconscionable or substantially unfair, there must at least be evidence of the commercial setting as well as the purpose and effect of the loan transaction. This can extend to conduct in the formation of the transaction (see *Carringtons, Limited v Smith* [1906] 1 KB 79 at 93). Further, the relevant clauses(s) of the loan transaction being challenged have to be specifically presented. There may be terms of the transaction that go beyond the legitimate commercial interests of the parties, and these may be taken into consideration in determining whether the transaction is unconscionable or substantially unfair.

57 In addition to considering the aforesaid matters, the court must also undertake a qualitative and objective assessment of all the other facts and circumstances of the case, including (but not limited to): (a) the circumstances leading up to the loan transaction in question (including whether independent legal advice was available to the borrower); (b) the conduct of the licensed moneylender *vis-à-vis* the borrower, in particular, whether the borrower was in a vulnerable position and whether the licensed moneylender took grossly unfair advantage of the borrower's financial weakness or otherwise exploited that weakness in a manner which would offend good conscience or attract moral condemnation; and (c) the terms of the transaction (including but not limited to the interest rates charged).

58 In this case, Evan Lim's argument on the second limb of s 23(1) was based entirely on the Interest Rates charged by MWA under the MWA Loan Agreement. Its contention was that the risk for MWA was low as its loan to the Company was for a short-term and was secured (see [44] above). Other than the Interest Rates charged, Evan Lim did not single out any other term or aspect of the MWA Loan Agreement that it was dissatisfied with.

59 We first consider the evidence of the commercial setting as well as the purpose and effect of the MWA Loan Agreement. At the material time in July 2014, the Company's intent was to borrow money from a licensed moneylender in order to pay some of its debts, several of which it had already clearly defaulted on. As stated at [44] above, the Company was in dire financial straits at that time – it had already obtained at high interest rates alternative (*ie*, non-bank) sources of financing packaged as attractive "investments" to its lenders, and needed further financing. Against this backdrop, MWA was taking a significant risk in extending a $10m loan to the Company, in that it was parting with a very significant amount of money in return for *limited* security and a significant prospect of default by the Company.

60 Undoubtedly, as at July 2014, the Company was in urgent need of financing from a licensed moneylender. Its precarious financial circumstances made it difficult for it to obtain financing on attractive terms; indeed, it was highly unlikely that the Company could have obtained better terms of financing than those offered by MWA. The Company was vulnerable in that sense. However, mere evidence of vulnerability on the part of a borrower in and of itself is not sufficient to satisfy the second limb of s 23(1). As Keane J aptly put it in the High Court of Australia's decision in *Paciocco v Australia & New Zealand Banking Group Ltd* [2016] HCA 28 (albeit in a different legal context), "[t]he existence of a disparity in bargaining power, which is an all-pervading feature of a capitalist economy, does not establish that the party which enjoys the superior power acts unconscionably by exercising it" (at [293]).

61 Signs of gross unfairness or exploitative conduct indicative of unconscionability or substantial unfairness may be present when the negotiations leading up to the loan transaction concerned or other matters relating to the transaction are resolved in a manner that is entirely for the benefit

of the licensed moneylender without any benefit at all for the borrower. This was not the case on the facts. On the contrary, there was clear evidence before us of back and forth negotiations that took place between the Company and MWA on pertinent terms of the MWA Loan Agreement such as the Interest Rates. There was no suggestion before us that all these matters were resolved in favour of MWA. Notably, Evan Lim did not complain about MWA's conduct, nor did it point to any exploitation of the Company's financial weakness by MWA which was such as would offend good conscience or attract moral condemnation.

62 Further, it is unlikely that a loan would be considered substantially unfair or unconscionable where the borrower fully understands the terms of the loan (see *Reading Trust, Limited v Spero* [1930] 1 KB 492 at 504 and 510). In this case, the Company's sole director and shareholder, Ivy Lee, was not at all a novice to business transactions. Instead, she was a businesswoman and property developer, and she fully understood the $10m loan that she was seeking from MWA on behalf of the Company. There was no suggestion that she did not have a good grasp of what was involved under the MWA Loan Agreement before she executed that agreement on the Company's behalf. In this regard, it is pertinent to note that prior to the grant of the loan by MWA, Ivy Lee had read and signed on the Company's behalf a Note of Contract on 4 July 2014 which prominently highlighted the Interest Rates that were payable by the Company. Both the Company and Ivy Lee were legally represented, and they had the benefit of legal advice before entering into the MWA Loan Agreement and the other agreements which provided MWA with security in connection with its loan to the Company.

63 Considering all the above factors, we had no difficulty reaching the conclusion that there was simply nothing before us to warrant a finding that the

MWA Loan Agreement was "unconscionable or substantially unfair" under the second limb of s 23(1) of the MLA.

Conclusion

64 For the foregoing reasons, we dismissed the appeal and fixed the costs of the appeal in the sum of $38,000 (inclusive of disbursements) in favour of each of the respondents to the appeal, *ie*, MWA and the Liquidators.

65 Separately, there was the matter of the costs of the Liquidators' application to be joined as a party to the appeal. Only MWA was named as a respondent in the Notice of Appeal filed by Evan Lim, and the Liquidators subsequently applied either to be joined as a party to the appeal or, alternatively, for leave to make submissions at the hearing before this court. There was no question at all that the Liquidators had a right to be heard, and Evan Lim's stance in objecting to the Liquidators being made a party to the appeal and/or being heard at the appeal was unreasonable. We therefore fixed the costs of the Liquidators' joinder application in the sum of $10,000 and $2,000 (both inclusive of disbursements) in favour of the Liquidators and MWA respectively. We also made the usual consequential orders.

Sundaresh Menon Chief Justice	Belinda Ang Saw Ean Judge	Quentin Loh Judge

Tan Tee Jim SC, Gan Theng Chong, Andrew Tan Jian Ming and Chua Huimin Michelle (Lee & Lee) for the appellant;
Teo Chun-Wei Benedict, Lim Mei Yee Elaine and Sim Yu Xuan

Shane (Drew & Napier LLC) for the first respondent;
Michael Palmer and Reuben Tan Wei Jer (Quahe Woo & Palmer LLC) for the second respondent.
