Belfield International (Hong Kong) Ltd *v* Sheagar s/o T M Veloo
[2013] SGHC 206

Case Number : Suit No 876 of 2011

Decision Date : 04 October 2013

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : R Dilip Kumar (Gavan Law Practice LLC) for the plaintiff; Suresh s/o Damodara (Damodara Hazra LLP) for the defendant.

Parties : Belfield International (Hong Kong) Ltd — Sheagar s/o T M Veloo

Contract – Illegality and public policy – Statutory illegality

4 October 2013 Judgment reserved.

Lai Siu Chiu J:

Introduction

1 In the present action, Belfield International (Hong Kong) Limited ("the plaintiff") is claiming against Sheagar s/o T M Veloo ("the defendant") for US$358,480.57, interest and costs under a guarantee that he gave for a loan extended to Blue-Sea Engineering Pte Ltd ("Blue-Sea") by the plaintiff, of which the defendant was the managing director and effective owner.

The background

The parties

2 The plaintiff is a company incorporated in Hong Kong and is in the business of providing commodities brokerage and structuring of trade finance services. The two directors of the plaintiff are Henri Adriaan Hamelers ("Henri"), who is the managing director, and Gregorio Tolentino Ang Jr.

3 Blue-Sea was a company incorporated in Singapore and was a wholly-owned subsidiary of Great Sea Holdings Pte Ltd ("Great Sea"), in which the defendant holds more than 99% of the shares.

The first loan to Blue-Sea

4 During the worldwide financial crisis of 2008, banks were reluctant to give loans and many companies were financially tight. The plaintiff was approached for loans by some companies through friends and associates. The plaintiff gave loans in very exceptional cases, which loans were extended to not more than four companies since the plaintiff's incorporation on 6 June 2006.

5 Govender Dayanandan ("Daya") and Tan Yong Hong ("Eric") were the business associates of Henri. The defendant was introduced to Daya by his friend C Chandrasegar ("Chandra"), who is an advocate and solicitor, and a fellow director of Great Sea with the defendant.

6 The defendant informed Daya and Eric that Blue-Sea required a loan of US$348,000 as Blue-Sea was having cash flow problems in paying staff's salaries, Central Provident Fund contributions and

other expenses. This was followed by a meeting between the defendant and Henri sometime in August 2009. Henri then discussed the matter with Daya and Eric.

7 Prior to giving any loan to Blue-Sea, it was decided that Daya and Eric would go to Blue-Sea's office to perform a due diligence check and a credit appraisal of Blue-Sea and the Great Sea group of companies to ascertain their commercial viability and their loan serviceability if a loan were to be granted to Blue-Sea. The financial statements and accounts showed that Blue-Sea had an impressive sales revenue record for 2006, 2007 and 2008, and it was the main operating company of the Great Sea group of companies. The due diligence check was mostly done by Daya and Eric. As both Daya and Eric were retired bankers with experience in this field, Henri trusted their judgment. Daya and Eric met up with Henri to go through the financial documents, and it was agreed that the plaintiff would give a loan of US$348,000 to Blue-Sea ("the first Loan").

8 To ensure that any loans complied with the legal requirements in Singapore, the plaintiff engaged Ms Bhargavan Sujatha ("Sujatha") as their lawyer, and Sujatha conducted all the required legal searches (such as the companies winding-up search and the profile search) and prepared the legal documents for the loan.

9 On 27 August 2009, the plaintiff passed a directors' resolution to grant Blue-Sea a loan of US$348,000. The plaintiff's solicitors then prepared the following documents (collectively "the first Loan Documents") for the first loan:

(a) the Loan Agreement ("the first Loan Agreement"), which stipulated the terms and conditions of the loan;

(b) the Subordination Agreement ("the first Subordination Agreement"), which stipulated that the defendant agreed that Blue-Sea would repay the plaintiff's loan before repaying the defendant any monies owed to him by Blue-Sea; and

(c) the deed of guarantee and indemnity ("the first Deed of Guarantee and Indemnity"), which required a personal guarantee from the defendant for the loan given to Blue-Sea.

10 On 27 August 2009, Henri signed the first Loan Documents, witnessed by Daya, and the defendant signed the same, witnessed by Chandra. On 1 September 2009, the loan of US$348,000 was transferred by the plaintiff into Blue-Sea's bank account in Singapore. On 1 October 2009, Blue-Sea made the first monthly payment of interest and management fee amounting to US$6,033.91. Thereafter, Blue-Sea made regular monthly payments of the interest and management fee.

The second loan to Blue-Sea

11 In early January 2010, about four months after the first Loan was given, the defendant requested Daya to assist him in getting another loan for Blue-Sea for the amount of US$358,000 ("the second Loan"). The defendant told Daya that the reason for the second Loan was that Blue-Sea was again unable to meet its expenses. As the financial statements of Blue-Sea and its related companies had just been checked four months earlier, and because Blue-Sea was regular in its monthly payments under the first Loan, Daya recommended that the second Loan be given to Blue-Sea; Henri agreed. Sujatha was similarly engaged by the plaintiff to conduct the relevant legal searches. She then prepared the legal documents, which were identical to the documents for the first Loan. (Hereinafter the documents will be referred to as the second Loan Agreement, the second Subordination Agreement, and the second Deed of Guarantee and Indemnity.)

12 On 29 January 2010, Blue-Sea's board of directors passed a directors' resolution accepting the second Loan of US$358,000 from the plaintiff on the terms and conditions set out in the second Loan Agreement. The directors' resolution was signed by the defendant himself. On the same day, the defendant also signed the second Loan Agreement, the second Subordination Agreement, and the second Deed of Guarantee and Indemnity, witnessed by the defendant's fellow director, Chandra. On the same day too, Henri signed the same documents, witnessed by Daya. The second Loan amount of US$358,000 was then remitted to Blue-Sea's bank account by the plaintiff. From March 2010 onwards, Blue-Sea regularly paid the monthly interest and management fees for both the first and the second Loans.

13 Clause 1 of the second Deed of Guarantee and Indemnity is the main operative clause and it provides for the defendant's obligation to pay the plaintiff any sums of monies that remained unpaid by Blue-Sea, interest at a rate of 7% per annum, and legal costs incurred in the enforcement of the guarantee on an indemnity basis:

> The Guarantor will pay to the Lender on demand all sums of monies or liabilities which are now or shall hereafter from time to time be due or owing or shall remain unpaid to the Lender or be incurred from or by the Customer anywhere whether as principal or as surety and whether solely or jointly with any other person or persons (in partnership or otherwise) on any account or accounts or otherwise including the ultimate balance which at the date of such demand shall be due or owing or remain unpaid to the Lender by the Customer under the Facility or in respect of any monies for which the Customer may be liable to the Lender as surety whether solely or jointly with any person or persons (in partnership or otherwise) or in any other way whatsoever whether such liabilities to the Lender thereon at the date of such demand be certain or contingent and not as yet due and payable TOGETHER WITH in all the cases aforesaid interest at a rate of 7% per annum commission discount and other charges and together with all legal and other costs (including legal costs on an indemnity basis) charges and expenses which the Lender may incur in enforcing or seeking to enforce any security for or obtaining or seeking to obtain payment of all or any part of the monies and liabilities hereby guaranteed on a full indemnity basis. All amounts payable by the Guarantor hereunder (whether on account of principal interest or otherwise) shall be paid in full free of set-off or counterclaim.

Events after the giving of both loans

14 Sometime between 29 July 2010 and 20 October 2010, the defendant made arrangements to sell Blue-Sea and remove himself as a director. By 20 October 2010, Blue-Sea was owned by Holcroft Finance Corporation, and two new directors had replaced the defendant as a director of Blue-Sea. The defendant also placed Blue-Sea under provisional liquidation by October 2010.

15 On 26 October 2010, Henri sent two letters of demand to Blue-Sea, and another two letters of demand to the defendant for repayment of the first Loan and the second Loan. On the same day, the defendant sent two letters of undertaking to the plaintiff, undertaking to fulfil his obligations under the first and second Deeds of Guarantee and Indemnity, as the guarantor of the first Loan ("the first Letter of Undertaking") by making payment by 15 December 2010, and of the second Loan ("the second Letter of Undertaking") by making payment by 1 February 2011.

16 On 16 December 2010, the first Loan, including the interest and management fees thereunder, was completely repaid by the defendant as guarantor of the loan. The defendant paid the monthly interest and management fee for the second Loan from March 2010 until 3 February 2011. However, the second Loan remained outstanding and was due on 1 February 2011.

17 On 9 November 2010, the plaintiff received a letter dated 4 November 2010 from Blue-Sea's liquidator, Elango Subramaniam ("Elango"), asking the plaintiff to file a proof of debt by 8 November 2010. As the plaintiff did not have sufficient time to do so, and the plaintiff was looking to the defendant to repay the first and second Loans as the guarantor, the plaintiff did not follow up with Elango.

18 Pursuant to the second Letter of Undertaking, the defendant was to repay the second Loan as the guarantor by 1 February 2011. However, the defendant failed to do so despite a demand from the plaintiff. On 14 February 2011, the defendant e-mailed Eric to request that he be allowed to pay the second Loan in instalments spread over three months. The plaintiff acceded to the request and the defendant agreed to an increase in the interest rate to 2% per month, and to pay a restructuring fee of US$3,580 and legal fees of US$1,000. It was also agreed that the plaintiff would send the defendant a new letter of undertaking ("the third Letter of Undertaking") for the second Loan, and the defendant would affirm his liabilities and undertake to fulfil his obligation under the second Deed of Guarantee and Indemnity, and the additional payments in consideration of the instalment arrangement.

19 However, the defendant did not return a signed copy of the third Letter of Undertaking which Eric e-mailed to him on 2 March 2011.

The plaintiff's claim

20 The plaintiff alleged that Blue-Sea had breached the second Loan Agreement and that events of default had occurred, which were particularised as follows:

(a) there were numerous legal proceedings instituted against Blue-Sea in the Singapore courts of which Blue-Sea failed to inform the plaintiff;

(b) by October 2010, the ownership of Blue-Sea had been transferred from Great Sea to Holcroft Finance Corporation, but Blue-Sea failed to notify the plaintiff of the change of ownership;

(c) between July 2010 and October 2010, the defendant removed himself as a director of Blue-Sea and was replaced by Roslan Bin Amri and Radhakrishna Sambath Kumar – Blue-Sea failed to notify the plaintiff of this change of directorship;

(d) sometime in October 2010, Blue-Sea became insolvent and winding-up proceedings were commenced with a liquidator appointed – Blue-Sea failed to notify the plaintiff of these proceedings; and

(e) Blue-Sea had disposed of all its assets substantially.

21 Pursuant to the terms of the second Loan Agreement and the second Deed of Guarantee and Indemnity, the default by Blue-Sea, and the plaintiff's notice of demand sent in October 2010, the sum of US$358,000 and interest at the rate of 7% per annum became due and payable by the defendant to the plaintiff.

22 Further, the defendant had breached the second Letter of Undertaking in which the defendant affirmed his liability under the second Deed of Guarantee and Indemnity and undertook to fulfil his obligation to pay the plaintiff the loan amount of US$358,000 as guarantor by 1 February 2011.

The defendant's case

The defendant's case

23 The defendant argued that the second Loan Agreement and the second Deed of Guarantee and Indemnity were unenforceable pursuant to:

(a) ss 5 and 14(2) of the Moneylenders Act 2008 (Act 31 of 2008) ("the Moneylenders Act 2008");

(b) ss 5 and 21(1)(*a*) of the Business Registration Act (Cap 32, 2004 Rev Ed) ("the Business Registration Act"); and/or

(c) the Hong Kong Money Lenders Ordinance (Cap 163) ("the Hong Kong Money Lenders Ordinance").

24 First, the defendant argued that the plaintiff was in the business of moneylending and was prohibited from such a business by s 5 of the Moneylenders Act 2008. The plaintiff did not fall within the exception of an "excluded moneylender" as provided by ss 2 and 5(1)(*b*) of the Moneylenders Act 2008 because the defendant did not lend money solely to corporations. The contention was that the second Loan Agreement was a sham to the extent that it was a personal loan to the defendant disguised as a corporate loan to Blue-Sea. Moreover, the "principal debtor clause" in the second Deed of Guarantee and Indemnity made the defendant the borrower in the second Loan. Since the defendant was not a corporate entity but an individual, the plaintiff was not an "excluded moneylender" under s 2 of the Moneylenders Act 2008.

25 Second, the defendant argued that the plaintiff conducted business in Singapore in the form of the loan transactions, but failed to register its business as required by s 5(1) of the Business Registration Act. Pursuant to s 21(1)(*a*) of the Business Registration Act, the second Loan Agreement and the second Deed of Guarantee and Indemnity, being contracts in relation to the business carried on by the plaintiff, were unenforceable.

26 Third, the defendant argued that the Hong Kong Money Lenders Ordinance applied to the second Loan Agreement and the second Deed of Guarantee and Indemnity because the loan was disbursed from the plaintiff's bank account in Hong Kong, and the loan was to be repaid by Blue-Sea into the same. Accordingly, the application of the Hong Kong Money Lenders Ordinance rendered the second Loan Agreement and the second Deed of Guarantee and Indemnity illegal, and hence the same were unenforceable in Singapore as this would be against public policy.

27 In addition, the defendant argued that as a matter of public policy, the second Loan Agreement and the second Deed of Guarantee and Indemnity should not be enforced as the plaintiff was trying to circumvent the effects of the Moneylenders Act 2008.

The plaintiff's case

28 The plaintiff argued that it was an "excluded moneylender" under s 2 of the Moneylenders Act 2008 because it lent money solely to corporations, or because it carried on a business not having for its primary object the lending of money. The second Loan was not a sham, as shown by the due diligence done on Blue-Sea, Blue-Sea's directors' resolution to accept the loan, and the fact that the defendant and not someone else stood as the guarantor. Therefore, the prohibition against the business of moneylending under s 5 of the Moneylenders Act 2008 did not apply to the plaintiff.

29 The plaintiff argued that the Hong Kong Money Lenders Ordinance did not apply to the plaintiff because the plaintiff was not carrying on business as a moneylender in Hong Kong. This was shown

by, *inter alia*, how the plaintiff had only made isolated loans to four companies, the fact that all documentation for the loan was prepared and executed in Singapore, and the fact that the loans had been disbursed in Singapore.

The issues

30 The issues before this court are as follows:

(a) Was the second Loan Agreement a sham to the extent that it was a personal loan to the defendant disguised as a corporate loan ("Issue 1")?

(b) Did the "principal debtor clause" in the second Deed of Guarantee and Indemnity make the defendant the borrower in the second Loan ("Issue 2")?

(c) Were the second Loan Agreement and the second Deed of Guarantee and Indemnity unenforceable pursuant to the Business Registration Act ("Issue 3")?

(d) Were the second Loan Agreement and the second Deed of Guarantee and Indemnity unenforceable pursuant to the Hong Kong Money Lenders Ordinance ("Issue 4")?

The decision

Issue 1: Was the second Loan Agreement a sham to the extent that it was a personal loan to the defendant disguised as a corporate loan?

The applicable law

31 Since the second Loan Agreement was made on 29 January 2010, the applicable statute was the Moneylenders Act 2008, which came into operation on 1 March 2009. The Moneylenders Act 2008 repealed and re-enacted the Moneylenders Act (Cap 188, 1985 Rev Ed), and introduced the concept of an "excluded moneylender". An "excluded moneylender" was not caught by the prohibition in s 5 of the Moneylenders Act 2008 against carrying on the business of moneylending without a licence in Singapore. Section 2 of that Act defined "excluded moneylender" to include any person who lent money solely to corporations, or who carried on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lent money:

> **Interpretation**
>
> **2.** In this Act, unless the context otherwise requires —
>
> …
>
> "excluded moneylender" means —
>
> (*a*) any body corporate, incorporated or empowered by an Act of Parliament to lend money in accordance with that Act;
>
> (*b*) any person licensed, approved, registered or otherwise regulated by the Authority under any other written law, to the extent that such person is permitted or authorised to lend money or is not prohibited from lending money under that other written law;(*c*) any society registered as a credit society under the Co-operative Societies Act (Cap. 62);

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

(*e*) any person who —

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

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

(iii) lends money solely to —

(A) corporations;

(B) limited liability partnerships;

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

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

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

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

…

32 This definition of an "excluded moneylender" remains unchanged in the latest revised edition of the Moneylenders Act (Cap 188, 2010 Rev Ed).

33 A document is a sham if all the parties thereto have a common intention that the document was not to create the legal rights and obligations which it gives the appearance of creating: *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802; *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)* [2010] SGHC 163 at [112]. In other words, a sham transaction is one which is good in form but false in fact: *TKM (Singapore) Pte Ltd v Export Credit Insurance Corp of Singapore Ltd* [1992] 2 SLR(R) 858 at [41].

34 The person alleging that a document is a sham has the burden of proving that the parties intended the document to be a pretence, and there is a very strong presumption that the parties intended to be bound by the provisions of the agreements which they entered into: *Chng Bee Kheng and another (executrixes and trustees of the estate of Fock Poh Kum, deceased) v Chng Eng Chye* [2013] 2 SLR 715 at [51]; *National Westminster Bank plc v Jones and others* [2001] 1 BCLC 98 at [59].

The present facts

35 The documentary evidence shows that the second Loan was a corporate loan extended by the plaintiff to Blue-Sea. The second Loan Agreement expressly stated that the plaintiff was the lender of the sum of US$358,000, while Blue-Sea was the borrower. The second Loan was accepted by Blue-Sea following a directors' resolution passed on 29 January 2010. The fact that a due diligence check and a credit appraisal of Blue-Sea and the Great Sea group of companies were conducted showed

that the borrower was indeed Blue-Sea, not the defendant.

36 The defendant argued that the following facts showed that the second Loan Agreement was a sham:

(a) The plaintiff did not file a proof of debt against Blue-Sea pursuant to the winding-up rules.

(b) The plaintiff's "strict credit appraisal" was a sham.

(c) The second Loan Agreement was signed on 29 January 2010 and the money was remitted by 4 February 2010, before the plaintiff received Sujatha's letter dated 8 February 2010 confirming that the due diligence searches (which comprised the winding-up search, the judicial management search and the bankruptcy search, and the composite litigation search) on Blue-Sea had been done.

(d) The "management fee" in the second Loan Agreement was disguised interest.

(1) Proof of debt

37 At the outset, it should be noted that the plaintiff barely had sufficient time to file a proof of debt. Elango sent a letter dated 4 November 2010 to the plaintiff's address in Hong Kong requesting the plaintiff to file a proof of debt by 8 November 2010 and to attend a creditor's meeting on 10 November 2010. However, Henri only received the letter on 9 November 2010.

38 Although the plaintiff could have filed a proof of debt after the deadline, I find that the plaintiff was entitled to pursue the defendant as guarantor of the loan without having to exhaust the option of pursuing Blue-Sea. I accept the plaintiff's explanation that it did not want to incur legal expenses by proceeding against Blue-Sea as the latter was under liquidation. Pursuing the defendant as guarantor would understandably be more expedient and useful as the defendant had already agreed to pay the second Loan amount by 1 February 2011 under the second Letter of Undertaking.

(2) Credit appraisal

39 The plaintiff entrusted Daya and Eric with the task of ascertaining Blue-Sea's commercial viability and loan serviceability. It was revealed that Daya and Eric's credit appraisal of Blue-Sea for the first Loan was not conducted according to the strictest standards. The first Loan Agreement was signed on 27 August 2009, but the financial statements which they looked at were for the years 2006 and 2007. Even though the revenue of Blue-Sea was S$15m for the year 2008, Daya and Eric seemed to have placed too much weight on this factor in determining Blue-Sea's credit standing as revenue alone could not have been determinative of the company's financial status. Nevertheless, I find that Daya was entitled to consider the future growth potential of the Great Sea group of companies, even though Blue-Sea was a separate legal entity from the other companies in the Great Sea group.

40 Even though the plaintiff conceded that the credit checks could have been done in a more rigorous manner, this does not detract from the fact that there was a genuine effort to do credit appraisal. Moreover, Eric was ready to vouch for Blue-Sea's credit standing for the first Loan. The plaintiff may well have misplaced its trust in Daya and Eric in asking them to conduct a strict credit appraisal of Blue-Sea, but the plaintiff was reasonably entitled to rely on Daya and Eric, given that they were retired bankers with a wealth of financial experience. Even though there was no credit appraisal done for the second Loan, it should be noted that a credit appraisal of Blue-Sea and the Great Sea group of companies had already been conducted by Eric and Daya four months prior to the

disbursement of the second Loan amount, and Blue-Sea had a good track record of performing its obligations under the first Loan Agreement. In such circumstances, it would not be unreasonable for the plaintiff to grant the second Loan without another credit appraisal. The absence of a strict credit appraisal of Blue-Sea for the second Loan may also be explained by the fact that Daya had a personal interest in recommending that the loan be given to Blue Sea by the plaintiff. Daya admitted that he was entitled to US$14,520 from Blue-Sea under a fee agreement dated 29 January 2010 between him and Blue-Sea for arranging the loan. Although this conflict of interest is unfortunate and may have compromised the rigour of Daya's credit appraisal of Blue-Sea, the plaintiff later consented to it.

(3) Due diligence searches

41 Clause 3 of the second Loan Agreement provided that the obligation of the plaintiff to disburse the loan was subject to the plaintiff being satisfied that there were no legal or winding-up proceedings against Blue-Sea and the defendant:

> **3. CONDITION PRECEDENT**
>
> The availability of the Facility of the Borrower and the obligation of the Lender to advance and/or disburse any part of the Facility or allow any drawdown shall be subject to the following conditions precedent:-
>
> …
>
> (iii) the Lender shall be satisfied that:-
>
> (a) there is no legal proceeding suit or action of any kind whatsoever (whether criminal or civil) instituted or being instituted or threatened against the Borrower or the Guarantor; and
>
> (b) there is no winding-up notice/petition/proceeding against the Borrower or any bankruptcy notice/petition/proceeding against the Guarantor.

42 Therefore, the fact that the searches done by Sujatha were only completed by 5 February 2010, after the second Loan Agreement was signed, was acceptable as the plaintiff could still choose not to disburse the loan amount if there were any adverse results from the searches.

43 While it does seem odd that the loan amount was disbursed before the searches were done, this has to be seen in the larger context of the entire circumstances. Similar to the credit appraisal of Blue-Sea, a due diligence check of Blue-Sea and the Great Sea group of companies had already been conducted by Eric and Daya four months prior to the disbursement of the second Loan amount, ascertaining Blue-Sea's commercial viability and loan serviceability. Moreover, Blue-Sea had a good track record of performing its obligations under the first Loan Agreement, and the second Loan Agreement contained essentially the same terms and conditions as the first Loan Agreement. In the circumstances, I find that it was not entirely unreasonable for the plaintiff to have disbursed the second Loan amount before the due diligence searches were done. Even though this reflected a lapse on the part of the plaintiff, I do not find that it is sufficient to show that the second Loan Agreement was a sham to disguise a personal loan to the defendant.

44 I find Henri's actions following the loan to be consistent with the position that the second Loan made to Blue-Sea was not a sham. On 15 October 2010, the defendant told Daya that he was going to put Blue-Sea under provisional liquidation because his engineers had made wrong projection

calculations and that Blue-Sea was very much in debt. The defendant then asked Daya to request the plaintiff to "transfer" the second Loan from Blue-Sea to another related company, Blue-Sea Ventures Pte Ltd, *ie*, to change the borrower from Blue-Sea to Blue-Sea Ventures Pte Ltd, even though the loan amount had been disbursed to Blue-Sea earlier. After Daya had informed the plaintiff of the defendant's request and despite the defendant's indication that the plaintiff might not be able to recover its loan to Blue-Sea, Henri declined the request as he considered that it would be "legally unacceptable to shift loans from one company to another on the basis of documents without any real transfer of the underlying loans". In my view, this supports the plaintiff's position that the plaintiff intended the second Loan Agreement to create the legal rights and obligations which it gave the appearance of creating.

(4) Management fee

45 The defendant argued that the "management fee" in the second Loan Agreement was disguised interest and hence an untruth, and that in itself tainted the legality of the second Loan Agreement and rendered the agreement a sham. I disagree. Even if the "management fee" was effectively disguised interest which the plaintiff charged the defendant, that did not show a common intention that the second Loan Agreement was a sham such that the loan was in fact a personal loan given to the defendant while giving the false appearance that it was a corporate loan to Blue-Sea. In other words, any alleged disguised interest was not relevant to the issue of whether the loan was made to Blue-Sea or to the defendant.

46 Therefore, considering the totality of the facts, I am not persuaded that the second Loan Agreement was a sham to the extent that it was a personal loan to the defendant disguised as a corporate loan. In the circumstances, even if the plaintiff was in the business of moneylending (which I find it was not at [55], [72]–[78] below), I am of the view that the plaintiff was an "excluded moneylender" under s 2 of the Moneylenders Act 2008. Accordingly, the second Loan Agreement and the second Deed of Guarantee and Indemnity are not unenforceable pursuant to the Moneylenders Act 2008. Given my findings, it follows that the second Loan is legitimate and the plaintiff was not attempting to circumvent the Moneylenders Act 2008.

Issue 2: Did the "principal debtor clause" in the second Deed of Guarantee and Indemnity make the defendant the borrower in the second Loan?

47 The defendant argued that the "principal debtor clause" in the second Deed of Guarantee and Indemnity made the defendant the borrower in the second Loan. Since the defendant was not a corporate entity but an individual, the plaintiff was not an "excluded moneylender" under s 2 of the Moneylenders Act 2008. The "principal debtor clause" is found in cl 9 of the second Deed of Guarantee and Indemnity:

> 9. As a separate and independent obligation the Guarantor agrees that the Guarantor shall be liable to the Lender at all times as principal debtor and in addition any monies mentioned in paragraph 1 above which may not be recoverable on the footing of a guarantee, whether by reason of any legal limitation disability or incapacity or lack of any borrowing powers of or by the Customer or lack of authority of any manager officer director or agent of the Customer or otherwise shall be recoverable from the Guarantor as sole or principal debtor in respect of it and the Guarantor undertakes to pay all such monies to the Lender on demand.

48 I reject the defendant's argument. It is one thing to say that the defendant was liable to pay the sums owed to the plaintiff as the principal debtor, and quite another to say that the defendant was the borrower and that the second Loan was made to the defendant. In the former, the guarantor

merely accepted the obligation to pay the sums owed to the lender without the guarantor receiving the loan amount, while in the latter, it would be the borrower who actually received the loan amount. These two scenarios must be distinguished in analysing the real relationship between the parties.

49 In the present case, the loan amount of US$358,000 was disbursed to Blue-Sea's bank account, not to the defendant's. While the account book of Blue-Sea recorded the deposit of the loan amount as coming from the defendant, that was the result of the defendant's own instructions to his accounting staff, and there is no doubt that the monies came from the plaintiff's direct transfer into Blue-Sea's account. The defendant then admitted to withdrawing the loan amount and applying the loan amount to his other companies. However, I am not persuaded that this was done with the knowledge of the plaintiff. It should be reiterated that Blue-Sea was expressly stated to be the borrower in the second Loan Agreement, and I did not find that the second Loan Agreement was a sham (see above at [46]). Therefore, the loan was not made to the defendant, and the fact that the defendant agreed to be the principal debtor did not make the defendant the borrower of the loan. Consequently, even if the plaintiff was in the business of moneylending (which I find it was not at [55], [72]–[78] below), the plaintiff was an "excluded moneylender" under s 2 of the Moneylenders Act 2008. Accordingly, the second Loan Agreement and the second Deed of Guarantee and Indemnity are not unenforceable pursuant to the Moneylenders Act 2008.

Issue 3: Were the second Loan Agreement and the second Deed of Guarantee and Indemnity unenforceable pursuant to the Business Registration Act?

50 Section 5(1) of the Business Registration Act requires a business to be registered before it is carried out in Singapore:

> **Application for registration**
>
> **5.**—(1) Subject to the provisions of this Act, every person shall, before carrying on business in Singapore, make an application to the Registrar in the prescribed manner for registration under this Act.
>
> (2) Notwithstanding this section, only one application for registration is required to be made where the same person or persons carry on business under the same business name.

51 The consequence of failing to register is found in s 21(1) of the Business Registration Act, which states that where a person carries on business without being registered, the defaulter's rights under a contract in relation to the business carried on by the defaulter shall not be enforceable:

> **Disability of persons in default**
>
> **21.**—(1) Where a person required to be registered under this Act —
>
> (*a*) carries on business without being registered under this Act to do so; or
>
> (*b*) fails to furnish any information required under section 14,
>
> then the rights of the defaulter under or arising out of any contract, in relation to the business carried on by the defaulter in respect of which there is no valid registration or there is non-compliance with section 14, made or entered into by or on behalf of the defaulter at any time while he is in default shall, subject to subsection (3), not be enforceable by action or other legal proceedings either in the business name or otherwise.

…

52 The term "business" is defined in s 2 of the Business Registration Act:

2.—(1) In this Act, unless the context otherwise requires —

…

"business" includes every form of trade, commerce, craftsmanship, calling, profession and any activity carried on for the purposes of gain but does not include any office, employment or occupation, or any of the businesses specified in the First Schedule;

…

53 In the present case, the plaintiff was in the business of providing services relating to commodities brokerage and the structuring of trade finance. Henri explained the plaintiff's business as such during cross-examination:

Court: What does your company do, Mr Hamelers?

Witness: The company is in, erm, commodities brokerage, er, Your Honour. That is mainly finding, er, business opportunities for outside parties, putting it together with financial institutions, et cetera, where after they negotiate on their own and, er, Belfield would then earn a commission of any transaction that's been done.

54 Even with Henri's explanation, it is still not quite clear how the plaintiff's business was conducted. But quite apart from the issue of whether the plaintiff did carry on the business of providing commodities brokerage and structuring of trade finance services in Singapore, the relevant question to be answered is whether the giving of the loans by the plaintiff falls within the definition of "business" in s 2 of the Business Registration Act. Specifically, the question to be answered is whether the giving of loans by the plaintiff is an "activity carried on for the purposes of gain". It should be noted that an "activity carried on for the purposes of gain" is very wide and the literal application of this catch-all definition of business will potentially lead to a rather absurd situation where every act done for the purpose of gain would be caught. Therefore, I find that the *ejusdem generis* canon of construction should apply such that the meaning of the words "activity carried on for the purposes of gain" should be limited to those activities in the same class as a "trade, commerce, craftsmanship, calling, profession". In *Bennion on Statutory Interpretation* (LexisNexis, 5th Ed, 2008) at p 1231, the *ejusdem generis* principle is described in the following terms:

The Latin words *ejusdem generis* (of the same kind or nature), have been attached to a principle of construction whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character. The principle may apply whatever the form of the association, but the most usual form is a list or string of genus-describing terms followed by wider residuary or sweeping-up words.

…

The *ejusdem generis* principle arises from the linguistic implication by which words having literally a wide meaning (when taken in isolation) are treated as reduced in scope by the verbal context. It may be regarded as an instance of ellipsis, or reliance on implication. The principle is presumed to apply unless there is some contrary indication.

55 I note that the preceding words of "trade, commerce, craftsmanship, calling, profession" involve a necessary degree of system, repetition and continuity, which are the features of the concept of a "business" laid down in the common law (see below at [69]); see also *Agus Anwar v Orion Oil Ltd* [2010] SGHC 6 at [7]–[9]. The genus of the type of activity encompassed by the phrase "activity carried on for the purposes of gain" should therefore be confined to an activity which is not only carried on for the purpose of gain, but which has a sufficient degree of system, repetition and continuity. As discussed below at [69]–[77], I find that the giving of loans by the plaintiff did not have a sufficient degree of system, repetition and continuity as would give rise to a business.

56 Accordingly, since the giving of loans by the plaintiff did not constitute a business, and the second Loan Agreement and the second Deed of Guarantee and Indemnity were not related to the plaintiff's business of commodities brokerage and structuring of trade finance services, I find that the disability provided in s 21 of the Business Registration Act does not apply. The right of the plaintiff to claim from the defendant does not arise from a contract "in relation to the business carried on by the [plaintiff] in respect of which there is no valid registration". Therefore, the second Loan Agreement and the second Deed of Guarantee and Indemnity are not unenforceable pursuant to the Business Registration Act.

57 In any case, it should be noted that ss 21(2) to 21(4) of the Business Registration Act provide that the court may grant the defaulter relief against the disability imposed by s 21(1):

> (2) A defaulter referred to in subsection (1) may apply to the court for relief against the disability imposed by this section.
>
> (3) The court, on being satisfied that the default was accidental or due to inadvertence or some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may grant such relief either generally, or as respects any particular contract, on condition that the costs of the application are paid by the defaulter, unless the court otherwise orders, and on such other conditions (if any) as the court may impose.
>
> (4) Relief under subsection (3) shall not be granted except on such service and publication of notice of the application as the court may order, nor shall relief be given in respect of any contract if any party to the contract proves to the satisfaction of the court that, if the provisions of this Act had been complied with, he would not have entered into the contract.

58 I refer to *Federal Lands Commissioner v Benfort Enterprise and another and other actions* [1997] 3 SLR(R) 895 at [13]–[14], which expounded the purpose of the disability under s 17(1) of the Business Registration Act (Cap 32, 1985 Rev Ed), which was then the equivalent of the current s 21(1) of the Business Registration Act:

> 13 The nub of the plaintiffs' application was what is the mischief that the Act seeks to prevent? It is that those who do business in Singapore disclose their particulars by registering with the Registrar so as not to mislead those whom they do business with as to their real identity. If they do not do so, the court is given the widest possible powers of granting relief to persons in default. It provides that the court on being satisfied that the default was accidental, or due to inadvertence, or some other sufficient cause, or that "on other grounds it is just and equitable to grant relief" may grant such relief. As Lush J said in *Weller v Denton* [1921] 3 KB 103 at 109 in the course of his judgment on a similar provision in the English Registration of Business Names Act 1916 (on which the Act is substantially based):
>
> The reason why this wide power of granting relief should be given to the court can well be

understood. Where the defendant has not been misled, and knew the members of the firm or other persons with whom he was dealing, it might be most unjust and inequitable to hold that the plaintiff's action should not be maintainable merely because he did not know that he ought to have been registered under the Act.

14 I take the same view. …

59 In the present case, there is no evidence that the defendant or Blue-Sea did not know who they were dealing with in the plaintiff or that they were misled. There is also no evidence that the plaintiff's omission to register their business with the Registrar of Businesses was deliberate and that the defendant or Blue-Sea had been misled as a result. Accordingly, I find that it would be just and equitable to grant the plaintiff relief against the disability imposed by s 21(1) of the Business Registration Act, if the giving of the second Loan is to be found to be part of a business.

Issue 4: Were the second Loan Agreement and the second Deed of Guarantee and Indemnity unenforceable pursuant to the Hong Kong Money Lenders Ordinance?

The applicable law

60 It was not disputed that the proper law of the second Loan Agreement and the second Deed of Guarantee and Indemnity is Singapore law, as expressly agreed by the relevant parties in the second Loan Agreement and the second Deed of Guarantee and Indemnity.

61 It should be noted that the contravention of a foreign law, Hong Kong law in this case, is only relevant if reference is made to such a foreign law by a choice of law rule, a forum mandatory rule, or the fundamental public policy of the forum (Singapore in this case): *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2013 Reissue) at para 75.359.

62 The defendant has so identified a fundamental public policy of Singapore, which is the principle of public policy formulated in the case of *Foster v Driscoll* [1929] 1 KB 470 ("the principle in *Foster v Driscoll*"). In *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2013 Reissue), Prof Yeo Tiong Min succinctly summarised the principle in *Foster v Driscoll* at para 75.365:

> If the contracting parties in entering into the contract had at the outset a common intention to use the contract [to] commit an act in a friendly foreign country which is illegal by the law of that country, then the contract will not be enforceable as being contrary to the fundamental public policy of the forum.

63 The principle in *Foster v Driscoll* has been explained by the Court of Appeal in *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842 at [45]–[47]:

> 45 The appellant also raised a related argument based on a principle of public policy formulated in the case of *Foster v Driscoll* [[1929] 1 KB 470]. This principle states that the courts will treat a contract governed by its own law as void where the parties' intention and object contemplated thereby jeopardises relations between its government and another friendly government. The case concerned a contract, governed by English law, for the supply and sale of whisky that was to be smuggled into the United States of America in contravention of the prohibition laws in force at the time. The actions were brought in relation to various disputes arising out of the contract. The Court of Appeal categorically stated that the courts would not enforce such a contract "made between the parties to further an adventure or break the laws of a foreign state". Sankey LJ added:

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

In other words, an agreement whose object to be attained is a breach of international comity will be regarded by the courts as being against public policy and void.

46 This principle was elaborated on in the case of *Regazzoni v K C Sethia* (1944) Ltd [[1958] AC 301] which concerned a contract for the sale and delivery of jute bags. The parties to the contract contemplated that these bags should be shipped from India to Genoa for resale to South Africa. One party eventually repudiated the contract and the other party brought an action for damages for breach of contract. The proper law of the contract was English law. At the time, there was in force a prohibition on the export of goods to South Africa by the Indian Government. The Law Lords agreed with and applied *Foster v Driscoll*. Lord Keith said … at 327:

> … to recognise the contract between the appellant and the respondent as an enforceable contract would give a just cause for complaint by the Government of India and should be regarded as contrary to conceptions of international comity. On grounds of public policy, therefore, this is a contract which our courts ought not to recognize.

47 In the same case, Lord Reid added at 323 that:

> The real question is one of public policy in English law: but in considering this question we must have in mind the background of international law and international relationships often referred to as the comity of nations. This is not a case of a contract being made in good faith but one party thereafter finding that he cannot perform his part of the contract without committing a breach of foreign law in the territory of the foreign country. If this contract is held to be unenforceable, it should, in my opinion, be because from the beginning the contract was tainted so that the courts of this country will not assist either party to enforce it.

Based on this and the finding that the parties had intended to violate the laws of India, the House of Lords held that the contract was unenforceable since an English court would not enforce a contract or award damages for its breach, if its performance would involve doing an act in a foreign and friendly state which would violate the law of that state. This was based on the principle of public policy and the consequent desire for international comity.

64 Therefore, an analysis of whether the second Loan Agreement and the second Deed of Guarantee and Indemnity are unenforceable under the Hong Kong Money Lenders Ordinance is necessary.

Application of Hong Kong law

65 The short answer to the defendant's argument is that the parties did not have a common intention to use the second Loan Agreement to commit an act in Hong Kong which was illegal under the laws there, because the second loan transaction was not caught by the Hong Kong Money Lenders Ordinance. I elaborate on this below.

66 It was accepted that two conditions must be satisfied for a particular loan transaction,

expressly governed by a foreign law, to be caught by the Hong Kong Money Lenders Ordinance, as stated in *Hong Kong Shanghai (Shipping) Ltd v The owners of the ships or vessels "Cavalry" (Panamanian Flag) and others* [1987] HKLR 287 ("*Cavalry*") at 296 (approved and applied in *China Merchants Bank v Minvest International Limited and Hu Xiang Dong James* [2001] HKCU 982):

(a) the lender was carrying on the business as a moneylender in Hong Kong or advertising, announcing or holding itself out as so conducting itself; and

(b) the proper law of the contract, objectively assessed, was Hong Kong law.

67 The issue to be addressed now is whether the plaintiff was carrying on the business of moneylending in Hong Kong. Section 2(1) of the Hong Kong Money Lenders Ordinance defines a "money lender" as:

> … every person whose business (whether or not he carries on any other business) is that of making loans or who advertises or announces himself or holds himself out in any way as carrying on that business, but does not include–
>
> (a) a person specified in Part 1 of Schedule 1; or
>
> (b) as respects a loan specified in Part 2 of Schedule 1, any person who makes such loan …

68 The test for determining whether a person was carrying on the business of moneylending was whether, at the time of the loan, the business of the person was that of making loans, which is a question of fact to be decided by reference to the facts of each case: *Chow Wun Sing Winston v Yiu Chun Luk*, unrep, CACV 295/2006, 6 March 2008 ("*Chow*") at [15].

69 The expression "business" connotes some degree of system, repetition and continuity: *Edgelow v MacElwee* [1918] 1 KB 205 ("*Edgelow*"); *R v Cheng Chun-hung* [1987] HKDCLR 17. As elaborated in *Edgelow* at 206, a person will generally be found to be carrying on a moneylending business if he makes loans with the necessary degree of system, repetition and continuity, and the fact that a person made occasional loans is not enough:

> … A man does not become a money-lender by reason of occasional loans to relations, friends, or acquaintances, whether interest be charged or not. Charity and kindliness are not the bases of usury. Nor does a man become a money-lender merely because he may upon one or several isolated occasions lend money to a stranger. There must be more than occasional and disconnected loans. There must be a business of money-lending, and the word "business" imports the notion of system, repetition, and continuity …

70 Generally, a man who carries on a moneylending business is one who is ready and willing to lend to all and sundry: *Litchfield v Dreyfus* [1906] 1 KB 584 at 589.

71 In *Newman v Pyke* (1908) 25 TLR 127 at 128, the court held that the plaintiff in that case was not in the business of moneylending after taking into account that: (a) there were very few lending transactions before the loan in question; (b) the loans were mostly to friends and relatives; and (c) there was no holding out or advertising by the plaintiff.

72 In the present case, I find that the plaintiff was not carrying on the business of moneylending. The plaintiff was in the business of providing commodities brokerage and structuring of trade finance services. Even though there was proper documentation of the loans and guarantees, a credit

appraisal check done by Daya and Eric, and due diligence searches done by Sujatha, these should be seen as necessary and prudent measures, given the large loan amounts of US$348,000 for the first Loan and US$358,000 for the second Loan. Daya and Eric were retired bankers, and they were not on the payroll of the plaintiff but assisted on an informal basis in reviewing Blue-Sea's business operations. I accept Daya's explanation during cross-examination of the relationship between himself and the plaintiff:

> Q: So how would you describe your relationship with Belfield International?
>
> A: I was basically a financial consultant. And a financial consultant, you---you're calling it an "agent". I'm calling myself a financial con---consultant. I mean at the end of the day, there was a relationship between me and Belfield. That was---
>
> Q: And what is the relationship?
>
> A: Well, whenever we had some sort of, er, business opportunity we felt that was viable, we put it to Belfield. And it was just on a---on a---on a---erm, you know, on a---er, on a informal basis. It wasn't a---a formal that Harry, er, or Belfield told us "Go and bring me business", I mean, you know, "Go and get loans for me" of "Get commodities for me." Nothing---there was nothing, absolutely nothing. Erm, so it was on a [*sic*] informal basis that we brought---we thought it was a good opportunity because of the yields being low in US dollars, it was a good opportunity for Belfield to---to take, er, you know, the-the small and medium enterprise lending market was---was a bit basically squashed after 2008. So it was an opportunity because the yields were better and, er, much better than leaving the money in the bank. And this is why we put this proposal to him. I mean at the end of the day, he had to measure the risk, er, and make---er, make a judgment on it but it came with our recommendation.

Accordingly, I do not find that there was a sufficient degree of system for the loans given by the plaintiff to constitute a business in moneylending.

73 The plaintiff only advanced loans to four companies between 2009 and 2010, namely, Blue-Sea, Nordlinger Automation Pte Ltd, PT Indoasia Cemerlang, and IRA International Pte Ltd. Although I accept that there may have been more than one loan for each of the four companies, and there were in fact two loans given to Blue-Sea, the defendant has not discharged its burden of showing that more than one loan was indeed given to each of the four companies such that the total number of loans exceeded five. It should be noted that the first Loan given to Blue-Sea in 2009 was the first of such loans to the four companies. Accordingly, I find that there was no sufficient degree of repetition for the loans given by the plaintiff to constitute a business in moneylending.

74 Moreover, the plaintiff did not seek out the borrowers, and the plaintiff neither advertised nor announced nor held itself out in any way as carrying on a moneylending business. This goes to show that there was no sufficient degree of continuity for the loans given by the plaintiff to constitute a business in moneylending. The plaintiff only made loans to four companies because of requests that were made to the plaintiff for loans by cash-strapped companies through friends. The requests for loans were prompted by the financial crisis of 2008 when companies were finding themselves in a tight liquidity situation as banking facilities were withdrawn from them. It was not the case of the plaintiff deciding to give loans to all and sundry when there was no desperate request from companies. It is also evident from the plaintiff's financial statements that the plaintiff did not provide loans to companies from its incorporation on 6 June 2006 until the financial crisis of 2008.

75 The defendant sought to characterise the plaintiff as seeking to take advantage of the financial crisis of 2008 and the tight liquidity situation to enter the business of moneylending. I do not find that this assertion has been borne out by the facts. I accept Henri's explanation in cross-examination that the plaintiff did not decide to venture into the business of moneylending to take advantage of the tight liquidity situation:

> Q: So, simply put, if a party who is the borrower, is desperate, then he'll be more inclined to accept high interest rates. That's what you're saying?
>
> A: Exactly. The same as in the banking world.
>
> Q: Yes. And the---and the opportunity of imposing a high interest rates [*sic*] became especially right, given the fact there's a global meltdown, and a lot of companies were desperate for liquidity. Correct?
>
> A: Well, yes. It---it was applicable at that stage, yes.
>
> Q: Yes. And this is something that you took into consideration after you had spent 4½ years in the trading and commodity business before the company decided to go into the moneylending business. Correct?
>
> A: No, the company did not decide it wanted a moneylending business after the brokerage business. The company was approached for loans, which the company did not want to do, but under the circumstances had no option to do. These were friendly request by people who were really desperate---who were really, er, which we understand was short of any source of funds from the banks. They were probably, er, reached the limits from the banks they had, so they had no other option but to go into the---the private market. Right.

76 Further, the fact that loans were only made to four companies whose owners or directors were friends or associates militate against finding such allegedly opportunistic behaviour on the part of the plaintiff. In the case of the two loans to Blue-Sea, the defendant was a friend of Henri and Chandra. Chandra was a director in Blue-Sea and friend of Daya. Daya and the defendant were acquaintances who met at parties and Chandra's house, and Daya had gone to the defendant's house for meals and played football with the defendant's children. It was Chandra who referred the defendant to Daya and requested for assistance in the form of a loan to Blue-Sea or the Great Sea group of companies. Chandra also referred PT Indoasia Cemerlang to the plaintiff. Eric had known the defendant through Chandra since 2005 when Eric was working in a bank.

77 The plaintiff sought to argue that Henri's statement in his affidavit that the giving of loans was "not its core business" and that the plaintiff was never in the "primary business" of lending money implied that the giving of loans was the plaintiff's secondary business. I find that the plaintiff's fixation on the words "core" and "primary" was misplaced. I accept Henri's explanation in cross-examination that there was no intention to give out loans on a regular basis to give rise to a finding of a moneylending business:

> Q: No, all I'm saying is that given the fact that you said it is rather unfortunate that the words "primary" and "core" appears in your own affidavit at paragraph 4---
>
> A: Right.
>
> Q: ---I'm giving you an opportunity to explain why you say it is rather unfortunate that these

two words appear in the context of conducting a business.

A: Right. These---Your Honour, these words, er, give the impression---well, while one reads that it---it---it definitely says that we did, er, we did do loans and over and above the---so on. But it also implies that that is the kind of business that, erm, the company would carry on doing as a matter of standard. Erm, I better come back to the fact that the loans that were made were not made from our own side. We did not marketeted [*sic*] them. We did not go out to find borrowers, the borrowers came to us. So had there been no more borrowers coming to us, we would have not made any further loans. And all these loans, Your Honour, I must stress again, this company would have never ever considered a private, personal loan. Now, that's just putting the cherry on the top, We are not really in the---that understanding that kind of a market of doing loans. Erm, er, principal business was brokerage business. Brokerage. Arbitrage.

78 Although it is entirely possible for the plaintiff to be in the business of providing commodities brokerage and structuring of trade finance services *and* also be in the business of moneylending, the small proportion of its profits and revenue derived from the giving of loans to the four companies, although not conclusive, is consistent with the finding that the plaintiff was not carrying on the business of moneylending. For the financial year 2009 as at 30 September 2009 (which was after the first Loan was given), the total income from "loan interest" and "loan management fee" was just $49,009.72, which was 4.5% of the total revenue and 14.7% of the profit before taxation in 2009. As was asserted by the defendant and accepted by Henri, the "management fee" was essentially "disguised interest" and not for any actual management of the loan. At the very least, the small proportion of the income from the loans to the plaintiff's revenue and profit shows that the plaintiff's business of the provision of commodities brokerage and structuring of trade finance services was hardly a sham and façade for a hidden business in moneylending.

79 For completeness, I should state that had I found that the plaintiff carried on the business of moneylending, the place of the plaintiff's moneylending business would have been Hong Kong. In *Cavalry* at 297, the court held that the conduct of the business of moneylending in Hong Kong postulated both the lending of money and the repayment of money in Hong Kong. In the present case, the monies were disbursed from the plaintiff's bank account in Hong Kong, the monies for the first Loan were repaid into the same bank account, and the monies for the second Loan were to be repaid into the same. This is notwithstanding that the negotiations, the signing of the documents, and the preparation of the invoices were all done outside of Hong Kong. Given the foregoing, there is no issue of the extraterritorial application of the Hong Kong Money Lenders Ordinance because the transaction would be characterised as taking place in Hong Kong and hence caught by the territorial application of the Ordinance.

Conclusion

80 For all the reasons set out earlier, I award judgment to the plaintiff for its claim in the sum of US$358,000, with contractual interest at 7% per annum on US$358,000 from 8 April 2011 until the date of payment.

81 It follows from [80] that the defendant's counterclaim is dismissed.

82 Pursuant to cl 1 of the second Deed of Guarantee and Indemnity (see above at [13]), the plaintiff shall have its costs (one set) for the claim and the counterclaim taxed on an indemnity basis unless otherwise agreed.