YEOW GUANG CHENG v TANG LEE HIOK

CaseAnalysis
| [2020] MLJU 1936

Yeow Guang Cheng v Tang Lee Hiok & Ors [2020] MLJU 1936

Malayan Law Journal Unreported

HIGH COURT (SHAH ALAM)

WONG KIAN KHEONG J

SIVIL SUIT NO BA-22NCVC-423-07 OF 2017

8 November 2020

Alex Gan Yi Yang (Siow Kim Leong, Teo Guan Seng and Vilasiny a/p Gannasen with him) (Siow Kim Leong & Co) for the plaintiff.
Khoo Ai Theng (Ng Kee Way & Co) for the first, second, third and fourth defendants.
Lui Kar Yee (Bryan Goh Tseng Fook with him) (Lim Kian Leong & Co) for the fifth defendant.

Wong Kian Kheong J:

JUDGMENT

(After trial)
A. Introduction

[1] This judgment essentially concerns whether -

(1) a sale of the plaintiff's (**Plaintiff**) property in a piece of land (**Land**) [on which three units of three-storey terrace house (**Property**) are erected] to the first to fourth defendants ("**1st Defendant**" to "**4th Defendant**"); and

(2) the subsequent registration of the transfer of the Land from the Plaintiff to the 1st to 4th Defendants (**Transfer**) under the National Land Code (**NLC**)

- is genuine or an unlicensed moneylending business which is prohibited by s 5(1) of the Moneylenders Act 1951 (**MA**). The Plaintiff has alleged in this case that the fifth defendant (**5th Defendant**), a practising Advocate and Solicitor (**A&S**), abetted the 1st to 4th Defendants in the commission of an unlicensed moneylending business by disguising it as a sale of the Property.
B. Proceedings

[2] The Plaintiff has instituted this action (**Original Action**) against the 1st to 5th Defendants for the following relief, among others:

(1) a declaration that the following documents are null and void for contravening MA -

(a) a Sale and Purchase Agreement dated 15.12.2015 (**SPA**) whereby the Plaintiff purportedly sold the Property to the 1st to 4th Defendants at a price of RM900,000.00 (**Price**);

(b) an instrument under NLC to transfer the Land from the Plaintiff to the 1st to 4th Defendants (**Form 14A**); and

(c) a power of attorney regarding the Land executed by the Plaintiff in favour of the 1st to 4th Defendants (**PA**);

(2) a declaration that the Transfer is invalid;

(3) a declaration that the 1st to 4th Defendants are registered as co-owners of the Land under the NLC and own the Land as constructive trustees for the benefit of the Plaintiff;

(4) a perpetual mandatory injunction to compel the 1st to 4th Defendants to -

(a) execute all the required documents to re-transfer the Land to the Plaintiff; and

(b) deliver the "*Issue Document of Title*" of the Land (**IDT**) to the Plaintiff;

(5) an order for the 1st to 4th Defendants to refund all the money paid by the Plaintiff to the 1st to 4th Defendants; and

(6) an order for the 1st to 5th Defendants (collectively referred to as the "**Defendants**") to pay damages to the Plaintiff (which will be assessed by the court).

[3] In this case the 1st to 4th Defendants are represented by the same learned counsel while the 5th Defendant has a separate legal representation.

[4] The 1st to 4th Defendants have filed a counterclaim in this case for the following relief against the Plaintiff, among others [**Counterclaim (1st to 4th Defendants)**]:

(a) a perpetual mandatory injunction to compel the Plaintiff to deliver vacant possession of the Property to the 1st to 4th Defendants; and

(b) an order for the Plaintiff to pay to the 1st to 4th Defendants -

(a) damages for unlawfully occupying the Property (which will be assessed by the court); and

(b) rent for the ground floor of two units of the Property which have been let out by the Plaintiff.

[5] The 5th Defendant's Amended Defence pleaded in essence that, among others, the SPA, Form 14A and Transfer were genuine.

[6] By consent of all the parties, the Original Action and Counterclaim (1st to 4th Defendants) are tried together.

C. Evidence

C(1). Admissibility of extrinsic evidence to contradict SPA

[7] It is not disputed that as a general rule, by reason of ss 91 and 92 of the *Evidence Act 1950* (**EA**), extrinsic evidence cannot be adduced by parties to the SPA to contradict, vary, add to or subtract from the contents of the SPA (**General Rule**) - please refer to the judgment of Chang Min Tat FJ in the Federal Court case of *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, at 232-233.

[8] Mr. Lui Kar Yee, the 5th Defendant's learned counsel, has contended that the Plaintiff and 1st to 4th Defendants are "*bound by the four corners of the [SPA] which they put pen to*". I am not able to accept this argument for the following reasons:

(1) one of the exceptions to the General Rule is proviso (a) to s 92 *EA* which allows oral and documentary evidence to be admitted to contradict a contract on the ground of illegality - please see the Supreme Court's judgment delivered by Peh Swee Chin SCJ in *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281, at 289; and

(2) the court has a discretionary power to decide whether a certain contract, document or transaction is a sham or otherwise. It is decided in *Jemix Co Ltd & Anor v Jemix Heat Treatment (M) Sdn Bhd & Ors* [2019] 2 MLRH 276, at [29(2)(c)], as follows -

"*[29(2)(c)] … In the English Court of Appeal case of Snook v London and West Riding Investments Ltd*

[1967] 1 All ER 518*, at 528,* ***Diplock LJ (as he then was) decided in the majority judgment that any agreement, document or transaction executed by a person is a "sham" if it is intended to give to third parties or to the Court an appearance of creating between the parties legal rights and obligations which are different from the actual legal rights and obligations which the parties intend to create. This meaning of a "sham" contract, document or transaction in Snook has been accepted by Gopal Sri Ram JCA (as he then was) in the Court of Appeal in*** *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 CLJ 779*, at 788-789.*"

(emphasis added).

The above decision in **Jemix** has been affirmed on appeal by Kamaludin Mohd. Said JCA in the Court of Appeal in *Ikumi Terada v Jemix Co Ltd and another appeal* *[2019] MLJU 561*.

[9] Based on the aforesaid reasons, I admit oral and documentary evidence in this case so as to ascertain whether the SPA, Form 14A, PA and Transfer had contravened *s 5(1)* *MA*.

C(2). Plaintiff's case

[10] Only the Plaintiff testified in support of the Original Action. According to the Plaintiff, among others:

(1) on or about 15.8.2015, the Plaintiff borrowed RM600,000.00 (**1st Loan**) from CML Realty Snd. Bhd. (**CML**). Regarding the 1st Loan -

(a) the 1st Loan was an unlicensed moneylending business for which -

(i) the Plaintiff handed the IDT to CML's solicitors, Messrs Khor & Rafidah (**Messrs KR**), as collateral for the 1st Loan;

(ii) the Plaintiff and CML signed a Sale and Purchase Agreement dated 21.7.2015 [**SPA (CML)**] which was prepared by Messrs KR. According to the SPA (CML), among others, the Plaintiff purportedly sold the Property to CML for RM600,000.00 [**Price (CML)**]; and

(iii) the Plaintiff paid monthly interest for the 1st Loan to CML [**Monthly Interest (1st Loan)**]; and

(b) the Plaintiff could not subsequently pay the Monthly Interest (1st Loan) to CML. At the material time, the Plaintiff owed a total sum of RM780,000.00 to CML [**Plaintiff's Debt (CML)**]. Hence, to avoid the Land from being transferred to CML, the Plaintiff had to find another unlicensed moneylender to repay the Plaintiff's Debt (CML);

(2) the 1st to 4th Defendants were unlicensed moneylenders who offered a loan to the Plaintiff on the following terms and conditions (**2nd Loan**) -

(a) the 2nd Loan was for a sum of RM900,000.00;

(b) the 1st to 4th Defendants would pay the Plaintiff's Debt (CML) to CML and the balance of RM120,000.00 would then be given by the 1st to 4th Defendants to the Plaintiff;

(c) the Plaintiff would pay interest for the 2nd Loan to the 1st to 4th Defendants at the rate of 12.5% per month [**Monthly Interest (2nd Loan)**]; and

(d) the Plaintiff was required to execute the SPA, Form 14A and PA as a form of "*security*" for the 2nd Loan. The SPA, Form 14A and PA were prepared by the 5th Defendant, a partner in Messrs SR Tan, Cheng, Lim & Tee (**Messrs SRT**);

(3) the Plaintiff accepted the 2nd Loan on the terms and conditions as stated in the above sub-paragraph (2). Hence, the Plaintiff signed the SPA, Form 14A and PA. Thereafter, the 1st to 4th Defendants handed RM120,000.00 in cash to the Plaintiff;

(4) from March to September 2016, the Plaintiff had paid to the 1st to 4th Defendants a total of RM328,400.00 as Monthly Interest (2nd Loan). During cross-examination by Ms. Khoo Ai Teng, learned counsel for the 1st to 4th Defendants, the Plaintiff admitted that the interest rate charged by the 1st to 4th Defendants for the 2nd Loan was not 12.5% per month; and

(5) subsequently, the Plaintiff was unable to pay Monthly Interest (2nd Loan) and the following matters arose -

(a) the 4th Defendant sent "*WeChat*" messages and voice mails which threatened the Plaintiff that if the Plaintiff failed to pay Monthly Interest (2nd Loan), the Land would be transferred to the 1st to 4th Defendants (**4th Defendant's Threats**);

(b) the Transfer was registered without the Plaintiff's knowledge. The Plaintiff only knew about the Transfer when the Plaintiff did a land search in April, 2017;

(c) Plaintiff's then solicitors, Messrs Veera & Co. (**Messrs VC**), sent a demand dated 21.4.2017 to the 5th Defendant and Messrs SRT (**Messrs VC's Demand**). Messrs VC's Demand stated, among others, that the SPA was a sham to conceal the unlicensed moneylending business between the 1st to 4th Defendants on the one part and the Plaintiff on the other part;

(d) Messrs VC sent a letter dated 22.5.2017 to Messrs SRT [**Messrs VC's Letter (22.5.2017)**] which, among others, requested from Messrs SRT on an urgent basis for all documents, letters, correspondence and receipts of payments; and

(e) the 1st to 4th Defendants prevented the Plaintiff from having access to the Property. Consequently, the Plaintiff suffered loss as follows -

(i) the Plaintiff had to stop his bird's nest business which was carried on in the upper floors of the Property; and

(ii) the Plaintiff could not rent out rooms in the first floor of the Property to his tenants.

C(3). <u>Evidence adduced by Defendants</u>

[11] The 1st and 3rd to 5th Defendants testified in this case.

[12] The 1st, 3rd and 4th Defendants gave the following evidence, among others:

(1) the 1st, 3rd and 4th Defendants denied that they were unlicensed moneylenders who had made the 2nd Loan to the Plaintiff;

(2) the SPA, Form 14A, PA and Transfer were genuine as the 1st to 4th Defendants had paid the Price for the Land; and

(3) the 1st to 4th Defendants had appointed the 5th Defendant to prepare the SPA, Form 14A and PA.

[13] The above evidence of the 1st, 3rd and 4th Defendants was corroborated by the 5th Defendant. Additionally, the 5th Defendant testified as follows, among others:

(1) the 5th Defendant acted only for the 1st to 4th Defendants (not the Plaintiff) in respect of the SPA, Form 14A and PA;

(2) by way of a letter dated 4.12.2015 from Messrs KR to Messrs SRT [**Messrs KR's Letter (4.12.2015)**], Messrs KR informed Messrs SRT as follows, among others -

(a) CML was "*willing*" to terminate SPA (CML) subject to a "*compensation sum*" of RM780,000.00 to be paid by the Plaintiff on or before 15.12.2015; and

(b) upon receipt of RM780,000, Messrs KR undertook to forward the IDT to Messrs SRT;

(3) the Plaintiff signed, among others, the following documents which were handed to Messrs SRT -

(a) an "*Acknowledgement*" dated 8.12.2015 [**Plaintiff's Acknowledgement (8.12.2015)**] which stated, among others -

(i) the Plaintiff had elected not to be legally represented in respect of the SPA; and

(ii) in consideration of Messrs SRT's consent to attend to the execution of the SPA by the Plaintiff, the Plaintiff "*expressly state that [the Plaintiff] will not make any allegation against [Messrs SRT] nor make any complaints or claims against [Messrs SRT] in any Court of law … whatsoever pertaining to the transaction herein*"; and

(b) the Plaintiff's letter dated 9.12.2015 to Messrs SRT [**Plaintiff's Letter (9.12.2015)**] which stated that, among others, the Plaintiff "*shall*" not hold Messrs SRT liable for whatever losses in relation to the Plaintiff's authorization for Messrs SRT to release a payment of RM780,000.00 (from the Price) to Messrs KR (on behalf of CML);

(4) the 1st to 4th Defendants deposited a total of RM780,000.00 with Messrs SRT which was then paid to Messrs KR (on behalf of CML). Consequently -

(a) CML and the Plaintiff entered into a "*Deed of Revocation*" dated 4.1.2016 (**Revocation Deed**) which, among others, revoked SPA (CML); and

(b) Messrs KR handed, among others, the IDT to Messrs SRT;

(5) the 5th Defendant had prepared "*Form 19B*" under NLC (**Form 19B**) dated 22.12.2015 for the 1st to 4th Defendants to enter a private caveat over the Land [**Caveat (1st to 4th Defendants)**]. The Caveat (1st to 4th Defendants) was signed by the 1st to 4th Defendants and was supported by a statutory declaration affirmed by the 1st to 4th Defendants before a Commissioner for Oath (**CO**) on 22.12.2015 [**SD (1st to 4th Defendants)**];

(6) the Land is subject to a "*restriction in interest*", namely the Land cannot be, among others, transferred by the Plaintiff without the consent of the State Authority (**SA's Consent**). Hence, on behalf of the 1st to 4th Defendants, the 5th Defendant applied for SA's Consent for the Transfer. SA's Consent was obtained by way of a letter dated 13.1.2016 [**LA's Letter (13.1.2016)**] from the Land Administrator (**LA**). According to LA's Letter (13.1.2016), SA's Consent was only effective for three years from the date of LA's Letter (13.1.2016);

(7) Messrs SRT sent a letter dated 27.3.2017 to the 1st to 4th Defendants [**Messrs SRT's Letter (27.3.2017)**] which, among others, confirmed the instruction of the 1st to 4th Defendants that the 1st to 4th Defendants would present Form 14A to the Land Office for registration under NLC. All the relevant documents, including IDT and Form 14A, were delivered to the 1st to 4th Defendants under the cover of Messrs SRT's Letter (27.3.2017);

(8) Form 14A was presented to the Land Office by the solicitors of the 1st to 4th Defendants in this case. Consequently, the Transfer was registered on 6.4.2017; and

(9) by way of a letter dated 12.5.2017 [**Messrs SRT's Letter (12.5.2017)**], Messrs SRT had denied all the allegations raised in Messrs VC's Demand.

D. <u>Issues</u>

[14] The following questions arise in this case:

(1) as against the 5th Defendant, whether the Amended Statement of Claim (**ASOC**) has -

(a) disclosed a reasonable cause of action against the 5th Defendant; and

(b) breached O 18 r 15(1) of the Rules of Court 2012 (**RC**) when no relief against the 5th Defendant has been specifically prayed for in the ASOC;

(2) did the Plaintiff pay Monthly Interest (2nd Loan) to the 1st to 4th Defendants which would invoke a rebuttable presumption under *s 10OA* *MA* that the 1st to 4th Defendants had carried on a business of "*moneylending*" by giving the 2nd Loan to the Plaintiff without a moneylender's license granted by the "*Registrar of Moneylenders*" under s 5B(1) *MA*?;

(3) if a rebuttable presumption arises under *s 10OA* *MA*, whether the 1st to 4th Defendants have adduced sufficient evidence on a balance of probabilities to rebut this presumption;

(4) independent of *s 10OA* *MA*, has the Plaintiff discharged the legal and evidential burden to prove on a balance of probabilities that the 1st to 4th Defendants had carried on an unlicensed moneylending business which was disguised by way of the SPA, Form 14A and PA? In this regard, does s 17A *MA* apply in this case?;

(5) if the 1st to 4th Defendants had carried on an unlicensed moneylending business in this case -

(a) whether the 2nd Loan and SPA are void under *s 15* *MA* read with *s 24(a)* and/or *(b)* of the *Contracts Act 1950* (**CA**);

(b) is the registered title of the Land in favour of the 1st to 4th Defendants [**Registered Title (1st to 4th Defendants)**] defeasible under s 340(2)(b) NLC on the ground that the registration of the Transfer has been obtained by way of a void Form 14A?;

(c) are the PA, Plaintiff's Acknowledgement (8.12.2015) and Plaintiff's Letter (9.12.2015) enforceable?; and

(d) whether the Plaintiff is barred by the doctrine of *ex turpi causa non oritur actio* and/or by public policy from seeking any relief from this court. This novel issue discusses whether ss 5(1), 15 MA, s 24(a), (b) CA and s 340(2)(b) NLC should prevail over the case law doctrine of *ex turpi causa non oritur actio* in respect of unlicensed moneylending business;

(6) if the 2nd Loan is void, whether the 1st to 4th Defendants can recover the 2nd Loan from the Plaintiff pursuant to -

(a) ss 66 or 71 CA; and/or

(b) the doctrine of unjust enrichment; and

(7) had the Defendants committed a tort of conspiracy to injure the Plaintiff by unlawful means [by way of a contravention of s 5(1) MA]? This issue concerns the following matters -

(a) can the Plaintiff claim for a tort when the tort arises from the Plaintiff's own unlawful act in accepting the 2nd Loan?; and

(b) whether the Defendants can rely on the defence of *volenti non fit injuria* because the Plaintiff had consented to the 2nd Loan.

I am not able to find a previous Malaysian case which has decided this question.

E. Credibility of witnesses

[15] In deciding the Plaintiff's credibility as a witness, I am mindful of the following material matters:

(1) the 1st to 4th Defendants had paid a total of RM900,000.00 (RM780,000.00 to CML and RM120,000.00 to the Plaintiff);

(2) if the Original Action is allowed and the Counterclaim (1st to 4th Defendants) is dismissed, the Plaintiff would be unjustly enriched as follows -

(a) the Plaintiff would be restored as the registered owner of the Land; and

(b) the Plaintiff would evade repayment of the 2nd Loan.

It is clear from the above sub-paragraphs (a) and (b) that the Plaintiff had a self-serving motive to file the Original Action and to testify in the manner he did in this case; and

(3) there were occasions during the Plaintiff's cross-examination by Ms. Khoo that the Plaintiff was not consistent in his testimony, eg. the Plaintiff's evidence regarding the rate and amount of Monthly Interest (2nd Loan).

[16] I have considered all the matters elaborated in the above paragraph 15 and yet, I find as a fact that the Plaintiff's testimony regarding the 1st and 2nd Loans to be true. This factual finding is based on the following evidence and reasons:

(1) CML purportedly purchased the Land from the Plaintiff by way of SPA (CML) for a price of RM600,000.00 but CML claimed for an amount of RM780,000.00 as "*compensation*" for the Plaintiff's purported "*revocation*" of SPA (CML). It is clear that CML had enjoyed a "*profit*" of RM180,000.00 by giving the 1st Loan, an unlicensed moneylending business, to the Plaintiff. It is not probable for any genuine purchaser of landed property to make a profit of 30% (RM180,000/RM600,000 X 100%) within an extremely short period of less than 5 months [from 21.7.2015, the date of SPA (CML) until 10.12.2015 (when Messrs SRT sent a cheque of RM780,000.00 to Messrs KR)];

(2) recital (A) to the Revocation Deed (drafted by Messrs KR) referred to a "*Sale and Purchase Agreement dated 14th August 2015*" whereas SPA (CML) (also drafted by Messrs KR) dated 21.7.2015. This contradiction in the dates of the same SPA (CML), clearly showed that both SPA (CML) and the Revocation Deed were contrived to camouflage the 1st Loan as a sale of the Property;

(3) the SPA, PA, Form 14A and Transfer could not be genuine because there was undisputed documentary evidence that the Plaintiff had paid Monthly Interest (2nd Loan) as follows -

(a) the Plaintiff had issued a personal cheque dated 28.3.2016 for an amount of RM46,800.00 in favour of the 3rd Defendant. During cross-examination by the Plaintiff's learned counsel, Mr. Alex Gan Yi Yang, the 3rd Defendant admitted that the sum of RM46,800.00 had been credited to the 3rd Defendant's bank account. However, the 3rd Defendant alleged that Plaintiff had borrowed a sum of RM53,000.00 from her and after the Plaintiff's repayment of RM46,800.00, the Plaintiff still owed money to the 3rd Defendant [**Alleged Plaintiff's Debt (3rd Defendant)**].

I cannot accept the existence of the Alleged Plaintiff's Debt (3rd Defendant) because the 3rd Defendant had not demanded at any time for the Plaintiff to pay the Alleged Plaintiff's Debt (3rd Defendant). Furthermore, the Counterclaim (1st to 4th Defendants) did not pray for the payment of any outstanding debt due from the Plaintiff to the 3rd Defendant;

(b) the Plaintiff had issued a personal cheque dated 22.3.2016 for a sum of RM36,000.00 to the 4th Defendant. The 4th Defendant admitted during cross-examination by Mr. Gan that the sum of RM36,000.00 had been banked into 4th Defendant's bank account.

The Plaintiff had adduced his bank statements (**Plaintiff's Bank Statements**) which showed that the Plaintiff had transferred the following sums of money to the 4th Defendant's bank account -

(i) a sum of RM15,000.00 on 31.3.2016;

(ii) an amount of RM10,000.00 on 1.4.2016;

(iii) a sum of RM5,000.00 on 3.4.2016;

(iv) an amount of RM20,000.00 on 4.4.2014; and

(v) a sum of RM1,000.00 each on 11.4.2016 and 21.7.2016.

The 4th Defendant had admitted during cross-examination by Mr. Gan that the above sums of money had been transferred to the 4th Defendant's bank account.

The 4th Defendant's witness statement in answer to question no. 5 stated that Plaintiff had borrowed money from 4th Defendant but during cross-examination by Mr. Gan, the 4th Defendant testified that the 4th Defendant's husband, Mr. Chia Ngak Keng (**4th Defendant's Husband**), had lent money to the Plaintiff [**Alleged Plaintiff's Debt (4th Defendant's Husband)**] and all the above amounts of money constituted the Plaintiff's repayment of the Alleged Plaintiff's Debt (4th Defendant's Husband).

I have no hesitation to reject the 4th Defendant's testimony regarding the Alleged Plaintiff's Debt (4th Defendant's Husband) because -

(ba) as explained in sub-paragraph (5) below, the Alleged Plaintiff's Debt (4th Defendant's Husband) is inconsistent with the contents of WeChat messages between the Plaintiff and 4th Defendant (**WeChat Messages**). When there is a conflict between oral evidence and contemporaneous records, the court should accept the latter - please refer to the judgment of Siti Norma Yaakob JCA (as she then was) in the Court of Appeal case of *Guan Teik Sdn Bhd v Hj Mohd Noor Hj Yakob & Ors* [2000] 4 CLJ 324, at 330;

(bb) there was no demand at any time by the 4th Defendant's Husband for the Plaintiff's repayment of the Alleged Plaintiff's Debt (4th Defendant's Husband);

(bc) if the Alleged Plaintiff's Debt (4th Defendant's Husband) were true, the Plaintiff could had issued a cheque to the 4th Defendant's Husband (not to the 4th Defendant) and/or transferred money to the bank account of the 4th Defendant's Husband; and

(bd) the 4th Defendant's Husband was not called as a witness by the 4th Defendant to prove the Alleged Plaintiff's Debt (4th Defendant's Husband). No evidence had been adduced by the 4th Defendant on why the 4th Defendant's Husband could not be compelled by a court subpoena to testify in this case regarding the Alleged Plaintiff's Debt (4th Defendant's Husband). Accordingly, this court draws an adverse inference under *s 114(g) EA* against the 4th Defendant for suppressing material evidence of the 4th Defendant's Husband with respect to the Alleged Plaintiff's Debt (4th Defendant's Husband) - please see the Supreme Court's judgment delivered by Mohd. Azmi SCJ in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, at 494. It is to be borne in mind that in civil cases, an adverse inference under s 114(g) *EA* may be made by the court against a defendant - please refer to the decision of Hashim Yeop Sani CJ (Malaya) in the Supreme Court case of *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33, at 34-35; and

(c) the Plaintiff had issued a personal cheque dated 1.4.2016 for an amount of RM6,000.00 to Mr. Chong Kim Fui, the 1st Defendant's husband (**1st Defendant's Husband**).

During cross-examination by Mr. Gan, the 1st Defendant alleged that the Plaintiff owed the above sum of RM6,000.00 to the 1st Defendant's Husband [**Alleged Plaintiff's Debt (1st Defendant's Husband)**] and the Plaintiff's cheque constituted a repayment of the Alleged Plaintiff's Debt (1st Defendant's Husband).

I am not able to accept the 1st Defendant's evidence with regard to the Alleged Plaintiff's Debt (1st Defendant's Husband). This is because firstly, the 1st Defendant's Husband did not make any demand at any time for the Plaintiff to repay the Alleged Plaintiff's Debt (1st Defendant's Husband). Secondly, the failure of the 1st Defendant to call the 1st Defendant's Husband to testify with respect to the Alleged Plaintiff's Debt (1st Defendant's Husband) attracts an adverse inference pursuant to s 114(g) *EA* against the 1st Defendant;

(4) if the SPA, Form 14A, PA and Transfer were genuine, there was no reason why the Plaintiff who had sold the Property for RM900,000.00, would still need to borrow money from the 1st Defendant's Husband, 3rd Defendant and 4th Defendant's Husband;

(5) before I allude to the WeChat Messages, the following matters are pertinent -

(a) the WeChat Messages are made in Mandarin but a Malay translation of the WeChat Messages has been adduced as evidence in this case;

(b) the solicitors for the 1st to 4th Defendants have classified the WeChat Messages as "*Part B*" documents pursuant to O 34 r 2(2)(e)(i) RC, namely the 1st to 4th Defendants have agreed only to the authenticity of the WeChat Messages but dispute the interpretation and weight of their contents - please refer to *KTL Sdn Bhd & Anor v Leong Oow Lai and 2 other cases* [2014] 1 LNS 427, at [32(b)]; and

(c) on 9.8.2019, when Mr. Gan cross-examined the 4th Defendant regarding the WeChat Messages, Ms. Khoo stood up and informed the court that she did not have the complete record of the WeChat Messages. I stood the case down for Ms. Khoo to get instruction from the 4th Defendant on whether the 4th Defendant would wish to apply to court for an order to compel the Plaintiff to hand over to Ms. Khoo the complete record of the WeChat Messages. After this case was recalled, Ms. Khoo informed the court that the 4th Defendant did not wish to make an application for the complete record of the WeChat Messages.

During cross-examination by Mr. Gan, the 4th Defendant admitted as follows, among others -

(i) the 4th Defendant had "*typed*" herself the WeChat Messages to the Plaintiff; and

(ii) the 4th Defendant gave the number of her bank account in Hong Leong Bank Bhd (**HLB**) in WeChat Message dated 31.3.2016 to the Plaintiff. The number of the 3rd Defendant's HLB bank account was also given by the 4th Defendant to the Plaintiff in WeChat Message dated 28.6.2016.

The following WeChat Messages (in chronology) are most telling -

(ca) on 20.3.2016, the Plaintiff informed the 4th Defendant -

> "***Kak Lim [4th Defendant], hari Selasa ambil yang 36 ribu itu pergi masuk! tq***"

(emphasis added);

(cb) the 4th Defendant told the Plaintiff at 19:40 hours, 3.4.2016 -

> "***Bagitahu saya lepas kirim, kerana esok saya kena keluarkan untuk kembalikan kepada bos?***"

(emphasis added);

(cc) the 4th Defendant sent the following message to the Plaintiff at 19:44 hours, 3.4.2016 -

> "***Esok jangan lambat sangat, kerana terlepas tiga minggu, lagipun mereka bising semasa saya tolong kamu merayu untuk dapat potongan?***"

(emphasis added); and

(cd) on 17.3.2017, the 4th Defendant informed the Plaintiff as follows -

> "***Pada hari Isnin, jika anda tidak boleh mendapatkan modal asal, anda perlu mendapatkan sekurang-kurangnya 2,000 baru dapat terangkan kepada bos?***"

(emphasis added);

The 4th Defendant had incredulously claimed that the "*boss*" in the above WeChat Messages was the 4th Defendant's Husband. As explained in the above sub-paragraphs 16(3)(ba) to (bd), I cannot accept such evidence.

The WeChat Messages corroborated the Plaintiff's oral and documentary evidence (Plaintiff's cheques and Plaintiff's Bank Statements) regarding the Plaintiff's payment of Monthly Interest (2nd Loan);

(6) the following provisions in the SPA show that the SPA is a sham -

(a) clause 1.1 SPA (**Clause 1.1**) stated that, among others, a deposit of RM120,000 had already been paid by the 1st to 4th Defendants to the Plaintiff. Clause 2.1 SPA (**Clause 2.1**) provided that the balance of the Price in a sum of RM780,000.00 (**Balance Purchase Price**) "*shall*" be paid by the 1st to 4th Defendants to the Plaintiff on or before the date stipulated in Part 12 of the First Schedule to the SPA (**1st Schedule**), namely 12 months from the date of the SPA. Clauses 1.1 and 2.1 were mandatory provisions because the parties to the SPA had used an imperative term, "*shall*".

Clauses 1.1 and 2.1 were not true because the 1st to 4th Defendants had paid in full the purported Price even before the date of the SPA (15.12.2015);

(b) according to clause 9.1 SPA (**Clause 9.1**), the 1st to 4th Defendants "*shall be entitled to receive the rents and profits accruing therefrom as from the date*" of the full payment of the Balance Purchase Price. Notwithstanding that the purported Price had been paid in full even before the SPA, the 1st to 4th Defendants did not claim from the Plaintiff at any time pursuant to Clause 9.1 the rent of the first floors of the Property (**Rent**) and profit from the bird's nest business carried on at the Property [**Profit (Bird's Nest Business)**] which had been obtained by the Plaintiff. It is clear that the mandatory Clause 9.1 was a mere façade;

(c) clause 9.6 SPA had defined "*vacant possession*" (**VP**). Clause 1.1 SPA stipulated that the Property was sold by the Plaintiff to the 1st to 4th Defendants with VP. According to clause 9.2 SPA (**Clause 9.2**), the Plaintiff "*shall*" deliver VP of the Property to the 1st to 4th Defendants within 7 days from the date of receipt of the Balance Purchase Price in full by Messrs SRT (as stated in Part 15 of the 1st Schedule). The purported "*Price*" of the SPA had been paid in full before the execution of the SPA on 15.12.2015. If Clause 9.2 were genuine, the 1st to 4th Defendants "*shall*" be entitled to VP of the Property on 15.12.2015 and if the Plaintiff refused to hand over VP of the Property, the 1st to 4th Defendants should have filed a suit against the Plaintiff and applied for an order of specific performance of the SPA; and

(d) clause 14 SPA (**Clause 14**) had provided that, among others, quit rent, assessments, water, electricity and sewerage charges (**Outgoings**) "*shall*" be apportioned on the "*Delivery Date*" (defined in Clause 9.2 as the date of delivery of VP of the Property by the Plaintiff to the 1st to 4th Defendants) between the parties. The 5th Defendant admitted during cross-examination by Mr. Gan that no apportionment of the Outgoings had been carried out as stipulated in Clause 14. It is therefore clear that Clause 14 is a mere "*window dressing*"; and

(7) on 29.4.2017, the Plaintiff had lodged a police report regarding the 1st and 2nd Loans.

[17] I acknowledge that the evidence of the 1st and 3rd to 5th Defendants mutually corroborate each other's testimony. Having said that, I find as a fact that the 1st and 3rd to 5th Defendants are not credible witnesses.

[18] This court's finding of fact that the 1st, 3rd and 4th Defendants are not honest witnesses is premised on the following evidence and reasons:

(1) the SD (1st to 4th Defendants) stated as follows -

"

1) ***Saya/Kami telah membayar wang cengkeram sebanyak [RM120,000.00] sahaja kepada [Plaintiff] untuk membeli hartanahnya [details of Land and Property]***.

2) ***Saya/Kami ingin memasukkan suatu Kaveat Persendirian ke atas [sic] daftar hakmilik untuk menjamin dan melindungi kepentingan kami***."

(emphasis added).

On 22.12.2015 [the date of the affirmation of the SD (1st to 4th Defendants)], paragraph 1 of the SD (1st to 4th Defendants) [**Paragraph 1**] is false because the entire "*Price*" of RM900,000.00 had already been paid by the 1st to 4th Defendants.

I reproduce below *s 3* of the *Statutory Declarations Act 1960* (**SDA**), *ss 193*, *199* and *200* of the *Penal Code* (**PC**) -

"*SDA*

s 3 ***Declarations made by virtue of the provisions of [SDA] shall be deemed to be such declarations as are referred to in sections 199 and 200 [PC]****.*

PC

s 193 Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine; and ***whoever intentionally gives*** *or fabricates* ***false evidence in any other case, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.***

s 199 ***Whoever, in any declaration made*** *or subscribed* ***by him, which declaration*** *any Court, or* ***any public servant*** *or other person,* ***is bound or authorized by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence****.*

s 200 ***Whoever corruptly uses or*** *attempts to use* ***as true any such declaration knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence***."

(emphasis added).

The following offences may have been committed -

(a) the LA is a "*public servant*" within the meaning of *s 21(i)* and/or *(j) PC*. As understood in *s 199 PC*, for the purpose of the entry of the Caveat (1st to 4th Defendants), the LA is authorised by s 323(2) NLC to receive the SD (1st to 4th Defendants) as evidence When the 1st to 4th Defendants affirmed the false

Paragraph 1, they may have committed an offence under s 3 *SDA* read with *ss 193* and *199* *PC* [**1st Offence (1st to 4th Defendants)**]; and

(b) the 1st to 4th Defendants might have corruptly used Paragraph 1 with the knowledge that Paragraph 1 is false. Hence, an offence under *s 200* read with *s 193* *PC* may have been committed [**2nd Offence (1st to 4th Defendants)**];

(2) it is difficult to believe that the 1st to 4th Defendants are genuine co-purchasers of the Property because -

(a) there was no agreement among the 1st to 4th Defendants regarding their alleged co-proprietorship of the Land. There was also no evidence that before or after the SPA, the 1st to 4th Defendants had jointly purchased other landed property. Furthermore, the 1st to 4th Defendants do not have any common business or interest to acquire the Land in equal shares. In other words, there was no reason why the 1st to 4th Defendants would agree to purchase the Land in equal shares;

(b) a *bona fide* purchaser of real estate would have appointed a valuer to value the real estate before acquiring that real estate. No valuation of the Property had been done by the 1st to 4th Defendants before they executed the SPA;

(c) a genuine purchaser of a landed property would have entered and inspected the property before deciding to acquire the property. However, the 1st and 3rd Defendants admitted during cross-examination by Mr. Gan that they had not entered the Property at any time before the execution of the SPA;

(d) Clause 9.1 had expressly allowed the 1st to 4th Defendants to claim for the Rent and Profit (Bird's Nest Business) from the Plaintiff and yet, the 1st to 4th Defendants did not do so. The irresistible inference was that the 1st to 4th Defendants did not buy the Property but gave the 2nd Loan at high interest rate to the Plaintiff;

(e) according to the LA's Letter (13.1.2016), SA's Consent for the Transfer had already been given. The 1st to 4th Defendants only presented Form 14A for registration under NLC on 6.4.2017. There was therefore a delay of more than 1 year 2½ months [from the date of LA's Letter (13.1.2016) to 6.4.2017] in the registration of the Transfer.

Our NLC embodies the Torrens system which has two essential features as explained in *Md Erpan Bin Mairi v Kamaruddin Bin Yacoob & Ors* , Shah Alam High Court Civil Suit No. BA-21NCVC-41-07/2017, at [52], as follows -

"*[52]* ***It is not disputed that the NLC embodies the Torrens system with the following two essential features****:*

(1) s 89 NLC *provides for the conclusiveness of the "register document of title" (**RDT**) (defined in* s 5 NLC*). Any party who proposes to enter into a dealing regarding title or interest in alienated land may rely on the RDT by conducting a search of the RDT; and*

(2) ***once an instrument of dealing regarding a title or interest in alienated land (Land Instrument) has been registered by the "Registrar" (Land Registrar) (defined in*** s 5 NLC***), by virtue of*** s 340(1) NLC***, the registered title or interest in land "shall" be indefeasible save for certain exceptions stipulated in*** s 340(2)(a) to (c) NLC (***Indefeasibility Principle***)."

(emphasis added).

In view of the Indefeasibility Principle, a *bona fide* purchaser of land will act expeditiously to ensure that the transfer of title to the land from the vendor to the purchaser is registered under NLC as soon as reasonably possible. The inordinate delay in the registration of Transfer in this case, could only mean that the 1st to 4th Defendants were not genuine co-purchasers of the Land; and

(f) upon payment of the purported "*Price*" in full, by reason of Clause 9.2, the 1st to 4th Defendants were entitled to VP of the Property as early as 15.12.2015. However, the 1st to 4th Defendants only assumed possession of the Property in April 2017. Such a delay of about one year 4 months does not support the fact that the 1st to 4th Defendants are genuine co-purchasers of the Property;

(3) if the 1st to 4th Defendants had shared equally in the payment of the "*Price*" of the Property at RM900,000.00, each of the 1st to 4th Defendants would had contributed RM225,000.00 towards the "*Price*". The 1st to 4th Defendants had not adduced any documentary evidence regarding their financial capability to pay RM225,000.00 each for the Property. On the contrary, the following evidence casts doubt on the financial ability of the 1st to 4th Defendants to acquire the Property -

(a) 1st Defendant has stated during her cross-examination by Mr. Lui that she exports and imports fresh seafood. The 1st Defendant however did not produce in court any documentary evidence that her business had generated sufficient profit for her to contribute RM225,000.00 for her ¼ share of the Property;

(b) when asked by Mr. Lui, the 3rd Defendant testified that she had previously worked as a hawker but she had not worked for the past two years (before she gave evidence in this case). In such circumstances, the court seriously doubts how the 3rd Defendant was able to come up with RM225,000.00 for her ¼ share of the Property; and

(c) the 4th Defendant was first cross-examined by Mr. Bryan Goh Tseng Fook (who assisted Mr. Lui on behalf of the 5th Defendant). The 4th Defendant answered during her cross-examination by Mr. Goh that she had previously worked as an employee in a snooker centre but she is now a homemaker.

When questioned by Mr. Gan, the 5th Defendant gave evidence that she was only paid RM2,000.00 a month as an employee in a snooker center. The 4th Defendant further admitted during cross-examination that her husband does not provide any money to her. The 5th Defendant however claimed that her son and daughter worked in the United Kingdom and gave money to her. I cannot give any credence to such a testimony because firstly, the 4th Defendant did not call her son and daughter to testify in this case. Furthermore, the 4th Defendant did not provide any document to evidence the source of income of her son and daughter; and

(4) the credibility of the 1st, 3rd and 4th Defendants is severely undermined by undisputed contemporaneous documentary evidence in the form of the Plaintiff's personal cheques, Plaintiff's Bank Statements and WeChat Messages.

[19] The following evidence and reasons support my factual finding that the 5th Defendant is not a reliable witness:

(1) the 5th Defendant is called to the Malaysian Bar on 18.12.1999. Since then, the 5th Defendant has been in active conveyancing practice. Consequently, the 5th Defendant had nearly 16 years of active conveyancing practice from the date of her admission to the Malaysian Bar (18.12.1999) until SPA (15.12.2015).

If an honest and reasonably competent conveyancing solicitor who had about 16 years of active conveyancing practice were informed that CML had demanded a sum of RM780,000.00 as "*compensation*" for the Plaintiff's purported "*revocation*" of SPA (CML), the honest and reasonably competent conveyancer would have known that the SPA (CML) was not genuine;

(2) the 5th Defendant drafted the SPA herself and yet, Clauses 1.1 and 2.1 were not true. Any lawyer who -

(a) drafts a contractual provision with the knowledge that the provision is false; and

(b) attests the execution of the contract which contains an untrue provision

- lacks honesty;

(3) the 5th Defendant admitted during cross-examination by Mr. Gan that Clause 14 was not complied with in this case;

(4) the 5th Defendant had prepared the SD (1st to 4th Defendants)]. In fact, the 5th Defendant attested the execution of Form 19B by the 1st to 4th Defendants and then applied to the LA (on behalf of the 1st to 4th Defendants) to enter the Caveat (1st to 4th Defendants). As such, the 5th Defendant might have abetted the commission of the 1st Offence (1st to 4th Defendants) which is an offence in itself under s 109 PC [**1st Offence (5th Defendant)**];

(5) Messrs SRT's Letter (12.5.2017) replied to Messrs VC's Demand with the following false statements -

(a) the penultimate paragraph in the first page of Messrs SRT's Letter (12.5.2017) stated that, among others, RM780,000.00 was paid by the 1st to 4th Defendants to "*Tan Boon Sin*" and CML. The evidence adduced in this case, namely Messrs KR's Letter (4.12.2015) and Revocation Deed, clearly showed that the payment of RM780,000.00 was made to CML only; and

(b) in the second paragraph of the second page of Messrs SRT's Letter (12.5.2017), the 5th Defendant stated that the Plaintiff handed the IDT to the 1st to 4th Defendants "*for their onward transmission*" of the IDT to the 5th Defendant. This statement was not true because the IDT was delivered by Messrs KR (not by the Plaintiff) to Messrs SRT (not to the 1st to 4th Defendants);

(6) Messrs VC'S Letter (22.5.2017) requested from Messrs SRT on an urgent basis for all documents, letters, correspondence and receipts of payments. Messrs SRT did not provide any document to Messrs VC. Nor was there a reply by Messrs SRT to Messrs VC'S Letter (22.5.2017). Such a conduct of the 5th Defendant is relevant under *s 8(2) EA* and shows a lack of candour on the part of the 5th Defendant; and

(7) during cross-examination by Mr. Gan, the 5th Defendant testified that she had ceased to act for the 1st to 4th Defendants in February 2017. Subsequently, by way of Messrs SRT's Letter (27.3.2017), all documents (including the IDT) had been handed over by the 5th Defendant to the 1st to 4th Defendants. However, these relevant facts were concealed by the 5th Defendant from the Plaintiff.

F. Was ASOC defective against 5th Defendant?

[20] Mr. Lui has contended that the ASOC does not disclose any reasonable cause of action against the 5th Defendant. Furthermore, according to Mr. Lui, the ASOC has breached O 18 r 15(1) RC when the ASOC did not plead specifically any relief against the 5th Defendant.

[21] O 18 r 15(1) RC provides as follows:

> "***Statement of claim***
>
> O 18 r 15(1) ***A statement of claim shall state specifically the relief or remedy which the plaintiff claims****; but costs need not be specifically claimed.*"

(emphasis added).

[22] I am of the view that paragraphs 7 to 23, 25 and 27 to 32 ASOC have pleaded sufficient material facts regarding the Plaintiff's claim that the 1st to 5th Defendants had committed a tort of conspiracy to injure the Plaintiff by unlawful means [by way of a breach of *s 5(1) MA*]. The 5th Defendant, a practising A&S, cannot claim to be prejudiced by any defect in the ASOC because -

(1) prior to the filing of the 5th Defendant's defence against the Original Action [**Defence (5th Defendant)**], the 5th Defendant did not request for further and better particulars of the Plaintiff's pleading pursuant to O 18 r 12(3) RC;

(2) the Defence (5th Defendant) was subsequently amended with leave of court. Hence, the 5th Defendant's Amended Defence [**AD (5th Defendant)**] was then filed. The 5th Defendant was not prejudiced by ASOC in any manner regarding the filing of AD (5th Defendant); and

(3) the 5th Defendant had defended herself against the Original Action by adducing evidence and two written submissions.

[23] The ASOC has not breached O 18 r 15(1) RC because the Plaintiff has prayed for damages against all the Defendants, including the 5th Defendant, in sub-paragraphs 33(K) and (L) ASOC.

G. Whether there was a contravention of s 5(1) MA in this case

G(1). Relevant provisions of MA

[24] I reproduce below the Long Title, definition of "*moneylender*" in *s 2 MA*, *ss 5*, *10OA* and *15 MA*:

> "*Long Title*
>
> ***An Act for the regulation and control of the business of moneylending, the protection of borrowers of the monies lent in the course of such business, and matters connected therewith***.

s 2

> ***"moneylender" means any person who carries on or advertises or announces himself or holds himself out in any way as carrying on the business of moneylending, whether or not he carries on any other business;***"

5. ***Licences to be taken out by moneylender***

(1) ***No person shall carry on or advertise or announce himself or hold himself out in any way as carrying on the business of moneylending unless he is licensed under this Act****.*

(2) ***Any person who carry on or advertise or announce himself or hold himself out in any way as carrying on the business of moneylending without a valid licence, or who continues to carry on such business after his licence has expired or been suspended or revoked shall be guilty of an offence under this Act and shall be liable to a fine of not less than two hundred and fifty thousand ringgit but not more than one million ringgit or to imprisonment for a term not exceeding five years or to both, and in the case of a second or subsequent offence shall also be liable to whipping in addition to such punishment****.*

Presumption as to the business of moneylending

10OA ***Where in any proceedings against any person, it is alleged that such person is a moneylender, the proof of a single loan at interest made by such person shall raise a presumption that such person is carrying on the business of moneylending, until the contrary is proved****.*

Contract by unlicensed moneylender unenforceable

15. ***No moneylending agreement in respect of money lent after the coming into force of [MA] by an unlicensed moneylender shall be enforceable****.*"

(emphasis added).

[25] It is decided as follows in *Wong Thian Choy & Anor v Goodnite Sdn Bhd & Anor* [2019] 7 AMR 82, at [34] and [36]:

"*[34]* ***MA has been substantially amended as follows****:*

(1) ***Moneylenders (Amendment) Act 2003 (Act A1193) has, among others*** *-*

(a) ***introduced a new long title to MA*** *(****Long Title****);*

(b) ***introduced a new*** *s 5 MA****; and***

(c) ***amended*** *s 15 MA.*

Act A1193 came into effect on 1.11.2003; and

(2) ***Moneylenders (Amendment) Act 2011 (Act A1390) has, among others*** *-*

(a) ***provided a new definition of "moneylender" in*** *s 2 MA;*

(b) ***amended*** *s 5 MA****; and***

(c) ***introduced a new*** s 10OA *MA.*

Act A1390 is enforced with effect from 15.4.2011.

...

[36] ***Firstly, I opine that cases decided regarding MA before the enforcement of A1193 and A1390, should be read with caution. It is decided in*** *Barisan Tenaga Perancang (M) Sdn Bhd v Dr Mansur bin Hussain & Ors* [2017] 2 MLRH 177***, at [48], as follows****:*

"*[48]* ***I am of the following view regarding MA****:*

(1) ***the title to MA and the above provisions in MA show Parliament's intention for MA to regulate the business of moneylending and not to regulate all kinds of moneylending transactions.*** *Section 5(1)* and *(2) MA* ***prohibit unlicensed moneylending business and certain acts related thereto. MA does not prohibit any moneylending transaction with interest unless the lender has carried on an unlicensed moneylending business****;*

(2) *s 10OAMA* ***provides that in any proceedings against any person where it is alleged that such person is a moneylender, proof of a single loan at interest made by such person shall raise a rebuttable presumption that such person is carrying on the business of moneylending. Even if a presumption arises under*** *s 10OA MA* ***against a certain party, that party may adduce evidence to rebut this presumption by proving that the party is not carrying on moneylending business. A party is only required to adduce evidence on a balance of probabilities to rebut a statutory presumption - please see the Supreme Court's judgment delivered by Wan Suleiman SCJ in*** *Akin Khan bin Abdul Rahman v Public Prosecutor [1987] 2 MLJ 217, at 218-219;* ***and***

(3) *s 15MA* ***applies only to a moneylending agreement by an unlicensed moneylender who is carrying on business of moneylending. This is because of the definition of "moneylender" in*** *s 2 MA*."

(emphasis added).

The High Court's decision in **Barisan Tenaga Perancang** *has been affirmed by the Court of Appeal in a judgment given by Abang Iskandar Abang Hashim JCA (as he then was) in Dr Mansur bin Hussain & Ors v Barisan Tenaga Perancang (M) Sdn Bhd* [2019] 1 LNS 661*.*"

(emphasis added).

G(2). Can Plaintiff rely on rebuttable presumption in s 10OA MA?

[26] As explained in **Wong Thian Choy**, Parliament has introduced *s 10OA MA* by way of the Moneylenders (Amendment) Act 2011 (**Act A1390**). The issue that arises is whether the Plaintiff can invoke a rebuttable presumption under *s 10OA MA* that the 1st to 4th Defendants had carried on a moneylending business by giving the 2nd Loan to the Plaintiff without a moneylender's license granted by the Registrar of Moneylenders under s 5B(1) *MA*.

[27] I have no hesitation to decide in this case that a rebuttable presumption (the 1st to 4th Defendants had carried on a moneylending business by granting the 2nd Loan to the Plaintiff without a moneylender's license) has arisen pursuant to *s 10OA MA* (**Rebuttable Presumption**). The Rebuttable Presumption arises because there are undisputed contemporaneous documents in the form of the Plaintiff's personal cheques, Plaintiff's Bank Statements and WeChat Messages which proved that the Plaintiff had paid Monthly Interest (2nd Loan) to the 1st to 4th Defendants. It is to be noted that *s 2 MA* has given a wide interpretation of "*interest*" as follows:

" ***"interest" does not include any sum lawfully charged in accordance with this Act by a moneylender for or on account of stamp duties, fees payable by law and legal costs but, save as aforesaid, includes any amount by whatsoever name called in excess of the principal paid or payable to a moneylender in consideration of or otherwise in respect of a loan;***"

(emphasis added).

G(3). Whether 1st to 4th Defendants can rebut Rebuttable Presumption

[28] Once the Rebuttable Presumption arises under *s 10OA MA*, the 1st to 4th Defendants have the evidential onus to rebut the Rebuttable Presumption on a balance of probabilities - please see *Barisan Tenaga Perancang (M) Sdn Bhd v Dr Mansur bin Hussain & Ors* [2017] 2 MLRH 177, at [48(2)].

[29] I find as a fact that the 1st to 4th Defendants had failed to rebut the Rebuttable Presumption on a balance of probabilities. This decision is due to the following evidence and reasons:

(1) Clauses 1.1 and 2.1 are false;

(2) as explained in the above paragraph 16, the Plaintiff's evidence regarding the 2nd Loan is true;

(3) the 1st, 3rd and 4th Defendants are not credible witnesses - please refer to the above paragraphs 17 and 18; and

(4) despite serious allegations made by the Plaintiff in this case against, among others, the 2nd Defendant, the 2nd Defendant had elected not give any evidence to defend himself. Such a failure on the 2nd Defendant's part attracts the following three consequences -

(a) when there was sworn evidence adduced by the Plaintiff in a trial against the 2nd Defendant and there was no evidence from the 2nd Defendant to rebut the Plaintiff's testimony, the court may presume the Plaintiff's evidence to be true against the 2nd Defendant. In the Federal Court case of *Takako Sakao v Ng Pek Yuan & Anor (No. 1)* [2009] 6 MLJ 751, at [4], Gopal Sri Ram FCJ decided as follows:

> "*[4] In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to have been presumed to be true. As Elphinstone CJ said in Wasakah Singh v. Bachan Singh* [1931] 1 MC 125 *at p 128:*
>
> > ***If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.***"
>
> (emphasis added);

(b) based on **Takako Sakao (No. 1)**, at [5], the court draws an adverse inference under *s 114(g) EA* against the 2nd Defendant due to the 2nd Defendant's failure to testify in this case; and

(c) I make an adverse inference under *s 114(g) EA* against the 1st, 3rd and 4th Defendants for not calling the 2nd Defendant as a witness in this case. There was no reason why the 1st, 3rd and 4th Defendants could not have applied to court to issue a subpoena which could compel the 2nd Defendant to give evidence in this case.

I have not overlooked the claim by the 1st, 3rd and 4th Defendants that the 2nd Defendant wished to "*withdraw*" as a co-proprietor of the Land. Such a claim is not credible because -

(i) if the 2nd Defendant had genuinely purchased one-quarter of the Property for RM225,000.00, the 2nd Defendant should not have hesitated to give evidence to resist the Original Acton and to support the Counterclaim (1st to 4th Defendants). It is clear that the 2nd Defendant had elected not to testify in this case because the 2nd Defendant was one of the unlicensed moneylenders together with the 1st, 3rd and 4th Defendants who had jointly given the 2nd Loan to the Plaintiff in breach of *s 5(1) MA*; and

(ii) notwithstanding the 2nd Defendant's "*refusal*" to give evidence in this case, the 1st, 3rd and 4th Defendants could still have applied for a court subpoena to compel the 2nd Defendant to testify in this case.

G(4). Did 1st to 4th Defendants infringe s 5(1) MA?

[30] In the event that I have erroneously invoked the Rebuttable Presumption, I will now consider the following question (independent of the application of *s 10OA MA*) - whether the Plaintiff has discharged the legal and evidential burden under *s 101(1), (2)* and *102* *EA* to prove on a balance of probabilities that the 1st to 4th Defendants had carried on a moneylending business contrary to *s 5(1)* *MA* by making the 2nd Loan to the Plaintiff and the 2nd Loan was camouflaged by way of the SPA, Form 14A and PA.

[31] This court makes a finding of fact that the Plaintiff has succeeded to discharge the legal and evidential burden to prove on a balance of probabilities that the 1st to 4th Defendants had carried on a moneylending business contrary to *s 5(1)* *MA* by making the 2nd Loan to the Plaintiff and by disguising the 2nd Loan by way of the SPA, Form 14A and PA. This decision is based on the following evidence and reasons:

(1) the SPA is a sham as explained in the above sub-paragraph 16(6);

(2) the Plaintiff's personal cheques, Plaintiff's Bank Statements and WeChat Messages constituted contemporaneous documentary evidence to prove that as a consequence of the 2nd Loan, the Plaintiff had paid Monthly Interest (2nd Loan) to the 1st to 4th Defendants;

(3) the Plaintiff's evidence regarding the 2nd Loan is credible - please see the above paragraph 16;

(4) based on the evidence and reasons elaborated in the above paragraphs 17 and 18, this court cannot accept the 1st, 3rd and 4th Defendants as witnesses to the truth; and

(5) the three consequences which arise from the 2nd Defendant's failure to give evidence in this case - please refer to the above sub-paragraph 29(3).

[32] Based on the evidence and reasons stated in the above paragraph 31, the following offences might have been committed:

(1) the 1st to 4th Defendants might have committed an offence under *s 5(2)* *MA* [**3rd Offence (1st to 4th Defendants)**];

(2) the Plaintiff had abetted in the commission of the 3rd Offence (1st to 4th Defendants), an offence which is punishable under *s 109* *PC* read with *s 5(2)* *MA* [**Offence (Plaintiff)**]; and

(3) the 5th Defendant might be liable for an offence under s 29AA(1) *MA* [**2nd Offence (5th Defendant)**]. Section 29AA(1) *MA* provides as follows -

> "***Prohibition of assisting unlicensed moneylending.***
>
> 29AA(1) ***Any person who assists a moneylender in contravention of subsection 5(1) shall be guilty of an offence under this Act and shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding twenty thousand ringgit or to both***."

(emphasis added).

Section 29AA MA has been introduced by Act A1390.

G(5). Whether s 17A MA applies in this case

[33] Mr. Lui has attempted to rely on s 17A *MA* in this case. Section 17A *MA* states as follows:

> "***Interest for secured*** *and unsecured* ***loans***
>
> *17A*
>
> (1) ***For the purposes of this Act***, ***the interest for a secured loan shall not exceed twelve per centum per annum*** *and the interest for an unsecured loan shall not exceed eighteen per centum per annum.*
>
> (2) ***Notwithstanding subsection (1), interest shall not at any time be recoverable by a licensee of an amount in excess of the sum then due as principal unless a Court, having regard to all the circumstances, otherwise decrees***.
>
> (3) ***Where in a moneylending agreement the interest charged for a secured loan or an unsecured loan, as the case may be, is more than that specified in subsection (1), that agreement shall be void and have no effect and shall not be enforceable***.

(4) ***Any licensee who contravenes this section shall be guilty of an offence under this Act and shall be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding eighteen months or to both**.*"

(emphasis added).

[34] I am not able to find any Malaysian case which has interpreted s 17A *MA*.

[35] I am of the following view regarding s 17A *MA*:

(1) it is clear from the Long Title to MA that the intention of Parliament in enacting MA is to, among others, protect borrowers in moneylending transactions [**Object (MA)**]. The Object (MA) is achieved by way of *s 5(1)* *MA* - no person can carry on a moneylending business unless the person is licensed under MA;

(2) s 17A(2) and *(4)* *MA* have expressly stated that these provisions apply to a "*licensee*". According to *s 2* *MA*, a "*licensee*" means a moneylender to whom a license has been issued under s 5B *MA*; and

(3) s 17A(1) and *(3)* *MA* do not expressly state that these provisions only apply to licensed moneylenders. I opine that s 17A(1) and *(3)* *MA* can only apply to licensed moneylenders. This opinion is premised on the following reasons -

(a) if unlicensed moneylenders can rely on s 17A(1) and *(3)* *MA*, this will allow unlicensed moneylenders to circumvent the prohibition in *s 5(1)* *MA*. Such an interpretation will defeat the Object (MA). Accordingly, on a purposive construction of s 17A(1) and *(3)* *MA*, these provisions can only apply to licensed moneylenders; and

(b) MA has been revised under the Revision of Laws Act 1968. As such, by virtue of *s 2(1)(b)* of the *Interpretation Acts 1948 and 1967* (**IA**), Part 1 of IA applies in the construction of MA. *Section 16* *IA* is in Part 1 IA and states as follows -

"***Notice to be taken of division into parts**, chapters, etc.*

*16. **Where an Act** or subsidiary legislation **is divided into parts** or chapters or otherwise**, the fact and particulars of the division shall**, without express mention thereof in the Act or subsidiary legislation, **be taken notice of in all courts and for all purposes whatsoever**.*"

(emphasis added).

Section 17A *MA* is in Part V of MA (*Conduct of Moneylending Business*). As provided in *s 16* *IA*, the court can take notice of Part V of MA. It is clear that Part V of MA only applies to conduct of licensed moneylending business because *s 5(1)* *MA* has already prohibited the carrying on of unlicensed moneylending business. Hence, s 17A *MA* (in Part V of MA) can only apply to licensed moneylenders.

[36] As explained in the above paragraph 35, s 17A *MA* has no application in this case because the 1st to 4th Defendants are not licensed moneylenders. There is a second reason why s 17A *MA* cannot be invoked by the Defendants. The SPA, PA and Form 14A had been contrived by the Defendants. Furthermore, the Transfer had been registered under NLC. The Defendants are clearly estopped by their own conduct from asserting that the transaction between the Plaintiff on the one part and the 1st to 4th Defendants on the other part, is governed by s 17A *MA*. The doctrine of equitable estoppel has a wide application - please see the judgment of Gopal Sri Ram JCA (as he then was) in the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, at 294.

H. What is effect of breach of s 5(1) MA?

[37] I reproduce below the relevant part of *s 24* *CA*:

"***What considerations and objects are lawful, and what not*** *s 24* ***The consideration or object of an agreement is lawful, unless*** *-*

(a) ***it is forbidden by a law****;*

(b) ***it is of such a nature that, if permitted, it would defeat any law****;*

…

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void*.*"

(emphasis added).

H(1). Are 2nd Loan and SPA valid?

[38] In view of the fact that the 2nd Loan was granted by the 1st to 4th Defendants in contravention of *s 5(1) MA* [**Breach (MA)**], the 2nd Loan is void under *s 15 MA* read with -

(1) *s 24(a)CA* [the 2nd Loan is "*forbidden*" by *s 5(1) MA*]; **and/or**

(2) s 24(b) *CA* [the 2nd Loan is of such a nature that, if permitted, the 2nd Loan would "*defeat*" *s 5(1) MA*].

[39] It is decided in *Dr HK Fong Brainbuilder Pte Ltd v SG-Maths Sdn Bhd & Ors* *[2018] 11 MLJ 701*, at [41], that if a contract is void under any paragraph in *s 24 CA*, any other contract, instrument or document which is related to the void contract may be tainted with illegality and may also be rendered void.

[40] I have no hesitation to decide that the SPA is void for the following reasons:

(1) as explained in the above sub-paragraph 16(6), the SPA was a sham to conceal the Breach (MA). If the court does not invalidate the SPA, this will allow the Defendants to circumvent *s 5(1) MA* and frustrate the Object (MA); **and/or**

(2) premised on **Dr HK Fong Brainbuilder**, the SPA is tainted by the Breach (MA) and is thereby rendered void.

H(2). Whether court should invalidate Transfer and Registered Title (1st to 4th Defendants)

[41] The relevant part of s 340 NLC provides as follows:

"***Registration to confer indefeasible title*** *or interest****, except in certain circumstances.***

340(1) ***The title*** *or interest* ***of any person or body for the time being registered as proprietor of any land,*** *or in whose name any lease, charge or easement is for the time being registered,* ***shall, subject to the following provisions of this section, be indefeasible****.*

(2) ***The title*** *or interest* ***of any such person or body shall not be indefeasible*** *-*

…

(b) ***where registration was obtained*** *by forgery, or* ***by means of*** *an insufficient or* ***void instrument****; or*

…"

(emphasis added).

[42] Section 340(2)(b) NLC is similar to s 42(iii) of the Federated Malay States' Land Code [**LC (FMS)**]. In the High Court case of *Appoo S/O Krishnan v Ellamah D/O Ramasamy* *[1974] 2 MLJ 201*, at 204, 205, 206 and 207, Azmi J (as he then was) set aside a registered transfer of land under s 42(iii) LC (FMS) on the ground that, among others, the sale and purchase agreement in that case was actually an unlicensed moneylending transaction.

[43] Form 14A in this case was obtained by the 1st to 4th Defendants by way of the 2nd Loan which constituted the Breach (MA). Premised on **Dr HK Fong Brainbuilder**, Form 14A was tainted by the Breach (MA). Consequently -

(1) Form 14A was a "*void instrument*" within the meaning of s 340(2)(b) NLC; and

(2) the Registered Title (1st to 4th Defendants) is defeasible.

[44] Additionally or alternatively, based on **Appoo**, the Transfer and Registered Title (1st to 4th Defendants) should be invalidated.

H(3). Validity of PA, Plaintiff's Acknowledgement (8.12.2015) and Plaintiff's Letter (9.12.2015)

[45] As explained in **Dr HK Fong Brainbuilder**, the PA, Plaintiff's Acknowledgement (8.12.2015) and Plaintiff's Letter (9.12.2015) were tainted with the Breach (MA). As such, the PA, Plaintiff's Acknowledgement (8.12.2015) and Plaintiff's Letter (9.12.2015) are void. It is to be noted that in **Appoo**, at p. 207, the High Court had invalidated a power of attorney which was granted in relation to an unlicensed moneylending transaction.

I. Is Plaintiff barred by *ex turpi causa non oritur actio* doctrine from seeking relief in this case?

[46] Mr. Lui has raised an ingenious argument - as the Plaintiff is *in pari delicto* regarding the Breach (MA), the Plaintiff is barred by the doctrine of *ex turpi causa non oritur actio* and/or by public policy from seeking any relief from the court. According to Mr. Lui, the court should allow the "*loss to lie where it falls*".

[47] I am not able to accede to the above submission for the following reasons:

(1) case law doctrines are subject to written law. Hence, the case law doctrine of *ex turpi causa non oritur actio* is subject to *ss 5(1)*, *15 MA*, *s 24(a), (b) CA* and s 340(2)(b) NLC. The Object (MA) is clear, especially in view of the fact that *s 5(1) MA* has been specifically introduced by Parliament through the Moneylenders (Amendment) Act 2003 (**Act A1193**). If this court has applied *ex turpi causa non oritur actio* doctrine to refuse any remedy to the Plaintiff, this will not only defeat the Object (MA) as introduced by Act A1193 but this is also contrary to *s 15(1) MA*, *s 24(a), (b) CA* and s 340(2)(b) NLC; and

(2) if I have refused to grant any relief to the Plaintiff in this case, this will embolden unlicensed moneylenders to contravene blatantly *s 5(1) MA* without any adverse consequence to unlicensed moneylenders. In financially challenging times, there are "*desperate*" people who have to borrow from "*Ah Longs*" at an exorbitant interest rate. When these borrowers are unable to pay the illegal loans, unlicensed moneylenders resort to despicable, if not inhumane, methods to "*recover*" those loans. To deter unlicensed moneylenders from continuing with their nefarious business, it is in the public interest for unlicensed moneylenders to be deprived of their illegal "*principal loan sums*", interest and whatever ill-gotten property or benefit enjoyed from their unlawful moneylending business.

J. What is appropriate relief to Plaintiff regarding Breach (MA)?

[48] In view of the Breach (MA) and its consequences on the 2nd Loan, SPA, Transfer, Registered Title (1st to 4th Defendants) and PA [please see the above Parts H(1) to H(3)], I exercise my discretion to award the following relief to the Plaintiff:

(1) a declaration is granted under *s 41* of the *Specific Relief Act 1950* (**SRA**) and O 15 r 16 RC that the SPA, Form 14A, PA and Transfer are invalid;

(2) a declaration is made that the 1st to 4th Defendants own and hold the Land as constructive trustees for the benefit of the Plaintiff;

(3) a perpetual injunction is given pursuant to *s 52(1) SRA* to restrain the 1st to 4th Defendants from transferring or charging the Land to any party until the Land is re-transferred to the Plaintiff (**Re-Transfer**);

(4) a perpetual mandatory injunction is awarded under *s 53 SRA* to compel the 1st to 4th Defendants to -

   (a) execute all the required documents for the purpose of the Re-Transfer; and

   (b) deliver the IDT to the Plaintiff;

(5) if the 1st to 4th Defendants fail to perform the Re-Transfer, the court registrar shall be ordered to execute all the required documents for the purpose of the Re-Transfer; and

(6) the LA is ordered to register the Re-Transfer under s 417(1) NLC. Section 417(1) NLC provides as follows -

> "***General authority of the Court.***
>
> *417(1)* ***The Court or a Judge may by order direct the*** *Registrar or* ***any [LA] to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the*** *Registrar or* ***[LA] to comply with the order forthwith****.*"

(emphasis added).

K. Whether court should order Plaintiff's restitution of 2nd Loan in favour of 1st to 4th Defendants

[49] Pursuant to the court's oral decision regarding the Breach (MA) and its consequences, Ms. Khoo has invited this court to order the Plaintiff to return RM900,000.00 to the 1st to 4th Defendants [**Restitution Prayer (1st to 4th Defendants)**]. Ms. Khoo has relied on the following grounds:

(1) s 66 CA; and/or

(2) the doctrine of unjust enrichment.

In support of the Restitution Prayer (1st to 4th Defendants), Ms. Khoo has cited, among others, the Court of Appeal's judgment delivered by Zabariah Yusof JCA (as she then was) in *Paragon Union Bhd v Prestamewah Development & Anor and another appeal* *[2018] 4 MLJ 307*.

[50] Firstly, **Paragon Union** does not concern a breach of *s 5(1)* MLA and the Object (MA).

[51] I will take this opportunity to discuss whether *s 71* *CA* applies in favour of the Restitution Prayer (1st to 4th Defendants).

[52] *Sections 66* and *71* *CA* state as follows:

> "***Obligation of person who has received advantage under void agreement****, or contract that becomes void*
>
> *s 66.* ***When an agreement is discovered to be void****, or when a contract becomes void****, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it****.*
>
> ***Obligation of person enjoying benefit of non-gratuitous act***
>
> *s 71.* ***Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered****.*"
>
> (emphasis added)

K(1). Does s 71 CA apply to Restitution (1st to 4th Defendants)?

[53] In an appeal to the Privy Council from Malaysia, *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* *[1967] 2 MLJ 118*, at 120, Lord Upjohn has decided that the following four conditions must be fulfilled cumulatively by a plaintiff before the plaintiff can rely successfully on *s 71* *CA*:

> *"****It has been common ground before their Lordships that four conditions must be satisfied to establish a claim under*** *section 71*.
>
> ***The doing of the act or the delivery of the thing referred to in the section:***
>
> (1) ***must be lawful***
>
> (2) ***must be done for another person***
>
> (3) ***must not be intended to be done gratuitously***

(4) ***must be such that the other person enjoys the benefit of the act or the delivery***."

(emphasis added).

The above decision in **Siow Wong Fatt** has been applied by Balia Yusuf Wahi FCJ in the Federal Court in *Usima Sdn Bhd v **Lee** Hor Fong (trading under the name and style of Pembinaan LH Fong)* [2017] 5 MLJ 273, at [55] to [57].

[54] The 1st to 4th Defendants cannot rely on s 71 CA because the first condition for the application of s 71 CA as explained in **Siow Wong Fatt** has not been satisfied in this case. This is because the 2nd Loan is unlawful due to a breach of s 5(1) MA.

K(2). Can 1st to 4th Defendants rely on s 66 CA?

[55] It is decided in **Dr HK Fong Brainbuilder**, at [47] and [48], as follows:

"*[47] According to [Tan Chee Hoe & Sons Sdn Bhd v Code Focus Sdn Bhd* [2014] 4 MLRA 1***], for*** s 66 CA ***to apply*** *-*

(1) ***there must be evidence that a contracting party has received an "advantage" in an agreement "discovered to be void" or when the agreement "becomes void"; and***

(2) ***any contracting party who received an advantage can be ordered by the court to restore the advantage or pay compensation to the other contracting party***.

[48] ***I am unable to invoke*** s 66 CA ***in this case because the 1st Defendant has made payments under the MLA (2013) to Dr. Fong and the Plaintiff regarding the 1st Defendant's right to operate BrainBuilder Business. As such, the 1st Defendant has not received any advantage under the MLA (2013) to be restored to the Plaintiff under*** s 66 CA***. Moreover, the Plaintiff has taken the position in this case that MLA (2013) is valid and has not breached FA. Hence, the Plaintiff did not plead in the SOC and adduce any evidence regarding any advantage received by the 1st Defendant under a void MLA (2013)***."

(emphasis added).

[56] I have decided not to allow the Restitution Prayer (1st to 4th Defendants) under s 66 CA. My reasons are as follows:

(1) the following conduct of the 1st to 4th Defendants does not support the Restitution Prayer (1st to 4th Defendants) -

(a) the 1st to 4th Defendants had not only breached s 5(1) MA but had camouflaged the Breach (MA) in the form of the SPA, Form 14A and PA;

(b) the Caveat (1st to 4th Defendants) had been wrongly entered under s 323(1)(a) NLC because the 1st to 4th Defendants were not genuine co-purchasers of the Land. Accordingly, the 1st to 4th Defendants had no "*caveatable interest*" in the Land within the meaning of s 323(1)(a) NLC so as to be entitled to enter the Caveat (1st to 4th Defendants) - please see the judgment of Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719, at 755-756;

(c) Paragraph 1 had been falsely affirmed by the 1st to 4th Defendants before the CO - please refer to the above sub-paragraph 18(1);

(d) upon the Plaintiff's failure to pay the Monthly Interest (2nd Loan), without giving any notice to the Plaintiff, the 1st to 4th Defendants "*enforced*" the 2nd Loan by registering the Transfer;

(e) the 1st to 4th Defendants denied the Original Action. In fact, the Counterclaim (1st to 4th Defendants) had been filed without any prayer for restitution of the 2nd Loan;

(f) the 1st, 3rd and 4th Defendants have resisted the Original Action to the hilt and this court has found them to be less than honest (please refer to the above paragraphs 17 and 18); and

(g) the 1st Offence (1st to 4th Defendants), 2nd Offence (1st to 4th Defendants) and 3rd Offence (1st to 4th Defendants) might have been committed in this case;

(2) the 1st to 4th Defendants are clearly *in pari delicto* regarding the Breach (MA). Accordingly, the doctrine of *ex turpi causa non oritur actio* and/or by public policy bar the Restitution Prayer (1st to 4th Defendants). The 1st to 4th Defendants are the authors of their own "*misfortune*" and this court should allow the loss of the 2nd Loan to fall solely on the 1st to 4th Defendants;

(3) if I have allowed the Restitution Prayer (1st to 4th Defendants), this may undermine, if not defeat, the Object (MA). Such a restitutionary order may send the "*wrong*" message to unlicensed moneylenders as explained in the above sub-paragraph 47(2); and

(4) the Plaintiff had paid Monthly Interest (2nd Loan) to the 1st to 4th Defendants. Since the 1st to 4th Defendants took possession of the Property, the 1st to 4th Defendants had enjoyed the Rent and Profit (Bird's Nest Business). In other words, the 1st to 4th Defendants did not suffer a total loss of RM900,000.00.

K(3). Whether 1st to 4th Defendants can rely on unjust enrichment doctrine

[57] In the Federal Court case of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441, at [110], [117] and [118], Azahar Mohamed FCJ (as he then was) has decided that the court may apply the doctrine of unjust enrichment if a plaintiff (**X**) can prove all the following four conditions against a defendant (**Y**):

(1) Y has been enriched;

(2) Y's enrichment has been gained at X's expense;

(3) Y's retention of the benefit is unjust; and

(4) Y has no defence to extinguish or reduce Y's liability to make restitution to X.

[58] I have no hesitation to refuse the Restitution Prayer (1st to 4th Defendants) on the ground of unjust enrichment doctrine because -

(1) the Plaintiff's "*enrichment*" in the form of the 2nd Loan had not been gained at the "*expense*" of the 1st to 4th Defendants. The 1st to 4th Defendants had unlawfully carried on a moneylending business and any money lent by them should not be considered in law to be an "*expense*" which is recoverable by the 1st to 4th Defendants. Hence, the non-fulfilment of the second condition for the application of the doctrine of unjust enrichment in this case; **and/or**

(2) the third condition for the invocation of the doctrine of unjust enrichment has not been met here. The Plaintiff's retention of the 2nd Loan is not unjust in view of the Object (MA) and the need to send a message of deterrence to unlicensed moneylenders that the court will not allow unlicensed moneylenders to recover their illegal "*principal loan sums*" - please see the above sub-paragraph 47(2).

L. Can court allow Plaintiff's claim for tort of conspiracy to injure Plaintiff?

[59] The tort of conspiracy has been explained in *Muniandy a/l Nadasan & Ors v Dato' Prem Krishna Sahgal & Ors* [2016] 11 MLJ 38, at [18] and [21] as follows:

"[18] ***My understanding of case law is that there are 2 kinds of tort of conspiracy to injure, namely*** *-*

(1) ***tort of conspiracy to injure by unlawful means****; and*

(2) ***tort of conspiracy to injure by lawful means****.*

...

[21] ***Based on my understanding of the above cases*** *-*

(1) ***the 3 elements of the tort of conspiracy to injure by unlawful means*** *(**3 Elements**), **are as follows**:*

(a) ***there must be proof of*** *-*

(i) ***an agreement****; and/or*

(ii) ***a combination of efforts of the conspirators to injure the plaintiff****. **Such an agreement or combination may be** -*

(ai) ***formal or informal****; or*

(aii) ***in writing or by word of mouth****;*

(iii) ***there are acts committed to execute the agreement or combination to injure the plaintiff****; **and***

(iv) ***the plaintiff has suffered damage due to acts done in execution of the agreement or combination to injure the plaintiff****.*

(b) ***the tort of conspiracy to injure by lawful means has the 3 Elements and a fourth ingredient, namely there is a pre-dominant purpose or intention of the conspirators to injure the plaintiff****.*"

(emphasis added).

[60] I am satisfied that the Plaintiff has proven on a balance of probabilities that all the Defendants have committed a tort of conspiracy to injure the Plaintiff by unlawful means [**Tort (1st to 4th Defendants)**]. The three elements of the Tort (1st to 4th Defendants) are proven as follows:

(1) there was an agreement among all the Defendants to injure the Plaintiff [**Agreement (Conspiracy)**] by -

(a) giving the 2nd Loan to the Plaintiff which is contrary to *s 5(1) MA*;

(b) disguising the 2nd Loan in the form of the SPA, Form 14A and PA;

(c) imposing exorbitant Monthly Interest (2nd Loan); and

(d) entering the Caveat (1st to 4th Defendants);

(2) the Defendants had committed the following acts in execution of the Agreement (Conspiracy) [**Acts (Conspiracy)**] -

(a) the execution of the SPA, Form 14A and PA; and

(b) the lodgement of the Caveat (1st to 4th Defendants) with the LA; and

(3) the Plaintiff had suffered damage as a result of the Acts (Conspiracy), namely -

(a) the Plaintiff had to pay Monthly Interest (2nd Loan); and

(b) the Plaintiff's title to the Land was unlawfully transferred to the 1st to 4th Defendants; and

(c) the Plaintiff could not enjoy the Rent and Profit (Bird's Nest Business) when the 1st to 4th Defendants took possession of the the Property.

[61] Despite the commission of the Tort (1st to 4th Defendants), I cannot grant any relief to the Plaintiff. Firstly, the court cannot award any relief to a plaintiff (**Z**) for any tort committed against Z when the tort is based on Z's own unlawful act. I cite the following judgment of Ewbank J in the English High Court in *Ashton v Turner* [1980] 3 All ER 870, at 877:

"*...* ***The conclusion I have come to is that the law of England may in certain circumstances not recognise the existence of a duty of care by one participant in a crime to another participant in the same crime, in relation to an act done in connection with the commission of that crime. That law is based on public policy****, ...*"

(emphasis added).

In this case, the Plaintiff had committed the Offence (Plaintiff) when he accepted the 2nd Loan and the 2nd Loan had been fully disbursed. Hence, the doctrine of *ex turpi causa non oritur actio* and/or public policy will deny the Plaintiff of any remedy regarding the Tort (1st to 4th Defendants).

[62] There is another reason for disallowing the Plaintiff to claim for any relief with regard to the Tort (1st to 4th Defendants). The Plaintiff had consented to the 2nd Loan and all the consequences arising therefrom. The Plaintiff could not claim ignorance of the "*onerous*" effect of an unlicensed loan as he had previously accepted the 1st Loan. The Defendants can rely on the defence of *volenti non fit injuria* as explained by Lord Herschell in the House of Lords in *Smith v Baker & Sons* [1891-4] All ER 69, at 87, as follows:

"***It was said that the maxim volenti non fit injuria applied, and effectually precluded the plaintiff from recovering.***

The maxim is founded on good sense and justice. One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong."

(emphasis added).

M. Outcome of Counterclaim (1st to 4th Defendants)

[63] As explained in the above Parts E, G(1) to G(4), H, H(1) to H(3), I to K and K(1) to K(3), I am constrained to dismiss the Counterclaim (1st to 4th Defendants).

N. Costs

[64] The court has an unfettered discretion under O 59 rr 2(2) and 19(1) RC to award costs after a trial.

[65] I have decided to exercise my discretion pursuant to O 59 rr 2(2) and 19(1) RC not to award costs for the Original Action and Counterclaim (1st to 4th Defendants). This exercise of discretion is dependent on the following reasons:

(1) despite the fact that the Plaintiff is substantially successful in the Original Action, I did not award any costs to the Plaintiff against the Defendants. This is because firstly, the Plaintiff had willingly accepted the 1st and 2nd Loans contrary to *s 5(1) MA*. Secondly, save for the Monthly Interest (2nd Loan), there was no order for the Plaintiff to repay the 2nd Loan to the 1st to 4th Defendants. In other words, the Plaintiff now enjoys the balance of the 2nd Loan [after deducting the Monthly Interest (2nd Loan)]. Lastly, the Plaintiff should be deprived of costs in view of the possible commission of the Offence (Plaintiff);

(2) the 1st to 4th Defendants cannot claim any costs in this case because -

  (a) the 1st to 4th Defendants had carried on an unlicensed moneylending business which is prohibited by *s 5(1) MA*. The court cannot award costs in light of such an illegal conduct on the part of the 1st to 4th Defendants - please refer to **Dr HK Fong Brainbuilder**, at [72]. Furthermore, the 1st Offence (1st to 4th Defendants), 2nd Offence (1st to 4th Defendants) and 3rd Offence (1st to 4th Defendants) might have been committed in this case;

  (b) the 1st to 4th Defendants did not resist successfully the Original Action; and

  (c) the Counterclaim (1st to 4th Defendants) was not allowed; and

(3) the 5th Defendant was not entitled to any costs because she had abetted the 1st to 4th Defendants in the Breach (MA). Worse still, the 5th Defendant had concealed and "*securitised*" the 2nd Loan. The 5th Defendant is a senior A&S who is duty bound to uphold the law at all times. Instead, the 1st Offence (5th Defendant) and 2nd Offence (5th Defendant) might have been perpetrated.

O. Court's decision

[66] Premised on the above evidence and reasons -

(1) the Original Action is allowed with -

  (a) the orders as stated in the above paragraph 48; and

  (b) no order of restitution and/or damages is made in respect of the Original Action;

(2) the Counterclaim (1st to 4th Defendants) is dismissed; and

(3) no order as to costs is made in this case.

[67] In closing, an A&S should not abet in any unlicensed moneylending business, let alone conceal and "*securitize*" it by way of a Sale and Purchase Agreement of landed property. Any A&S who does so, should face the full measure of the law and the most severe disciplinary sanction of being struck off the Roll of A&S under *s 94(2)* of the *Legal Profession Act 1976*.

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