IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 81

Suit 866/1992

Between

Bhagwandas

… *Plaintiff*

And

Brooks Exim Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Credit and Security — Money and moneylenders; Credit and Security — Money and moneylenders — Illegal money-lending; Restitution — Money had and received

Version No 1: 29 Oct 2026 (23:45 hrs)

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Bhagwandas v Brooks Exim Pte Ltd

[1994] SGHC 81

Suit 866/1992
Lai Siu Chiu JC
30 March 1994

1 Cur Adv Vult

2 This was a suit brought by an Indonesian national against a Singapore company for moneys had and received. At the close of the proceedings, I found that the defendants had not raised any defence to the action and accordingly, I gave judgment for the plaintiff. The defendants have appealed against my decision and I now give my reasons.

3 **The facts**

4 The two directors of the defendants and the plaintiff were brothers-in-law. It was unfortunate that they should end up at all in court over what was, to a large extent, initially meant to be a family favour extended and received in good faith.

5 The plaintiff was a businessman of considerable inherited wealth in Indonesia. He was in the main a textile merchant who also engaged in occasional property investments. Although he did not carry on any business in Singapore, he had several bank deposit accounts here, in the region of US$2m.

In the course of his business in Indonesia, the plaintiff applied to PT Bank Mashill Utama (`BMU`) for the use of some banking facilities in Indonesia. A standby letter of credit was to be opened in favour of BMU to serve as security for the grant of the facilities. The plaintiff said he requested BMU to accept the letter of credit from the Bank of India (`BOI`) Singapore branch but BMU refused as BOI only had a representative office, not a branch, in Jakarta. The plaintiff therefore approached the defendants for help and an arrangement was made over the telephone. Pursuant to the arrangement, the plaintiff transferred a sum of US$960,185.11 from his fixed deposit account with BOI into the defendants` `one-day call` deposit account with Deutsche Bank (`DB`), Singapore. The standby letter of credit was opened on 10 July 1990 by the defendants with DB, through the latter`s Jakarta branch in favour of BMU, for a period of one year expiring on 10 July 1991. On 5 June 1991, before its expiry, the standby letter of credit was, however, released by BMU. Thereafter the plaintiff made several demands for the return of the entire sum of US$960,185.11.

6 On 16 September 1991 the defendants paid the plaintiff S$29,008 through a Banque Nationale de Paris account standing in the name of one Ishwardas Daryani. By a letter dated 23 September 1991 the plaintiff demanded that a sum of US$500,000 should be remitted to a Jakarta account by 30 September 1991. Upon the defendants` failure to make the necessary remittance the plaintiff flew from Jakarta to see the defendants` directors in their office in Singapore. An agreement was reached and evidenced in a letter from the defendants to the plaintiff dated 5 October 1991 which reads as follows:

> *Re: Fixed deposit - US$1,043,436.93*
>
> *With reference to the above fixed deposit, please be informed that we shall be able to send you the remittance in four (4) instalments as follows:*

On/abt 30 November 1991 - US$250,000

On/abt 30 December 1991 - US$250,000

On/abt 31 January 1992 - US$250,000

On/abt 28 February 1992 - US$293,436.93

7 Thanking you.

8 In the meantime, before the first instalment fell due, the plaintiff demanded payment of interest for the period 12 September 1991 to 12 November 1991 amounting to US$20,897; the defendants complied with the request. The defendants did not however keep their word regarding the instalment payment arrangement - not even the first instalment was paid.

9 On 23 December 1991 the plaintiff, having lost faith in the defendants` promises wrote to the defendants demanding the payment of the entire amount by 30 December 1991. Again, on 6 January 1992, the plaintiff wrote to demand the return of the deposit money. In his letter the plaintiff made clear his intention to file a police report for the defendants` alleged criminal breach of trust if the latter persisted in their refusal to return his money. The plaintiff gave the defendants an ultimatum to pay on the following scheme:

15 January 1992 US$300,000 (US Dollars Three Hundred Thousand)

(30) January 1992 US$300,000 (US Dollars Three Hundred Thousand)

(12) February 1992 US$443,438.93 (US Dollars Four Hundred and Forty-Three Thousand Four Hundred and Thirty- Eight and Cents Ninety-Three 93/100)

10 Came 15 January 1992, there was, yet again, no payment. On 17 January 1992, the plaintiff again flew to Singapore from Jakarta and went straight to the Criminal Investigation Department at Robinson Road. He telephoned the

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defendants before proceeding to lodge a report. His two brothers-in-law hurried to Robinson Road in an attempt to dissuade him from filing any complaint. They managed to pacify the plaintiff by promising to come up, within a few days, with a new scheme of payment. On 27 January 1992, the defendants made a fresh proposal of payment by eight unequal monthly instalments commencing on 20 March 1992. The proposal was however unequivocally rejected by the plaintiff, who informed the defendants that he would instruct solicitors to recover the deposit money. In the interval, however, the defendants paid to the plaintiff, pursuant to his request, a sum of US$20,868.74 representing interest on the deposit for three months commencing 13 November 1991.

11 A letter of demand was subsequently issued by the plaintiff`s solicitors on 13 March 1992, requiring the defendants to pay a total sum of US$1,043,436.93 by two equal monthly instalments. The first payment had to be received by 31 March 1992. On 30 March 1992, however, the defendants came up with another payment scheme whereby the plaintiff would be repaid in five monthly instalments commencing 20 April 1992. Unfortunately the defendants, yet again, went back on their word. On 8 May 1992, with little prospect of any settlement in sight, the plaintiff filed his writ of summons in this action against the defendants.

12 **The cause of action**

13 The statement of claim, as it then stood on the first day of hearing, was inadequate. It claimed a refund of moneys amounting to US$1,043,436.93 deposited with the defendants for establishing a standby letter of credit. Counsel for the plaintiff applied for and was granted leave to re-amend the statement of claim so as to allege a cause of action for money had and received. I granted the defendants liberty to make any consequential amendments to their defence. The

plaintiff in the amended statement of claim prayed for the return of the initial sum of US$960,185.11 with bank interest thereon amounting to US$83,251.93 for the period 3 July 1990 to 11 September 1992 inclusive. He also claimed interest on the US$960,185.11 from 13 March 1992 (date of his solicitors` letter of demand) until the date of judgment. There was also a claim for any loss which the plaintiff may suffer as a result of fluctuations in the exchange rate of the US dollar.

14 **The defence**

15 The defendants raised several lines of defence. First they alleged that the initial arrangement for the opening of the standby letter of credit was tainted with illegality and therefore unenforceable. It was, so the defendants argued, a conscious attempt to evade the revenue laws of Indonesia. I will return to this defence later.

16 Secondly the defendants argued that they were not liable for interest on the US$960,185.11 for the period between 3 July 1990 and 11 September 1991 as there was no prior agreement for them to pay over the accrued interest to the plaintiff. To this I think it is more than adequate to say that the converse was that neither was there any prior agreement for the defendants to retain the accrued interest. In my judgment, the law is unambiguous that if one succeeds in an action for moneys had and received, then one is also entitled to any accrued interest, unless there is a prior agreement to the contrary.

17 Thirdly the defendants argued that it was an implied term of the initial arrangement that the deposit with the defendants was to be at the plaintiff`s risk. The plaintiff by his act impliedly agreed to assume the risk of the defendants` bank, DB, exercising its right of lien over the deposit account into which he

transferred his money. The argument has no merit at all. Even assuming the contractual principles governing the implication of terms apply, it could not be said, in the present case, that the `officious bystander` test was satisfied. Neither was it `necessary` to imply such a term to give such efficacy as the parties must have intended. I should also mention that even after DB exercised its lien over the defendants` deposit account (on or about 13 September 1991), there was a balance of US$175,000 left in the account which instead of paying to the plaintiff, the defendants paid over to DG Bank, another of their bankers. Prior thereto, they utilized US$52,025 from the plaintiff`s deposit to pay one of their creditors in Jakarta.

18 Fourthly the defendants contended that the deposit money had, sometime after the expiry of the standby letter of credit, been converted to a loan in contravention of the Moneylenders Act (Cap 188) (`the Act`) and was therefore rendered irrecoverable. I will also return to this defence later. As a matter of chronology, it is more logical to first deal with the question of illegality stemming from the alleged evasion of the revenue laws of Indonesia. To this I will now turn.

19 **Illegality on ground of public policy**

20 The defence of illegality is not a panacea. All too often defendants come before the court in a futile attempt to allege that a transaction is illegal because it contravenes a certain provision in a foreign law. Trite though it may be, a Singapore court applies, generally speaking, Singapore law. Judges do not sit to enforce the laws of another friendly country. Neither are they expected to, not even under the auspices of comity of nations. There are, of course, cases where a transaction is rendered unenforceable, notwithstanding the fact that it is perfectly legal in Singapore, because it is illegal under foreign law. But not

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every transaction which is illegal under foreign law is rendered unenforceable in Singapore. The principles have been laid down in the cases. In ***Regazzoni v KC Sethia Ltd***

21 ,1 Viscount Simonds said at p 290:

> *Just as public policy avoids contracts which offend against our own law, so it will avoid at least some contracts which violate the laws of a foreign state, and it will do so because public policy demands that deference to international comity. ...*

22 In ***Foster v Driscoll*** , a decision of the English Court of Appeal subsequently approved by the House of Lords in ***Regazzoni*** , all parties concerned were actively engaged in an enterprise to import whisky into the United States of America, an act which was then prohibited by the law of the United States of America. The contract was held void on grounds of illegality.

23 In ***Regazzoni*** , an Indian ordinance prohibited the taking out of British India goods which were destined for any port or place in the Union of South Africa or which were intended to be taken to the latter country although destined for a port or place outside it. The respondents agreed to sell and deliver to the appellant a quantity of jute bags cif Genoa. To the knowledge of both contracting parties the goods were to be shipped from India and were to be made available in Genoa so that they might be re-sold to the South African buying agency contrary to the ordinance. The proper law of the contract was English law. The appellant sued for non-delivery. It was held by the House of Lords that the contract was unenforceable in England as a matter of public policy, because its performance would have involved, as the parties to it knew, doing in a foreign and friendly country an act which would have violated a law of that country.

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24 The question of illegality under foreign law has also arisen in local cases. In ***Four Seas Communication Bank Ltd v Sim See Kee*** , the plaintiffs were a bank incorporated in Singapore and the defendant was a resident in Malaysia. The plaintiffs advanced moneys and extended credit facilities to the defendant in his overdraft account with the plaintiffs` bank. The overdraft account was operated in Singapore and the moneys involved were in Singapore currency. The defendant argued that the loan was unenforceable due to a breach of the Malaysian Exchange Control Act 1953. The proper law of the contract was that of Singapore. Applying para 5 ***of Encyclopaedia of Banking Law Vol*** 1124, AP Rajah J held that:

> *if the contract is lawful by the proper law and lawful at the place of performance, then it is immaterial that the party liable to perform would by doing so violate the laws of the foreign country in which he is resident or carries on business or of which he is a national.*

25 In ***Singapore Finance Ltd v Soetanto and Ors*** , there was a mortgage transaction. The defendants similarly raised the defence of illegality based on the Malaysian Exchange Control Act 1953. Though not bound by the decision of AP Rajah J in ***Four Seas Communication Bank Ltd*** , GP Selvam JC accepted it as reflecting the `true law and reason` and said it was `not discordant with ***Regazzoni v Sethia*** `. It was said that the House of Lords in ***Regazzoni*** had based its decision on `the principle that the performance of the contract would be illegal in India the place of performance of the contract` and the finding that `the appellant had knowledge of the illegality`. The learned judicial commissioner therefore laid down the test as follows at p 411 :

> *In deciding the question of enforcement of an agreement involving breach of foreign law, a two-fold test should be applied: First, whether it would be unlawful under the law of the place of performance and secondly, whether the person seeking the enforcement had at the time of making the contract knowledge*

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> *that foreign law would be breached by performance of the contract.*

26 The facts and the defence raised in ***Overseas Union Bank Ltd v Chua Kok Kay & Anor*** were similar to those in ***Singapore Finance*** . KS Rajah JC adopted the two-fold test as set out by GP Selvam JC in ***Singapore Finance*** .

27 So far as regards the question of illegality under foreign law in general, the authorities are clear. Foreign revenue law must however receive a separate treatment. Judges in different times have understandably shown a certain degree of wariness toward revenue law of a foreign sovereign state. Lord Mansfield CJ said in no less than three cases (***Planche v Fletcher*** , ***Holman v Johnson*** , ***Lever v Fletcher***): `For no country ever takes notice of the revenue laws of another.` In ***James v Catherwood,*** Lord Tenterden (then Abbott CJ) said: `(t)his point is too plain for argument. It has been settled, or at least considered as settled, ever since the time of Lord Hardwicke that in a British court we cannot take notice of the revenue laws of a foreign State.` The rationale behind such special treatment of foreign revenue law was of course the fact that tax collection was an exercise of sovereign power over the subjects and often an intricate and prolonged matter.

28 A court of law does not, of course, sit for the purpose of collecting taxes for another country. In more recent times, however, the courts have, as perhaps required by comity of nations, shown a more moderate approach. In ***Government of India v Taylor*** at p 505, Viscount Simonds remarked:

> *It is possible that the words `take notice of` might, if applied without discrimination, lead to too wide an application of the rule; for as Lord Tomlin pointed out in* ***In re Visser*** *there may be cases in which our courts, although they do not enforce foreign revenue law, are bound to recognize some of the consequences of that law, and for this reason the terms of Lord Mansfield`s proposition have been criticized.*

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29 The same view was also expressed in the Court of Appeal and the House of Lords in ***Regazzoni*** . In both ***Regazzoni*** and ***Foster*** the courts were however not dealing with foreign revenue law. This is clear from what Viscount Simonds said in ***Regazzoni*** at p 292:

> *I ought not to part from the case without noting that Sankey LJ (sitting in* ***Foster****) observed that the cases relating to the breach of a revenue law were not germane to the issue. Nor are they germane to this appeal. Whether they are still to be regarded as a binding authority is a question that must await determination.*

30 His Lordship nevertheless embarked on a brief review of cases involving foreign ***revenue*** law, including ***Boucher v Lawson*** , ***Pellecat v Angell*** and ***Emperor of Austria v Day & Anor*** . In all these cases it was held that the courts would not refuse to enforce or give relief in respect of a contract on the grounds that the contract in question involved acts to be performed or performed in the foreign country in contravention of its revenue laws. These cases were however decided at a time when the prevailing attitude of the courts was not even to take notice of foreign revenue law. In fact Viscount Simonds himself doubted whether such cases should still be regarded as binding authorities.

31 Against the doubt cast by Viscount Simonds on earlier authorities on the issue, it must be noted that in the ***Overseas Union Bank*** case,5 while applying the principle as expounded in ***Regazzoni*** , KS Rajah JC did not seem to regard the same principle as applicable in cases where foreign revenue law was involved, as his Honour said at p 699: `This court would not enforce a contract to deceive the Malaysian authorities in Malaysia, ***subject to the point about foreign revenue law*** , if Malaysia is the place of performance, but Malaysia is not the place of performance.` (Emphasis mine.) As the case did not involve any foreign revenue law the remark was, with respect to my brother judicial commissioner, only strictly obiter.

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32 In ***Patriot Pte Ltd v Lam Hong Commercial Co*** , a Court of Appeal decision, it was held, applying the principle as set out in ***Foster*** , that `if a party to a contract actively engages in an illegal adventure to get goods into a country in breach of the revenue laws of that country, the court will not assist the parties to the adventure by entertaining or settling any dispute between the parties arising out of the contract.` The court, however, came to this conclusion on the basis that this was `settled law since ***Foster v Driscoll*** `. With the utmost respect, ***Foster*** was not a case involving foreign revenue law. In fact, as late as 1957 when ***Regazzoni*** was decided by the House of Lords, the applicability of ***Foster***`s principle to foreign revenue law was still unsettled, as can be seen from statements made by Viscount Simonds (supra). Nevertheless in view of the doubt cast by Viscount Simonds in ***Regazzoni*** on those earlier authorities involving foreign revenue laws, the decision of the Court of Appeal in ***Patriot Pte Ltd*** was entirely consistent with modern judicial propensity to take cognizance of foreign revenue law.

33 The principle as derived from the authorities discussed above can be summarized as follows. A contract which involves doing of an act in a foreign and friendly country in contravention of its revenue laws is void and unenforceable in Singapore on grounds of public policy, notwithstanding that it is valid under the proper law of the contract. The same principle no doubt applies in the present case where there was no contract but a mere arrangement, since the public policy considerations in both cases are identical.

34 As a matter of construction, I was satisfied on the evidence that interest accruing on the plaintiff`s deposit money, even though the latter was inherited from his father, was liable to income tax under art 4(1)(f) of the Law of the Republic of Indonesia No 7 of 1983. I was fortified in my opinion by the Elucidation on Law regarding Income Tax, which contained the official

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explanation of the provisions in Law No 7 of 1983. This was, of course, a finding of fact, as foreign law was, after all, only a question of fact. It was not disputed by the plaintiff that no tax was paid at any time in respect of the US$960,185.11. Under art 38 of Law No 6 of 1983, the plaintiff would, if charged, be liable to one year`s imprisonment and/or a fine not exceeding twice the amount of tax payable, notwithstanding that it was, so I found, a negligent failure. The tax authority may of course in its discretion allow him, with impunity, save the levy of interest charges, to correct his tax returns. That was a discretion ordinarily given to any prosecuting authority. Nevertheless, in the circumstances, I was satisfied that the plaintiff had contravened the revenue law of Indonesia.

35 The finding did not however assist the defendants in their case for two reasons. First, the crucial question here was this. Did the initial deposit arrangement require an act to be performed in Indonesia which was in contravention of any provisions in the revenue law of Indonesia? In my judgment, the question must be answered in the negative. Whilst it may be true to say that the arrangement involved performance in Indonesia, as the beneficiary under the standby letter of credit was an Indonesian bank, the act of any payment under the letter of credit would not in itself have been illegal under Indonesian law. In fact, what was alleged to constitute illegality under Indonesian law was the fact that the plaintiff had failed to report the true state of his wealth to the Indonesian tax authorities. However, it is hardly necessary to observe that it was not a term of the arrangement, and thus not part of the performance required under it, that the plaintiff should breach the revenue laws of Indonesia. It must be remembered that in both ***Regazzoni*** and ***Foster*** where the defence of illegality under foreign law succeeded, the contractual acts to be done in the foreign country, namely, exporting goods destined for South Africa

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and importing whisky into the United States respectively, were in themselves illegal by the law of that foreign country. In the present case, no act illegal under Indonesian law was required, by the terms of the arrangement, to be performed in Indonesia. In my judgment, therefore, the arrangement, though potentially involving performance in Indonesia, did not require an illegal act to be done in Indonesia.

36 In the premises, the defendants failed to satisfy even the first limb of the two-fold test as formulated by GP Selvam JC in ***Singapore Finance*** . In any event, the second limb was also not satisfied. I believed that the plaintiff was genuinely ignorant of the distinction between interest accruing from inheritance and the inheritance itself, which was not subject to any income tax. The defendants had therefore failed to prove that the plaintiff knew about the illegality.

37 That being so, the defence of illegality failed. It is however still necessary to consider whether the initial deposit arrangement was nevertheless `tainted with illegality`, a concept traditionally regarded as distinct from the doctrine of illegality itself.

38 In ***Overseas Union Bank Ltd*** even though the loan transaction was not illegal under the law of the place of performance ie Singapore law and thus the defence afforded by the ***Regazzoni*** principle failed, KS Rajah JC nevertheless proceeded to ask the question whether it had a degree of connection with illegal acts in Malaysia which may render it tainted and therefore unenforceable in Singapore. The learned judicial commissioner reiterated the principle that our courts would not enforce foreign law. However he made it clear that the courts would recognize foreign law and, in appropriate circumstances where there is sufficient connection between a contract and illegal acts under the foreign law

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in question, the contract may be rendered unenforceable on the grounds that it is tainted with illegality, even though it is valid by its proper law and the law of the place of performance. To be so tainted with illegality however, knowledge and assistance on the part of the plaintiff is required.

39 Whether the deposit arrangement between the parties was, though not void under the ***Regazzoni*** principle, nevertheless unenforceable on the grounds that it was tainted with the illegality under the revenue law of Indonesia was, in my view, a question of fact. In the present case, as I have found, the plaintiff was genuinely unaware of his liability under art 4(1)(f) of Law No 7 of 1983. The plaintiff had no knowledge of the illegality in Indonesia. In the circumstances, therefore, it could not be said that the transaction was `tainted by illegality`.

40 For the sake of completeness, I would mention the fact that the defendants subpoenaed BOI which had been ordered by another court to produce certain documents relating to the plaintiff`s account with them. On the first day of hearing, I restricted the scope of discovery and ordered BOI to file an affidavit by the following day, with an indemnity for costs from the defendants. Upon examination of the draft affidavit prepared by counsel for BOI, I found there was nothing in it which could possibly assist in the defence of illegality. The draft affidavit was therefore withheld from the defendants. The defendants however had the opportunity to examine PH Sethunaman (DW3), the manager of the credit division of BOI. The only outstanding question was whether the deposit was turned into a loan in contravention of the Moneylenders Act. To that I next turn.

41 **The Moneylenders Act**

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42 A brief mention of the factual matrix of the defence is required. The defendants argued that the deposit money had, since sometime after the expiry of the standby letter of credit, been treated by parties as a loan. Whether that had been so was a question of fact. I do not think there was any doubt that there was, so to speak, a loan. Any interest accruing during the subsistence of the initial deposit arrangement for the purpose of the standby letter of credit would of course go to the plaintiff. That would not however render the arrangement a loan, because at the material time, the money was not at the free disposal of the defendants. However, the plaintiff was clearly receiving interest from the defendants in respect of the deposit money, even after the standby letter of credit had been released. After the release, the defendants were, so far as the DB was concerned, at liberty to utilize the money in their account. For the plaintiff to allow them to do so in consideration of receiving interest payments, he must have treated it as a loan to the defendants.

43 The question was whether it was a loan given in contravention of the Act. The applicability of the Act, as the law now stands, is governed by s 5(1) of the Act. In ***Lorrain Esme Osman v Elders Finance Asia Ltd*** , Karthigesu J, delivering the judgment of the Court of Appeal at p 372, said:

> *The same issues canvassed at the trial were canvassed before us, namely, (a) whether Pica was a moneylender within the meaning of that word as defined by s 2 of the Act and if so, whether Pica came within exception (c) of the definition; (b) whether Pica was residing and carrying on the business of moneylending in Singapore; and (c) whether the loan to Osman was made by Pica in Singapore or outside Singapore.*

44 ... In our view it is logical to consider issue (b) before considering issues (a) and (c) because if Pica was not `residing` in Singapore within the meaning of s 5(1) of the Act, it would not be subject to the provisions of the Act ...

45 Accordingly we will consider, firstly, whether Pica was `residing` in Singapore within the meaning of s 5(1) of the Act ...

46 Section 5(1) of the Act provides:

> *`Every moneylender residing and carrying on the business of moneylending in Singapore whether as principal or as agent shall take out a licence annually.`*

47 The logical approach as suggested by the Court of Appeal in ***Lorrain Esme Osman*** is to consider first whether the plaintiff in the present case was residing in Singapore within the meaning of s 5(1) of the Act since the Act would not apply if the plaintiff was not so residing.

48 Such a construction of s 5(1) would mean, in effect, that a person borrowing from a moneylender who resides outside Singapore is deprived of any protection afforded by virtue of the Act. It follows that any person may carry on the business of moneylending, without licence, in Singapore, with impunity, so long as he is not residing in Singapore. With the utmost respect, this result could not have been intended by Parliament. In my view, s 5(1) is not the exclusive provision defining the scope of the Act. A careful perusal of the Act would tend to show that any person residing outside Singapore is, far from being given the ***carte blanche*** to carry on the business of moneylending in Singapore without licence, absolutely prohibited from carrying on the business of moneylending in Singapore. Read together, ss 5(2), 8(1)(b) and 15 seem to bear out this conclusion. Section 5(2) reads:

> *A licence shall be taken out in respect of each name under which moneylending business is conducted. No licence shall be granted to a person not ordinarily resident in Singapore or to a firm where the person proposed to be responsible for the management of the firm is not ordinarily resident in Singapore.*

49 Section 8(1)(b) reads:

> *If any person -*
>
> (b) carries on business as a moneylender without holding a licence or, being licensed as a moneylender, carries on business as such in any name other than his authorised name or at any place other than his authorised address or addresses;...
>
> *he shall be guilty of an offence ...*

50 Section 15 reads:

> *No contract for the repayment of money lent by an unlicensed moneylender shall be enforceable.*

51 If the Act was not intended by Parliament to apply to persons residing outside Singapore, then it would not have been necessary to provide in s 5(2) that no licence should be granted to such persons. Moreover, the section creating criminal offences, namely s 8, would not have used the phrase `any person`, but instead `any person residing in Singapore`. Section 15 would perhaps begin with a qualifier such as `Save where the moneylender is one who resides outside Singapore`.

52 Be that as it may, I am bound by the Court of Appeal decision. In the present case, there was clearly no evidence that the plaintiff was residing in Singapore. The test of residence for the purposes of the Act was laid down in ***Lorrain Esme Osman*** . It is the same as the test of residence used in revenue cases. As the plaintiff was a natural person, the relevant test is contained in s 2 of the Income Tax Act (Cap 134) which provides:

> *... in relation to an individual, means a person who, in the year preceding the year of assessment resides in Singapore except for such temporary absences therefrom as may be reasonable and not inconsistent with a claim by such a person to be resident in Singapore and includes a person who is physically present or who exercises an employment (other than as a director of a company) in Singapore for 183 days or more during the year preceding the year of assessment ...*

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53 Thus there is a primary test which is `qualitative` and two subsidiary tests which are `quantitative`, one relating to physical presence and one relating to employment. On the facts, although the plaintiff had some deposit accounts with banks in Singapore, there was no evidence, save those occasions when he and his wife visited relatives in Singapore, that he resided here or even that he had any business dealings with businessmen and companies in Singapore. On this ground alone, the defence that the plaintiff was an unlicensed moneylender failed. However, in view of my reservation on the precise scope of the Act, I will go on to consider the question whether the plaintiff was a moneylender within the meaning of the Act.

54 The word `moneylender` is defined in s 2 of the Act:

> *`moneylender` includes every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business ... but does not include -*
>
> (c) any person … bona fide 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 …

55 Furthermore, s 3 provides that:

> *Save as excepted in paragraphs (a) to (e) of the definition of `moneylender` in s 2, any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary is proved to be a moneylender.*

56 There was no suggestion that the plaintiff was lending in the course of or for the purposes of his business. The predominant reason why the plaintiff agreed to treat the deposit money as a loan was the fact that his brothers-in-law were the alter ego of the defendants. Clearly, therefore, the plaintiff did not fall within the exception (c). As the loan was given in consideration of interest payments, the plaintiff was presumed, by virtue of s 3 of the Act, to be a

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moneylender, until the contrary was proved. The onus is thus upon the plaintiff to rebut the statutory presumption on a balance of probabilities. Whether one can be said to be carrying on the business of moneylending must depend on the particular facts of any given case. It is especially essential in this type of case for a trial judge to have the benefit of hearing the plaintiff in cross-examination. It was for this reason that in ***Esmail Sahib v Noordin*** it was said that the plaintiff could only discharge the burden placed upon him `by himself giving evidence to the effect that he is not a moneylender and by submitting to cross-examination on the point`. This the plaintiff did and he appeared to me to be a credible witness.

57 The question then before me was this. How could the plaintiff successfully rebut the statutory presumption? In ***Litchfield v Dreyfus,*** Farwell J at p 589 said:

> *... But not every man who lends money at interest carries on the business of moneylending. Speaking generally, a man who carries on a moneylending business is one who is ready and willing to lend to all and sundry, provided that they are from his point of view eligible. I do not of course mean that a moneylender can evade the Act by limiting his clientele to those whom he chooses to designate as `friends` or otherwise: it is a question of fact in each case ...*

58 The above passage was quoted with approval in ***Subramaniam Dhanapakiam v Ghaanthimathi*** in which Chan Sek Keong J at p 448 said:

> *The settled law is that what is prohibited by the Act was not moneylending but the business of moneylending. This is a question of fact. It is also settled law that the giving of a number of loans to friends does not constitute the business of moneylending, unless there is a system and continuity about the transactions.*

59 In fact, the test of system and continuity emerged as early as in the case of ***Newton v Pyke*** . It was consistently applied in subsequent cases such as

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Edgelow v McElwee and ***Esmail Sahib*** . Recently, Chan J`s statement was applied by the Court of Appeal in ***Cheong Kim Hock v Lin Securities*** , at p 357.

60 In ***Chellapah Rasadurai v Selvadurai*** , however, Ali FJ at p 172 said that:

> *... It is for the trial court to consider and decide for itself whether the evidence by the party giving the loans has sufficiently rebutted the presumption as in the case of* ***Baju Ria v Liau Kim Lian*** *[1965] 1 MLJ 128 . In consideration of such evidence for the purpose of s 3, system and continuity would hardly be relevant. They would be if it falls on the borrower to prove positively that the party lending the money is a moneylender for the purpose of s 2.*

61 With respect, it is hard to see why evidence as to system and continuity or a lack of it is irrelevant. This is exactly what the plaintiff would have to prove, that although he engages in moneylending, he is not in the business of moneylending. In this respect it is pertinent whether there is system and continuity in his moneylending activity. It must however be said that the test of system or continuity does not, in my judgment, rule out the possibility that one solitary transaction can, if the facts so justify, nevertheless amount to a moneylending transaction. There is nothing in the Act to suggest otherwise. The test of system or continuity is a general, albeit important, one. If one such transaction is sufficient to raise the presumption under s 3, there is no reason why the lender can rebut the presumption by merely proving, without more, that it is a solitary transaction.

62 That is the law. I will now come to the evidence. Although the defendants had pleaded in their defence that the plaintiff was `in the habit of lending money at exorbitant interest charges`, the only evidence they adduced at the trial related to two transactions between the plaintiff and themselves. The

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first was a sum of S$95,000. The defendants invited the plaintiff to invest in a property at Orchard Road which they were purchasing. The money was given to the defendants on 20 March 1991. On 3 July 1991, the defendants returned a sum of S$110,591.50 to the plaintiff as, in the words of Bhagwandas Methani (DW2) `profit`. At the trial, however, Methani said that the investment was aborted and parties thus treated the money as a loan from the plaintiff at an interest rate of 5.5% per month. In his affidavit evidence, however, there was no mention of any abortive investment plan. The admission only came when Methani was cross-examined by counsel for the plaintiff. He was not able to give the exact identity of the property which was the intended subject of their investment apart from saying it was at Orchard Point Building. On the other hand, the plaintiff`s evidence was more credible. He said that the money was given to the defendants upon the latter`s representation that it was to be expended on the purchase of a property at Orchard Road. The plaintiff repeatedly requested for the particulars of the property. The defendants were, however, masters of procrastination. No particulars were eventually given to the plaintiff. The plaintiff was, however, content when he received his money with profit thereon. It was, in my view, an understandable attitude of any man in business. Nevertheless, I was sure there was in reality no plan at any time to invest anywhere. It was, from the outset, a story concocted by the defendants` directors in order to obtain money from their wealthy brother-in-law.

63 The second transaction was a sum of S$90,000 in April 1991. The defendants alleged that it was an outright loan. It was repaid 121 days later with interest calculated, so the defendants alleged, at the rate of 5.5% per month. In fact documentary evidence showed that the plaintiff got back S$100,000. The rate of returns was in fact only 2.7% per month as counsel for the defendants impliedly conceded during his cross-examination of the plaintiff. The plaintiff

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said in cross-examination that the second transaction was also for the purpose of investing in a property, namely, a warehouse. As with the previous transaction, the defendants failed to provide the plaintiff with any details of the property in question. On each occasion, the defendants promised that the plaintiff would `get back his money in 90 days`. I formed the distinct impression that the defendants were in the habit of abusing the trust which the plaintiff reposed in them as a result of family ties. In the premises, I do not see how these two incidents could have helped the defendants in establishing their moneylending defence.

64 That left the defendants with only one instance of loan ie the deposit money of US$960,185.11. It was not disputed that the plaintiff received interest payments in respect of the money. In fact the plaintiff was vehement that he had a right to interest. Interest may have been paid at rates which I would not consider as low. Nevertheless, they were not exorbitant in any sense of the word, in view of the prescribed maximum rate of 20% in s 23(5) of the Act. In any event, I was convinced that the plaintiff was a reluctant lender, far from one who was willing to lend to `all and sundry`. The defendants were deliberately delaying payment of his deposit money. Of course the plaintiff could have pursued his legal remedy at once. But the defendants were, corporate entity aside, his brothers-in-laws` company. The plaintiff wished that the matter could be resolved in a family-like manner. In the circumstances the plaintiff had no choice but to accept the defendants` proposal to treat the deposit money as a temporary loan. The plaintiff was a credible witness who convinced the court that he was not carrying on any business of moneylending within the meaning of the Act. The defence of illegal moneylending was therefore unsustainable.

65 Accordingly I gave judgment for the plaintiff in the following terms. First, the sum of US$960,185.11. Secondly, taking into consideration the

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several interest payments already made, the sum of US$83,251.93 as representing outstanding interest for the period before the writ was issued. Thirdly I awarded interest on US$960,185.11 from the date of the writ, ie 8 May 1992. I also gave judgment for the plaintiff to recover any loss he may have suffered in the conversion of the principal sum of US$960,185.11 to Singapore dollars as at 7 July 1991. I also ordered costs to the plaintiff to be taxed unless otherwise agreed. Last but not least, security for costs furnished by the plaintiff in the sum of $25,000 was ordered to be released forthwith to the plaintiff or his solicitors.

66 Claim allowed.

Lai Siu Chiu JC

P Nair and V Menon (Ong Tan Nair & Kwek) for the plaintiff
Sarjit Kaur and Aqbal Singh (Sarjit Kaur & Co) for the defendants
Vinodh Commaraswamy (Shook Lin & Bok) for the Bank of India

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