Tang Lee Hiok & Ors v Yeow Guang Cheng [2022] 5 MLJ 584

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COURT OF APPEAL (PUTRAJAYA)

LEE SWEE SENG, CHE MOHD RUZIMA AND GUNALAN MUNIANDY JJCA

CIVIL APPEAL NO B-02(NCvC)(W)-1193–09 OF 2020

15 July 2022

Case Summary

Moneylenders — Unlicensed moneylender — Whether defendants contravened Moneylenders Act 1951 ('MLA') — Defendants being unlicensed moneylenders under MLA loaned plaintiff sum of money with exorbitant monthly interest rate — As security, plaintiff signed sale and purchase agreement ('SPA'), memorandum of transfer ('Form 14A') and power of attorney ('PA') in favour of defendants over his land — Defendants transferred land into their names when plaintiff could no longer service monthly interest payments — Whether the SPA being a sham to disguise an illegal moneylending transaction was unenforceable under the MLA — Whether the loan agreement between the parties was unlawful and null and void under s 15 of MLA read with s 24 of Contracts Act 1950

The respondent had initially taken a RM600,000 loan from an unlicensed moneylender ('CML') using his land as security. When he subsequently could not pay the monthly interest on the loan and the amount he owed CML had ballooned to RM780,000, the respondent approached the appellants who were willing to give him a RM900,000 loan bearing an alleged monthly interest rate of 12.5% in order to settle his debt with CML and get back his land. The respondent agreed to the appellants' terms and conditions and signed a sale and purchase agreement ('SPA'), a Form 14A memorandum of transfer and a power of attorney ('PA') in respect of his land favouring the appellants. In due course, the respondent could not pay his monthly interest on the loan whereupon the appellants transferred the land to their names. The respondent sued the appellants to, inter alia, declare all documentation he had signed in respect of the land and the transfer of the land to the appellants as null and void for breach of the Moneylenders Act 1951 ('the MLA') on the ground that the appellants were not licensed under the MLA to do moneylending. The respondent also sought an order to cancel the appellants' ownership of the land and direct that the property be transferred back to him. Denying that they were unlicensed moneylenders and maintaining that the SPA over the land was genuine and that they had paid the full purchase price for it, the appellants counterclaimed for an order compelling the respondent to deliver vacant possession of the land to them plus damages to be assessed. Following a trial, the High Court allowed the respondent's claim and dismissed the appellants' counterclaim. The court found that the SPA was a sham to disguise an illegal moneylending transaction

which was void and unenforceable. The court ordered the appellants' ownership of the land to be cancelled and directed the property to be transferred back to the respondent. The instant appeal was against the High Court's decision.

Held, unanimously dismissing the appeal:

(1) Taking the discrepancies together, which included the full payment of the purchase price without taking vacant possession and even asking for the keys, the long delay in the property being registered in the appellants' names and the various payments made by the respondent at the express instruction of some of the appellants, this court was more than satisfied that the trial judge was not plainly wrong in concluding that the transaction in the instant case was an illegal moneylending transaction. The instrument used to effect the transaction and the SPA was a sham and being illegal, the natural consequence of it being null and void was inevitable as provided under the MLA (see para 76).

(2) The appellants could not claim restitution under ss 66 or 71 of the Contracts Act 1950 as they were aware of the illegality and could not plead ignorance. To allow them to claim restitution would be to allow them to benefit from the transaction that they had devised to camouflage their nefarious intention and that would only embolden unlicensed moneylenders (see para 76).

(3) This court agreed with the respondent's contention that the entire actions of the appellants did not reflect the express terms of the SPA at all material times and instead their actions had clearly shown that the appellants only wished to complete the disbursement of the loan sum to the respondent without adhering to the terms and/or clauses under the SPA (see para 26).

(4) The trial judge had adequately and thoroughly evaluated and analysed the evidence as a whole, including the issue of witness credibility, before concluding that the impugned SPA was a sham document designed to disguise an illegal moneylending transaction. The findings of fact made by the judge and the conclusion he reached were not plainly wrong to warrant appellate interference (see paras 70, 72 & 74).

Responden pada mulanya telah mengambil pinjaman RM600,000 daripada pemberi pinjaman wang tidak berlesen ('CML') menggunakan tanahnya sebagai cagaran. Apabila beliau kemudiannya tidak dapat membayar faedah bulanan pinjaman dan jumlah hutang CML beliau telah meningkat kepada RM780,000, responden telah mendekati perayu yang sanggup memberinya pinjaman RM900,000 dengan kadar faedah bulanan yang didakwa 12.5% untuk menyelesaikan hutangnya dengan CML dan mendapatkan kembali tanahnya. Responden bersetuju dengan terma dan syarat perayu dan

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menandatangani perjanjian jual beli ('SPA'), memorandum pindahmilik Borang 14A dan surat kuasa wakil ('PA') berkenaan tanahnya terhadap perayu. Lanjutan daripada itu, responden tidak dapat membayar faedah bulanannya ke atas pinjaman yang mana perayu-perayu memindahkan tanah tersebut kepada nama mereka. Responden menyaman perayu untuk, antara lain, mengisytiharkan kesemua dokumentasi yang telah ditandatanganinya berkenaan dengan tanah dan pindahmilik tanah kepada perayu sebagai terbatal dan tidak sah kerana melanggar Akta Pemberi Pinjam Wang 1951 ('APW') atas alasan bahawa perayu tidak dilesenkan di bawah APW untuk melakukan pinjaman wang. Responden juga memohon perintah untuk membatalkan pemilikan tanah perayu dan mengarahkan supaya hartanah tersebut dipindahkan semula kepadanya. Menafikan bahawa mereka adalah pemberi pinjaman wang tidak berlesen dan mempertahankan bahawa SPA ke atas tanah tersebut adalah tulen dan bahawa mereka telah membayar harga belian penuh untuknya, perayu-perayu membuat tuntutan balas untuk perintah yang memaksa responden untuk menyerahkan milikan kosong tanah tersebut kepada mereka serta ganti rugi yang akan ditaksirkan. Selepas perbicaraan, Mahkamah Tinggi membenarkan tuntutan responden dan menolak tuntutan balas perayu. Mahkamah mendapati bahawa SPA adalah palsu untuk menyamarkan transaksi pinjaman wang haram yang tidak sah dan tidak boleh dikuatkuasakan. Mahkamah memerintahkan hak milik perayu-perayu ke atas tanah tersebut dibatalkan dan mengarahkan hartanah tersebut dipindahkan semula kepada responden. Rayuan semasa adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, sebulat suara menolak rayuan:

(1) Mengambil kira kesemua percanggahan, yang termasuk bayaran penuh harga belian tanpa mengambil milikan kosong dan juga meminta kunci, kelewatan yang lama dalam hartanah didaftarkan atas nama perayu dan pelbagai bayaran yang dibuat oleh responden atas arahan nyata beberapa perayu, mahkamah ini lebih berpuas hati bahawa hakim perbicaraan tidak terkhilaf secara nyata dalam membuat kesimpulan bahawa transaksi dalam kes semasa tersebut adalah transaksi pinjaman wang haram. Instrumen yang digunakan untuk melaksanakan transaksi dan SPA adalah palsu dan menyalahi undang-undang, akibat semula jadi ia terbatal dan tidak sah tidak dapat dielakkan seperti yang diperuntukkan di bawah APW (lihat perenggan 76).

(2) Perayu-perayu tidak boleh menuntut restitusi di bawah ss 66 atau 71 Akta Kontrak 1950 kerana mereka sedar ia bertentangan dengan undang-undang dan tidak boleh memplidkan tidak mempunyai pengetahuan. Bagi membenarkan mereka menuntut restitusi adalah membenarkan mereka mendapat manfaat daripada transaksi yang mereka reka untuk menyamarkan niat jahat mereka dan itu hanya akan mendorong pemberi pinjaman wang tidak berlesen (lihat perenggan 76).

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(3) Mahkamah ini bersetuju dengan hujah responden bahawa keseluruhan tindakan perayu tidak mencerminkan syarat nyata SPA pada setiap masa yang penting dan sebaliknya tindakan mereka jelas menunjukkan bahawa perayu hanya ingin menyelesaikan pembayaran jumlah pinjaman kepada responden tanpa mematuhi terma dan/atau klausa di bawah SPA (lihat perenggan 26).

(4) Hakim perbicaraan telah menilai dan menganalisis keterangan secara menyeluruh, termasuk isu kredibiliti saksi, sebelum membuat kesimpulan bahawa SPA yang dipersoal adalah dokumen palsu yang direka untuk menyamarkan transaksi pinjaman wang haram. Dapatan fakta yang dibuat oleh hakim dan kesimpulan yang beliau capai tidaklah salah secara nyata untuk menjamin campur tangan rayuan (lihat perenggan 70, 72 & 74).]

Cases referred to

Barisan Tenaga Perancang (M) Sdn Bhd v Dr Mansur bin Hussain & Ors [2017] 2 MLRH 177, HC (refd)

Dr HK Fong BrainBuilder Pte Ltd v SG-Maths Sdn Bhd & Ors [2018] 11 MLJ 701, HK (folld)

Dr Mansur bin Hussain & Ors v Barisan Tenaga Perancang (M) Sdn Bhd & Ors [2019] MLJU 1552; [2019] MLRAU 170, CA (refd)

Garnac Grain Co Inc v HMF Faure & Fairclough Ltd [1996] 1 QB 650

Global Globe Property (Melawati) Sdn Bhd v Jangka Prestasi Sdn Bhd [2020] 6 MLJ 333; [2020] 6 CLJ 1, CA (refd)

Hitch and others v Stone (Inspector of Taxes) [2001] STC 214, CA (folld)

Joseph Paulus Lantip v Tnio Chee Chang and another appeal [2020] 5 MLJ 708, CA (refd)

Lam Soon Oil & Soap Manufacturing Ltd v Impex Syndicate [1964] 1 MLJ 176; [1964] 1 MLRA 741, FC (refd)

Lee Heng Yak & Anor v Li Chee Loong & Anor [2018] MLJU 1346; [2018] MLRAU 359, CA (refd)

Nanyang Development (1966) Sdn Bhd v How Swee Poh [1970] 1 MLJ 145, FC (refd)

Polygram Records Sdn Bhd v The Search & Anor [1994] 3 MLJ 127, HC (refd)

Snook v London and West Riding Investments Ltd [1967] 2 QB 786, CA (refd)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (refd)

Legislation referred to

Contracts Act 1950 ss 24, 24(a), (b), 66, 71

Evidence Act 1950 ss 101, 101(1), (2), 102, 114(g)

Moneylenders Act 1951 ss 1, 2, 5, 5(1), (2), 5B(1), 10OA, 15, 29AA(1)

National Land Code s 340(2), Forms 14A, 19B

Penal Code s 109

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Appeal from: *Yeow Guang Cheng v Tang Lee Hiok & Ors* [2020] MLJU 1936 (High Court, Shah Alam)

Lim Koon Huan (with Siew Ka Yan) (Skrine) for the appellants.
Alex Gan Yi Yong (with Vilasiny a/p Gannasen and Siow Kim Leong) (Siow Kim Leong) for the respondent.

Gunalan Muniandy JCA:

INTRODUCTION

[1] This is an appeal by the appellants/defendants ('D1–D4') in the court below against the decision of the learned High Court judge ('LHCJ') wherein the respondent/plaintiff's claim against D1–D4 was allowed with no order as to costs.

[2] The plaintiff's pleaded claim was premised on the appellants' having carried on an illegal moneylending business in regard to the purported sale and purchase agreement ('SPA') with the respondent which was allegedly an unlawful loan agreement.

BACKGROUND FACTS

The plaintiff/respondent's case

[3] On or about 15 August 2015, the plaintiff borrowed RM600,000 ('first loan') from CML Realty Sdn Bhd ('CML'). Regarding the first loan, the first loan was an unlicensed moneylending business for which the plaintiff handed the Issue Document of Title ('IDT') to CML's solicitors, Messrs Khor & Rafidah ('Messrs KR'), as collateral for the first loan.

[4] The plaintiff and CML signed a sale and purchase agreement dated 21 July 2015 ('SPA (CML)') which was prepared by Messrs KR. According to the SPA (CML), the plaintiff purportedly sold the Property to CML for RM600,000 and the plaintiff paid monthly interest for the first loan to CML.

[5] The plaintiff could not subsequently pay the monthly interest to CML. At the material time, the plaintiff owed a total sum of RM780,000 to 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.

[6] The first to fourth defendants were unlicensed moneylenders who offered a loan to the plaintiff on the following terms and conditions ('second loan'):

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(a) the second loan was for a sum of RM900,000;

(b) the first to fourth defendants would pay the plaintiff's debt to CML and the balance of RM120,000 would then be given by the first to fourth defendants to the plaintiff;

(c) the plaintiff would pay interest for the second loan to the first to fourth defendants at the rate of 12.5% per month; and

(d) the plaintiff was required to execute the sale and purchase agreement ('SPA'), Form 14A and power of attorney ('PA') as a form of 'security' for the second loan. The SPA, Form 14A and PA were prepared by the fifth defendant, a partner in Messrs SR Tan, Cheng, Lim & Tee ('Messrs SRT').

[7] The plaintiff accepted the second loan on the above terms and conditions. The plaintiff signed the SPA, Form 14A and PA. Thereafter, the first to fourth defendants handed RM120,000 in cash to the plaintiff.

[8] From March to September 2016, the plaintiff had paid to the first to fourth defendants a total of RM328,400 as monthly interest (second loan).

[9] Subsequently, the plaintiff was unable to pay monthly interest (second loan). The fourth defendant sent

'WeChat' messages and voice mails which threatened the plaintiff that if he failed to pay monthly interest (second loan), the land would be transferred to the first to fourth defendants.

[10] The transfer was registered without the plaintiff's knowledge. The plaintiff only knew about the transfer when he did a land search in April, 2017.

[11] The plaintiff's then solicitors, Messrs Veera & Co ('Messrs VC'), sent a demand dated 21 April 2017 to the fifth defendant and Messrs SRT which stated that the SPA was a sham to conceal the unlicensed moneylending business between the first to fourth defendants on the one part and the plaintiff on the other part.

[12] Messrs VC sent a letter dated 22 May 2017 to Messrs SRT which requested from Messrs SRT on an urgent basis for all documents, letters, correspondence and receipts of payments.

[13] The first to fourth defendants prevented the plaintiff from having access to the property. Consequently, the plaintiff suffered loss as follows:

(a) the plaintiff had to stop his bird's nest business which was carried on in the upper floors of the property; and

(b) the plaintiff could not rent out rooms in the first floor of the property to his tenants.

The defendants/appellant's case

[14] The first, third and fourth defendants gave evidence as follows:

(a) the first, third and fourth defendants denied that they were unlicensed moneylenders who had made the second loan to the plaintiff;

(b) the SPA, Form 14A, PA and transfer were genuine as the first to fourth defendants had paid the price for the land; and

(c) the first to fourth defendants had appointed the fifth defendant to prepare the SPA, Form 14A and PA.

[15] The fifth defendant testified that:

(a) the fifth defendant acted only for the first to fourth defendants (not the plaintiff) in respect of the SPA, Form 14A and PA;

(b) by way of a letter dated 4 December 2015 from Messrs KR to Messrs SRT, Messrs KR informed that:

(i) CML was 'willing' to terminate SPA (CML) subject to a 'compensation sum' of RM780,000 to be paid by the plaintiff on or before 15 December 2015; and

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

(c) the plaintiff signed the following documents which were handed to Messrs SRT:

(i) an 'Acknowledgement' dated 8 December 2015 which stated the plaintiff had elected not to be legally represented in respect of the SPA and 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

(ii) the plaintiff's letter dated 9 December 2015 to Messrs SRT which stated that 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 (from the price) to Messrs KR (on behalf of CML);

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(d) the first to fourth defendants deposited a total of RM780,000 with Messrs SRT which was then paid to Messrs KR (on behalf of CML). Consequently:

(i) CML and the plaintiff entered into a 'Deed of Revocation' dated 4 January 2016 ('revocation deed') which revoked SPA (CML); and

(ii) Messrs KR handed the IDT to Messrs SRT.

(e) the fifth defendant had prepared 'Form 19B' under NLC ('Form 19B') dated 22 December 2015 for the first to fourth defendants to enter a private caveat over the land ('caveat (first to fourth defendants)'). The caveat (first to fourth defendants) was signed by the first to fourth defendants and was supported by a statutory declaration affirmed by the first to fourth defendants before a commissioner for oaths on 22 December 2015 ('SD (first to fourth defendants)');

(f) 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 first to fourth defendants, the fifth defendant applied for SA's consent for the transfer. SA's consent was obtained by way of a letter dated 13 January 2016 from the land administrator ('LA's letter'). According to LA's letter, SA's consent was only effective for three years from the date of LA's letter;

(g) Messrs SRT sent a letter dated 27 March 2017 to the first to fourth defendants ('Messrs SRT's letter (27 March 2017)') which, among others, confirmed the instruction of the first to fourth defendants that the first to fourth defendants would present Form 14A to the Land Office for registration under NLC;

(h) Form 14A was presented to the Land Office by the solicitors of the first to fourth defendants in this case. Consequently, the transfer was registered on 6 April 2017; and

(i) by way of a letter dated 12 May 2017, Messrs SRT had denied all the allegations raised in Messrs VC's demand.

[16] The plaintiff had instituted this action ('original action') against the first to fifth defendants for the following relief:

(a) a declaration that the documents below are null and void for contravening Moneylenders Act 1951 ('the MLA'):

(i) a sale and purchase agreement dated 15 December 2015 whereby the plaintiff purportedly sold the property to the first to fourth defendants at a price of RM900,000;

(ii) an instrument under NLC to transfer the land from the plaintiff to the first to fourth defendants; and

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(iii) a power of attorney regarding the land executed by the plaintiff in favour of the first to fourth defendants;

(b) a declaration that thetransfer is invalid;

(c) a declaration that the first to fourth 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;

(d) a perpetual mandatory injunction to compel the first to fourth defendants to:

(i) execute all the required documents to re-transfer the land to the plaintiff; and

(ii) deliver the 'Issue Document of Title' of the land to the plaintiff;

(e) an order for the first to fourth defendants to refund all the money paid by the plaintiff to the first to fourth defendants; and

(f) an order for the first to fifth defendants to pay damages to the plaintiff (which will be assessed by the court).

[17] The first to fourth defendants have filed a counterclaim for the following reliefs against the plaintiff:

(a) a perpetual mandatory injunction to compel the plaintiff to deliver vacant possession of the property to the first to fourth defendants; and

(b) an order for the plaintiff to pay to the first to fourth defendants:

(i) damages for unlawfully occupying the property (which will be assessed by the court); and

(ii) rent for the ground floor of two units of the property which have been let out by the plaintiff.

[18] On 5 August 2022, the LHCJ allowed the respondent's claim against the appellants without order as to costs and dismissed the appellants' counterclaim.

[19] The LHCJ found that the appellants had carried on a moneylending business contrary to *s 5* of the MLA by granting the loan of RM900,000 to the respondent without a moneylender's license pursuant to *s 10OA* of the MLA, and ordered the completed transfer of the property registered in the appellants' names to be cancelled and re-vested with the respondent.

[20] The appellants submitted amongst others that:

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(a) there is in fact no other evidence of moneylending business nor pattern of conduct which ties the appellants to any moneylending business;

(b) the contents of the 'WeChat' messages do not support the respondent's allegations that threats were made to transfer the ownership of the disputed property to the appellants in the event of default in repayment of the purported loan;

(c) the purported 'delay' in registering the transfer of ownership to the appellants and the appellants' taking vacant possession have been satisfactorily explained by not only the appellants, but the fifth defendant as well; and

(d) the conveyancing errors in the date of the payment of the purchase price, second SPA and the use of the term 'wang cengkeram' in the statutory declaration are minor and immaterial and in any event is irrelevant to the impute the finding of moneylending on the part of the appellants.

OUR DECISION

[21] Primarily, the core issue for our determination in this appeal is whether the LHCJ had correctly decided that the appellant's purchase of the disputed property was not a genuine sale and purchase transaction but a purported moneylending transaction in which the appellants were the purported unlicensed moneylenders and the disputed property was a collateral for the loan.

[22] To our minds, the dispute between the two litigants in the suit before the High Court ('HC') is rather straightforward wherein the appellants contended that they entered into a genuine SPA with the respondent to purchase the subject property while the latter's position was unequivocally that the SPA was a sham agreement that, in fact, was an illegal money lending transaction in disguise. After conducting a full trial and hearing all the evidence adduced, the LHCJ found as a fact that the appellants had carried on a moneylending business contrary to *s 5* of the Moneylenders Act 1951 ('the MLA') by granting the loan of RM900,000 to the respondent/plaintiff without a moneylender's licence. The finding was made pursuant to *s 10OA* of the MLA. Thereupon, it was ordered that the completed transfer of the disputed property (as defined below) registered in the appellants' names to be cancelled and re-vested with the respondent.

[23] We would pause here to scrutinise the appellants' grounds of appeal as per the memorandum of appeal ('MOA'). The crux of the appeal was that the LHCJ had erroneously decided that the appellants had unlawfully indulged in a moneylending business when not in possession of a moneylender's licence when dealing with the respondent in 2015 which caused grave repercussions to

the respondent in regard to ownership of the subject property. As per the MOA, the grounds advanced are as follows:

(a) the learned judge had erred in law and/or in fact in finding and deciding that the appellants are carrying out moneylending business under the MLA (refer to p 6 R/P RRT — Ground 1 of the MOA);

(b) the learned judge had erred in law and/or in fact in finding and deciding that there was a contravention of *s 5(1)* of the Moneylenders Act 1951. (refer to p 6 R/P RRT — Ground 2 of the memorandum of appeal);

(c) the learned judge had erred in law in invoking the rebuttable presumption under *s 10OA* of the Moneylenders Act 1951 (refer to p 6 R/P RRT — Ground 3 of the memorandum of appeal); and

(d) the learned judge had erred in law and/or in fact in finding and deciding that the sale of the property held under PM 1745, Lot No 7112, Pekan Sungai Pelek, Daerah Sepang, Negeri Sembilan ['the property'] by the respondent to the appellants is unenforceable under *s 15* of the Moneylenders Act 1951 ('the MLA').

[24] For the purposes of our analysis, the following relevant provisions of the MLA are reproduced below:

Moneylending Act 1950	
Section 1	'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 he carries on any other business.
Section 5	5 Licences to be taken out by money-lender
	(1) No person shall carry on or advertise of announce himself or hold himself out in any way as carry on or advertise or announce himself or hold himself out in any way as carrying on the business of money/ending unless he is licensed under this Act.
Section 15	15 Contract by unlicensed moneylender unenforceable
	No moneylending agreement in respect of money lent after the coming into force of this Act by an unlicensed moneylender shall be enforceable.

Section 10OA	10OA Presumption as to the business of moneylending
	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.

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[25] In the court below, the premise of the plaintiff's claim was primarily that the agreed terms of the SPA executed on 15 December 2015 were blatantly not complied with. Instead, the events that followed were something very different from the said express terms. The material events are these:

(a) the SPA was in fact signed by the parties respectively on 8 December 2015 and not on 15 December 2015;

(b) the deposit of RM120,000 was only paid by the appellants to the respondent on 15 December 2015 in cash;

(c) the remaining 'purchase price' of RM780,000 was paid by the appellants to the respondent way earlier before the deposit had been paid to the respondent;

(d) the appellants have alleged that the RM120,000 which has been paid to the respondent on 15 December 2015 was a payment for the balance of the 'purchase price' and not a deposit; and

(e) hence, the deposit had been paid in advance and is part of the 'purchase price' of RM789,000.

[26] We are inclined to agree with the respondent's contention that the entire actions of the appellants did not reflect the express terms the SPA at all material times and instead their actions have clearly shown that the appellants only wished to complete the disbursement of the loan sum to the respondent without adhering to the terms and/or clauses under the duly signed SPA.

[27] This fact of non-compliance with the SPA was amply supported by the appellants' witnesses' evidence together with their own documentary evidence in regard to the payment of deposit. In was explicitly stipulated in the SPA that the deposit was required to be paid by the appellants as the purchasers on or before 8 December 2015, ie, the date of execution of the SPA but the same was received by the respondent only on 15 December 2015 and that too not as a deposit but as the balance purchase price ('BPP') which was wholly contrary to the clear and explicit terms of the SPA. The major portion of the purchase price in the sum of RM780,000 was paid well before the deposit as agreed upon was even due for payment.

[28] It was submitted by the respondent that, as found by the LHCJ, the explanations given by the appellants for the manner of payment as alluded to were not credible and that there were too many discrepancies which clearly proved that the SPA dated 15 December 2015 is not a legally valid agreement and appellants' arrangement is not a common practice followed in any genuine real estate SPA transaction.

[29] We accept it as settled law that parties to a written contract are strictly

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bound by the agreed terms and conditions as expressly stipulated. A leading authority in point is *Polygram Records Sdn Bhd v The Search & Anor* *[1994] 3 MLJ 127* where it was held that:

> [2] A party who signs a written contract is bound by the terms of the contract, except in the limited cases where fraud, undue influence or misrepresentation may be established. Therefore, the argument by the group that the first contract was not binding on them since they did not 'agree to the terms' could be dismissed summarily.

[30] In urging us to affirm the LHCJ's decision, the respondent impressed upon us that there was a glaring failure by the appellants to disregard the agreed terms of the SPA right from the payment of the deposit that was wholly inconsistent with the said express terms. As such, that the LHCJ's finding that the agreement is void in accordance with the provisions under the existing law and established principles is absolutely a right decision.

[31] The appellants, on the contrary, contended that the LHCJ's decision was erroneous in the following respects:

(a) completely misconstrued the factual matrix and evidence presented of the appellants' SPA transaction here with the respondent (ie the second SPA), and particularly:

(i) there was insufficient judicial appreciation of the evidence of circumstances before him;

(ii) the learned judge was plainly wrong and had completely overlooked the inherent probabilities (or improbabilities) of the case;

(iii) the course of events affirmed by the learned judge could not have occurred; and

(iv) the learned judge had made unwarranted deductions based on faulty judicial reasoning from admitted or established facts.

(b) the LJ had in fact also misapplied the test of proof of moneylending and rebuttable presumption in *s 10OA* of the MLA.

[32] At the core of this appeal is the appellants' submission that the LHCJ had critically erred in making the presumption of moneylending in this case (the first limb of *s 10OA* of the MLA) as the respondent had not made out or provided any proof of a transaction of a 'loan with interest' said to have been provided by the first to fourth appellants.

[33] Reference was made to *s 10OA* of the MLA, which, in the appellants' submission, contains the following requirements:

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(a) at the outset the establishment of proof of a loan given with interest based on the facts and evidence to lead to the presumption that such a person is carrying on the business of moneylending; and

(b) then only once such proof is provided will there be a need to raise a rebuttal to the presumption of moneylending.

[34] Central to the respondent/plaintiff's claim in the court below was that the second SPA that he had entered into with the appellants was in fact a security for an unlicensed moneylending transaction involving the appellants, and is thus a sham, and ought to be declared null and void. In support thereof, the respondent alleged:

(a) he entered into a moneylending transaction for the sum of RM600,000 with one CML Realty and had deposited the title of the disputed property with CML Realty as security for that loan;

(b) he then took another loan of RM900,000 from the first to fourth respondents to pay the CML Realty Loan, and this second loan carried an interest at a whopping rate of 12.5% per month;

(c) he made interest payments to the first to fourth appellants between March and September 2016, then defaulted; and

(d) the first to fourth appellants harassed and threatened him for payment.

[35] It was the appellants' position that the CML money lending transaction as above was completely different and distinct from the transaction with the appellants who had no connection with the former. The respondent had purportedly failed to provide any cogent evidence in support of his allegations as above which had been unequivocally denied and disputed by the appellants who had given consistent testimonies on the issue at hand. The respondent, on the other hand, was said to have been evasive on the alleged illegality and to have given evidence that was contradictory on material facts.

[36] Amongst others, that he did not understand the amended statement of claim and did not know whether the first and second SPAs were against the law for being in breach of the MLA. Despite making grave allegations as to the SPAs being sham agreements and illegal, the respondent's testimony was purportedly filled with inconsistencies that were not resolved. Moreover, it was alleged that two law firms, had participated in and profited from the alleged illegal agreements/transactions, ie, the first and second SPA respectively. Reference was made to *ss 101* and *102* of the *Evidence Act 1950* that placed the onus of proof on the party that raises a particular fact or issue against another party (see *Nanyang Development (1966) Sdn Bhd v How Swee Poh* *[1970] 1 MLJ 145* at p 145H).

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[37] According to the appellants, apart from the respondents' bare allegation of the CML SPA being a moneylending transaction, there was in fact no other evidence of moneylending business nor pattern of conduct which ties the appellants to any moneylending business. However, the LHCJ had purportedly omitted to take the critical step of evaluating the respondent's completely contradicting and illogical testimony and failed to conclude that such contradicting, illogical and equivocal assertions by the respondent had completely failed to establish even prima facie proof of a 'loan given at an interest'.

[38] We were urged to take note, in particular, in contrast to the CML loan transaction (first loan), the following:

(a) it is the respondent's own pleaded case and sworn assertion in his witness statement that the purported second loan of RM900,000 carried interest of '12.5% per month';

(b) on a simple calculation, such interest as pleaded by the respondent would amount to RM112,500 per month (RM900,000 x 12.5% per month);

(c) the respondent's concession that, contrary to his pleading, the interest rate charged was not 12.5% per month;

(d) the respondent's concession that the alleged interest rate of 12.5% per month as pleaded was incorrect;

(e) the contradiction in respect of the interest rates chargeable for the loan affected the key component of the presumption of illegal moneylending; and

(f) the respondent's oral evidence was completely contradictory with his own documentary evidence as to how he arrived at the figure of RM348,400.

[39] In essence, the appellants' contention was that the respondent's case as presented in his oral evidence had breached the trite principle that parties in establishing their claim are strictly bound by their pleadings. The Court of Appeal in *Joseph Paulus Lantip v Tnio Chee Chang and another appeal* *[2020] 5 MLJ 708* recently re-stated this cardinal principle when it remarked that it would be most damaging to our administration and system of justice if parties are allowed to plead a certain complaint, lead evidence on another and the court decides on something entirely different.

[40] We would pause her to scrutinise the LHCJ's reasoning in making his finding on the presumption of moneylending business under *s 10OA* of the MLA. He had no hesitation in finding that:

> … there was a rebuttable presumption the first to fourth defendants had carried on

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> a moneylending business by granting the second loan to the plaintiff without a moneylender's license) has arisen pursuant to s 100A of the MLA (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 (second loan) to the first to fourth defendants. It is to be noted that *s 2* of the MLA 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.

[41] It is important for us to note here that the LHCJ had made an affirmative finding of fact after a full consideration of all the evidence that on the facts, the respondent was entitled to invoke a rebuttable presumption under *s 10OA* of the MLA that the first to fourth defendants had carried on a moneylending business by giving the second loan to the plaintiff without a moneylender's licence granted by the Registrar of Moneylenders under *s 5B(1)* MLA. It was apparent that the LHCJ made the finding on sound basis, essentially, on the undisputed facts before him, particularly, the contemporaneous documents and communication between the parties at the material time. As such, as the decision was on the facts and arrived at following a trial, we would in principle not interfere with the finding unless it is demonstrated to us that it is plainly wrong or baseless on the facts and evidence.

[42] Thereafter, the LHCJ had correctly dealt with the crucial issue as to whether the appellants (defendants 1–4) had successfully rebutted the above presumption. He took the correct position that once the rebuttable presumption arises under *s 10OA* of the MLA, the first to fourth defendants have the evidential onus to displace the rebuttable presumption on a balance of probabilities — see *Barisan Tenaga Perancang (M) Sdn Bhd v Dr Mansur bin Hussain & Ors* [2017] 2 MLRH 177, at [48(2)].

[43] The LHCJ then, after due consideration of the material facts and documents found as a fact that the first to fourth defendants had failed to rebut the rebuttable presumption on a balance of probabilities. This decision is due to the following evidence and reasons:

(a) cll 1.1 and 2.1 are false;

(b) based on the conduct of CML and D1–D4 together with the undisputed documentary evidence the plaintiff's evidence regarding the second loan is true;

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(c) the first, third and fourth defendants are not credible witnesses — please refer to the above paras 17 and 18; and

(d) despite serious allegations made by the plaintiff in this case against, among others, the second defendant, the second defendant had elected not give any evidence to defend himself. Such a failure on the second defendants' part attracts adverse consequences to the defendants' case.

[44] We are in agreement with the LHCJ's view that when the respondent adduced sworn evidence against D2 at the trial and there was no evidence in rebuttal by D2 against the respondent's evidence, the court may presume as

true the evidence against D2. He adopted the principle in the leading Federal Court case of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751, where, Gopal Sri Ram FCJ pronounced that:

> [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.

[45] Based on the above principle, the LHCJ drew an adverse inference against D2 under s 114(g) of the *EA* for failing to testify and against D1, D3 and D4 as well for failing to call D2 as a witness in the case against them without any reasonable explanation for not compelling his attendance by recourse to an application for a subpoena for this purpose. Their explanation that D2 wished to withdraw as co-proprietor of the subject land was found not to be credible and not supported by any evidence justifying his non-calling.

[46] In our view, the LHCJ had also correctly deliberated upon the important issue as to whether, independent of the application of s 10OA of the MLA, the plaintiff had discharged the legal and evidential burden under ss 101(1), (2) and 102 of the *EA* to prove on a balance of probabilities that the first to fourth defendants had carried on a moneylending business contrary to s 5(1) MLA by making the second loan to the plaintiff which was allegedly camouflaged by way of the SPA, Form 14A and PA.

[47] Having done so, the LHCJ made a finding of fact that the respondent had succeeded in discharging the legal and evidential burden to prove on a

balance of probabilities that D1–D4 had carried on a moneylending business as alleged above in respect of the second loan based on the reasons and evidence as below:

(a) the SPA is a sham as the important clauses were mere facades and not meant to be complied with;

(b) the plaintiff's personal cheques, plaintiff's bank statements and WeChat Messages constituted contemporaneous documentary evidence to prove that as a consequence of the second loan, the plaintiff had paid monthly interest (second loan) to D1–D4;

(c) the respondent's testimony regarding the first and second loans is found to be credible and truthful for, inter alia, these reasons:

  (i) CML had made a profit of RM180,000 from the respondent within a span of five months as compensation for the revocation of the CML SPA;

  (ii) the CML SPA and the revocation deed were contrived to camouflage the first loan as a sale of the disputed property;

  (iii) there was undisputed documentary evidence that the respondent had paid monthly interest. Amongst these were the respondent's bank statements showing the transfer of sums of money to D4 account purportedly as repayment of a loan granted by D4's husband whereas the alleged debt had not been proved;

  (iv) the respondent's payment to D1's husband was also not proved to be settlement of a debt owed to the latter.

(v) 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, would still need to borrow money from the D1's husband, D3 and D4's husband;

(vi) the WeChat Messages between the parties corroborated the plaintiff's oral and documentary evidence (plaintiff's cheques and plaintiff's bank statements) regarding the plaintiff's payment of monthly interest (second loan); and

(vii) several provisions of the SPA indicate that it is a sham, particularly in relation to the payment of the deposit on the date of the SPA (15 December 2015) and the payment schedule of the balance purchase price when D1–D4 had paid in full the entire purchase price even before the date of the SPA;

(d) based on an analysis of the evidence as a whole, D1, D3 and D4 cannot be considered as witnesses of truth despite corroborating each other's testimony. Amongst others, they had made a false statement in their

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statutory declaration that as at 22 December 2015 they had paid a deposit of RM120,000 for the property when in fact on that date the entire purchase price of RM900,000 had been fully settled. From their conduct all throughout and lack of agreement among themselves they were, in all probability, not genuine purchases.

In our opinion, it was pertinent for the LHCJ to have taken into consideration the inordinate delay by the appellants in the transfer of the title in this instance which implied that D1–D4 were not genuine co-purchasers of the disputed land. This is what he remarked:

> 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 delay here was about one year four months from the date they were entitled to vacant possession of the property; and

(e) the adverse consequences to the defence case which arise from the failure of D2 to give evidence as he was a material witness in the unfolding of the defence narrative. This point has been elaborated in an earlier part of our judgment and does not require further discussion.

[48] We, likewise, do not propose to comment on the LHCJ's view as to the likely offences that D1–D4 and the respondent may have committed under *s 5(2)* of the MLA read with *s 109* of the *Penal Code*. Similarly, that D5 may have committed an offence under *s 29AA(1)* of the MLA for assisting unlicensed moneylending. This is a matter of an opinion expressed by the LHCJ and not a finding of fact that requires our deliberation.

[49] We would proceed to comment only on the effect of breach by the appellants of *s 5(1)* of the MLA as found affirmatively by the LHCJ. For convenience, we reproduce the law applicable where the consideration or object of an agreement is unlawful, namely, the Contracts Act 1950, of which the relevant part states that:

> 24 What considerations and objects are lawful, and what are not
>
> 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.

[50] Having made a finding of fact that the second loan was granted by

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D1–D4 in contravention of s 5(1) of the MLA, the LHCJ held that this loan was void under s 15 of the MLA read with:

(1) s 24(a)of the CA [the second loan is 'forbidden' by s 5(1) of the MLA] and/or.

(2) s 24(b)of the CA [the second loan is of such a nature that, if permitted, the second loan would 'defeat' s 5(1) of the MLA].

[51] We are inclined to adopt the decision in the case cited in support, *Dr HK Fong BrainBuilder Pte Ltd v SG-Maths Sdn Bhd & Ors* [2018] 11 MLJ 701, at [41] where it was held that if a contract is void under any paragraph in s 24 of the 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.

[52] The LHCJ had, thereupon, no hesitation in declaring the SPA void for the following reasons:

(a) based on an evaluation of the evidence, the SPA was a sham to conceal the breach (MLA). If the court does not invalidate the SPA, this will allow the defendants to circumvent s 5(1) of the MLA and frustrate the object (MA); and/or

(b) premised on *Dr HK Fong Brainbuilder*, the SPA is tainted by the breach (MLA) and is thereby rendered void.

[53] The other orders made by the LHCJ were necessary and consequential orders to give effect to his decision that the second SPA was null and void for being in contravention of the law and consequently ought to be set aside. These orders do not merit further comment from us except to state our view that the LHCJ was correct in principle in holding that a transfer of land registered under s 340(2) of the National Land Code may be set aside on the ground, amongst others, that the SPA concerned was actually an unlicensed moneylending transaction in disguise.

[54] We also concur with the LHCJ that the appellants' proposition was misconceived that as the plaintiff is *in pari delicto* regarding the breach (MLA), 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.

[55] As correctly pointed out, the non-granting of relief in a case of the present nature would have adverse consequences that would condone the prevalent activity of unlicensed moneylending and the imposition of exorbitant interest rates on 'desperate borrowers' seeking to protect their properties.

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[56] Another issue of significance concerns the completion date of the SPA dated 15 December 2015 which was shrouded in contradictions arising from the clauses applicable to the completion date. The three clauses concerned led to confusion and uncertainty as to when the SPA could be considered as perfected.

[57] The LHCJ had taken into consideration the three incompatible scenarios presented by the respondent as follows:

(a) scenario 1, according to cl 2 (Second Schedule), this SPA should be considered completed since January 2016 because the appellants had successfully obtained permission to charge property title from the land office on 13 January 2016;

(b) scenario 2, according to Part 12 of the First Schedule, the SPA is considered complete on 15 December 2016; and

(c) scenario 3, according to cl 2.1 of the SPA, the agreement is deemed perfect when the respondent receive the balance purchase price for the property. In this case, the respondent had received the balance sum of the purchase price amounting to RM120,000 from the fourth appellant at his residence on 15 December 2015.

[58] It bears reiteration that the crux of the appeal before us is against the LHCJ's decision that the appellants were at the material time carrying out a moneylending business under the MLA in contravention of s 51(1) of the MLA and in invoking the rebuttable presumption under *s 10OA* of the MLA in arriving at his decision to allow the respondent's claim for the declarations and the orders sought. Also against the decision that the sale of the subject property was in contravention of law and thus, unenforceable under *s 15* of the MLA.

[59] It would be instructive at this point for us to place on record certain leading authorities that we have considered in the determination of this appeal.

[60] We would first adopt with approval the Court of Appeal judgment of *Global Globe Property (Melawati) Sdn Bhd v Jangka Prestasi Sdn Bhd [2020] 6 MLJ 333*; [2020] 6 CLJ 1 where Lee Swee Seng JCA quoting *Hitch and others v Stone (Inspector of Taxes)* [2001] STC 214 which referred to *Snook v London and West Riding Investments Ltd [1967] 2 QB 786* pronounced on the applicable test in determining a sham agreement at para [105]:

> [64] An inquiry as to whether an act or document is a sham requires careful analysis of the facts and the following points emerge from the authorities.
>
> [65] First, in the case of a document, the court is not restricted to examining the four comers of the document. It may examine external evidence. This will include

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> the parties' explanations and circumstantial evidence such as evidence of the subsequent conduct of the parties.
>
> [66] Second, as the passage from *Snook* makes clear, the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties.
>
> [67] Third, the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where parties make an agreement which is unfavourable to one of them, or artificial,

and a situation where they intend some other arrangement to bind them. In the former situation, they intend the agreement to take effect according to its tenor. In the latter situation, the agreement is not to bind their relationship.

[68] Fourth, the fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding. The proper conclusion to draw may be that they agreed to vary their agreement and that they have become bound by the agreement as varied (see for example *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1996] 1 QB 650 at 683–684 per Diplock LJ, which was cited by Mr Price).

[69] Fifth, the intention must be a common intention (see *Snook*).

[61] The respondent brought to our attention another COA decision in point, *Lee Heng Yak & Anor v Li Chee Loong & Anor* [2018] MLJU 1346; [2018] MLRAU 359 which pronounced that:

[36] We were persuaded to consider the habitual act of the first defendant in lending out loans and then transfer the borrowers' houses to him with the assistance of the second defendant. The plaintiffs' counsel referred to the Court of Appeal case *Tan Ah Moai & Ors v Li Chee Loong* [2018] MLJU 52; [2018] MLRAU 21 and also the rest of other similar cases in Johor Bahru. It was contended that, the same law firm is involved in moneylending scheme through the modus operandi of a sale and purchase transaction. Counsel submitted that the case of Tan Ah Moai had referred to the Federal Court case of *Bandar Eco-Setia Sdn Bhd v Angelane Eng* [2016] 1 MLJ 764; [2016] 1 MLRA 103; [2016] 3 CLJ 173; [2016] 1 AMR 425 in which it was held by the court that the court will consider the conduct of the party who seeks to enforce the contract and the relevant circumstances before granting the specific performance.

[62] In our considered view, the determination of the crucial question as to whether a SPA is in a given factual situation in fact a moneylending transaction is essentially fact based from an evaluation of the material evidence, including the credibility of the parties involved and their respective versions given under oath.

[63] The respondent's position which found favour with the LHCJ was that

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the appellants were the parties who wanted to execute the SPA but when looking at the background or the reasons why the SPA was signed by both parties, it was contrary to s 5 of the MLA 1951 because there was an interest sum paid by the respondent and the payment received by the appellants was in full even though the appellants never obtained a licence to provide moneylending services with interest.

[64] Likewise, that, the respondent had paid interest fees for RM120,000 to the appellants from March 2016 to September 2016 whereby the total payment so far was RM348,400 which was duly received by the appellants from the respondent.

[65] The LHCJ was satisfied that the aforesaid repayment together with interest charges through online banking facilities and in cash had been supported by documentary evidence. Importantly, we must stress that this was purely a finding of fact at the conclusion of the trial.

[66] We would now proceed to look at the law on appellate interference against a decision by the trial court which had heard first-hand the witnesses for the litigants and considered their evidence in its totality. The principles relating to appellate intervention of a trial court's decision premised on findings of fact are well settled.

[67] In the leading case of *Lam Soon Oil & Soap Manufacturing Ltd v Impex Syndicate* [1964] 1 MLJ 176; [1964] 1 MLRA 741, the Federal Court decided as follows:

The appellants now seek to reverse the judgment of Ambrose J. I can do no better than to refer to a passage in the judgment of the Privy Council delivered on 14 January 1964 in the Singapore case of Tay Kheng *Hong v Heap Eng Moh Steamship Co Ltd* [1964] MLJ 87, 91, 92 for a statement of the principles upon which an appellate Court should act in reviewing the decision of a judge of first instance:

> There is a heavy onus on a party who seeks to displace the conclusion formed by the trial judge on questions of fact. The principles upon which an appellate court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in Watt or *Thomas v Thomas*: 'I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an Appellate Court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The Appellate Court may take the view that, without having seen or heard the witnesses. It is not in a position to come to any satisfactory conclusion on the printed evidence; III. The Appellate Court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having

> seen and heard the witnesses, and the matter will then become at large for the Appellate Court'. Later his Lordship quoted with approval a passage from the speech of Lord Shaw in *Clarke v Edinburgh & District Tramways Co Ltd*: 'In my opinion, the duty of an Appellate Court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tries the case — in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong/ If a cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment'. Before the Court of Appeal in Singapore was entitled to reject the trial judge's estimate of the credibility of the appellant and Goh Leh they would have to be satisfied that the trial judge's view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion.

[68] The above judgment speaks for itself on the meaning and scope of the plainly wrong test which the appellants must satisfy in a case like the present which went to full trial at the conclusion of which the trial judge entered judgment for the respondent supported by lengthy and elaborate reasoning.

[69] We concur with the appellant that the charging of unlawful interest is the key element to the establishment of the unlawful act or offence of illegal moneylending under the MLA. This element is the sub-stratum of the respondent's claim the proof of which is the subject of this appeal. In a nutshell, the appellants' position was principally that the LHCJ had misdirected himself and arrived at an erroneous conclusion when he failed to judicially appreciate that the respondent's evidence on the alleged payment of interest was dubious, highly questionable and contradictory in several respects.

[70] With respect, we are not inclined to agree with the appellants' contention as above having carefully scrutinized the LHCJ's grounds of judgment and noted that the LHCJ had adequately and thoroughly evaluated and analysed the evidence as a whole, including the issue of the witnesses' credibility before concluding on the issues that had arisen for determination. He had in fact carried out an elaborate assessment of the facts and evidence before the court on the critical issues, which he had sufficiently addressed. We do not agree that he had critically failed to take into account essential and material evidence that led to findings that were plainly wrong.

[71] Of primary consideration before the LHCJ was whether the impugned SPA of the disputed property was a sham document and was not genuine and lawful. It required a careful analysis of the facts and evaluation of all the material evidence adduced by both parties. We are satisfied that the LHCJ had carried out this exercise adequately and diligently. For completeness, we would

[2022] 5 MLJ 584 at 608

refer to the observation on this vital point in the Court of Appeal case of *Dr Mansur bin Hussain & Ors v Barisan Tenaga Perancang (M) Sdn Bhd & Ors* [2019] MLJU 1552; [2019] MLRAU 170 which applied the principle in the case of *Hitch and others v Stone (Inspector of Taxes)* [2001] STC 214 and stated that the applicable test to ascertain a sham document, first must take into consideration on the followings:

> I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended to give to third parties or to the court the appearance of creating between the parties' legal rights and obligations different from the actual legal rights. And obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality, and the authorities … that for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intention of a 'shammed' affect the rights of a party against whom he deceived.

[72] We do not find any plain error or failure by the LHCJ in regard to this pivotal issue in properly and sufficiently analysing the material facts and issues raised by the parties before concluding that the impugned SPA was a sham document designed to disguise an illegal moneylending transaction. Importantly, the trial court in determining whether there was a common intention among the parties to the agreement not to create legal rights and obligations as expressed in the document is not restricted to examining just the four corners of the document itself. It may additionally examine extraneous and circumstantial evidence such as the parties' explanation and subsequent conduct. Having thoroughly examined the pertinent facts, surrounding circumstances and conduct of the parties at the material time, the LHCJ came to a firm finding of fact that the disputed SPA was in fact intended to be a sham agreement and was purely an illegal loan agreement.

[73] Lastly, we concur with the respondent's concluding submission that the decision pronounced by the LHCJ was arrived at based on the facts and evidence produced and presented before the LHCJ during the process trial as well as pursuant to the advantage enjoyed by the trial judge by reason of having seen and heard the witnesses.

[74] There was sufficient justification in fact and law for the conclusion that was reached bereft of any serious misdirection that would warrant interference on appeal against what were essentially findings of fact by a trial court.

[2022] 5 MLJ 584 at 609

CONCLUSION

[75] The central question that arose for our deliberation and determination in these appeals was rather straightforward, namely, whether the LHCJ had made a decision that was plainly wrong that the appellants' purchase of the disputed property was not a genuine sale and purchase transaction but a purported moneylending transaction in which the appellants were the purported unlicensed moneylenders and the disputed property was merely a collateral and not intended for sale.

[76] At the conclusion of these appeals, we pronounced our judgment as follows:

> We have anxiously and carefully considered the evidence of the discrepancies in the SPA said to be nothing less than what could be explained as still a normal valid innocuous SPA.
>
> Taking the discrepancies together which include the full payment of purchase price without taking vacant possession and even asking for the keys, the long delay in the property being registered in the four purchasers' name and the various payments made by the vendor plaintiff at the express instruction of some of the defendants, we are more than satisfied that the learned Judge was not plainly wrong in concluding that the transaction was an illegal moneylending transaction.

Therefore, the instrument used to effect the transaction and the SPA is a sham transaction and being illegal, the natural consequence of it being null and void is inevitable as provided under the MLA. The first to the fourth defendants cannot claim restitution under *ss 66* or *71 Contracts Act 1950* as they were aware of the illegality and cannot plead ignorance.

To allow the first to the fourth defendant to claim restitution would be to allow them to benefit from the transaction that they had devised to camouflage their nefarious intention and that can only embolden unlicensed moneylenders.

There are no merits in the appeal of the first to the fourth defendants and so their appeal is hereby dismissed with costs of RM20,000 to the respondent subject to allocator.

As for the fifth defendant's appeal in R33 (Appeal No 33), she is not strictly an aggrieved party as no order for damages was made against her and in fact the plaintiff's claim against her was dismissed though no order for costs was made in her favour.

The LHCJ was careful to use the expression 'might have committed a misconduct' which is certainly not to be equated with a finding of misconduct. The last statement made in para 67 of the GOJ was more of a general statement to caution all solicitors involved in similar transactions to conduct themselves professionally and without reproach.

We would therefore would dismiss the appeal of the fifth defendant with no order as to costs.

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Appeal dismissed.
Reported by Ashok Kumar

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