

Guthrie, no.

1, 1960

No. 8 of 1959.

In the Privy Council

UNIVERSITY OF LONDON W.C.1. - 7 FEB 1961 INSTITUTE OF ADVANCED LEGAL STUDIES
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ON APPEAL
FROM THE COURT OF APPEAL OF THE COLONY
SINGAPORE
ISLAND OF SINGAPORE

50912

BETWEEN

10 THE OFFICIAL ASSIGNEE of the Property of
KOH HOR KHOON, ONG LENG SIM (f),
KOH CHWEE GEOK (f), KOH HAI KHOON
and LOH SENG CHOR, bankrupts (Plaintiff) . *Appellant*

AND

EK LIONG HIN LIMITED (Defendants) . . . *Respondents.*

Case for the Appellant

RECORD.

1. This is an Appeal from a Judgment of the Court of Appeal of the Colony of Singapore dated the 13th January, 1958, allowing an appeal against the Judgment of Knight, J., in the High Court of the Colony of Singapore dated the 24th June, 1957, whereby it was ordered and adjudged that the Appellant recover against the Respondents a sum equivalent to the value of the 100 tons of galvanised iron sheets claimed on the Writ of Summons as at the date of sale, i.e., the 12th January, 1953, and that the Respondents deliver to the Appellant two contracts dated the 3rd and 5th December, 1952, respectively and that the same be cancelled.

p. 59.
pp. 45-46.
pp. 1-3.
p. 62.
p. 63.

2. Leave to appeal to Her Majesty in Council was granted to the Appellants by the Court of Appeal of the Colony of Singapore by Order dated the 9th day of June, 1958.

p. 60.

3. The issue raised in this appeal is whether the Respondents were at the material times moneylenders within the meaning of the Singapore Moneylenders Ordinance (Chapter 193 of the Laws of the Colony of Singapore, 1955 Edition, Volume V and hereinafter called "the Ordinance").

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4. The material provisions of the Ordinance are :—

Section 2.—“ In this Ordinance, unless the context otherwise requires, the following expressions have the meanings herein respectively assigned to them, that is to say :—

* * * * *

‘ moneylender ’ shall include 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, whether or not that person also possesses or earns property or money derived from sources other than the lending of money . . . but shall not include . . .

(d) 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."

Section 3.—“ Save as excepted in paragraphs (a), (b), (c), (d), (e) and (f) of the definition of ‘ moneylender ’ in Section 2, any person who lends money at interest . . . shall be presumed, until 10 the contrary is proved, to be a moneylender.”

Section 5.—“ (1) No contract for the repayment by a borrower . . . of money lent to him . . . by a moneylender . . . , or for the payment by him of interest on money so lent, and no security given by the borrower . . . as aforesaid in respect of any such contract, shall be enforceable, unless a note or memorandum in writing of the contract in the English language be signed by the parties to the contract . . . or, in the case of a loan to a partnership firm, by a party in or agent of the firm, and unless a copy thereof authenticated by the lender or his agent be delivered to the borrower or his agent, 20 or, in the case of a loan to a partnership firm, to a partner in or agent of the firm, before the money is lent ; but no such contract or security shall be enforceable, if it is proved that the note or memorandum aforesaid was not so signed before the money was lent or before the security was given, as the case may be :

* * * * *

(3) The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show separately and distinctly :—

(a) the date of the loan ;

(b) the principal ; and

(c) the rate of interest *per centum* per annum payable in respect of such loan or, where the interest is not expressed in terms of a rate *per centum* per annum, the amount of such interest.”

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p. 1.

5. The action was commenced by Writ of Summons dated the 8th November, 1955, by the Appellant who is the Official Assignee of the property of Koh Hor Khoon, Ong Leng Sim (f), Koh Chwee Geok (f), Koh Hai Khoon and Loh Seng Chor, bankrupts, who before their bankruptcy carried on business under the firm or name of Koh Bian Seng. A Receiving Order was made against Koh Bian Seng on the 27th February, 40 1953, and Adjudication Orders against the said bankrupts on the 24th April, 1953.

p. 33, l. 19.

p. 33, ll. 20-21.

pp. 4-5.

6. By his Statement of Claim the Appellant averred that the Respondents were at all material times moneylenders as aforesaid ; that they lent to Koh Bian Seng on the 3rd December, 1952, the sum of \$30,000

on the security of 40 tons of galvanised iron sheets under a contract for the repayment of the said sum of \$30,000, dated the 3rd December, 1952, and on the 5th December, 1952, a further sum of \$40,000 on the security of 60 tons of galvanised iron sheets under a contract for the repayment of the said sum of \$40,000 dated the 5th December, 1952; that the said contracts did not comply with the requirements of the Ordinance; and that the said contracts and the said securities were unenforceable by the Respondents. The Appellant claimed a declaration that the said two contracts were unenforceable; an order for the return of the said 40 tons and 60 tons of galvanised iron sheets or their value; and an order for delivery up and cancellation of the said two contracts.

7. By their Amended Defence the Respondents denied that they were moneylenders within the meaning of the Ordinance and that the Ordinance had any application to the transactions hereinbefore referred to. The said transactions were otherwise admitted and it was admitted that they did not comply with the provisions of the Ordinance. The Respondents further averred that the said galvanised sheets had been sold by them on or about the 12th January, 1953, and the proceeds applied in reduction of the said bankrupts' indebtedness. The Respondents denied that the Appellant was entitled to the relief claimed by him or any relief.

8. The following facts relevant to the issue as to whether the Respondents were moneylenders as aforesaid were proved or admitted.

(A) Prior to September, 1951, the Respondents had been in business as rubber growers and dealers and they also owned vessels which plied between Singapore and Indonesia.

(B) In September, 1951, the Respondents opened a godown (or storage) department, the profits of which in 1952 amounted to \$143,694. The Respondents' total gross income (including gross profit, profits of departments, commissions, interest and rent) amounted to \$1,965,578.20 according to the Respondents' audited Profit and Loss Account.

(C) From the beginning of the operation of this department the Respondents started to lend money to customers who used the department. The evidence was that loans were not made to all customers, but there was no evidence as to the proportion of customers to whom loans were made.

(D) Between September, 1951, and the end of December, 1952, the Respondents made 198 separate loans at interest to 51 different customers (disregarding Customers Nos. 19-24 in the First Schedule to the Answers to Interrogatories, to whom no loans are shown to have been made). The aggregate of money lent over this period was \$4,790,000. The rates of interest varied between 12 per cent. and 24 per cent., 18 per cent. being the most common figure. The total amount of interest paid is not set out, but is included in the said profit of \$143,694 for the Godown Department. The dates of repayment and the sums shown to be still outstanding indicate that loans remained outstanding for substantial periods. For

p. 13.

example in the case of Customer No. 1 nearly \$79,000 lent between September and December, 1951, remained outstanding until November, 1952, so that interest at the rate of 18 per cent. would be about \$16,000 on this transaction alone.

pp. 67-68.

(E) According to the Balance Sheet at 31st December, 1952, of the Respondents, the Respondents' total assets were \$9,969,214.41, the Current Assets being \$8,382,208.82. Of the Current Assets loans against security of goods in Company's Godowns are shown as \$1,163,782.10 and other "Loans—Secured" as \$305,000.00. There is no evidence as to the last-mentioned loans.

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p. 12, l. 6.

p. 36, ll. 40-41.

p. 37, ll. 11-13, 17-18.

(F) The Respondents' evidence was that all the loans on the security of goods were effected on the security of goods already stored in the Respondents' godowns. Except for the loans to Koh Bian Seng there is no evidence as to how long after the deposit of the goods the loans were made. In the case of certain advances on the security of goods included among those referred to in (D) above the customers deposited cheques for the amount of such advances, which cheques were cancelled on repayment of the advances.

p. 12, ll. 28-32.

pp. 32, 83-84.

p. 37, ll. 25-27.

(G) The Respondents' evidence was that they only lent money to customers they knew well, but the Appellant humbly submits that this is inconsistent with the unchallenged evidence of the said Koh Hor Khoon (at the material time a partner in Koh Bian Seng) that apart from the loans from the Respondents to Koh Bian Seng hereinafter referred to, he had had no dealings with the Respondents.

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p. 34, ll. 19-22.

pp. 27, 64.

p. 64.

p. 35, ll. 19-21.

p. 70.

p. 71.

p. 70, ll. 14-16.

p. 71, l. 20.

(H) In the case of Koh Bian Seng five loans were made. Each of the loans was made on the same day as goods were deposited or within two days of the deposit of goods. According to the said Koh Hor Khoon, goods in Koh Bian Seng's premises were sent to the Respondents' godown when the loans were made. The Respondents' solicitors in their letters of the 3rd and 10th March, 1953, to Koh Bian Seng refer to goods included in earlier transactions placed in the Respondents' warehouse "for the purpose of securing them against the said loan" and "deposited with our clients as security for advances."

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p. 34, ll. 9-13.

p. 34, ll. 14-15.

p. 37, ll. 11-13.

p. 37, ll. 18-20.

p. 37, ll. 33-35, 43-44.

p. 37, ll. 35-37.

(I) In the case of the loans which are the subject of these proceedings the unchallenged evidence of the said Koh Hor Khoon was that he pledged the said corrugated iron sheets as security for the last-mentioned loans, and that the goods had to be put into the Respondents' godown. The evidence of the Manager of the Respondents' Godown Department was also that the said iron sheets had to be put in their godown before the Respondents made the said loans. Although the said Manager denied that there were negotiations for a loan before the first lot of the said iron sheets was brought to the Respondents' godown, he agreed in cross-examination that he had been told before the deposit of each of the said lots of iron sheets that Koh Bian Seng might require a loan against the said sheets, and, in the case of the first lot, he had told an employee

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of Koh Bian Seng to bring the iron sheets to the Respondents' godown, where he, the said Manager, would inspect them and advise as to their value.

(J) The Respondents' account to Koh Bian Seng in respect of the loans the subject of these proceedings shows that the amount due as interest on the loans was \$2,050, while only \$720 was due on storage charges. p. 69.

10 (K) The evidence was that some other proprietors of godowns advanced money to merchants on the security of goods stored in their godowns. The evidence for the Respondents was that they would lose certain customers using the Respondents' godowns if the Respondents did not lend them money against their goods. The Respondents' evidence also was that several customers who used the godown storage also used the Respondents' ships. p. 35, ll. 1-5.
p. 36, ll. 41-42.
p. 38, ll. 2-4.
p. 36, l. 44.
p. 37, ll. 1-2.
p. 37, ll. 2-3

9. Before the trial judge the issues argued were :—

(A) Whether on the evidence the Respondents carried on the business of moneylenders within the general definition of " money-lender " in the Ordinance.

20 (B) Whether on the evidence the Respondents were within the exception of Section 2 (d) of the Ordinance, namely, whether the loans made by the Respondents were made in the course of and for the purposes of a business carried on by the Respondents not having for its primary object the lending of money.

(C) Whether the sale of the said iron sheets before proceedings were brought precluded the Appellant from obtaining the relief prayed for.

30 10. In his written judgment, Knight, J., on the 8th June, 1958, decided in favour of the Appellant on all the issues referred to in paragraph 9 hereof, and held that the Appellant was entitled to the declaration claimed in the Statement of Claim, to judgment for the value of the said corrugated iron sheets when they were sold, to cancellation of the two contracts and costs. pp. 42-45.
pp. 4-6.

11. On the 11th July, 1957, the Respondents gave Notice of Appeal against the said judgment. By a Memorandum of Appeal dated the 25th September, 1957, the Respondents gave their grounds of appeal as:— p. 47.
p. 48.

(A) That Knight, J., erred in law in holding that the Respondents were moneylenders.

(B) That Knight, J., erred in law in holding that the Respondents were not within the exception of Section 2 (d) of the Ordinance.

40 12. Before the Court of Appeal of the Colony of Singapore (Whyatt, C.J., Tan Ah Tah, J., and Chua, J.) the issues argued were the issues raised by the Respondents' grounds of appeal as set out in paragraph 11 above. It was not argued on behalf of the Respondents that the sale of the said corrugated iron sheets before proceedings were brought precluded the Appellant from obtaining the relief granted by Knight, J.

pp. 49-56.

pp. 57-58.

p. 52, ll. 14-24.

p. 56, ll. 13-17.

p. 56, ll. 28-30.

13. Whyatt, C.J., in his written judgment (with which judgment Tan Ah Tah, J., and Chua, J., concurred), decided that the Respondents carried on a regular business of lending money, coming within the general definition of moneylender within Section 2 of the Ordinance. The learned Chief Justice, however, found in favour of the Respondents on their second ground of appeal, and decided that they fell within the exception of Section 2 (d) of the Ordinance. The learned Chief Justice decided that the Respondents' loans of money were incidental to their business of godown keepers. The Court of Appeal accordingly allowed the Respondents' appeal, and ordered the Appellant to pay the costs of the appeal and the proceedings in the court of first instance. 10

14. The Appellant humbly submits :—

(A) That having regard to Section 3 of the said Ordinance, the onus of proving that they were not moneylenders within the meaning of the said Ordinance is on the Respondents, as the loans the subject of the proceedings and the other loans hereinbefore referred to were loans of money at interest.

(B) That in any event the onus of proving that they came within the exception in Section 2 (d) of the Ordinance falls on the Respondents, once it is established that the Respondents were within the general definition of moneylender under the Ordinance. The Appellant relies on *Fagot v. Fine*, 105 L.T. 583, *per* Lush, J., at page 585. 20

(c) That the evidence showed, as was found by the learned trial Judge and the Court of Appeal, that the Respondents fell within the general definition of moneylenders under Section 2 of the Ordinance.

(D) That, so far as the exception in Section 2 (d) is concerned, the law is as stated by McCardie, J., in *Edgelow v. MacElwee* [1918] 1 K.B. 205 at page 207 in construing the equivalent provision (Section 6 (d)) of the Moneylenders Act, 1900 (63 and 64 Vic. c. 51) : 30
 “ But in my opinion no system of loans will fall within exception (d) unless such loans are in substance and actuality directly incidental to the business which is the primary object and pursuit of the person who makes the loans.” This statement of the law was adopted by Knight, J., in the present case. On the evidence the Respondents failed to discharge the onus of proving facts bringing themselves within the exception in Section 2 (d) of the Ordinance. Having regard to the facts summarised in paragraph 8 hereof and the number, type and magnitude of and interest on the loans referred to ; to the absence of evidence by the Respondents as to the proportion of the income of the godown department attributable to interest on loans as opposed to storage charges ; to the absence of any evidence as to how the money lent by the Respondents was employed by the borrowers or that it was employed in any way connected with the Respondents' business ; and to the extent to which interest exceeded storage charges in the case of the loans the subject of these proceedings (as set out in sub-paragraph (J) of 40

p. 44, ll. 10-17.

paragraph 8 hereof), the Respondents' moneylending business constitutes a separate and profitable line of business, on a scale and of a type which is not either in substance or actuality incidental to any business which is the primary object or pursuit of the Respondents.

(E) That the Court of Appeal paid no or no proper regard to where the onus of proof lay as set out in sub-paragraphs (A) and (B) above, and failed to attach due weight to the matters referred to in sub-paragraph (D) above.

10 (F) That the Court of Appeal attached undue weight to the evidence that other shipping companies owning godowns made loans to customers on the security of goods stored in warehouses; and misdirected themselves that as "these loans were made in accordance with the normal commercial practice of shipping and godown companies in Singapore . . . therefore it follows . . . that they were made in the course of the . . . (Respondents') . . . business." Because other shipping and godown companies may carry on the business of moneylending as part of their business activities, it does not follow that the business of moneylending is part of, or carried on in the course of, the business of shipping and godown proprietors.

pp. 50-51, 51.
p. 53, ll. 45-49.
p. 54, ll. 1-2.

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15. The Respondents did not include in their grounds of appeal, and did not argue before the Court of Appeal, the point whether the sale of the said iron sheets before proceedings were brought precluded the Appellant from obtaining the relief prayed for. The Appellant therefore humbly submits that this point has been abandoned by the Respondents. In any event the Appellant humbly submits that the judgment of Knight, J., was right on this point; that the Respondents cannot establish their title to or their right to sell the said iron sheets by contracts unenforceable through non-compliance with the Ordinance; and that they cannot rely upon such contracts as a defence to a claim for the value of goods given as security under such contracts, any more than they could as a defence to a claim for an order for delivery up of such goods. The Appellant humbly submits that this point does not provide any grounds of distinction from the decision of Tucker, J., in *Cohen v. Lester (J.) Limited* [1939] 1 K.B. 504, and relies on the judgment in the last-mentioned case as an authority for his right to the relief claimed in these proceedings.

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pp. 44-45.

16. The Appellant humbly submits that this Appeal should be allowed, that the judgment of the Court of Appeal of Singapore was wrong and ought to be reversed and that the judgment of Knight, J., was right and ought to be restored for the following among other

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REASONS

- (1) BECAUSE the evidence at the trial established that the Respondents were moneylenders within the meaning of Section 2 of the Ordinance.

- (2) BECAUSE it having been established on the evidence that the Respondent had made loans at interest, the onus of proving that they were not moneylenders within the Ordinance was on the Respondents.
- (3) BECAUSE the onus of proving that the Respondents came within the exception in Section 2 (*d*) of the Ordinance was on the Respondents, once it was established that they were moneylenders within the general definition in Section 2 of the Ordinance.
- (4) BECAUSE the Respondents failed to discharge the 10 onus of proving either that they were not moneylenders or that they came within the said exception.
- (5) BECAUSE the Court of Appeal and Knight, J., were right in holding that the Respondents carried on the business of moneylenders.
- (6) BECAUSE Knight, J., was right in holding that on the evidence the Respondents did not come within the exception under Section 2 (*d*) of the Ordinance, and the Court of Appeal were wrong in holding that the Respondents did come within the said exception. 20
- (7) BECAUSE the judgment of the Court of Appeal was wrong.
- (8) BECAUSE the judgment of Knight, J., was right for the reasons given in his judgment and ought to be restored.
- (9) BECAUSE on the evidence at the trial the Appellant is entitled to the relief granted to him by Knight, J.

BASIL ECKERSLEY.

In the Privy Council

ON APPEAL

*from the Court of Appeal of the Colony
of Singapore.*

Island of Singapore.

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Case for the Appellant

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