No. 8 of 1959.

In the Privy Council

ON APPEAL

FROM THE COURT OF APPEAL OF THE COLONY OF SINGAPORE, ISLAND OF SINGAPORE.

BETWEEN

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 Respondents

1. This is an Appeal by the Plaintiff from a judgment of the Court of Appeal of Singapore of the 13th January, 1958, allowing an appeal by the Respondents from a judgment of the Honourable Mr. Justice Knight in the High Court of the Colony of Singapore on the 5th July, 1957, when judgment was entered for the Appellant (Plaintiff) with costs.

2. The Writ in this action was issued on the 8th day of November, 1955, and a copy thereof and of the pleadings in the action are set out in the Appendix.

3. The question for determination in this Appeal is whether the Respondents in the course of certain transactions were acting as moneylenders within the definition of " moneylender " as set out in the Singapore Moneylenders Ordinance (Cap. 193) Section 2.

4. By Section 2 of the Moneylenders Ordinance the expression " 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 owns property or money derived from sources other than the lending of money, and whether or not that person carries on the business as a principal or as an agent, but shall not include . . . (*d*) any person bona fide carrying on the business of banking or insurance or 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. (Paragraph (*d*) is an exact repetition of Section 6 (*d*) of the Moneylenders Act, 1900.)

5. The material facts in this case which were not in dispute are that the Respondents are a limited company carrying on in Singapore a business of shipowners, warehousemen, rubber dealers and rubber growers, and as part of their business as warehousemen they started in September, 1951, a godown storage department. It was common practice for shipping companies to have godowns so that they could offer storage space to customers which in its turn attracted business. This was why the Respondents started their godown storage department. It was also common practice for companies to make loans against the security of goods stored in their godowns. These were regarded as normal mercantile transactions and provided a useful facility for members of the business community.

6. The Respondents' shipping manager and godown manager gave evidence at the trial that their godown department attracted business for the shipping interests of the Company and that if they did not allow their customers loans against the goods they stored they would stand to lose customers for their shipping and warehouse business. The Appellant's witness Koh Hor Khoon stated that other companies operating godowns advanced money against goods stored and that a lot of merchants raised money in this way.

7. Two such advances, one of $30,000 and one of $40,000, were made by the Respondents to the firm Koh Bian Seng on the 3rd and 5th December, 1952, on the security of in one case 40 tons and the other case 60 tons of galvanized iron sheets. Shortly afterwards the said Koh Bian Seng encountered financial difficulties and as the loans were not repaid the Respondents sold the galvanized iron sheets crediting the money from the sale against the loans. The money realised fell a little short of the total sum due for principal, interest, insurance fees and store rent charges. Koh Bian Seng regarded the loans as normal mercantile transactions but when a Receiving Order was made against them and the Official Assignee took charge of the debtors' affairs he raised the issue that the Respondents were moneylenders and were not entitled to recover the moneys advanced since the loan contracts did not comply with the requirements of the Ordinance.

8. At the trial of the action the Appellants contended that the Respondents were moneylenders as defined in the Ordinance and could not bring themselves within the exception in Section 2 (*d*). The Respondents denied that they fell within the definition of moneylenders and said that the Ordinance had no application to the transactions in question. They further contended that even if these transactions were unenforceable they were not illegal or void and, the goods pledged under them having been sold upon the bankruptcy of the borrower, the Appellants were not able to recover. This point was decided against the Respondents at first instance and is not now relied on.

9. In his judgment Mr. Justice Knight adopted as his *ratio decidendi* the dictum of McCardie, J., in *Edgelow* v. *MacElwee* [1918] 1 K.B. 205, at p. 207 that " 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." In the present case he was of opinion that the loans in question could not be said to have been either "in substance" or "in actuality" directly or indirectly incidental to the Company's main objects of trading in rubber and shipping and were not therefore exempted under Section 2 (*d*) of the Ordinance. Judgment was therefore given in the Appellant's favour for the value of the goods, cancellation of the contracts and costs.

10. Upon the appeal by the Respondents to the Court of Appeal of the Colony of Singapore (Chief Justice Whyatt, Mr. Justice Tan Ah Tah and Mr. Justice Chua) the Respondents' appeal was unanimously allowed, the Court holding that although the Respondents carried on the business of moneylending they came within the scope of the exception contained in Section 2 (*d*) of the Ordinance.

11. In the written judgment of Chief Justice Whyatt (in which his brethren both concurred) it was pointed out—

(A) that the evidence that the present Respondents were *bona fide* carrying on a business not having for its primary object the lending of money was overwhelming;

(B) that the annual profit from the Respondents' godown department amounted only to $143,694 whereas the gross profit of their business as a whole was in the neighbourhood of $2,000,000;

(C) that it had not been argued that the godown department could be regarded as a business separate from the Respondents' other business activities;

(D) that, even if it were so regarded, the godown department was primarily a business of providing storage space and was not a mere cover for a moneylending business;

(E) that the loans made by the Respondents were made in accordance with the normal commercial practice of shipping and godown companies in Singapore, from which it followed that they were made in the course of the Respondents' business; and

(F) that the purpose of such loan transactions was to prevent the Respondents from losing business to their competitors, which made it impossible to say that the money was not lent for the purposes of their business.

12. Dealing with the authorities, the learned Chief Justice observed that the dictum of McCardie, J., in *Edgelow* v. *MacElwee* postulated that the lender had a business which was "his primary object and pursuit" and could not be applied without modification where his business was a complex one comprising shipping, warehousing, rubber dealing and rubber growing. More apposite, in his opinion, to the present case was the illustration given by Phillimore, J., in *Furber* v. *Fieldings Ltd.* (23 T.L.R. 363) of the solicitor who lends money not merely or primarily for the interest on the money but for the purpose of maintaining or increasing his professional business and the resultant professional fees. He also quoted

the dictum of Farwell, J., in *Litchfield* v. *Dreyfus* [1906] 1 K.B. 584, at p. 590, that the Moneylenders Act, 1900 " was intended to apply only to persons who are really carrying on the business of moneylending as a business, not to persons who lend money as an incident of another business," and considered that it was precisely applicable to the facts of the present case.

13. The Respondents will contend that the governing words of Section 2 (*d*) of the Ordinance are the words " *bona fide* " and that unless it can be inferred from the evidence, as it could in *Edgelow* v. *MacElwee*, that the business ostensibly carried on by the lender is merely a cover for the lending of money to borrowers the protection of Section 2 (*d*) will apply. It is submitted that Mr. Justice Knight misdirected himself by (in effect) substituting the dictum of McCardie, J., for the relevant words of the Ordinance; by disregarding the evidence as to the reason why shipping and godown companies in Singapore made a practice of lending money on the security of goods stored in their warehouses; and by (in effect) substituting his own opinion for that of the Respondents as to what the purposes of their business required or justified as a matter of commercial expediency.

14. The Respondents humbly submit that the said judgment of the Court of Appeal of the Colony of Singapore dated the 13th January, 1958, is right and ought to be affirmed for the following, amongst other,

REASONS

(1) BECAUSE the Respondents were at the material time *bona fide* carrying on a business not having for its primary object the lending of money.

(2) BECAUSE they made the loans in question in the course of that business.

(3) BECAUSE the evidence showed that the Respondents viewed the making of such loans as a means of pursuing the purposes of their said business.

(4) BECAUSE the evidence left no room for doubt as to the Respondents' *bona fides* in holding that view.

(5) BECAUSE the dictum of McCardie, J., in *Edgelow* v. *McElwee* is not to be treated as a definitive exposition of the meaning of Section 2 (*d*) of the Ordinance.

(6) BECAUSE Mr. Justice Knight was wrong in so treating it.

(7) For the reasons given in the written judgment of Chief Justice Whyatt.

C. P. HARVEY.

I. STARFORTH HILL.

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