Moneylending in Malaysia – Can You Recover Loans With Interest?

Moneylending in Malaysia is governed by the Moneylenders Act 1951 ("**MLA**"). Section 5 of the MLA provides that no one shall carry on the business of moneylending unless he is licensed under the MLA.

The MLA excludes its application to loans by certain entities and individuals. These include local authorities, statutory corporations, co-operative societies, licensed banks and financial institutions, insurance companies, takaful companies, pawnbrokers, development financial institutions, finance companies, inter-company loans between related corporations, company loans to its directors or officers or employees, debt securities, capital market persons, scheduled institutions under the Financial Services Act 2013 and Islamic Financial Services Act 2013, credit card or charge card issuing companies, and Labuan-licensed companies.

Section 2 of the MLA defines "*moneylending*" as "*the lending of money at interest, with or without security, by a moneylender to a borrower*", and "*moneylender*" as "*any person who carries on or advertises or announces himself or holds himself out in any way as carrying on the business of moneylending, whether or not he carries on any other business*".

Loans that contravene the MLA are those considered as "moneylending" transactions as opposed to "friendly loans". In 2011, the MLA was amended to include Section 10OA, which establishes that a single loan with interest creates a presumption that the lender is conducting the business of moneylending, shifting the burden of proof to the lender to demonstrate otherwise, failing which they may be deemed an unlicensed moneylender. This means that even a single loan with any interest levied thereon places the onus on the lender to prove that they are not engaged in the business of moneylending.

This principle was established in the Court of Appeal case of *Mahmood bin Ooyub v Li Chee Loong and Another Appeal [2020] 6 MLJ 755* and a similar position was taken in the case of *Global Globe Property (Melawati) Sdn Bhd v Jangka Prestasi Sdn Bhd [2020] 6 CLJ 1, [2020] 6 MLJ 333*. This statutory presumption aims to prevent illegal moneylenders from concealing their moneylending activities through seemingly legitimate written documents or agreements. By doing so, it ensures that any other illegal transactions, not related to moneylending, cannot be disguised in the same way through deceptive written agreements.

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To determine if the presumption under Section 10OA of MLA is rebutted, the Court considers various factors. These include examining the relationship between the lender and borrower (whether they are acquaintances or strangers), assessing the history of past moneylending transactions (whether there have been multiple similar transactions), and scrutinizing the interest rate imposed (particularly if the lender frequently imposes exorbitant rates). The higher and more unreasonable the interest rate, the more likely the Courts will perceive the transaction as moneylending rather than a friendly loan. Banks' simple interest rates can also serve as a benchmark for acceptable rates. Additionally, the Court examines whether the lender consistently profits from moneylending activities.

In *Tan Aik Teck v Tang Soon Chye [2007] 5 CLJ 441*, the Court of Appeal provided some guidance on what would constitute a 'friendly loan' and held that *"… A friendly loan is opposed to the normal borrowing from a moneylender or financial institution. A friendly loan is a loan between two persons based on trust. There may be an agreement such as an I.O.U. or security pledged to repayment but most important there will be no interest imposed*".

However, notwithstanding the interpretation in *Tan Aik Teck* of a friendly loan characterized as having no interest-bearing element, the Courts have taken varying approaches on this position. For example, the High Court in *Menta Construction Sdn Bhd v. SPM Property & Management Sdn Bhd & Anor [2017] 1 LNS 675; [2017] MLJU 526* , a case which dealt with an alleged moneylending transaction involving a loan with interest at the rate of 8.8% per annum, identified the loan arrangement as a friendly loan as opposed to a moneylending transaction, notwithstanding the interest component. The High Court allowed the lender to claim the principal sum, and also granted a lower simple interest rate of 5% per annum.

The Court of Appeal in *Global Globe Property (Melawati) Sdn Bhd* further elucidated that interest may be charged on friendly loans provided that the interest rates are lower than that of a licensed moneylender, i.e. *"A person who is not a moneylender cannot under the guise of a friendly loan exact more onerous terms than what a licensed moneylender is permitted as that would turn the law upside down".* The MLA prescribes a maximum interest rate of 12% per annum for secured loans, and a maximum interest rate of 18% per annum for unsecured loans. However, it should be noted that the Court of Appeal's reference to the rates charged by moneylenders merely serves as a form of guidance, and interest rates for friendly loans may still vary on a case-by-case basis.

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The High Court in *Tan Boon An v Lee Peng Too [2021] MLJU 150* acknowledged that "*… where the interest-bearing loan is incidental to a continuing business relationship between the parties for the primary purpose of facilitating or assisting a party's performance of his obligations under the ongoing business relationship, the loan is not a moneylending in contravention of the statute even if it is interest-bearing*", which further carves out certain interest-bearing transactions from falling within the ambit of a 'moneylending transaction' under the MLA.

The High Court in this case further elaborated on the considerations the Court will need to take into account, namely "*In assessing whether the impugned transaction is a friendly loan or a moneylending transaction, the Court has to consider and scrutinize all the relevant factors and circumstances of the case, guided by the five points stated in paragraphs [64] to [69] of the Court of Appeal's judgment in Global Globe Property (Melawati) supra and the guidelines and examples in the previous decided cases and come to a conclusion as to whether the Plaintiff's version of friendly loan or the Defendant's version of moneylending is more probable or more likely, having regard to the course of natural events, human conduct and public and private business in their relation to the type of transaction in the particular case. This assessment and scrutiny cannot be done by taking one or two factors in isolation but has to be done by considering all the relevant factors and circumstances before coming to an eventual conclusion as to which version is more probable, though a factor or circumstance may have more weight than the others in the factual matrix of the case*".

In view of the foregoing, the position taken in *Tan Aik Teck* should not be misconstrued to suggest that every loan involving interest automatically qualifies as a moneylending transaction in contravention of the MLA. The context and specific terms of each arrangement will determine whether a loan with interest is subject to the MLA or otherwise.

In the Federal Court case of *Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd [1980] 2 MLJ 9*, the Federal Court determined that the definition of a 'moneylender' should be interpreted in accordance with Section 2 of the MLA. The Federal Court also emphasized the importance of taking into account "*continuity, system, or repetition of similar transactions to establish the existence of a moneylending business*" in such interpretation.

In the Court of Appeal case of *Sureshraj Krishnan v. Pv Power Engineering Sdn Bhd & Anor [2023] 1 MLJ 632*, the discussion centred around the presumption of a moneylending business, where multiple loans were given to a relative of the lender. The Court of Appeal concluded that lending to a relative for financial assistance, whether as a single occurrence or in multiple instances, and in the circumstances where the financial assistance is only given to the relative and no one else,

would not fall within the ambit of the MLA, even though elements of continuity and repetition of similar transactions are apparent.

Being presumed to be in the business of moneylending can have serious consequences, as any loan provided by a person involved in this business is deemed a moneylending transaction. If the lender is not in possession of a licence under the MLA, such a transaction would violate the MLA.

Violating the MLA renders a loan agreement based on an illegal moneylending transaction void and unenforceable. The Court has discretionary power to decide whether to order the return of the loan. If both parties were aware of the illegality, the Court may not order the return of the loan.

Unlicensed moneylenders who carry out moneylending activities in breach of Section 5 of the MLA may be liable to a fine between RM250,000.00 to RM1,000,000.00 and/or to imprisonment for up to 5 years. Repeat offenders may face whipping in addition to fines and/or imprisonment.

In a recent landmark decision by the Federal Court in Malaysia, an unlicensed moneylender's attempt to recover a loan amount and associated interest has been thwarted. The ruling has raised concerns amongst companies that have been providing loans and charging interest without a license, prompting them to question whether they may also face difficulties in retrieving their loans and interest thereon.

Federal Court Ruling

The Federal Court ruling in the case of *Triple Zest Trading & Suppliers Sdn Bhd v Applied Business Technologies Sdn Bhd (02(f)-16-02/2022(A))* on 19 June 2023 ("**Triple Zest Case**") revolved around a case involving Applied Business Technologies Sdn Bhd and businesswoman Junaidah Leman, her son Fairuz Roslan, and their company, Triple Zest Trading & Suppliers Sdn Bhd.

The case involved the businesswoman, her son, and Triple Zest Trading & Suppliers seeking a loan from Applied Business Technologies to support their oil trade business and the construction of a petrol station. They provided two plots of land as collateral, and the money was transferred to a Singaporean company on the instructions of an intermediary named

Shamsuri Johar. Applied Business Technologies subsequently filed a lawsuit seeking RM1.6 million, comprising the principal loan sum and additional "agreed profits".

In 2020, the High Court in Ipoh ruled in favour of Applied Business Technologies, but the following year, the Court of Appeal partially allowed the appeal, ordering the repayment of the principal sum.

The Court of Appeal's decision hinged on the distinction between moneylending businesses and friendly loans. The Court of Appeal established that in this case, since Applied Business Technologies did not possess a licence, the loan transaction was categorized as a friendly loan. The Court of Appeal took the position that friendly loans, unlike formal moneylending agreements, do not allow for the charging of interest. Consequently, the Court of Appeal ruled that Applied Business Technologies could only recover the principal sum of the loan and not the interest charged, as the interest rate was deemed excessively high.

This conclusion was based on several facts, including the fact that Applied Business Technologies was an information technology company which was not involved in the business of moneylending; testimonies from witnesses confirming that it was a single loan transaction; and the absence of evidence indicating that Applied Business Technologies lent money to others or engaged in moneylending as a business activity. Consequently, the Court of Appeal classified the agreement as a friendly loan. However, the Court of Appeal disallowed the charging of interest on the friendly loan, resulting in the rejection of Applied Business Technologies' claim for the "agreed profit".

Dissatisfied with the outcome, the businesswoman, her son, and Triple Zest Trading & Suppliers obtained leave from the Federal Court to appeal against the decision of the Court of Appeal.

During the appeal, the Federal Court was asked to consider the legality of providing for 100% interest payable within 30 days, whether a person not defined as a moneylender could lend money with interest, and if the Court could order the repayment of only the principal sum in case of illegality.

The appellants' lawyer argued that the loan agreement was illegal due to Applied Business Technologies' lack of a moneylending licence under the MLA. He further stated that the interest rate of 100% payable within 30 days exceeded the limits set by the MLA. The maximum interest chargeable under the MLA is 12% per annum for secured loans and 18% per annum for unsecured loans. The appellants' lawyer contended that the RM800,000 claimed as "agreed profits" was

actually interest disguised as profits, and that "*the court should not assist illegal moneylenders to recover the principal amount or else it would create a breeding ground for them to flourish*".

The Federal Court accepted the contentions by the defendants and held that Applied Business Technologies, an unlicensed moneylender, could not recover the loan of RM1.6 million from the defendants comprising the principal sum and "agreed profits" or interest, due to the absence of a moneylending licence, which rendered the loan agreement illegal.

It should be noted that the Court of Appeal decision in *Tang Lee Hiok & Ors v Yeow Guang Cheng [2022] 5 MLJ 584*, affirmed by the Federal Court, determined that restitution under Section 66 of the Contracts Act 1950 ("**CA**") does not apply to cases involving violations of the MLA. Section 66 of the CA stipulates that when an agreement is discovered to be void or a contract becomes void, any advantage received under the agreement or contract must be restored or compensated to the party from whom it was received. However, this provision does not apply to cases where the MLA has been violated to prevent unlicensed moneylenders from benefiting from transactions designed to disguise their illicit intentions, as stated in *Tang Lee Hiok*. Therefore, if a lender is found to have engaged in an illegal moneylending transaction by the Court, they will not be able to recover the loan sum from the borrower. This proposition was further emphasized by the Federal Court in the Triple Zest Case.

Impact of the Federal Court's Ruling

Although the grounds of judgment of the Federal Court ruling have yet to be released as at the date of writing, the Federal Court ruling holds significance as it appears to deviate from other judgments pertaining to unlicensed moneylending. Just a few months earlier the High Court in *Manmohan Samra v Sandave Singh a/l Harbhajan Singh [2023] MLJU 132* permitted the charging of interest at a rate of 18% per annum on a "friendly loan" or an "investment loan." This decision was based on the absence of evidence indicating that the lender in that particular case engaged in a "*main business activity related to money lending*" thereby not "*carrying on the business of moneylending*" requiring a license under the MLA.

Even in instances where the agreement was deemed an unlicensed moneylending agreement, such as in *Poh Kee dan satu lagi v Chim Kim Yang dan lain-lain [2022] MLJU 752*, or the calculation method for interest was unclear, as in the case of *Chong Poh Chee v Melinda Ramli [2022] MLJU 2660*, the Courts had previously ordered the repayment of at least the principal sum. However, the Federal Court decision in the Triple Zest Case differs in that it does not mandate the return of the principal amount.

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For unlicensed moneylenders who are concerned about the impact of this ruling on their lending practices, there are several key points to keep in mind. It is crucial to emphasize that friendly loans can still be provided, but interest charges should be reasonable to avoid potential legal challenges. By ensuring that the interest rate is not excessive, lenders could increase their chances of recovering the interest in the event of a dispute.

It is important to note that this ruling is specific to the circumstances of the Triple Zest Case and should not be regarded as a blanket judgment for all unlicensed moneylenders. Existing case law indicates that each case will be assessed individually, and factors such as the interest rate charged, continuity, system, or repetition of similar transactions, and the presence of guarantees or other forms of security may be considered.

Companies approached to consider providing loans may find it beneficial to seek legal advice to consider whether other arrangements would be more appropriate.

It is therefore vital to examine the specific details of the Federal Court decision in the Triple Zest Case once the grounds of judgment for the Federal Court's ruling are published to analyse the same upon release in order to fully understand the specific factors that influenced their decision.

By examining the Federal Court's reasoning and the factors that led to the decision, lenders can better understand the implications for their own lending practices and adopt practices that mitigate potential legal consequences and ensure compliance with relevant laws and regulations.

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