

CHAPTER III

MONEYLENDING UNDER THE MONEYLENDERS'
ORDINANCE 1951

This chapter deals very briefly with the definition; duties and liabilities of a moneylender. It serves merely to give the reader a general idea of a moneylender in relation to the Moneylenders' Ordinance 1951.

The Moneylenders' Ordinance 1951 is based on the English Moneylenders' Acts of 1900 and 1927. Accordingly, decisions based on the English Acts are applicable to Malaysia by virtue of section 3 of the civil law Act 1956 which provides that:

"Save as excepted in paragraphs (a), (b), (c), (d) and (e) of the definition of "moneylender" in section 2 of this Ordinance, any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary be proved to be a moneylender".

Therefore, in attempting to state the law on moneylending, due reference is made to English cases, particularly on matters of interpretation.

Definition of Moneylender

The definition section¹ is discussed in the context of people who are not licensed moneylenders but who lend money in such a manner so as to raise the question of whether they carry on the business of moneylending within the meaning of the said ordinance.

(1) Who is Prima Facie A Moneylender

"The expression "Moneylender" in section 2 of the Ordinance "includes every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property on money derived from sources other than the lending of money and whether or not that person carried on the business as a principal or as an agent"

This part of the section deals with the positive aspect of the definition. The section proceeds to give five instances in which a person, society or company is not deemed to be a moneylender, though satisfying the above definition.

¹. Section 2 Moneylenders' Ordinance 1951.

Carrying on Moneylending Business

(a) The English Position

The question of what amounts to carrying on a moneylending business was considered in Litchfield V. Dreyfus² in that case Farwell J Said that:

".... not every man who lends money at interest carries on the business of moneylending. Speaking generally, a man who carries on a moneylending business is one who is ready and willing to lend to all and sundry, provided they are, from his point of view, eligible. I do not, of course mean that a moneylender can avoid the Act by limiting his clientele to those he chooses to designate as 'friends' or otherwise; it is a question of fact in each case..... The Legislature, however, in casting its net, has cast it exceedingly wide; and if a man is really carrying on the regular business of a moneylender in the ordinary sense of the terms, he comes within the provision of the statute, although his conduct may be free from all blame morally. The single question for determination is this: Does he, in the ordinary sense of the term, carry on the regular business of a moneylender? That, of course, depends on the facts of each particular case".

2. (1906) 1K.B. 584.

The above decision was subsequently applied in Newton V. Pyke³ which concerned the lending of money to friends and relations. The facts were that the plaintiff (a solicitor's articled clerk) lent money for a rate of interest or for other substantial remuneration on a number of occasions to the defendant and other persons falling into the categories of friends or relations. In no way had the plaintiff advertised or announced or held himself out as a moneylender. Walton J held that there was no carrying on of a moneylending business by the plaintiff. He pointed out that whether a man was carrying on a business as a moneylender was a question of fact, and that it was impossible to lay down any precise test or definition but that it was not enough merely that a man has had lent money on several occasions at remunerative rates of interest; there must be a certain degree of system and continuity involved⁴. Accordingly, an isolated transaction could not constitute a carrying on of business⁵. A licensed moneylender may, however, lend money to friends without complying with all the formalities contained in the statute, provided that the loan is not made as a business transaction⁶.

3. (1908) 25 TLR 127.

4. Cited from Meston, The Law Relating to Moneylenders, 5th Edition, Oyez Publications, London, 1968, p.2.

5. Newman V. Oughton (1911) 1K.B. 792.

6. Handelman V. Davies (1937) 1r.R.419, decided under the (Irish) Moneylenders Act 1933.

(b) The Malaysian Position

In the case of Esmail Sahib V. Nordin ⁷, Spencer -
Wilkinson J. said that:

"the definition of a "Moneylender" in our ordinance is the same as that contained in the English Act 1900 and it has been held in the courts of England that under this definition it is a question of fact in each case whether or not the transactions carried out by the moneylender are such as to bring him within the meaning of the words "carrying on the business of moneylending". It is not sufficient to prove that the lender has occasionally lent money at a remunerative rate of interest; ~~some~~ degree of system and continuity in moneylending transactions must be proved".

Among the cases cited in the above case were Litchfield V. Dreyfus ⁸ and Newton V. Pyke ⁹. Hence the expression "Carrying on moneylending Business" in the definition section has been interpreted by the court as having some degree of system and continuity.

(ii) Who is not A Moneylender

The definition of a moneylender in section 2 excludes the following catagories of persons and bodies:

⁷. (1951) 17 MLJ 95

⁸. (1906) 1K.B. 584

⁹. (1908) 25 TLR 127.

- (a) any body corporate ~~in-corporated~~ or empowered by a special Act of Parliament or by an Ordinance to lend money in accordance with such special Act or ordinance; or
- (b) any society registered under the co-operative societies ordinance, 1948; or
- (c) 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; or
- (d) any pawnbroker licensed under the provisions of any written law in force in the Federation or any part thereof relating to the licensing of pawnbrokers; or
- (e) any body corporate or society for the time being exempted by the Minister by notification published in the Gazette from the provisions of this ordinance.

(iii) Duties of A Moneylender

The ordinance imposes the following duties on a moneylender.

(a) Duty To Be Licensed

Section 5 (1) requires every moneylender residing and carrying on business in the Federation, whether as principal or as agent to take out annually in each State in which he carries on his business of moneylending a license in respect of the business. No license however shall be issued to a person not ordinarily resident in the

Federation or to a firm where the person proposed to be responsible for the management of the firm is not ordinarily resident in the Federation ¹⁰. Other necessary requirements include the showing of certain particulars on a licence. In this connection section 6 (1) provides that:

"Every licence granted to a moneylender shall show his true name and the name under which, and the address at which, he is authorised by the licence to carry on business as such, and in the case of an agent in addition to the true name of the principal, whether an individual or a firm, on whose behalf such business is carried on. A licence shall not authorise a moneylender to carry on business at more than one address or under more than one name or under any name which includes the word 'bank' or otherwise implies that he carries on the business of banking, and no licence shall authorise a moneylender to carry on business under any name except -

- (a) his true name or in the case of an agent the true name of the principal on whose behalf such agent carries on business; or
- (b) the name of a firm in which he is a partner or of which he is an agent; or

¹⁰. Section 5 (2), Moneylenders' Ordinance, 1951.

- (c) a business name, whether an individual or of a firm in which he is a partner or of which he is an agent, under which he or the firm or in the case of an agent his principal has been registered under the Registration and Licensing of Businesses Ordinance 1953".

At this point it should be noted that any licence taken out in a name other than the moneylender's true name shall be void.¹¹

The liabilities of a moneylender in respect of non-compliance with particular requirements of the licencing provisions are set out in section 8, which provides that:

"If any person -

- (a) takes out a licence in any name other than his true name; or
- (b) carries on business as a moneylender without holding a licence or, being licenced as a moneylender, carries on business as such in any name other than his authorized name or at any other place his authorized address or addresses; or
- (c) in the course of his business as a moneylender enters into any agreement with respect to any advance or repayment of money or takes any security for money otherwise than in his authorized name,

¹¹. Section 6 (2), Moneylenders' Ordinance, 1951.

Shall be guilty of an offence under this ordinance and shall be liable to a fine not exceeding one thousand dollars and for a second or subsequent offence shall be liable to the fine aforesaid or imprisonment for a term not exceeding twelve months and an offender being a company shall for a second or subsequent offence be liable to a fine not exceeding five thousand dollars".

Hence the liabilities in respect of licencing are substantially severe and are criminal in nature. The proviso to section 8 however excludes a principal, or in the case of a firm, the partner or partners who are not ordinarily resident in the Federation, from the ambit of the section. The proviso in question states that:

"Provided that a moneylender who is not, or in the case of a firm none of the partners of which are, ordinarily resident in the Federation may without being guilty thereby of an offence carry on business in any State without holding a licence if he carries on such business solely through an agent duly licenced under this ordinance to carry on such business in such State under the name of such moneylender".

The licencing provisions in respect of the moneylender as such can therefore be briefly stated as essentially constituting the duty to be licenced,¹² in which connection he is bound, to carry on money-lending business in his authorized name and at his authorized address;

¹². Section 5 (2), Moneylenders Ordinance, 1951.

and to enter into all moneylending agreements in his authorized name, by section 6 (1) and section 8 (c) respectively. Also, apart from the need to be licensed under the ordinance, it is also necessary to be registered under the Registration and Licensing of Businessess Ordinance 1953. 13

(b) Duty Not To Advertise

Section 13 of the Ordinance which places a restriction on moneylenders' advertisements state that:

(1) No person shall knowingly send or deliver or cause to be sent or delivered, to any person, except in response to his written request any circular or other document advertising the name, address or telephone number of a moneylender or containing an invitation -

(a) to borrow money from a moneylender;

(b) to enter into any transaction involving the borrowing of money from moneylender;

(c) to apply to any place with a view to obtaining information or advice as to borrowing any from a moneylender.

(2) Subject as hereunder provided, no person shall publish, or cause to be published, in any newspaper or other printed paper issued periodically for public circulation or by means of any poster or placard, an advertisement advertising any such particulars or containing any such invitation as aforesaid:

Provided that an advertisement in conformity with the requirements of this ordinance relating to the use of names on moneylenders' documents may be published by or on behalf of a moneylender in any newspaper or in any such paper as aforesaid or by means of a poster or placard exhibited at any authorized address of the moneylender if it contains no addition to the particulars necessary to comply with the said requirements except any of the following particulars, that is to say -

- (a) any authorized address at which he carries on business as a moneylender and the telegraphic address and telephone number thereof;
- (b) any address at which he formerly carried on business;
- (c) a statement that he lends money with or without security and of the highest and lowest sums that he is prepared to lend; and
- (d) a statement of the date on which the business carried on by him was first established.

Sub-section (3) prohibits the employment of an agent or canvasser for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a moneylender. The sub-section further prohibits any person from acting as agent or canvasser or demand or receive, directly or indirectly, any sum or other valuable consideration by way of commission or otherwise for introducing or undertaking to introduce to a moneylender any person desiring to borrow money.

Sub-section (4) on the other hand requires any document issued or published by or on behalf of a moneylender purporting to indicate the terms of interest upon which he is willing to make loans or any particular loan, to express the interest proposed either in terms of a rate percentum or per .

Liability in respect of any act which contravenes any of the above-mentioned provisions is imprisonment for a term not exceeding six months or a fine not exceeding five dollars or both.¹⁴

(c) Duty to Affix Boards At Business Premise.

Section 14(1) requires every licensed moneylender to affix in a conspicuous place outside his authorized address a board containing the words "Licenced Money " printed in letters not less than two inches. Failure to comply with this requirement entails a fine not exceeding fifty dollars.

(d) Duty to Observe The Form in which A Moneylending Contract Must Be Drawn In Order To Be Enforceable

By virtue of section 16(1) a contract between a moneylender and a borrower shall not be enforceable unless a note or memorandum in writing of the contract is signed by the parties to the contract, and an authenticated copy is delivered to the borrower or his agent.

The note or memorandum must contain all the terms of the contract, particularly the date of the loan, the principal and the rate of interest percentum per annum payable in respect of such loan or, where the interest is not expressed in terms of a rate percentum per annum, the amount of such interest.¹⁶ Hence where a promissory note in the English Language or Romanised Malay given by a borrower to a moneylender in respect of a loan contains in the body of the note or by writing thereon all the terms of the contract and is countersigned by the lender or his agent, such promissory note shall in itself be a sufficient note or memorandum of contract for the purpose of this section.¹⁷

(e) Duty Not To Charge Compound Interest

Section 17(1) essentially prohibits the charging of compound interest, and any contract for the loan of money by a moneylender shall be illegal in so far as it provides, directly or indirectly, for the payment of compound interest, or for the rate or amount of interest to be increased by reason of any default in the payment of sums due under the contract. The proviso to section 17(1) however allows the making of a provision that if default is made in the payment upon the due date of any sum payable to the moneylender under the contract, the moneylender shall be entitled to charged simple interest on that sum from the date of the default until the sum is paid, at a rate not exceeding the rate payable in respect of the principal apart from any default.

¹⁶ Section 16(3), Moneylenders' Ordinance, 1951.

¹⁷ Ibid section 16(4)

(f) Duty To Keep Accounts in Permanent Books

Section 18(1) requires a moneylender to keep or cause to be kept a regular account of each loan clearly stating in plain words and in English numerals with or without the numerals of the script otherwise used, the terms and transactions incidental to the account entered in a book paged and bound in such manner as not to facilitate the elimination of pages or the interpolation or substitution of pages.

Failure to comply with the above provisions shall disentitle a person from enforcing any claim in respect of any transaction in relation to which default is made. In addition he shall also be guilty of an offence under this ordinance, and shall be liable to a fine not exceeding fifty dollars, or in the case of a continuing offence, to a fine not exceeding ten dollars for each day or part of a day during which such offence continues.¹⁸

(g) Duty To Supply Information In Respect Of A Loan
And Copies of Documents Relating Thereto

According to section 19(1) a moneylender shall, on any reasonable demand in writing being made by the borrower at any time during the continuance of the contract for the repayment of money, and on tender by the borrower of the sum of fifty cents for expenses, supply to the borrower or, if the borrower so requires, to any person specified in that behalf in the demand, a statement of account in English figures signed by the moneylender or his agent showing -

¹⁸ Section 18(2), Moneylenders' Ordinance, 1951.

- (a) the date on which the loan was made, the amount of the principal of the loan and the rate per centum per annum or the amount of interest charged; and
- (b) the amount of any payment already received by the moneylender in respect of the loan and the date on which it was made; and
- (c) the amount of all sums due to the moneylender for principal but unpaid and the date upon which they became due and the amount of interest due and unpaid in respect of each sum; and
- (d) the amount of every sum not yet due which remains outstanding and the date upon which it will become due.

However a statement of account given in the form in the first schedule shall be deemed to comply with the above provisions.

By virtue of sub-section (2), a moneylender is also under a duty to supply a copy of any document relating to a loan made by him or any security given thereof to borrower or any person on his behalf, on any reasonable demand in writing by the borrower or on tender of the sum of one dollar. A moneylender to whom a demand has been made under this section fails without reasonable excuse to comply therewith within one month after the demand has been made shall not, as long as the default continues, be entitled to sue for or recover any sum due under the contract on account either of principal or interest, and interest shall not be chargeable in respect of the period of the default and, if such default is made or continued after proceeding have ceased to lie in

respect of the loan, the moneylender shall be liable to a fine not exceeding fifty dollars for every day on which the default continues. ¹⁹
sub-section (4)

- (h) Duty not To Charge Excessive Interest.
So As To Make The Transaction Harsh and
Unconscionable or Substantially Unfair.

Under section 22(1), an interest which exceeds the rate of twelve percentum per annum in the case of a secured loan or eighteen percentum per annum in the case of an unsecured loan, is presumed to be excessive so as to make the transaction harsh and unconscionable and substantially unfair, in which respect the court is empowered to reopen it under section 21(2). The logical deduction in respect of these two provisions therefore is that a moneylender is prohibited from charging interest in excess of the rates stipulated. These provisions will be discussed in greater detail in Chapter V.

- (i) Duty not To Charge Expenses In Respect Of Loans.

Section 23 prohibits a moneylender from charging a borrower in respect of costs, charges or expenses other than stamp duties, fees payable by law and legal costs incidental to or relating to the negotiations for the loan.

¹⁹

Section 19(3), Moneylenders' Ordinance, 1951.

(j) Duty To Give Notice And Information On
Assignment of Moneylenders' Debts.

Where any debt in respect of money lent by a moneylender, or in respect of interest on any such debt, or the benefit of any agreement made or security taken in respect of any such debt or interest, is assigned to any assignee, the assignar (whether he is the Moneylender by whom the money was lent or any person to whom the debt has been previously assigned) is by virtue of section 25(1) under a duty to give notice in writing to the assignee that ~~the~~ debt, agreement or security is affected by the operation of this Ordinance;²⁰ and to supply to the assignee all information necessary to enable him to comply with the provisions of this ordinance relating to the obligation to supply information as to the state of loans and copies of documents relating thereto.²¹ Any person who contravenes the above provision is liable to indemnify any other person prejudiced by the contravention. He shall also be guilty of an offence, and the liability in respect of each offence is imprisonment for a term not exceeding one year or a fine not exceeding one thousand dollars, or both. A Company guilty under this section is however liable to a fine of five thousand.

These are essentially the duties imposed by the Ordinance upon moneylenders in order to ensure that borrower are not unscrupulously exploited. Omission to comply with these duties would result in the imposition of penalties on the offenders. The duties as such are

²⁰ Section 25(1) (a), Moneylenders' Ordinance, 1951

²¹ Ibid, Section 25(1) (b).

therefore designed to protect borrowers from any irregularity or illegality that might be committed by moneylenders. They are also important because they act as guidelines as to how the business of moneylending is to be carried out.