CHAPTER V

REOPENING PROVISIONS

(1) The Malaysian Position

The various forms of checks and controls of moneylending business discussed in previous chapters are mainly directed towards preserving the interests of borrowers and maintaining the business practice on proper and legitimate lines as envisaged by the Ordinance. Of the illustrations examined, the reopening provisions in Section 21(2) deserve further comment as they provide the means of ironing out any illegality that may exist in such transactions.

Section 21(2) provides that:-

> "Where there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive and that the transaction is harsh and unconscionable or substantially unfair, the Court shall reopen the transaction and take an account between the moneylender and the person sued and shall, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken between them and relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest and legal costs as the Court, having regard to the risk and all

> the facts and ci (including facts and circumstances arising or coming to the knowledge of the parties after the date of the transaction) may adjudge to be reasonable, and, if any such excess has been paid or allowed in account by the debtor, may order the creditor to repay it andmay set aside either wholly or in part or revise or alter any security given or agreement made in respect of money lent by the moneylender and, if the moneylender has parted with the security, may order him to indemnify the borrower or other person sued:
>
> Provided that nothing in this sub-section shall prevent any further or other relief being given in circumstances in which a Court of equity would give relief.

The power conferred on the court by Section 21(2) is discretionary, subject to its satisfaction. Although the provisions are capable of rendering the utmost relief to borrowers, their weight and importance has not been put to test.[1] Therefore it is not quite possible to gauge the court's reaction and response to Section 21(2). But it is reasonable to expect that the court would accord them the most appropriate construction. And, in view of the practice at referring to English decisions and adopting English principles of law,

[1] The writer finds no Malaysian cases on this section.

it is likely that the same practice would be adhered to in this particular case. And, in order to perceive what the possible construction of the provisions in Section 21 may be, it is necessary to look at similar provisions in the English Moneylenders' Acts of 1900 and 1927, and the decisions made in that respect.

Relief and Remedies Available

The Court's powers under Section 21(2) are wide, and it may

(1) reopen the transaction and take an account between the moneylender and the person sued;

(2) not withstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken between them and relieve the person sued from any excess payment in respect of principal, interest and charges;

(3) if any excess has been paid or allowed in account by the debtor, order the creditor to repay it;

(4) set aside either wholly or in part or revise or alter any security given or agreement made in respect of money lent by the moneylender; and

(5) if the moneylender has parted with the security, order him to indemnify the borrower or other person sued.

In respect of the relief available under the above provisions, the borrower or others[2] have the option either of initiating an action

[2] Surety or other person liable or trustee in bankruptcy.

themselves, or of defending suits instituted by the moneylender. In other words, the court has power to entertain applications made by borrowers[3] in respect of transactions which are harsh and unconscionable or substantially unfair. In respect of bankruptcy proceedings, the like powers are rested in the Official Assignee by by virtue of sub-section (4). Where the scope of these reopening provisions are concerned, they are said to apply to any transaction whatever its form may be that is substantially one of moneylending by a moneylender.[4] Hence the provisions are essentially geared for the protection of borrowers.

It is necessary to mention other sections in the Ordinance which are relevant and related to these reopening provisions, and which may possibly serve as the basis for determining what constitutes "excessive,"[5] "harsh and unscionable," and "substantially unfair." These sections are Section 17;[6] Section 22;[7] Section 23[8] and Section 24.[9]

[3] Section 21 (3), Moneylenders' Ordinance, 1951.

[4] Ibid, sub-section (5).

[5] Section 2 only gives the definition of "interest."

[6] This section prohibits the charging of compound interest.

[7] This section fixes the interest rates for secured and unsecured loans, twelve and eighteen per centum per annum respectively.

[8] This section prohibits the charging of expenses on loans.

[9] This section provides for the calculation of interest in those cases where the interest charged is not expressed in terms of a rate.

In respect of Section 24, reference to the Second Schedule is necessary. In any case, such determination should also be based on the risk and all the facts and circumstances of the case (as provided by Section 21(2)). Therefore, failure of a moneylender to comply with Sections 17, 22 and 23 can never amount to the conclusive evidence that a particular transaction is "harsh and unconscionable" or "substantially unfair." The court must first evaluate the risk, facts and circumstances of each case.

Since English law on the subject is quite settled, it is possible that by virtue of Section 3 of the Civil Law Act, the Malaysian courts would depend on English decisions. Accordingly, the writer has devoted the rest of this chapter to the English position of the law relating to moneylenders. Reference is also made to Australian and New Zealand cases as the statutes under which they were decided were drafted along similar provisions and may as such be taken as persuasive authority by our courts. The absence of case-law on our reopening provisions is an indication of how ineffectively the interests of borrowers are protected. It also reflects the attitude of borrowers in general. Here, one of the most significant check imposed on moneylending practices is not made use of.

(II) P

The position in England in respect of reopening transactions are contained in section 1 of the Act of 1900, as amended by section 10 of the Act of 1927.

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Section 1(1) of the Moneylenders' Act, 1900 provides as follows:-

> "Where proceedings are taken in any court by a moneylender for the recovery of any money lent after the commencement of this Act, or the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive; or that the amounts charged for expenses, inquiries, fines, bonus, premiums, renewals, or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give relief, the court may reopen the transaction, and take an account between the moneylender and the person sued, and may, not withstanding any statement or settlement of account already taken

between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest and charges, as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent by the moneylender, and if the moneylender has parted with the security may order him to indemnify the borrower or other person sued."

In this respect, the conditions affording relief under sub-section 1 can be invoked where:-

(i) the interest charged in respect of the sum actually lent is excessive;

(ii) the amounts charged for expenses, inquiries, fines, bonus, premiums, renewals, or any other charges are excessive;

(iii) the transaction is harsh and unconscionable;

(iv) the transaction is such that a court of equity would give relief.

The point of interest is whether these are cumulative, or alternative and independent heads of relief.

Pannam[10] explains that "under the English Act of 1900, (i) and (ii) are alternatives but if either of them is satisfied then it must further be shown that the moneylending transaction comes within either (iii) or (iv). It consequently follows that "the words "or is otherwise such that a court of equity would give relief" do not qualify the preceding words "is harsh and unconscionable" but are alternative to them and therefore a transaction may be reopened although it would not have given rise to a claim for relief in a court of equity before the passing of the Act".[11]

The position is different in Australia and New Zealand. There, to obtain relief under similar provisions, it is sufficient to show that anyone of the four conditions is present in the transaction.[12]

The Malaysian position as governed by section 21(2) provides for reopening where the interest charged is excessive and the transaction harsh and unconscionable or substantially unfair.

[10] Clifford L. Pannam, The Law of Moneylenders In Australia and New Zealand, Australia, Halstead Press, 1965, pp. 277-278.

[11] Lord Meston, The Law Relating to Moneylenders, 5th Edition, London, Oyez Publications, 1968, p. 171.

[12] Ibid, p. 277

At this juncture it should be noted that "Section 1(1) deals with the relief available when the proceedings are instituted by the moneylender. Section 1(2), however, expowers the borrower, or surety or other person liable, to commence proceedings to obtain relief".[13] Section 1(2) provides that:-

> "Any court in which proceedings might be taken for the recovery of money lent by a moneylender shall have and may, at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under this section where proceedings are taken for the recovery of money lent, and the court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Act by the borrower or surety, or other person liable, notwithstanding that the time for the repayment of the loan, or any instalment thereof, may not have arrived."

The borrower and others are therefore given the option of initiating a suit themselves. Alternatively, they can defend proceedings instituted by moneylenders against them.

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[13] Ian G.C. Stratton & Ian S. Blackshaw, The Law Relating to Moneylenders, London, Butterworths, 1971, p. 58.

The Circumstances In Which A Transaction May Be Reopened[14]

(a) Excessive Interest

"No statutory guidance was given under the 1900 Act as to what might constitute "excessive interest ....."[15] As Lord James put it:[16] "The word 'excessive' applied to interest if, of course a relative and elastic term impossible of absolute definition....."

One view[17] is that the omission in Section 1(1) is rectified by Section 10(1) of the 1927 Act which provides that where the rate of interest on a loan exceeds 48 per cent per annum, or the corresponding rate in respect of any other period, there is a statutory presumption that the interest charged is excessive and that the transaction is harsh and unconscionable.[18] But these provisions merely provide the basis of what amounts to "excessive" interest in that "they only fix outer limits and do not involve the conclusion that a rate under those specified is not excessive."[19] Under the Malaysian provisions, where "the interest charged exceeds in the case

[14] These circumstances relate to the four conditions of relief mentioned earlier.

[15] Stratton & Blackshaw, op. cit., n. 13, p. 53

[16] Samuel v. Newbold (1906) AC 461 at pp. 475-476

[17] Stratton & Blackshaw, loc cit., p. 53

[18] Under this section the burden of proof lies on the moneylender to show that the interest charged is not excessive and that the transaction is not harsh and unconscionable.

[19] Pannam, op. cit., n. 10, p. 280

of a secured loan the rate of twelve per centum per annum or in the case of an unsecured loan the rate of eighteen per centum per annum, the Court, shall, unless the contrary is proved, for the purposes of Section 21 ....."that the interest charged is excessive and that the transaction is harsh and unconscionable or substantially unfair...."[20] But, as in the English context, this does not necessarily mean that an interest rate which does not exceed twelve per centum per annum or eighteen per centum per annum as the case may be is not excessive.

In some instances, the Court has specifically relied on the latter part of sub-section 1 in construing the word "excessive".[21] In this respect, Collins, M.R. in the case of Part v. Bond[22] said that:

> "In my opinion the Act contemplates that all the circumstances of each case should be considered because the latter part of Section 1(1), when prescribing the relief that may be given, contains the words ' regard to the risk and all the circumstances;' in this way the Act seems to provide a code as to the various considerations that should guide the court in arriving at a correct decision....."[23]

In Balkind v. Ralph,[24] Hosking J. said that "the greater the risk of non-payment ..... the higher will the rate of interest be

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[20] Section 22(1), Moneylenders Ordinance, 1951

[21] Meston, op. cit., n. 11, p. 174

[22] (1906)22 TLR 253

[23] Cited from Meston, op. cit., n. 11. p. 174

[24] (1918) N.Z.L.R. 929 at p. 931

expected to be." In Bailey v. The N.S.W. Mont De Piete Deposit & Inve L .[25] it was said that it is the business of money-lenders to run these risks, and that there is nothing unfair in openly averaging these risks, anymore than in the case of in companies, who make the long livers pay for those who die early.[26] In this respect the elements to be considered are the amount and duration of the loan and the value of the security[27] advanced. "If a loan is amply secured then only a relatively low rate of interest can be justified because the risk of non-payment is small." [28] Therefore, since the risk of non-payment normally associated with an d loan is quite high, a moneylender is justified in charging a far higher rate of interest than than appropriate to a secured loan.[29] "In the case of an unsecured loan, just as in the

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[25] (1918) V.L.R. 16

[26] Pannam, op. cit., n. 10, p. 286

[27] "Apart from the question of actual security offered by the borrower for the loan, there are of course other elements which may require to be considered... namely the age, sex health, and general f position of the borrower." Meston, op. cit., n. 11, pp. 175-176

[28] Pannam, ., p. 280

[29] Ibid, p. 283

case of a secured loan, the central factor in determining whether interest is excessive is the risk involved from the moneylender's point of view; it is not the risk as ascertained after the event which has to be looked at, but how the matter would present itself to the moneylender at the time of the loan"[30] with the experience he would have of borrowers.

In Thomas v. Ashbrook[31] Gibson J. explained the position as follows:

> "The reasonableness of (an interest) premium must be ascertained with reference to the conditions which were or ought to have been present to the mind of the lender at the time of the transaction, not the actual or true risk, which the event might show to have been stifling or non-existent. An advance made on the instant, without security, and without means of enquiry, might justify a rate which, if the true facts were known with certainty; would be excessive in relation to the actual risk. On the other hand, if the financial resources of the borrower are truly stated, and opportunity of reasonable rectification is afforded, the moneylender cannot, by unreasonably omitting, or professing to have omitted, enquiry he ought to have made, support interest out of all honest proportion to the risk....."[32]

[30] Meston, op. cit., n. 11, p. 175

[31] (1913) 2 Ir. R. 416 at p. 427

[32] Cited from Pannam, op. cit., n. 10, p. 285

Therefore, "a lender cannot escape the [illegible]ences of an application for relief under the Act of 1900 by saying that he was unaware of facts material in determining the fair terms of the bargain if reasonable inquiring on his part would have elicited those facts."[33]

Hence the position appears to be that the amount of interest chargeable upon a loan made by a moneylender must be proportionate to the risk involved, and such risk to be measured in relation to factors which invariably elucidate the creditworthiness of the borrower, for example, his income, assets and occupation. In this respect it is the duty of the moneylender to make reasonable inquiry in order to elicit facts crucial to a particular transaction. For academic purposes the writer has included a list of cases illustrating the factors which the courts have taken into consideration in ascertaining the magnitude of risk, in Appendix D.[34]

Accordingly, what constitutes "excessive" interest cannot be defined in absolute terms, and must certainly depend on the facts of each case. In the case of [illegible],[35] Cozens-Hardy, L.J. (adopting a view independent of the sob-section) said that:

> "The circumstances of each case must be considered, including the necessities of the borrower, his pecuniary position, the presence and absence of

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[33] Meston, op. cit., n. 11, p. 175

[34] This list is taken from Pannam, op. cit., n. 10, p. 284

[35] (1904) 21 TLR 11.

security, the relation in which the moneylender stood to the borrower, and the total remuneration derived by the moneylender from the whole transaction."[36]

(b) Excessive Charges

Another element to be considered by the court in exercising its statutory discretion in reopening a money-lending transaction relates to the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges.[37] These provisions should be read in the light of Section 12 of the 1927 Act[38] which provides that:

"Any agreement between a moneylender and a borrower or intending borrower for the payment by the borrower or intending borrower to the moneylender for any sum on account of costs, charges, or expenses incidental to or relating to the negotiations for or the granting of the loan or proposed loan shall be , and if any sum is paid to a moneylender by a borrower or intending borrower as for or on account of any such costs, charges or expenses, that sum shall be recoverable as a debt due to the borrower or

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[36] Cited from Stratton & Blackshaw, op. cit., n. 13, p. 55

[37] Section 1(1), Moneylenders' Act, 1900

[38] Section 12 does not, by virtue of Section 14(1) of the same Act, apply to pawnbrokers' loans.

> intending borrower, or, in the event of the loan being completed, shall, if not so recovered, be set off against the amount actually lent and that amount shall be deemed to be reduced accordingly."

From the language of the above, "Section 12 is of very application and is clearly designed to include those cases in which some charge is made on some collateral security as a consideration for negotiating or granting a loan."[39] "It provides in terms that charges for expenses on loans shall be illegal and recoverable as a debt due to the borrower or, in the event of the loan being completed, to be set off against the amount actually lent."[40]

Expenses involved here usually relate to stamp duties and solicitors' costs. In this connection, the question which arises is whether a moneylender can pass on these expenses to the borrower without infringing section 12.

In Alligham v. London and Westminister Loan and Discount Co. Ltd.,[41] it was held that the amount of stamp duties and expenses in respect of the transaction became a simple contract due to the moneylender by the borrower.

In Dunn Trust Ltd. v. Asprey,[42] the borrower contended that the solicitors' costs[43] involved fell within Section 12 and that his agreement

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[39] Meston, op. cit., n. 11, p. 166

[40] Ibid., p. 228

[41] (1940) 2 KB. 630

[42] (1934) 78 Sol. J. 747

[43] This relates to legal costs which the moneylenders had incurred on account of suing the borrower on a previous loan.

to pay them was therefore illegal. The learned judge said that his interpretation of Section 12 was that, when a moneylender agreed to lend money to a borrower, he must not deduct from the amount he lent, his charges or expenses in relation to that transaction.[44] Here it was held that since there was no substance in the borrower's contention, there was no infringement of Section 12 of the 1927 Act.

However, in cases where security for the loan is a charge on real property, the scale costs for investigating title to the land, and the expenses of stamping and registration are chargeable to the borrower. They constitute a simple contract debt due to the moneylender by the borrower and do not require to be stated on the note or memorandum of the contract,[45] because they are not terms of the contract of loan. The rationale behind this is that "it is the borrower who has offered as security for the loan his legal estate in the land, and no moneylender could reasonably be expected to advance money on that land unless he was assured that the borrower had a good marketable title free from incumbrances, including the liability to stamp and, when necessary, register the deeds to perfect the title."[46] Accordingly, these expenses do not render the whole transaction void.

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[44] Meston, op. cit. n. 11, p. 168

[45] Ibid., p. 167

[46] Ibid, p. 228

The Malaysian provision relating to the reopening of money-lending transaction is silent where charges for expenses are concerned; section 21(2) only provides for reopening of transactions in respect of excessive interest rates. The legal implications of this omission remain to be seen. However, the charging as such expenses are nevertheless prohibited by Section 23 of the Ordinance which provides that:

> "Any agreement between a moneylender and a borrower or intending borrower for the repayment by the borrower or intending borrower to the moneylender of any sum on account of costs, charges or expenses other than stamp duties, fees payable by law and legal costs incidental to or relating to the negotiations for or the granting of the loan or proposed loan shall be illegal, and if any sum is paid to a moneylender by a borrower or intending borrower as, for or on account of any such costs, charges or expenses than as aforesaid that sum shall be recoverable as a debt due to the borrower or intending borrower, or in the event of the loan being completed shall, if not so recovered, be set off against the amount actually lent and that amount shall be deemed to be reduced accordingly."

It is observed that Section 23 specifically allows the charging of expenses in respect of "stamp duties, fees payable by law and legal costs," hence limiting the scope of the section to expenses other than those aforesaid. Accordingly, any controversy over what amount to a chargeable and non-chargeable expense would be sufficiently removed.

(c) Harsh and Unconscionable Transactions

As with the term "excessive", the term "harsh and unconscionable" also varies with the facts and circumstances of particular cases. In the words of Lord Loreburn, "it is neither practicable nor expedient to attempt any exhaustive definition."[47] It can however be simply stated as a transaction which is "unreasonable, and not in accordance with the ordinary rules of fair dealing."[48] Dwyer J[49] however attempted to give a more elaborate statement of its meaning. He said that "harsh and unconscionable" means .....

> "something more than it imposes hard terms on the borrower; it suggests in addition the existence of circumstances which enable the lender to impose such terms, something in the nature of the oppression and abuse of power ..... a transaction becomes unconscionable when a lender is in a position of indue influence, and uses it to treat the borrower unfairly and extortionately. Such a position may arise when the borrower is helpless or inexperienced or unfit for business affairs; or where he was in extreme need, without alternative, and unable to exercise any real choice, or where he has been tempted into extravagance and improvidence; or for similar causes. In such cases, the parties are not really on an equal footing."

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47 Samuel v. Newbold (1906) AC 461 at p. 467

48 Ibid; p. 470

49 Lean Ltd. v. Dale (1936) 39 W.A.L.R. 22 at pp. 26-27

It is impossible to give a complete enumeration of all the circumstances which (apart from gross excess of interest) will render a transaction harsh and unconscionable.[50] However, as a matter of academic interest the writer has attached in the Appendix (E) a list of cases in which various factors and considerations have been held to be evidence of a harsh and unconscionable transaction.[51] It is important at this point to note that "if a moneylender can show that a borrower thoroughly understood the transaction, and voluntarily agreed to enter it even though the terms were very stiff, he may be able to show that it was not harsh and unconscionable."[52]

As a result the note or memorandum of contract sometimes contains a clause to the effect that the borrower understands all the terms of the contract and is willing and prepared to pay the rate of interest stated therein.[53] However the courts normally attach little weight and importance to any such clause in view of the fact that borrowers are always at a disadvantage.[54] Further it should be noted that whether a transaction is harsh and unconscionable is to be determined as at the time of the making of the loan.[55]

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[50] Meston, op. cit., n. 11, p. 196

[51] This list is taken from Meston, Ibid, p. 196

[52] Pannam, op. cit., n. 10, p. 291

[53] Ibid, p. 197

[54] Ibid, p. 197

[55] Ibid, p. 291

(d) Transactions Which Will Be Set Aside in Equity

This provision operates on the premise of the "general jurisdiction in equity to relieve against fraud whether actual or constructive,"[56] for example in cases of undue influence and unconscionable bargains, in respect of which the court is empowered to remodel a transaction completely.[57]

Conclusion

The reopening provisions discussed above are subject to a period of limitation specifically imposed by Section 13 of the 1927 Act.[58] The restriction is only directed to proceedings undertaken by moneylenders.

Apart from the Acts of 1900 and 1927, "an agreement with a moneylender which is contrary to public policy may be set aside in the same way as any other contract which offends in the like fashion."[59] In such a case relief may be claimed at common law. In addition there is no hard and fast rule governing the exercise of the courts' statutory discretion.[60] This in itself is an assurance that the interests of borrowers are adequately protected as the courts tend to be more sympathetic towards borrowers. In any case the reopening provisions are essentially designed to relieve borrowers from the abuse and hardships caused by unfair loan agreements.

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56 Pannam, op. cit., n. 10, p. 294

57 Ibid, p. 294

58 This section is partly repealed by Section 34(4) of and the Schedule to the Limitation Act, 1939. No specific provision is made in respect of the Malaysian provision.

59 Meston, op. cit., n. 11, p. 200

60 Ibid, p. 197