

THE COURT OF APPEAL PRESIDING AT PUTRAJAYA

CIVIL APPEAL NO: W-02-619-2000
(ORIGINATING SUMMONS NO: S2-24-2274-1999)

BETWEEN

AEH Capital Sdn Bhd (No. Syarikat 118735-K) ... PLAINTIFF

AND

AM-EL Holdings Sdn Bhd (No. Syarikat 203745-M) ... DEFENDANT

HEARD TOGETHER WITH

CIVIL APPEAL NO: W-02-665-2004
(CIVIL SUIT NO: D5-22-363-2000)

BETWEEN

AEH Capital Sdn Bhd (No. Syarikat 118735-K) ... PLAINTIFF

AND

(1) AM-EL Holdings Sdn Bhd
(2) Tempamas Sdn Bhd
(3) Low Koon Chuan ... DEFENDANTS

CORAM:

(1) DATIN PADUKA ZALEHA BINTI ZAHARI, JCA
(2) DATO' MD RAUS BIN SHARIF, JCA
(3) DATO' HJ ABDUL MALIK BIN HJ ISHAK, JCA

GROUND OF JUDGMENT
(DISSENTING)

Introduction

[1] These two appeals were heard together. The first appeal involved an originating summons no: S2-24-2274-1999 between AEH Capital Sdn Bhd as the plaintiff and AM-EL Holdings Sdn Bhd as the defendant. The first appeal pertained to the foreclosure proceedings as per the originating summons filed by the plaintiff on 19.11.1999 against the defendant and the first learned judge on 10.8.2000 dismissed the plaintiff's foreclosure proceedings with costs. Being aggrieved, the plaintiff filed the first appeal to the Court of Appeal against the decision of the first learned judge.

[2] The second appeal concerned a civil suit No: D5-22-363-2000 that was filed on 29.2.2000 and it was a tussle between AEH Capital Sdn Bhd as the plaintiff and AM-EL Holdings Sdn Bhd, Tempamas Sdn Bhd and Low Koon Chuan as the three defendants. The second learned judge who gave directions at case management level and proceeded to hear the civil suit without witnesses being called based on the written and the oral submissions of the parties was, unfortunately, transferred from Kuala Lumpur and, consequently, he did not decide the civil suit even though he had heard the matter substantially. The third learned judge who took over

conduct of the civil suit refused to hear further oral submissions of the parties and on 21.6.2004, the third learned judge allowed the plaintiff's claim with costs on a solicitor-client basis and dismissed the defendants' counter claim with costs. Being aggrieved, the defendants filed an appeal to the Court of Appeal against the whole decision of the third learned judge.

[3] It must be emphasised that the first learned judge who heard the foreclosure proceedings was not the same learned judge that disposed off the civil suit. And, for convenience, in this judgment, I shall refer the parties as they were when they appeared before the learned judges in the foreclosure proceedings as well as in the civil suit.

The conflicting decisions of the learned judges

[4] The parties herein were said to be in an incongruous position by virtue of the conflicting decisions of the High Courts. Each party succeeded and failed in the courts of co-ordinate jurisdiction involving the same transaction with virtually identical issues to boot with. It was quite extraordinary that the plaintiff in the first appeal was prevented from realising its security in the foreclosure proceedings and yet be permitted to execute against the defendants' other assets in the civil suit.

The first appeal

[5] The plaintiff, AEH Capital Sdn Bhd, was formerly known as Letac Credit Sdn Bhd. The plaintiff's exemption from the Moneylenders Act 1951

(Act 400) by the Minister of Housing and Local Government by virtue of section 2A (2) of the said Act was gazetted in the Government Gazette No: P.U.(B)242 dated 15.5.1996 as seen at pages 279 to 280 of the appeal records for the foreclosure proceedings and for convenience it will be referred to as “**AR-1**”. The exemption was for a period of three years with effect from 9.3.1996 until 8.3.1999 provided that the activities of the moneylending shall be limited to:

- (i) credit leasing ; and
- (ii) share financing.

[6] By way of a letter dated 17.5.1996 as seen at page 123 of “**AR-1**” which is the same as page 202 of the appeal records for the civil suit and for convenience it will be referred to as “**AR-2**”, the defendant applied to the plaintiff for a loan of RM4 million and offered as security, the following items:

- (a) First party assignment dated 4.6.1996 (see pages 171 to 193 of “**AR-1**”) over 47 units of condominiums known as Setapak Ria Condominium held under Master Title Geran 465, Lot 1130, Mukim of Setapak, Negeri Wilayah Persekutuan.
- (b) An irrevocable call/put option to purchase 30% of the issued and fully paid shares of Mahabudi Development Sdn Bhd (hereinafter

referred to as “**Mahabudi**”) for RM4 million. This option shall be effective upon occurrence of a default of the loan.

- (c) A corporate guarantee of Tempamas Sdn Bhd.
- (d) A personal guarantee of Low Koon Chuan, Michael.

[7] The purpose of the loan, the rate of interest leviable, the advisory fee that is payable, the time of the drawdown, the tenure of repayment, the late interest to be imposed together with the other terms and conditions are all set out in the letter of offer dated 24.5.1996 as seen at pages 124 to 130 of “**AR-1**”. It is ideal to reproduce them here and I shall do so now (the relevant parts only):

“Amount	: RM4,000,000.00 (Ringgit Four Million Only).
Purpose	: To part finance purchase of the fully issued and paid-up capital of Mahabudi Development Sdn. Bhd.
Interest Rate	: At 24.73% per annum (‘Prescribed Rate’) ie. RM748,000.00 (Ringgit Seven Hundred Forty Eight Thousand Only) and is payable upfront on the date of drawdown of TL.
Advisory Fee	: At 4% on the loan amount ie. RM160,000.00 (Ringgit One Hundred Sixty Thousand Only) and is payable upfront on the date of drawdown of TL.
Drawdown	: In one lump sum on June 5, 1996.
Tenure/ Repayment	: Repayable in one lump sum 9 months from the date of first drawdown ie. March 5, 1997.
Late Interest	: In addition and without prejudice to AEHC’s powers, rights and remedies conferred herein, should there be any delay in payment of principal and/or interest under the terms and conditions of this Letter of Offer, the Borrower shall pay late interest on the outstanding amount up to the date of actual payment at 4% per annum above the Prescribed Rate, calculated on a daily basis.”

[8] That letter of offer dated 24.5.1996 paved the way for the defendant to obtain the loan from the plaintiff. It was described as a term loan. The defendant's directors circular resolution in writing dated 27.5.1996 resolved to accept the term loan facility from the plaintiff upon the terms and conditions as stipulated in the letter of offer. The resolution can be seen at pages 337 to 338 of "AR-1" and it was worded in this way:

"AM-EL HOLDINGS SDN. BHD.
(Incorporated in Malaysia)
DIRECTORS' CIRCULAR RESOLUTION IN WRITING
MADE PURSUANT TO ARTICLE 90

We, the undersigned, being all the Directors of the Company, at this date, do pursuant to Article 90 of the Company's Articles of Association, RESOLVE:-

That approval be and is hereby given for the Company to accept the Term Loan facility of Ringgit Malaysia Four Million (RM4,000,000.00) only granted to the Company by AEH Capital Sdn. Bhd. upon the terms and conditions as set forth in their Letter of Offer, Reference: AEHC4608/PL/DL/tja dated 24 May, 1996:-

Amount

Ringgit Malaysia Four Million (RM4,000,000.00) only.

Purpose

To part finance the purchase of the fully issued and paid-up capital of Mahabudi Development Sdn. Bhd.

Interest Rate

At 24.73% per annum (**'Prescribed Rate'**) ie. Ringgit Malaysia Seven Hundred And Forty Eight Thousand (RM748,000.00) only and is payable upfront on the date of drawdown of Term Loan.

Advisory Fee

At 4% flat on the loan amount ie. Ringgit Malaysia One Hundred And Sixty Thousand (RM160,000.00) only and is payable upfront on the date of drawdown of Term Loan.

Drawdown

In one lump sum on June 5, 1996.

Tenure/Repayment

Repayable in one lump sum 9 months from the date of first drawdown ie March 5, 1997.

Security

- 1st party Loan Agreement Cum Assignment for RM4 million over 47 units of condominiums as follows:-

<u>Unit No.</u>	<u>Unit No.</u>	<u>Unit No.</u>
D-20-1	C-2-8	B-6-2
D-20-2	D-1-1	D-1-4
D-20-3	C-2-7	D-6-5
C-24-3	A-19-3	A-4-1
C-24-4	B-20-2	C-22-6
C-24-2	B-20-4	B-13-3
C-23-1	C-15-7	A-12-2
C-18-4	D-6-3	A-12-3
C-6-4	D-18-4	B-13-1
C-6-3	B-16-3	B-6-4
C-4-3	C-4-4	C-23-3
B-1-1	B-1-2	B-1-4
B-2-1	B-2-2	B-2-4
B-3-2	B-4-1	B-4-2
B-4-4	B-5-1	A-10-2
A-11-2	A-11-3	

All held under the Master Title Geran 465, Lot 1130, Mukim of Setapak, Negeri Wilayah Persekutuan ('collectively known as the Condominiums').

2. Loan Agreement for RM4.0 million.
3. Call/Put Option Agreement. The Company shall grant a call/put option to AEHC for AEHC to buy 30% of the issued and fully paid shares of Mahabudi Development Sdn. Bhd. for RM4.0 million. The tenure of the call/put option will commence from the date of drawdown up to one (1) month after expiry of the Term Loan. This option is only effective upon occurrence of a default of the loan. This is an irrevocable Call/Put Option by the Company of AEHC.
4. Corporate Guarantee of Tempamas Sdn. Bhd. for the full amount of RM4,000,000.00 together with the Board resolution sanctioning the acceptance of this Corporate Guarantee.
5. Personal Guarantee of Mr. Low Koon Chuan (NRIC 420710-10-5351/1492262) for the full amount of RM4,000,000.00.
6. Duly executed Power of Attorney for the Loan Agreement cum Assignments.
7. Duly accepted Letter of Offer together with the Board Resolution sanctioning the acceptance of this offer.

And that the Common Seal of the Company be affixed to all the relevant legal documents in accordance with the provisions of the Company's Articles of Association.

Sgd. (Illegible)
Mr. Michael Low Koon Chuan
Director
Sgd. (Illegible)
Miss Low Bee Leng
Director

Sgd. (Illegible)
Mdm. Tan Siew Eng
Director
Sgd. (Illegible)
Miss Low Bee Lay
Director

Kuala Lumpur,
Dated: 27 May, 1996.”

[9] The parties executed the loan agreement on 4.6.1996 as seen at pages 133 to 168 of “**AR-1**”. Pursuant to section 6.04 of the loan agreement, the defendant had agreed to pay to the plaintiff all sums due and owing under the loan agreement by way of a lump sum repayment within nine (9) months from the date of the release of the loan. And pursuant to section 10.01 (a) of the loan agreement, an event of default would occur, inter alia, when the defendant failed to make any repayment that has to be repaid in relation to the loan regardless of whether the amount has been formally demanded or not.

[10] Section 1.01 of the loan agreement (at page 134 of “**AR-1**”) sets out the purpose of the loan and it is stated to be for the purchase by the defendant of Mahabudi shares. Section 2.01 of the loan agreement (at page 136 of “**AR-1**”) categorically defined “**Mahabudi**” and “**Mahabudi shares**” in this way:

“ **‘Mahabudi’** means Mahabudi Development Sdn Bhd a company incorporated in Malaysia with its registered address at Room 503, Merlin Tower, Jalan Meldrum, 80000 Johore Bahru, Johor. ”

“ **‘Mahabudi Shares’** means the shares in Mahabudi purchased or to be purchased by the Borrower. ”

[11] Section 3.02 of the loan agreement also states the purpose of the loan in this way. That it “**shall be used to part finance the purchase of all the shares in Mahabudi**”.

[12] There was a letter of indemnity emanating from Low Koon Chuan – the third defendant in the civil suit, addressed to the plaintiff wherein the third defendant covenanted to cause the defendant in the foreclosure proceedings to complete the purchase of the entire issued and fully paid shares of Mahabudi shares and in the event of non-completion the third defendant covenanted to indemnify the plaintiff of all losses. That letter of indemnity was dated 27.5.1996 and it can be seen at page 393 of “**AR-2**” and it was worded as follows:

“From : Mr Low Koon Chuan, Michael
No.1 Jalan SS22A/4,
Damansara Jaya,
47400 Petaling Jaya,
Selangor Darul Ehsan.
Date : 27 May 1996
To : AEH Capital Sdn Bhd
Suite 6.01B, 6th Floor
Wisma Equity,
150 Jalan Ampang,
50450 Kuala Lumpur.

Dear Sirs,
Re: **Letter of Indemnity**

In consideration of your agreeing at my request to grant the loan of RM4 million to AM-EL Holdings Sdn Bhd, I hereby covenant to cause AM-EL Holdings Sdn Bhd to complete the purchase of the entire issued and fully paid shares of Mahabudi Development Sdn Bhd and I indemnify you of all losses in the event of non-completion.

Yours faithfully,

Sgd. (Illegible)

Low Koon Chuan, Michael

NRIC: 420710-10-5351/1492262.”

[13] The drawdown notice from the defendant to the plaintiff dated 4.6.1996 can be seen at pages 338 to 339 of the appeal record for the civil suit marked as “**AR-2**”. That drawdown notice make for an interesting reading material. It was worded in this way:

“Re: **Drawdown Notice**
Ringgit Malaysia Four Million Only (RM4,000,000.00)
Letter of Offer dated May 24, 1996

We refer to the above.

In accordance with the terms and conditions of the Letter of Offer, we hereby give you notice that we wish to drawdown the above mentioned loan on June 5, 1996.

We hereby irrevocably authorise and instruct you to drawdown the above loan sum in the following manner:-

1. a sum of RM3,042,000 to AM-EL Holdings Sdn Bhd;
2. a sum of RM748,000.00 to yourself to settle the upfront payment of interest in respect of the above loan;
3. a sum of RM160,000.00 to yourself to settle the upfront payment of advisory fee; (and)
4. a sum of RM50,000.00 to yourself as deposit for legal fees and stamp duty for the relevant documents.

We confirm that:-

- a) no event of default as defined in the Loan Agreement and no event which with the giving notice or the lapse of time or both has occurred and is continuing as at the date hereof or has occurred and is continuing as at the date hereof or has occurred and is continuing or will have occurred on the date stated herein on which the drawing is to be made;
- b) no extraordinary circumstances have occurred which will make it impossible for us to fulfill, perform and observe all the conditions, terms, covenants, agreements, stipulations, undertakings and

- obligations to be fulfilled, performed and observed by us under the terms of (the) security document;
- c) the representations and warranties contained in the Loan Agreement are true and accurate in all respects in relation to the facts pertaining as at the date hereof as if (it) had been set out in full herein;
 - d) the disbursement of the drawing as per our instructions herein will (not) cause any of the representations and warranties contained in the Loan Agreement to be untrue or incorrect as if made at the date of such disbursement and there is so far as we are aware, no reason why we will not be permitted to make payment as required under the Loan Agreement; and
 - e) there has been no breach of default by us in fulfilling, performing and observing all the conditions, terms, agreements, covenants, stipulations, undertakings and obligations contained in the Loan Agreement and/or other security documents on our part to be fulfilled, performed and observed.

Yours faithfully,

AM-EL HOLDINGS SDN BHD

Sgd. (Illegible)

DIRECTOR

For and on behalf of AM-EL Development Sdn Bhd

Name: Low Koon Chuan

IC No: 420710-10-5351.”

[14] By way of a letter dated 23.4.1997, the defendant expressed its wish to repay RM1.5 million to the plaintiff and also asked for an extension of time to repay the balance. That letter can be seen at page 295 of “AR-1” and it was worded in this way:

“Re: Term Loan of RM4 Million due to AEH Capital Sdn Bhd on April 25, 1997. Request for extension of RM2.5 Million for the period April 25, 1997 to October 31, 1997 and the option to extend a further 6 months ending 30 April 1997

We refer to the above and wish to repay RM1.5 Million (Ringgit One Million Five Hundred Thousand Only) of the above mentioned term loan facility of RM4 Million (Ringgit Four Million Only).

We hereby request for further extension of time to repay the outstanding balance of RM2.5 Million (Ringgit Two Million Five Hundred Thousand Only) for the period April 25, 1997 to October 31, 1997. We would also appreciate if you could consider to grant us another extension of six (6) months upon the expiry on October 31, 1997 - i.e. to extend to April 30, 1998.

The guarantors, Mr Michael Low Koon Chuan and Tempamas Sdn Bhd have been advised on the extension and they are agreeable to extend their commitment on it.

Your approval on the abovementioned request will be much appreciated.

Yours faithfully

Sgd. (Illegible)

MICHAEL LOW KOON CHUAN

DIRECTOR.”

[15] By letter dated 24.4.1997, the plaintiff agreed to the defendant’s request of extending the term for repayment of the RM2.5 million subject to the terms and conditions as set out in the letter of offer dated 24.5.1996. The plaintiff’s letter dated 24.4.1997 can be seen at pages 303 to 305 of “AR-1” or at pages 355 to 357 of “AR-1” and it was worded in this way:

“Re: Term Loan RM4 Million Further To Letter Of Offer Dated May 24, 1996. Extension of time to pay RM2.5 Million to AM-EL Holdings Sdn Bhd (‘AHSB’)

We refer to your request for extension of time to pay RM2.5 Million (Ringgit Two Million Five Hundred Thousand Only) due to us in your letter dated 23 April 1997.

We are pleased to advise that we are agreeable to extend the time for repayment of the RM2.5 Million due to us subject to the terms and conditions in our letter of offer dated May 24, 1996 and all security taken thereunder shall remain applicable except for the following:-

Condition:

The guarantors Mr Michael Low Koon Chuan and Tempamas Sdn Bhd. agreed and acknowledge to this extension of payment and all the terms and conditions and all incidental security documentation pertaining to the loan.

Tenure:

The extension is for a period of 6 months commencing on April 25, 1997 and expiring on October 31, 1997. The loan may be extended for a further 6 months without any extension fee – i.e expiring on April 30, 1998 at our sole discretion.

Interest:

Interest of 16% per annum on the extension period (i.e. 189 calendar days) amounting to RM207,123.29 (Ringgit Two Hundred And Seven Thousand, One Hundred Twenty Three And Twenty Nine Cents Only) shall be paid upfront to AEH Capital Sdn Bhd (‘AEHC’). This interest is

computed on the daily outstanding balance of the loan and charged upfront.

Fee:

Non-refundable extension fee of 2% flat amounting to RM50,000.00 (Ringgit Fifty Thousand Only) shall be paid upfront to AEHC.

Prepayment:

Prepayment of loan is allowed subject to three (3) days notice and interest shall be calculated up to the date of full repayment.

Existing securities:

All securities provided to us and all our rights under the above Loan shall be continuing except for the following which, under this extension, we are prepared to waive:-

- 1) The Call Option (expiring May 5, 1997) granted to AEHC to purchase 30% of the equity interest of Mahabudi Development Sdn Bhd for RM4 million for a tenure of 10 months.
- 2) The Grant of First Right of Refusal to AEHC to acquire Mahabudi Development Sdn Bhd in the event they decide to dispose Mahabudi to another listed company.

If the above is acceptable to you, kindly have your authorised signatory(ies) signify your acceptance by signing and returning the duplicate copy of this letter to us on or before 25 April 1997 together with all the relevant resolutions from yourselves and Tempamas Sdn Bhd (the corporate guarantor) sanctioning the acceptance of this letter and the terms and conditions herein, failing which this offer shall lapse.

Yours faithfully

Sgd. (Illegible)

Johari Low Abdullah @

Low Han Hing

DIRECTOR

Sgd. (Illegible)

Deniece Lim

DIRECTOR

We, AM-EL Holdings Sdn Bhd, hereby accept the above offer:

AM-EL HOLDINGS SDN. BHD.

Sgd. (Illegible)

MICHAEL K C LOW

Name:

Designation:

Date: 24/4/97

Acknowledgement that there is no objection to the above terms and conditions:

Sgd. (Illegible)

Mr. Michael Low Koon Chuan

Sgd. (Illegible)

Tempamas Sdn Bhd
(Authorised Signatory).”

[16] On 24.4.1997, the first defendant re-paid the plaintiff the sum of RM1.5 million (see paragraph 5 of the Statement of Agreed Facts as seen at pages 115 to 116 of “**AR-2**”). Such re-payment too was also alluded to in the affidavit of Wong Yoke Weng, the executive director in charge of operation for the plaintiff, that was affirmed on 8.8.2000. And, of crucial importance, such re-payment was also averred by the plaintiff in its Statement of Claim at paragraph 12 thereof (see page 51 of “**AR-2**”). The re-payment of RM1.5 million was also averred at paragraphs 8, 10 and 11 of the Amended Defence And Counterclaim as seen at pages 76 and 77 of “**AR-2**”.

[17] The defendant had breached the terms and conditions of the loan agreement when the defendant failed to settle the balance of the outstanding amount despite the demand made by the plaintiff. By a letter dated 3.2.1999 issued by the plaintiff’s solicitors and addressed to the defendant, the plaintiff had claimed from the defendant the sum of RM2,687,671.23 being the balance of the outstanding sum due and owing as at 15.12.1998 and which has to be settled within fourteen (14) days from the date of the aforesaid letter. That letter can be seen at page 240 of “**AR-1**” and it was worded as follows:

“Re: Outstanding amount of RM2,687,671.23 as at 15th December 1998 which is due and owing to AEH Capital Sdn. Bhd.

 We write in our capacity as solicitors for AEH CAPITAL SDN. BHD. of 3rd floor, Wisma Apex, 145A-C, Jalan Bukit, 43000 Kajang, Selangor Darul Ehsan.

Our client instructs us that pursuant to the terms of a letter dated 24th May 1996 and also pursuant to a Loan Agreement dated 4th June 1996, our client had granted to you a term loan facility to the amount of RM4,000,000.00 (‘the said loan facility’) for the purpose of your purchase of shares in Mahabudi Development Sdn Bhd.

Our client instructs us that the period for repayment under the said loan facility was extended by agreement until 31st July 1998. Our client further instructs us that you had failed to repay the amount then outstanding within the time agreed and our client had through a letter dated 21st September 1998, proceeded to terminate the said loan facility.

TAKE NOTICE that we have been instructed to demand which we hereby (do) that you settle the outstanding amount pursuant to the said loan facility of RM2,687,671.23 as at 15th December 1998 together with all applicable interests and our costs of RM105.00 for issuing this notice within fourteen (14) days of the date hereof, failing which our client will initiate legal proceedings against you to recover the same without any further reference to you.

Any part payment received will be accepted without prejudice to our client’s right to proceed with or maintain any legal action to recover the balance.”

[18] The defendant had failed, refused or neglected to pay the amount demanded by the plaintiff through its solicitors or any part thereof within the stipulated time period. It can readily be surmised that the failure, refusal or neglect to repay may be construed as a breach of the express term under the loan agreement. The terms are said to be expressed because they are specifically agreed upon by the parties. The terms and obligations undertaken by the parties are all set out in the loan agreement.

[19] Before I proceed any further, it would be ideal to dispose off some legal technicalities that has surfaced in the course of narrating the

facts of the case. The word “**guarantee**” – be it corporate or personal, appears and features prominently in the first appeal. It is the most common form of security. It is widely used in the commercial world today. Legally speaking, a guarantee may be defined as a promise by an individual known as the “**surety**” or “**guarantor**” to be held responsible for the default of another individual known as the “**principal debtor**” to a third person known as the “**creditor**”. In **P.J. Rajappa v. Associated Industries Pvt. Ltd. Quilon, 1 (1990) SC 162**, the court held that a contract of guarantee is a tripartite agreement involving the principal debtor, surety and the creditor. The courts in **Mathura Das v. Secretary of State, AIR 1930 All. 848**; and in **Nandlal Chananbax v. Firm Kishin Chand, AIR 1937 Sindh 50** held that the contract of guarantee can be created either by parol or by written instrument and that it may be express or it may be implied and inferred from the conduct of the parties. According to Bovill C.J. in **Coles v. Pack (1869) LR 5 CP 65 at page 70** that in construing a contract of guarantee, it is always prudent to construe the document in question according to the intention of the parties as expressed by the language that they have employed and try to understand it fairly in the sense it is used; and the intention of the parties can readily be ascertained by looking at the relative position of the parties at the time when the document is written. That would

be to paraphrase what Bovill C.J. said in that case. Certainly it involves the question of the construction of the contract of guarantee by the court.

[20] Simply put, a guarantee is the undertaking that the debt shall be paid by the guarantor (**Campbell v. Mc Isaac (1873) 9 NSR 287**). The distinctive feature of a contract of guarantee lies in the obligation which is assumed by the surety or guarantor (**Turner Manufacturing Co Pty Ltd v Senes (1964) NSW 692**; and **Coady v J Lewis & Sons Ltd (1951) 3 DLR 845**). It is always prudent to remember that the existence of a guarantee does not mean that the principal debtor is credit-worthy (**R v. Gurofsky (1919) 16 OWN 19**).

[21] On the other end of the scale, there is a contract of indemnity incurred by Low Koon Chuan—the third defendant in the civil suit. The contract of indemnity has been defined in **Yeoman Credit Ltd v Latter (1961) 1 WLR 828 at 830-831**, in **Total Oil Products (Aust) Pty Ltd v Robinson (1970) 1 NSW 701 at 703**; and in **Davys v Buswell (1913) 2 KB 47 at 53-55** as “a contract by one party to keep the other harmless against loss”. Such an obligation has no reference at all to the debt of another (**Clipper Maritime Ltd v Shirlstar Container Transport Ltd (1987) 1 Lloyd’s Rep 546 at 555**; and **Harburg India Rubber Comb Co v Martin (1902) 1 KB 778 at 784**).

[22] It is quite easy to identify a contract of indemnity as opposed to a contract of guarantee. The usage of the words “**indemnity**” or “**guarantee**” that appear in the instrument are clear indications of the intentions of the parties. One must determine the number of times, the expressions are being repeated (**Heald v O’ Connor (1971) 1 WLR 497 at 503**) or appear in the heading of the instrument itself (**Goulston Discount Ltd v Clark (1967) 2 QB 493 at 498 per Danckwerts L.J. ; Western Credit Ltd v Alberrry (1964) 2 ALL ER 938 at 940 per Davies L.J. ; and Crown Lumber Co Ltd v Engel (1961) 28 DLR (2d) 762**). Sometimes, however, such an indication would not be decisive (**Total Oil Products (Aust) Pty Ltd v Robinson (supra)**; and **Western Credit Ltd v Alberrry (supra)**) and the best approach would be to read and understand the document by looking for the essential nature of the document itself (**Yeoman Credit Ltd v Latter (supra)**).

[23] The defendant repaid RM1.5 million to the plaintiff and the legal position of the guarantee would be reduced accordingly. This was the stand adopted by Lord Denning in **Standard Chartered v Walker (1982) 3 ALL ER 938 at 943**:

“The guarantor is only under a secondary obligation to guarantee the debt of the principal debtor. If the principal debt is reduced for good reason, equally the guarantor’s obligation is reduced. If there is a term in the contract to the contrary, it should be rejected as being repugnant or unreasonable.”

[24] It must be emphasised that where the subject matter of the guarantee is the payment of a debt or a sum of money, then the understanding is this. If the principal debtor does not pay, then the surety or guarantor will have to pay. It is as simple as that. It is germane, at this juncture, to reproduce the speech of Baron Bayley in **Nicholson v Paget (1832) 1 Cr & M 48 at 52**. This was what his Lordship said:

“Now this is a contract of guarantee, which is a contract of peculiar description; for it is not a contract which a party is entering into for the payment of his own debt, or on his own behalf; but it is a contract which he is entering into for a third person; and we think it is the duty of the party who takes such a security to see that it is couched in such words as the party so giving it may distinctly understand to what extent he is binding himself. ”

[25] Recently, Lord Nicholls of Birkenhead in the House of Lords in **Royal Bank of Scotland v Etridge (No: 2) (2001) 3 WLR 1021 at page 1037** aptly said:

“The guarantor enters into the transaction at the request of the debtor. The guarantor assumes obligations. On the face of the transaction the guarantor usually receives no benefit in return, unless the guarantee is being given on a commercial basis. Leaving aside cases where the relationship between the surety and the debtor is commercial, a guarantee transaction is one-sided so far as the guarantor is concerned. The creditor knows this. ”

[26] In regard to the put option, I have this to say. It is an agreement where one party agrees to hold a particular obligation or to do a particular act or to purchase a particular property upon the happening of certain events or when the grantee requires that party to do it. Here, the put option

was given as security for the due payment of the debt. It constitutes a guarantee or at least place the grantor of the option in the position of a surety or guarantor bearing in mind that the exercise of the put option by the plaintiff is expressly conditioned on the default of the defendant as the borrower (**Standard Chartered Bank Australia Ltd v Greater Pacific Investments Ltd (1991) 5 WAR 541; and Mallett v Bateman (1865) LR 1 CP 163**).

[27] So much for the law. Reverting back to the factual matrix of the first appeal, it would be apparent that pursuant to section 4 (e) of the deed of assignment and as a result of the breach by the defendant, the plaintiff has the right, inter alia, to sell all the 47 condominium units in order to settle the amount outstanding under the loan. And by way of a letter dated 22.10.1999, the plaintiff through its solicitors had terminated the defendant's licence to occupy the condominium units and claimed vacant possession of the condominium units. That letter can be seen at page 245 of "**AR-1**" and it was addressed to the defendant and it was worded as follows:

**"Re: Outstanding amount of RM2,687,671.23 as at 15th December 1998 which is due and owing to AEH Capital Sdn Bhd
Deed of Assignment dated 4th June 1996**

We refer to our letter dated 3rd February 1999.

Our client instructs us that you have failed to settle the outstanding amount of RM2,687,671.23 as at 15th December 1998 together with accrued interests and legal fees within the time period stipulated therein.

We have been instructed to notify you which we hereby do that your license to possess the properties referred to as Parcel Nos. A-4-1, A-10-2, A-11-2, A-11-3, A-12-2, A-12-3, A-19-3, B-1-1, B-1-2, B-1-4, B-2-1, B-2-2, B-2-4, B-3-2, B-4-1, B-4-2, B-4-4, B-5-1, B-6-2, B-6-4, B-13-1, B-13-3, B-16-3, B-20-2, B-20-4, C-2-7, C-2-8, C-4-3, C-4-4, C-6-3, C-6-4, C-15-7, C-18-4, C-22-6, C-23-1, C-23-3, C-24-2, C-24-3, C-24-4, D-1-1, D-1-4, D-6-3, D-6-5, D-18-4, D-20-1, D-20-2, D-20-3 all of which forms a part of Setapak Ria Condominiums erected on Master Title held under Geran Mukim 465 Lot 1130 Mukim Setapak, Negeri Wilayah Persekutuan is TERMINATED FORTHWITH.

Kindly hand over vacant possession of the said properties to our client within seven (7) days of the date hereof. TAKE NOTICE that our client will be taking steps to sell the said properties under Clause 4 (e) of the Deed of Assignment dated 4th June 1996.”

[28] In short, the plaintiff sought to foreclose all the 47 condominium units by way of an auction sale.

[29] The defendant challenged the foreclosure proceedings and alleged that the loan agreement dated 4.6.1996 as seen at pages 133 to 168 of “**AR-1**” failed to comply and/or was contrary to the requirements of the Moneylenders Act 1951 (Act 400) and accordingly it was a transaction that was unlawful, unconscionable, inequitable, invalid and unjust and should be set aside. The defendant took issue on the validity of the agreements relating to the loan. The defendant also averred that the plaintiff ought to exhibit all the agreements in connection with the loan granted to the defendant. The defendant further averred that the loan agreement cannot be enforced by the plaintiff because it was wrongful and should be rejected as an attempt to show a transaction that is valid when, in fact, it was not. It was averred further by the defendant that the interest

imposed was excessive and inordinately high and was contrary to the provisions of the Moneylenders Act 1951 (Act 400). It was also said that the interest imposed upon interest was contrary to section 11 of the Civil Law Act 1956 (Act 67). It was alleged that the plaintiff had also agreed orally that they would provide a proper statement of account and release 22 units of condominiums should the defendant effect payment of RM1.5 million. On 24.4.1997, the defendant effected payment of RM1.5 million but the plaintiff breached the said oral agreement. It was said that the failure on the part of the plaintiff to honour the oral agreement has resulted in severe loss to the defendant as well as depriving the defendant of the benefit of the sale of the 22 units of condominiums. All these averments were nicely worded by way of an affidavit in reply affirmed by Low Koon Chuan, the director of the defendant on 29.6.2000.

[30] The defendant further averred, through Low Koon Chuan, as follows. That the plaintiff has instituted civil proceedings in the Kuala Lumpur High Court vide no: D5-22-360-2000 (referring to the civil suit of the second appeal) against the defendant, Tempamas Sdn Bhd and Low Koon Chuan for the recovery of (see page 260 of “**AR-1**”):

- “(i) the balance sum of RM2,687,671.23 owed as at 15.12.1998 ;
- (ii) interest on the sum of RM2,500,000.00 at the rate of 24.73% per annum from 16.12.1998 until full settlement ;

- (iii) costs on solicitors clients basis ; and
- (iv) such further or other relief as this Honourable Court deems fit and proper.”

[31] It was also averred that the defendants in the second appeal have filed the Statement of Defence and the Counterclaim. The defendant in the first appeal was advised to say that the “**plaintiff who seeks equity must also do equity**” and that the plaintiff must come to court with “**clean hands**”. It was the stand of the defendant that the originating summons that housed the foreclosure proceedings was defective, wrongful, invalid and failed to comply with the rules of the High Court. It was also the stand of the defendant that the plaintiff’s affidavit in support was defective, wrongful, invalid and failed to comply with the rules of the High Court for the following reasons:

- “(i) the affidavit in support failed to disclose the amount that was owing (which the defendant denied) and is to be paid ; and
- (ii) the affidavit in support contained a notice in accordance with Order 83 of the Rules of the High Court 1980 (**‘RHC’**).”

[32] By way of an affidavit styled as “**Affidavit III**”, the plaintiff through Wong Yoke Weng affirmed the said affidavit on 31.7.2000. In that affidavit, the particulars of the defendant’s accounts were listed as follows:

- “(a) the total amount borrowed by the defendant is RM4 million ;
- (b) the total amount paid by the defendant as at the date of this affidavit, namely as at 26.6.2000 is RM2,845,808.85 ;

- (c) the amount of outstanding interest calculated as at the date of the originating summons, namely as at 19.11.1999, is RM908,346.74;
- (d) the amount of outstanding interest calculated as at the date of this affidavit, namely as at 31.7.2000, is RM1,523,674.41 ;
- (e) the total interest per day accrued on the defendant's account, calculated from 1.7.2000 until 10.8.2000 is RM2,605.74 ; and
- (f) the total loan outstanding including the interest accrued as at the date of hearing of the originating summons, namely as at 10.8.2000 is RM4,050,131.45.”

[33] The first appeal revolved on the foreclosure proceedings and affidavits were exchanged between the parties. The first learned judge who heard the foreclosure proceedings had before him all the relevant affidavits.

[34] The following averments surfaced in the affidavit of Wong Yoke Weng, the executive director in charge of operation for the plaintiff, that was affirmed on 8.8.2000. The affidavit was styled as “**Affidavit IV**”. That affidavit also answered the second affidavit in reply of Low Koon Chuan that was affirmed on 7.8.2000. In “**Affidavit IV**”, it was averred that the plaintiff had complied with the requirements of the law particularly the Moneylenders Act 1951 (Act 4000) in its business transaction with the defendant. It was also averred that the plaintiff is carrying on its business as a licensed moneylender under the Moneylenders Act 1951 (Act 400) and the plaintiff was under no obligation to inform the defendant of matters concerning the exemption granted to the plaintiff under section 2A(2) of the

Moneylenders Act 1951 (Act 400). According to the plaintiff, the exemption was subject to the terms and conditions as may be imposed by the Minister. The plaintiff denied that it had failed to comply with the terms and conditions imposed by the Minister. The plaintiff put the defendant to strict proof and imposed a heavy burden on the defendant to prove that the plaintiff had breached any of the terms and conditions. The plaintiff was advised to say by their solicitors that the action of the Minister in granting the plaintiff the exemption was not ultra vires. The plaintiff averred that the accusation by the defendant was an insult to the good name of the Minister who is not a party to these proceedings and who is unable to give any explanation. And the Minister had acted properly and validly when he granted the exemption. The plaintiff was advised to say that it has the right to rely on section 2A (2) of the Moneylenders Act 1951 (Act 400) because as a licensed moneylender the plaintiff is subject to the provisions of the said Act including any exemption that has been granted by the Minister. The plaintiff was also advised to say that based on the conduct of the defendant, the principle of estoppel would be applicable. It was averred that the sum of RM1.5 million paid by the defendant was made as part repayment of the sum due and owing by the defendant to the plaintiff under the said loan. And that subsequent to the payment of RM1.5 million, the defendant was granted further extension of time by the plaintiff to settle the

remaining outstanding sum under the said loan upon the terms and conditions therein stipulated which have been agreed upon by the defendant. Among the agreed terms, the defendant will pay additional fees and interest in respect of the further extension of time. It was averred that it was not stated in any of the letters of extension which has been agreed by the defendant that the sum of RM1.5 million paid by the defendant was to secure the release of 22 units of the condominiums. The plaintiff was advised to say that the defendant was estopped from stating that the payment of RM1.5 million was intended to secure the release of the 22 units of the condominiums. It was averred that the defendant was estopped from adducing any oral agreement to contradict the express terms of the existing loan agreement. It was also averred that the defendant was estopped from denying the existence of the express terms and conditions as stipulated in the loan agreement.

[35] The first learned judge who heard the originating summons, in a short written judgment, dismissed the foreclosure proceedings with costs. His Lordship was of the view that the onus was on the plaintiff to produce evidence to satisfy the court that the purpose of the loan was for share financing. And that the plaintiff had also failed to annex any security documents to show that the loan was indeed for share financing. His Lordship felt that it was not sufficient to rely on the directors' circular

resolution of the defendant which stated that the purpose of the loan was to part finance the purchase of the fully issued and paid-up capital of Mahabudi in the face of the specific challenge mounted by the defendant in regard to the ability of the plaintiff to take advantage of the exemption as provided by section 2A (2) of the Moneylenders Act 1951 (Act 400). In the foreclosure proceedings, arguments pertaining to the payment by Hendersons (Malaysia) Sdn Bhd and in regard to the two (2) loans were not highlighted by the parties.

The second appeal

[36] Flowing from the foreclosure proceedings, the plaintiff filed the civil suit against the three defendants and this constituted the second appeal. The facts of the second appeal are the same as that of the first appeal and I shall not repeat them here unless they are necessary. Suffice for me to say that in the civil suit, the plaintiff claimed against the three defendants for the outstanding sum of RM2,687,671.23 owed as at 15.12.1998 together with interest at the rate of 24.73% per annum on the sum of RM2.5 million with effect from 16.12.1998 until the date of full settlement and costs on a solicitor client basis and such further or other relief as this Honourable Court deems fit and proper. The plaintiff's claim was based on a money-lending transaction between the plaintiff and the first defendant in the civil suit for a term loan facility of RM4 million for the

purchase of 30% of the issued and paid-up shares of Mahabudi. As security for the said loan, the first defendant in the civil suit had assigned 47 units of condominiums to the plaintiff.

[37] The Statement of Agreed Facts for the civil suit can be seen at pages 115 to 116 of “**AR-2**”. Included in the Statement of Agreed Facts was the averment that the plaintiff did not release 22 units of condominiums upon the receipt of RM1.5 million by the plaintiff from the first defendant in the civil suit on 25.4.1997. This meant that the parties agreed that 22 units of condominiums would be released to the first defendant by the plaintiff upon receipt of the RM1.5 million.

[38] The Summary of the Defence can be seen at pages 119 to 121 of “**AR-2**” while the Summary of the Counterclaim too can be seen towards the final part of page 121 of “**AR-2**”. The Defence has since been amended and in the Amended Statement of Defence (see pages 73 to 78 of “**AR-2**”), the defendants in the civil suit required proof that the plaintiff has a valid exemption from the rigours of the Moneylending Act 1951 (Act 400). According to the defendants, the loan agreement was a mere illegal money-lending transaction and it was also harsh, unconscionable, unjust and wrongful for the following reasons:

- (a) that the interest of 24.73% imposed on the loan was unreasonable, excessive, wrongful and illegal;

- (b) that the payment of an “**advisory fee**” constituted a wrongful charge and an illegal benefit required by the plaintiff;
- (c) that the payment of interest at the inception of the loan constituted a payment that has not accrued and, consequently, it was wrongful and illegal;
- (d) that the plaintiff has failed to comply with the law in this case;
- (e) that the plaintiff has failed to comply with the conditions precedent for the said loan; and
- (f) that the said loan was not for the costs of the purchase of Mahabudi shares by the first defendant.

[39] The Amended Statement of Defence in the civil suit further raised the following issues:

- (a) that the guarantee and indemnity cannot be enforced because the loan was illegal;
- (b) that there was no consideration for the guarantee and indemnity;
- (c) that the plaintiff was in breach of their specific undertaking to release the 22 units of condominiums to the defendants upon the first defendant paying the sum of RM1.5 million thereby causing loss and damages to the first defendant;

- (d) that the exemption granted to the plaintiff was ultra vires and that the loan was not confined to “**credit leasing and share financing**”; and
- (e) that the alleged purchase of the shares in Mahabudi was a sham devised and relied upon by the plaintiff to grant a loan to the first defendant without complying with the provisions of the Moneylenders Act 1951 (Act 400).

[40] The Amended Counterclaim of the first defendant as reflected at pages 78 to 81 of “**AR-2**” may briefly be stated as follows:

- (a) that since the loan transaction was wrongful, invalid, void and illegal and further since the exemption granted was invalid there was therefore no basis for the plaintiff’s claim which was unenforceable;
- (b) in the circumstances, the plaintiff was disentitled from relying on the exemption granted to blatantly contravene, at their whim, the provisions of the Moneylenders Act 1951 (Act 400); and
- (c) that as a consequence of the invalidity of the said transactions, the failure and breach by the plaintiff as well as their other wrongful acts, the first defendant has been put to expense and has suffered loss and damage.

[41] The first defendant in its Amended Counterclaim itemised the particulars of special damages in this way (see page 79 of “**AR-2**”):

- (i) Payment to solicitors Messrs Wong Lu Peen & Tunku Alina at RM49,947.00.
- (ii) Costs of obtaining a legal opinion at RM50,000.00.
- (iii) Legal fees and expenses incurred for the preparation of 25 assignments at RM31,250.00.

[42] There was also an averment in the Amended Counterclaim of the first defendant at page 80 of “**AR-2**” that despite the request of the first defendant, the plaintiff failed to provide a true and proper statement of account.

[43] And the first defendant sought for the following prayers in its Amended Counterclaim (see pages 80 to 81 of “**AR-2**”):

- “ (A) Damages.
 (B) Special damages at RM131,197.00.
 (C) Declarations that:
- (i) The loan agreement dated 4.6.1996 is wrongful, invalid and/or illegal in law.
 - (ii) The exemption granted to the plaintiff pursuant to section 2A (2) of the Moneylenders Act 1951 (Act 400) is wrongful and ultra vires the powers of the Minister granting it.
- In the event the said declarations are made, a consequential order be given that the plaintiff is disentitled from enforcing any agreement relating to the loan granted to the first defendant on 4.6.1996.
- (iii) Any guarantee and/or indemnity given by the second defendant and the third defendant to the plaintiff is void.
- (D) The plaintiff do provide a true account of all payments received from the first defendant.

- (E) Costs.
- (F) Such other additional or alternative relief as the interests of justice may require.”

[44] The Reply to the Amended Defence can be seen at pages 123 to 124 of “**AR-2**” and they may be paraphrased in this way:

- (a) That the plaintiff had been given the exemption by the Minister.
- (b) That the loan granted to the first defendant complied with the Moneylenders Act 1951 (Act 400).
- (c) That the first defendant wanted the loan for the purchase of the Mahabudi shares (see the first defendant’s directors resolution dated 27.5.1996 and the loan agreement dated 4.6.1996 signed by the first defendant).
- (d) That the first defendant was estopped from denying the purpose of the loan.
- (e) That the first defendant should not be allowed to benefit from their own default and should not escape repayment of the balance loan.
- (f) The guarantee and indemnity were valid and enforceable.
- (g) The plaintiff was not liable to ensure that the first defendant utilised the loan for the stated purpose for which they obtained the loan.

- (h) The plaintiff did not release the 22 units of condominiums because the first defendant failed to comply with their side of the bargain.
- (i) No merits in the contentions that the exemption granted by the Minister was ultra vires and that the alleged purchase of the Mahabudi shares was a sham. The plaintiff was not obliged to ensure that the first defendant utilised the loan for the purchase of the Mahabudi shares.

[45] The Defence to the Amended Counterclaim can be seen at page 125 of “**AR-2**” and there the plaintiff denied being liable to the defendants for any damages for reasons as stated in the Reply to the Amended Defence and, consequently, for the same reasons the first defendant was not entitled to the declaration.

[46] The parties were magnanimous. They agreed to resolve the civil suit based on three main issues, namely (see page 137 of “**AR-2**”):

- (a) Whether the loan granted by the plaintiff as stated in the Statement of Claim was settled on 24.4.1997?
- (b) Whether a new loan without a valid exemption of the Minister operates with effect from 25.4.1997?
- (c) Whether the exemption granted to the plaintiff by the Minister of Housing and Local Government exempting the plaintiff from the

provisions of the Moneylenders Act 1951 (Act 400) was ultra vires?

[47] At page 152 of “**AR-2**”, the notes of evidence indicated that the third learned judge decided the civil suit entirely on the three main issues without calling witnesses and relied entirely on the written submissions prepared by the learned counsel on both sides. And at page 153 of “**AR-2**”, the third learned judge announced his decision and allowed the plaintiff’s claims with costs. The third learned judge also dismissed the first defendant’s Counterclaim with costs. The additional record of appeal enclosed the order of the third learned judge dated 21.6.2004 and for convenience it will be referred to as “**AR-3**”. The original text of the order dated 21.6.2004 reads as follows (see pages 447 to 448 of “**AR-3**”, and obviously the reference to “**defendan**” must refer to the first defendant):

“MAKA ADALAH DIPERINTAHKAN bahawa tuntutan Plaintiff iaitu:
 (a) jumlah wang sebanyak RM2,687,671.23 setakat 15.12.1998; dan
 (b) faedah ke atas jumlah sebanyak RM2,500,000.00 pada kadar 24.73% setahun bermula 16.12.1998 sehingga ke tarikh penyelesaian penuh dibenarkan dengan kos DAN ADALAH JUGA DIPERINTAHKAN bahawa tuntutan balas Defendan ditolak dengan kos.”

[48] It must be emphasised that the plaintiff in its Statement of Claim did not disclose the payment of RM4 million by Hendersons (Malaysia) Sdn Bhd on 24.4.1997 nor did it disclose that the sum of RM2,242,876.71 that formed the second loan which was in favour of the first defendant was only

debited from the plaintiff's bank account on 30.4.1997. These non-disclosures contravened Order 79 rule 3 of the RHC.

[49] The third learned judge in the civil suit in relation to the second appeal did not render a written judgment.

Analysis of the first appeal and the second appeal

[50] It was argued that the plaintiff's claim may be unenforceable due to illegality. It was emphasised that the plaintiff had breached the provisions of the Moneylenders Act 1951 (Act 400) at its own peril. It was pointed out that the plaintiff had, for instance, imposed an interest rate of 24.73% per annum on the loan to the first defendant. This was said to be excessive, harsh and unconscionable. According to the case of **Samuel v. Newbold (1906) A.C. 461**, the fact that excessive interest was charged might in itself be sufficient evidence of harshness and unconscionableness. It was also emphasised that the plaintiff had also imposed "**advisory fees**" and collected interest and "**advisory fees**" up front because only the sum of RM3,042,000.00 was drawdown on 5.6.1996 (see the cheque dated 5.6.1996 for RM3,042,000.00 at page 344 of "**AR-2**" as well as the payment voucher for the same amount at page 343 of "**AR-2**") and the acknowledgment can be seen at page 342 of "**AR-2**" and it was worded as follows:

“AEH CAPITAL SDN BHD

(formerly known as Letac Credit Sdn Bhd)
(Licensed Moneylender)

June 5, 1996
AM-EL Holdings Sdn Bhd
No. 90 Jalan Alor,
50200 Kuala Lumpur
Attn. Mr Michael Low

Dear Sirs,

Re: Term Loan of RM4 Million

We refer to your drawdown instruction dated June 2, 1996 and are pleased to advise that the full loan of RM4,000,000.00 has been fully drawdown today ie. June 5, 1996. As per your instruction, we enclose herewith a cheque detailed as follows:-

Bank : Bank Bumiputra Malaysia Berhad

Cheque

Number: 092675

Amount : RM3,042,000.00

The above mentioned RM3,042,000.00 is derived as follows:-

(a) Interest paid upfront:	RM 748,000.00
(b) Advisory Fee:	RM 160,000.00
(c) Legal Fee & Stamp Duty deposit:	RM 50,000.00
(d) As balance of term loan of RM4 million paid to you:	<u>RM3,042,000.00</u>
Total	<u>RM4,000,000.00</u>

Kindly acknowledge receipt by having your authorised signatory(ies) sign and return to us the duplicate copy of this letter and the attached payment voucher.

Yours faithfully,
Sgd. (Illegible)
Deniece Lim
DIRECTOR

We hereby acknowledge receipt of the above:-
AM-EL HOLDINGS SDN BHD
Sgd. (Illegible)
DIRECTOR
For and on behalf of AM-EL Holdings Sdn Bhd
Name : Low Koon Chuan
Designation: Executive Chairman
Date: 5/6/1996.”

[51] Are the courts entitled to interfere with the freedom of contract that the parties are supposed to enjoy by questioning the harsh and unconscionable bargains that the parties have entered? There have been tell-tale signs of the resurgence of an equitable approach to

unconscionable bargains as reflected in the dicta of Lord Simon of Glaisdale in **Shiloh Spinners Ltd. v. Harding (1973) A.C. 691, 726**; and in the speech of Lord Diplock in **A. Schroeder Music Publishing Co. v. Macaulay (1974) 1 W.L.R. 1308, 1315**. And in **Alec Lobb (Garages) Ltd. v. Total Oil (Great Britain) Ltd (1985) 1 W.L.R. 173**, the Court of Appeal was quite magnanimous and did not rule out a broad doctrine of unconscionability even though it finally held that no unconscientious conduct had occurred. But, the recent cases have shown a trend to adhere firmly onto the principles of freedom of contract particularly in relation to commercial contracts between businessmen generally (**Multiservice Bookbinding Ltd. v. Marden (1979) Ch.84**; and **Photo Productions Ltd. v. Securicor Transport Ltd. (1980) A.C. 827**). Earlier on in 1962, Lord Radcliffe in **Bridge v. Campbell Discount Co. Ltd. (1962) A.C. 600, 626** re-emphasised the need to adhere religiously to the principles of freedom of contract.

[52] Here, the principles of freedom of contract must be adhered to. The parties willingly entered into the contract without any prompting from any third party. But the learned counsel for the first and the third defendants argued that the so called “**transgressions**” by the plaintiff may be excused if the plaintiff could validly rely on the exemption granted by the Minister. It was also argued that the Ministerial exemption was conditional

and only applied to loans granted by the plaintiff for “**credit leasing**” or “**share financing**”.

[53] The purpose of advancing the argument that the contract between the plaintiff and the first defendant in the second appeal was harsh and unconscionable was because of the stand by the first defendant that the contract ought to be set aside. Put differently, the first defendant in the second appeal challenged the loan agreement and sought for a declaration that the loan agreement was wrongful, invalid and/or illegal in law. Of course, if it can be shown that the plaintiff here engaged itself in unconscionable conduct or exerted an unconscientious use of power which must be characterised by some moral culpability or impropriety (**Alec Lobb (Garages) Ltd. v. Total Oil (Great Britain) Ltd (supra) at page 182**) then the loan agreement may be set aside. The plaintiff must have behaved “**in a morally reprehensible manner, that is to say, in a way which affects his conscience**” (borrowing the words utilised in **Multiservice Bookbinding Ltd. v. Marden (supra) at page 110**). And “**the classic example of an unconscionable bargain is where advantage has been taken of a young, inexperienced or ignorant person to introduce a term which no sensible, well-advised person would have accepted**” (again borrowing the words of **Multiservice Bookbinding Ltd. v. Marden (supra) at page 110**). But, the facts as unfolded did not

support the proposition that the plaintiff had acted in a reprehensible manner at par with the examples as illustrated by **Multiservice Bookbinding Ltd. v. Marden (supra)**. It is germane, at this juncture, to quote what Chong Siew Fai J. (as he then was) said in **Fui Lian Credit & Leasing Sdn. Bhd. v Kim Leong Timber Sdn. Bhd. & 7 Ors. (1991) 1 CLJ 522, 526:**

“In order that a party may free himself from complying with an agreement he had entered into, he must show that the bargain or some of its terms was unfair and unconscionable. It is not enough to show that, in the eyes of the court, it was unreasonable. A bargain cannot be unfair and unconscionable unless it is shown that one of the parties to it has imposed an objectionable term in a morally reprehensible manner, that is to say, in a way which affects his conscience or has procured the bargain by some unfair means.”

[54] This was not the case of the “**strong pushing the weak to the wall**” (borrowing the words used in **Alec Lobb (Garages) Ltd. v. Total Oil (Great Britian) Ltd (supra) at page 183**).

[55] It must be emphasised that the doctrine of unconscionability was alluded to in the affidavit in reply of Low Koon Chuan that was affirmed on 29.6.2000 as seen at pages 69 to 72 of “**AR-1**” at paragraph 5(i) when the loan transaction was described as “**unlawful, unconscionable and inequitable, invalid and unjust and should be set aside**”. It was also alluded to in the Amended Defence as seen at page 74 of “**AR-2**” at paragraph 3 when the loan transaction was described as “**harsh, unconscionable, unjust and wrongful**”. The same cannot be said of the

case of **Credit Lyonnais Bank Nederland NV v Burch (1997) 4 ALL ER 144** where Nourse L.J. acknowledged that the doctrine of unconscionability was not pleaded but observed that “**the unconscionability of the transaction remains of direct materiality to the case based on undue influence**” (see page 151). Millett L.J.’s judgment in **Credit Lyonnais Bank Nederland NV v. Burch (supra) at page 153** went so far as to hold that the doctrine of undue influence can be advanced within the broader doctrine of unconscionability. This was what Millett L.J. said:

“In such a context the two equitable jurisdictions (to set aside harsh and unconscionable bargains and to set aside transactions obtained by undue influence) have many similarities. In either case it is necessary to show that the conscience of the party who seeks to uphold the transaction was affected by notice, actual or constructive, of the impropriety by which it was obtained by the intermediary, and in either case the court may in a proper case infer the presence of impropriety from the terms of the transaction itself.”

[56] From the above passage, it would appear that there are similarities between these two (2) equitable doctrines: undue influence and unconscionable bargain. Indeed, the doctrine of undue influence may be subsumed by the broader doctrine of unconscionability. A narrower scope of the doctrine of unconscionability is the concept of inequality of bargaining power. Lord Denning MR in **Lloyds Bank Ltd. v. Bundy (1975) Q.B. 326**, had this to say about the concept of inequality of bargaining power (see page 339):

“By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.”

[57] However, in these two (2) appeals before us, the facts speak for themselves. It is not disputed that the plaintiff is a licensed money-lending company. And, according to the Statement of Agreed Facts at pages 115 to 116 of “**AR-2**”, the plaintiff is exempted from the rigours of the Moneylenders Act 1951 (Act 400) by virtue of section 2A (2) of the said Act and that exemption has been gazetted in the Government Gazette No: P.U(B) 242 dated 15.5.1996 for a period of three years. This meant that, at the material time, the exemption was still in force. Section 2A (2) of the Moneylenders Act 1951 (Act 400) enacts as follows:

“2A (2) The Minister may –

- (a) in consideration of the special circumstances relating to the nature of the business of any company, or the objects of any society, and its financial standing; and
- (b) if he is satisfied that it would not be contrary to the public interest to do so,

by notification in the Gazette exempt such company or society from all or any of the provisions of this Act, and such exemption shall be granted for such duration as may be specified in the notification, and may be made subject to such limitations, restrictions or conditions as the Minister may specify in the notification.”

[58] And by virtue of section 5(1) of the Moneylenders Act 1951 (Act 400), the plaintiff has been licensed to conduct business as a

moneylender. The licenses have been exhibited and they can be seen at pages 372, 389, 390 and 391 of “**AR-2**”. The gazette notification evidencing the exemption can be seen at pages 279 to 280 of “**AR-1**” and the exemption was given by the Minister of Housing and Local Government. Even the Statement of Agreed Facts mentioned the relevant Minister to be the Minister of Housing and Local Government. Yet, the learned counsel for the first and the third defendants in the second appeal and who also acted for the defendant in the first appeal argued that the “**blanket**” exemption was self defeating. He submitted that if the exemption was meant to exempt the plaintiff from the rigours of the Moneylenders Act 1951 (Act 400) then the plaintiff should not rely on section 2A (2) of the said Act in order to obtain the exemption. It was like, according to him, “**chopping off the hand that feeds you**”. He also submitted that the exemption as granted by the Minister was absurd, repugnant and inconsistent with the said Act as well as the Federal Constitution. According to him, it created a situation where Parliament could never possibly have intended. He submitted that should the exemption be valid then there was no necessity for the plaintiff to be licensed and the plaintiff would be permitted to flout the provisions of the said Act with impunity and the plaintiff would also be permitted to undertake the business of money-lending without even being a moneylender in law.

[59] By way of a rebuttal, I have this to say. It must be borne in mind that the Moneylenders Act 1951 (Act 400) strikes at moneylenders and not at money-lending. According to Salleh Abas F.J. (as he then was) in **Ngui Mui Khin & Anor. v. Gillespie Bros & Co. Ltd (1980) 2 MLJ 9, 12:**

“At the outset we wish to observe that the Moneylenders Ordinance, 1951 does not apply to money-lending but only to moneylenders. It does not make every money-lending transaction illegal and unenforceable. It is only a money-lending transaction of a moneylender which is the subject matter of the Ordinance and must comply with its provisions on pain of being declared illegal and unenforceable by the court.”

[60] And according to the same learned judge in the person of Salleh Abas F.J. (as he then was) in the case of **Yeep Mooi v. Chu Chin Chua & Ors. (1981) 1 MLJ 14, 15, 16:**

“We have on another occasion observed that the Moneylenders Ordinance, 1951 does not strike at moneylending but at moneylenders and at the loans lent by them. The Ordinance is never intended to apply to an individual, or any member of the public who lends money even at interest, unless he does so as a business.”

[61] As a business concern, the plaintiff has to make reference to the Moneylenders Act 1951 (Act 400) and to seek an exemption from the said Act by referring to the Minister of Housing and Local Government under section 2A (2) of the said Act. There is no other statute that confers such an exemption like the Moneylenders Act 1951 (Act 400). This is not the case of “**chopping off the hand that feeds you**” situation but rather it is the law of the country. The Moneylenders Act 1951 (Act 400) have been enacted by the legislature for the protection of the borrowers and the

moneylender has only himself to blame if he does not comply strictly with the provisions therein (**F.Xavier v. Kathamuthu Konar (1958) MLJ 286**; and **Ang Khye Pang v. Chop Ban Aik (1939) MLJ 282**). According to the case of **Kartar Singh v. Mahinder Singh (1959) MLJ 248**, moneylenders must learn the importance of strict compliance with the technical requirements of the Ordinance if they wish to recover their money. And according to Raja Azlan Shah J. (as His Royal Highness then was) in **Overseas Union Finance Ltd. v. Lim Joo Chong (1971) 2 MLJ 124, 126** that:

“This is indeed a lesson to be learnt by moneylenders in future to be more careful when lending money on a security and also to be sure that the Moneylenders Ordinance has been fully complied with. The Moneylenders Ordinance is calculated to protect borrowers from unscrupulous moneylenders but careless moneylenders are also caught by it.”

[62] Finally, Smith J., in **Teja Singh v. K. Periasamy (1958) 24 MLJ 81, 83** aptly said that the court may have sympathy for the moneylenders who may lose their claim on a technical ground but the court “**cannot fly in the face of the Moneylenders Ordinance.**”

[63] All these authorities show the need to adhere strictly to the provisions of the Moneylenders Act 1951 (Act 400) and the plaintiff here has done just that.

[64] Next, it was argued that it should be the Minister of Finance and not the Minister of Housing and Local Government who should grant the exemption. Section 2A (2) of the Moneylenders Act 1951 (Act 400) allows the Minister to grant an exemption but it does not specify who this Minister is to be. The plaintiff relies on the Ministerial Functions Act, 1969 to assert that the Minister of Housing and Local Government is the correct Minister that is empowered. Section 2 of the Ministerial Functions Act 1969 enacts as follows:

“2. Functions, styles and titles of Ministers.

- (1) The Yang di-Pertuan Agong may by order notify in the Gazette-
- (a) that a Minister has been conferred with any functions or has been charged with any responsibility in respect of a particular department or subject or that any transfer, to any other Minister, of any of the functions or responsibility referred to has been made;
 - (b) that any style or title has been assigned to any Minister (except the Prime Minister) or that any change in any style and title referred to has been made.”

[65] And by virtue of section 2 of the Ministerial Functions Act 1969 as reproduced above, the Yang diPertuan Agong makes the following order which may be cited as the Ministers of the Federal Government Order 1983. Order 2 of the Ministers of the Federal Government Order 1983 states as follows (see the gazette notification dated 26.5.1983 vide P.U.(A) 202):

“2. It is notified that the persons named in the first column of the Schedule shall have the styles and titles of office and shall be charged with the responsibility for the departments and subjects specified in the corresponding second, third

Ministerial
functions.

and fourth columns of the Schedule respectively and shall be assisted by the person or persons whose name or names appear in the first column of the Schedule underneath the names of the first-mentioned persons and who shall have the styles and titles of office specified in the corresponding second column of the Schedule.”

[66] Now, looking at the Schedule at page 830 of P.U.(A) 202, the Minister of Finance is empowered to handle matters pertaining to:

“External and domestic loans.
Loans and financial guarantees pertaining to States, statutory bodies, corporations and other bodies.”

[67] While the Schedule at page 836 of P.U.(A) 202, the Minister of Housing and Local Government is empowered to handle matters pertaining to:

“Pawnbrokers, moneylenders and money-lending.”

[68] It is now correct to say that the exemption that was given to the plaintiff by virtue of section 2A (2) of the Moneylenders Act 1951 (Act 400) by the Minister of Housing and Local Government was correctly done. We are concerned here with moneylenders and the right Minister has given the exemption.

[69] It was the first defendant who applied for the loan of RM4 million and the plaintiff granted the said loan. The first defendant had held out and represented to the plaintiff that the loan was for part financing of the purchase of Mahabudi shares. It was not the duty of the plaintiff to ensure that the loan was to be utilised for the purpose of purchasing the shares.

The first defendant had from the outset held out the purpose of the loan but reneged on it. The first defendant agreed to the interest and advisory fees as set out in the letter of offer and the loan documentation. Even the directors resolution of the first defendant agreed to the interest rate and the advisory fee. The first defendant also agreed to and paid the agreed interest upfront. All these were the agreed terms and the first defendant cannot resile from it (**The Co-operative Central Bank Ltd. v. Realvest Properties Sdn Bhd (1992) 3 CLJ 1485; Bumiputra Merchant Banker Berhad v. The Melewar Corporation Bhd. & 2 Ors. (1990) 2 CLJ 30; and Yeoh Hooi Ing (as personal representative of the Estate of Tan Teong Soon, deceased) v Cheung Kong Hotel Sdn Bhd (1997) 1 AMR 744**). Having agreed to all these terms it was pointless for the first defendant to argue that the loan of RM4 million for the purpose of purchasing the Mahabudi shares was a sham transaction. It was also pointless to argue that the plaintiff had exploited the first and the third defendants' then financial predicament by imposing exorbitant interest and charging advisory fee. This court would not lend its aid nor assist the first and the third defendants to take advantage of its own defaults or wrongs by relying on its own breaches in order to avoid its obligations (**Co-operative Central Bank Limited, The v Feyen Development Sdn Bhd (1995) 1 AMR 2751**).

[70] Incidentally, there was no evidence to show that the plaintiff was in pari delicto and that they knew that when they loaned the money to the first defendant the latter did not intend to purchase the Mahabudi shares (**Ahmad bin Udoh & Anor. v. Ng Aik Chong (1970) 1 MLJ 82, F.C.**). For all intents and purposes, the loan that was granted to the first defendant was for the purchase of Mahabudi shares by the first defendant. The following compelling evidence would suffice to show the purpose of the loan:

- (a) At page 202 of “**AR-2**” which is the same as page 123 of “**AR-1**”, the first defendant applied by letter dated 17.5.1996 for RM4 million loan and stated in the letter that, inter alia, the first defendant will grant an irrevocable call/put option to the plaintiff to purchase 30% of Mahabudi shares. This meant that the first defendant was to purchase the Mahabudi shares from the owners and then grant the option to the plaintiff.
- (b) At page 245 of “**AR-2**”, the plaintiff’s letter of offer dated 24.5.1996 where the purpose of the loan was also stated and that was to part finance the purchase of the fully issued and paid up capital of Mahabudi. The first defendant had also signed at the bottom of the letter of offer at page 251 of “**AR-2**”.

- (c) At pages 256 to 257 of “**AR-2**” which is the same as pages 337 to 338 of “**AR-1**” and that was the first defendant’s circular resolution approving the loan for the purpose of part financing the purchase of Mahabudi shares.
- (d) At pages 260 to 294 of “**AR-2**” which is the same as pages 133 to 168 of “**AR-1**”, and that was the loan agreement dated 4.6.1996 and it repeated again the purpose of the loan.
- (e) At pages 330 to 335 of “**AR-2**” which was the option agreement dated 4.6.1996 and again it repeated the purpose of the loan.
- (f) At page 337 of “**AR-2**” which was a letter dated 4.6.1996 from the first defendant to the plaintiff entitled “**First Refusal**”. By this letter, it showed that the first defendant had entered into a sale and purchase agreement to buy all the shares of Mahabudi.
- (g) At page 338 of “**AR-2**”, the drawdown notice from the first defendant to the plaintiff dated 4.6.1996 confirming compliance with the terms of the loan agreement.
- (h) At page 371 of “**AR-2**”, the Statutory Declaration dated 27.5.1998 of Low Koon Chuan – the third defendant, confirming

that all the statements and information provided were true and continue to be true.

- (i) At page 393 of “**AR-2**”, which was the letter of indemnity of Low Koon Chuan alluding to the purchase of the Mahabudi shares.

[71] The first and the third defendants challenged the loan agreement and sought for a declaration that the loan agreement was wrongful, invalid and/or illegal in law. But they forgot that there was a Statutory Declaration of the third defendant – Low Koon Chuan, dated 27.5.1998 which whittled away their arguments. That Statutory Declaration was worded as follows (see page 371 of “**AR-2**”):

“STATUTORY DECLARATION

I, **LOW KOON CHUAN (NRIC NO: 420710-10-5351)** of No. 1, Jalan SS 22A/4, Damansara Jaya, 47400 Petaling Jaya, a Director of AM-EL Holdings Sdn. Bhd. (Company No. 203745M) (hereinafter referred to as ‘the Company’) a company incorporated in Malaysia and having its registered address at No: 90, Jalan Alor, 50200 Kuala Lumpur do solemnly and sincerely declare that:-

1. I am fully authorised by the Company to make this declaration.
2. By a loan agreement dated June 4, 1996 (hereinafter referred to as ‘the Loan Agreement’) entered into between the Company and AEH Capital Sdn. Bhd. (‘the Lender’) the Lender granted the Company a loan of RM4,000,000.00 (‘the Loan’).
3. The Company has made a partial repayment of RM1,500,000.00. The balance of the Loan of RM2,500,000.00 is payable by July 31, 1998 and the Company has applied for an extension of time to repay the balance of the Loan.
4. In support of the application for the extension of the Loan, I hereby declare that since the date of the Loan Agreement:-
 - (a) there has been no material change or circumstances in or affecting the Company or its subsidiaries and that the statements and information provided to the Lender in particular in the Loan Agreement and security documents were true and continue to be

- true in all material respects at the time of submission by the Company;
- (b) all securities taken as security for the Loan Agreement including the assignment of 47 units of apartments at Setapak Ria held under Master Title Geran 465, Lot 1130, Mukim of Setapak, Wilayah Persekutuan are still intact;
 - (c) the Company's obligations under the Loan Agreement or any other document relating to the Loan continue to be valid, binding and enforceable in accordance with their terms;
 - (d) no litigation arbitration or administrative proceedings is current or pending or, so far as the Company is aware threatened (I) to restrain the entry into, exercise of its rights under and/or performance or enforcement of or compliance with its obligations under the Loan Agreement or any other document relating to the Loan or (II) which has or could have a material adverse effect on the Company.

AND I make this solemn declaration conscientiously believing the same to be true by virtue of the Statutory Declaration Act, 1960.

SUBSCRIBED and SOLEMNLY declared)
 by the abovenamed LOW KOON CHUAN) Sgd. (Illegible)
 in the State of Wilayah Persekutuan this)
 27th day of MAY 1998)

Before me,

Sgd. (Illegible)
 No. W 128
 Haron Hashim
 Pesuruhjaya Sumpah
 Malaysia.”

[72] When you talk about illegality, you must first ascertain (1) whether it is illegal at its inception and (2) whether it is illegal during performance. The first situation envisages the position where the contract is illegal at its inception or formation (**Levy v. Yates (1838) 8 A.&E. 129**). Whereas the second situation envisages the position where the contract is legal at its inception or formation but is performed in a manner which is illegal (**Ashmore, Benson, Pease & Co. Ltd. v. A.V. Dawson Ltd. (1973)**)

1 W.L.R. 828). In both situations, the courts will not enforce the contract nor provide any other remedies arising out of the contract.

[73] According to Blackburn J. in **Waugh v. Morris (1873) L.R. 8 Q.B. 202, 208** that, “**Where a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties knew the law or not**”. And when a legislation prohibits the making of the contract then the contract is said to be illegal (**Mahamed v. Alaga & Co. (1998) 2 ALL ER 720; and Hughes v. Kingston upon Hull C.C., (1999) 2 ALL ER 49**). At common law, when the contract is meant to “**rig the market**” by offering inflated prices for shares in a certain company, that contract is illegal because it involves a criminal conspiracy (**Scott v. Brown (1892) 2 QB 724**). In what way the loan agreement here was said to be illegal has not been demonstrated. It was a loan agreement for the sum of RM4 million to purchase the Mahabudi shares. It was not a loan agreement to commit a crime or to commit a civil wrong. The commission of a legal wrong was never contemplated by the parties when they signed the loan agreement. It is a legally binding contract which is not prohibited by statute and it is enforceable unlike the case of **Chai Sau Yin v Liew Kwee Sam (1962) MLJ 152, P.C.**

[74] Next, the learned counsel for the first and the third defendants argued that there were two (2) loans. The first loan was for the sum of

RM4 million which was granted to the first defendant on 4.6.1996 and drawdown on 5.6.1996 and it had been re-paid in full on 24.4.1997 in the sum of RM4 million by Hendersons (Malaysia) Sdn Bhd. The official receipt of the plaintiff vide no: 3009 evidencing such payment can be seen at page 411 of “**AR-2**” and I must reproduce it forthwith:

“OFFICIAL RECEIPT

No. 3009

AEH CAPITAL SDN BHD

(NO. SYARIKAT: 118735-K)

(formerly known as Letac Credit Sdn Bhd)

(Licensed Moneylender)

Suite 6.01B, 6th Floor, Wisma Equity,

150 Jalan Ampang, 50450 Kuala Lumpur, Malaysia

Tel: 03-2647625, 2647626 Fax:03-2647670

Date: 24/4/1997

Received from HENDERSONS (MALAYSIA) SDN BHD

The sum of ringgit **FOUR MILLION ONLY**

In payment of **PRINCIPAL OUTSTANDING ON AM-EL HOLDINGS SDN BHD LOAN**

Cash/Cheque No. 060311

This receipt is Valid

Subject to Clearance of your Cheque(s)

AEH CAPITAL SDN BHD

Sgd. (Illegible)

Authorised Signature.”

[75] The official receipt as reproduced above showed that the payment by Hendersons (Malaysia) Sdn Bhd to the plaintiff in the sum of RM4 million was payment for the “**principal outstanding on AM-EL Holdings Sdn Bhd loan**” and it was for this reason that it was argued that the loan for RM4 million that was granted by the plaintiff to the first defendant on 4.6.1996 was settled and paid in full on 24.4.1997 by Hendersons (Malaysia) Sdn Bhd. The cheque butt to show the payment of RM4 million on 24.4.1997 can be seen at page 428 of “**AR-2**”.

[76] The second loan, according to the learned counsel for the first and the third defendants, was for the sum of RM2,242,876.71 that was granted on 29.4.1997 to the first defendant by way of the plaintiff's cheque BBMB 138879 dated 25.4.1997 as seen at page 443 of "**AR-2**". The second loan was said to be granted on 29.4.1997 based on the payment voucher as seen at page 445 of "**AR-2**" and in that payment voucher the date of 29.4.1997 was deleted and substituted by the date 25.4.1997 and it was for this reason that the learned counsel for the first and the third defendants argued that there was a lapse of five (5) days between the repayment of the first loan and the granting of the second loan. And for the same reason it was also argued that the second loan could not and cannot be a continuation of the first loan which had been fully settled on 24.4.1997. It was emphasised that the plaintiff's cheque dated 25.4.1997 as seen at page 443 of "**AR-2**" to the first defendant was approved by the plaintiff's own payment voucher only on 29.4.1997 as seen at page 445 of "**AR-2**". It was also emphasised that the plaintiff's payment voucher contained an extraordinary alteration, that is, from the date "**29.4.1997**" to "**25.4.1997**".

[77] It was argued that on 29.4.1997 the plaintiff was not in a financial position to grant the second loan to the first defendant because the statement of account from the plaintiff's bank at page 424 of "**AR-2**" showed that the sum of RM2,242,876.71 was only cleared on 30.4.1997.

In short, it was only 30.4.1997 that the second loan was debited from the plaintiff's account in favour of the first defendant. And the lapse of five (5) days between the full repayment of the first loan and the disbursement of RM2,242,876.71 established the existence of the second loan which was granted to the first defendant on 29.4.1997.

[78] It was the stand of the first and the third defendants that there had been no extension of the first loan as alleged by the plaintiff. And since the second loan was clearly neither for credit leasing nor share financing, it was submitted that the Moneylenders Act 1951 (Act 400) had been contravened thereby rendering the second loan illegal and unenforceable or at the very least against public policy. Of crucial importance were the following submissions. That neither the first loan nor the second loan could have been for the purchase of Mahabudi shares because on 24.3.1997 (see pages 412 to 416 of "**AR-2**") the plaintiff had granted a loan of RM35 million to Shardin bin Mohd Arshad to acquire the entire issued and paid up capital of Mahabudi during the tenure of the first loan. The loan to Shardin bin Mohd Arshad was fully settled on 16.4.1997 (see page 418 of "**AR-2**").

[79] By way of a rebuttal, the plaintiff had this to say. That for the very first time in the second affidavit in reply of Low Koon Chuan that was affirmed on 7.8.2000 as seen at paragraphs 5 and 15 at pages 91, 93 and

94 of “AR-1” for the Malay language text and at pages 98, 100 and 101 of “AR-1” for the English language text the defence that the plaintiff had not purchased the Mahabudi shares was raised. It was too late in the day. The first defendant, after having agreed to and having executed all those documents as alluded to in the early part of this judgment and bearing in mind that Low Koon Chuan had sworn a Statutory Declaration on 27.5.1998, now state that the plaintiff did not purchase the Mahabudi shares. That was the unkindest cut of them all. The first defendant ought not to be allowed to raise that defence and rely on its own lies and defaults. The state of the law at the material time was that the security granted by an assignment must be considered as an equitable charge. And that an absolute assignment would rank higher than a charge (**Pancaran Nilam (M) Sdn Bhd v. Malayan Banking Bhd (2000) 4 CLJ 793, C.A.**). In **Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd (1980) 2 MLJ 149**, the Supreme Court held that in an absolute assignment the assignee had acquired all the interest of the assignor in the purchase agreement relating to immovable property. And that the chargor in order to oppose an order for sale being granted by the court must show cause to the contrary (**Kandiah Peter A/L Kandiah v. Public Bank Bhd. (1993) 4 CLJ 332, S.C.**). Furthermore, any contractual claims or breaches that the chargor

may have against the chargee cannot constitute cause to the contrary
(Low Lee Lian v. Ban Hin Lee Bank Bhd. (1997) 2 CLJ 36, S.C.).

[80] The plaintiff did not disclose the repayment of RM4 million by Hendersons (Malaysia) Sdn Bhd at the foreclosure proceedings and at the civil suit. It was disclosed, however, by the first and the third defendants upon a motion in their behalf during the course of the civil suit. Such payment was not denied by the plaintiff.

[81] It was submitted that by virtue of the full payment, even if there was a purchase of the Mahabudi shares (which the first and the third defendants denied), it was clear that the whole transaction for the purchase of the said shares was completed. It was emphasised that the request for an extension of time to repay the balance of RM2.5 million till 30.4.1998 was nullified when full payment of the first loan was made by Hendersons (Malaysia) Sdn Bhd on 24.4.1997.

[82] Having perused through the evidence with a toothcomb, it was part and parcel of my judgment that there was no unconscionable conduct on the part of the plaintiff. And no undue influence had been exerted by the plaintiff. The loan agreement was not harsh and unconscionable. The loan agreement too was not wrongful, nor invalid, nor illegal. It was executed at arms length. The loan was meant for the purchase of the Mahabudi shares. It was legally done and therefore enforceable. The rate of interest

was agreed by the first defendant and therefore it was not excessive nor harsh nor unconscionable. The advisory fees too have been agreed between the parties. The principles of freedom of contract have been vigorously applied in these appeals.

[83] The Ministerial exemption that was accorded to the plaintiff expired on 8.3.1999. And if this court were to accept the submissions of the learned counsel for the first and the third defendants that there were two (2) loans, these two (2) loans would technically still be covered by the Ministerial exemption. Now, evidence wise, the first loan was for the sum of RM4 million and there was a loan agreement for that purpose. The chronology of events surrounding the first loan would be as follows:

- (a) On 4.6.1996, the loan agreement for RM4 million was executed.
- (b) On 5.6.1996, a cheque for RM3,042,000.00 (after paying the agreed up front charges and fees) was issued to the first defendant.
- (c) On 23.4.1997, the first defendant repaid RM1.5 million to the plaintiff and the first defendant requested to extend time to repay the balance of RM2.5 million by 30.4.1998 (the Statement of Agreed Facts also mentioned about the first defendant repaying RM1.5 million to the plaintiff).

- (d) On 24.4.1997 Hendersons (Malaysia) Sdn Bhd paid RM4 million to the plaintiff for payment of the loan amounting to RM4 million. The official receipt showed that the payment was for the **“principal outstanding on AM-EL Holdings Sdn Bhd Loan”**.

[84] Thus, calculation wise, the net result would be as follows:

RM1.5 million	(paid by the first defendant)
<u>RM4 million</u> +	(payment by Hendersons (Malaysia) Sdn Bhd)
RM5.5 million	(Total amount paid)
<u>RM4 million</u> -	(loan amount)
<u>RM1.5 million</u>	(surplus amount)

[85] This meant that the first defendant had overpaid the plaintiff by RM1.5 million in respect of the first loan. This amount too would more than sufficient to pay whatever interests that may be imposed by the plaintiff. And since the first loan had been repaid in full, there was no necessity to foreclose all the 47 condominium units by way of an auction sale. The evidence about the full re-payment of the first loan of RM4 million was not made available to the first learned judge and his Lordship made no reference to it in his written judgment. To be fair to the first learned judge, there was no mention of the re-payment of RM4 million by Hendersons (Malaysia) Sdn Bhd in the Statement of Claim and in the Amended Defence And Counterclaim. The observations of the late Sharma J., in

Janagi v. Ong Boon Kiat (1971) 2 MLJ 196, should be highlighted. There

his Lordship said:

“The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance. If the parties agree to a factual position then it is hardly open to the court to come to a finding different from such agreed facts. The only purpose in requiring pleadings and issues is to ascertain the real difference between the parties and to narrow the area of conflict and to see just where the two sides differ. ”

Here, the parties agreed, as stated earlier, to resolve the civil suit based on three main issues which included the question of the settlement of the loan on 24.4.1997 and that would also indirectly refer to the re-payment of RM4 million by Hendersons (Malaysia) Sdn Bhd on behalf of the first defendant to the plaintiff.

[86] In regard to the second loan which was for the sum of RM2,242,876.71, which sum was by way of a cheque dated 25.4.1997 (see page 443 of “**AR-2**”) in favour of the first defendant from the plaintiff, it was not supported by any loan agreement. The payment voucher for the disbursement of the sum of RM2,242,876.71 stated that it was for the drawdown of the term loan. That payment voucher can be seen at page 445 of “**AR-2**” and it was worded in this way:

“AEH CAPITAL SDN BHD
(formerly known as Letac Credit Sdn Bhd)
PAYMENT VOUCHER

Pay to : AM-EL Holdings Sdn Bhd

PV No : 35/97

Date : ~~29/4/97~~
25/4/97

Particulars of payment	Amount
Being drawdown of Term Loan as per memorandum attached	RM2,242,876.71
	RM2,242,876.71
Prepared by : Sgd. Bank : BBMB, KL (Illegible) Approved by: Sgd. Cheque No: 138879 (Illegible) Received by: Sgd. Account Use Only: (Illegible) Checked by: Name Posted by:	

”

But the term loan for the sum of RM4 million had already been drawdown on 5.6.1996 and there was nothing left to drawdown again. Evidence wise, this cheque of RM2,242,876.71 was cleared on 30.4.1997 (see the plaintiff's bank account at page 424 of “AR-2”). There was no evidence that the second loan was meant for credit leasing or for share financing. In my judgment, as far as the second loan was concerned it was illegal and unenforceable. The same cannot be said about the first loan. In my judgment, the first loan had all the trappings of legality.

[87] Calculation wise, if the sum of RM2,242,876.71 is deducted by the sum of RM1.5 million, a sum of RM742,876.71 would remain and it is this sum which the plaintiff advanced to the first defendant on an ex gratia basis. In my judgment, the sum of RM742,876.71 must be construed to lie where it falls.

[88] You just cannot “**sweep under the carpet**”, so to speak, the re-payments of RM1.5 million and RM4 million to the plaintiff. Such re-payments must be construed in its correct perspective and when so construed, the net result would show that the loan of RM4 million had been re-paid in full to the plaintiff.

[89] For the reasons as adumbrated above, I must dismiss the plaintiff’s appeal in regard to the foreclosure proceedings with costs and direct that the deposit be paid to the defendant. In regard to the first and the third defendants’ appeal pertaining to the civil suit, I must allow that appeal with costs and direct that the deposit be refunded to the first and the third defendants. I would, accordingly, dismiss the first and the third defendants’ counterclaim with costs since they have succeeded in their arguments pertaining to the second loan.

[90] My learned sister Zaleha Zahari JCA and my learned brother Md. Raus Sharif JCA have seen this judgment in draft and they have expressed their disagreement with it. And so I have the singular honour of writing this dissenting judgment. It has been most gratifying.

29 November 2007

Justice Dato' Hj Abdul Malik bin Hj Ishak
Judge, Court of Appeal
Putrajaya

Counsel

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The Third
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