

THE UNIVERSITY OF HULL

**Moneylenders Law in Malaysia:
A Comparative Study with the United Kingdom**

being a Thesis submitted for the degree of Doctor of Philosophy
in the University of Hull

by

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DEDICATION

*This effort is dedicated to my beloved father,
Mohamad Arif Osman*

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ABSTRACT

This thesis aims to examine the extent to which the Malaysian Moneylenders (Amendment) Act 2003 has rectified the defects of its parent Act, the Malaysian Moneylenders Act 1951 in regulating and controlling the business of moneylending, protecting the borrowers in the course of moneylending transactions and eliminating illegal moneylending. In order to achieve these objectives, an in-depth analysis of the 2003 Act was therefore undertaken. This includes analysing the licensing regime, the advertising system, the enforcement mechanisms, the prescribed moneylending agreement, the conduct of moneylending business, as well as civil and criminal sanctions. From the methodological point of view, this thesis seeks to demonstrate the importance of a comparative approach as a key to understanding the present law of a country and to determine whether further reforms are needed. Thus, the English Consumer Credit Acts 1974 and 2006 were chosen as a basis of comparison, for justifiable reasons. The points of comparison are analysed in terms of their strengths and limitations, with a view of suggesting ways to optimise the strengths and minimise the limitations. The findings of the research indicate that the 2003 Act has brought significant reform to the moneylending industry in line with modern credit practice. However, despite the remarkable improvement, the 2003 Act also suffers from serious flaws in several important aspects. Immediate attention and further reform are essential in the areas of licensing, advertisement permits, search and arrest as well as the prescribed moneylending agreement. Failure to address these critical issues will undermine the very aims of the reform and may jeopardise the interest of borrowers in the moneylending transactions.

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LIST OF ABBREVIATIONS

Anglo-Am. Law Rev.	Anglo-American Law Review
AC	Law Reports, Appeal Cases
ADR	Alternative Dispute Resolution
ADRJ	Australian Dispute Resolution Journal
AIR	All India Reporter
All ER	All England Law Reports
ALJR	Australian Law Journal Reports
APR	Annual Percentage Rate
BMB	Banking Mediation Bureau
CCA	Consumer Credit Act 1974
CCLR	Consumer Credit Law Reports
CIL	Contemporary Issues in Law
CJQ	Civil Justice Quarterly
CLJ	Current Law Journal
CLR	Commonwealth Law Reports
CPA	Consumer Protection Act 1999
Ch	Law Reports, Chancery Division
Consum. L. J.	Consumer Law Journal
DSA	Direct Sales Act 1993
DTI	Department of Trade and Industry
EWCA Civ	England and Wales Court of Appeal (Civil Division)
FMB	Financial Mediation Bureau
FMSLR	Federated Malay States Law Reports
HPA	Hire-Purchase Act 1967
ICR	Industrial Cases Report
INSAF	Journal of the Malaysian Bar
IMB	Insurance Mediation Bureau
Ind. App	Law Reports, Indian Appeals
JBL	Journal of Business Law
JUST. SYS. J.	The Justice System Journal
KB	Law Reports, King's Bench

LGR	Local Government Review
LQR	Law Quarterly Review
MCLR	Moneylenders (Control and Licensing) Regulations 2003
MLA	Moneylenders Act 1951
MLA 2003	Moneylenders (Amendment) Act 2003
MLJ	Malayan Law Journal
NSWR	New South Wales Reports
NZLR	New Zealand Law Reports
OFT	Office of Fair Trading
PC	Law Reports, Privy Council Appeal Cases
QB	Law Reports, Queen's Bench
SLR	Singapore Law Reports
SLT	Scots Law Review
TLR	Times Law Reports
TSDs	Trade Standard Departments
UKHL	United Kingdom House of Lords
WALR	University of Western Australia Law Review
WLR	Weekly Law Reports

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Revamappa v SN Raghunath (1983) Cr LJ 321
Standard Trust Co. Ltd. (Trustee) v Standard Trust Co [1993] 21 CBR 24
Suganchand v Balchand AIR 1957 Rajasthan 89
Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd & Ors (1978) 139 CLR 410,
53 ALJR 1

Chapter One

INTRODUCTION

1.0 Introduction

This thesis seeks to review the Moneylenders (Amendment) Act 2003¹ (hereinafter “the MLA 2003”) and evaluate its effectiveness in addressing the past failings of its parent Act, the Moneylenders Act 1951² (hereinafter “the MLA”), in regulating the business of moneylending. The challenges faced by the MLA 2003 are to protect the interest of borrowers in the moneylending transactions and to eliminate illegal moneylending. A comparative method of evaluation is utilised to ascertain the strengths and limitations of the MLA 2003, and a legal comparison with the UK Consumer Credit Act 1974 (hereinafter “the CCA”) is carried out in order to examine and evaluate this new moneylenders law and to suggest necessary reforms. It is argued that the MLA 2003 has, to a certain extent, succeeded in reforming the moneylenders law and rectified the flaws in the old law. The strength of the new law is evidenced in the reformed licensing regime, the introduction of the advertisement permits, the enforcement system, the prescribed moneylending agreement, the fixed ceiling interest rate and prescribed interest rate for default payments, as well as the major revision in criminal sanctions. Despite the significant contribution of the MLA 2003 to improving the moneylending industry, however, this thesis maintains that further reform is urgently required in order to strengthen the law and further achieve its purpose. It is also suggested that regulation alone is not enough to fight illegal moneylending.

¹ Act A1193 of 2003 which by virtue of P.U.(B) 332/2003 came into effect on November 1, 2003.

² Act 400.

1.1 Statement of Problem

Moneylending itself is not a problem in Malaysia. Legitimate moneylenders who abide by the law provide a useful service for the public and they offer a service which far too many people find indispensable. The problem is illegal moneylending which is widely prevalent, and loan sharks who charge exorbitant interest rates to borrowers who are unable to repay their loans, and then resort to harassment and intimidation to collect repayments. The weaknesses of the MLA had paved the way for uncontrolled illegal moneylending activities.

The MLA was a long-established law imported from the UK. It has been in operation for over fifty years, with only minor amendments. Despite the existence of the MLA, numerous infringements, abuses and rampant disregard of this law were apparent; evidenced by the thriving illegal moneylending business run by unscrupulous loan sharks. Lack of enforcement powers and insufficient penalties in the MLA were factors contributing to this predicament. The underlying cause was lack of reform to make the law suitable for the modern consumer credit market and to address the issue of loan sharks. Hence, the MLA was harshly criticised as being obsolete and failing to prevent the loan sharks' activities.³

It has been noted over the years that the Ministry of Housing and Local Government (hereinafter "the Ministry"), which enforces the MLA, had received reports on cases of fraud and oppression through excessive interest rates from borrowers, involving harassment, intimidation and other criminal offences. Regrettably, no action could be taken on most cases since enforcement provisions in the MLA were lacking. The

³ Statement of Dr. Rais Yatim, Minister at the Prime Minister's Department in 'Akta Pemberi Pinjaman Wang 1952 sudah lapuk.' [sic] (The Moneylenders Act 1952 is obsolete). [sic] *Utusan Malaysia*, 3 December 2002.

police could only act under the Penal Code, the Restricted Residence Act and the Emergency Ordinance on any violence that resulted from loan sharks' activities. However, no action could be taken by the police on the basis of unlicensed moneylending business. Thus the loopholes in the MLA allowed the establishment of illegal moneylending businesses, which caused social disruption and many untold sad stories. The threat of loan sharks led to scores of incidents of harassment and intimidation. Those who could not bear such a burden and pressure chose to take their own lives, sometimes taking the lives of their families as well. Extensive media coverage of such tragic incidents finally opened the legislators' eyes, inducing them to conduct a review of the MLA. The trigger was the suicide pact of a couple and their four-year-old son.⁴ This tragic incident aroused anxiety, public concern and outrage since it was acknowledged that constant harassment and intimidation from loan sharks had led to suicide in many cases, but illegal and unlicensed moneylending

⁴ Businessman M.Manimaran, 35, Leela Vellu, 27 and son Devan Raja, four, died on November 28, 2002, three days after swallowing *paraquat* to escape harassment by loan sharks. Manimaran had borrowed RM500,000 from five loan sharks because his photocopy business had run into financial difficulties. Repayment could not be made as a business associate had given him a dishonoured cheque for RM1 million. See T. Leonard, "Extent of loan sharks' involvement investigated", *The Malay Mail*, 1 December 2002; T. Leonard, "Heartless Act: loan sharks break into borrower's shop a day after his death." *The Malay Mail*, 1 December 2002; Tan Siok Choo, "Loan sharks fill a vacuum." *New Straits Times*, 8 December 2002; N. Spykerman, "Ah Longs will come after us: Family of suicide victim Prakash Kasavan worried...." *The Malay Mail*, 14 November 2003; Marsha Tan, "Grieving family harassed by loan sharks." *The Star*, 9 November 2003; N. Spykerman, "Hawker in the soup: Woman in debt found hanged from the staircase." *The Star*, 8 November 2003; T. Leonard, "Why? Son-in-law dead, daughter critical." *The Malay Mail*, 7 October 2003; T. Leonard, "Previous case also a Manimaran." *The Malay Mail*, 7 October 2003; T. Leonard, "LIES to make suicide bid victim live." *The Malay Mail*, 7 October 2003.

businesses were still allowed to operate.⁵ In response, revision of the MLA was expedited.⁶

The MLA 2003 was gazetted on 29 May 2003 while enforcement took effect on 1 November 2003. According to the Ministry, the MLA 2003 would reform and improve the old moneylenders law, strengthen the role of the Ministry as the administrator and regulator of the Act and overcome the prevailing problems brought by the MLA.⁷ The main focus of the amendment is on administration, licensing, advertisements, enforcement, conduct of moneylending business and sanctions.⁸ All these issues, apart from administrative aspects, will be the subject of this study. The Government was optimistic about the new amendment.⁹ Consumer associations applauded the move.¹⁰ Society at large is eager to witness a new dimension in the moneylending industry. However, the big question is whether the new legislation is

⁵ Zainul Arifin, "Is your pound of flesh worth it?" *New Straits Times*, 10 December 2002; Jacob George, "Action that may be taken to curb loan sharks." *The Star*, 9 December 2002; J.D. Lovrenciear, "Affirmative action needed to stamp out loan sharks." *The Star*, 9 December 2002; Lau Bing, "Find ways to keep loan sharks at bay." *The Sun*, 9 December 2002; Wong Chun Wai, "Give cops more clout to go after loan sharks." *Sunday Star*, 8 December 2002; J. George, "Set up database and hotline to get at loan sharks." *New Straits Times*, 6 December 2002; J. Rajagopal, "Enforcement is a problem." *New Straits Times*, 6 December 2002; R. Nadeswaran, "Moneylenders must go." *The Sun*, 2 December 2002.

⁶ S. Khoo and D. Rajah, "Loan control: Moneylending activities to come under Housing and Local Govt Ministry." *The Star*, 9 December 2003; Chow Kum Hor, "New law to fine, jail loan sharks." *New Straits Times*, 4 December 2002; Foong Pek Yee, "Stiffer penalties for loan sharks." *The Star*, 4 December 2002; "Jail, rotan for loan sharks," *New Straits Times*, 2 December 2002.

⁷ Penyata Rasmi Parlimen, Dewan Rakyat, *Perbahasan Rang Undang-undang Pemberipinjam Wang (Pindaan) 2003*, Parlimen ke-10, Penggal ke-5, Jabatan Percetakan Negara, 2003, p. 1 (Parliamentary Debates, House of Representatives, *Debate on Moneylenders (Amendment) Bill 2003*, Tenth Parliament Fifth Term, National Publishers Department, 2003, p. 1.) (hereinafter "Parliamentary Debate on Moneylenders Bill 2003").

⁸ Faridah Begum, "Loan sharks head for troubled waters." *The Star*, 3 December 2003; Rita Jong, "Bad news for 'Ah Longs'." *The Malay Mail*, 5 November 2003: 11; "Illegal moneylenders to face the heat," *New Straits Times*, 5 November 2003; D. Rajah, Ministry expects more bite soon to reel in loan sharks. *The Star*, 27 October 2003.

⁹ "With these proposals, I hope loan sharks will be a thing of the past," commented *Dato' Seri Ong Ka Ting*, Housing and Local Government Minister on the amendments expected to be tabled in Parliament. For further details, see Chow Kum Hor, "New law to fine, jail loan sharks." *New Straits Time*, 4 December 2002.

¹⁰ The President of the Federation of Malaysian Consumer Associations (FOMCA), the Chairman of the Malaysian Trade Union Congress and the Secretary-General of the Malaysian Muslim Consumer Association all commended the amended law; see "Pindaan Akta Pemberi Pinjaman Wang disokong" (Amendment to Moneylenders Act supported), *Utusan Malaysia*, 5 December 2002.

adequate to regulate and control the business of moneylending, to protect borrowers in the moneylending transaction and address the issues of modern day 'Shylocks'. Thus, it is important that a review be conducted to evaluate the effectiveness of this new Act in curbing loan sharks' activities and providing appropriate consumer protection measures, as well as the law's relevance to the modern consumer credit market.

1.2 Objectives of the Study

The purpose of this thesis is to analyse the provisions of the MLA 2003 to determine the extent to which it has rectified the defects of its parent Act, in the light of the UK CCA. It seeks to achieve three primary objectives. First, the thesis aims to investigate whether the MLA 2003 is effective in regulating, as well as controlling, the business of moneylending. Second, it examines whether sufficient protection is provided for borrowers in the course of moneylending transactions. Third, it evaluates whether the revision has achieved its goal of eliminating illegal moneylending by extending the scope of the Act to unlicensed moneylenders.

These objectives are pursued by examination of several areas of the legislation, including the licensing system, the advertising system, the enforcement system, the conduct of moneylending business, and the civil and criminal sanctions. A legal comparison with the CCA is carried out in order to analyse and evaluate the new moneylenders law and to suggest necessary reforms. However, it should be noted that the CCA is not studied *sui generis*: instead, it will be analysed with a view to identify the strength and the flaws in the MLA 2003. The choice of the UK is almost a necessity, since the MLA was modelled on the English Moneylenders Acts 1900-1927.

However, the UK has long ago abolished its Moneylenders Acts, has embraced a whole new approach that is based on the substance rather than the form of a credit transaction, by introduction of the CCA and finally, has undertaken a major reform through the Consumer Credit Act 2006 (hereinafter “the CCA 2006”). Thus, the CCA and its statutory instruments have become relevant in this comparison and the importance for Malaysia of learning from the UK experience cannot be overstated.

1.3 Significance of the Study

Any law governing the relationship between parties with unequal bargaining power needs continuous review to keep up with current developments in order to protect the interest of the weaker party. The MLA, however, had never gone through major overhaul for over fifty years until the MLA 2003. Most of the original provisions were found to be obsolete and unable to cope with the challenges of modern credit transactions. The serious gaps in the statute had paved the way for the unrestrained growth of loan sharks. Both the public and the Government agreed that the weaknesses of the MLA were the main cause of the widespread of illegal moneylending. Debates and discussions, especially in the newspapers, resulted in the amendment of the law. An in-depth study of the revision of the moneylenders law is crucial to evaluate whether the main aims of reform have been achieved. A comparative analysis is vital to determine whether further reforms are needed.

In Malaysian academia, research on consumer credit, especially moneylending is seriously lacking. Literature on the subject is, therefore, scarcely found. Hence, there is an urgent need to conduct research on moneylending transactions in the Malaysian context to fill the vacuum that exists in the moneylending literature. This thesis will

therefore be the first study to review the MLA 2003 systematically. Not only is this a groundbreaking effort, but its comparative and analytical contributions will provide genuine input to strengthening the law further. It is also anticipated that this study will significantly bridge the gap in the moneylending literature.

1.4 Scope and Limitations of the Study

Given the objectives of the research, this thesis will focus on the MLA 2003 and its regulations as well as its application in Peninsular Malaysia and the corresponding legislation in the UK. Moneylending in Sabah and Sarawak is excluded since these states are governed by different legislation. Further, although it is acknowledged that there are many problem areas in the field of consumer credit in Malaysia,¹¹ this study will only focus on moneylending. The law of hire-purchase, pawnbroking and other grey areas such as revolving credit are excluded from this study because these subjects merit special research in their own right. In terms of UK law, the study is limited to discussing the CCA, excluding discussion on the European Commission's (EC) Consumer Credit Directive. Further, due to the limitations and difficulties of obtaining relevant materials from the Ministry, this study relies heavily on newspaper reports. About 130 articles are referred to in this thesis.

1.5 Methodology

This study is non-empirical, and is thus mainly based on library research. It is concerned with assessing the approaches of the revised moneylending law in regulating moneylending business, particularly in protecting the interest of borrowers in moneylending transactions and eliminating illegal moneylending. It also analyses

¹¹ See Yap Kon Lin. "Consumer Credit Regulations in Malaysia: A Country Report", paper presented at the Asian Conference on Consumer Protection, Competition Policy and Law, Kuala Lumpur, 28 February - 1 March, 2003, p. 8.

the strengths, weaknesses and limitations in the regulatory approaches, and tries to find a more appropriate and effective mode of regulation for moneylending business. In making the assessment, the MLA 2003 is extensively discussed and analysed. The literature consulted in this thesis consists of statutes, rules and regulations, case law, government reports and documents, books, journals, parliamentary papers and reports, annual reports, newspaper articles and reports, as well as other periodicals.

Since this study does not use empirical evidence to prove or disprove any hypothesis or theory deduced from the literature, a comparative law method of evaluation is utilised as an alternative tool. In doing so, the UK CCA has been chosen as the subject of comparison. The choice of the UK as a basis of comparison may be explained as follows. First, the MLA originates from the UK Moneylenders Acts 1900-1927. Second, the UK Moneylenders Acts have been abolished and replaced with the CCA, which established a new order in consumer credit transactions where regulation is based on the substance rather on the form of the transaction. Third, the CCA has recently gone through a significant reform with a view to enhancing the protection of consumers' interest in a consumer credit transaction: the CCA 2006 received Royal Assent on 30 March 2006. Fourth, the problem of loan sharks is also prevalent in the UK consumer credit market, as substantiated by a series of consultation documents, concluding with a White Paper. Thus, a comparative study with the UK seems to be indispensable and a comparison with the UK laws might further enrich the discussion of this study. The main points of comparison in the study are:

- The legislative framework
- The institutional framework

- The licensing regime
- The advertisement regime
- The enforcement mechanisms
- The standard agreement
- The criminal, civil and administrative sanctions
- The redress mechanisms

In the study, the above points of comparison are analysed in terms of their strengths and limitations, with a view of suggesting ways to optimise the strengths and minimise the limitations. It is hoped that through the comparative analysis, the differences and similarities between the regulatory experience of Malaysia and the UK will be exposed. More importantly, the strengths and weaknesses in the approach under the MLA 2003 can be highlighted, and problems and possible solutions identified. As pointed out by Lepaulle:¹²

“To see things in their true light, we must see them from a certain distance, as strangers which is impossible when we study any phenomena of our own country. That is why comparative law should be one of the necessary elements in the training of all those who are to shape the law for societies in which every passing day brings new discoveries, new activities, new sources of complexity, of passion, and of hope.”

1.6 Outline of Chapters

This thesis is divided into eight chapters. Chapter One explains the problem, objective, significance, scope, limitation and methodology of this thesis, which is on the moneylenders laws. This study is predominantly based on Malaysia but has the UK as the basis of comparison. The purpose is to examine both systems and to learn,

¹² ‘The Functions of Comparative Law’, (1922) 35 *Harvard Law Report* 853.

from the experience of the UK, the best possible way to regulate the business of moneylending.

Chapter Two investigates the legislative framework of the MLA 2003 and the CCA. The developments of the moneylenders law in Malaysia are explored, starting from the unregulated days to the MLA and to the current MLA 2003. The developments in the UK are also examined, from the Moneylenders Acts 1900-1927 to the CCA 2006. The institutional frameworks of consumer credit in both Malaysia and the UK are analysed as well. Further, this chapter investigates the important definitions and exceptions under the MLA 2003.

The third chapter examines the importance of business licences and advertisement permits in a moneylending business. This chapter seeks to investigate and analyse the licensing and advertising provisions under the MLA 2003 in order to determine whether the three objectives of the Act are achieved. The discussion of the licensing regime will include the procedure for applying for licences, grant and refusal of licences, fees, duration and renewal of licences, revocation or suspension of licences, appeal, transfer or assignment of licences and also termination of licences. The discussion of the advertisement permits regime includes application and renewal of permits, as well as the content of moneylending advertisements.

The new enforcement system introduced under the MLA 2003 is the focus of Chapter Four. This chapter aims to examine and assess the new provisions in regard to investigation, search, seizure and arrest under the MLA 2003. The significance of these new provisions in enforcing the moneylenders laws is analysed in comparison

with enforcement provisions in other consumer protection laws in Malaysia as well as the CCA. It seeks to determine whether sufficient power is granted to the enforcement officers to undertake their duties.

The aim of Chapter Five is to investigate whether sufficient protection is given to the borrowers in the course of moneylending transactions. The discussion will include three main subjects: the moneylending agreement; the rights and duties of the parties to the agreement; and the interest aspects. Revolutionary improvements brought by the 2003 amendment such as the prescribed agreement, a ceiling for the interest rate for secured and unsecured loans and the fixed daily interest rate for default payments are the centre of discussion. Comparisons with the CCA will assist in evaluating whether the MLA 2003 provides adequate protection for borrowers in the course of moneylending transactions.

The sixth chapter examines the reform of the criminal and civil sanctions brought by the MLA 2003. This includes the significant modification of criminal penalties in monetary and imprisonment terms, as well as the introduction of the punishment of whipping. This chapter also acknowledges that the civil sanctions mechanisms have shown legitimate interest in protecting borrowers in moneylending transactions, but highlights the limitations in enforcing civil remedies. The administrative control measures introduced under the CCA 2006 are also discussed in this chapter.

Redress mechanisms are discussed in Chapter Seven. The complications and inconvenience of the court procedures in pursuing a moneylending dispute provided the impetus for this chapter. Taking into consideration the success of Alternative

Dispute Resolution (ADR) in other consumer areas such as the Financial Mediation Bureau, the Consumer Claims Tribunal and the Homebuyers Tribunal, the question is raised whether it is necessary and desirable to develop an ADR for moneylending disputes.

This thesis concludes with the eighth chapter, which highlights the comparative elements derived from the discussion, analysis and comparison. The strengths and weaknesses of the current legislation are explored and attention is drawn to lessons that could be learnt and mistakes that could be avoided in Malaysia in order to have an overall better system to protect borrowers in moneylending transactions.

The author has endeavoured to ensure that the law in this thesis is validly stated as at 30 June 2006. All translations from the Malay are the author's own.

Chapter Two

SOURCES OF LAW

2.0 Introduction

Chapter 1 identified the problems to be addressed by this study and its objectives. Before embarking on these issues, it is necessary to provide an understanding of the moneylenders laws in Malaysia and the consumer credit laws in the UK. This chapter will discuss the development of the moneylending industry in Malaysia as well as the applicable law, i.e. the Usurious Enactments, the MLA and the MLA 2003. The Consumer Law Reform Report, which advocated reform in consumer credit law in Malaysia, will also be considered. In regard to the UK, discussion will focus on the English Moneylenders Act, the CCA and the newly gazetted CCA 2006. The Crowther Report,¹³ which was the turning point that transformed the moneylenders law in the UK from piecemeal legislation to a whole new order of consumer credit law based on substance rather than form will also be considered. To this day, consumer bodies in Malaysia still lobby for the abolition of the fragmentary approach and its replacement with a comprehensive Malaysian Consumer Credit Act, as in the UK. However, it is not the object of this study to canvass for the integration of the piecemeal legislation, but to illustrate the advantages and difficulties of the current practice.

This chapter will also investigate the institutional framework for consumer credit for both countries, identifying the regulator and the enforcer for both the Moneylenders Act and the Consumer Credit Act. In pursuing this study, it is important to grasp the

¹³ *Crowther Report on Consumer Credit*. HMSO 1971. Cmnd, 4596 (hereinafter "Crowther Report").

main terms that will be used. This chapter analyses the interpretation of the key terms under the MLA 2003 such as “moneylender” and “unlicensed moneylender”. Finally, this chapter will also investigate the statutory and ministerial exceptions provided under the MLA 2003 in order to determine whether the objective of the Act to protect the interest of the borrowers in moneylending transactions, will be effected.

2.1 Historical Development of Malaysian Moneylending Business

Ancient records have shown that the early civilizations of Mesopotamia survived by lending and borrowing.¹⁴ Lending money at interest is an age-old business and has been a controversial issue since usury was condemned by religion and the state.¹⁵ In the then Malaya, the Federated Malay States had the Usurious Loans Enactment (FMS Cap 63) and the Unfederated Malay States had their own respective Enactments to regulate loan transactions involving interest and to protect borrowers from usurious transactions.¹⁶

The history of the moneylending industry in Malaya dates back to the existence of moneylenders from the Chettiar Community in the early nineteenth century. In the beginning, the influx of this pioneering class of shrewd, hardworking, thrifty and wealthy moneylenders from India assisted greatly in supporting the early development of the country and scores of individuals benefited from the quick loans provided by them.¹⁷ The services of the Chettiers were in demand due to the difficulties in getting personal loans. Formal institutions such as banks and financial institutions were very

¹⁴ Crowther Report, para 2.1.1.

¹⁵ See Karen Rowlingson, *Moneylenders and their Customers*, Policy Institute, London, 1994, p. 9; Geraint Howells and Stephen Weatherill, *Consumer Protection Law*, 2nd ed, Ashgate, Hants, 2005, p. 298.

¹⁶ See *Rengasamy Pillay v Ibrahim* (1923) 4 FMSLR 91; *Registrar of Title, NS v Arumugam* (1923) 4 FMSLR 77; *Chait Singh v Budin* (1918) 1 FMSLR 348.

¹⁷ S.K.D. “Nattukottai Chettiers in Malaya” [1958] *MLJ* xiv.

limited in those days, and furthermore, personal bank loans were unheard of. Indeed, only affluent members of society made use of banking services. Many other people had no choice but to resort to other means. This predicament had created a gap in the provision of credit. Nevertheless, this quandary was seen as an opportunity to establish moneylending businesses and the gap was soon filled in by the Chettiars.

The financial services provided by the Chettiars were well suited to meet the small-scale but frequent financial needs of the small tradesmen and office workers who needed small but quick financial assistance.¹⁸ According to Singh, moneylenders are the largest group of non-institutional providers of credit in Malaysia.¹⁹ Later, the moneylending industry saw a further colourful development with the participation of other ethnic groups such as the Sikhs and the Chinese. The moneylending business was considered an easy way to make money, as expertise, skill, knowledge and experience were not needed, and further, the business was not regulated or controlled.²⁰ Towards the end of the phase of unsupervised moneylending activities, the position of moneylenders became more significant in society but the business became tainted with many malpractices and irregularities. The Government soon recognised the need for a uniform regulation to curb unscrupulous moneylenders. This paved the way to the enactment of the Moneylenders Ordinance 1951 and the abolition of the Usurious Loans Enactments.

¹⁸ SY Kok, "Who is a moneylender in year 2003?" [2004] 3 *MLJ* cxxi.

¹⁹ Jaginder Singh, *Credit and Security in West Malaysia*, University of Queensland Press, St. Lucia, 1980, p. 108; Paul Kratoska, *The Chettiar and the Yeoman*, Institute of Southeast Asian Studies, Singapore, 1975, p. 9.

²⁰ L.H. Singh, *Law of Moneylenders in Malaysia and Singapore*, Sweet & Maxwell Asia, Kuala Lumpur, 2003, p. 1.

2.2 The Malaysian Moneylenders Law

The discussion on the Malaysian moneylenders law will focus on the MLA, the MLA 2003 and its regulations.

2.2.1 The Moneylenders Act 1951

The MLA was enacted on 31 March 1952 with the aim of standardising the usury laws separately enacted by each state. The MLA, containing 30 sections, became the main statute regulating the business of moneylending in the Malaysian Peninsula. The MLA was initially known as the Moneylenders Ordinance, since it was enforced six years before Malaya gained its independence from the British. The Ordinance was renamed the Moneylenders Act in 1986 following a law revision under the Law Revision Act 1968. For historical reasons, the MLA had its roots in the English Moneylenders Acts 1900-1927. Therefore, the MLA was not only *pari materia* with the English Moneylenders Acts 1900-1927, but was also founded on similar assumptions and concepts. In this context, both jurisdictions share the philosophy underlying moneylenders laws, namely, to “protect consumer borrowers from the unfair dealings and sharp practices of moneylenders.”²¹ In order to satisfy this concept, the MLA adopted the objective of regulating the conduct of moneylenders. Due to the general nature of the Act, common law cases and principles played an important role in interpreting it.

A year after the MLA came into force, a slight technical amendment took effect.²² A second amendment took place in 1988 which exempted a number of bodies from the

²¹ Koh Kheng Lien, et al., *Credit and Security in Singapore*, University of Queensland Press, St. Lucia, 1973, p. 99.

²² The Moneylenders (Amendment) Ordinance, 1953 (Ord. 51/53) which took effect from 15 October 1953.

application of the MLA.²³ The 1988 amendment included the infamous section 2A(1)(h) which exempted the MLA from regulating moneylending activities undertaken by firms and companies as secondary activities. The impact of the inclusion of this provision was quite major, as it provided a means to circumvent the law.

It should be noted that the amendments above did not affect the original provisions of the MLA. The Act therefore was in operation without any review or assessment for over fifty years, despite the major changes in the political, social and economic framework in Malaysia. Thus, the law came to be seen as irrelevant to the modern commercial situation. In 1992, the Consumer Law Reform Report, which called for an urgent review of the credit laws in Malaysia, was presented.

2.2.1.1. The Consumer Law Reform Report

In 1992 a report on consumer law reform, funded by the United Nations Development Programme and the Selangor and Federal Territory Consumers Association, was published. The working group was chaired by Dr Rachagan, who undertook to prepare a report to “provide a perspective on the law as it in reality affects consumers and indicate the needed reform.”²⁴ Several consumer areas were investigated under this report, including consumer credit. The Report highlighted the weaknesses of the legislation pertaining to consumer credit, including the MLA, the Hire-Purchase Act 1967 and the Pawnbrokers Act 1974, and argued the urgent need for a review of these

²³ The Moneylenders (Amendment) Act, 1988 (Act A688) which took effect from 19 February 1988.

²⁴ Sothi Rachagan, *Consumer Law Reform-A Report*, United Nations Development Programme and Selangor and Federal Territory Consumers' Association, Kuala Lumpur, 1992, p. viii (hereinafter “Malaysian Consumer Law Reform Report”).

laws. In regard to the MLA, issues such as exemptions, licensing, moneylending contract, interest and loan sharks were highlighted.

The Report stressed that reviews in other countries including the United States, the United Kingdom, Australia and New Zealand had resulted in a whole new order in consumer credit legislation.²⁵ The Report called for the abolition of piecemeal legislation and its replacement with a single statute entitled the Malaysian Consumer Credit Act, which should be based on the CCA and the Victorian Credit Bill.²⁶ The Report also represented the opinion of consumer advocates in Malaysia who called for a comprehensive Consumer Credit Act enforced by a single authority to regulate consumer credit matters.²⁷ Regrettably, no action was taken over the Report, although the Ministry of Domestic Trade and Consumer Affairs promised to gauge public opinion on the proposed reforms.²⁸

2.2.2 The Moneylenders (Amendment) Act 2003

The spur to revision of the MLA was, regrettably, the problems brought by illegal moneylending. Apparently, the gaps and weaknesses in the MLA had paved the way to loan sharks' activities. The MLA did not confer any enforcement powers to act against loan sharking; therefore loan sharks happily operated illegal moneylending businesses without any system and control, charging exorbitant interest rates to borrowers who were unable to repay their loans. Further, as mentioned in Chapter

²⁵ Ibid, paras. 5.10-5.11.

²⁶ Malaysian Consumer Law Reform Report, para 5.11.7.

²⁷ See Sadna Saifuddin, "Revamp outdated credit laws to protect consumers", *Business Times*, 30 March 2004; S. Rachagan, "Consumer Credit: The Need for Changes in Law and Practice", paper presented at the seminar on *Consumer Credit/Credit for the Poor*, Kuala Lumpur, 13-14 September 1989; Grace Xavier, "The Regulation of Consumer Credit Transactions in Malaysia", paper presented at the *Developing Consumer Law in Asia Seminar*, Kuala Lumpur, 9-12 August 1993, p. 5; Jacob George, "Action that may be taken to curb loan sharks", *The Star*, 10 December 2002.

²⁸ Malaysian Consumer Law Reform Report, p. vi.

One, they also resorted to harassment and intimidation to collect repayments. The problem of loan sharks and their activities caused concern, as their unhealthy presence threatened the harmony of society.

Ironically, it was only after a few lives were sacrificed, victims were slashed and their families and relatives terrorised, that reality sank in. It was the extensive media coverage of the issue and the relentless lobbying by consumer organisations and the public to address this problem that finally caught the attention of the policy-makers and politicians. On a positive note, the Moneylenders Bill took less than a year to receive royal assent. The MLA 2003 entered into force on 1 November 2003 with the aims to regulate and control the business of moneylending and to protect the borrowers of the monies lent in the course of such business and related matters.²⁹

Based on the preamble of the 2003 Act, the Parliamentary Debate on moneylenders laws³⁰ and newspaper reports³¹, this study here suggests that there are three objectives that the MLA 2003 seeks to achieve:

- to regulate and control the business of moneylending;
- to protect the interest of borrowers in the course of moneylending transactions; and

²⁹ MLA 2003, preamble.

³⁰ The Parliamentary Debate on Moneylenders Bill 2003, p. 2.

³¹ See J. George, "Action that may be taken to curb loan sharks", *The Star*, 9 December 2002; S. Khoo and D. Rajah, "Loan control: Moneylending activities to come under Housing and Local Govt Ministry", *The Star*, 9 December 2003; Foong Pek Yee, "Stiffer penalties for loan sharks", *The Star*, 4 December 2002; "Jail, rotan for loan sharks", *New Strait Times*, 2 December 2002; Faridah Begum, "Loan sharks head for troubled waters", *The Star*, 3 December 2003; Rita Jong, "Bad news for 'Ah Longs'", *The Malay Mail*, 5 November 2003: 11; "Illegal moneylenders to face the heat", *New Straits Times*, 5 November 2003; D. Rajah, "Ministry expects more bite soon to reel in loan sharks", *The Star*, 27 October 2003. In Chow Kum Hor, "New law to fine, jail loan sharks." *New Straits Times*, 4 December 2002, the Housing and Local Government Minister commenting on the Moneylenders Bill said, "With these proposals, I hope loan sharks will be a thing of the past."

- to eliminate illegal moneylending.

Nine out of thirty provisions under the principal Act were deleted via the MLA 2003. The new law now contains sixty-two provisions, bringing about some radical changes to several aspects of the law. It also reflects a change in perspective and a shift in official policy. The amendment has added, and widened the scope of, several provisions, such as on licensing, powers of investigation, conduct of moneylending business and sanctions. The MLA 2003 has also been given a new format. It is now divided into six distinct parts as follows:

1. Part I - Preliminary
2. Part II - Licensing of moneylenders
3. Part III- Investigation, search, seizure and arrest
4. Part IV- Evidence
5. Part V - Conduct of moneylending business
6. Part VI- Miscellaneous

2.2.3 Subsidiary Legislation

The moneylenders law is contained in two important regulations, other than the MLA 2003: the Moneylenders (Control and Licensing) Regulations 2003³² (hereinafter “the MCLR”) and the Moneylenders (Compounding of Offences) Regulations 2003³³. The former provides details of applications for licences and advertisement permits, moneylending agreements, appeals and other matters, whereas the latter explains the types of offences that could be compounded.

³² P.U. (A) 400/2003

³³ P.U. (A) 401/2003

2.3 UK Consumer Credit Laws: From the Moneylenders Acts 1900-1927 to the Consumer Credit Act 2006

The law on consumer credit in the UK has been through a great transformation. The Crowther Report instigated the shift from piecemeal legislation to a whole new approach based on the substance rather than the form of a credit transaction. The following sections will discuss the change brought by the Crowther Report, which saw the abolition of the Moneylenders Acts, the implementation of the CCA and finally, the reform brought by the CCA 2006.

2.3.1 The Moneylenders Acts 1900-1927

The Moneylenders Acts 1900-1927 governed the activities of moneylenders prior to the enactment of the Consumer Credit Act. The Moneylenders Act 1900 was the consequence of serious abuses by moneylenders in the period of unregulated loan transactions. The Report of the House of Commons Select Committee on Money-lending 1898 identified high rates of interest, oppressive conditions of repayment and misleading advertising as the evils attending moneylending business.³⁴

The remedies which the Moneylenders Act 1900 introduced were threefold. First, registration was made mandatory for all moneylenders. Second, criminal sanctions in regard to moneylending offences were introduced. Third, a provision empowering the courts to re-open harsh and unconscionable moneylending transactions was enacted. The moneylending legislation was notably strengthened by the passing of the Moneylenders Act 1927 by virtue of which registration was substituted with licensing.

³⁴ Abstract of the Report from the Select Committee on Moneylending. Available: <http://www.bopcris.ac.uk/bop1833/ref977.html> [accessed 20 September 2003]. The Report also mentioned that one lender had admitted charging interest as high as 3000 per cent, while another confessed trading under thirty-four different names, in order to avoid the bad reputation likely to result from his activities.

The UK Moneylenders Acts only regulated moneylenders engaged in the business of moneylending; therefore, other types of credit businesses such as banks, insurers, pawnbrokers and building societies were exempted from its control. Due to the exceptionally strict limitations of the Acts, a minute technical breach of the statutory requirements could render the entire loan irrecoverable and any security unenforceable. In consequence, borrowers could take advantage of this flaw to escape on a technical point wholly devoid of any merit.³⁵

2.3.1.1 The Crowther Report

The Committee on Consumer Credit chaired by Lord Crowther was appointed by the British Government in 1968 to review consumer credit in the UK comprehensively. The review was focused on improving consumers' rights and rationalising the law into a new and coherent framework. The Committee's report was published in March 1971 and discussed in depth the social and economic implications of credit, as well as containing an exhaustive assessment of the law relating to credit transactions. The Committee identified seven types of deficiencies and concluded that the credit law required extensive reform. The seven deficiencies were:³⁶

- Piecemeal regulations governed different types of credit although they shared similar substance and function³⁷
- Failure to distinguish consumer from commercial transactions

³⁵ *Askinex Ltd. v Green* [1969] 1 Q.B. 272.

³⁶ Crowther Report, chapter 4.2.

³⁷ Para 4.2.2 of the Report stated that:

“The greatest weakness of the present law of credit, and that from which most of the other defects stem, is the failure to look behind the form of the transaction and deal with the substance. This manifests itself in the drawing of distinctions between one type of transaction and another which are based on legal abstractions and are regarded in the commercial world as unrealistic.”

- Artificial separation of the law relating to lending from the law relating to security for loans
- Absence of any rational policy in relation to third party rights
- Excessive technicality
- Lack of consistent policy in relation to sanctions for breach of statutory provisions
- Failure to provide just solutions to common problems

2.3.2 The Consumer Credit Act 1974

The Crowther Report resulted in a White Paper on the *Reform of the Law of Consumer Credit*.³⁸ In July 1974, the CCA was enacted. The CCA repealed the Moneylenders Acts, Bill of Sale Acts, Pawnbrokers Acts and Hire-Purchase Acts and replaced them with new legislation covering all forms of consumer credit. The CCA gave effect to a number of recommendations of the Crowther Committee. Most importantly, the archaic lender credit and vendor credit dichotomy was replaced with a single statute, although with necessary concessions to differing forms of credit businesses. Institution-based lending, such as banking, credit cards, cheque and voucher trading, first and second mortgage loans, which were previously unregulated, were regulated by the CCA. The three primary functions of consumer credit legislation as laid down by the Crowther Report were embedded in implementing the CCA: to redress inequality of bargaining power, to control trading malpractices through a licensing system and civil and criminal sanctions, and to regulate the remedies for default.³⁹ The CCA aimed to provide protection to individuals (including sole traders and partnerships, excluding limited companies) who entered

³⁸ HMSO, 1973, Cmnd. 5427.

³⁹ Crowther Report, para. 6.1.15.

into consumer credit or consumer hire agreement, unless specifically exempted. The Act was divided into twelve parts:

- Part I - Office of Fair Trading
- Part II - Credit Agreements, Hire Agreements and Linked Transactions
- Part III- Licensing of Credit and Hire Businesses
- Part IV- Seeking Business
- Part V - Entry into Credit or Hire Agreements
- Part VI- Matters Arising during Currency of Credit or Hire Agreements
- Part VII- Default and Termination
- Part VIII- Security
- Part IX- Judicial Control
- Part X - Ancillary Credit Businesses
- Part XI- Enforcement
- Part XII- Supplemental

2.3.3 Subsidiary Legislation

Other than the main statute, the consumer credit law is supported by regulations. A large part of the detail is in regulations, including:

- the Consumer Credit (Advertisements) Regulations 2004;
- the Consumer Credit (Agreements) Regulations 1983; and
- the Consumer Credit (Disclosure of Information) Regulations 2004.

2.3.4 The Consumer Credit Act 2006

After nearly thirty years, a review of the CCA started in 2001. The aim was to address the huge changes in the consumer credit market. This was followed by a

White Paper entitled *Fair, Clear and Competitive – the Consumer Credit Market in the 21st Century*⁴⁰ (hereinafter “CC White Paper”) in December 2003. The White Paper identified a significant number of problems with the current regulation of consumer credit and suggested necessary reforms to modernise the CCA. A two-year review of the consumer credit laws was undertaken and finally the Consumer Credit Bill 2005 was prepared. The Bill received royal assent on March 30, 2006.

The CCA 2006 principally amends the CCA with four main aims:⁴¹

- to regulate all consumer credit and consumer hire agreements subject to certain exceptions;
- to improve the licensing regime;
- to replace the current extortionate credit provisions with a new “unfairness” test in order to enable debtors to challenge unfair relationships with creditors; and
- to provide an Ombudsman scheme for consumer credit disputes.

2.4 Institutional Framework for Consumer Credit

2.4.1 Malaysia

In Malaysia, consumer credit is the responsibility of two Government agencies. The Ministry of Housing and Local Government formulates and implements policies and enforces legislation pertaining to moneylending and pawn-broking, while the Ministry for Domestic Trade and Consumer Affairs regulates the Hire-Purchase Act. Besides moneylending and pawn-broking, the Ministry of Housing and Local Government

⁴⁰ Cm 6040.

⁴¹ DTI, *Consumer Credit Act 2006: Explanatory Notes*, April 2006. Available: http://www.opsi.gov.uk/acts/en2006/ukpgaen_20060014_en.pdf (accessed 2 April 2006).

also looks after housing matters and enforces the Housing Development (Control and Licensing) Act 1966 [Revised 2002].⁴² Regrettably, due to this fragmentary approach, other areas of consumer credit such as credit cards virtually no effective control at all.

Initially, the moneylending licensing regime was regulated by the Department of Malaysian Judiciary. The High Court Registrar was appointed the Registrar of Moneylenders while the Senior Assistant Registrars and Assistant Registrars were made Assistant Registrars of Moneylenders. Later, it was discovered that the Department was not the suitable body to regulate the licensing system, based on its role and function. Moreover, the MLA was under the jurisdiction of the Ministry of Housing and Local Government (hereinafter “the Ministry”). Thus, the Malaysian Cabinet agreed to appoint the Ministry to regulate the MLA from August 1, 1979. The Chief Secretary was appointed Registrar of Moneylenders, while the State Secretaries were appointed Assistant Registrars of Moneylenders.

Prior to the MLA 2003, the MLA was nominally regulated by the Ministry. It merely processed exemption applications, which had to be approved by the Minister, and prepared the list of moneylenders to be gazetted by the Ministry’s Legal Unit in July every year. The Gazette was evidence in all courts that the persons listed were licensed moneylenders, and the absence of the name was evidence that the person was not licensed.⁴³ Regulation and enforcement of the MLA were under the jurisdiction of each local authority. Hence, every state had its own procedures in granting and refusing moneylending licences. Problems such as inconsistencies of procedures and

⁴² Act 118

⁴³ MLA, s 7.

enforcement were among those highlighted under such administrative organisation. Following the MLA 2003, the Ministry became the sole regulator of the new moneylenders law.⁴⁴ It was believed that this important breakthrough would eradicate some of the problems experienced in the past. Indeed, by becoming the only supervisory body, the role and function of the Ministry in regulating the conduct of moneylenders, administering the licensing system as well as monitoring and enforcing the moneylenders laws would be strengthened.

2.4.2 United Kingdom

In the UK, the Fair Trading Act 1973 established the post of Director General of Fair Trading. The Director General is supported by the Office of Fair Trading (hereinafter “the OFT”), a Government agency responsible promoting and protecting consumer interests throughout the UK, while ensuring that businesses are fair and competitive. The OFT also administers a number of consumer laws including the CCA. It has responsibility for controlling the consumer credit licensing system and is also an enforcement authority. Besides that, the OFT advises the Department of Trade and Industry (hereinafter “the DTI”) on how the Act is working, puts proposals for reform to the DTI and reports on the Act. The OFT also explains and improves awareness and understanding for businesses and consumers, in addition to publishing booklets, leaflets and educational material about consumer rights. In 2003, following the enactment of the Enterprise Act 2002, the post of Director General of Fair Trading was abolished and replaced with the OFT. Finally, Part 1 of the Enterprise Act formally established the OFT.⁴⁵

⁴⁴ MLA 2003; s 4 and s 4A; see S. Khoo and D. Rajah. “Loan Control: Moneylending activities to come under Housing and Local Govt Ministry”, *The Star*, 9 December, 2002.

⁴⁵ Enterprise Act 2002, s 1.

The DTI is the Government Department responsible for consumer law, including consumer credit. It is responsible for preparing new legislation on consumer protection and for making sure that existing legislation is working. The DTI however, does not deal with enforcement issues. Trading Standards Departments (hereinafter “TSDs”) in each local authority are the main enforcers of the CCA and the licensing system.⁴⁶ The TSDs are also responsible for enforcing the law against illegal moneylending but investigations and prosecutions are uncommon, since they do not have the resources and manpower to address the issue.⁴⁷ There are currently 203 TSD offices in the UK.⁴⁸ They are funded mainly by the local authorities, although there is some central Government funding.

The history of the development of consumer credit law in the UK may offer some insight to the Malaysian Government on how to improve its consumer credit law. Although the introduction of this chapter stated that it is not the purpose of this thesis to canvass for the integration of a piecemeal legislation, it is inevitable that the difficulties resulting from the current practice should be highlighted. It should be noted that the deficiencies of the fragmentary approach pointed out by the Crowther Committee are still applicable in Malaysia.

Chapter Four shows that due to this fragmentary approach consumers are unaware of the role of the Ministry of Housing and Local Government as the regulator of moneylenders law. Table 4.1 illustrates that in the event of moneylending disputes, borrowers tend to file complaints to other agencies, such as the police, the Ministry of

⁴⁶ Legally, it is the local weights and measures authority.

⁴⁷ CC White Paper, para 5.56.

⁴⁸ Philip Hampton, “Reducing administrative burdens: Effective inspection and enforcement”, March 2005. Available: <http://www.hm-treasury.gov.uk/media/A63/EF/bud05hamptonv1.pdf> (accessed 4 April 2006).

Finance and the Central Bank of Malaysia. Even after the implementation of the MLA 2003, the level of awareness among borrowers remains low. Further, discussion in Chapter Seven will show that borrowers in moneylending disputes do not have any specific redress mechanism to solve their disputes, although hire-purchase disputes may be referred to the Consumer Tribunals. This is ironic since the Crowther Report mentioned that the distinction between lender credit and vendor credit was unrealistic, based on legal abstractions and theoretical concepts developed two centuries ago. It is suggested that if a single consumer credit statute is developed in Malaysia, the problem might well be resolved. Further, consumer advocates have long lobbied for the transfer of moneylending jurisdiction from the Ministry of Housing and Local Government to either the Central Bank or the Ministry of Domestic Trade and Consumer Affairs.⁴⁹

2.5 Interpretations

The following sections explain the definitions of certain key words in the MLA 2003, to assist in understanding this thesis.

2.5.1. “Moneylender”

As the main thrust of the moneylenders law is to regulate and control the business of moneylending, “moneylender” must be clearly defined. The new law has revised the definition to include loan sharks, and it has been pointed out this is a significant improvement brought by the MLA 2003.⁵⁰

⁴⁹ See “Pindaan Akta Pemberi Pinjaman Wang disokong” (Amendments to Moneylenders Act supported), *Utusan Malaysia*, 5 December 2002; J. George, “Action that may be taken to curb loan sharks”, *The Star*, 10 December 2002; “Akta Pinjaman Wang dipinda banteras along” (The Moneylenders Act amended to restrain loan sharks), *Berita Harian*, 10 May 2005.

⁵⁰ The Parliamentary Debate on Moneylenders Bill 2003, p. 3.

2.5.1.1 The original definition of a “moneylender”

“Moneylender” was defined in section 2 of the original Act, while grounds for presuming that a person was a moneylender was provided under section 3. Several bodies were exempted from the application of the Act (section 2A). A “moneylender” was defined as:

“Every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or as an agent.”

According to SY Kok, this was a “pure and simple” definition of moneylender which reflected the business of the “Chettians” in the old days.⁵¹ In contrast, Navaratnam opined that the greatest failure of the Act was the uncertainty surrounding this definition.⁵² The definition of “moneylender” was modelled on section 6 of the English Moneylenders Act 1900. However, the provision “whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or as an agent” was not present under the English law. The English Moneylenders Act also did not have a provision presuming “any person who lends a sum of money in consideration of a larger sum being repaid” to be a moneylender.⁵³ This provision (section 3 of the MLA) was said to be an alternative if one found it too burdensome to prove that the moneylender was carrying on a moneylending business under s 2.⁵⁴

⁵¹ SY Kok, “Who is a moneylender in year 2003?” [2004] 3 *MLJ* cxxi.

⁵² Nahendran Navaratnam, “Moneylending”, paper presented at *Consumer Credit/Credit for the Poor*, Selangor and Federal Territory Consumers Association and Federation of Malaysian Consumers Associations, 13-14 September 1989.

⁵³ This rebuttable presumption was provided under the old s 3 of the MLA.

⁵⁴ Awther Singh, *Sale of Goods, Hire-Purchase and Moneylending in Malaysia*, Queens Pte Ltd, Kuala Lumpur, 1980, p. 180.

The effects of the differences between the Malaysian and English definitions of moneylender were as follows:

- Earnings derived from an activity other than moneylending were not given any weight in establishing whether a person was a moneylender or not;
- Both principal and agent were accountable as moneylenders;
- The “reversal of onus” provision under section 3 placed the burden on the moneylender to prove that his activities did not amount to a business of moneylending.

2.5.1.2 The amended definition of a “moneylender”

Section 2 of the MLA 2003 amended the definition of a moneylender to read that a moneylender is:

“Any person who lends the sum of money to a borrower in consideration of a larger sum being repaid to him.”

This amended definition has two purposes: first, to extend the definition of a moneylender to include the activities of loan sharks, and second, to accommodate the deletion of section 2A(1)(h) regarding *bona fide* lenders, which had prevented the MLA from regulating the moneylending activities undertaken by firms and companies as secondary activities.⁵⁵ The redefinition has indeed widened the scope of ‘moneylender’. Further, it is apparent that the new definition is very general as compared to the old definition, which was in fact business oriented. In sum, the intention of the amendment was to include all moneylending activities which are not covered under the Banking and Financial Institutions Act 1989, either as the main

⁵⁵ S 2A(1)(h) is discussed in 2.6.1.

activity or secondary activity, in whatever form.⁵⁶ However, the simplified definition that was meant to clarify the scope of moneylenders has invited endless discussion on who is a moneylender. For instance, the legal consequence of inter-company loans, employer-employee loans, Government loans and loan amongst friends is called into question.⁵⁷ Perhaps, for the time being, the Ministry should issue guidelines to clarify this definition, until further interpretation is provided. In the meantime, the wisdom of the court in interpreting the new definition of 'moneylender' is awaited with much interest.

2.5.1.3 Moneylending under the CCA

It was mentioned earlier that the CCA regulates the substance rather than the form of a credit transaction; thus the terminology and the structure of the CCA have to be understood fully to identify the different types of credit regulated. Under the CCA, the important distinction between pure money loans and loans explicitly connected to the purchase of goods and services is reflected in the terminology, debtor-creditor agreements and debtor-creditor-supplier agreements, respectively.

In the UK, moneylending businesses are being referred to as "weekly home collected credit companies,"⁵⁸ "weekly collected credit"⁵⁹ or "home credit industry."⁶⁰ The DTI acknowledged that statistical information on illegal moneylending in the UK is

⁵⁶ See the Ministry for Housing and Local Government, "Amendment to the Moneylenders Act 1951: A briefing by the Minister of Housing and Local Government to the Malaysian Parliament Government Supporters Club," Unpublished document, 2003.

⁵⁷ See SY Kok, "Who is a moneylender in year 2003?" [2004] 3 *MLJ* cxxi.

⁵⁸ Elaine Kempson and Claire Whyley, *Extortionate Credit in the UK (A Report to the DTI)*, Personal Finance Research Centre, London, 1999. Available: <http://www.dti.gov.uk/ccp/topics1/extortionate.htm> (accessed May 2004) (hereinafter "UK Extortionate Credit Report").

⁵⁹ K. Rowlingson, *Moneylenders and their Customers*, Policy Institute, London, 1994, p. 23.

⁶⁰ See *The Home Credit Industry* in the Consumer Credit Association website in <http://www.ccauk.org/homecred.html> (accessed October 2005).

rare.⁶¹ However, a research study by Kempson and Whyley indicated that there were about 1200 licensed moneylending companies, 27000 licensed debt-collectors and three million customers. Rowlingson categorised them as follows:⁶²

- Six national companies, with at least 1000 agents each;
- 50-60 medium-sized regional companies, with 50-100 agents each;
- 700 small companies, with around 10 agents each; and
- 400 sole or very small traders, with one employee each.

Apart from that, a study conducted by Strathclyde TSD's Taskforce to Tackle Illegal Moneylending in the late 1980s and early 1990s signified that there were 60 illegal moneylending rings with an annual income of £100,000 each, in Strathclyde alone.⁶³ Like Malaysia, the UK faces problems with illegal and unlicensed moneylenders,⁶⁴ and takes necessary steps to deal with the problem.⁶⁵

2.5.2 Moneylending business

A moneylending business differs from moneylending *per se*. Like the MLA, the MLA 2003 is silent on the definition of a "moneylending business." Throughout the years, the courts have had a serious task in determining the existence of a moneylending business in order to prevent extortion by the moneylender and to

⁶¹ CC White Paper, para 5.60.

⁶² See K. Rowlingson, *Moneylenders and their Customers*, Policy Institute, London, 1994, p. 25.

⁶³ CC White Paper, para 5.60.

⁶⁴ See Lionel Bently and Geraint Howells, 'Loansharks and Extortionate Credit Bargains - 2' *The Conveyancer and the Property Lawyer*, July-August 1989; UK Extortionate Credit Report.

⁶⁵ See the DTI, *Tackling loan sharks - and more! A consultation document on making the extortionate credit provisions within the Consumer Credit Act 1974 more effective*. March 2003. CCP 007/03; CC White Paper, paras 5.57-5.60. The White Paper mentioned a two-year pilot study of cases of illegal moneylending.

realise that lending *per se* is legal in law.⁶⁶ Apart from the statute, decided cases have also established several factors to substantiate the existence of a moneylending business. Accordingly, the most important element is system and continuity. *Newton v Pyke*⁶⁷ was the landmark case that established this. This test has been strictly followed in later decisions.⁶⁸ System and continuity basically connote an ongoing and routine series of transactions. These prerequisites are important in order to distinguish between the business of moneylending and the lending of money occasionally, since what is regulated by the law is not moneylending but the “business” of moneylending. In the words of McCardie J, “there must be more than occasional and disconnected loans...the word ‘business’ imports the notion of system, repetition and continuity”⁶⁹ while “carrying on” involves “some sort of course of continuing conduct”.⁷⁰ Therefore, numerous transactions indicate the existence of a business of moneylending. For example, a total of seventeen loan transactions over a two-year period signified a business of moneylending⁷¹ whereas a total of five loans over a three-year period were held to be lacking in system and continuity.⁷² Apart from that, the following elements might suggest a structured moneylending

⁶⁶ See *Larut Matang Supermarket Sdn Bhd v Liew Fook Yung* [1995] 1 MLJ 375: the MLA is not intended to apply to individuals or companies or members of the public who lend money and charge interest unless they do so as a business.

⁶⁷ [1908] 25 TLR 127

⁶⁸ *Esmail Sahib v Noordin* [1951] 1 MLJ 98; *Sadhu Singh v Sellathurai* [1955] MLJ 117; *Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] AC 209; *Subramaniam Dhanapakiam v Ghaanthimathi* [1991] 2 MLJ 447; *Cheong Kim Hock v Lin Securities (Pte) (In Liquidation)* [1992] 2 SLR 349; *Brooks Exim Pte Ltd v Bhagwandas* [1994] 2 SLR 431; *Ng Kum Peng v Public Prosecutor* [1995] 3 SLR 231; *Wong Kim Fatt v Yong Kwet Yin* [1996] 1 MLJ 451; *Fima Logistics Sdn Bhd & Anor v Perniagaan Sin-Kung Sdn Bhd* [1999] 4 MLJ 34. *Muhibbah Teguh Sdn Bhd v Yaacob bin Mat Yatim (Y/A Tetuan Yaacob Mat Yim & Rakan-rakan)* [2005] 7 MLJ 270. Nevertheless, Yong Pung How CJ in *Ng Kum Peng v Public Prosecutor* [1995] 3 SLR 231 seems to opine that system and continuity are only initial considerations to establish a “business” of moneylending as there could be other indicators on the facts of the case.

⁶⁹ *Edgelow v MacElwee* [1918] 1 KB 205 at p. 206; this case followed *Newton v Pyke* [1908] 25 TLR 127.

⁷⁰ *Baju Ria v Liau Kim Lian* [1965] 1 MLJ 128 at p. 130

⁷¹ *Edgelow v MacElwee* [1918] 1 KB 205

⁷² *Esmail Sahib v Noordin* [1951] MLJ 98. Likewise, two personal loan transactions cannot be construed as evidence of ‘system and continuity’; see *Wong Kim Fatt v Yong Kwet Yin* [1996] 1 MLJ 45 at p. 54.

transaction: fixed rate of interest, creditworthiness and past conduct of the borrower, as well as a clear and definite repayment schedule.⁷³

An alternative test to system and continuity was established in *Litchfield v Dreyfus*,⁷⁴ based on the readiness and willingness of the alleged moneylender to lend to all and sundry as opposed to a restricted class. Again, readiness and willingness is a question of fact, not law. This test was followed in *Esmail Sahib v Noordin*,⁷⁵ *Subramaniam Dhanapakiam v Ghaanthimathi*⁷⁶ and *Bhagwandas v Brooks Exim Pte Ltd*.⁷⁷ However, in the *Bhagwandas* case, although the alternative test was applied by Chan Sek Keong J, it seems that weight is still given to the requirement of system and continuity.

The nature of the relationship between both parties may also be considered in ascertaining the existence of a moneylending “business”. An informal loan to friends or relations would not normally fall within the bounds of “business”.⁷⁸ Generally, friendly loans could be identified; for example, interest was not demanded or the rate of interest was low.⁷⁹ However, it has been established that even in cases of loans between friends, the requirement of system and continuity is still the leading test.⁸⁰ Thus limiting clientele to friends, relations and acquaintances is not an excuse to

⁷³ *Ng Kum Peng v Public Prosecutor* [1995] 3 SLR 231 at p. 239; A total of three transactions over a period of three months with a fixed interest rate and explicit repayment terms showed a regularity which led to a conclusion that the loans were not merely occasional loans.

⁷⁴ [1906] 1 KB 584

⁷⁵ [1951] MLJ 98

⁷⁶ [1991] 2 MLJ 447

⁷⁷ [1994] 2 SLR 431

⁷⁸ In *Edgelow v MacElwee* [1918] 1KB 205, McCordie J also stated that lending to strangers on occasional terms will also disqualify a person from being a moneylender.

⁷⁹ *Subramaniam Dhanapakiam v Ghaanthimathi* [1991] 2 MLJ 447

⁸⁰ See *Litchfield v Dreyfus* [1906] 1 KB 584; *Subramaniam Dhanapakiam v Ghaanthimathi* [1991] 2 MLJ 447; *Haji Bidari bin Tan Sri Datuk Haji Mohamad v Idris bin Abdullah @ Das Murthy Masri bin Tan Sri Datuk Haji Mohamad* [1996] 345 MLJU 1

escape the provisions of the MLA 2003. On the other hand, it is interesting to note that a licensed moneylender is still bound to provide a written note or memorandum of the transaction even though he lent money interest-free to his father or brother.⁸¹

2.5.3 Unlicensed moneylenders, illegal moneylenders and loan sharks

To avoid any confusion, it is necessary to define the terms “loan sharks”, “illegal moneylenders” and “unlicensed moneylenders”. For the purpose of this thesis, the term “loan sharks” refers to persons offering illegal moneylending services without obtaining a valid licence from the Ministry. In Malaysia, loan sharks are also known as *ceti haram* or *ah long*. The loan sharks’ activities are categorised as those of a “systematic criminal syndicate” and not moneylending *per se*.⁸² Lack of system and control over loan sharks’ activities has led to unlawful behaviour and criminal misconduct. An example is charging high interest rates and using heinous and contemptible enforcement tactics in collecting repayments. It has been reported that a loan shark’s syndicate operates like a financial institution, with a multi-tiered system controlled by area managers and supervisors to oversee workers who disburse loans and collect repayments.⁸³ It should be noted that the term “loan sharks” and “illegal moneylenders” are used inter-changeably in this thesis, as they mean the same. However, “unlicensed moneylenders” does not exclusively refer to loan sharks: the term may also refer to honest moneylenders who are not licensed for certain reasons, such as not realising the need to be licensed or forgetting to renew their licences, or whose application for licences are pending approval at the Ministry.

⁸¹ *Karuppiah Pillai v Kaka Singh* [1973] 1 MLJ 96

⁸² See “Kegiatan ceti haram jenayah terancang” (Loan sharks activities are systematic crime), *Berita Harian*, 30 September 2004; Bishan Singh, “Masalah Ceti Haram” (Illegal moneylender issues), *Buletin Pengguna*, January 2003.

⁸³ L. Charles and N. Benjamin, “Cops get death threats”, *The Star*, 26 September 2004.

2.5.4 The meaning of “borrower”

A borrower is defined as “a person to whom money is lent by a moneylender.”⁸⁴

Based on the definition, borrowers may include those who borrow from licensed moneylenders and loan sharks. However, no research has been conducted on the demographic profile of borrowers in moneylending transactions in Malaysia. Nevertheless, according to SY Kok, in the old days, those who borrowed from moneylenders were office workers and small tradesmen who took small but frequent loans of less than RM1000.⁸⁵ Indeed, until now, the same people continue to borrow from informal financial institutions, including licensed moneylenders and loan sharks. Thus, it is reported that at present, small traders, hawkers, taxi drivers, shop owners, office workers and civil servants are frequent customers of loan sharks.⁸⁶ In a simple survey undertaken by the Institute of Management and Social Development, four types of loan sharks’ customers were identified:⁸⁷

- those involved in illegal businesses such as smuggling and drug trafficking;
- those involved in criminal activities such as drug addicts, gamblers and smugglers;
- small traders who need quick funds and;
- ordinary workers who need money to support day-to-day life.

⁸⁴ MLA 2003, s 2.

⁸⁵ SY Kok, “Who is a moneylender in year 2003?” [2004] 3 *MLJ* cxxi.

⁸⁶ See Loo Yok Soi, Faridah Begum and S. Arulidas, “15,000 turn to loan sharks to settle debts”, *The Star*, 3 December 2002; “Traders urged to utilise Government loan facilities”, *New Straits Times*, 9 December 2002; “Kaji punca peniaga kecil gemar pinjam Along” (Examine why small traders frequent loan sharks), *Berita Harian*, 4 December 2002; “Suspected loan shark held under amended Act”, *New Straits Times*, 8 April 2005; “Civil servants heavily in debt”, *Sunday Mail*, 13 November 2005.

⁸⁷ B. Singh, “Masalah Ceti Haram” (Illegal moneylender issues), *Buletin Pengguna*, January 2003. Several reports on loan shark suicide victims showed that among the amounts and the reasons for borrowing were; borrowed RM30,000 to expand business; borrowed to pay for electricity and rental deposits; borrowed RM38,000 to start a business; see further N. Spykerman, “Ah Longs will come after us”, *The Malay Mail*, 14 November 2003; N. Spykerman, “Hawker in the Soup”, *The Malay Mail*, 8 November 2003; T. Leonard, “Why? Son-in-law dead, daughter critical”, *The Malay Mail*, 7 October 2003.

2.5.5 Financial limit

Moneylenders in Malaysia have never had any financial limit to their application to license moneylending businesses. Thus the MLA 2003 applies to both consumer and commercial transactions, ranging from small-scale loans to transactions worth millions of *ringgit*. On the other hand, in the UK, the CCA regulates consumer credit and consumer hire agreements up to £25,000. However, the CCA 2006 will bring some changes to this long-practised control; it will remove the current limit on consumer lending but retain the £25,000 limit for business lending.⁸⁸ Thus there will be no financial limit for consumer credit and consumer hire agreements, unless specifically exempted.

2.5.6 Inspectors of Moneylenders

The MLA 2003 introduced the term ‘Inspectors of Moneylenders’.⁸⁹ These are the officers who enforce the Act by carrying out investigations, searching, seizing and arresting. In other consumer protection statutes, enforcement officers are known by several other names such as Assistant Controller and Chief Inspector. The term “Inspector” will be used interchangeably with “enforcement officers” throughout this thesis. Apart from the Inspectors, the MLA 2003 also authorises the police to enforce the Act.

2.5.7 Age limit

Under the MLA 2003, it is an offence to lend money to under-aged persons; thus, moneylenders can only deal with people above the age of eighteen.⁹⁰ This is in line

⁸⁸ CCA, s 8, as amended by the CCA 2006, s 2.

⁸⁹ MLA 2003, s 4.

⁹⁰ MLA 2003, s 8(d).

with the Malaysian Contracts Act 1950 which provides that only a person who has attained the age of majority is competent to contract.⁹¹

2.5.8 Currency

The current exchange rate between the UK pound sterling and the Malaysian *ringgit* is £1 is equivalent to RM7.

Following this interpretation of the key words in the study, the persons and bodies exempted from the application of the MLA 2003 will be considered in the next section.

2.6 Exemptions under the MLA 2003

There are two types of exemptions under the law of moneylenders: exemption by statute under section 2A(1) of the MLA 2003, and also exemption given by the Minister of Housing and Local Government under section 2A(2).

2.6.1 Statutory exemption

The broad definition of ‘moneylender’ under the MLA 2003 has brought a variety of persons under the Act. In order to avoid any misunderstanding and misconception over the interpretation of a moneylender, exceptions are granted to specific categories of bodies under section 2A of the Act. Such exemptions can be justified as most of the categories concerned are regulated by other statutes.

⁹¹ Contracts Act 1950, s 11. The age of majority in Malaysia is eighteen; see Age of Majority Act 1961, s 2.

Originally, under the old moneylenders law, seven categories of persons were expressly exempted by section 2A(1) of the MLA. The MLA 2003 deleted the infamous section 2A(1)(h) which exempted genuine businesses whose primary object of business is not moneylending.⁹² In other words, the MLA was prevented from regulating moneylending activities undertaken by firms and companies as secondary activities. The difficulty brought by this provision was that moneylenders could easily circumvent the requirement to get licences by maintaining that moneylending was not their primary business. Due to the weakness of the definition, it was reported that there were cases where the Court could not convict unlicensed moneylenders for not obtaining moneylending licences.⁹³

Section 2A(1)(h), based on an English concept, was inserted by the Moneylenders (Amendment) Act 1988 (Act A688).⁹⁴ This was the only category of exception that was not regulated by any specific statute. It therefore constituted a loophole in the MLA, of which moneylenders apparently took advantage. Hence this provision has seen much litigation in Malaysia and in the UK alike.⁹⁵ For example, a person carrying on a main business of selling second-hand cars and at the same time lending

⁹² Section 2A(1)(h) provided that the Act did not apply to “any person *bona fide* carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money.”

⁹³ The Ministry of Housing and Local Government, *Unpublished Report*, 1997.

⁹⁴ The words that require the most careful consideration are “not having for its primary object the lending of money.” This is, however, a question of fact and must depend on the facts of each case; see for example *Litchfield v Dreyfus* [1906] 1KB 584; *Edgelow v McElwee* [1918] 1KB 204; *Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] AC 209, [1962] MLJ 74; *Ngui Mui Khin & Anor v Gillespie Brothers & Co* [1980] 2 MLJ 9. The words “for the purposes whereof” refer to the business and not to the primary object of the business. So long as the lender lends money for the purpose of his business, i.e. to preserve, advance, or otherwise assist the business, it should be sufficient to bring him within this exception; see *The Official Assignee v Ek Liang Hin Ltd* [1960] MLJ 85 at 87, 88, PC; *Frank H Wright (Constructions) Ltd & Ors v Frodoor Ltd & Anor* [1967] 1 All ER 433.

⁹⁵ See *Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] AC 209, [1962] MLJ 74; *Ngui Mui Khin & Anor v Gillespie Brothers & Co* [1980] 2 MLJ 9; *Karuppiah Pillai v Kaka Singh* (1973) 1 MLJ 96; *Yeap Mooi v Chu Chin Chua & Ors* (1981) 1 MLJ 14; *Baju Ria v Liau Kim Lian* (1965) 1 MLJ 128. See also *Litchfield v Dreyfus* [1906] 1 KB 584; *Newton v Pyke* (1908) 25 T.L.R. 127; *Newman v Oughton* [1911] 1 K.B. 792; *Bonard v Dott* (1905) 92 L.T. 822; *Furber v Fieldings* (1907) 23 T.L.R. 362; *Edgelow v McElwee* [1918] 1 KB 204.

money did not need to possess a valid licence under the MLA,⁹⁶ as moneylending was not his primary object. By employing this deception, a substantial number of moneylenders had conducted moneylending businesses without being regulated by any specific law. The defect of section 2A(1)(h) was further compounded by the lack of indication as to how to determine the main business of a person who undertook more than one business, since the MLA was silent on this matter. The deletion of this provision was timely and a commendable move by the legislature. In the light of this change, what used to be a common practice is now outlawed.

Besides removing sub-section (h), the MLA 2003 added another exception, making the moneylenders law inapplicable to development financial institutions.⁹⁷ Under the new law, the expressly exempted institutions are as follows:

- (a) any authority or body established, appointed or constituted by any written law, including any local authority;⁹⁸
- (b) any co-operative society registered under the Co-operative Societies Act 1948 (Act 287), now the Co-operative Societies Act 1993(Act 502);
- (c) any bank or merchant bank licensed under the Banking and Financial Institutions Act 1989⁹⁹ (hereinafter “BAFIA”) or the Islamic Banking Act, 1983 (Act 276);¹⁰⁰
- (d) any insurance company licensed under the Insurance Act 1996 (Act 553);

⁹⁶ According to Rachagan, ‘the category included in (h) ...is vague and it is unclear to which classes of persons it applies. It is here suggested that the Act is meant to apply to all “lender-credit” transactions and not “vendor-credit” transactions;’ see the Malaysian Consumer Law Reform Report, para 5.5.2.

⁹⁷ MLA 2003, s 2A(1)(fa).

⁹⁸ Comprising any City Council, Municipal Council, or District Council, as the case may be; see the Local Government Act 1976 (Act 171).

⁹⁹ See the definitions of ‘bank’, ‘banking business’, ‘merchant bank’ and ‘merchant bank business’ in BAFIA, s 2(1).

¹⁰⁰ See the definitions of ‘Islamic bank’ and ‘Islamic banking business’ in the Islamic Banking Act 1983 (Act 276), s 2.

- (e) any company licensed under the *Takaful* Act 1984 (Act 312);¹⁰¹
- (f) any pawnbroker licensed under the Pawnbrokers Act 1972 (Act 81);
- (fa) a development financial institution prescribed under the Development Financial Institution Act 2001 [sic] [Act 618]; and
- (g) any licensed finance company as defined in section 2(1) of the BAFIA.¹⁰²

Sub-section (fa) is a new provision inserted by the MLA 2003. Section 3 of the Development Financial Institution Act 2001 defines a “development financial institution” as “an institution which carries on any activity, whether for profit or otherwise, with or without any Government funding, with the purpose of promoting development in the industrial, agricultural, commercial or other economic sector, including the provision of capital or other credit facility”. Examples of such institutions are the *Bank Simpanan Nasional* and the Agricultural Bank. Although extending exemptions from the term ‘moneylenders’ seems quite odd in view of the objective to protect the interest of consumers, the addition of sub-section (fa) was purposely to accommodate the enactment of the Development Financial Institution Act, and those financial institutions referred to under the Act were initially under the jurisdiction of BAFIA. Thus it may be suggested that the exemption under section 2A(1) of MLA 2003 does not widen its scope as those development financial institutions were originally exempted under BAFIA.

¹⁰¹ *Takaful* refers to Islamic insurance.

¹⁰² A finance company business is defined under BAFIA to mean (a) the business of receiving deposits on deposit account, savings account or other similar account; and (b) (i) giving of credit facilities; (ii) leasing business; (iii) business of hire-purchase, including that which is subject to the Hire-Purchase Act 1967; or (iv) business of acquiring rights and interests in a hire purchase, leasing or other similar transaction; (c) such other business as the Bank, with the approval of the Minister, may prescribe.

In the UK, the CCA also provides statutory exemptions. Section 16 of CCA exempts nine categories of persons and bodies in connection with land mortgages from the application of the statute.¹⁰³ These include insurers, friendly societies, organisations of employers or organisations of workers, charities, specific bodies corporate, building societies and deposit takers. Further, the CCA 2006 will add another two categories of statutory exemptions. First, consumer credit agreements and consumer hire agreements can be exempted by the Secretary of State where the debtor or hirer has a “high net worth”.¹⁰⁴ In order to qualify for the exemption, the debtor or hirer must be a natural person and he must agree to relinquish the protection and remedies of a regulated agreement offered by the CCA.¹⁰⁵ The second exception is exemption relating to businesses.¹⁰⁶ In this case, consumer credit and hire agreements will be exempted if they are entered into mainly for the debtor’s or hirer’s business purposes and the amount of credit or hire exceeds £25,000.¹⁰⁷

Certain consumer credit agreements are also exempted from the CCA depending on the nature of the credit, number of repayments and the charge for credit.¹⁰⁸ Exemptions by the *nature of the credit* involve contracts relating to the purchase of land or agreements secured on land and certain ancillary transactions.¹⁰⁹ Therefore, where land or property is being purchased, land mortgages by local authorities, housing authorities, banks, building societies and certain other lenders are exempted from the CCA.¹¹⁰

¹⁰³ CCA, s 16.

¹⁰⁴ CCA, s 16A, as inserted by CCA 2006, s 3.

¹⁰⁵ Ibid.

¹⁰⁶ CCA, s 16B, as inserted by CCA 2006, s 4.

¹⁰⁷ Ibid.

¹⁰⁸ Consumer Credit (Exempt Agreements) Order 1989, order 2, 3 & 4; OFT, *Regulated and Exempt Agreements*, January 1992.

¹⁰⁹ Consumer Credit (Exempt Agreements) Order 1989, order 2.

¹¹⁰ CCA; s 16(1), s 16(2) and s 16(6A).

Exemptions by the *number of repayments* involve both debtor-creditor-supplier agreements for fixed-sum credit which require no more than four repayments payable within 12 months of the agreement being made and running-account debtor-creditor-supplier agreements where the balance has to be paid in one instalment when it falls due.¹¹¹ The first refers to everyday credit such as newspaper and milk bills which are settled periodically, while the second refers to the difference between a charge card and a credit card.¹¹² A charge card, such as American Express, falls within the exemption since the monthly bill must be paid in full. However, a credit card, which includes Mastercard and Visa, does not, since the customer is given the option to repay in full or to pay a minimum percentage of the outstanding balance and carry the balance to the next month.

Finally, exemption on the basis of the charge for credit operates on the basis of the low charge for credit and applies only to particular classes of consumers, such as students and employees.¹¹³

2.6.2 Minister's power of exemption

The MLA granted the Minister for Housing and Local Government a wide discretion in exercising his power of exemption. The ministerial power enables him to exempt certain companies and societies from all or any of the provisions of the Act under section 2A(2).

¹¹¹ CCA; s 16(5); see also the Consumer Credit (Exempt Agreements) Order 1989, order 3.

¹¹² See Brain Harvey and Deborah Parry, *The Law of Consumer Protection and Fair Trading*, 6th ed, Butterworths, London, 2000, p. 299.

¹¹³ The Consumer Credit (Exempt Agreements) Order 1989, order 4.

Originally, the Minister had exclusive discretion in giving exemptions. However, presumably in fear of any abuse of power at the highest level of administration, a guideline was provided to assist him in the exercise of this discretion. This guideline was included under section 2A(2) of the Moneylenders (Amendment) Act 1988.¹¹⁴ It empowered the Minister to give blanket exemption to certain companies and societies by notification in the *Gazette*, provided that such power was exercised in consideration of the following conditions:¹¹⁵

- i) the special circumstances relating to the nature of the business of such company, or the objects of any society;
- ii) the financial standing of the said company; and
- iii) the public interest would not be prejudiced by such exemption.

The exemption is limited to companies and societies: it does not extend to individuals. An exemption authorises an institution to trade without observing some or all requirements under the moneylenders law. Any duration, limitations, restrictions or conditions will be specified in the exemption notification.¹¹⁶ Failure to observe such limitation, restriction or condition may result in revocation of the exemption.¹¹⁷

The three factors above need to be considered wisely by the Minister before giving exemption, so as to avoid any mischievous application intended to circumvent the law. If exemption were given without due consideration, a line of business would be formed that would create unhealthy competition with commercial banks, as well as finance companies. An undue advantage would be given to exempted moneylending

¹¹⁴ Act A688.

¹¹⁵ MLA, s 2A (2) (a) and (b).

¹¹⁶ MLA, s 2A (2).

¹¹⁷ Such revocation will only take place after procedural requirement and opportunity of being heard is exercised.

businesses as they could trade without being governed by any specific law. Hence, such exemption does not promote fair trading. If such discretion were exercised imprudently, it would be likely a route to risks, corruption and bribery. Indeed, the temptation of running an unregulated business is too high.

The effect of the Minister's exemption is illustrated in the following case. In *Kok Swee Chin v General Factoring & Credit Sdn. Bhd.*,¹¹⁸ it was held that a moneylender lawfully exempted from the provisions of the MLA by the Minister from 1983 to 1991 pursuant to the old section 2(e) of the MLA was not bound by the Act and could contract for interest rates over and above the rates stipulated in the Act so long as the contracting parties had agreed to the same. The defendant was also allowed to collect repayment and payment of the agreed interest and late payment charges beyond 1991 in respect of those loan agreements executed during the exemption period. Thus, when a business is exempted from the moneylenders laws, the parties to the moneylending contract may exercise freedom of contract in undertaking the loan, although some of the terms and the interest rates may be considered unreasonable.

The exercise of a wide discretion in deciding exemption applications without taking into consideration the intention of the statute is contrary to the aim of the MLA. As mentioned earlier, the risks and dangers of abuse of power are highly at stake if the Minister does not exercise his discretion wisely. Therefore, decided cases have shown that exercise of discretionary power is only valid if it is not abused.¹¹⁹ One of the criteria to be considered by the Minister, "the special circumstances relating to the

¹¹⁸ [2004] 6 CLJ 101-112, HC.

¹¹⁹ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694; *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9; *R Rama Chandran v The Industrial Court of Malaysia* [1997] 1 MLJ 145.

nature of the business”, is very subjective in nature and might steer the emphasis away from preserving the public interest. Therefore, such power must be exercised on legitimate principles, i.e. in accordance with the law. Perhaps, it is advisable that the Minister does not take into consideration an irrelevant factor or fail to take into account a relevant factor and he must not act *mala fide*. The discretion must not be unlawfully fettered, and it must adhere to any procedural safeguards contained in the legislation.

It is suggested here that section 2A(2) is indeed a dangerous provision, as whatever protection is afforded by the Act is brought to naught by the exemption. Over the years, a very large number of corporations have been exempted by the Minister.¹²⁰ The fact that exemption granted can be revoked at any time is no answer, for by then the damage would have been done. Such revocation does not invalidate the loan, which is recoverable despite the breach of conditions of exemption.¹²¹ Thus, instead of securing compliance, regrettably, the serious consequences of past breaches remain unresolved. Hence, the emphasis on prudent discretion before the Minister exercises his judgement.

In the UK however, there is a different way of dealing with the situation. Instead of vesting the power of exemption in the OFT, the CCA empowers the OFT to make a validating order. This ‘case by case’ approach under section 40 of the CCA sees that a regulated agreement made by an unlicensed trader can only be enforced if the OFT makes a validating order. Before making such an order, the OFT must consider

¹²⁰ Malaysian Consumer Law Reform Report, para 5.5.2.

¹²¹ *North Central Wagon Finance Co. Ltd. v Brailsford* [1962] 1 All ER 502; in this case, the plaintiffs were exempted from the Moneylenders Acts by order of Board of Trade with a condition that the company do not take interest on a loan at a rate exceeding ten per centum per annum.

factors such as the extent to which debtors and hirers have been prejudiced, whether or not the OFT would have granted a licence to the trader if he had applied for it, and the degree of culpability for failure to obtain a licence.¹²² According to Lowe and Woodroffe, section 40 serves as a powerful deterrent against unlicensed trading, since the most effective sanction is the unenforceability of agreements.¹²³

In view of the above, it is worth discussing whether section 40 should be adopted in Malaysia, in particular, to replace the provision on ministerial exemption. It is submitted that although section 40 provides a good example to avoid any unnecessary exemption by the Minister, the ministerial exemption provision should remain, as its main purpose is to address the failure of the law to “distinguish consumer from commercial transactions.”¹²⁴ Apparently, since the MLA 2003 does not distinguish consumer from commercial transactions, large-scale business transactions are also subjected to the requirements of the moneylenders law, although these large corporations are competent to exercise freedom of contract and invoke their own terms and conditions. Therefore, they do have valid reasons to apply for exemptions, to avoid the technicalities that may render their loan transactions void.

2.7 Conclusion

This chapter has examined the Malaysian moneylenders laws and the UK Consumer Credit Act, as well as the institutional framework for consumer credit in both countries. As mentioned in the Introduction, the comparative approach is undertaken to highlight the strengths and weaknesses of the MLA 2003, in light of the modern

¹²² CCA, s 40(4).

¹²³ Robert Lowe and Geoffrey Woodroffe, *Consumer Law and Practice*, 6th ed, Sweet & Maxwell, London, 2004, p. 356.

¹²⁴ This is one of the deficiencies submitted by the Crowther Committee, in evaluating the credit law in the UK; see further Crowther Report, para 4.2.6.

development of the UK CCA. A comparative approach is also the best method to evaluate the benefits and difficulties of the fragmentary approach retained by the Malaysian Government in the area of consumer credit; principally on moneylending. It seems that the deficiencies quoted by the Crowther Report still exist, and in particular, several credit forms, such as credit cards remain unregulated by any specific statute. As stated by Rachagan, unregulated credit transactions not only make credit unjustly expensive and discriminatory in its provisions but also lead consumers into unmanageable debt; and further sacrifice the legitimate interests of consumers.¹²⁵

In regard to moneylending, there are indeed evident drawbacks suffered by borrowers due to the current institutional framework of consumer credit. Having two different agencies regulating consumer credit laws has resulted in different application, different rules and different enforcement. There is apparent confusion over the agency controlling the law governing moneylending and the activities of loan sharks, evidenced with low awareness of the public over the function of the Ministry. Further, it is puzzling that hire-purchase disputes but not moneylending disputes could be referred to the Consumer Tribunal. Ironically, they are under one umbrella of consumer credit, but are regulated under different statutes and by different Ministries. This is to the detriment of borrowers in moneylending transactions. For the above reasons, there have been calls to identify a single authority to enforce consumer credit laws. On the other hand, in the context of the MLA 2003, the move to appoint the Ministry as the sole regulator of the new moneylenders law is certainly optimistic, as previously, the Ministry only played a nominal role.

¹²⁵ Malaysian Consumer Law Reform Report, para 5.1.1.1; Sadna Saifuddin, 'Revamp outdated credit laws to protect consumers,' *Business Times*, 30 March 2004.

This chapter has analysed the definitions of the key terms in the MLA 2003, and both the statutory as well as ministerial exceptions. It was pointed out that the definition of 'moneylender' has been widened in order to include illegal moneylenders. The effort to extend the jurisdiction of the Act is indeed commendable, as one of the purposes of the Act is to eliminate loan sharks' activities. However, the redefinition has also posed questions on the legal consequence of inter-company loans, employer-employee loans, Government loans and friendly loans. Thus it is suggested that a guideline should be published by the Ministry to clarify this issue.

The move taken by the new law to delete section 2A(1)(h), which exempted genuine businesses whose primary object of business is not moneylending, was highly creditable, as it had been used as a means to circumvent the moneylenders law. As discussed earlier, this was the only category that was exempted and not regulated by any statute. However, the power of exemption by the Minister has caused some concern. Such power may create exposure to risks, corruption and bribery, if not carefully guarded. Nevertheless, this exception has to be retained, in order to address the issue of the disparity between consumer and commercial moneylending. In sum, it may be concluded that apart from the exception by the Minister, the mechanisms in defining the MLA 2003 and providing exceptions are moving in the right direction and are likely to satisfy the objective of the statute in providing protection for consumers in moneylending transactions.

It is the intention of this study to investigate whether revision of the moneylenders laws in Malaysia has kept pace with the commercial developments and constant changes in consumer credit practices, although the Government has chosen to

continue the piecemeal approach. Thus, it is the goal of this thesis to investigate whether the three objectives of the MLA 2003 to regulate the moneylending business, to protect the interest of borrowers in the moneylending transactions and to eradicate loan sharks' activities could be achieved. This intention is carried out in the following chapters.

Chapter Three

BUSINESS LICENSING AND ADVERTISEMENT PERMITS

3.0 Introduction

Chapter Two discussed the sources of moneylenders law, the background of the MLA 2003 and the interpretation of the key words in the statute. The role of the licensing regime and advertisement permits will now be investigated. This chapter seeks to examine and analyse the licensing and advertising provisions under the MLA 2003 in order to determine whether the three objectives of the Act, to regulate and control the business of moneylending, to protect borrowers in the course of moneylending transactions and to eliminate illegal moneylending, are achieved. In order to realise these aims, section 5 of the MLA, the key provision on licensing, has been amended to widen the scope of the moneylenders law to include loan sharks' activities.

The licensing regime is a dynamic and powerful regulatory mechanism to identify and exclude dishonest moneylenders as well as to maintain high standards in business. The MLA 2003 has expanded the licensing provisions and nearly twenty new provisions that explain the details of the licensing regime will be analysed. Discussion of the licensing regime will include the procedure for application for licences, grant and refusal of licences, fees, duration and renewal of licences, revocation or suspension of licences, appeal, transfer or assignment of licences and also termination of licences. However, much discussion will centre on the Malaysian concept of a "fit and proper person" and the UK's "fitness test", which is the tool used to select only suitable applicants to be given a licence.

The MLA 2003 also introduced advertisement permits, which is a new method of regulating and controlling moneylending advertisements. The significance of advertisement permits is similar to that of licensing, since the advertising permits regime safeguards consumers by screening out misleading and vague moneylending advertisements. Discussion of the advertisement permits regime includes application and renewal of permits, as well as the content of moneylending advertisements. An analysis of moneylending advertisements posted in a daily newspaper will be conducted to determine whether these advertisements conform to the moneylenders law.

3.1 Significance of the Licensing System

The establishment of a licensing regime for moneylenders was among the main characteristics of the Moneylenders Act in the Commonwealth countries.¹²⁶ In theory, the licensing system is the core element supporting the law to enhance its effectiveness, but in practice, as a method of control, its efficiency relies on the administration and enforcement machinery.¹²⁷ As explained in Chapter Two, from the historical perspective, manifest abuses such as fraud and oppression were the driving force for the establishment of a licensing system, particularly to identify and exclude the unscrupulous.

¹²⁶ Nick McBride, 'Consumer Credit Regulation', paper presented at *Asian Conference on Consumer Protection, Competition Policy and Law*, 28 February - 1 March 2003, Kuala Lumpur, p. 4. In the UK, licensing provisions under the Moneylenders Acts were repealed on 1 August 1977: see the CCA, Schedule 5, while the moneylending legislation of the various Australian states, which was largely based on the English Moneylenders Acts 1900 - 1927, was repealed in the early and mid-1980s; see Duggan, Begg and Lanyon, *Regulated Credit: The Credit and Security Aspects*, The Law Book Company Limited, Sydney, 1989, pp. 23-24. Repeal of the Acts was based on the report of the Crowther Committee in the UK and the Rogerson and Molomby Committees in Australia.

¹²⁷ See R.M. Goode, *Consumer Credit Law*, London, Butterworths, 1989, p. 183; R.M. Goode, *The Consumer Credit Act*, London, Butterworths, 1979, pp. 103-104. Prior to the MLA 2003, the ineffectiveness of MLA was said to be due to the decentralisation in administration and the weakness of the enforcement mechanism.

Literature in the UK commended the licensing system as “an effective weapon against unscrupulous traders,”¹²⁸ a “potentially powerful regulatory weapon,”¹²⁹ “the most far-reaching type of licensing in Britain today”¹³⁰ and “central to the success of the Consumer Credit Act 1974.”¹³¹ Borrie pointed out several reasons for the introduction of a licensing system; among them to ensure that only skilled and competent people practise in a certain area, by excluding the unskilled, incompetent and unwanted.¹³² Licensing ensures that businesses comply with certain conditions before operating so that consumers deal only with fit and proper businesses. Further, even though a licence is approved, it is not a warrant to trade dishonestly. Indeed, the business must maintain its capability and avoid any improper and unfair business practice, as the licence could be suspended or revoked. In sum, it may be suggested that the strength of licensing lies in the identification of competent traders and the exclusion of the incompetent and dishonest.

Historically, in Malaysia, the initial objective of the establishment of the licensing system was to safeguard the interest of borrowers.¹³³ In the Parliamentary Debate on moneylending law in 1951, it was acknowledged that, “there is probably no form of business which requires a greater degree of control than that of lending money at

¹²⁸ The OFT, *Consultation Document on the Working and Enforcement of the Consumer Credit Act 1974*, 1993.

¹²⁹ B. Harvey and D. Parry, *The Law of Consumer Protection and Fair Trading*, 6th ed, Butterworths, London, 2000, p. 306.

¹³⁰ C. Scott and J. Black, *Cranston's Consumer and the Law*, 3rd ed, Butterworths, London, 2000, p. 447.

¹³¹ G. Howells, *The United Kingdom's Experience of the Consumer Credit Act 1974 and its Relevance to Malaysia*, paper presented at the Regulation of Consumer Credit Transactions Seminar, Kuala Lumpur, 4-5 October 1994, p. 41; see also David Tench, *Consumer Credit Control - The UK Experience*, paper presented at the Asian Seminar on Consumer Law, Kuala Lumpur, 9-12 August 1993, p. 1.

¹³² For further details, see G. Borrie, ‘Licensing Practice under the Consumer Credit Act’ [1982] *JBL* 91, at pp. 101-102.

¹³³ *Penyata Rasmi Parlimen, Perbahasan Rang Undang-undang Pemberipinjam Wang*, Jabatan Percetakan Negara, 1951. (Malayan Hansard, *Debate on Moneylenders Laws*, National Publishers Department, 1951).

interest and no form of business which is capable, if abused, of causing so much misery and social corruption".¹³⁴ Apparently, this statement is still relevant. The need for more care and control over moneylending business is certainly greater, due to the many changes brought about by modern commercial transactions.

Over fifty years after the MLA was first enacted, the need for enhanced control over moneylending business was recognised. The 2003 Parliamentary Debate on moneylending law observed that intensified economic growth and the need to raise the standard of living not only accelerated the business of moneylending but also added complexity to the business, some involving large scale transactions, hence the major emphasis on licensing as a measure to achieve better control over the business.¹³⁵ According to the MLA 2003, a moneylender is obliged to acquire a valid licence before operating any moneylending business.¹³⁶ Any person may apply for a moneylender's licence if he can fulfil the conditions under the MLA 2003 and the MCLR. However, only one licence is applicable to one business premises. A separate licence must therefore be obtained for every address at which the moneylender carries on business.¹³⁷

It may be suggested here that licensing also serves two purposes: to help the authorities identify competent persons to run moneylending businesses and to instil confidence in the consumers whilst dealing with moneylenders. It is believed that when a consumer knows he or she is dealing with someone approved by the authorities, it will help build trust and faith in the business. Further, the genuine

¹³⁴ Ibid.

¹³⁵ The Parliamentary Debate on Moneylenders Bill 2003, p. 1.

¹³⁶ MLA 2003, s 5.

¹³⁷ MCLR, reg 3(5).

intention of the Government of protecting the borrowers' interest in moneylending transactions is reflected in the powers given to the enforcers of the MLA 2003 and the police to act against unlicensed and illegal moneylenders.

It is obvious that the main thrust of the MLA 2003 was on licensing. Nearly twenty provisions in the Amendment Act deal with licensing, in contrast to only four licensing provisions under the old law. The Malaysian Government may want licensing to be a dynamic and powerful regulatory weapon, as it has every potential to be an effective regulatory mechanism to identify and keep out dishonest moneylenders, while at the same time, protecting the borrowers. Licensing will also ensure that moneylenders maintain a high standard of trading, or suffer the action of revocation or suspension of their licences. This is where the significance of licensing lies.

Criminal sanctions are the tool controlling the licensing regime, and the MLA 2003 provides stern punishments for failure to obtain valid licences. The MLA 2003 clearly states that if a person is convicted of running an unlicensed moneylending business, he is liable to be fined between RM25,000 and RM100,000 or to imprisonment for a term not exceeding five years or both; further, a subsequent offence is liable to whipping.¹³⁸ The punishment is a far cry from the old law, where the penalty for carrying out moneylending business without a valid licence was only a fine not exceeding RM1000.¹³⁹

¹³⁸ MLA 2003, s 5(2). The amount quoted is equivalent to £357 - £14286. Further discussion on the sanctions under the MLA 2003 is in Chapter 6.

¹³⁹ MLA, s 8.

3.2 The Licensing Regime

The system of licensing is regulated by the Registrar of Moneylenders, Deputy Registrars of Moneylenders and Inspectors of Moneylenders. Apart from that, the Minister is empowered by the MLA 2003 to make necessary regulations to give full effect to its provisions and objectives.¹⁴⁰ The licensing regime includes the issuance, renewal, suspension and revocation of licences, subject to rights of appeal to the Minister. As mentioned in Chapter Two, the MLA 2003 introduced a centralised system that vests the sole right to issue licences to moneylenders in the Ministry, in contrast to the preceding decentralised system.¹⁴¹ This new system would appear to have addressed the serious problem of administrative discrepancy under the old moneylenders law.¹⁴² According to the Ministry, there were 2719 licensed moneylenders in operation in 2002. Table 3.1 illustrates the approved number of licences according to states.

¹⁴⁰ MLA 2003, s 29H; the MCLR and the Moneylenders (Compounding of Offences) Regulations 2003 are the regulations made in exercise of the powers conferred by s 29H.

¹⁴¹ See para 2.4.1.

¹⁴² Reports received from various states showed that some states such as Perlis, Kelantan, Pahang and Negeri Sembilan had no written rules and guidance on application for licences, whereas others like Perak laid down in detail the process of application, which included written examination and interview, as well as grant of a licence. The state of Kedah, for example, set out in detail the evidence needed to process the moneylending application, such as proof from the bank stating that the applicant has sufficient capital (the capital needed for a partnership or company was not less than RM100,000 whereas individuals needed not less than RM50,000); see the Ministry of Housing and Local Government, *Unpublished Report*, 1997.

Table 3.1: Figures on moneylending licences issued by the Ministry in 2002.

<i>State</i>	<i>Total</i>
Perlis	21
Perak	348
Kedah	333
Penang	371
Selangor	318
Wilayah Persekutuan	222
Melaka	197
Negeri Sembilan	248
Johor	299
Kelantan	10
Terengganu	-
Pahang	86
Total	2719

Source: The Ministry of Housing and Local Government, 2003.

Table 3.1 shows the number of licences approved by the Ministry before the commencement of the MLA 2003. It illustrates that quite a number of licensed moneylenders had to be monitored by each local authority in big cities such as Perak, Penang and Selangor. On the other hand, the states of Kelantan, Perlis and Pahang had less moneylending business while Terengganu had none. The explanation for the disparity of moneylending business in the four states quoted above may be because the majority of the population are Muslims and they believe that transactions involving interest are forbidden.

Following the enforcement of the new law, the record shows that applications for new licences have increased, and the majority of moneylenders have remained in the business by renewing their licences. The renewal process is not automatic, as the Ministry announced that it would review the renewal applications to ensure that moneylenders were genuinely eligible and free from any misconduct.¹⁴³ Table 3.2

¹⁴³ See "Government to review 2,200 moneylending licences", *The Star*, 10 April 2003.

shows the total number of moneylenders' licences issued by the Ministry after the implementation of the new law.

Table 3.2: Figures on moneylending licences issued by the Ministry in 2004-2005.

<i>Year/Month</i>	<i>New Application</i>	<i>Renewal</i>	<i>Total</i>
2004			
January	-	-	-
February	-	-	-
March	-	-	-
April	-	-	-
May	-	-	-
June	-	-	-
July	1	176	177
August	2	678	680
September	13	765	778
October	30	490	520
November	25	155	180
December	25	47	72
2005			
January	38	16	54
February	23	18	41
March	35	12	47
April	25	6	31
May	46	9	55
June	53	15	68
July	25	7	32
August	23	1	24
September	48	2	50
October	21	3	24
November	16	1	17
December	25	1	26
Total	474	2394	2876

Source: The Ministry of Housing and Local Government, 2006.

With regard to Table 3.2, it is interesting to consider whether the new applications mean that moneylenders are becoming more confident of the new laws. It may also indicate that some moneylenders who have been in business for some time have only just realised that they must be licensed to operate the business; or they are concerned

about being caught and punished with stern penalties. In contrast, it is also interesting to speculate whether some moneylenders did not renew their licences because the new laws proved to be very strict and affected their businesses.¹⁴⁴

3.2.1 Application for licence

In order to obtain a licence, the prospective licensee must submit an application in writing to the Registrar in the form prescribed in Schedule A of the MCLR. Strict compliance with these requirements is imperative to avoid any risk in the application. The Registrar is entitled to request, in writing, additional documents or information from the applicant, before deciding on the fitness of the applicant for the licence.¹⁴⁵ If no such prerequisite is supplied, the application is deemed to have been withdrawn.¹⁴⁶ The law also provides that it is an offence to supply any misleading statement, false representation or description of the particulars or information required.¹⁴⁷

3.2.2 Grant and refusal of licence

The granting of a licence is at the discretion of the Registrar, but he may impose conditions or refuse to grant a licence.¹⁴⁸ There are stringent conditions which must be complied with before an applicant can be granted a licence. For example, no licence shall be granted unless the applicant has an issued and paid-up capital in cash of not less than RM500,000 for a new application and RM100,000 to renew a

¹⁴⁴ A study in Singapore showed that the number of licensed moneylenders has significantly dropped as a result of the amendment to the moneylenders law; Lee Chin Yen, *The Law of Consumer Credit: Consumer Credit and Security over Personalty in Singapore*, Singapore University Press, 1980, p. 8.

¹⁴⁵ MLA 2003, s 5A (2).

¹⁴⁶ MLA 2003, s 5A (3).

¹⁴⁷ MLA 2003, s 29A(1)(a); MCLR, reg 3 (2).

¹⁴⁸ MLA 2003, s 5B; MCLR, reg 3(3).

licence.¹⁴⁹ The applicant is also obliged to produce a statutory declaration as specified in Schedule C of the MCLR and a corroboration letter on his suitability, signed by a police officer.¹⁵⁰ The statutory declaration certifies *inter alia* that the applicant:¹⁵¹

- has attained the age of majority;
- has never been convicted of any offence involving fraud and dishonesty, or any offence affecting the human body or any offence against property, or an offence under the MLA 2003;
- is not an undischarged bankrupt;
- has never been associated with a moneylending business which has been wound up or dissolved by the court;
- was not responsible for the management of a business of moneylending which has been wound up or dissolved by the court; and
- agrees to adhere to all provisions in the MLA 2003 and its regulations.

The Registrar is not required to give his reasons when exercising his discretion in refusing an application. Nevertheless, he is expected to exercise his discretion judicially. The Registrar may add to, revoke or vary any of the conditions as he thinks fit. Failure to comply with the stipulated conditions is an offence.¹⁵²

¹⁴⁹ Ministry of Housing and Local Government, *Guidelines for application and renewal of moneylending licence*. Available: http://www.gov.my/kpkt/borang/panduan/gp_pinjamwang_pembaharuan.pdf (accessed 5 November 2005).

¹⁵⁰ MCLR, reg 4.

¹⁵¹ MCLR, schedule C.

¹⁵² MLA 2003, s 5D (1) and (2).

3.2.2.1. The “fit and proper person” test

A licence shall not be denied under normal situations. However, in order to ensure that the licensed moneylender is reputable and clean of any criminal record, conditions and limitations were set down by section 9 of the MLA 2003 as grounds for refusal of a licence. The following circumstances which apply to an individual applicant, or the director, president, vice-president, secretary, treasurer, partner or member, or any person responsible for the management of the business of the applicant where the applicant is a company, a society or a firm, are grounds for refusal of a licence:¹⁵³

- i) Conviction for an offence involving fraud and dishonesty, or an offence relating to Chapter XVI (of offences affecting the human body) or XVII (of offences against property) of the Penal Code;
- ii) Conviction, and sentenced to a fine exceeding RM10,000 or to imprisonment, under the MLA 2003;
- iii) At the time of application for a licence, the individual applicant having been declared bankrupt; or alternatively, the applicant company, society or firm having been wound up or dissolved by a court;
- iv) Revocation of the applicant’s licence;
- v) Satisfactory evidence of bad character;
- vi) Satisfactory evidence is given to show that the applicant is not a fit and proper person to hold a licence.

It is suggested here that the above conditions determine whether an applicant is a “fit and proper person” to be given a moneylending licence. Most of these circumstances

¹⁵³ MLA 2003, s 9(1)(a)-(f).

are incorporated in the statutory declaration mentioned above. They may disqualify an applicant and must not be present for the person to be able to establish that he is actually fit and proper to operate a moneylending business.

In regard to evidence of bad character, section 9(1)(f) says that “The licence ... shall not be issued if satisfactory evidence has been produced that the applicant.....is not a fit and proper person to hold a licence”. The term is now worded in the negative in contrast to the positive term in the old law, i.e. “A licence shall not be refused except....that satisfactory evidence has not been produced of the good character of the applicant”.¹⁵⁴ The burden is on the applicant to satisfy the Ministry as to his fitness. However, both the principal Act and the MLA 2003 are silent on definition of either ‘good character’ or ‘bad character’. Therefore, in order to grasp the meaning of ‘character’, reference may be made to the Bruneian case of *Re Alan Wong Hoi Ping*,¹⁵⁵ where Godfrey J defines character as “...his disposition, what he in fact is; or it may be his reputation, what other people think he is.” In the case of *Plato Films Ltd v Speidel*,¹⁵⁶ Lord Denning defined ‘good character’ as follows:

“(I)t means both his disposition and reputation, so that if the petitioner appears, from the evidence on the petition, either to lack the qualities of integrity, honesty and the like...or to have a bad reputation in these respects, he will be shown to want that ‘good character’ which he needs in order to satisfy the qualification.”¹⁵⁷

It is deduced that evidence of bad character will have to show the unpleasant nature of a person, as well as a negative impression of him. On the other hand, virtues of integrity and honesty are among the attributes by which good character may be

¹⁵⁴ MLA, s 9(1)(a).

¹⁵⁵ [1988] 3 MLJ 25; this case regarded a petition to be admitted as an advocate and solicitor. The petitioner had previously been convicted of criminal offences but convictions were subsequently quashed. The court had to decide whether the petitioner was a person of ‘good character’.

¹⁵⁶ [1961] AC 1090.

¹⁵⁷ *Ibid*; per Lord Denning at pp. 1137 and 1138.

determined. Perhaps the negative wording under the new law is meant to provide better guidance, as it is always easier to establish bad character than good character. Bad character may be proven with police records, whilst good character is quite subjective.

Further, the Ministry provides administrative guidelines that require a reference letter to prove 'good character', a confidential report from the police to establish that the applicant is free from criminal record, and an interview to assess the applicant's understanding of the moneylenders law. It is submitted that despite the guidelines there still needs to be a clear published guidance to determine the criteria of a 'fit and proper' person, as well as 'evidence of bad character' in order to avoid any uncertainty and ambiguity for either the regulator or the moneylender. It was reported that lack of measures to determine the criteria of a "fit and proper person" has made licences very easy to obtain.¹⁵⁸

3.2.3 Fee

Under the amended law, an application for a moneylender's licence shall only be considered upon the payment of a prescribed fee of RM2000 to the Registrar.¹⁵⁹ This reasonable amount was the first increase from RM120 per year, as practised in the last fifty years. It is submitted that the increased amount of the fees is a remarkable improvement, since the previous amount was said to be too small, not proportionate to the profit accumulated by the moneylender, and insufficient to cover the local

¹⁵⁸ The Ministry of Housing and Local Government, *Unpublished Report*, 1997.

¹⁵⁹ MLA 2003, s 5B (3); MCLR, reg 3(4). RM2000 is equivalent to £285.

authorities' administrative costs. Apart from the application fee, there is also a fee for the renewal of the licence.¹⁶⁰

3.2.4 Duration and renewal of a licence

A moneylender's licence was initially issued for a renewable period of one year and was issued to commence from a specified date and expire on the 30th June next following. By the new amendment as stated by section 5C, a licence, when granted, runs for a period of two years. The Registrar will specify the commencement and the expiry date in the licence. Although the burden of dealing with renewal applications now happens every two years, the amendment has anticipated the problem of coping with many applications simultaneously by requiring all licence holders to forward their renewal applications three months before the expiry of their current licences.¹⁶¹ The Ministry has also published reminders in the newspapers to moneylenders to renew their licences, stressing the effect of not renewing and telling where to renew such licences.¹⁶²

A moneylender must pay a renewal fee of RM2000 upon application for renewal. A renewal of licence with particulars of renewal as in Schedule E will then be granted to the moneylender. Renewal applications must be supported with required documents.¹⁶³ A penalty of RM300 is imposed for an application made after the said period. Failure to renew the licence before the expiry period will debar the holder of the licence from making a new application for a period of two years.¹⁶⁴ This two-year suspension period will definitely cause hardship to the moneylender, as he will be

¹⁶⁰ MLA 2003, s 5E (4).

¹⁶¹ MLA 2003, s 5E (2).

¹⁶² "Moneylending licences to expire," *The Star*, 16 June 2004.

¹⁶³ MLA 2003, s 5E (1).

¹⁶⁴ MLA 2003, s 5E (2).

deprived of his livelihood. The consequence above illustrates the importance of possessing a valid licence in order to carry on a moneylending business. It is suggested here that since licensed moneylenders in Malaysia are not many, reviewing the licence every two years appears reasonable, as compared to the annual review practised previously. The new rule is expected to reduce the administrative burden on the Ministry.

3.2.5 Particulars to be shown on licence

There is no substantial change to the old moneylending provision on the details needed to be shown on licences. Section 6 provides that the licence must be in the moneylender's "authorised name" and specify an "authorised address" at which he must conduct his business. An "authorised name" is the name stated in the identification card, under which the moneylender is authorised to carry on business. It must be a true name, i.e. one acquired at birth (or incorporation/registration in the case of a company or firm).¹⁶⁵ An "authorised address" is the address stated in the licence, at which the moneylender is authorised to carry on business. A moneylender who takes out a licence in a name other than the true name is liable to both criminal and civil sanctions.¹⁶⁶

Whether or not a moneylender carries on business under the authorised name also depends on the facts in each case. An immaterial difference or slight discrepancy in

¹⁶⁵ The issue of the 'true name' arose in the U.K. in relation to immigrant persons whose original names had been changed after arrival and on naturalisation. It has been said that what is the true name of an individual seems to be a mixed question of law and fact, and must in measure rest on fact; see *The Times*, 10th January, 1928, pg. 11 col. 6 under the heading "Moneylenders' Names" and also (1928) 165 L.T. News. 30, under the heading "Choice of Names by Moneylender" cited by D. Meston, *The Law Relating to Moneylenders*, 5th ed, Oyez Publications, London, 1968, at p. 33.

¹⁶⁶ MLA 2003, s 6(2) and s 8; the position was the same under the repealed English Moneylenders Acts; see *Bonard v. Dott* (1906) 22 T.L.R. 399; *In re Robinson, Clarkson v. Robinson* [1910] 2 Ch. 571. Both criminal and civil sanctions are further discussed in Chapter Six.

the name does not infringe the statutory provision, if it is not such as to mislead.¹⁶⁷ In the leading case of *Menaka v Ng Siew San*,¹⁶⁸ the appellant was a registered moneylender carrying on business under the name of AR PR M Firm. Through her attorney, she lent some money to the respondent under her own name on the security of a charge on certain lands belonging to the respondent. When the respondent failed to pay the principal sum and interest, the appellant filed for an order for the sale of land. The respondent objected to the application on the basis that the appellant had been carrying on a moneylending business in any name other than her authorised name and had taken a security for money other than the authorised name, which are offences under sections 8(b) and (c) of the MLA.¹⁶⁹ The Privy Council gave judgment in favour of the respondent and held that both the contract and the security had contravened section 8 of the MLA and therefore were unenforceable.

On the other hand, in the case of *Chai Sau Yin v Kok Seng Fatt*¹⁷⁰ where the moneylender's true name was Kok Seng Fatt and he was one of a number of parties carrying on business under the authorised name of Yoong Shing Finance Company, it was *inter alia* held by the Federal Court that he complied with the Ordinance, when he was described in the Memorandum of Loan and the charge as "Kok Seng Fatt of Yoong Shing Finance Company".

¹⁶⁷ *Peizer v Lefkowitz* [1912] 2 K.B. 235

¹⁶⁸ [1977] 1 MLJ 91, PC

¹⁶⁹ S 8(b) of the old law provided for the offence of carrying on a moneylending business in any name other than his authorised name; s 8(c) provides for the offence of taking a security for money other than the authorised name.

¹⁷⁰ [1966] 2 M.L.J. 54; In the case of *Letchumanan v Kok Seng Fatt* [1973] 1 MLJ 171, the same issue was brought up by the appellant on appeal. The Federal Court, however, dismissed the appeal on the ground that the objection on the status of the respondents was not raised in the trial court.

As mentioned in the case of *Menaka v Ng Siew San* above,¹⁷¹ it is also an offence for a moneylender to take security other than in his authorised name. Thus in the case where the moneylending business was registered under the name of the S. W. E. M. Society, Ltd., as security for the money the borrowers gave and the company took a promissory note in the following form: "On demand we jointly and severally promise to pay to W. A. H. or other the secretary for the time being of the S. W. E. M. Society, Ltd., 190l. value received," it was held that the company had taken a security for money "otherwise than" in their "registered name" within the meaning of the Moneylenders Act 1900, and that the note was illegal and void by virtue of the Act.¹⁷² However, a moneylender is not prohibited from taking security on which his name does not appear at all, such as a bill of exchange endorsed to him in blank.¹⁷³

The requirement in section 6 to incorporate the moneylender's true name and address in the moneylender's licence is an important provision retained by the MLA 2003.¹⁷⁴ Section 6 certainly protects the borrower from any dishonest moneylender disguised under a false name. The advantage is indeed on the borrower if the moneylender does not trade under his true name. Section 6 and decided cases have proved that if the moneylender commits such offence, he must face the consequence of a void and unenforceable moneylending contract.

¹⁷¹ [1977] 1 MLJ 91, PC

¹⁷² *Merz v South of Wales Equitable Money Society Ltd* [1927] 2 KB 366.

¹⁷³ *Shaffer v Sheffield & Anor* [1914] 2 KB 1

¹⁷⁴ Under the CCA, there is no requirement to state the authorised name and address but it is an offence for a licensee under a standard licence to carry on business under a name not specified in the licence. The OFT, for example, revoked a mortgage broker's consumer credit licence after the licensee had been convicted of two offences under the CCA for trading under a name not specified on his licence and allowing another mortgage firm to use his licence; see "OFT revokes mortgage broker's credit licence," 22 March 2004. Available: <http://www.ofi.gov.uk/news/Annual+Report/2004/49-04.htm> [accessed 15 November 2004].

3.2.6 Requirement to display licence

A moneylender is required at all times to display his licence in a conspicuous place at the premises where he carries out or operates his business.¹⁷⁵ This new requirement replaced the original provision which required a licensed moneylender to affix a board bearing the words “Licensed Moneylender” in a conspicuous position outside his authorised address. It is an offence for a moneylender to alter, tamper with, deface or mutilate the licence which is required to be displayed.¹⁷⁶ Further, exhibiting a forged or imitated or altered licence is equally prohibited.¹⁷⁷ It may be suggested that the amended provision may cause ambiguity and might raise two questions. The first is whether the original licence must be displayed, or is it sufficient to display a certified copy of the original licence. Second, one might ask what is deemed to be conspicuous, whether the licence should be displayed outside the authorised address or inside the premises. It may be suggested that two copies of licences should be issued by the Registrar, the original licence for safekeeping by the moneylender and the authorised copy, which is to be displayed at the relevant address.¹⁷⁸ Nevertheless, the requirement in section 5F is intended to safeguard the interest of borrowers so that they know that they are dealing with authorised moneylenders.

Section 5F(1) also requires the moneylender to conduct his moneylending business in his premises. This is supported by regulation 15 of the MCLR where it says that every moneylending transaction shall be made by a moneylender and a borrower at the registered address of the moneylender. The rationale behind this regulation is

¹⁷⁵ The MLA 2003, s 5F(1). The penalty for committing this offence is a fine not exceeding RM10,000 or imprisonment for a term not exceeding six months or to both.

¹⁷⁶ MLA 2003, s 29A(d).

¹⁷⁷ MLA 2003, s 29A(e), (g) & (h).

¹⁷⁸ See L.H. Singh, *Law of Moneylenders in Malaysia and Singapore*, Sweet and Maxwell Asia, Petaling Jaya, 2003, pp. 56-57.

presumably that when business dealings are transacted in a business premises, it will instil awareness on the borrower that he or she is undertaking a business transaction. Further, this new rule is aimed to prevent borrowers from being hounded and embarrassed at their residences in front of their neighbours by loan sharks' runners. Indeed, this is the legal response to the common problems of borrowers being intimidated by loan sharks and errant moneylenders as frequently reported by newspapers. Thus, it is a commendable move to shield borrowers from such deceitful and ruthless tactics. Perhaps, the new rule also serves the aim of instilling awareness amongst borrowers that they are getting into loan transactions that are full of risks and obligations.

Furthermore, conducting moneylending transactions in the moneylender's office differs from conducting the same in the borrower's house. If the transaction is conducted in the borrower's house, the situation is often informal and the borrower might be obliged to be polite to the moneylender. The borrower also might not know how to send away the moneylender if he does not want to take the loan. Thus, the borrower might feel pressurised by conducting a business arrangement in his own home. Further, moneylenders might use persuasive techniques to influence borrowers to accept the loan or to extend a subsisting loan. On the other hand, the formal office environment would make borrowers more aware of what they are getting into. In fact, borrowers walk into moneylenders' office to get loans at their own will, and if they change their mind, they can always walk out.

Unfortunately, this strict requirement of conducting the business of moneylending within the confines of the moneylender's office has caused big concern among the

moneylenders.¹⁷⁹ According to them, the restriction imposed on visiting borrowers at home is a major setback in the new law. This view is in line with Rowlingson's opinion that "doorstep collection is an efficient way of collecting repayments and one which customers are keen on".¹⁸⁰ Such restriction may incur additional costs to borrowers to make payments at the business premises and they might not call as regularly and dutifully. According to the Chairman of the Malaysian Licensed Moneylenders Association, the new stringent requirements on licensed operators may force them out of business, as borrowers have now turned to loan sharks who provide flexible loan arrangements.¹⁸¹ It may be suggested that what is meant by the comment was that borrowers may prefer doorstep collection and loan sharks may provide this service as they do not abide by the laws. At a glance, it may seem that the rule restricting all moneylending transactions within the moneylenders' premises is over-protective. Nevertheless, the law intends to enhance its protection shield over the borrowers against any untoward consequences.

The restriction of doorstep collection could be overcome by resorting to other types of repayment collections such as requesting borrowers to pay-in repayments in their bank accounts and accepting postal orders or cheques from borrowers. In this regard, the Ministry has urged the moneylenders to contribute suggestions to modernise the moneylending business and to work closely with the Ministry to set up a system that could improve repayment by borrowers.¹⁸²

¹⁷⁹ "Moneylenders concerned over amended Act", *The Star*, 6 September 2003.

¹⁸⁰ K. Rowlingson, *Moneylenders and their Customers*, Policy Studies Institute, London, 1994, p. 153.

¹⁸¹ Syahril Kadir, "Peminjam berlesen mungkin gulung tikar" (Licensed moneylenders may be forced out of business), *Utusan Malaysia*, 1 October 2004.

¹⁸² "Modernise business, moneylenders urged", *The Star*, 20 April 2006; R. Hammim, "Hotline to run check on moneylenders", *New Straits Times*, 7 April 2006.

3.2.7 Revocation or suspension of licence

The newly inserted section 9A empowers the Registrar to revoke or suspend a moneylenders licence in the event that a moneylender:

- (a) has been carrying on his business, in the opinion of the Registrar, in a manner detrimental to the interest of the borrower or to any member of the public;
- (b) has contravened any of the provisions of the MLA or any regulations or rules made under MLA;
- (c) has been licensed as a result of a fraud, mistake or misrepresentation in any material particular; or
- (d) has failed to comply with any of the conditions of the licence.

According to Goode, the effect of suspension or revocation of a licence is more severe than rejection of an application in the first instance, since it puts a person out of business.¹⁸³ Therefore, in order to give the moneylender the opportunity of being heard and to be transparent in discharging his power, before revoking or suspending a licence, the Registrar will give a notice in writing and require the moneylender to submit reasons why the licence should not be revoked or suspended.¹⁸⁴ The moneylender is given 14 days to surrender his licence to the Registrar upon revocation of the licence, or the rejection of an appeal against the revocation.¹⁸⁵ Failure to do so is an offence under the Act. A revocation or suspension, however, will not affect any moneylending agreement entered into before such revocation or suspension.¹⁸⁶

¹⁸³ R.M. Goode, *Consumer Credit Law*, Butterworths, London, 1989, p. 216.

¹⁸⁴ MLA 2003, s 9B.

¹⁸⁵ MLA 2003, s 9F (1).

¹⁸⁶ MLA 2003, s 9A (3).

It is suggested here that the main emphasis, in this new provision, is to support the longer length of licensing tenure. Under the old law, the duration of a licence was only one year, and if moneylenders committed offences during this term, the Ministry could simply disapprove renewals. However, under the MLA 2003, the term of a licence is two years, and section 9A provides a good option to suspend or revoke a licence if moneylenders commit any of the acts listed. Apart from that, section 9A also seeks to strengthen the objective of the Amendment Act, i.e. to regulate and control the business of moneylending, as well as protecting the interest of consumers by maintaining only honest and truthful moneylenders in business. However, there has been no case of revocation or suspension of a licence in Malaysia to date. Perhaps, it is too early to see the effect of section 9A.

3.2.8 Appeals

Any person aggrieved by the Registrar's decision may appeal to the Minister against that decision within fourteen days, under section 9C. Such appeal must be in writing, in the national language (a translation into English may be enclosed) stating the grounds of appeal.¹⁸⁷ A copy of the appeal must be submitted to the Registrar who will submit his reason for the decision to the Minister within 14 days.¹⁸⁸ There is no major change to the appeal provision, except that the new provision is more firm on the finality of the decision of the Minister, as it stipulates that such decision shall not be questioned in any court.¹⁸⁹ It is vital to determine who falls under the category of an "aggrieved person" for the purpose of section 9C, since neither the principal nor the amendment Act defines the phrase. Thus, in order to overcome this *lacuna*, court

¹⁸⁷ MCLR, reg 13 (2) and (3).

¹⁸⁸ MCLR, reg 13 (4) and (5).

¹⁸⁹ The former s 9(2) only mentioned that "the decision of the Minister shall be final," whereas s 9C of the MLA 2003 adds that such decision "shall not be questioned in any court."

decisions on the meaning of the same in other statutes, such as the National Land Code, are referred to.¹⁹⁰ Accordingly, in the moneylending context, an “aggrieved person” may be construed to be someone not merely dissatisfied with some act or decision by the Registrar but who has suffered legal grievance and been wrongly deprived of holding a valid licence.

It is submitted that although the MLA 2003 literally restricts the right to appeal within the Ministry, there is a statutory presumption that the ‘finality’ clause does not reflect the intention of the Parliament to remove all appeal opportunities from the aggrieved person. This clause indicates that the decision is conclusive on the facts, but not final on the law.¹⁹¹ In the words of Romer L.J.:¹⁹²

“I cast no reflection whatever on tribunals such as that in the present case, and they do their work conscientiously and with efficiency. But in the nature of things these and similar inferior tribunals (and there are many of them nowadays) are bound to go wrong from time to time in matters of law. Their members consist in the main of people who have devoted their lives to activities far removed from the study and practice of the law; and neither by training nor by experience can they be expected to have that knowledge of principles of construction which is so necessary for the proper understanding, and application of the various statutes and regulations which often come before them. Injustice may well result, and a sense of injustice is a grievous thing. I therefore think (and I have said as much before) that it is not in the public interest that inferior tribunals of any kind should be ultimate arbiters on questions of law.”

Decided cases have shown that despite finality and ouster clauses, courts are prepared to perform administrative review where jurisdictional error has resulted in miscarriage

¹⁹⁰ See *United Malayan Banking Corp Bhd v Development & Commercial Bank Bhd* [1983] 1 MLJ 165 at p. 167; *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 at p. 41; *Comptroller of Income Tax v Harrisons & Crossfield (M) Ltd* [1954] MLJ 83; *Ex parte Sidebortham, Sidebortham* 14 Ch 458, at p. 465; *Nanyang Development (1966) Sdn Bhd v How Swee Poh* [1970] 1 MLJ 145 at p. 147.

¹⁹¹ *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 All ER 796; *Anisimic Ltd. v Foreign Compensation Commission* [1969] 2 AC 147.

¹⁹² *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 All ER 796 at p. 803.

of justice.¹⁹³ Such a move is in line with constitutional functions and upholds the principle of natural justice, in respect of which a person aggrieved by the decision of the Registrar may file for a writ of *certiorari* in the High Court.¹⁹⁴ In view of the above, it might be presumed that the provision on the finality of the Minister's decision may not be as firm as it sounds. On the other hand, the rationale of inserting such provision may be to encourage the aggrieved person to resolve his or her differences at the Ministry level in a simple procedure which may save time and cost as compared with going to court. The tendency to restrict appeals within the entrusted agency can be seen in nearly all Malaysian consumer protection statutes such as the Direct Sales Act 1993 and the Consumer Protection Act 1999.

3.2.9 Transfer or assignment of licence

This section will discuss the procedure of transfer or assignment of a moneylending licence, and its impact. Generally, section 26 of the MLA 2003 provides that "except where the context otherwise requires, references in this Act to a moneylender shall accordingly be construed as including any such assignee as aforesaid". This means that any debt to a moneylender in regard to any money lent by him or in respect of interest on the loan or of any benefit of any moneylending agreement or security taken in respect of the agreement shall continue to apply although the debt or benefit or security have been assigned to an assignee.¹⁹⁵ Further, section 26(2)(a) of the MLA

¹⁹³ See *Mohamed v Commissioner of Lands and Mines Terengganu & Anor* [1968] 1 MLJ 227; *Kannan & Anor v Menteri Buruh dan Tenaga Rakyat & Ors* [1974] 1 MLJ 90; *Minister of Labour and Manpower & Anor v Paterson Candy (Malaysia) Sdn Bhd* [1980] 2 MLJ 122; *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 All ER 796; *Anisimic Ltd. v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208.

¹⁹⁴ This ancient remedy is a normal process by which the High Court exercises its role in the supervisory and not appellate capacity. Breach of the rules of natural justice is one of the grounds to file for the writ; see *Halsbury's Laws of England*, 4th ed, vol 11(2), para. 1489, Butterworths, London, 1973 - . In the UK, writ of certiorari is now called a 'quashing order'; see rule 54.1(2) of the Civil Procedure Rules 1998.

¹⁹⁵ MLA 2003, s 26.

2003 provides that the agreement or security taken by a moneylender should be “valid in favour of any *bona fide* assignee or holder for value without notice of any defect due to the operation and of any person deriving title under him”. Moreover, any payment or transfer of money or property made *bona fide* by any person on the faith of the validity of a moneylending agreement or security, without notice of any defect, shall be valid in favour of that person.¹⁹⁶ In both circumstances, it is the moneylender who is liable to indemnify the borrower or any person prejudiced by section 26.

In regard to the above, the MLA 2003 has introduced a new feature to the MLA. Section 9G prohibits any transfer or assignment of licences except with the prior written consent of the Registrar. In cases of liquidation of a moneylending company or dissolution of a moneylending firm or society, the Registrar may authorise the transfer of the licence to the receiver or manager. Apart from that, the Registrar has a wide discretion to authorise any transfer or assignment of a licence, for any reason that he deems appropriate.¹⁹⁷ Indeed, section 9G(3)(b) authorises the Registrar to transfer a licence *for any reason* when he is satisfied that it would be just to do so. Therefore, section 9G(3)(b) is not protective of borrowers at all, since much power is conferred on the Registrar, thereby inviting the question of competence. In sum, this provision is open to risk of inappropriate recipients, whereby loan sharks or rogue moneylenders may get licences through assignment. In other words, if the Registrar does not exercise his discretion wisely, section 9G(3)(b) is likely to be the back door way to get licences. Furthermore, it is of concern that section 26(2) may be manipulated and the assignee might gain the benefits of a moneylending agreement “unlawfully”. Therefore, in the interest of borrowers, it is suggested here that the

¹⁹⁶ MLA 2003, s 26(2)(b).

¹⁹⁷ MLA 2003, s 9G(3).

procedure of assignment of licences should be on the same basis as application for original licences, and assignees should go through the vetting process as well.

3.2.10 Effect of the MLA 2003 on illegal moneylenders

It is now interesting to investigate the response of loan sharks to the implementation of the MLA 2003. This study identifies two reactions from the loans sharks; positive and negative. Further, it is also envisaged that there may be some loan sharks who are not concerned at all about the new law. The positive reaction shows that some loan sharks wanted to make amends and start afresh, by becoming law-abiding moneylenders. Obviously, they are concerned over the strict penalties under the MLA 2003. On the other hand, the negative reaction illustrates that the hard-core loan sharks arrogantly challenged the police, simply refuse to give-up their illegal moneylending businesses, and presumably, are not intimidated by the stern punishments under the new law.

On the positive side, it is important to highlight that some loan sharks realised the risks of operating illegal moneylending activities and wanted to start legitimate moneylending business. In fact, they intended to apply for licences but were afraid of being rejected by the Ministry. It was reported that over twenty-two loan sharks wanted to legalise their businesses due to several factors: concern over the new stiff penalties, having suffered huge losses due to bad debts, lack of system and control in their businesses, and fighting among themselves when sharing the money retrieved from borrowers.¹⁹⁸ Thus, they pleaded with the Government to give them licences.

¹⁹⁸ P. Almeida, "Give us licence, say loan sharks", *The Malay Mail*, 9 December 2002.

In this case, it seems that the loan sharks were prepared to be regulated and to comply with the moneylenders laws.

On the other hand, negative reactions came from loan sharks following tough police action nationwide to wipe out illegal moneylending activities after the implementation of the MLA 2003. (This chapter will only discuss the response of the loan sharks; the police actions will be further discussed in Chapter Four.) It was reported that loan sharks had sent death threats to senior police officers who were involved in battling loan sharks' activities to show their defiance of the crack-down actions.¹⁹⁹ The police however, regarded such loan sharks as "an uncivilised lot"²⁰⁰ and the threats as an "immoral act of cowardice".²⁰¹ Further, the police are undeterred by those threats and are more than ever determined to eliminate illegal moneylending.

Based on the positive and negative reactions by the loan sharks, it is important to discuss whether the Government should give a chance to loan sharks who wish to make amends. In a random survey following the appeal from loan sharks, the public at large were worried that granting loan sharks licences would mean condoning and legalising their appalling activities.²⁰² Further, the objectives of the MLA 2003 are to protect borrowers in moneylending transactions and to eliminate loan sharks. Therefore, does giving licences to loan sharks defeat the purposes of the Act? Moreover, should the law rehabilitate loan sharks or simply eliminate them? In

¹⁹⁹ A senior police officer, for example, received a bullet and a death threat with the words "we dare the police" and "we are not afraid of the police (L. Charles and N. Benjamin, "Cops get death threats", *The Star*, 26 December 2004). Other threats were "we want the whole of Malaysia to know we are not afraid of the police" ("Police act tougher against aggressive loan sharks", *Utusan Express*, 28 September 2004); "do not interfere with our activity" ("Perak police also receive threats from loan sharks", *Utusan Express*, 9 December 2004).

²⁰⁰ "Police: We can be nasty with loan sharks too", *The Star*, 29 September 2004.

²⁰¹ "Senior cops' association condemns threats by loan sharks", *The Star*, 1 October 2004.

²⁰² Dennis Chua, "Do not make it easy for them", *The Malay Mail*, 9 December 2002.

response to this issue, the Government has blankly refused to legitimise loan sharks and wanted them to give up their business.²⁰³ In fact, a spokesman from the Ministry even said that he did not see how the Government could turn loan sharks into legal businessmen.²⁰⁴ This reaction clearly shows that the Government is annoyed with illegal moneylending and the troubles brought by loan sharks' activities.

Although the Government is adamant on not giving licences to repentant loan sharks, this study here believes that they ought to be given second chances. Further, even though granting loan sharks licences may be seen as giving licences to thugs and disregarding their bad activities, however, practically, this is the means to identify and monitor their activities. In other words, it is a question of balancing two evils and giving loan sharks licences will prevent greater harm in the long term. This is to avoid them carrying out illegal moneylending and creating more problems in society. If they create trouble, their licences could always be revoked. However, care must be taken so that only those who really repent who should be given another chance. Moreover, there must be a system to carry out this intention, especially in deciding whether the loan sharks are worth being given another chance. Perhaps, the appeal process should be the mechanism to determine the genuine intention of the repentant loan sharks.

The following section investigates the licensing system under the CCA.

²⁰³ "Ministry will not legitimize loan sharks", *The Star*, 11 December 2002.

²⁰⁴ *Ibid.*

3.3 Licensing regime in the UK

The CCA practises a positive licensing system that covers a wide area and regulates six categories of businesses. They are consumer credit businesses, consumer hire businesses, credit brokerage, debt adjusting and debt counselling, debt-collecting, and credit reference agencies.²⁰⁵ There are two types of licences: standard licences that are issued to named persons, and group licences.²⁰⁶ The current licensing fee for a sole trader under the CCA is £110 and £275 for a partnership or limited company respectively and the tenure is for the period of five years. The policy applied in the UK is that fees charged should generally cover the administrative costs.²⁰⁷ In regard to the licensing period, the approach by the Government has varied widely over the years. Licences have been issued for both short and long duration. Originally, the duration was three years: it was then increased to ten years in 1979 and 15 years in 1986. Control and supervision over such a long period was found to be ineffective; therefore, in 1991, the licence period was reduced to five years, which it remains.

3.3.1 The “fitness” test

As mentioned in section 3.1, literature in the UK praised the licensing system under the CCA highly. The positive licensing system in the UK ensures only ‘fit’ persons engage in the activities covered by the licence. It also means that the burden is on the applicant to satisfy the OFT as to his fitness. The fitness test is an important device to

²⁰⁵ CCA, ss 21 and 145; A.G. Guest and M.G. Lloyd, *Encyclopedia of Consumer Credit Law*, London, Sweet & Maxwell, 1975 - , para. 2-024. The licensing system established under the CCA affects banks, finance houses, building societies, moneylenders, pawnbrokers, check and voucher traders, the issuers of credit cards, mail order companies, retailers, service industries, first and second mortgage companies, and other businesses providing financial accommodation.

²⁰⁶ CCA, s 22.

²⁰⁷ In a consultation on the CCA proposed fee structure, most respondents opted for a ‘front-loaded’ model as practised by the FSA, whereby a relatively high fee is charged in respect of initial applications and a lower fee for subsequent renewals; see “Summary of Responses to the Consultation Document on the Licensing Regime under the Consumer Credit Act 1974”, 2003, p. 9. Available: <http://www.dti.gov.uk/ccp/topics1/pdf1/creditresextort.pdf> [accessed 15 April 2004].

screen out incompetent applicants. Under section 25(1) of the CCA, two criteria must be fulfilled before a licence is issued: that the applicant is a fit person to hold a licence and that the name under which he applies is not misleading or otherwise undesirable. In essence, the fitness test means that an applicant must satisfy the OFT that he will trade “honestly, lawfully and fairly” with the consumers.²⁰⁸ In considering ‘fitness’, the OFT can take into account a number of factors including:²⁰⁹

- any offence or conviction connected with the business or anyone involved in running the business
- failure to comply with the provisions of the CCA or other consumer protection legislation
- consumer complaints
- evidence of unfair business practices
- evidence of discrimination on grounds of sex, colour, race or ethnic/national origin.

It is interesting to note that discrimination practised on grounds of sex, colour, race or ethnic or national origin is one of the factors used to determine fitness. As stated by Howells, “the breadth of these powers is quite significant; especially the fact that behaviour can be taken account of notwithstanding that it is not unlawful.”²¹⁰

²⁰⁸ *Consultation on the Licensing Regime under the Consumer Credit Act 1974*, [2003] March, p. 5. Available: <http://www.dti.gov.uk/ccp/consultpdf/credlic.pdf> [accessed 15 April 2004].

²⁰⁹ CCA, s 25(2); The OFT has also published guidance for the fitness test, *Consumer credit licences - Guidance for holders and applicants*, OFT 329.

²¹⁰ G. Howells, *The United Kingdom's Experience of the Consumer Credit Act 1974 and its Relevance to Malaysia*, Regulation of Consumer Credit Transactions Seminar, Kuala Lumpur, 1994, p. 41.

3.3.2 Grant and refusal of licence

Upon an application for a credit licence, the OFT has the right to grant the licence, refuse the application or grant the licence subject to conditions.²¹¹ The OFT can also vary the licence on application by the licensee or compulsorily.²¹² Further, section 27 of the CCA provides that before the OFT is minded to refuse an application, to grant the licence in different terms from the application, or to vary, suspend or revoke a licence, it must inform the applicant of its reasons for that decision and give him the opportunity to submit representations in support of his application.²¹³ Between April 2004 and March 2005, the OFT served 46 'minded to revoke' notices for existing licence holders. Fifteen licences were revoked within this period and a higher number of 21 revocations took place between April 2003 and March 2004.²¹⁴ The main reason for revocation was unfitness of the creditor to carry on business. Among the fitness issues taken into account when revoking licences were convictions for supplying drugs,²¹⁵ harassment,²¹⁶ engaging in unfair business practices²¹⁷ false accounting,²¹⁸ unlawful wounding,²¹⁹ driving offences,²²⁰ and handling stolen goods.²²¹ According to Howells and Weatherill, apart from the strength of licensing

²¹¹ CCA, s 27.

²¹² CCA, ss 30 and 31.

²¹³ CCA, ss 27, 30, 31 and 32.

²¹⁴ The OFT's Annual Report and Resource Accounts 2004-05. Available: <http://www.of.gov.uk/news/Annual+Report/2004.htm> [accessed 9 October 2005] (hereinafter "OFT Annual Report 2004-05"); The Annual Report covers a 12 month period from 1 April 2004 to 31 March 2005.

²¹⁵ "OFT revokes Wrexham wholeseller's credit licence," 24 March 2004. Available: <http://www.of.gov.uk/news/Annual+Report/2004/53-04.htm> [accessed 15 November 2004].

²¹⁶ "OFT revokes home improvement credit licence," 11 February 2004. Available: <http://www.of.gov.uk/news/Annual+Report/2004/22-04.htm> [accessed 15 November 2004].

²¹⁷ "OFT revokes Norfolk motor dealer's consumer credit licence," 5 November 2003. Available: <http://www.of.gov.uk/news/Annual+Report/2003/PN+143-03.htm> [accessed 10 August 2004].

²¹⁸ "OFT revokes Bradford trader's credit licence." 8 July 2004. Available: <http://www.of.gov.uk/news/Annual+Report/2004/106-04.htm> [accessed 15 November 2004].

²¹⁹ "Manchester broker and debt manager has licence revoked," 13 June 2005. Available: <http://www.of.gov.uk/news/Annual+Report/2005/108-05.htm> [accessed 9 October 2005].

²²⁰ "Stockport lender has credit licence revoked," 29 September 2005. Available: <http://www.of.gov.uk/news/Annual+Report/2004/159-04.htm> [accessed 15 November 2004].

²²¹ "OFT revokes Bristol trader's credit licence," 9 July 2004. Available: <http://www.of.gov.uk/news/Annual+Report/2004/109-04.htm> [accessed 15 November 2004].

in restricting entry to those unable to meet the necessary requirements, another significant and effective weapon in the licensing regime is the threat of refusal or withdrawal of a credit licence.²²²

There have been suggestions that a negative licensing scheme should be adopted for ancillary credit businesses, but the proposal was rejected by the OFT.²²³ It was argued that the negative licensing system could save huge administrative effort and resources, based on the OFT statistics on licensing. The licensing population is around 205,000 and the OFT handles around 30,000 applications and renewals a year.²²⁴ Around 800 cases are challenged each year, including the issue of 250-300 warning letters and the refusal or revocation of 70-80 licences.²²⁵ In 2004-05, around 2,088 licensing actions were carried out by the OFT, whereas 985 applications were kept on hold pending further enquiries to the applicant and 632 applications were withdrawn.²²⁶ Actions taken during this period included issuing 278 warning letters, revoking 15 licences and refusing 48 applications for licence.²²⁷

3.3.3 Appeals

In the UK, the right to appeal under the CCA encompasses all licensing decisions made by the OFT, from initial refusals to grant a licence to subsequent revocation.

²²² G. Howells and S. Weatherill, *Consumer Protection Law*, 2nd ed, Ashgate, Hants, 2005, pp. 438-439.

²²³ See, for example, the DTI, *Consumer Credit Bill: Full Regulatory Impact Assessment*, 2004. Available: <http://www.dti.gov.uk/ccp/creditbill/pdfs/creditbillria2.pdf> (accessed 9 October 2005); *Consumer Credit Licensing*, NCC Policy Paper, December 1988; The OFT, *Review of Consumer Credit Licensing: Comments by the Director General of Fair Trading on the Proposals of the Department of Trade and Industry*, December 1988; OFT Press Release 35/93; *Consumer Credit Deregulation*, OFT, June 1994, pp. 95-99; D. Tench, *Consumer Credit Control - The UK Experience*, Asian Seminar on Consumer Law, Kuala Lumpur, 1993, p. 2.

²²⁴ *Modernising Consumer Credit to Improve Consumer Protection: A Note by the Office of Fair Trading in response to the DTI's Consultation Document on Credit Licensing*, OFT, May 2003, p. 2.

²²⁵ *Ibid.*

²²⁶ The OFT Annual Report 2004-05.

²²⁷ *Ibid.*

Such appeals are by way of a re-hearing, heard by a panel of qualified independent persons. The Secretary of State will then decide on the appeal based on the recommendation from this panel. The appeal procedure is laid down under the UK Consumer Credit Licensing (Appeals) Regulations 1998, starting with filing a notice of appeal to the Secretary of State for Trade and Industry. The Secretary of State then appoints an approved person or persons who are either legally qualified, or have special knowledge or expertise in the area to hear the appeal.²²⁸ A public hearing is conducted and the panel then makes a report to the Secretary of State.²²⁹ The Secretary of State's decision has to be published, and appeal may be made to the High Court on points of law.²³⁰ Between April 2004 and March 2005, nineteen appeals were lodged to the Secretary of State, as compared to nine appeals lodged in the previous year.²³¹

3.3.4 Reform in licensing regime

Ten years ago, the Government was satisfied that the licensing system worked satisfactorily, and learned writers had praised the system highly.²³² However, circumstances have changed and apparently, there have been suggestions to reform the UK consumer credit licensing system. According to Professor Lomnicka, "the CCA licensing regime has long been regarded as ineffective, both in its design and in its operation".²³³ Indeed, the OFT and the DTI discovered the dire need to improve the existing UK consumer credit licensing regime to better target rogue traders. The

²²⁸ Consumer Credit Licensing (Appeals) Regulation 1998, reg 24.

²²⁹ Ibid, regs 16 and 21.

²³⁰ Ibid, regs 22 and 23.

²³¹ "Consumer Credit Statistics for 2004 to 2005." Available:

<http://www.ofi.gov.uk/news/Annual+Report/Statistics/2004-annexes.htm> [accessed 9 October 2005].

²³² See notes 128 – 131.

²³³ See Professor Eva Lomnicka, "The Future of Consumer Credit Regulation", *CIL*, vol. 7, issue 2, 2003/2004, p. 201.

CC White Paper has therefore proposed to strengthen the fitness test, to introduce investigation powers and to move toward indefinite licences, which would reduce the administrative burden of the OFT and lessen the burden on the honest traders.²³⁴ Further, the appeal system was suggested to be replaced with an independent appeal process.

The Government regarded the current fitness test as a low-level entry test, since the information required (business name, address, past applications, criminal convictions and county court judgments and bankruptcy) for the applicant's background check was said to be inadequate to determine the suitability of the applicant.²³⁵ Thus, there was a common perception that it is easy to acquire and retain consumer credit licences.²³⁶ The White Paper suggested a strengthened "fitness" test to overcome this weakness.²³⁷ In addition to the past failings of the applicant, future capability would be taken into account. In order to do so, the OFT proposed further powers to enable frequent supervision and investigation of ongoing business activities.

These suggestions are incorporated in the CCA 2006. For example, the fitness test is further strengthened by considering the skills, knowledge and experience of the applicant and his employees, and the practices and procedures that will be implemented in connection with the business.²³⁸ Besides those factors, the OFT will also take into account any evidence of:

- commission of any offence involving fraud, or other dishonesty or violence;

²³⁴ CC White Paper, para. 3.3.

²³⁵ "Consultation on the Licensing Regime under the Consumer Credit Act 1974", [2003] March, p. 15.

²³⁶ *Ibid.*, p. 17.

²³⁷ CC White Paper, paras. 3.8-3.11.

²³⁸ CCA, s 25(2), as amended by CCA 2006, s 29(2).

- infringement of the provisions of the CCA, the consumer credit jurisdiction in Part 16 of the Financial Services and Markets Act 2000, and any other laws relating to consumer credit;
- practising discrimination; or
- having been engaged in business practices, which appear to OFT to be deceitful, oppressive, unfair or improper

It seems that consumer complaint has been removed as a measure of the fitness of an applicant.²³⁹ The justification of this may be explained by reference to the statement of the former Director-General of the OFT. According to Borrie, the most difficult “minded to refuse” notices are those based solely on consumer complaints, as they are one-sided and the trader might have forgotten what had taken place.²⁴⁰ The CCA 2006 also imposes an obligation on the OFT to prepare and publish guidance on the requirements of the new fitness test,²⁴¹ and is empowered to revise the guidance as needed.²⁴² Furthermore, the OFT is required to consult any persons it thinks fit in preparing or revising the guidance.²⁴³

Many of the ideas for a rigorous competence test are based on the requirement of the Financial Services Authority (FSA) for authorised firms.²⁴⁴ However, the improvements brought by the CCA 2006 have great potential to strengthen the fitness test, and provide better protection for borrowers. The duty imposed on the OFT to

²³⁹ CCA, s 25(2), as amended by CCA 2006, s 29(2).

²⁴⁰ G. Borrie, “Licensing Practice under the Consumer Credit Act”, [1982] *JBL* 91, p. 95.

²⁴¹ CCA, s 25A, as inserted by CCA 2006, s 30.

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ Opponents of this idea argued that it was too burdensome to adopt the FSA model as it was formulated for investment products and therefore caters for different markets with distinct types of consumer risk and detriment.

publish the fitness test guidance is indeed an excellent mechanism to disseminate information to the public and particularly to the traders. Further, the OFT must also seek advice from proper persons before preparing or revising the guidance, which is a commendable practice to produce a suitable and justifiable outcome. Apart from the new law, the OFT has announced the launch in 2006 of a new computer system that will offer more effective and efficient fitness checking of licence holders and applicants.²⁴⁵

Apart from the fitness test, the CCA 2006 has also put an end to the internal appeal system. The move to reform the appeal system was in favour of removing the Secretary of State from the appeal process.²⁴⁶ The CC White Paper recommended an independent appeal process by way of a Tribunal service administered by the Department for Constitutional Affairs (DCA).²⁴⁷ The main objective is to enhance transparency in the appeal process. This proposal was accepted by the Government and the CCA 2006 will therefore establish the Consumer Credit Appeals Tribunal.²⁴⁸ In future, appeals will no longer go to the Secretary of State, but to the Tribunal. The procedures of the Tribunal will be established by the rules of the Tribunal.²⁴⁹ Right to appeal to the Courts of Appeal will be limited to a point of law against a decision of the Tribunal.²⁵⁰ The CCA 2006 also provides that the Tribunal will be covered by the Tribunals and Inquiries Act 1992, which indicates that the Tribunal will be answerable to the Council of Tribunals.²⁵¹ Further, the CCA 2006 will also introduce

²⁴⁵ OFT Annual Report 2004-05.

²⁴⁶ "Summary of Responses to the Consultation Document on the Licensing Regime under the Consumer Credit Act 1974", 2003, p. 11.

²⁴⁷ CC White Paper, para. 3.24.

²⁴⁸ CCA 2006, ss 55 – 58.

²⁴⁹ CCA 2006, ss 55 – 56.

²⁵⁰ CCA 2006, s 57.

²⁵¹ CCA 2006, s 58.

enforcement powers to enforce the licensing rules and financial penalties for breach of licensing rules. These will be dealt with in Chapter Six.

3.4 Malaysian and UK law: A comparative analysis

The discussion above illustrates that a licensing regime is very significant in regulating moneylending and consumer credit industry. Both jurisdictions have recently reviewed their respective licensing systems in order to strengthen the regime and provide better control over the businesses. There are some basic similarities in regard to the approach adopted by Malaysia and the UK. For example, in deciding an application, the Ministry and the OFT have the discretion to grant, vary or refuse a licence. Further, the applicant must satisfy certain basic requirements before being eligible to hold a licence. The high trading standard is maintained by giving the authorities the power to revoke and suspend licences. Moreover, an applicant who is not satisfied with the decision of the regulator may file an appeal.

Despite the similarities, there are striking differences in implementing the licensing regime in the two jurisdictions. It should be noted that the MLA 2003 has brought great changes in streamlining the licensing regime, especially in centralising the system under one body. Several aspects such as fee, duration and renewal, displaying the licence in the business premises, conducting moneylending transactions at the moneylenders' premises and revocation as well as suspension of licences are either amended or formulated to keep up with the current commercial standard and safeguard the borrowers' interest. Nevertheless, in light of the practice in the UK, there are indeed some weaknesses in the MLA 2003 that should be considered so that the moneylending licensing regime could be further enhanced. These include the

“minded to refuse notice”, the fitness test, the appeal system and termination of licences.

First, the “minded to refuse” notice is important under the CCA as this is an administrative step in the process of deciding whether or not to take action against the applicant.²⁵² Section 27 of the CCA provides that before rejecting an application, the OFT must inform the applicant of its reasons for that decision and give him the opportunity to submit representations in support of his application. On the other hand, although Malaysia has no “minded to refuse” notice, the Ministry’s guidelines show that an inquiry will be held when an application is incomplete or not approved, but the method is not explained.²⁵³ It is envisaged that in view of the wide discretion of the Registrar in granting or disapproving a licence, a clear procedure provided under the statute such as the “minded to refuse” notice would improve the licensing system, so that the transparency of the Ministry is acknowledged.

Second, in comparison to the UK law, it is suggested here that careful consideration has not been given under the MLA 2003 to emphasising the crucial factor in a licensing regime: the *fit and proper person* test. Section 9 of the MLA 2003 provides seven grounds that may disqualify an applicant, whereas section 9(1)(f) of the Act says that “the licence ... shall not be issued if satisfactory evidence has been produced that the applicant.....is not a fit and proper person to hold a licence”. Further, the applicant must submit a statutory declaration which incorporates most of the gist of section 9, as well as a corroborative letter demonstrating his suitability. It is here

²⁵² G. Borrie, “Licensing Practice under the Consumer Credit Act” [1982] *JBL* 91, at p. 94.

²⁵³ The Ministry for Housing and Local Government. Guidelines for application and renewal of moneylending licence. Available: http://www.gov.my/kpkt/borang/panduan/gp_pinjamwang_pembaharuan.pdf (accessed 5 November 2005).

submitted that the present system only offers very limited information to the Registrar to determine an application, hence the claim that licences are very easy to obtain.²⁵⁴ Thus, in order to provide an effective mechanism to select only competent applicants, the potential of the “fit and proper person” test should be well-utilised. Therefore, it may be suggested that section 9 should be the basis to develop the “fit and proper person” test, and the substance of section 9 should be widened and further enhanced to incorporate other important elements to provide the criteria for a “fit and proper person”.

It is suggested here that factors such as evidence of unfair business practice, evidence of discrimination and consumer complaints, as provided under the CCA, should be included in the “fit and proper person” test. This recommendation is based on the premise that it is important that the opinion of consumers is heard, as the objective of the licensing system is to protect consumers. Although it was pointed out that consumer complaints were removed from the fitness test under the CCA 2006, it is here believed that consumer complaints should be relevant in moneylending businesses and have value when assessing the capability of an applicant. The absence of discriminatory practices should also be considered as one of the grounds to determine fit and proper character, in order to enhance racial harmony in this plural-society country. Moreover, the new element of future capability in the UK fitness test, i.e. skills, knowledge and experience, also shows promising ability to keep out incompetent applicants and should also be considered in determining whether an applicant is a “fit and proper person”. Finally, the requirement on the OFT to prepare and publish guidance on the new fitness test, to revise the guidance and to consult

²⁵⁴ The Ministry of Housing and Local Government, *Unpublished Report*, 1997.

suitable persons in preparing and revising the guidance is also an ideal practice.²⁵⁵ Perhaps, it should also be required of the Ministry to publish the guidance on “fit and proper person” and to disseminate the information to those involved in the moneylending industry.

The reform brought by CCA 2006 shows that the significance of the fitness test is emphasised by the UK Government, as the backbone to the licensing regime. The test was also reviewed from time to time to ensure that licensing remains the most effective regulatory weapon. It is submitted here that the suggestions above should be further considered by the Malaysian Government as they are significant in enhancing the efficiency of the moneylending licensing regime.

In reference to the appeal system, the internal inquiry under the MLA 2003 may seem outdated. It may be suggested that in order to ensure procedural safeguards and promote transparency in providing justice, an independent body should be the proper forum to decide on appeal cases. Thus, Malaysia might want to consider the improvement brought by the CCA appeal system in the CCA 2006. Nevertheless, it is envisaged that there may be some difficulties in realising this proposal, due to the small licensing population and restrictions in terms of money, manpower and infrastructure.

Both the MLA 2003 and the principal Act are silent on termination of licences for individuals in cases of death or insanity. The MLA 2003 only mentions transfer of

²⁵⁵ CCA, s 25A, as inserted by CCA 2006, s 30.

licence in cases of liquidation, receivership or dissolution.²⁵⁶ Conversely, the UK Consumer Credit (Termination of Licences) Regulations 1976 lists nine “terminating events”, which can cause a licence to terminate automatically.²⁵⁷ Termination provisions do not, however, cover corporate bodies, due to certain practical difficulties recognised by the Government. Deferment of termination for a period of twelve months is also provided whereby, for example, upon the death of the licensee, an authorised person such as an executor or administrator may carry on the business.²⁵⁸ It is envisaged that a termination provision should be included in the MLA to clarify in what situations automatic termination of licences can take place. Nevertheless, in order to protect the interest of borrowers, such termination should not affect existing moneylending contracts.

Finally, in regard to transfer or assignment of licence, it was pointed out that section 9G(3) of the MLA 2003 confers a wide discretion to the Registrar to authorise any transfer or assignment of licence, for any reason that he deems appropriate.²⁵⁹ It is submitted that this provision does not protect borrowers at all and is open to the risk of inappropriate recipients. Therefore, it is suggested that the procedure of assignment of licences should be on the same basis as application for original licences, and assignees should go through the vetting process as well.

This thesis will now move to another method of controlling the moneylending business: advertisement permits.

²⁵⁶ MLA 2003, s 9G.

²⁵⁷ CCA, s 37(1) and Consumer Credit (Termination of Licences) Regulations 1976, regs 1(2) and 2.

²⁵⁸ CCA, s 37(3); see also Consumer Credit (Termination of Licences) Regulations 1976, reg 3.

²⁵⁹ MLA 2003, s 9G(3).

3.5 Moneylending Advertisements

This thesis seeks to evaluate, taking into account the credit advertising regulations in the UK, whether the MLA 2003 has provided sufficient measures to prevent illegal advertising and whether the prevailing advertising law is adequate to give information and to safeguard borrowers.

3.5.1 Background

The moneylending advertisement is an important method of publicising a moneylending business, and to attract borrowers to borrow from moneylenders. The moneylenders must provide accurate details of their business to the public so that they can decide whether to take the loan. In the business world, an advertisement is an important marketing strategy to increase sales and this situation has always put consumers at the mercy of businesses, as they are open to exploitation by misleading advertisements. Regrettably, this is also evident in the moneylending context.

It is apparent in Malaysia that errant moneylenders and loan sharks adopt outrageous advertising tactics to attract potential borrowers into moneylending transactions. Persuasive wordings are commonly used in advertising their illegal services, for example, "*Easy Loan*", "*Fast Cash*", "*RM10,000 without Guarantor*," "*Low Interest Rate*" and so on. Such advertisements are posted in newspapers, in public places as well as in every house's letterbox. The issue at stake is that people who are in need of fast cash, usually the vulnerable section of society, often fall into this advertising trap. Misleading advertisements usually do not state clearly the background of the loan sharks, and in some cases, false company names are used. Pre-paid mobile numbers are normally given, which are difficult to trace as they are not registered numbers.

Ironically, desperate borrowers still do respond to these vague and unclear advertisements. The main reason is that moneylending services offered by the loan sharks do not involve any bureaucratic procedures. Borrowers need only produce copies of their identity cards, income statements for the last three months, electricity bills and Employees Provident Fund statements. In most circumstances, the loan sharks will retain borrowers' Automatic Teller Machine cards. If borrowers borrow over a certain amount, collateral, such as cars and jewellery, is required.

Before the MLA 2003, the Government had no power to overcome the huge volume of loan sharks' advertisements in the newspapers.²⁶⁰ This is because under the old moneylenders law, only moneylenders who fell within the definition of a 'moneylender' under section 2 of the Act were bound by the law that controlled moneylending advertisements.²⁶¹ In addition, there were no rules and regulations to prevent publishers from publishing misleading and illegal moneylending advertisements. This grave loophole was happily exploited by unscrupulous loan sharks to place dishonest advertisements in the newspapers. Some segments of society called for an outright ban on carrying advertisements of moneylenders in newspapers, as desperate borrowers easily fall prey to such advertisements.²⁶² Therefore, one of the strategies towards wiping out loan sharks' activities was to amend and delete sections 11 and 13 of the MLA respectively.

²⁶⁰ It was reported that when the loan sharks became a big issue due to some borrowers being driven to commit suicide, the Ministry of Domestic Trade and Consumer Affairs called a meeting of newspaper publishers, as the Ministry wanted newspapers to reject advertisements from moneylenders. When its officers were bluntly told that there were no provisions in the law empowering them to do that, they backed down. See Nadeswaran, R, "Moneylenders must go", *The Sun*, 2 December 2002; Loo Yok Soi, J. Sebastian and S. Aruldas, "Study why loan sharks dare advertise services", *The Star*, 5 December 2002; "FOMCA gesa akhbar teliti iklan pinjaman mudah" (FOMCA urged newspapers to analyse easy loan advertisements), *Berita Harian*, 10 December 2003; Nizam Yatim, "Iklan along tarik peminjam kesempitan wang" (*Along's* advertisements attracted desperate borrowers), *Utusan Malaysia*, 3 December 2002.

²⁶¹ See the deleted s 13 of the MLA; see also *Mac Donald v N.G. Napier Ltd.* [1960] S.L.T. 345.

²⁶² Chow Kum Hor, "New law to fine, jail loan sharks", *New Straits Times*, 4 December 2002.

The purpose of both sections 11 and 13 of the old law was to protect the borrower from being deceived by devious advertising tactics in any advertisements, circular, business letter or other document issued, published, or caused to be issued or published by the moneylender. The former section 11 provided that the authorised name of the moneylender should be stated clearly in any document, whereas section 13 explained the restrictions on moneylenders' advertisements. An example of such restrictions was a prohibition on advertising moneylenders' services in newspapers unless the advertisement conformed to the requirements under the MLA. Unlike the English Moneylenders Act 1927, the former Australian Moneylenders Acts and the New Zealand Moneylenders Act 1908, the MLA did not provide any civil consequences for contravening either section 11 or 13. It could be presumed that it was the intention of the legislators that only criminal sanctions were provided for the breach of advertising regulations. Therefore, a moneylending contract that was made following a breach of the advertising regulations under the MLA was not considered void, illegal or unenforceable. In this context, it is presumed that the statutory intention was only to reduce the number and nature of inducements to the public to borrow from moneylenders, and not to prohibit moneylending transactions that arose out of advertisements by moneylenders. Some fifty years later on, it was acknowledged that both sections 11 and 13 were obsolete and incompatible with the modern commercial conditions. Unscrupulous loan sharks employed outrageous advertising tactics, innocent borrowers fell prey to such ploys but the authority's hands were tied, as they had no power to act.

Having dealt with the scope of the old advertising law, it will now be considered whether advertising permits have the potential to be an effective regulatory weapon to

fight illegal moneylending advertisement, and at the same time, provide adequate protection to borrowers.

3.5.2 Advertisement Permits

The significance of advertisement permits is similar to that of licensing. The advertising permits regime protects consumers by screening out misleading and vague moneylending advertisements. A major contribution of the MLA 2003 is to extend the scope of advertising regulation to loan sharks. Thus, the requirement for advertising permits may serve two-pronged purposes: to allow genuine moneylending advertisements from licensed moneylenders to be published for the public and weed out illegal moneylending advertisements.²⁶³

The advertisement permits regime is the most important mechanism in relation to moneylending advertisements. The permit is a requirement that applies to all forms of advertising, including brochures, newspapers, signboards, radio, television, compact disc-video, cinema and internet.²⁶⁴ Therefore, under the amended law, moneylenders must now seek approval from the Ministry before they can advertise their services.²⁶⁵ The Act clearly states that it is an offence to publish an advertisement without obtaining a permit from the Registrar.²⁶⁶ It may be suggested here that advertisement permits provide a very tight control over moneylending advertisements. In fact, advertisement permits under the MLA 2003 are not general permits to advertise but specific individual permits, as Schedule F of the MCLR requires moneylenders to submit copies of the proposed advertisements to be vetted by the Ministry. It is

²⁶³ MLA 2003, s 11(1) and (2).

²⁶⁴ MCLR, reg 2; see also schedule G.

²⁶⁵ "Get moneylenders' detail before printing their ads", *The Star*, 13 December 2002.

²⁶⁶ The maximum fine is RM10,000 and the maximum sentence is twelve months imprisonment; MLA 2003, s 11(2).

assumed that the process of vetting will screen out misleading and vague moneylending advertisements, as every advertisement is individually assessed and verified.

3.5.2.1 Application and renewal

The applicant for an advertisement permit must submit his application in the form prescribed in Schedule F together with all relevant documents.²⁶⁷ Any approval, conditional approval or refusal of an application is at the Registrar's discretion.²⁶⁸ A fee of RM200 for the period of two years is required upon submission of an application for an advertisement permit.²⁶⁹ Once a permit is issued, the moneylender is not authorised to change, amend or modify the permit, unless with the Registrar's approval, and subject to the payment of RM100.²⁷⁰ The same procedure also applies in renewal of a permit. Applications must be submitted in compliance with Schedule H with all required information, and the Registrar will determine whether to approve or refuse the application.²⁷¹ The applicant is required to pay the same fee for another period of two years.

It is interesting to note that although 2876 licences were issued by the Ministry between January 2004 and December 2005, only the small number of 620 advertisement permits were issued by the Ministry during the same period. It could be assumed that the majority of moneylenders do not advertise their services. Table 3.3 shows the evidence of the number of advertisement permits issued by the Ministry:

²⁶⁷ MCLR, reg 6(3).

²⁶⁸ MCLR, reg 6(5).

²⁶⁹ MCLR, reg 6(7) .

²⁷⁰ MCLR, reg 6(10) .

²⁷¹ MCLR, reg 7(1)&(3) .

Table 3.3: Advertisement permits issued by the Ministry in 2004-2005.

<i>Year/Month</i>	<i>New Application</i>	<i>Renewal</i>	<i>Total</i>
2004			
January	-	-	-
February	-	-	-
March	29	-	29
April	14	-	14
May	22	-	22
June	-	-	-
July	-	-	-
August	-	-	-
September	8	3	11
October	46	18	64
November	68	21	89
December	48	4	52
2005			
January	34	3	37
February	54	3	57
March	38	1	39
April	23	1	24
May	41	-	41
June	34	-	34
July	21	1	22
August	22	-	22
September	16	-	16
October	21	-	21
November	13	-	13
December	13	-	13
Total	565	55	620

Source: The Ministry for Housing and Local Government, 2006.

3.5.2.2 Particulars in advertisements

The content of an advertisement is perhaps the most significant message conveying the intention of the advertiser. In the moneylending context, the content is prescribed and therefore, the following details must be incorporated in a moneylender's advertisement: the moneylender's licence number and its validity date, the advertisement permit number, the name, address and telephone number of the

moneylender and the interest rate offered.²⁷² Moneylenders are prohibited from implying that they carry on the business of banking in any moneylending advertisement, circular or document.²⁷³ It can be deduced that the statutory intention is to provide some information about the background of the moneylender so that prospective borrowers will know with whom they would be dealing. The interest rate offered must also be made known to the potential borrower, as this is an important factor in considering whether the loan is affordable. However, despite the noble intention of the MLA 2003 to protect borrowers, the law does not clearly state how interest rates should be quoted; for example, monthly rate or annual rate, flat rate or compounded rate. In reality, quotation of interest rates may have great influence on borrowers. For example, the monthly rate may look inexpensive and might attract more consumers to borrow. However, they would probably discover later on that they have been misled by the monthly rate and could find themselves unable to commit to the repayments. In contrast, the annual rate would appear deterrent, and might keep away consumers; therefore an advertiser might prefer not to show it. Indeed, evidence shows that moneylenders tend to quote interest rates on a monthly basis.²⁷⁴ Nevertheless, the law should be clear on this matter, with a view to safeguarding consumers' interest. Moreover, this weakness may eventually cause undesirable effects on borrowers. Therefore, it is suggested here that the MLA 2003 be amended to clarify the method of quoting interest rates in moneylending advertisements.

²⁷² MCLR, reg 8.

²⁷³ MLA 2003, s 12. In the relevant English case, a moneylending company which advertised itself in a newspaper as "Merchant Bankers" and on the window of its office places a sign "Merchants' Bankers and Financiers" was prosecuted and convicted; *Board of Trade v Premium Trading Co. Ltd.* [1926] *The Times*, 8 July 1926.

²⁷⁴ "U Buy U Sell", *New Straits Times*, 12 September 2005, p. 7.

Apart from the content of the advertisement, the MLA 2003 also provides that the terms and conditions in the advertisement must conform to the terms and conditions in the moneylending agreement. If such terms or conditions are not genuine and do not correspond with those in the advertisement, such terms or conditions may be rendered void.²⁷⁵ This is a good measure to ensure consumer protection. Further, a distinctive feature of the new law is the prohibition of describing any connection with certain people and bodies in the moneylenders' advertisement.²⁷⁶ Presumably there have been cases in the past where the public were duped by confidence tricksters who claimed to have a connection with the royal family or the federal or state government. Indeed, people may easily be drawn to those who claim to be related to an important person or to a big name.

3.5.2.3 Analysis of moneylending advertisements

This section seeks to analyse whether the advertising regulation under the MLA 2003 is effective in protecting consumers' information interest. This study selected twenty moneylending advertisements posted by thirteen moneylenders that were published in one established daily newspaper dated 12 September 2005.²⁷⁷ The main purpose is to determine whether these advertisements conform to the moneylenders law. Apparently, all twenty advertisements provided the details of the moneylenders, the licence number and advertisement permits references. On the surface, it may be assumed that these advertisements were authorised by the Ministry, because of the

²⁷⁵ MCLR, reg 12.

²⁷⁶ MCLR, reg 9. The persons and bodies referred to are (a) the patronage of the Yang di-Pertuan Agong or of any member of His Majesty's family; (b) the patronage of the Head of State of any State in Malaysia or any member of his family; (c) any connection with (i) the Federal Government; (ii) the Government of any State in Malaysia; (iii) any City Council or Municipal Council or District Council; (iv) any society or body established and incorporated by statute; (v) any public building; or (vi) any public place.

²⁷⁷ See "U Buy U Sell", *New Straits Times*, 12 September 2005, p. 7.

existence of permit reference numbers. However, further examination of these advertisements raises serious doubts as to their authenticity, since they are not only confusing but also misleading and in clear breach of the moneylenders laws. The summary of the moneylending advertisements is illustrated in Table 3.4.

Table 3.4: Analysis of moneylending advertisements

No	Moneylender	Breach of law	Types of breach or misleading information
1	Two Max Enterprise, Kuala Lumpur (WP1003/14/01-2/130906)	✓	<ul style="list-style-type: none"> Misleading description - "1% per month", without stating whether for secured or unsecured loan.
2	Two Max Enterprise, Subang Jaya (WL1003/10/01-2/050906)	✓	<ul style="list-style-type: none"> Misleading description - "1% per month", without stating whether for secured or unsecured loan.
3	Sinmax S/B, Kepong (WP1014/01-1/130706)	✓	<ul style="list-style-type: none"> Misleading description - "1.0% - 1.5% per month", without further explanation
4	Sinmax S/B, Kuala Lumpur (WP1014/14/01-1/130706)	✓	<ul style="list-style-type: none"> Accepted pawn letters as mortgage Misleading description - "0.5% per month" "1.0% per month", without further explanation
5	Common Formula S/B (WP3549/10/01-1/030806)	✓	<ul style="list-style-type: none"> Licence number incomplete Accepted properties, gold, electronic things and branded watch as deposit Misleading description- "0.5%", without further explanation
6	Bakti Mentari Enterprise, Kuala Lumpur (WP5071/14/03-1/280307)	✓	<ul style="list-style-type: none"> Interest rate for secured loan not provided
7	Bakti Mentari Enterprise, Subang (WP5071/10/02-1/280307)	✓	<ul style="list-style-type: none"> Interest rate for secured loan not provided
8	Bakti Mentari Enterprise, Petaling Jaya (WP5071/10/01-1/280307)	✓	<ul style="list-style-type: none"> Interest rate for secured loan not provided
9	Bakti Mentari Enterprise, Kuala Lumpur (WP5071/14/02-1/280307)	✓	<ul style="list-style-type: none"> Interest rate for secured loan not provided Confusing expression - "immediate approval"
10	Bakti Mentari Enterprise, Kuala Lumpur (WP5071/14/01-1/280307)	✓	<ul style="list-style-type: none"> Interest rate for secured loan not provided Confusing expression - "full loans"
11	Ultimax Management Services (WP1001/10/01-1/121006)	x	<ul style="list-style-type: none"> Confusing expression - "immediate full loan"

continued.....

No	Moneylender	Breach of law	Types of breach or misleading information
12	Perfect Million Capital S/B (WP1421/14/01-1/290706)	x	<ul style="list-style-type: none"> Confusing expression – “RM10K-100K/RM10K=RM933 *12mths”
13	I-Pac Resources S/B (WP3796/14/01-1/310806)	✓	<ul style="list-style-type: none"> Interest rate for secured loan not provided Confusing expression – “loan RM1K = Get RM1K”
14	MxLand Enterprise (WP2684/14/01-1/300606)	✓	<ul style="list-style-type: none"> Misleading description – “1% - 1.5% monthly”, without stating for secured or unsecured loan
15	Firstmax Enterprise, Kuala Lumpur (WP1002/14/01-2/170806)	✓	<ul style="list-style-type: none"> Misleading description – “interest as low as 1% per month”, without further explanation
16	Firstmax Enterprise, Petaling Jaya (WP1002/10/01-1/121006)	x	<ul style="list-style-type: none"> Confusing expression - “immediate full loan”
17	Easy Capital S/B (WP1409/14/01-1/100806)	✓	<ul style="list-style-type: none"> Accepted diamonds and gold as collateral Misleading description – “1.5%”, without stating for secured or unsecured loan
18	Siong Wang Trading (WP1037/14/01-1/201006)	✓	<ul style="list-style-type: none"> Misleading description – “from 4% a year without collateral”
19	Jie Xing Tat S/B (WP1058/04/01-270806)	✓	<ul style="list-style-type: none"> Interest rate not provided
20	Everlast Enterprise (WP1004/14/04-2/270906)	✓	<ul style="list-style-type: none"> Misleading description – “1.0%”, without stating for secured or unsecured loan

Source: “U Buy U Sell”, *New Straits Times*, 12 Sept 2005, p. 7; full advertisement is at Appendix A
() refers to the advertisement permit number

As shown in Table 3.4, all except three advertisements were found to be in breach of the MLA 2003 and its regulations. Those three advertisements, however, were found to use expressions that may cause misunderstanding on the borrower’s part. Generally, it may be perceived that most advertisements are aimed at low-income earners, as evidenced by the words “min salary RM500”, “businessman or hawkers” and “factory workers”. Some advertisements also mentioned negotiable repayment schemes. It is also apparent from Table 3.4 that some moneylending businesses have more than one business premise. Bakti Mentari Enterprise for example, has four business addresses; however, this is not in contravention of section 6 of the MLA

2003, as the firm has four different licences.²⁷⁸ It can be gathered that the most common advertising breach is providing incomplete interest rate information, such as “0.5%” and “interest as low as 1% per month.” Further, some advertisements do not mention whether the interest rate is for unsecured or secured loans, some only provide for unsecured loans and one advertisement does not state any interest rate at all.

Table 3.4 also illustrates that one advertisement was found to be in breach of the moneylenders regulation for accepting pawn tickets as securities.²⁷⁹ Another advertisement accepted diamonds and gold as a mortgage, which resembles a pawn transaction, and another accepted “properties, gold, electronic things and branded watch” as a deposit. It is also quite strange for a deposit to be taken in a moneylending transaction.

Further, Table 3.4 illustrates that confusing expressions are commonly used in moneylending advertisements, such as “immediate full loan” and “loan RM1K = Get RM1K”. The former expression gives the impression that approval of the loan is guaranteed, although it may be that the borrower is not qualified to borrow. Since it is assumed that the credit status of the borrower is not verified in a moneylending transaction, the borrower may borrow over his ability to repay and this may put him heavily into debt. The advertisement “loan RM1K = Get RM1K” may also cause confusion as the borrower may be charged for interest and other costs.

Analysis over Table 3.4 shows evident violation of the advertising rules. It brings up a question on whether these advertisements were illegal or whether the vetting process

²⁷⁸ S 6 provides that a moneylending licence is only applicable to one business address.

²⁷⁹ Item 11 to Schedule K of the MCLR provided that “security” does not include “credit card, charge card, auto teller machine card, birth certificate, identification card or pawn ticket”.

is failing. This study identifies three types of offences committed by moneylenders: citation of interest rate; using confusing expressions; and accepting pawn tickets, gold and diamonds as security. Apparently, the most common offence regards citation of interest rates. However, it is submitted here that moneylenders alone should not be blamed for defying the law, since the law itself is flawed. Regulation 8(1)(d) only states that moneylenders should include the “interest rate offered”, without giving further explanation on how to quote the interest rate. Hence, moneylenders did literally mention the interest rate, perhaps without even realising they had committed any offence, because the law itself is not clear.

Obvious disregard of the law may also invite another discussion; the strictness of the vetting process. It is submitted here that such infringement would never have happened if the vetting process had been properly carried out. This is because advertisement permits are not general permits and therefore, proposed advertisements are inspected individually. Hence, any apparent breach should be noticed immediately and the application for permits should be amended or rejected. Further, regulation 6(4) of the MCLR states that “any misleading, false representation or description of particulars or information” required in an application for an advertisement permit is an offence. Thus, besides the Registrar’s power to approve or disapprove an application for advertisement permit, there is still room to act against misleading description in the advertisement, since it is also a regulatory offence under the moneylenders laws. Indeed, the Registrar has wide measures to control moneylending advertisements, and such a clear breach of the law should never have happened. Apart from the administrative control, the law further provides that if any terms in the advertisement do not conform to the moneylending agreement, the term

in the moneylending agreement may be rendered void for non-conformity.²⁸⁰ Thus, moneylenders must word their advertisements carefully, or else have to face the consequence of invalid terms in the agreement. Based on the discussion above, it could be deduced that the requirement for vetting proposed advertisements is revolutionary and has potential to control moneylending advertisements. Regrettably, the vetting process is clearly flawed.

On the other hand, there is another possibility that may explain how such advertisements managed to get the Registrar's approval. It may be that the moneylenders had never applied for advertisement permits and those permit numbers were self-inserted. The permit number provided by the Ministry is the same as that of the business licence, except for the letter "L" which stands for licence and "P" which refers to permit. Thus, rogue moneylenders can easily insert the permit number without even applying for such permit. It is also a concern that a simple process to advertise online may invite some abuse in moneylending advertisements. Newspapers use 'Classifieds online' widely to place advertisements. This straightforward procedure only needs an internet connection and a credit card. Advertisements may be placed anytime, anywhere. It is suggested that the enforcement department of the Ministry monitor these types of advertisements in the newspapers closely, as there is no provision under the MLA 2003 to charge the publisher of advertisements for displaying misleading moneylending advertisements.

²⁸⁰ MCLR, reg 12.

3.5.2.4 Internet advertising

Apart from conventional newspaper advertisements, this study considers that it is also important to further investigate internet advertising, as it clearly falls under the MLA 2003 as illustrated by the MCLR.²⁸¹ This is further supported by the application form for an advertisement permit, where the applicant is supposed to indicate the type of advertisement.²⁸² Advertisement by internet is listed as one of the categories. Unfortunately, the statute is silent on further information regarding internet advertisement. Several questions may arise as to the form of cyber-advertisements and how enforcement of virtual advertisements is carried out.

An example of an internet advertisement is www.pinjaman2u.com, posted by Siong Wang Trading.²⁸³ The moneylender had used another name, “Vault Credit Co.”, as the “online branding name”, although the licence and permit numbers quoted were those of Siong Wang Trading, the same as advertised in the daily newspaper. Both licence and permit numbers were in very small print and unclear. The interest rate quoted in the advertisement was “12% for collateral and 18% for non-collateral payment”: it was not mentioned whether this was on a monthly or yearly basis. The advertisement also mentioned a “referral bonus”, whereby a person who successfully referred a borrower to the moneylender would be entitled to receive a commission. In regard to the details of the moneylender, only mobile numbers and email address were given. Address of business premises was not provided. Further, it is quite peculiar that the Malaysian denomination, the *ringgit* (“RM”) was not used; “\$” was used instead. Moreover, the models in the advertisements were all Caucasians, which did not reflect the Malaysian population at all.

²⁸¹ MCLR, reg 2.

²⁸² MCLR, schedule G.

²⁸³ The home page of the advertisement is at Appendix B.

The study also found that confusing and misleading information in the advertisement's FAQ was very obvious. For example, the moneylenders advertised themselves as "a nationwide loan consulting and loan placement company", although the business licence only allowed them to conduct business at one business premise. They also opted to refer to themselves in a fashionable and stylish manner; the word "moneylender" was replaced with "loan consulting and loan placement company". Further, the FAQ also shows that authentication documents are not required to process loan applications in many cases. It may be argued that if documentation is not needed, the moneylender would not know whether the borrower had credit problems or was blacklisted by the banks and financial institutions. Such practice may encourage multiple borrowing and result in over-commitment where the borrower cannot meet his obligation of repayment of debts. It is also unbelievable that a "consulting fee" is charged after the loan is approved. The said "fee" depends on the amount and type of loan approved. This is a devious tactic to manipulate the borrowers and to extort more money from them.

Many confusions and violations of the law could be identified from www.pinjaman2u.com. It is certain that this advertisement could not have been approved by the Ministry. However, it is unclear how the Ministry supervises internet advertisements. In the UK, special rules have been proposed to regulate electronic advertisements, including those via the internet. For instance, the OFT suggested that "all key information should appear on the same screen if possible, and if not then on the same page with clear links between information."²⁸⁴

²⁸⁴ OFT, *Consumer Credit Act Review DTI Consultation Paper – Establishing a transparent market: Response by the Office of Fair Trading*, March 2004. Available: <http://www.of.gov.uk/nr/rdonlyres/40cd937c-0f6b-4026-85cd-dce580962e45/oft712a.pdf> (accessed 25 May 2005).

Analysis of the moneylending advertisement regime shows that advertising permits have good potential to safeguard consumers from misleading and illegal moneylending advertisements. The shift of the law to tighter control over moneylending advertisements is due to the mushrooming of uncontrolled deceptive and illegal moneylending advertisements in a variety of forms.

However, recent newspaper reports showed that the creativity and inventiveness of loan sharks are beyond imagination, as their approaches and strategies in advertising their services are always ahead of the law. In fact, they have become bolder since the new law was enacted. They have employed new tactics since the banning of vague advertisements in newspapers. They now distribute advertisements in the form of stickers, faxes, personalized calling cards featuring calendars of scantily clad women: the latest step is 'bank letters.'²⁸⁵ Lack of response to calling cards posted in domestic letterboxes brought another scheme to trap consumers: distribution of lucky draw letters offering various attractive gifts.²⁸⁶ These lucky draws are substantially similar to tactics employed by direct sales companies. Further, loan sharks were hiring children to distribute pamphlets and business cards as a tactic to evade enforcement officers.²⁸⁷ Moreover, it was recently reported that more than eighty percent of road signage in the housing area in Johor Bahru was vandalised by loan sharks and a 'war of posters' was conducted among themselves to advertise their services.²⁸⁸ The latest

²⁸⁵ "Loan sharks' new gimmick", *The Star*, 25 October 2004; Sam Cheong, "Loan sharks getting desperate", *The Malay Mail*, 14 February 2004. The "bank letters" are bogus bank letters offering personal loans.

²⁸⁶ Mohd J. Anbia & Mohd N. Daud, "Ceti hantar surat cabutan bertuah" (*Chetty distribute lucky draws*), *Harian Metro*, 27 May 2004.

²⁸⁷ "Loan sharks hire pupils to distribute business cards", *The Star*, 20 May 2004; "Loan sharks using children as runners", *The Star*, 20 May 2004.

²⁸⁸ Mary V. Dass, "Iklan along kuasai tanda jalan" (Loan sharks advertisements conquers road signages), *Harian Metro*, 10 October 2005.

trend among loan sharks is offering their services by sending messages to mobile phones.²⁸⁹

In sum, although advertising permits may appear to be a promising tool to monitor moneylending advertisements, further examination of the advertisement regime proved otherwise. This study has identified six factors contributing to the imminent failure of the MLA 2003, which has deviated from its aim to protect the borrowers from misleading and illegal moneylending advertisements. First, the law is not clear on how to advertise the interest rate. The law only requires moneylenders to mention the interest rate offered, without further explaining how it should be quoted. Therefore, moneylenders have complied literally with this requirement, but with adverse impact on consumers. This is evidenced with various kinds of confusing description of interest rates, as discussed under Table 3.4.

Second, analysis of the moneylending advertisements shows obvious disregard of the advertising rules. The most obvious breaches of the law are regarding interest rates; by not providing them or giving misleading description. Other infringements are accepting deposits in terms of property and electrical items, as well as accepting diamonds, gold and pawn letters as collateral. All these violations may call into question the integrity of the vetting process. Third, the publisher of an advertisement is not accountable for publishing a misleading advertisement in his publication. Lack of such a provision certainly does not support the law, as publishers will continue to overlook and ignore the content of advertisements to be published.

²⁸⁹ Alyssa Wong, "Ah Long offering loans via SMS", *The Malay Mail*, 8 February 2006.

Fourth, it can be assumed that the advertising permit regime can be easily circumvented as the permit number is similar to the licence number, except for the letter 'P' for permit and 'L' for licence. Moneylenders can easily insert the permit number without even applying for such a permit. Fifth, there are many advertising media provided under the MLA 2003; it may be asked how the authority supervises all these kinds of advertisements. An example is the lacuna on internet advertising. Other means to advertise illegal moneylending services are by distributing flyers and calling cards, placing posters in public places as well as sending messages through mobile phones.

Finally, lack of enforcement over illegal moneylending advertisement is obviously due to lack of power conferred by the law to act against such offences. Regrettably, it is doubtful that advertisement permits have the potential to be an efficient regulatory weapon to eradicate misleading and illegal moneylending advertising, unless the rules are strengthened in view of the above comments.

3.5.3 Credit advertising in the UK: A comparative analysis

The law on credit advertising in the UK is much more detailed than that of moneylending advertisements in Malaysia. In the UK, the general rules on credit advertising are provided in the CCA under sections 43, 44, 45, 46, 47, 151, 168 and 169 whilst the details are contained in the Consumer Credit (Advertisements) Regulations 2004 (hereinafter "the UK Advertisements Regulations") which replaced the Consumer Credit (Advertisements) Regulations 1989 on 31 October 2004.

Credit advertising in the UK has undergone revision in the past years to provide more transparency and to provide consumers with better understanding of the product advertised.²⁹⁰ The UK Advertisements Regulations are designed to control credit and hire advertisements in order to provide fair and sufficient information about the nature of credit and its costs to consumers. This is to assist consumers to make informed choices and choose the offering that suits them best. The UK Advertisements Regulations apply to advertising in any form: whether print, radio, TV, the internet, films or video, in catalogues, at point-of-sale displays, or on show cards or price lists. According to the UK Advertisements Regulations, credit or hire advertisements must:

- be in plain English, and easily legible or clearly audible;
- state the name of the advertiser;
- include financial details if certain financial information is given;
- abide by the rule governing when to display the 'typical' Annual Percentage Rate (“APR”);²⁹¹
- abide to the rules governing the prominence of the typical APR;
- present credit information ‘together as a whole’ within the advertisement;
- (if relevant) clarify security matters together with details of what is required; prominent warnings must be displayed if the borrower’s/hirer’s home is the security item.

The OFT Annual Report shows that 33% of regional newspaper advertisers failed to comply with the new credit advertising regulations.²⁹² The latest survey conducted by the trading standards services across the UK shows a higher number – 60% – non-

²⁹⁰ DTI, Regulatory Impact Assessment on the Consumer Credit (Advertisements) Regulations 2004. Available: www.dti.gov.uk/ccp/topics1/pdf1/credriaad04.pdf (accessed 9 October 2005).

²⁹¹ APR is the standard measure to compare the real cost of credit, which includes interest and additional charges such as administration or acceptance fees, survey fees and fees charged by credit brokers; OFT, *Credit charges and APR*, OFT 144.

²⁹² OFT Annual Report 2004-05.

compliant.²⁹³ However, this situation can be explained since the UK has been undergoing a transition process since the UK Advertisements Regulations became law. It is assumed that a major problem in the UK is that traders and businesses are still grappling with the changes; and that is the reason for the higher rate of non-compliance. Most breaches are regarding the APR; either omitting it or not giving it the required prominence, or not showing it together with other information.²⁹⁴

There are several areas in which Malaysia can learn from the UK in order to improve moneylending advertisement. First, publishers of illegal advertisements should be held responsible over such publication. In the UK, under section 47 of the CCA, the publisher and any person who develops the advertisement are also held liable for breach of advertising regulations. TSDs, for example, have taken action against national newspaper advertisers who violated the credit advertising regulations.²⁹⁵ In light of the practice in the UK, it is suggested that publishers in Malaysia should also be held responsible for the content of their publications. For a start, it is proposed that the Ministry and the publishers develop an effective relationship and co-operate to prevent misleading and illegal moneylending advertisements.

Second, applications for a Malaysian advertisement permit must be in the form prescribed in Schedule F, but the law is silent on the structure of the advertisement. On the other hand, regulation 3 of the UK Advertisements Regulations imposed a condition that credit advertising must use plain and intelligible language, as well as be easily legible. This is important to avoid tricky advertising using deceiving lay-out,

²⁹³ OFT, *Credit Advertising sweep show over 60 per cent not complying with rules*. Available: <http://www.offt.gov.uk/News/Press+releases/2005/index.htm> (accessed 9 October 2005).

²⁹⁴ *Ibid*; see also the OFT Annual Report.

²⁹⁵ OFT Annual Report 2004-05.

legal and technical jargon and also small print. It will also ensure that the language used is understood by persons to whom it is addressed.

Third, in regard to the content of advertisements, regulation 8 of the MCLR only provides the particulars that should be included in the advertisement such as the licence and permit number, name, address and contact number of the moneylender as well as the interest rates offered. However, the law has overlooked certain expressions that may confuse a borrower. In the UK, expressions such as “interest-free”, “no deposit”, “loan guaranteed” and “pre-approved” are prohibited unless those statements are truthful and accurate.²⁹⁶ Table 3.4 illustrates that the use of confusing expressions is quite rampant. It is a concern that such appealing expressions might in reality only be used as a strategy to attract borrowers. Although such expressions may fall under ‘misleading advertisement’ under regulation 6(4) of the MCLR, which is a criminal offence, a clear approach as in regulation 9 of the UK Advertisements Regulations may perhaps provide better protection to consumers. Therefore, it may be suggested that the moneylenders law also prohibits certain expressions that may confuse consumers, unless those statements are genuine.

Fourth, there is no provision on security warnings in the MLA 2003, although the Act covers both unsecured and secured loans. In the UK, a security warning must be included in the advertisement in capital letters if the loan is secured by a home or other forms of security such as a guarantee provided by a third party.²⁹⁷ An example of such a warning is “YOUR HOME MAY BE REPOSSESSED IF YOU DO NOT

²⁹⁶ UK Advertisements Regulations, reg 9.

²⁹⁷ UK Advertisements Regulations, reg 7.

KEEP UP REPAYMENTS ON A MORTGAGE OR ANY OTHER DEBT SECURED ON IT”.

Finally, in contrast to the UK, the importance of APR is not mentioned in Malaysian moneylenders laws. In the UK, the use of an interest rate is discouraged if it is not genuinely informative to consumers and it may lead to confusion with any APR.²⁹⁸ Nevertheless, the OFT has provided some guidance which can benefit Malaysia as well. According to the OFT, quoting monthly rates in advertising may cause confusion to consumers and may lead to committing an offence of providing misleading advertisement.²⁹⁹ This view should be given serious consideration as the MCLR is silent on how to quote interest rates.

3.6 Conclusion

This thesis acknowledges that a positive licensing regime is a dynamic and powerful regulatory mechanism to identify and keep out dishonest moneylenders as well as to maintain high standards in business. In order to realise the benefits of licensing, the licensing system has gone through major reform under the MLA 2003. The reform has indeed brought great changes in streamlining the licensing regime, especially in removing local authorities from regulation of the moneylending industry and replacing them with a centralised system under the Ministry. Perhaps the move will enhance supervision and co-ordination in the licensing system. Several licensing provisions such as fees, duration and renewal, displaying the licence in the business premises, conducting moneylending transactions at the moneylenders' premises and

²⁹⁸ OFT, *Consumer Credit (Advertisements) Regulations 2004: Frequently Asked Questions*, September 2005. Available: <http://www.of.gov.uk/NR/rdonlyres/3BE594B7-1DD5-47C1-85AE-D5D6BE38D909/0/of746.pdf> (accessed 25 October 2005).

²⁹⁹ *Ibid.*

revocation as well as suspension of licences are either amended or freshly formulated to keep up with current commercial standards, and to safeguard the borrowers' interests. This study here believes that the reform of moneylenders law has sparked the attention of illegal moneylenders, and some are concerned over the strict new rules and penalties. This is evidenced by their appeal to be given licences.

However, in light of development under the CCA, several weaknesses under the MLA 2003 become apparent. It is submitted here that the Malaysian Government should fully optimise the opportunity to strengthen the 'fit and proper person' test, as this is the key factor that would distinguish an honest from a crooked applicant. This study here believes that certain criteria such as evidence of unfair business practice, evidence of discrimination and consumer complaints should be further considered under the Malaysian law. Moreover, evidence of skills, knowledge and experience also show promising ability to keep out incompetent applicants and may also be considered in determining whether an applicant is a "fit and proper person". Further, as has been practised in the UK, the Ministry should review the test from time to time, publish guidance on the test, revise it and consult suitable persons in preparing and revising it.

Similar to licensing, advertisement permits are also an effective method of controlling moneylending advertisements by screening out misleading and vague moneylending advertisements. It is acknowledged that the advertisement permits regime under the MLA 2003 is innovative, as each proposed advertisement is vetted specifically. Unfortunately, the noble intention of the MLA 2003, to protect borrowers, could be defeated because of the flaws in the advertising rules. The analysis of moneylending

advertisements shows obvious disregard of the law, hence calling into question the integrity of the vetting process. In view of the weaknesses of the advertising rules, as well as the practice under the UK Advertisements Regulations, this study has proposed some suggestions to improve the moneylending advertising rules. Among the suggestions are those regarding quotation of interest rates, the content and structure of moneylending advertisements, restrictions on confusing expressions, provision on security wealth warnings, imposing a duty on publishers to be responsible over the content of their publication as well as enhancing supervision over the variety of media in advertising, especially illegal advertising.

In the next chapter, discussion turns to the enforcement system under the MLA 2003.

THE ENFORCEMENT SYSTEM

4.0 Introduction

Chapter Three discussed the Ministry's regulatory power in implementing the licensing and advertisement permits regimes. Both systems rely heavily on the enforcement machinery to obtain the full effect of the law. This chapter will discover the effectiveness of such machinery. It was pointed out in Chapter Three that section 5 of the MLA 2003 is a significant milestone that widens the law and empowers the authority to act against illegal moneylending. The introduction of section 5 also has great impact on the enforcement machinery, as in the past the Government was powerless to act against loan sharks' activities. Section 5 has indeed enhanced the power of enforcement authorities in their task of controlling and regulating the business of moneylending.

This chapter will analyse Part III and Part IV of the MLA 2003. In regard to the former, this study aims to examine and assess the new provisions in regard to investigation, search, seizure and arrest under the MLA 2003. This is to determine whether the new law provides adequate powers to the enforcement authority to regulate and control the moneylending business, to act against illegal moneylending and to protect the interest of borrowers in moneylending transactions. The much-awaited powers conferred by Part III should shed some light on the dead-lock situations faced by the Government when dealing with loan sharks in the past. Further, it is also the intention of this study to discuss the impact of the new rules on evidence as provided under Part IV of the MLA 2003. It will be seen whether the

provisions on evidence, protection and reward for informers will offer any assistance in eliminating loan sharks.

This chapter differs from Chapters Three, Five and Six: the enforcement provisions under the MLA 2003 will be analysed in the light of other consumer protection laws in Malaysia as well as of the CCA and the UK Trade Descriptions Act 1968. The two-pronged strategy is to identify the strengths and weaknesses of the enforcement mechanisms under the MLA 2003, as well as to investigate the standard practice of enforcement in consumer protection laws.

4.1 Background

Learned writers have pointed out that effective enforcement machinery is the key instrument in any consumer protection legislation, without which even the most refined legislation would be rendered futile.³⁰⁰ An effective system ensures that the law is adhered to, and those who breach the law will be duly penalised. This machinery should be supported by sufficient manpower and well-trained officers to perform their duties - hence the saying that a law is only as good as its enforcement. It has been discussed that, prior to the MLA 2003, the old moneylenders law did not provide any specific power to enforcement officers or the police to act against illegal moneylending.³⁰¹ Action could only be taken against violence caused by loan sharks under other laws such as the Penal Code, the Restricted Residence Ordinance 1933 (hereinafter "the RRO") and the Emergency Ordinance (Public Order and Crime Prevention) 1969. The action taken was usually based on reports filed by victims of

³⁰⁰ R.M. Goode, *Consumer Credit Law*, London, Butterworths, 1989, p. 182; S. Rachagan, "Consumer Protection Legislation in Developing Countries: A Case Study from Malaysia", (1995) 11 *Ritsumeikan Law Review*, p. 41, where he said that "the paucity of appropriate legislation in many developing countries is compounded by ineffective implementation."

³⁰¹ See para. 1.1.

offences of causing bodily harm or intimidation and harassment and not for the offence of illegal moneylending.

The Penal Code, the RRO and the Emergency Ordinance are still being utilised in handling violence caused by loan sharks' activities even after the MLA 2003. In 2004, for instance, around 405 cases against loan sharks were reported to the police by the public and 32 loan sharks were prosecuted under various sections of the Penal Code.³⁰² Under the RRO, for example, the punishment given to loan sharks was usually banishment, which has proved to be a failure as a deterrent.³⁰³ In 2004, seven loan sharks were banished, but only one loan shark faced the same punishment in 2003.³⁰⁴ Although it is a serious punishment, very few were banished under this law. According to a former Minister at the Prime Minister's Department, banishment is no longer a relevant sanction in this modern world.³⁰⁵ He also mentioned the difficulties faced by the police in monitoring the movement of loan sharks, as modern technology provides various ways for loan sharks to operate.³⁰⁶ This study here strongly supports the Minister's statement, as loan sharks could easily use mobile phones and the internet to communicate with other group members, even when banished to an isolated place.

³⁰² "32 kes 'Along' dikena tindakan mahkamah" (32 loan sharks faces prosecution), *Utusan Malaysia*, 13 July 2005.

³⁰³ Under the RRO, once a person is ordered to reside in an area, that person is prohibited from entering any other area. He must report to the nearest police station and is prohibited from leaving his residence without written authority from the Chief Police Officer of the State. The restriction order may not exceed five years, but may be renewed. Any person convicted of a breach of the order is liable to be imprisoned up to three years.

³⁰⁴ "Seven Ah Longs from Johor", *The Malay Mail*, 30 September 2004.

³⁰⁵ "Hukuman buang daerah along tidak sesuai: Rais" (Banishment is no longer relevant: Rais), *Berita Harian*, 7 December 2003.

³⁰⁶ *Ibid.*

There is a close link between the licensing system and the enforcement machinery in controlling loan sharks' activities. As discussed in Chapter Three, licensing and advertisement permits are powerful weapons with great potential to be effective regulatory mechanisms in identifying and keeping out dishonest moneylenders, while at the same time, protecting the borrowers from misleading and illegal moneylending advertisements. However, the dynamism of the licensing regime would be worthless in the absence of enforcement powers. In Malaysia, for example, although the licensing system was implemented long ago, it proved to be a failure in restraining illegal moneylending because the law did not extend to illegal moneylending and therefore, the Ministry had no power to act against illegal moneylenders.³⁰⁷

4.2 The Enforcement Machinery

As mentioned in Chapter Two, the Ministry for Housing and Local Government enforces the moneylenders laws, pawn-broking laws and housing laws. Among the three laws above, it is assumed that the Supervision and Enforcement Division (hereinafter "the Enforcement Division") of the Ministry is more focused on enforcing the housing laws as compared to moneylenders laws and pawn-broking laws.³⁰⁸ This presumption is supported by the establishment of a housing legal clinic

³⁰⁷ When a daily newspaper published a report exposing the activities of loan sharks in the year 2000, the Ministry for Housing and Local Government washed its hands of the problem saying, "the existing laws don't give us power to act against illegal moneylenders, the Act only covers those to whom we have issued licences" while the police said, "there are no criminal elements in such transactions"; R. Nadeswaran, "Moneylenders must go", *The Sun*, 2 December 2002; see also the statement of the Minister for Housing and Local Government where he said that "cases involving loan sharks have been on the rise as previous laws were not strict enough to curb the problem", in R. Jong, "Bad News for *Ah Longs*", *The Malay Mail*, 5 November 2003; see further in Wong Chun Wai, "Give cops more clout to go after loan sharks", *Sunday Star*, 8 December 2002. In this article, the writer commented that the amendments to the MLA "are necessary to give police specific powers to act against loan sharks because the authorities have no specific laws to turn to at present."

³⁰⁸ In the Ministry of Housing and Local Government unpublished report, 1997, it was stated that the Supervision and Enforcement Division only allocated five percent of their job specification to monitor moneylending activities. In Penang, for example, there was only one officer charged with enforcement tasks; see Edmund Ghanamuthu, "Moneylending: Malpractices and the law", paper presented at *Seminar on Law, Justice and the Consumer*, 19-23 November 1982, Penang, p. 12.

and the Homebuyers Claims Tribunal under the Ministry to handle complaints from dissatisfied house purchasers, while there is none for moneylending disputes. Nevertheless, the Enforcement Division has a special police unit to accept and investigate illegal moneylending complaints.³⁰⁹ However, the present study seeks to investigate whether this presumption will jeopardise the function of the Enforcement Division in regulating and controlling the moneylending industry, protecting borrowers in moneylending transactions and in fighting against loan sharks' activities.³¹⁰

Earlier, it was pointed out that the lack of power under the old moneylenders law had hampered the Enforcement Division from acting on reports by the public over illegal moneylending. In the state of Penang for instance, between 1979 and 1982, only two complaints on loan sharks' activities were brought to the Legal Aid Bureau, but no case at all was reported to the State Secretary.³¹¹ These figures show a complete failure in the enforcement of the MLA, because only two complaints on loan sharks were received over a four-year period in one big city. It certainly does not indicate any effectiveness of the moneylenders law in protecting borrowers in moneylending transactions.

³⁰⁹ "Special police unit to deal with illegal moneylenders", *The Star*, 27 November 2003.

³¹⁰ This issue is raised because the Division was recently accused of being incompetent to manage housing matters. It is a concern that such circumstances may also take place in moneylending matters. The claim was made by the National House Buyers Society, who had received 32,000 housing complaints for the year 2003; see Sadatul M. Rosli, "Penguatkuasaan lemah punca banyak aduan rumah gagal diselesaikan" (Weaknesses in enforcement the reason why many housing complaints went unsolved), *Utusan Malaysia*, 26 August 2004.

³¹¹ This figure is based on research conducted by the Consumers' Association of Penang. Before the amendment, the State Secretaries in each state acted as Assistant Registrars of Moneylenders; see further in E. Ghanamuthu, "Moneylending: Malpractices and the law", *Seminar on Law, Justice and the Consumer*, 1982, Penang, p. 12; Yap Kon Lim, "Consumer Credit Regulations in Malaysia: A Country Report", paper presented at *Asian Conference on Consumer Protection, Competition Policy and Law*, p. 5.

As the Minister had no power to enforce the MLA, total reliance was placed on the police to instigate an investigation.³¹² On the other hand, the police claimed that they had no power under any particular statute to act against loan sharks for the offence of operating illegal moneylending businesses.³¹³ As mentioned earlier, the police could only act, through the Penal Code, the RRO and the Emergency laws, against the violence brought by loan sharks' activities. The conflict over who could take action against loan sharks allowed the rapid development of the loan sharks' activities, which soon became a thriving business beyond the authorities' control.³¹⁴ The Ministry, however, believed that the most effective enforcement agency to tackle loan sharks' activities was the police force.³¹⁵ Loan sharks syndicates were well-connected, well-structured and influential; they usually generated capital from underground vice-related businesses such as gambling and prostitution.³¹⁶ In order to penetrate this solid ring of vice, assistance from the police is vital. The police may have records of applicants who have possible links with thugs, or those with criminal records, and this information may help in screening licence applicants. Unfortunately, the position and jurisdiction of the police were also not specified under the old moneylenders law.³¹⁷

³¹² In response to a question by a Member of Parliament in the House of Commons, the then Deputy Finance Minister explained that unlicensed moneylending activities were offences under the MLA, but only the police could investigate and take action against the offender. See "Kerajaan bertindak banteras skim ninja" (Government act against the *ninja* scheme), *Berita Harian*, 20 July 1993.

³¹³ Wong Chun Wai, "Give cops more clout to go after loan sharks", *Sunday Star*, 8 December 2002; R. Nadeswaran, "Moneylenders must go", *The Sun*, 2 December 2002; see Table 4.1, item 13 whereby two police reports were forwarded to the Central Bank of Malaysia, state of Kedah branch regarding unlicensed moneylending activities that were discovered while conducting a raid on a shop. If the police had powers to act against moneylending activities, they would act on those reports instead of forwarding the matter to the Central Bank.

³¹⁴ "Ong: Planted agents to help nab loan sharks", *The Star*, 5 November 2003.

³¹⁵ See the statement of the Minister of Housing and Local Government in Faridah Begum, "Loan sharks head for troubled waters", *The Star*, 3 December, 2003.

³¹⁶ "Police: More Datuks may be involved in syndicate", *The Star*, 22 September 2004 ('*Datuk*' is an honourable title before the forename, given by the monarch); The loan sharks were alleged to receive protection from politicians and community leaders, which was one of the reasons why it was difficult to crack down on their activities - see Fong Pek Yee, "Stiffer penalties for loan sharks", *The Star*, 4 December 2002; see also "Loan sharks 'have backing of politicians'", *The Star*, 4 December 2002.

³¹⁷ A senior police officer who was interviewed by a reporter went through various statutes with the reporter and explained that there were no provisions empowering the police to act against loan sharks: R. Nadeswaran, "Moneylenders must go", *The Sun*, 2 December 2002.

In view of these defects, section 10 of the principal Act, which dealt with matters relating to the suspension and forfeiture of moneylenders' licences, was deleted *in toto*. In return, new provisions of sections 10A to 10K, which explain the powers of the Inspector and the police officer in relation to investigation, search, seizure and arrest, were incorporated under Part III of the MLA 2003. Further, in order to strengthen the powers of investigation, provisions on evidence were inserted under sections 10L to 10O in Part IV of the MLA 2003.

It will now be investigated whether the enforcement powers provided under the MLA 2003 are sufficient to enable the authorities to regulate and control the business of moneylending, to act against loan sharks and to protect borrowers' interest in moneylending transactions.

4.3 Investigation

The enforcement system consists of two processes. Initially, there is the investigation stage, then the prosecution stage. The former, which is the main concern of the MLA 2003, is carried out by enforcement officers of the Ministry and also police officers. The new law has introduced a body of officers termed the Inspectors of Moneylenders (hereinafter "the Inspectors"), which are generally known as enforcement officers.³¹⁸ The Inspector has a statutory authority, subject to the general direction of the Minister, to carry out the functions and responsibilities of enforcing the MLA 2003. Besides that, in order to enhance the Ministry's role in fighting loan sharks, the Public Services Department has approved seven postings for senior officers from the police force, ranging from superintendents to inspectors, to form a special unit in the

³¹⁸ The Inspectors are appointed under s 4 of the MLA 2003.

Ministry to deal with illegal moneylenders.³¹⁹ It is anticipated that collaboration with police officers who are experienced in running investigations will offer great assistance in arresting and charging people for loan sharking. In theory, then, adequate power has been provided by the MLA 2003 to the Inspectors of Moneylenders and as well as the police to control moneylending businesses, to act against loan sharks and to protect the interest of borrowers. The effectiveness of section 10A – 10K will now be investigated.

4.3.1 Powers of Inspector or Police Officer in Investigation

Section 10A of the MLA 2003 provides “Powers of Inspector or Police Officer in Investigation”.³²⁰ This refers to the power to require information. According to section 10A, the Inspector or police officer may require any person acquainted or suspected of acquaintance with the facts and circumstances of the case under investigation to provide information that he is aware of, or supposed to be aware of. In the course of investigation, written information or oral information reduced into writing is acquired from that person. Any refusal to comply with the requirement to give information, or provision of false information, or furnishing as true any information which the person knows or has reason to believe to be false, is an offence under the MLA 2003.³²¹ However, if false information is provided, it is not a defence against a claim of misinterpretation, unintentional supply of information, or want of

³¹⁹ “Special police unit to deal with illegal moneylenders”, *The Star*, 27 November 2003; “Ong: Planted agents to help nab loan sharks”, *The Star*, 5 November 2003; see further the MLA 2003, s 2; Police Act 1967.

³²⁰ Although the title seems to imply extensive investigation powers, careful reading of the provision indicates a narrower authority, as compared to relevant provisions under the Consumer Protection Act 1999 (Act 599) (“the CPA”), the Hire-Purchase Act 1967 (Act 212) (“the HPA”) and the Direct Sales Act 1993 (Act 500) (“the DSA”). S 10A of the MLA 2003 specifies what the Inspector or police officer is authorised to do in an investigation, which is to require information from any suspected person, either orally, or in writing. In contrast, the CPA, HPA and DSA generally provide the power to the Assistant Controller to investigate the ‘commission of any offence’ committed under those Acts and their regulations, without providing any guidance on how to conduct investigation.

³²¹ MLA 2003, s 10A(2).

criminal or fraudulent intent.³²² Section 10A is further supported by section 10B and section 10C, which deal with power to investigate complaints and inquire into information and power to examine persons.

4.3.2 Power to investigate complaints and inquire into information

Section 10B of the MLA 2003 explains the procedure for accepting complaints and the power to investigate them. After a written complaint is accepted, section 10B(5) provides that an investigation will commence upon receipt of such complaint by the Inspector or police officer, if he has reason to suspect the commission of such an offence. It is suggested that the Inspector or police officer may not only investigate an offence upon receipt of written complaints, but beyond. This is illustrated by section 10B(5) which says that the Inspector or police officer may also launch an investigation based on *information* received by him. "Information" in this context may have a wide meaning. The validity of such information may not need to be ascertained, and it may include tip-offs from the public or *agents provocateurs*. A briefing by a superior officer may also be the basis for commencing an investigation.³²³ This argument can find support under the new amendment to the housing laws. Section 10(1) of the Housing Development (Control and Licensing) Act 1966 (Amendment 2002) explicitly provides that the Controller or Inspector may investigate under conditions of secrecy, either on his own volition or upon being directed by the Minister. Therefore, it is envisaged that the enforcement officers are empowered to investigate beyond written complaint.

³²² MLA 2003, s 10A(3).

³²³ *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] 1 All ER 129.

4.3.3 Power to examine persons

Under section 10C of the MLA 2003, an Inspector or police officer investigating an offence under the Act is conferred with powers to examine persons, which in his opinion, will assist in the investigation. Section 10C therefore enables the Inspector or police officer to order any person to attend before him for an oral examination, or to produce any book or documents, or to furnish a sworn written statement.³²⁴ The person so ordered must be truthful, and produce the documents and materials required.³²⁵ Mere failure to surrender requested documents to an enforcement officer is an offence under the MLA 2003.³²⁶ The officer is also entitled to seize and detain relevant documents, if he has reasonable grounds to suspect them to be the subject matter of an offence under the Act.³²⁷ The Act further provides that the examination conducted under section 10C must be recorded by the investigating officer.³²⁸ Such a record, or any statement received or documents obtained, will be admissible in evidence in any proceedings, notwithstanding “any written law or rule of the law” to the contrary.³²⁹ However, the MLA 2003 also maintains the concept of protection against self-incrimination. Section 10C(5) forbids the Inspector or police officer to compel any person to disclose any information, book, document or an article that would be likely to incriminate him for any offence under the MLA 2003 or any other written law. Finally, it is inferred that in order to encourage co-operation with the suspects, those who contravene the provisions under section 10C commit an offence under the Act.³³⁰

³²⁴ MLA 2003, s 10C(1).

³²⁵ MLA 2003, s 10C(2).

³²⁶ MLA 2003, s 10C(5) & (8); compare with *Barge v British Gas Corporation & Anor* (1982) 81 LGR 53, DC.

³²⁷ MLA 2003, s 10G(1).

³²⁸ MLA 2003, s 10C(6).

³²⁹ MLA 2003, s 10C(6) and (7).

³³⁰ MLA 2003, s 10C(8).

It is submitted here that the introduction of sections 10A, 10B and 10C of the MLA 2003 has conferred adequate powers on enforcement officers and the police to investigate loan sharks' activities, and further, to act against loan sharks. The new provisions have indeed strengthened the enforcement system to regulate and control moneylending business, to eliminate illegal moneylending and to protect borrowers in moneylending transactions. The introduction of these provisions is indeed creditable and has brought great transformation to the enforcement machinery.

4.4 Search

Under the old moneylenders law, enforcement officers were not empowered to enter the premises of licensed moneylenders, let alone unlicensed ones. This situation however, has changed by virtue of the MLA 2003. The following sub-sections will discuss the new law on search by warrant and search without warrant. This will involve analysing sections 10D - 10K of the MLA 2003.

4.4.1 Search by warrant

Section 10D of the MLA 2003 is the authority for search by warrant. The law provides that upon a formal application, a warrant may be issued by the Magistrate if there is a necessity and a reasonable cause to believe that an offence under the MLA 2003 has been committed, or is being committed, in respect of any premises.³³¹ Based on the above, the Magistrate should not automatically issue a search warrant. Before he acts, he should have information and make some inquiry. The Magistrate can only issue a warrant if he has reason to believe³³² that any evidence may be found

³³¹ MLA 2003, s 10D(1).

³³² According to s 26 of the Penal Code, "A person is said to have 'reason to believe' a thing, if he has sufficient cause to believe that thing, but not otherwise".

in the place which is going to be searched. Where the Magistrate has not applied his mind at all before issuing the search warrant, such order may be quashed.³³³

Once a search warrant is secured, the Inspector and police officer may conduct the search operation. Upon entry, the Inspector or police officer must, if requested, declare his office.³³⁴ Failure to declare office upon request will jeopardise the investigation process but failure to declare office voluntarily will not put at risk the officer's authority to perform his duties.³³⁵ It is further provided that the search warrant empowers the Inspector or police officer to force an entry³³⁶ and seize any materials reasonably believed to furnish evidence from the premises.³³⁷ Any person found on the premises may also be searched or detained in order to facilitate the search.³³⁸ Where it is necessary to conduct a body search of any person, it is mandatory that the search is carried out by a person of the same gender.³³⁹ A strict application of this mandatory provision is important in Malaysia where traditional Asian values are deeply embedded in the society. The Inspector or police officer is authorised to arrest, with warrant, any person found committing an offence under the Act, or is reasonably suspected of having committed, or has attempted to commit, or is about to commit the said offence.³⁴⁰ Based on the account above, it may be suggested that the provision of a power to search has indeed enabled the enforcement officers to undertake their duties to enforce the moneylenders laws and to act against

³³³ *Revamappa v SN Raghunath* (1983) Cr LJ 321.

³³⁴ MLA 2003, s 10J.

³³⁵ D. Parry & R. Rowell (edit), *Butterworths Trading and Consumer Law*, vol. 2, Butterworths, London, 1993-, para 3[300].

³³⁶ MLA 2003, s 10D(7). Under normal circumstances, where premises are locked, the Inspector or police officer should first demand that the premises be opened. Upon rejection or unreasonable delay, he may then proceed to use force to secure entry to the premises.

³³⁷ MLA 2003, s 10D(2).

³³⁸ MLA 2003, s 10D(3).

³³⁹ MLA 2003, s 10D(8).

³⁴⁰ MLA 2003, s 10E. Once a person is arrested, he must be brought immediately before a Magistrate.

loan sharks. Thus, the power to search is very significant, especially in raiding illegal moneylenders' premises.

In conducting a search with warrant, section 10D(2) also authorises the Inspector or police officer to inspect any book, account, document or data, based on reasonable suspicion. The officers are also allowed to inspect any mark, signboard, card, letter, pamphlet, item, thing, article or goods reasonably believed to furnish evidence. Seizure of such material is permitted, if necessary. In other words, to give full effect to section 10D, the offence under the MLA 2003 should *have been* committed, or *is being* committed, but not about to be committed. The property seized must be released to the owner if it is not required, or if there is no prosecution for the offence.³⁴¹ A record in writing must be produced specifying in detail the circumstances of, and the reasons for, such a release.³⁴²

Based on the above, it may be suggested that a warrant is not a licence to conduct a 'fishing trip'. No such indiscriminate search and seizure may be carried out by an enforcement officer merely because he has a search warrant. According to Parry and Rowell, there must be a basis before taking any action.³⁴³ It must be based on 'belief' and 'suspicion',³⁴⁴ and not merely 'in the public interest.' Therefore, an Inspector or

³⁴¹ MLA 2003, s 10K (1). See *Webb v Chief Constable of Merseyside Police; Porter & Anor v Chief Constable of Merseyside Police* [2000] QB 427, [2000] 1 All ER 209, CA, which stated that the authority was not entitled to retain property when there was no conviction of an offence.

³⁴² MLA 2003, s 10K (2).

³⁴³ D. Parry & R. Rowell (edit), *Butterworths Trading and Consumer Law*, vol. 2, Butterworths, London, 1993-, para 3[312].

³⁴⁴ Suspicion is a state of conjecture and shall not be confused with the state of evidence - *Shaaban & Ors v Chong Fook Kam & Anor* [1970] AC 942; *Holtham v Metropolitan Police Comm* (1987) *The Times*, 28 November, CA. Observation *per se* was not a basis to form a suspicion; information received, whether true or false, may form a basis for suspicion provided that all the surrounding circumstances would also be regarded as suspicious by a reasonable man; see *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] 1 All ER 129.

police officer may only exercise the powers under section 10D while conducting a search if they have a strong basis to do so. These powers are:

- i) Power to enter a premises by force and to remove any obstruction by force if *necessary* to do so;³⁴⁵
- ii) Power to inspect any materials in the premises entered if it is reasonably *suspected* to contain any information regarding any offence *suspected* to have been committed;³⁴⁶
- iii) Power to inspect any materials if they are reasonably *believed* to furnish evidence regarding the commission of an offence under the Act;³⁴⁷
- iv) Power to detain and remove a person if it is reasonably *necessary* for the purpose of facilitating the search;³⁴⁸
- v) Power to seize and take possession for the purpose of investigation, if there are *reasonable* grounds to *suspect* the subject matter of an offence under the Act;³⁴⁹ and
- vi) Power to seal the articles or goods seized if it is *not practicable* to remove them.³⁵⁰

As illustrated above, the Inspector or police officer may only exercise the powers to search if supported by some basis, for instance on the basis of “necessity”, “belief” or “suspicion”. It may be assumed that failure to satisfy the above conditions may affect the validity of the investigation. For instance, the evidence may be inadmissible, or there could be a possibility of the case being thrown out of the court. Therefore, it

³⁴⁵ MLA 2003, s 10D(1) and (7).

³⁴⁶ MLA 2003, s 10D(2)(a).

³⁴⁷ MLA 2003, s 10D(2)(b).

³⁴⁸ MLA 2003, s 10D(3) and (7)(c).

³⁴⁹ MLA 2003, s 10D(2), (4) and s 10G.

³⁵⁰ MLA 2003, s 10D(5).

may be suggested that restriction of power by requiring some basis before taking action encourages transparency among enforcement officers and has the potential to safeguard against abuse of power. As stated by Parry and Rowell, “a power of search was a necessary but draconian power.”³⁵¹ However, it is also possible for the law to provide protection against exceeding the power to search, to make sure that the legitimate business is not unnecessarily interrupted.

The MLA 2003 has also taken steps to ensure that the Inspector or police officer conducts a search without any interruption. Thus, section 10I is conveniently included under the search regime. Section 10I expressly provides seven types of offences in relation to obstruction of inspections and searches. They are:

- refusal of access to any premises or failure to submit to a search;
- assaulting, obstructing, hindering or delaying an Inspector or police officer;
- failure to comply with any lawful demand, notice, order or requirement of an Inspector or police officers;
- omission, refusal or neglect to give an Inspector or police officer any information;
- failure to produce to, or concealing or attempting to conceal from, an Inspector or police officer any documents, articles or goods;
- rescuing anything that has been seized; and
- destroying anything to prevent its seizure.

The basic practices that authorise search with warrant, also known as ‘entry and inspection’, can be traced back to 1967 in the HPA. Since then, all consumer

³⁵¹D. Parry & R. Rowell (edit), *Butterworths Trading and Consumer Law*, vol. 2, Butterworths, London, 1993-, para 3[312].

protection laws in Malaysia have had these provisions incorporated in their respective statutes. The framework of entry and inspection under the HPA is, in turn, mainly based on the CCA. Since very little case law can be found in this area, reference is made to *Butterworths Trading and Consumer Law*.³⁵² The following will discuss the search by warrant procedure under other Malaysian consumer law which is not available under the MLA 2003.

First, this study will consider the reasonable time to cause entry. The CCA and the UK Trade Descriptions Act 1968 (hereinafter “the UK TDA”) as well as the HPA and the Malaysian Trade Descriptions Act 1972 (hereinafter “the Malaysian TDA”) state that the power of entry must be exercised at “reasonable hours”.³⁵³ This may raise the question whether an appointment is necessary before exercising such power.³⁵⁴ Such a provision is, however, not included under the MLA 2003. It may then be presumed that a search procedure would normally be conducted during normal office hours. However, it is submitted here that the lack of provision specifying when to cause entry into the premises is actually good, as the Inspector or police may conduct a search at any time, depending on the circumstances of the case. In fact, loan sharks may not necessarily operate during office hours, and lack of such provision gives flexibility to the enforcement officers to conduct a search as necessary.

The second aspect regards the time limit for search warrants. Unlike most consumer protection law, the MLA 2003 does not provide for any time limit for search

³⁵² Ibid. Notes to s 28 of the Trade Descriptions Act 1968 are referred to in evaluating the powers of entry and inspection.

³⁵³ CCA, s 162; UK TDA, s 28; HPA, s 50; Malaysian TDA, s 28.

³⁵⁴ See *Creasey v Hoskins* (1953) unreported. This case confirms that an inspector has the right to inspect on the spot and without an appointment.

warrants.³⁵⁵ It is suggested that a time limit of one calendar month, as provided by other consumer protection statutes, should provide a clear indication of when to enter the premises. Further, it would also assist significantly in planning entry to the premises, as one warrant only permits one entry.³⁵⁶

Third, the MLA 2003 does not impose any obligation on the Inspector or the police to ensure that the premises under search are effectively secured against trespassers. This requirement, however, is present under the HPA, DSA and the TDA.³⁵⁷ Both the CCA and the UK TDA have similar provisions. It may be suggested that this is a serious omission in view of the borrowers' interest, since a moneylender's office may contain important information and documents relating to the borrowers. Borrowers may be faced with potential danger if their private documents fall into the wrong hands.

Fourth, the MLA 2003 is also silent on the protection of enforcement officers from any action or prosecution whilst carrying out their duties under the said Act. Such protection is, however, provided under the HPA,³⁵⁸ DSA,³⁵⁹ and Weights and Measures Act 1972³⁶⁰ (hereinafter "the WMA"). These laws expressly provide that no action or prosecution shall be brought against enforcement officers for any act done for the purpose of carrying into effect the relevant statutes, if the act was done in good faith and in a reasonable belief that it was necessary according to the law. It is

³⁵⁵ The maximum limit for search warrants is provided under s 50 of the HPA, s 29 of the DSA, and s 28 the Malaysian TDA. Both the UK TDA and CCA have similar provisions.

³⁵⁶ D. Parry & R. Rowell (edit), *Butterworths Trading and Consumer Law*, vol. 2, Butterworths, London, 1993-, para 3[311].

³⁵⁷ HPA, s 50; DSA, s 29; Malaysian TDA, s 28.

³⁵⁸ Hire Purchase (Amendment) Act 1992 (Act 513), s 56A.

³⁵⁹ S 43.

³⁶⁰ Weights and Measures (Amendment) Act 1990 (Act A754), s 28B.

advised here that such a provision should be included to instil more confidence in the officers while discharging their duties. However, this protection is certainly not a licence for any abuse of power, as the enforcement officers should carry out their duties according to the law. It is rather surprising that this provision is not included in the MLA 2003, whereas all the above-mentioned Malaysian laws were amended in the 1990s, specifically for the purpose of adding the said provision.

Finally, another point to note in the MLA 2003 is the lack of a saving clause to validate a warrant despite any defect, mistake or omission, as provided under the HPA³⁶¹ and the DSA.³⁶² Such a saving clause, although it may sound quite unjust, may benefit the case investigated, and prevent it being disqualified merely on technicalities. Therefore, in order to ensure an efficient enforcement process, it is suggested here that a saving clause to validate a warrant should be included in the MLA 2003.

4.4.2 Search without warrant

Apart from search by warrant, the MLA 2003 also permits a search without warrant in exceptional situations. An Inspector or police officer is thereby permitted to conduct a search of any premises without a warrant in a situation covered by section 10F when circumstances make it necessary. Such authority is only exercisable if the enforcement officer *has reasonable cause to believe* that, by reason of delay in obtaining a search warrant, the investigation would be adversely affected or evidence likely to be compromised.³⁶³ The test to establish “reasonable cause to believe” that delay will adversely affect the investigation is an objective one, and the burden is on

³⁶¹ Hire Purchase (Amendment) Act 1992 (Act 513), s 51A.

³⁶² S 32.

³⁶³ MLA 2003, s 10F.

the officer to show the “reasonable cause”. Failure to meet the test will adversely affect an investigation and may amount to an abuse of power. It may well affect the admissibility of evidence in any later prosecution following the unauthorised act. Nevertheless, the provision for search without warrant is a significant power to enhance the investigation, because in exercising search without warrant, the Inspector or the police may apply all the powers conferred in a search by warrant “in as full and ample manner as if he were authorized to do so” by a warrant issued under section 10D.³⁶⁴

It is important to note that while there is a clear provision on search without warrant, no similar provision on arrest without warrant is available under the MLA 2003. Such an oversight on the part of the legislators of this significant investigation power may affect the investigation, especially when conducting raids. The weakness of the law is evident and the opportunity to apprehend loan sharks might easily slip away. Fortunately, this situation is realised by the Ministry, and an effort to amend the law to include arrest without warrant is under way.³⁶⁵

In sum, besides investigation and examination, the provision on searches with and without warrant can be seen to offer further powers to the Inspector and the police to act against loan sharks. The power to search suspected premises provides the opportunity to gather and seize evidence to prove loan sharks’ activities. However, the present study has also discovered several flaws in the provisions of search that

³⁶⁴ MLA 2003, s 10F.

³⁶⁵ See “Tightening the law against illegal moneylenders”, *The Malay Mail*, 7 December 2004; “Getting tough with loan sharks”, *New Straits Times*, 26 November 2004; “Pinda Akta Pemberi Pinjam Wang Banteras Along” (Amend the Moneylenders Act to restrain loan sharks), *Utusan Malaysia*, 2 October 2004; “Akta Pinjaman Wang dipinda banteras Along” (Moneylenders Act amended to restrain loan sharks), *Utusan Malaysia*, 10 May 2004.

should be addressed. In order to provide an effective search regime, provisions on time limit for search warrants, obligation to secure premises against trespassers, protection of enforcement officers and also a saving clause to validate a warrant should be included.

To conclude the discussion on investigation, search, seizure and arrest, it can be stated that the MLA 2003 has taken seriously the task of acting against illegal moneylending with the appointment of Inspectors of Moneylenders and senior police officers under the Enforcement Division to carry out enforcement duties. The establishment of a special unit to accept and investigate moneylending complaints further supports the enforcement machinery. More significantly, the police are also empowered to enforce the MLA 2003. The genuine intention of the MLA 2003 to regulate and control moneylending business, to protect borrowers and to fight loan sharks' activities is shown by the introduction of sections 10A – 10K, which conferred adequate powers on enforcement officers to investigate loan sharks' activities, to examine suspected persons, to conduct searches, to seize relevant materials and further, to act against loan sharks. These new provisions have indeed strengthened the enforcement machinery to eliminate loan sharks. The introduction of these provisions is highly commendable, as in the past the authorities' hands were tied; they could not act against illegal moneylending and they had no specific laws to turn to. It will now be assessed whether the rule on evidence also contributes to getting rid of loan sharks.

4.5 Evidence

The section on evidence will include discussion on secret agents, informers, and the admissibility of evidence, as well as rewards to informers.

4.5.1 *Agents provocateurs*

Evidence plays an important role in establishing moneylending offences under the MLA 2003. The Amended Act has provided specific rules of evidence, in particular to admit the evidence of accomplices and *agents provocateurs* in court, to protect informers and the information supplied by them, as well as to rule on the admissibility of statements by accused persons.

One of the significant features of the MLA 2003 is the introduction of an *agent provocateur* or secret agent. The authorities are permitted to plant *agents provocateurs*, either the Inspector or police officers, or anybody, to approach the loan sharks for loans, and act as witnesses later.³⁶⁶ Since the credibility of an *agent provocateur* is not questionable, any statement made to him, whether oral or written, will be admissible in evidence.³⁶⁷ Likewise, any witness who is involved in the moneylending offence or has knowledge of the commission of the offence, or accepts or agrees to accept any sum of money from a moneylender, is not to be regarded as an accomplice.³⁶⁸ Therefore, the enactment of the MLA 2003 has introduced two methods of establishing evidence against moneylenders or loan sharks: through *agents provocateurs* and through witnesses. It is suggested that the legislative policy underlying section 10L has great potential to encourage the Ministry to crack down on illegal moneylending.

³⁶⁶ MLA 2003, s 10L(1)(b).

³⁶⁷ Ibid.

³⁶⁸ MLA 2003, s 10L (1)(a)(i) and (ii). It may be assumed that there can be other reasons to act as an accomplice.

4.5.2 Informers

Another point to note is that the MLA 2003 provides statutory protection for informers, and extends such protection to the information given by them.³⁶⁹ Section 10M is a stringent provision against the disclosure of the identity of an informer or the contents of any information provided by him in any proceedings.³⁷⁰ Further, the court has the duty to ensure that the identity of the informer is not revealed in any stage of the court proceeding. This is the safeguard to ensure that the identity of the informer is protected. However, the MLA 2003 provides two exceptions to the rule for protection of informers whereby the identity of the informer may be disclosed: first, in circumstances where the informer makes a false statement which he knew or believed to be false, or second, where the court forms the opinion that justice cannot be fully done between the parties without the discovery of the informer.³⁷¹ These exceptions can be seen as a reasonable and justified provision to ensure fairness to all parties in the proceedings.

In practice, it is questionable whether the borrowers or informers are courageous enough to come forward and co-operate with the authorities. The police are aware that in some cases, although borrowers are beaten up by loan sharks, they are still afraid to give information to the police. In order to address this issue, the Inspector-General of Police has ensured that “secret meetings” between the police and the informers can be arranged to guarantee their safety.³⁷²

³⁶⁹ MLA 2003, s 10M.

³⁷⁰ *The Annotated Statutes of Malaysia - Moneylenders Act 1951*, 2004 reissue, MLJ Sdn Bhd, Kuala Lumpur, p. 48.

³⁷¹ MLA 2003; s 10M(3).

³⁷² Beh Yuen Hui, “Secret meetings with informants possible”, *The Star*, 26 September 2004.

4.5.3 Admissibility of evidence

Section 10N is the authority on admissibility of evidence under the MLA 2003. Section 10N is *pari materia* with section 113 of the Malaysian Criminal Procedure Code (Act 593) (Revised 1999) (hereinafter the “CPC”), but with the addition of highly enhanced provisions for admissibility of the statement by a person arrested or who is informed that he may be prosecuted for an offence under the Act.³⁷³ The rules for admissibility of evidence, for example, are suitably relaxed to secure more effective prosecution under the MLA 2003.

Section 10N is designed to render a statement admissible in evidence at any trial or inquiry into an offence under the Act.³⁷⁴ If the person tenders himself as a witness, the statement can be used to cross-examine him for the purpose of impeaching his credit.³⁷⁵ However, there are two exceptions that may render the statement inadmissible. The first is if, the statement is made as a result of any inducement, threat or promise having reference to the charge against the person.³⁷⁶ The second is if, in the case of a statement made by a person after his arrest or after notification that he may be prosecuted for any offence under the Act, a caution was not administered to him as prescribed under section 10N(3).³⁷⁷ Further, the court is empowered to draw inferences from the silence or conduct of an accused person in any criminal proceedings: such inferences may amount to corroboration of any evidence given against the accused.³⁷⁸ Generally, in comparison to the CPC, it can be seen that the

³⁷³ *The Annotated Statutes of Malaysia - Moneylenders Act 1951*, 2004 reissue, MLJ Sdn Bhd, Kuala Lumpur, p. 50.

³⁷⁴ MLA 2003, s 10N(1).

³⁷⁵ *Ibid.*

³⁷⁶ *Ibid.*, s 10N(2)

³⁷⁷ However, s 10N(4) provides that the statement by any accused person should be admissible in evidence even if such caution was not served on him, provided it is served on him as soon as reasonably possible thereafter.

³⁷⁸ MLA 2003, s 10N(6) & (7).

flexibility of the rules for admissibility of statements under the MLA 2003 is intended to convict more loan sharks.

4.5.4 Reward to informers

In order to encourage the public to give information regarding loan sharks' activities, regulation 20(1) of the MCLR empowers the Registrar to reward with an amount of money any informer whose information leads to the conviction of any offender under the MLA 2003. The reward is paid from the Consolidated Fund.³⁷⁹ This new proactive provision, which is a creditable attempt by the legislators to encourage the public to co-operate with the authorities to disclose the identities of loan sharks, is seen as a modern trend adopted by the Government to involve the public in the fight against crime. Such a provision is also available under the CPA.³⁸⁰

To conclude the discussion on evidence, the introduction of *agents provocateurs* can also be seen to offer more opportunities for the Inspector and the police to nail down loan sharks. Further, borrowers who borrow from loan sharks can act as witnesses without jeopardising their safety, as it is guaranteed by the police. These evident advantages, together with the power of investigation, examination and search, will fully equip the Inspectors and police officers to fight against loan sharks.

The laws on evidence having been discussed, the following section looks at the provision on prosecution.

³⁷⁹ MCLR, reg 20(2). The Consolidated Fund refers to all revenues and moneys raised or received by the Federation or State; see the Federal Constitution, Articles 97 and 110, read with Tenth Schedule, Part III.

³⁸⁰ S 135.

4.6 Prosecution

As mentioned earlier in para 4.3, prosecution is the second stage in the enforcement system. The power to prosecute is conferred by section 29D of the MLA 2003. Section 29D provides that unless there is written consent by the Public Prosecutor, no prosecution for an offence under the MLA 2003 shall be instituted. This indicates that permission must be granted from the Attorney-General's Chambers before a case is prosecuted. This provision follows the CPA and the Housing Development (Control and Licensing) Act 1966 (hereinafter "the Housing Act"). However, under the HPA and the DSA, a clearer and more direct approach was taken. Both laws conferred the power of prosecution for any offence under the respective Acts on any officer appointed under those statutes.³⁸¹

In view of the above, it may be asked whether prosecution under the MLA 2003 should be brought by the Public Prosecutor, or whether prosecution may be brought by the Ministry's officers, only requiring written permission from the Public Prosecutor. The intention of section 29D is queried because if prosecutions were to be brought by the Public Prosecutor, a longer and more time-consuming process would be involved. It may also act as a barrier to prosecuting cases. However, recent newspaper reports on the first loan shark to be charged under the MLA 2003 mentioned that the person who prosecuted the case was attached to the Ministry.³⁸² It therefore appears that notifying the Attorney-General's Chambers is only a procedural requirement, and is not a barrier to prosecuting a case. It may also be suggested that as in the HPA and DSA, the power to prosecute offences under the MLA 2003 is conferred on the Ministry's officers; it was only that the provisions in these statutes

³⁸¹ HPA, s 55 and DSA, s 34.

³⁸² "Along pertama kena dakwa," (First loan shark to be charged), *Berita Harian*, 13 April 2005; "Along kena denda RM30,000" (Loan shark fined RM30,000), *Berita Harian*, 3 June 2005.

were worded differently, but with the same intention. Thus time and effort is saved in bringing moneylending cases to court, since the Ministry has its in-house prosecutors.

The following section will investigate the awareness of the public of the role of the Ministry. In particular, if borrowers do not know where to complain against moneylenders or loan sharks, the Enforcement Division will be unable to launch any investigation. Thus, the authority could not protect borrowers from unscrupulous moneylenders and loan sharks.

4.7 Statistics of Complaints

This section will analyse the complaints on legal and illegal moneylending businesses received by the Ministry before and after the implementation of the MLA 2003. Although it is too early to form any judgement on the outcome post 2003 and there is only limited information prior to 2003 to compare with, the outcome may still offer a foundation to reflect, discuss, improve and enhance the progress of the Enforcement Division. Nevertheless, the restricted data before 2003 may stand as a barrier against clear and evident findings.

The only record prior to the introduction of the MLA 2003 that could be obtained was the 1997 unpublished report by the Ministry. It is unfortunate that moneylending complaints that had reached local authorities could not be obtained. The 1997 report stated that seventeen complaints on moneylenders had reached the Ministry from 1991-1996, including legal as well as illegal moneylenders. These complaints were received by the Central Bank, and forwarded to the Ministry, as shown in Table 4.1:

Table 4.1: Summary of letters of complaint received by the Central Bank over moneylending business

<i>No</i>	<i>Name and address of complainant</i>	<i>Date of complaint</i>	<i>Addressee</i>	<i>Address of moneylenders business</i>	<i>Complaint</i>
1.	✓	5.3.1991	Chief Director Inland Revenue Department	✓	Unlicensed moneylending business
2.	✓	22.1.1991	Chief Director Inland Revenue Department	✓	Unlicensed moneylending business
3	✓	7.11.1990	Chief Disciplinary Board Police Head Quarters	✓	Carrying out unlicensed moneylending business
4	Anonymous	Undated	Chief Officer Central Bank of Malaysia	✓	High interest
5	✓	20.12.1991	Manager Special Investigation Unit	Incomplete	High interest
6	Anonymous	Undated	Chairman Central Bank of Malaysia Kuala Lumpur	✓	Abuse in licensed moneylending business, bank's auto teller machine card retained by moneylender
7	Anonymous	Undated	None	✓	Illegal moneylenders
8	✓	Undated	The Learned Magistrate Court	✓	(ongoing-court case) Claimed that debt has been paid but never given receipt, bank book and credit card retained by moneylender

....continued

No	Name and address of complainant	Date of complaint	Addressee	Address of moneylenders business	Complaint
10	✓	11.12.1992	Chief Director Inland Revenue Department	✓	High interest, never paid tax
11	Anonymous	Undated	Malaysian Finance Minister	Incomplete	Provide information and telephone numbers of <i>chettiers</i> (moneylenders)
12	✓	29.5.1993	Inspector- General of Police	Incomplete	Loan sharks in the state of Malacca
13	Chief of Police of Kedah	13.10.1993	Manager Central Bank of Malaysia, Kedah	✓	Unlicensed moneylenders activities discovered in a raid; copies of police reports enclosed
14	✓	6.1.1994	Central Bank of Malaysia, Johor	✓	Illegal moneylenders
15	Anonymous	5.6.96	Central Bank of Malaysia, Pahang	✓	Loan sharks who were also involved in secret societies
16	Anti-Corruption Agency, Malacca	22.9.1996	Central Bank of Malaysia	✓	Found to engage in "friendly loan" activities with interest 3%-4%.

Sources: Unpublished Report, the Ministry for Housing and Local Government, 1997

✓ indicates that details are provided

Table 4.1 shows that all complaints came from the public except two, which came from the police and the anti-corruption agency respectively. Several points that suggest acute lack of awareness of the role of the Ministry are open for discussion based on the information gathered above. First, these complaints were directed to all

sorts of public authorities such as the police, the Central Bank of Malaysia, the Income Tax department, the Magistrates Court and the Finance Minister, but not the Ministry. This shows that members of the public had the courage to file a complaint, although the level of ignorance as to the right authority to whom to complain was very high. Second, it is startling that the police and the anti-corruption agency, being part of the Government sector, were also unaware where to direct their complaints. Third, the complaint that came from the state of Kedah Chief of Police clearly shows that the police had no power to act against unlicensed moneylenders' activities, despite discovering such activities while conducting a raid. Fourth, the police have limited ability to act on complaints received via letters, as they are often anonymous and hardly contain enough information to conduct further investigation.³⁸³ It is submitted here that the summary of letters shows that the level of awareness amongst the public in regard to the regulator of the moneylenders law was very low.

Have there been any changes since the implementation of the MLA 2003? This thesis seeks to determine whether any improvement was brought by the new law in terms of public awareness of the Act and the role of the Ministry. This is measured by the number of complaints received by the Ministry after the enforcement of the MLA 2003, and whether complaints are filed directly to the Ministry. Table 4.2 shows the statistics of complaints obtained from the Ministry:

³⁸³ On the other hand, a police report, for example, will enable the police to obtain more details on the crime, but most victims are reluctant to file police reports.

Table 4.2: Statistics of complaints against moneylenders 2003-2005

<i>Year</i>	<i>Month</i>	<i>Number of complaints</i>	<i>Total</i>
2003	Nov	5	
	Dec	8	13
2004	Jan	10	
	Feb	6	
	Mar	6	
	Apr	11	
	May	5	
	June	3	
	July	7	
	Aug	3	
	Sept	6	
	Oct	4	
	Nov	1	
	Dec	3	65
2005	Jan	3	
	Feb	4	
	Mar	2	
	Apr	2	
	May	1	
	June	4	16

Source: Ministry for Housing and Local Government, 2005

According to Table 4.2, a total of 94 complaints were filed against moneylenders and loan sharks from November 2003 until June 2005. On paper, the total number of complaints can be regarded as quite high as compared to only seventeen complaints received by the Central Bank from 1991-1996 and only two recorded complaints in the state of Penang from 1979 to 1982, obtained from the Consumers Association of Penang. However, bearing in mind that a comprehensive record of complaints before 2003 could not be obtained, it cannot be established whether there are any changes in the number of complaints after the implementation of the MLA 2003. Nevertheless, it may be safely assumed that the total amount of complaints could be considered very small as compared to the real problem of loan sharks that is frequently reported by the newspapers. However, a newspaper report stating that the Ministry has started

investigating more than 150 illegal moneylenders and that several were prosecuted in 2005 looks promising.³⁸⁴ On the other hand, it cannot be denied that hundreds of borrowers are suffering from borrowing from illegal moneylenders, but dare not complain to the authorities.

It is also important to note that not all complaints illustrated in Table 4.2 were filed directly to the Ministry. Most complaints were forwarded from other agencies such as the Central Bank, the police force, the Income-tax department, the Ministry for Domestic Trade and Consumer Affairs and various consumer bodies. This shows that lack of awareness from the public regarding the role of the Ministry persists, despite the enforcement of the MLA 2003 and the publicity given by the media on loan sharks cases.

The present study also seeks to examine the categories of complaint received by the Ministry, to determine the main reason for complaint. An analysis of the types of complaint received by the Ministry in 2004 illustrates that most complaints were regarding unlicensed moneylenders, mainly loan sharks. It was reported that a total of 48 out of 65 complaints were about unlicensed moneylenders. This was followed by complaints regarding high interest charges, which comprised 14 cases. The other three cases were complaints on other matters. It is surprising that no complaint on harassment and intimidation by the moneylenders was lodged with the Ministry, although it was reported that in the state of Perak, police received 56 reports of such offences in the first nine months of 2004.³⁸⁵ This revelation may also confirm the belief that the public are unaware that they can complain to the Ministry. It may also

³⁸⁴ "War against Ah Longs starts", *The Star*, 15 March 2006. Reference was made to the newspaper report due to limitation to obtain the latest statistics on moneylending complaints.

³⁸⁵ "Officer in 'khalwat' case transferred", *The Star*, 1 October 2004.

be that the public are oblivious to the existence of the Ministry as the regulator of the moneylenders laws and that its jurisdiction also extends to loan sharks' activities. It may be suggested here that it is for those reasons that the public lodge their complaints to the police instead of the Ministry. On the other hand, the fact that 73.8% of complaints concerned unlicensed moneylenders as shown in Table 4.2 may suggest that the borrowers may have been trying to avoid paying back their loan by reporting the unlicensed moneylenders' activities, although they knew that they were dealing with illegal operators from the start.

As it is presumed that the public are more inclined to file complaints to the police, and the police also have the authority to enforce the MLA 2003, this study intends to discuss the impact of enforcement provisions of the MLA 2003 on the police in meeting the objective to eliminate illegal moneylending. It should be noted that due to the lack of access to official data from the police, this discussion is therefore based on several newspaper reports published after the enforcement of the MLA 2003.

It is exciting to discover that shortly after the enforcement of the MLA 2003, the Deputy Prime Minister urged the police to take necessary actions to eliminate loan sharks.³⁸⁶ Following this, a directive to seize loan sharks was issued to the police force and the police launched an 'all out war against loan sharks.'³⁸⁷ The genuine interest of the police to get rid of loan sharks is reflected in their conduct of raids and operations against illegal moneylenders.

³⁸⁶ "Najib mahu polis hapuskan ceti haram" (Najib urges the police to eliminate loan sharks), *Utusan Malaysia*, 30 September 2004; "Najib mahu tindakan tegas terhadap along" (Najib insists on serious actions against loan sharks), *Utusan Malaysia*, 18 September 2004.

³⁸⁷ "Police now turn their attention to loan sharks", *New Straits Times*, 30 September 2004; L. Charles and N. Benjamin, "Cops get death threats", *The Star*, 26 December 2004; "Perak police joins action against loan sharks", *Utusan Express*, 30 September 2004.

It was reported that in April 2004 two loan sharks were arrested for harassing and threatening a canteen operator. The victim had borrowed RM15,000 from the loan sharks and had to pay 12% interest daily.³⁸⁸ The police also seized from the suspects their car, 800 business cards, five mobile phones, six pieces of paper containing lists of debtors, and 10 cheque books from four banks.³⁸⁹ Further, eighteen loan sharks' runners were arrested in May 2004 in Kuala Lumpur, and the police seized from the premises documents detailing more than RM3 million, which includes 700 documents, a large amount of cash, eight mobile phones, several automated teller machine cards, several birth certificates, bank books and 21 car keys believed to have been taken from borrowers as collateral.³⁹⁰

In August 2004, police arrested two loan sharks' runners and seized an assortment of weapons such as pistols, bullets and *parangs*³⁹¹ from them.³⁹² In September, a man suspected to be a loan shark who had used a goldsmith shop as a front to operate illegal moneylending services was arrested by police.³⁹³ The police had seized from his premises several items of jewellery and luxury watches, video recorders, cameras, mobile phones and laptops which were believed to be collateral given by borrowers.³⁹⁴

³⁸⁸ "Loan sharks held for harassing man for payment", *The Malay Mail*, 19 April 2005. It was also reported that when he could not repay the debt, he borrowed another RM36,000 from seven other loan sharks.

³⁸⁹ *Ibid.*

³⁹⁰ J. Joheng, "18 debt collectors nabbed", *New Straits Times*, 24 May 2004; "Blitz on loan sharks", *The Star*, 24 May 2004.

³⁹¹ A *parang* is a short, heavy, straight-edged knife used in Malaysia and Indonesia as a tool and weapon.

³⁹² Azman A. Ghani, "Weapons seized from 'enforcers' of loan sharks", *The Malay Mail*, 3 August 2004.

³⁹³ "Suspected loan shark nabbed in raid", *New Straits Times*, 14 September 2005.

³⁹⁴ *Ibid.*

The biggest illegal moneylending operation uncovered was the arrest of sixty loan sharks in Kuala Lumpur in June 2004. The police seized several items from the premises, including cash totalling RM135,000, post-dated cheques with a combined value of RM7.4 million, 16 mobile phones, five passports, ten car registration cards, eight credit cards and an assortment of jewellery.³⁹⁵ The police were also surprised to discover a set of instructions for syndicate members on what to do if they were caught by the police.³⁹⁶ Police investigation revealed that the group had operated their illegal moneylending businesses for nine months before the arrest and had advertised their services through flyers and calling cards with mobile numbers.³⁹⁷

It was also reported that the police had arrested the mastermind of vice and gambling and had banished him to a detention centre under the Emergency Ordinance.³⁹⁸ The godfather of the underworld was said to own vast legitimate businesses including hotels, clubs and security agencies but used them as fronts for illegal businesses such as loan sharking, illegal gambling and prostitution.³⁹⁹ Following this arrest, police investigation also revealed that several *Datuks* may be involved in illegal moneylending syndicates.⁴⁰⁰ The police believed that these titled criminals are ringleaders behind gangs involved in illegal gambling, illegal moneylending and prostitution. News broadcasts about titled criminals had also caught the interest of the Deputy Prime Minister, who sent clear warnings that “the long arm of the law would pursue all wrongdoers irrespective of their positions in society”.

³⁹⁵ Ahmad F. Othman, “Police nab 60 loan sharks”, *New Straits Times*, 30 June 2006.

³⁹⁶ Azman A. Ghani and V. Paneerselvam, “Loan shark syndicate crippled”, *The Malay Mail*, 30 June 2006.

³⁹⁷ Ahmad F. Othman, “Police nab 60 loan sharks”, *New Straits Times*, 30 June 2006.

³⁹⁸ “Two-year preventive detention for Datuk vice”, *The Malay Mail*, 25 May 2004.

³⁹⁹ “Crime lord’s 10-year reign comes to an end”, *The Malay Mail*, 26 May 2004.

⁴⁰⁰ Shahrum Sayuti, “Titled criminals to face consequences”, *New Sunday Times*, 4 July 2004; “More *Datuks* may be involved in syndicate”, *The Star*, 22 September 2004.

From the discussion above, it may be concluded that the police are working hard to eliminate illegal moneylending, the main purpose of the MLA 2003. Nevertheless, it seems that the police had also resorted to other laws such as the Penal Code and the Emergency Order to prosecute the loan sharks. It is also evident that the police conducted raids against loan sharks and their runners based on complaints from the public that they were being harassed and intimidated. This provides the justification for using the Penal Code and Emergency Order in enforcing the law. It further also shows that the police took action in the first place because of the violence brought by illegal moneylending and not because of the business being illegitimate. This view is strengthened by the statement of the former Inspector-General of Police, who admitted that it was difficult to prevent people from borrowing from loan sharks, 'but we can act on the violence and crimes brought about by the activities.'⁴⁰¹ Further, the Deputy Minister of Internal Security said that loan sharks who resort to violence including murder threats may face the Emergency Ordinance.⁴⁰² Although the MLA 2003 was not used in most police operations, it may be suggested that that the impact brought by the implementation of the Act had led the police to fight against illegal moneylending. Thus, the legitimate interest of the police in eliminating loan sharks is evident based on their actions.

4.8 Awareness Campaign on the Role of the Ministry

It was pointed out that the public are more inclined to file complaints against illegal moneylending to the police. This may be because they are not aware of the role of the Ministry. It may be further suggested that public ignorance on the role of the Ministry as the regulator of the moneylenders laws is a serious impediment to the function of

⁴⁰¹ Koh Lay Chin, "Move to tighten laws to curb growing loan shark menace", *New Straits Time*, 1 December 2002.

⁴⁰² "Loan sharks using threats may face Emergency Ordinance", *Utusan Express*, 29 September 2005.

the Ministry. Perhaps, there was confusion amongst the public over the law governing the activities of loan sharks.⁴⁰³ As mentioned in Chapter Two, the fragmentary approach in consumer credit law and jurisdiction had contributed to the misunderstanding on the role of the Ministry. However, this deficiency of knowledge can be rectified in some measure by consumer education. Thus, some serious efforts must be made to inform the public at large about the existence of the Ministry and the services it offers. It is important to promote public awareness and to educate the public about the Ministry, especially the Enforcement Division, so that it can be fully utilised by those who need it most.

4.8.1 Promoting Public Awareness

There are several ways to promote awareness amongst the public regarding the existence and the role of the Ministry. The Ministry should carry out programmes to generate public consciousness on its existence, function and objectives. This could be done through conducting road shows, seminars, workshops and TV appearances in order to educate the public about the existence of this body. It is important that these programmes reach out to all types of borrowers, especially those located in rural areas. In the UK, a survey on awareness of the OFT amongst consumers in 2004 showed that 81% of respondents were aware of the OFT.⁴⁰⁴ The findings also showed that 83% of respondents could name one of its roles, while 51% believed that the OFT is responsible for consumers' rights.⁴⁰⁵ These high percentages indicate high consumer awareness of the existence of OFT in the UK. It is suggested here that Malaysia

⁴⁰³ Koh Lay Chin, "Move to tighten laws to curb growing loan shark menace", *New Straits Time*, 1 December 2002.

⁴⁰⁴ See the OFT, *Competition Act and Consumer Rights*, May 2004. Available: <http://www.of.gov.uk/nr/rdonlyres/9fb811e0-666e-42d3-bd41-1fccedcf22b2/0/of736intro.pdf> (accessed June 2005).

⁴⁰⁵ Ibid.

could and should learn from the experience in the UK and the Ministry should work hard to instil awareness amongst the public of its roles and functions.

4.8.2 Financial Literacy Programme

Research studies show that consumers are not fully aware of the avenues for redress when they have complaints against businesses and service providers. The findings of two surveys undertaken to determine the level of awareness of the consumers of the existence of the Consumer Claims Tribunal and the former Banking Mediation Bureau in Malaysia are evidence of this low level of awareness.⁴⁰⁶ The first survey was undertaken by the Ministry of Domestic Trade and Consumer Affairs: the findings showed that only 15% of Malaysians were aware of the existence of the Consumer Tribunal.⁴⁰⁷ Another survey, conducted by the Consumer Associations, indicated that the level of awareness of the existence of the (former) Banking Mediation Bureau was also very low.⁴⁰⁸ Based on the findings above, the Ministry should formulate a mechanism to create awareness amongst the public of the existence of the Ministry and its role as the regulator of moneylenders laws. A financial literacy programme would be a means to achieve this aim.

Potential borrowers may require information on related matters and details on aspects of moneylending transactions before embarking upon one. The processes and documentation involved, the relevant fees and charges to be incurred and the financial rights and responsibilities as well as commitment, risks and benefits of the transaction

⁴⁰⁶ Further discussion on both the Consumer Claims Tribunal and the Banking Mediation Bureau is in Chapter Seven.

⁴⁰⁷ M. Krishnamoorthy, 'Many consumers not aware of claims tribunal'. *The Star*, 28 June 2002.

⁴⁰⁸ See the Governor of the Malaysian Central Bank's Opening Remarks at the 'Launch of the Banking Consumer Education Programme', [2003] January. Available: <http://www.bnm.gov.my/index.php?ch=9&pg=15&ac=130> [Accessed 26 February 2005].

should be known to borrowers. They should be aware of their rights and how best to seek redress over any dissatisfaction with the transaction. A financial literacy programme is anticipated to address information gaps that may exist and enhance borrowers' knowledge of moneylending transactions. The main task of the financial literacy programme would be to focus on the dissemination of information on moneylending transactions, how and where to complain about moneylending disputes and the function of the Ministry in regulating the moneylenders laws. It is proposed here that the Ministry produce booklets in several languages that set out the important information for borrowers. These booklets could be made available from the Ministry, the Central Bank as well as moneylenders. The Ministry should also set up a "Moneylending Info" website to benefit computer literate borrowers.

4.8.3 Media Coverage

The significant role of the media in dissemination of information is proven. It is the fastest way to spread news and information. The Malaysian Consumer Claims Tribunal, for example, has received wide media coverage since its inception and the public has benefited from such exposure. It is suggested that the Ministry establish a good relationship with the media to promote effective media coverage over moneylending issues. Further, the Ministry should take advantage of the interest paid by the media in the loan sharks' issue.

4.9 Conclusion

The remarkable contribution of Part III and Part IV of the MLA 2003 is the formulation of adequate provisions on investigation, examination, search, seizure and arrest, as well as rules on evidence. The new law has formed a strong enforcement

mechanism to control and regulate the business of moneylending, to fight loan sharks' activities and to protect borrowers in moneylending transactions. The enforcement provisions have also generally conformed to standard enforcement procedures as provided under other consumer protection laws. The legitimate intention of the MLA 2003 to achieve its aims is reflected in the appointment of Inspectors of Moneylenders and senior police officers under the Enforcement Division to perform enforcement duties. Further, the genuine intention of the MLA 2003 to protect borrowers and to fight illegal moneylending is shown by the introduction of sections 10A – 10K, which granted sufficient powers to enforcement officers to investigate, examine, search, seize and finally, arrest loan sharks. These new provisions have indeed strengthened the enforcement machinery to eliminate loan sharks. However, it is important to emphasize that it is up to the Ministry to make use of the law and fully utilise its excellent framework to materialise the measures to fight loan sharks.

In regard to Part IV, significant improvement has been brought by the recognition of *agents provocateurs* to enable the enforcement officers to restrain illegal moneylending, as they are authorised to approach the loan sharks for loans, and act as witnesses later. The MLA 2003 also provides statutory protection for informers, and extends such protection to the information given by them. Further, a monetary reward is introduced to encourage the public to give information regarding loan sharks' activities.

On the other hand, it is submitted here that there are certain flaws in the search and arrest provisions that need immediate attention. This includes lack of provision on arrest without warrant, obligation to secure the premises under search against

trespassers, protection of enforcement officers from any action or prosecution whilst carrying out their duties and lack of any saving clause to validate a search warrant. It is also a concern of this study that the Enforcement Division gives more interest to housing matters than to moneylending issues. Further, the Division was recently accused of being incompetent to manage housing matters.⁴⁰⁹ The fear is that it may also be incompetent in moneylending matters.

This chapter has also found that the number of moneylending complaints received by the Ministry is quite low. From this finding, it may be inferred that it is highly probable that the public is unaware of the existence of the Enforcement Division, let alone that it is under the jurisdiction of Ministry. Further, this study discovered that the public is inclined to file complaints over illegal moneylending to the police. Three suggestions were therefore made to educate the public regarding the role of the Ministry. It may be suggested that the legitimate interest of the law in protecting borrowers will only prevail when the borrowers know where to file moneylending complaints and the authority takes actions over such complaints.

After analysing licensing and advertisement permits as well as the powers of the enforcement officers in enforcing moneylenders law, the next chapter discusses the moneylending agreement as well as the rights and duties of the parties in a moneylending contract.

⁴⁰⁹ This claim was made by the National House Buyers Society, who had received 32,000 housing complaints for the year 2003. See Sadatul M. Rosli, "Penguatkuasaan lemah punca banyak aduan rumah gagal diselesaikan" (Weaknesses in enforcement the reason why many housing complaints went unsolved), *Utusan Malaysia*, 26 August 2004.

Chapter Five

CONDUCT OF MONEYLENDING BUSINESSES

5.0 Introduction

Chapter four discussed the power conferred by the MLA 2003 on the Inspector and the police to regulate and control moneylending and to protect the interests of borrowers. Now, the intention of the MLA 2003 to protect the borrowers in the course of moneylending transactions will be considered. The discussion in this chapter will include three main subjects: the moneylending agreement; the rights and duties of the parties to the agreement; and the interest aspects. It is necessary to examine the newly introduced moneylending agreement under the MLA 2003 in order to analyse its strengths and limitations, as there was previously no prescribed moneylending contract. It is foreseeable that the implementation of the standard agreement may perhaps be an important breakthrough in facilitating efficient moneylending transactions. Further to examining the moneylending agreement, this chapter also looks into the statutory rights and duties of both the moneylenders and the borrowers, which are derived from the moneylending agreement and the moneylending laws. The third aspect to be considered is the interest element in the moneylending agreement, which includes the implementation of fixed ceiling interest rates, the new calculation on default payments as well as reopening harsh and conscionable or substantially unfair transactions. A discussion on whether the Malaysian moneylenders law should abandon the very old “harsh and unconscionable or substantially unfair” term in place of the UK’s “extortionate credit bargain” or the newly proposed “unfairness” test is also included in this chapter. The UK consumer credit agreement will be considered, as a basis of comparison to analyse and evaluate the practice in Malaysia. It is important to note that in the UK, some changes have

taken place in regard to the consumer credit agreement. New regulations on the form and content of consumer credit and consumer hire agreements, contract disclosure and early settlement came into force on 31 May 2005.⁴¹⁰ Comparisons with the position in the UK will assist in evaluating whether the MLA 2003 provides sufficient protection for borrowers in the course of moneylending transactions.

5.1 Moneylending Agreement

This section discusses the moneylending agreement, the core element in a moneylending transaction. The significance of a moneylending agreement is perhaps that it is evidence of a binding contract between the moneylender and the borrower. The MLA 2003 defines moneylending agreement as “an agreement made in writing between a moneylender and a borrower for the repayment, in lump and instalments, of money borrowed by the borrower from the moneylender.”⁴¹¹ Stringent provisions govern the moneylending agreement, whereby breach of its terms and conditions may incur both criminal and civil sanctions.

The necessary elements required in a legally binding moneylending agreement will now be investigated.

⁴¹⁰ The Consumer Credit (Agreements) (Amendment) Regulations 2004 substantially amend the Consumer Credit (Agreements) Regulations 1983 dealing with the form and content of the consumer credit and consumer hire agreements. The Consumer Credit (Disclosure of Information) Regulations 2004 contain new provisions relating to pre-contract disclosure for non-distance contracts. The Consumer Credit (Early Settlement) Regulations 2004 replaced the Consumer Credit (Rebate on Early Settlement) Regulations 1983.

⁴¹¹ MLA 2003, s 2.

5.1.1 Requisites of a valid moneylending agreement

The following sections seek to investigate whether the requirements for a valid moneylending agreement under the MLA 2003 are sufficient to protect the borrower's interest in the moneylending contract, taking the UK consumer credit agreement as the basis of evaluation.

5.1.1.1 Requirements under the MLA 2003

The MLA 2003 provides five fundamental elements of a valid moneylending agreement. First, the contract must be in writing in the prescribed form.⁴¹² If it is secured, the agreement should conform to Schedule J, and if it is unsecured, it should follow Schedule K.⁴¹³ Second, details of the contract such as the date of contract, particulars of the contracting parties, the principal amount borrowed and interest rate per centum per annum or the amount of interest as provided in the First Schedule in both Schedule J and K must be specifically disclosed. Third, the agreement must be certified by the Commissioner for Oaths or other qualified persons.⁴¹⁴ Fourth, both the borrower and the moneylender must sign the contract before any money is lent.⁴¹⁵ Finally, a copy of the contract duly stamped must be delivered to the borrower before the loan is disbursed.⁴¹⁶

These five requirements display evident safeguards in ensuring that the interests of borrowers are protected. Besides incurring criminal sanctions, breach of these requirements may invalidate the moneylending agreement. Thus, such requisites can be seen to offer legitimate interest in protecting consumers from any manipulation by

⁴¹² MLA 2003, s 10P.

⁴¹³ MCLR, reg 10(1). Further discussion on Schedule J and K is at 5.1.2.2.1.

⁴¹⁴ MLA 2003, s 27.

⁴¹⁵ MLA 2003, s 16.

⁴¹⁶ Ibid.

moneylenders in a moneylending contract. Notwithstanding these attractions, however, the requirements for a valid moneylending agreement under the MLA 2003 suffers from three major drawbacks. First, the moneylending agreement fails to support the borrower's understanding of the content of the agreement, perhaps due to the fact that the agreement does not assist easy reading and some borrowers may not understand the language used. Second, the borrower's right to withdraw from the agreement is desperately lacking. Third, a statement of protection and security warning are also missing. The moneylending agreement therefore may be interpreted as a "non-friendly" agreement due to the first failing, while the second and third flaws may violate borrowers' information rights, and may further invite potential risks to borrower's contractual obligations. In sum, these weaknesses may affect the borrowers' interests in moneylending contracts.

Based on the above, the following sections discuss the requirements that should be present under the MLA 2003.

5.1.1.2 Legibility

A clear and readable agreement is likely to assist easy reading and understanding of its terms and conditions. The lay-out of the agreement, including lettering, colour and font size is perhaps the means to achieve this aim. For example, a borrower might not be aware of his rights and obligations under the moneylending agreement because the information is contained in small print, and therefore, he does not take the trouble to read it. As legal documents are very technical and most borrowers do not understand them, a requirement to facilitate easy reading and comprehension will offer a chance

to borrowers to appreciate the terms of the contract they are entering into. Regrettably, such requirements are clearly absent from the MLA 2003.

However, a different situation is found in the UK. The UK Consumer Credit (Agreements) Regulations 1983, as amended in 2004 (hereinafter “the UK Agreements Regulations”) places great emphasis on legibility of the document. Although there is no requirement for minimum font size, the law however requires easy readability of the agreement. The lettering of the terms of the consumer credit agreement, for example, must be easily legible and if necessary, “be of a colour which is readily distinguishable from the background medium upon which the information is displayed”.⁴¹⁷ The law also provides that all terms of the agreement must be readily legible when the document is presented to the debtor for signature.⁴¹⁸ Accordingly, a document is not ‘readily legible’ if certain terms of the agreement, such as the repayment period, the amounts or the dates of repayments are left blank to be filled in by the debtor. By referring to the practice in the UK, it may be suggested that lack of regulations in terms of legibility of the moneylending agreement in Malaysia places the borrowers at disadvantage. Since the UK Agreements Regulations provides a good example to follow, such practice should be implemented in Malaysia to good effect. Thus, it may be suggested here that the MLA 2003 should require easy reading and probably specify a minimum size of type to be used in all moneylending agreements.

⁴¹⁷ UK Agreements Regulations, reg 6(2)(a).

⁴¹⁸ CCA, s 61.

5.1.1.3 Language

This section investigates the importance of comprehensible language to be adopted in the moneylending contract. This analysis is necessary, since one of the problems of a multi-lingual society such as exists in Malaysia is that of specification of a language to be used for contractual documents. This issue came into question because the old moneylenders law provided that the memorandum of contract should be in either the English language or the National language,⁴¹⁹ but this provision was not retained in the MLA 2003. Therefore, it is essential to determine which language should the moneylending agreement embrace; the National language or the English language?

In this regard, it is best to refer to the Malaysian Federal Constitution. The Federal Constitution provides that the Malay language shall be the National language, but other languages should also be used and practised, except for official purposes.⁴²⁰ It is common knowledge in Malaysia that the National language is hardly used in legal documentation, as the main language of commerce is English. The reason can be traced back to the history of Malaysia. Before its independence in 1957, Malaysia was colonised by the British. Thus, the influence of the British is still strong in many aspects of life in Malaysia. In legal practice, for example, the use of the Malay language by the lawyers and legal officers is still minimal⁴²¹ and most legal references are still in English. Although the Malay language has been imposed as the language of the court since June 1990, lawyers often apply to speak in English in the court. The legal and judicial system is still deeply influenced by the common law and the English legal tradition. The practice in the insurance sector might be referred to as

⁴¹⁹ MLA, s 16(1).

⁴²⁰ Federal Constitution, article 152(1).

⁴²¹ Faiza Tamby Chik, "Penggunaan Bahasa Melayu Dalam Mahkamah" (The usage of the Malay language in the court), [1993] 4 CLJ, xxvi.

another example to illustrate the usage of English as the commercial language. According to the former Malaysian Insurance Mediation Bureau, the typical complaint of policyholders is that the policy is in the English language and they are unable to understand the terms and conditions of the policy.⁴²²

It is believed that it is not an offence under the Federal Constitution not to use the National language in legal documentation, if the documentation is of a personal and business nature and not meant for official purposes. However, the main concern is whether the borrower would understand the terms and conditions of the agreement if he does not read English. In the moneylending context, although the MLA 2003 does not specify in what language the moneylending agreement should be, however, based on the above discussion, it is here believed that the agreement would be in English. Therefore, it is strongly suggested that the agreement must be in the National language as well, in order to accommodate those who are not fluent in the English language.

It might be worth discussing the situation in New Zealand when the issue of language came up in the review of the New Zealand Consumer Credit Bill. It is understood that the population of New Zealand is mostly of European descent, with Māori being the largest minority, while non-Māori Polynesian and Asian peoples are also significant minorities, especially in the nation's cities.⁴²³ Although English is New Zealand's official language, other languages are also used by the minorities. In this regard, the Commerce Committee voiced their concern that creditors do not offer contracts in the

⁴²² IMB Annual Report 2001, p. 4.

⁴²³ See http://en.wikipedia.org/wiki/New_Zealand

language in which they advertise.⁴²⁴ The Committee considered providing consumer contracts in other languages as well, but this idea was abandoned when the Committee foresaw some difficulties for consumer advisors, the courts and dispute tribunals if contracts were provided in other languages. Therefore, the Committee proposed a regulation to authorise the translation of the agreement into one or more languages.⁴²⁵ In the light of the practice in New Zealand, the legislators in Malaysia should be more sensitive to the needs of borrowers and the proposal of the Commerce Committee in New Zealand over the issue of language would be a good example to follow.

5.1.1.4 Withdrawal

The right to withdraw from an agreement is perhaps among the most important provisions in consumer credit agreements. The concept of withdrawal is in line with the common law rule which allows a person to revoke an offer before acceptance. Nevertheless, such a provision is seriously lacking from the MLA 2003. In contrast, under the CCA, withdrawal from a prospective agreement is permissible under section 57 via a written or oral notice indicating such an intention. It is submitted here that the MLA 2003's silence on withdrawal right is a major drawback in protection of the borrower's interest. It is further submitted that provision on withdrawal should be included in the moneylenders law.

5.1.1.5 Statements of protection and security warnings

Statements of protection and security warnings are usually found in loan agreements to inform borrowers of the risk and obligation undertaken in the contract. Under the

⁴²⁴ The New Zealand Consumer Credit Bill: As reported from the Commerce Committee. Available: <http://www.clerk.parliament.govt.nz/Content/SelectCommitteeReports/2bar2.pdf#search='new%20zealand%20consumer%20credit%20bill%2C%20commentary'> (accessed 11 October 2005).

⁴²⁵ Ibid.

UK Agreements Regulations, standard statutory warnings are provided under Schedule 2 to instil awareness amongst consumers on the effects of any default in repayment on their future credit rating and also the implications of securing credit on property. Examples of warnings under the UK Agreements Regulations include “MISSING PAYMENTS” warning and security warning statements such as “YOUR HOME MAY BE REPOSSESSED”.⁴²⁶ Unfortunately, the importance of such caution was not acknowledged under the MLA 2003, although some moneylending transactions under the Act may also involve secured transactions. This certainly signifies a further failing of the MLA 2003 in protecting the borrower’s interest in a moneylending contract. It is therefore proposed that the legislators should seriously consider including statutory wealth warnings in the statute, as it could provide comprehension and awareness on the part of borrowers, as to the risks taken in a moneylending transaction and would therefore give more protection to borrowers’ interests.

The discussion above shows the shortcomings in the MLA 2003’s approach to protect borrowers in a moneylending agreement. Failure to provide any regulation on four aspects – legibility of the agreement, usage of language, requirement for withdrawal as well as lack of statement of protection and security warning – is a serious impediment in understanding the risks and obligations in a moneylending agreement. Such provisions can be seen as useful facilitative techniques to assist borrowers in understanding the terms and conditions of moneylending agreements. It is rather surprising that such requirements are absent in the new moneylending law. Thus it is suggested that the four factors should be incorporated in the moneylending agreement

⁴²⁶ CCA, s 60; UK Agreements Regulations, schedule 2.

in order to establish binding protection for borrowers' interest in moneylending contracts.

The ensuing section will analyse the prescribed moneylending agreements.

5.1.2 Prescribed moneylending agreements

The discussion on prescribed moneylending agreement will be conducted in light of the position before and after the enforcement of the MLA 2003. The merits and disadvantages of standard form contracts will also be considered. Finally, the implementation of standard provisions under the CCA consumer credit agreement will be looked into.

5.1.2.1 Prior to the MLA 2003

Under the old moneylenders law, a moneylending contract was not prescribed in any statutory form. A 'note or memorandum' of it was satisfactory, provided it contained all the material terms of the contract. It was sufficient that when parties entered into a contract under the MLA, the moneylenders ensured that such contract was in writing, and the authenticated copy of the note or memorandum of the contract was given to the borrower, as provided under the former section 16. The law did not prescribe the terms to be imposed in the contract, except for the amount of the loan and interest to be levied.

A moneylending contract that conformed to section 16 and the requirement for attestation under section 27 was valid and enforceable. Perhaps, the spirit behind these two provisions was to enhance awareness among borrowers and moneylenders

regarding their obligations under a moneylending contract, but it is highly debatable that they had a genuine intention in protecting the borrowers in the moneylending contract. Lack of uniformity of moneylending agreements was a further failing, as various forms of moneylending agreements were used by moneylenders, and each of them preferred to have their own standard format, which was permitted, as long as they fulfilled the minimum requirement of the law. Thus, moneylending agreements were open to uncertainty and doubt, whereas they should be clear and certain.

As a result, both sections 16 and 27 have been the subject of extensive litigation and the law had become too technical.⁴²⁷ Many unfortunate borrowers were deceived by moneylenders who had failed to observe the requirements of moneylending contracts. For instance, execution of blank documents was among the frequent complaints.⁴²⁸ Furthermore, it also invited manipulation and exploitation in the moneylending contract. In loan agreements secured by land, for example, moneylenders deliberately did not insert the value of land in the instrument of transfer of title or interest to the land, but demanded that borrowers sign the instrument.⁴²⁹ Moneylenders were also found to reside on and develop the borrower's land until all repayments were

⁴²⁷ Among the issues raised before the court under the old s 16 were: form of authentication - *Kartar Singh v Mahinder Singh* [1959] MLJ 248; whether other documents annexed to the note or memorandum may be read as forming part of the memorandum - *Chau Sau Yin v Kok Seng Fatt* [1966] 2 MLJ 54; delivery/service of document - *Kartar Singh v Mahinder Singh* [1959] MLJ 248; *Subchent Kaur v Chal Sau Klan* [1958] MLJ 32; *Subramaniam v Konar* [1962] MLJ 385; *Mahinder Singh v Beh Yok Nam* [1967] 1 MLJ 294; failure to observe requirements as to the date of the loan, the principal and the rate of interest per centum per annum - *Thangaula v Saudagar Singh* [1965] 1 MLJ 38; *Karuthan Chettiar v Parameswara Iyer* [1966] 2 MLJ 151; *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124; *Associated Finance Corp Ltd v Poomani* [1972] 1 MLJ 117; whether an IOU is a sufficient note or memorandum to prove the existence of an agreement - *Ooi Phee Cheng v Kok Yoon San* [1950] MLJ 187. Under the old s 27, language was among the issues raised before the court; see *Sundralingam v Ramanathan Chettiar* [1967] 2 MLJ 211; *KR Narayanan v AL Alagappa* [1956] MLJ 23.

⁴²⁸ Essentially this represents the plea of *non est factum* (it is not his deed) in the classic sense. The governing rule is that even ignorant and illiterate persons must exercise care in executing documents and a plea of *non est factum* will fail if they had failed to take such care (see *Ramasamy v Suppiah* [1969] 2 MLJ 187).

⁴²⁹ The Ministry of Housing and Local Government, *Unpublished Report*, 1997.

completed.⁴³⁰ In unsecured loans, the memorandum, promissory note or the I.O.U was often not properly prepared and omission of the amount of loan, interest rates and repayment period was not uncommon.⁴³¹ Thus, it is safely assumed that the old moneylenders law has signally failed to take substantive action to protect borrowers in moneylending contracts. In order to overcome these problems, the MLA was amended to require moneylending agreements to be in the prescribed form.⁴³² Hence, the commencement of standard contracts in moneylending transactions.

5.1.2.2 The prescribed agreement under the MLA 2003

The crucial provision that requires prescribed agreements in moneylending contracts is section 10P of the MLA 2003. Section 10P provides that “a moneylender who intends to lend money to a borrower shall enter into a moneylending agreement with the borrower, and that agreement shall be in the prescribed form.” The standard agreement is provided in both Schedule J and K of the MCLR. It could be argued that this significant provision has justifiably rectified a serious defect in the moneylenders law by prescribing standard agreements for moneylending, both with and without security.⁴³³ The amendment spells out what terms have to be included in the agreement so that moneylenders may not extort other benefits and privileges from borrowers. Further, the law also provides that any addition, omission or alteration to the agreement without the consent of the Registrar is not permissible, and may render the agreement void and unenforceable.⁴³⁴ It may be suggested that this amendment could have a far-reaching effect in facilitating moneylending transactions, assisting

⁴³⁰ Ibid.

⁴³¹ Ibid.

⁴³² S 10P of MLA 2003 provides that a moneylending agreement must be in a prescribed form.

⁴³³ MCLR, reg 10(1); A moneylending agreement without security shall conform to Schedule J while an agreement with security shall follow Schedule K.

⁴³⁴ MCLR, reg 10(2); MLA 2003, s 10P(3).

the enforcement process, as well as protecting the moneylenders' and borrowers' rights. Serious consequences may face the moneylenders if the agreement is not provided in the prescribed form: apart from having the agreement void and unenforceable, they may also be fined or imprisoned for committing such an offence.⁴³⁵ A subsequent offence will invoke the punishment of whipping.⁴³⁶ Indeed, moneylenders may face both civil and criminal consequences if they do not provide prescribed moneylending agreements to borrowers.

5.1.2.2.1 Schedules J and K

A moneylending agreement for an unsecured loan is provided in Schedule J, whereas Schedule K provides for a secured loan agreement. It is an offence to execute a moneylending agreement in any other form than those in the Schedules.⁴³⁷ The core information about the agreement lies in the First Schedule of both Schedules J and K, which lays down all information regarding the loan which has to be disclosed. As mentioned earlier, the Schedules can only be modified upon obtaining the Registrar's permission; otherwise such variation could render the agreement void.⁴³⁸

In cases of secured loans, particulars and value of the security are also included in the agreement under items 11 and 12 of the First Schedule. It is interesting to note that 'security' is interpreted in the agreement to exclude common items of security taken by loan sharks, i.e. credit card, charge card, auto teller machine card, birth certificate, identification card or pawn ticket.⁴³⁹ This provision reflects the strong resentment of the Government over loan sharks' devious tactics in concluding loans with desperate

⁴³⁵ MLA 2003, s 10P(2)

⁴³⁶ Ibid.

⁴³⁷ Ibid.

⁴³⁸ MCLR, reg 10(2).

⁴³⁹ MCLR, schedule K, item 11.

borrowers. It therefore may be safely assumed here that a moneylender who accepts prohibited security items in a moneylending agreement may run the risk of the agreement being unenforceable by law.

In the past, where a loan involved a security, two separate documents had to be completed; a note or memorandum of contract under which a loan of money was given, and also a note or memorandum of security which was given for the above loan.⁴⁴⁰ It is suggested here that preparing one comprehensive document is better than preparing two different documents; as any misunderstanding on how many documents are to be prepared, as well as clerical mistakes, may be easily avoided. Thompson C.J. in *Abirami Ammal & Anor v M.S.M.M. Meyappa Chettiar*⁴⁴¹ clearly stated that:

“Section 16 of the Ordinance clearly differentiates between the contract for the repayment of the loan and any security given in respect of that contract and it is of the contract that the note or memorandum must be delivered. That note or memorandum is required to contain all the terms of the contract and where it was a term of the contract that a particular security be given in respect of it, the particulars of that security would require to be stated either in terms or by reference (see *Reading Trust Ltd v Spero* [1930] 1 KB 492). Nevertheless, the Ordinance treats the contract and the security in respect of it as separate and distinct things. There may be a contract without security; there may be a contract with security. In either case the note or memorandum must embody the terms of the contract and in the latter case it must also embody in one way or another the terms of the security”

In the case above, a charge on land had been registered by a moneylender as security for loan of money. Apart from this charge, nothing was reduced to writing and the question therefore was whether the charge itself could be regarded as the note or memorandum of the contract within the meaning of section 16. It was held by the Court of Appeal that the moneylending contract was unenforceable due to a clear failure to comply with the express provision of section 16.

⁴⁴⁰ This was the provision under the former s 16 of the MLA.

⁴⁴¹ (1959) MLJ 149, at p.151.

Based on the account above, the implementation of Schedule K which incorporates the particulars of security in the loan document is commendable. Schedule K may facilitate better moneylending agreement, serves to prevent any exploitation of the loan security, and avoid any misinterpretation of the statute as well as technical errors.

5.1.2.2.2 The First Schedule

The First Schedule sets out the important elements of a moneylending contract, which include:

- the details of the moneylender and the borrower;
- the date of the contract;
- the amount of the loan and interest charges;
- the duration of repayment;
- the number of instalment repayments;
- the amount of each instalment repayment, as well as the amount of the final instalment; and
- the particulars and amount of security (if any).

All information provided in the First Schedule must be clear and accurate. However, it may be questioned whether mistakes and omissions constitute a failure to comply with the requirements of the First Schedule. Decided cases suggest that the right test is to determine whether such a mistake or omission is a material deviation from the requirements of the First Schedule: a positive answer will render the contract unenforceable, but not otherwise.⁴⁴²

⁴⁴² This test was propounded by Meston; see further in Meston, *The Law Relating to Moneylenders*, 5th ed, Oyez Publication, London, 1968, pp. 94-95. The materiality of any such variation is a question of law for the judge to decide; see *Peizer v Lefkowitz* [1912] 2 K.B. 235.

In the Kuala Lumpur High Court case of *Overseas Union Finance Ltd. v Lim Joo Chong*⁴⁴³ the moneylending contract was held to be unenforceable since the memorandum did not contain all the terms of the contract and the real date of the loan. In this case, the memorandum of agreement was signed and delivered on 21 January 1969, not 18 January 1969, as stated in the memorandum. Besides, the memorandum stated that payment of the loan was to be made on January 18, but in actual fact the payment was made in various amounts on different dates subsequent to the signing on January 21. These circumstances constituted a material error and non-compliance of section 16(3) of the MLA. By this reason of non-compliance, the contract was declared unenforceable.

In the case of *Chai Sau Yin v Kok Seng Fatt*,⁴⁴⁴ there were discrepancies of the dates of the loan in the memorandum of contract and the authenticated copy of the memorandum. The borrower alleged that there was failure to comply with section 16 of the MLA as the authenticated copy delivered to the borrower was not an exact copy of the memorandum and therefore, did not comply with the requirements of section 16. The Federal Court held that the authenticated copy must be read together with the other documents delivered to the borrower and therefore, that the missing dates were clearly supplied. According to the Court, although the authenticated copy was not an exact copy of the memorandum, this was not fatal, as the defects in the copy could be remedied by a consideration of the other documents.

⁴⁴³ [1971] 2 MLJ 124.

⁴⁴⁴ [1966] 2 MLJ 54

In the English case of *Gaskell, Ltd. v Askwith*,⁴⁴⁵ a clerical error resulted in insertion of an incorrect date in the moneylending contract. The Court of Appeal held that, although the insertion of the wrong date in the memorandum was due to a clerical error by which no one had been deceived, the memorandum had failed to comply with the requirements of section 6 of the Moneylenders Act, 1927, in a material respect, and the claimants were therefore not entitled to recover judgment from the defendant. On the other hand, a wrong date inserted as regards the first payment was held to be an error which did not and could not mislead anyone, and so did not vitiate the contract and therefore the claimants were entitled to judgment for the full amount claimed.⁴⁴⁶ However, where a moneylending contract failed to state the date of the contract, the loan would be unenforceable on that very basis.⁴⁴⁷

Based on the cases above, it is believed that the date of the moneylending agreement is crucial to the moneylending contract, as any mistake or inaccuracy as to the actual date may invalidate the loan. However, these cases should be differentiated from the case of *Chai Sau Yin v Kok Seng Fatt*,⁴⁴⁸ where discrepancy of dates in the memorandum of loan and the authenticated copy of the loan was not held to be significant as there were other documents that rectified the inaccurate date.

Apart from the date of the agreement, the principal amount of the loan must also be clearly stated in the moneylending agreement to avoid any misunderstandings regarding the amount of instalment payment, amount of interest, and so on. In the

⁴⁴⁵ (1928) 45 T.L.R. 566

⁴⁴⁶ *Sherwood v Deeley and Wife* (1931) 47 T.L.R. 419

⁴⁴⁷ *Temperance Loan Fund, Ltd. v Rose and Another* [1932] 2 K.B. 522

⁴⁴⁸ [1966] 2 MLJ 54

case of *Colin Campbell Ltd. v Pine*,⁴⁴⁹ the memorandum of the moneylending contract was held to fail to comply with section 6 of the Moneylenders Act, 1927 as the true amount of the loan was not properly shown. This is because, instead of stating the actual amount of the loan in the memorandum of contract, the amount of repayment of an earlier debt was also included as the principal amount of the loan. In such cases, the role of the First Schedule cannot be denied. Careless mistakes may be prevented and borrowers are provided with greater protection.

In addition to the above elements, the rate of interest charged on the loan must also be certain. In the case of *Karuthan Chettiar v Parameswara Iyer*,⁴⁵⁰ the term of the contract relating to interest as embodied in the memorandum was “rate of interest: 18% per annum / month”. According to the High Court, on the face of it, unless the word “annum” or the word “month” was deleted from the contract it was impossible to say what the rate of interest was. Thus, the ambiguity in this case was a patent one, and therefore the contract was not enforceable by reason of non-compliance with section 16(3)(c) of the MLA.

From the cases quoted above, it can be concluded that errors *too trivial for notice* do not vitiate the note or memorandum or thereby render the agreement unenforceable; however, mistakes that affect the material detail of the agreement may be found to render the agreement unenforceable. It is true that many actions have been dismissed by the Court on purely technical grounds, but the Court had no option but to do so

⁴⁴⁹ [1967] S.L.T (Sheriff Court) 49

⁴⁵⁰ [1966] 2 MLJ 151

once it discovered a clear failure to comply with an express provision of the Ordinance. As was stated by Lord Radcliffe in the case of *Kasumu v Baba-Egbe*:⁴⁵¹

“When the governing statute enacts that no loan which fails to satisfy any of these requirements is to be enforceable it must be taken to mean what it says, that no court of law is to recognize the lender as having a right at law to get his money back. That is part of the penalty which the statute imposes. There is no room to reform the terms of the loan, since the statute is not concerned with the vice of its content but with the vice of the conditions under which it was made.”

5.1.2.3 Advantages and disadvantages of standard form contracts

According to Mulcahy and Tillotson, the importance of standard form contracts in commercial and consumer transactions cannot be overstated.⁴⁵² Standard form contracts are universally used in business-consumer contracts as they are efficient, and time-saving and avoid the cost of negotiating and drafting separate contracts for every transaction.⁴⁵³ Furthermore, in the course of time, the public would be conversant with the terms and conditions, especially rights, obligations and legal implications.⁴⁵⁴ Standard form contracts may either be drafted by the businesses or by the statute. In the latter, their attraction lies in the fact that the agreements are prescribed by the law and would prevent any issues of unjust terms in the agreement. An example of a prescribed agreement is the moneylending agreement introduced by the MLA 2003.

In the moneylending context, it is suggested that the prescribed moneylending agreements with or without security have certainly improved the moneylending transaction. As mentioned earlier, numerous issues have been litigated in court due to

⁴⁵¹ [1956] AC 539, p. 551

⁴⁵² L. Mulcahy and J. Tillotson, *Contract Law in Perspective*, 4th ed, Cavendish Publishing, London, 2004, p. 174.

⁴⁵³ See D. Dewees and MJ Trebilcock, “Judicial Control of Standard Form Contracts” in P. Burrows and CJ Veljanosvski (edit), *The Economic Approach to Law*, Butterworths, London, 1981, chapter 4; G. Howells and S. Weatherill, *Consumer Protection Law*, 2nd ed, Ashgate, Hants, 2005, p. 19.

⁴⁵⁴ The Crowther Report, para. 6.5.6.

the exploitation, confusion and abuse in moneylending contracts caused by lack of uniformity in moneylending contracts.⁴⁵⁵ Thus, it cannot be denied that the genuine intention of the law to protect borrowers in moneylending contracts could be achieved through the implementation of a prescribed form of moneylending agreement.

However, it should also be pointed out that not all standard form contracts are advantageous. First, standard contracts drafted by businesses and not by statute may raise the issue of inequality of bargaining power between the businesses and the consumers and may be a source of abuse of consumers.⁴⁵⁶ This is because the businesses are more aware of the content of the contract whereas the consumer “will almost never have read nor will ever read” the contents of the contract.⁴⁵⁷ Therefore, it could be further argued that lack of awareness to read and understand the contents of the contract may defeat the idea that “free will, a bargain and an agreement lie at the heart of a consumer contract.”⁴⁵⁸ Second, not only do prescribed contracts reflect a lack of negotiation between the parties, but also they often include terms that are incomprehensible to the layman; thus, consumers may succumb to unfavourable terms due to lack of information.⁴⁵⁹ In *A Schroeder Music Publishing Co Ltd v Macaulay*, Lord Diplock commented to this effect:⁴⁶⁰

“The terms of this kind of standard form of contract have not been the subject of negotiation between the parties to it, or approved by any organisation representing the interests of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with other providing similar goods or services, enables him to say: ‘If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it.’”

⁴⁵⁵ See section 5.1.2.1.

⁴⁵⁶ IR Macneil, “Bureaucracy and Contracts of Adhesion”, (1984) 22 *Osgoode Hall Law Journal* 5.

⁴⁵⁷ G. Howells and S. Weatherill, *Consumer Protection Law*, 2nd ed, Ashgate, Hants, 2005, p. 19.

⁴⁵⁸ *Ibid.*

⁴⁵⁹ Sir G. Treitel, *The Law of Contract*, 11th ed, Sweet & Maxwell, London, 2003, p. 215.

⁴⁶⁰ [1974] 1 WLR 1308, 1316 per Lord Diplock.

Third, in the words of Howells and Weatherill, “the notion that free will, a bargain and an agreement lie at the heart of a consumer contract” is rather distorted by the prevalence of standard-form contracts which will go largely unread. Therefore, the common application of standard form contracts has led to development of legislative and judicial forms of protection for consumers who suffer from inequality of bargaining power by such contracts. In the UK, for example, the Unfair Contract Terms Act 1977 (hereinafter “the UCTA”) and the Unfair Terms in Consumer Contracts Regulations 1999⁴⁶¹ (hereinafter “the UTCCR”) protects the interest of borrowers in standard form contracts by controlling unfair exclusion and limitation clauses in such agreements. However, such protection is not needed in Malaysia since moneylending agreements are approved by statute and laid out in a uniform manner. Further, any modifications or variations of the terms and conditions of the agreement are prohibited by the statute.⁴⁶² Thus, it is suggested here that there are no unfair terms in the moneylending agreements under the MLA 2003.

5.1.2.4 The UK position

In the UK, during the reform of credit structure in the early 70s, a proposal for standard form contracts was rejected by the Crowther Committee for two reasons. First, the terms in the standard agreement might impede the development of new forms of credit, and second, the bad experience of the application of standard contracts in the Bills of Sales Act that restricted new business techniques and forced the parties into agreements that did not accommodate them.⁴⁶³ In other words, the Crowther Committee found that standard contracts were not desirable since they argued that such agreements would restrict freedom of contract and hamper the

⁴⁶¹ SI 1999/2083.

⁴⁶² MCLR, reg 10(2).

⁴⁶³ The Crowther Report, para. 6.5.6.

evolution of new forms of credit.⁴⁶⁴ With due respect, this study here could not agree with the Committee's view in terms of moneylending aspects. This is simply because the standard agreement under the MLA 2003 deals with moneylending *per se*; thus, such prescribed agreement may not hinder the notion of freedom of contract nor inhibit the growth of new types of credit. On the other hand, the Committee's argument was justified in relation to the proposed credit law, since the law would cover a wide range of credit instruments.

However, despite the Committee's suggestions, regulated agreements under the CCA are typically in the prescribed form, conforming to the UK Agreement Regulations and containing all the prescribed terms such as the amount of credit, the credit limit, the total charge for credit, the rate of interest and repayments as well as cancellation rights. Section 61(1)(b) of the CCA, which resembled section 6(2) of the Moneylenders Act 1927, provided that the consumer credit agreement must embody all the terms of the agreement except for the implied terms. The agreement must also contain statements of protection and remedies to alert the debtor of the rights and duties conferred or imposed by the agreement. If all these requirements are fulfilled, an entirely handwritten credit agreement is also acceptable under the UK law.⁴⁶⁵ However, non-conformity with the prescribed form and the prescribed terms may render the agreements unenforceable.⁴⁶⁶ Nevertheless, variation to the credit agreement is permissible under the law.⁴⁶⁷ Apart from the prescribed terms, it is also

⁴⁶⁴ Ibid, paras. 6.5.6-7.

⁴⁶⁵ The OFT, *The Consumer Credit (Agreements) Regulations 1983 as amended by the 2004 Amendment Regulations, Consumer Credit (Disclosure of Information) Regulations 2004, Consumer Credit (Early Settlement) Regulations 2004; Frequently Asked Questions (FAQs)(Draft)*, April 2005. Available:<http://www.ofi.gov.uk/NR/rdonlyres/D536ECCA-DBD6-4184-A0F3-5793D32797A4/0/CreditagreementFAQs.pdf> (accessed 19 October 2005).

⁴⁶⁶ *Wilson v First County Trust (No.2)* [2003] 3 WLR 568.

⁴⁶⁷ CCA, s 82.

important to highlight that in a regulated agreement, the creditors are permitted to include their own conditions. These conditions are regulated by the UCTA and UTCCR which has been mentioned earlier.

The next section discusses the requirement of attestation of moneylending agreements.

5.1.3 Attestation of a moneylending agreement

In order to instil awareness amongst borrowers regarding the terms of the moneylending agreement, it is mandatory that the agreement is attested by qualified professionals. Under the old section 27, the law provided for attestation of promissory notes specifically for borrowers who did not understand the language in which the note was written.⁴⁶⁸ The burden was on the borrower to provide evidence of such attestation. This provision was retained in the MLA 2003, but with a fundamental modification. Under the new law, an obligation is imposed on the attestator to explain the contents of the moneylending agreement to the borrower, irrespective whether the borrower understands the language in which the note is written.⁴⁶⁹ This is a salutary rule for the protection of each party involved in a moneylending transaction. Borrowers normally do not understand the language and the manner of legal documentation, no matter whether in the National language or in English. Thus the old presumption that only illiterate borrowers should have the

⁴⁶⁸ This usually refers to illiterate borrowers; see the statement of Murray-Aynsley J (as he then was) in *Haji Osman v Ng Ah Siew* [1939] MLJ 247;

‘The guiding principle in dealing with cases of this kind is that great caution should be exercised in admitting documents alleged to have been executed by illiterate persons. Those who obtain the IOU’s and other documents can and should have the execution witnessed by persons of such a character that further dispute is impossible. If they do not do this they have only themselves to blame. Where there is serious ground for suspicion the document should not be accepted.’

If not attested as required, the note is void and ‘the lender shall not be entitled to recover any loan for which such note is taken as security;’ *Natha Singh v Syed Abdul Rahman* [1962] MLJ 265.

⁴⁶⁹ MLA 2003, s 27.

terms of a moneylending contract explained to them is no longer applicable. Such practices as providing the debtor with less money and recording larger sums as having been lent should have seen their last days with the enforcement of the new law. Failure to observe this provision will render an agreement void, of no effect and unenforceable.⁴⁷⁰ Nevertheless, it would be interesting to see whether this rule is closely observed because the practice in other transactions is that the Commissioner for Oaths only verifies the legal document, without any effort to explain the contents.

This discussion turns now to possible issues that may arise in standardised contracts.

5.1.4 Issues in standardised contracts

This study believes that it is wise to identify the issues surrounding uniform contracts, as the standard form of moneylending agreement is newly implemented and there are other precedents from other prescribed agreements. In this context, the standard form of contract governing the sale and purchase of houses is selected.⁴⁷¹ The reason is that both moneylenders law and housing law have one purpose in common, i.e. to protect borrowers or purchasers against unscrupulous moneylenders and loan sharks

⁴⁷⁰ MLA 2003, s 27(3).

⁴⁷¹ Housing Developers (Control and Licensing) Regulations 1989, reg 11. The relevant schedules containing the format of the sale and purchase agreement is Schedules G and H.

or developers.⁴⁷² The consumers in both cases obviously have unequal bargaining power compared with that of the lender or developer. Further, both laws are enforced by the same Ministry and do not apply to the states of Sabah and Sarawak. In addition, both moneylenders and developers must obtain valid licences before engaging in their respective businesses. The sale and purchase agreement, however, has been enforced since 1982.⁴⁷³ As this standard agreement has been in practice for over twenty years, several issues have been explored and litigated in the courts. A discussion of two issues might offer some guidance on the moneylenders law; preparation of the moneylending agreement and the modification of moneylending agreement.

5.1.4.1 Preparation of moneylending agreements

As discussed earlier, standard moneylending agreements in moneylending transactions are now compulsory by virtue of the 2003 Amendment Act. However, there is no direct provision clarifying the party responsible for preparing the moneylending agreement. Nevertheless, the intention of the legislature can be deduced from sections 10P(2) and 23 of the MLA 2003 and regulation 10(3) of the MCLR. Section 10P(2) provides that a moneylender who does not enter into a

⁴⁷² In the context of the Moneylenders Law, the intention of the legislature is obviously stated in the preamble to MLA 2003;

‘An Act for the regulation and control of the business of moneylending, *the protection of borrowers* of the monies lent in the course of such business, and matters connected therewith’.

As for the housing law, the intention of the legislature was supported by the learned judges in several cases. In the case of *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31, Suffian LP at p. 34 stated that;

‘It is common knowledge that in recent years, especially when the government started giving housing loans making it possible for public servants to borrow money at 4% interest per annum to buy homes, there was an upsurge in demand for housing and that to protect home buyers, most of whom are people of modest means, from rich and powerful developers, Parliament found it necessary to regulate the sale of houses and *protect buyers* by enacting the Act.’

⁴⁷³ The first standardized sale and purchase agreement in Malaysia took the form of Schedule E which was prescribed by reg 12(1) of the Housing Developers (Control and Licensing) Regulations 1982.

moneylending agreement with the borrower in the prescribed form is liable to a criminal sanction if convicted. Under section 23, the borrower is only accountable to pay fees payable by law and legal costs, while regulation 10(3) states that the borrower shall be entitled to a complete set of the moneylending agreement including all annexures (if any) for the purpose of execution of the agreement, free of charge. Although these provisions do not directly shed light on who should prepare the agreement, some points might be worth deliberation. First, under section 10P(2), it is only the moneylender who is liable to criminal sanction if the agreement is not in the statutory form. This could indicate that it is the moneylender who is responsible for preparing the agreement. This assumption could be supported by the word 'entitled' in regulation 10(3) which may imply that the borrower is given the right to receive the moneylending agreement, which is certainly not being prepared by him. Second, section 23 provides that the borrower can only be required to pay the fees payable by law and legal costs: it could be inferred that it is the moneylender who prepares the agreement and the borrower may be accountable to pay for the costs of preparing the agreement.

In conveyancing practice, by drawing an analogy to the sale and purchase agreement of landed property, the long established practice⁴⁷⁴ is that it is the seller's solicitor who prepares the agreement and forwards it to the buyer's solicitor for approval. Although this tradition is well-recognized, the issue is still a recurrent problem faced by conveyancing solicitors. This situation is aggravated by the fact that there are

⁴⁷⁴ See P. H. Kenny & R. Hewitson, *Conveyancing*, 7th ed, Blackstone Press, London, 1999, p. 43; R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, 2nd ed, Blackstone Press, London, 2000, p. 59; D.G. Bransley & P.W. Smith, *Barnsley's Conveyancing Law and Practice*, 3rd ed, London, Butterworths, 1999, p. 136.

some who hold that it is the purchaser's solicitor who should prepare the sale and purchase agreement and send it to the vendor or his solicitor for approval.⁴⁷⁵

In the context of moneylending transactions it is here submitted, based on the arguments above, that the moneylender is the party responsible for preparing the moneylending agreement, since he is the one who provides the loan. The moneylender should draw up the agreement either in the form of Schedule J or Schedule K, as the case may be, and he must abide by the moneylenders law while preparing it. Although the borrowers are entitled to a free set of the moneylending agreements from the moneylenders, they still may have to pay legal fees to the moneylender's solicitors, whose duty is to draft the said agreement. Section 23 was drawn up to accentuate the fact that the moneylender is not allowed to charge any other costs and charges to the borrower, such as service charges or printing charges. It is also the case that any other payment that is unauthorised by the law, which is charged by the moneylender, can be set off against the loan.

5.1.4.2 Modification of moneylending agreement

Section 10P(1) requires that the moneylending agreement should be "in the prescribed form" and not "in accordance with the prescribed form"; therefore, another foreseeable issue is regarding the modification of the standardized moneylending agreement. The issue that may arise is whether any variation from this uniform agreement is permissible under the MLA 2003 and, if so, what are the limits of acceptable variation? These questions are best answered by making an in-depth analysis of the relevant law. The law is stated in section 10P of the MLA 2003 and

⁴⁷⁵ Yang Pei Keng, "The Vendor should Prepare the Sale and Purchase Agreement – the Developer or its Solicitor is not entitled to demand from the purchaser printing charges for the sale and purchase agreement", [1995] 1 *CLJ* ccvi.

regulations 10, 11 and 12 of the MCLR, whereas the format is laid out in Schedule J and Schedule K.

The wordings of section 10P(1) and Regulation 10(1) signify an absolute obligation to use the statutory form.⁴⁷⁶ The law also provides that any variation, by whatever means, without prior approval of the Registrar, will have severe implications that will affect the validity of the agreement.⁴⁷⁷ However, it is quite certain that an exception is provided by regulation 11, but this provision was worded badly so that the intention of the statute is not clear. Regulation 11 states:

“Notwithstanding regulation 10, where the Registrar is satisfied that owing to special circumstances or hardship or necessary compliance with any of the provisions in the moneylending agreement is impracticable or unnecessary he may, by a letter in writing waive, modify, change, alter, vary, add or omit such provisions” (the writer’s underlining)

The confusion is caused by the word “necessary” when it is presumed that the right word should be “necessity”. If the latter is adopted, then the intention of the legislation may be translated as being that the Registrar may vary the agreement by a letter in writing, on condition that he is satisfied that in view of special circumstances or hardships or necessity, compliance with *any provision* of the moneylending agreement is impracticable or unnecessary. Thus, it is submitted here that since the moneylender is entrusted to carry out the moneylending agreement in the prescribed form, the root phrase ‘*special circumstances or hardship or necessity*’ as in regulation

⁴⁷⁶ S 10P(1) states that “a moneylender who intends to lend money to a borrower *shall* enter into a moneylending agreement with the borrower, and that agreement shall be in the prescribed form,” while reg 10(1) provides that “every moneylending transaction without security *shall* be in the form prescribed in Schedule J and where the agreement for moneylending transaction with security *shall* be in the form prescribed in Schedule K and any moneylender who executes a moneylending agreement other than any of the Schedules commits an offence under the Act and shall on conviction be liable to the fine and imprisonment specified under subs 10P(2) of the Act.” (the writer’s italics)

⁴⁷⁷ MCLR, reg 10(2) states that “any waiver, modification, change, alteration, variation, addition or omission of any provision in Schedule J or K without the prior consent of the Registrar shall render the agreement to be void and have no effect and shall not be enforceable”.

11 must then be construed for the benefit of the moneylender.⁴⁷⁸ In this line of argument, it may be further submitted that a closer look at regulation 11 illustrates a wide discretion on the Registrar's part. The Registrar, therefore, is obliged to discharge his duty impartially in order to maintain the equality of bargaining power between the moneylender and the borrower.

The debate on the modification of a standardised agreement centres on the variation of either format or substance of the agreement. Variation of the former may not affect the essence of the contract but variation of the latter may have adverse implication. Examples of modification of substance may include omission or variation of interest rates and particulars of security of the loan. In contrast, modification of the format refers to non-compliance with the layout of Schedules J and K respectively.

Referring to the position in the housing cases, the learned Federal Court Judge, Suffian LP, held that only terms and conditions that might have been devised to conform to the requirements of the Housing Developers (Control and Licensing) Rules 1970 could be inserted into the standardized sale and purchase agreement.⁴⁷⁹ The learned Judge's judgment was based on the intention of Parliament to regulate the sale of houses and "to protect home buyers....from rich and powerful developers".⁴⁸⁰ However, SY Kok in his article opined that even if the modification of a sale and purchase agreement does substantially alter the fundamental provision in the standardized agreement, there would be no infringement of the law if the alteration

⁴⁷⁸ This also represents the view of SY Kok in explaining reg 11(3) of the Housing Developers (Control and Licensing) Regulations 1989, which is *pari materia* with reg 10(2) of the MCLR; SY Kok, *Law Governing the Housing Industry*, Malayan Law Journal Sdn. Bhd, Kuala Lumpur, 1998, p. 28.

⁴⁷⁹ *SEA Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 (FC).

⁴⁸⁰ *Ibid* at p. 34.

were for the *sole benefit* of the house purchaser.⁴⁸¹ This argument may illustrate that in housing matters, the interest of the borrower could override the statutory provision.

Applying the above argument to moneylending cases, one might ask whether a fundamental provision in relation to the moneylending agreement might be varied to the advantage of the borrower. In the moneylenders law, alteration of the fundamental substance of the agreement without the prior approval of the Registrar may not be permissible, as the interest of the moneylender may be prejudiced. Likewise, although the agreement was modelled to protect the interest of the borrower, this does not mean that the interest of the moneylender should be overlooked. While the moneylender is often referred to as the dominant party in the agreement, it is unjustifiable if such an agreement puts the moneylender in an unfavourable position.

On the other hand, if the modification removes the statutory protection of the borrower and results in the detriment of the borrower's interest, then such modification is deemed to infringe the law. It should always be considered that the purpose of enforcing the moneylenders laws and the utmost intention of the laws is to safeguard the borrower's interest. Thus the test to determine whether a variation of the standardized moneylending agreement is lawful or unlawful is to ask whether that attempted modification will remove the protective shell of the *bona fide* borrower.

Bearing in mind the intention of the legislature to *protect the borrower of the monies lent in the course of moneylending business*, it is submitted here that only modification that does not change in any way the basic substance of the contract but

⁴⁸¹ SY Kok, "Law Governing the Housing Industry: A Postscript", [1999] 2 *MLJ* cxxxi.

merely alters the formatting of the contract may be acceptable by law, provided that the borrower's interest is not violated. In other words, substantial compliance with the prescribed form is mandatory. This argument may find support in the words of Lord Hailsham:⁴⁸²

'The policy of the law has been repeatedly used to protect weaker of two parties who do not contract from bargaining positions of equal strength.'

A different situation is found in the UK, where variation to the credit agreement is permissible under section 82 of the CCA. Unilateral variation by the creditor is permissible if such a provision is contained in the consumer credit agreement.⁴⁸³ The creditor, for example, is permitted to vary the interest rate if such term is made clear in the contract.⁴⁸⁴ However, the variation only takes effect after notice of it is given to the debtor according to the law.⁴⁸⁵ Mutual variation is also permitted under the law where parties to the credit agreement are free to vary their contract as they think appropriate. According to the *Encyclopedia of Consumer Credit Law*, technically and legally, such variation may only take place "as a matter of contract, of contractual obligations by mutual agreement of the parties."⁴⁸⁶ Thus consensual variation may take place, for example, where a further advance is made under an existing fixed-sum loan agreement. In such a situation, the old agreement is deemed to be revoked and replaced with a new "modifying agreement".⁴⁸⁷ However, as mentioned before, any specified wording in the UK Agreement Regulations must be reproduced without any alteration or addition.⁴⁸⁸

⁴⁸² *Johnson v Moreton* [1978] 3 All ER 37, at p. 49.

⁴⁸³ CCA, s 82.

⁴⁸⁴ *Paragon Finance plc v Nash and Staunton* [2002] C.C.L.R. 2, para. A-016; *Sterling Credit Ltd. v Rahman* (No. 2) [2003] C.C.L.R. 113, para. A-466.

⁴⁸⁵ The Consumer Credit (Notice of Variation of Agreements) Regulations 1977.

⁴⁸⁶ A.G. Guest and M.G. Lloyd, *Encyclopedia of Consumer Credit Law*, London, Sweet & Maxwell, 1975 -, para. 2-083.

⁴⁸⁷ CCA, s 82(2).

⁴⁸⁸ See para 5.1.2.4.

In concluding the discussion on moneylending agreements, it is submitted here that the introduction of a prescribed agreement under section 10P of the MLA 2003 has certainly brought a new phase in moneylending transactions. It has rightly rectified a serious defect in the past, where borrowers were exploited through lack of uniformity of agreement. Important elements of the contract such as the contents and the format of the agreement have been established and verified and therefore, any uncertainty and ambiguity are avoided. The far-reaching effect brought by Schedules J and K will better facilitate moneylending transactions and assist the enforcement process, as well as protecting the borrowers' interest. However, despite the noble intention of a prescribed agreement, apparent weaknesses in the structure and the content of Schedules J and K constitute major barriers in safeguarding the borrowers' interest in the moneylending transaction. Absence of any regulation on four aspects - legibility of the agreement, usage of language, requirement for withdrawal as well as lack of statement of protection and security warnings, are all serious flaws that must be urgently addressed. Apart from that, the new requirement of attestation that impose an obligation on the attestator to explain the contents of the moneylending agreement to the borrower, irrespective whether the borrower understands the language in which the note is written, is a salutary rule for the protection of borrowers' interests.

This chapter moves to another important topic in relation to moneylending agreements: the statutory rights and duties of the parties under the moneylending agreement.

5.2 Statutory rights and duties of the parties under a moneylending agreement

Normally, once a contract is signed, both parties are bound by the terms of the contract. At the same time, they are also required to observe their statutory rights and duties. In the moneylending contract, such rights and duties can be derived from the moneylending agreement and the moneylending laws. There are general rights and duties which apply to both parties, and also specific rights and duties which concern only one particular party to the contract.

5.2.1 The borrower's rights and duties

5.2.1.1 Right to information

This study here believes that borrowers need protection, not because they are members of a vulnerable group such as the poorly educated or the low-income earners, but because as consumers, they are systematically unable to process the information they need to make good decisions. Thus, it is important that borrowers obtain the right information before they embark on a moneylending transaction and when they actually enter into the transaction.

The importance of receiving valid information about details of moneylending transactions cannot be denied. This is the role of moneylending advertisements. As discussed in depth in Chapter Three, a moneylending advertisement lists the details of the moneylender as well as the interest rates. In order to ensure that the public receive correct information from moneylenders, advertisement permits have been introduced to regulate moneylending advertisements.

The absence of information may result in a borrower entering an agreement without understanding his rights and obligations. Thus, attestation of moneylending agreements by qualified professionals should provide explanation to borrowers on the terms and conditions of the moneylending agreement. For example, the borrower should know how many instalment payments are to be completed, the principal and interest due without demand on a monthly basis, as well as the interest rate. It should also be made clear to him that in the event of default, he would be charged simple interest at the rate of eight per centum per annum on the unpaid sum of instalment on a day-to-day basis from the date of default until the instalment is paid.

5.2.1.2 Right to receive a copy of the moneylending agreement

The importance of receiving a copy of the moneylending agreement may be two-fold; first, as a warning of the borrower's risk and commitment, and second, as a record for future reference.⁴⁸⁹ Therefore, the borrower has an absolute right to receive a complete set of the moneylending agreement, including all annexures, if any, from the moneylender. The copy of the moneylending agreement to be supplied to the borrower must be a genuine copy so that the borrower will not be misled as to the effect of the document on him.⁴⁹⁰ The moneylender has no right to charge any fees or demand payment for providing the agreement to the borrower, as provided by regulation 10(3) of the MCLR. However, this ruling has been criticised for not really providing consumer protection, as members of the lower-income groups and ethnic minorities may not understand the document and/or simply fail to retain it for future reference.⁴⁹¹ In the moneylending case, this comment may possibly be refuted, as the compulsory attestation of the agreement, if properly monitored, could avoid any

⁴⁸⁹ G. Howells and S. Weatherill, *Consumer Protection Law*, 2nd ed, Ashgate, Hants, 2005, p. 317.

⁴⁹⁰ *Chai Sai Yin v Kok Seng Fatt* [1966] 2 M.L.J. 54 (F.C).

⁴⁹¹ G. Howells and S. Weatherill, *Consumer Protection Law*, Dartmouth, Aldershot, 1995, p. 254.

ignorance as to the terms of the agreement. However, it is agreed that some borrowers may have problems with the language of the document if it is in English. The regulation also specifies that the borrower is entitled to a complete set of the agreement before execution of the agreement. It is believed that the intention of the legislature is to ensure that the borrower is given the opportunity to examine the terms of the agreement before the contract is concluded. The agreement is only enforceable once it is duly signed by all parties to the contract and a copy of the agreement duly stamped is delivered to the borrower by the moneylender before the money is lent.

After discussing the rights of borrowers, it is appropriate to investigate their obligations. The following paragraphs discuss the duties of borrowers.

5.2.1.3 Duty to make repayments regularly

Along with his rights in the moneylending transaction, the borrower is also required to perform his duties under the said contract. The borrower is obliged to honour the terms of the moneylending agreement and comply with the monthly instalment payments as provided in the First Schedule, consistently. If the repayments are not observed regularly, the borrower may find himself in default of instalment payments. However, if the borrower fails to rectify the default, the moneylender is entitled to terminate the agreement and claim the balance outstanding from the borrower.⁴⁹²

5.2.1.4 Duty to discharge expenses and charges

Both item 5 of Schedule J and item 7 of Schedule K explicitly provide that all stamp duties and attestation fees shall be borne by the borrower. Therefore, the borrower

⁴⁹² MCLR, Schedule J, item 3; Schedule K, item 5.

may be required to pay the fees payable by law.⁴⁹³ However, no claim for service charges shall be directed to the borrower.⁴⁹⁴ Further, if the transaction involves lawyers, the ability to charge legal fees is limited to the scale of fees set down in the Solicitors' Remuneration Order 1991. Rule 4 of Order 1991 states that the fees 'shall include charges for normal copying and stationery and all other similar disbursements' in respect of any sale, purchase or other form of conveyance for completing any transaction. Thus, there is no possibility of inflating the legal fees. The law is also clear that the borrower is not liable to pay any extra fee or charges in regard to the moneylending agreement.⁴⁹⁵

Like borrowers, the moneylenders have rights and obligations under the moneylenders law. In fact, moneylenders are required to comply with twelve duties, which will be further investigated below.

5.2.2 The rights and duties of the moneylender

5.2.2.1 Right to charge simple interest in cases of default

The law provides that if the borrower defaults in the repayment of instalments in regard to principal or interest upon the due date, the moneylender is entitled to charge simple interest on the unpaid sum of instalment, which shall be calculated at the rate of eight per centum per annum from day to day from the date of default until the sum

⁴⁹³ MLA 2003, s 23.

⁴⁹⁴ *Yik Wah Trading (Pte) Ltd v Tan King Kak* [1972] 1 MLJ 94.

⁴⁹⁵ In the unreported case of *Indrani d/o Renganathan @ Indrani Singarajah & Sharmini a/p R Singarajah v Aneka Batu (M) Sdn. Bhd.* (Kuala Lumpur High Court Commercial Division No. D5-22-1535-92), the High Court confirmed the basic principle of conveyancing that it is the duty of the developer to prepare the sale and purchase agreement at its own cost. The Court held that the purchaser is not liable to pay for the printing charges for the sale and purchase agreement supplied by the developer or its solicitor.

of instalment is paid.⁴⁹⁶ As mentioned earlier, this new provision restricts any exploitation of the borrower through charging of high interest rate.

The following formula is adopted in calculating the interest:

$$R = \frac{8}{100} \times \frac{D}{365} \times S$$

- R - represents sum of interest to be paid.
- D - represents the number of days in default.
- S - represents the sum of monthly instalment which is overdue.

5.2.2.2 Right of action

There are two circumstances that enable a moneylender to terminate a moneylending agreement under the MCLR. The first instance is failure on the borrower's part to repay any instalment amount and interest in excess of twenty-eight days after its due date.⁴⁹⁷ The second is when the individual borrower is declared bankrupt or enters into composition or arrangement with his creditors.⁴⁹⁸ In cases where the borrower is a company, the moneylender may terminate the agreement when the company enters into liquidation, whether compulsorily or voluntarily.⁴⁹⁹ The borrower is then given fourteen days to rectify the contract or the agreement is deemed to be annulled.⁵⁰⁰ Once an agreement is terminated, the moneylender has the right to claim the balance outstanding from the borrower.⁵⁰¹ It may be deduced from the discussion above that

⁴⁹⁶ MCLR, Schedule J, item 2(1); Schedule K, item 2(1); see also MLA 2003, s 17(1).

⁴⁹⁷ MCLR, Schedule J, item 3(1)(a); Schedule K, item 5(1)(a).

⁴⁹⁸ MCLR, Schedule J, item 3(1)(b); Schedule K, item 5(1)(b).

⁴⁹⁹ Ibid.

⁵⁰⁰ MCLR, Schedule J, item 3(2); Schedule K, item 5(2).

⁵⁰¹ In cases where the balance outstanding is below RM250 000, the claim shall be in accordance with Order 45 of the Subordinate Court Rules 1980, in cases where the balance outstanding is above RM250 000, the claim shall be made under Order 79 of the Rules of the High Court 1980. Both Order 45 and Order 79 deal with moneylenders' actions.

under the MLA 2003, the right of a moneylender to take action in cases of default is clearly stated.

Where a moneylending agreement involves a security, there are two methods to claim the balance outstanding. If the security is an immovable property, charge actions over the property shall be dealt with in accordance with Order 83 of the Rules of the High Court 1980.⁵⁰² In cases of movable property, the moneylender may dispose of the asset by auction.⁵⁰³ He is also entitled to bid for and purchase the security at the auction.⁵⁰⁴ If there is any surplus from the proceeds of sale of the security, the moneylender must pay the amount to the borrower within thirty days after the auction.⁵⁰⁵

After discussing the rights of moneylenders, it will now deal with their duties.

5.2.2.3 Duty to have a valid moneylender's licence

The most important obligation of a moneylender is to possess a valid moneylending licence before he can engage in any moneylending business.⁵⁰⁶ In the event of non-compliance, the moneylender will run the risk of incurring criminal sanctions. Further, the validity of the moneylending agreement and also any security offered will also be affected. The first loan shark prosecuted under section 5(2) of the MLA 2003 was found guilty of the offence of carrying on a moneylending business without

⁵⁰² MCLR, Schedule K, item 5(4)(a).

⁵⁰³ MCLR, Schedule K, item 5(4)(b).

⁵⁰⁴ MCLR, Schedule K, item 5(5). The lender must forward to the borrower a notice stating the particulars of the auction within seven days after the auction; MCLR, Schedule K, item 5(6).

⁵⁰⁵ MCLR, Schedule K, item 5(7). Failure to do so would require the lender to pay the surplus together with liquidated damages calculated from day to day at the rate of eight per centum per annum of the surplus sum until the date the lender pays the surplus sum; MCLR, Schedule K, item 5(8).

⁵⁰⁶ MLA 2003, s 5.

licence and fined RM30,000 or six months imprisonment.⁵⁰⁷ The loan shark was discharged by the court after he had paid the fine.

5.2.2.4 Duty to display licence at all times

It is the statutory duty of a moneylender to display the moneylending licence in a conspicuous place at the business premise at all times.⁵⁰⁸ Since it is not clearly stated where the licence must be displayed, it may be assumed that it is upon the discretion of the moneylender to determine what is a conspicuous place at his premises. Indeed, this is a commendable rule, as it is believed that the intention of law is to inform prospective borrowers that they are dealing with licensed moneylenders. Since this is a legal requirement, a breach of this condition will incur criminal sanction.

5.2.2.5 Duty to keep accounts accurately

Every moneylender is obliged to keep a regular account of each loan made in a paged and bound book.⁵⁰⁹ It is important that the moneylender keep a clear account of each transaction, since such account must be produced in court in the event of recovery of any money lent or enforcement of any moneylending agreement or security made in respect of the loan.⁵¹⁰ This duty must be strictly observed as failure to do so would prevent the moneylender from enforcing any claim in regard to any default in the moneylending transaction. Apart from that, the moneylender would also be liable to criminal penalties.

⁵⁰⁷ "Along kena denda RM30,000" (Loan shark fined RM30,000), *Berita Harian*, 8 April 2005.

⁵⁰⁸ MLA 2003, s 5F.

⁵⁰⁹ MLA 2003, s 18(1).

⁵¹⁰ MLA 2003, s 21(2)

5.2.2.6 Duty to supply information

The law on the obligation to supply information as to the state of loan was provided in the original version of the Act, which has been retained in the MLA 2003. The only difference between the earlier and the latter provision is the amount payable for expenses for supplying information on the borrower's demand. Throughout the tenure of a moneylending agreement, the moneylender is obliged to supply information to the borrower in the form of account statements and loan or security documentation. This duty should only be discharged upon receiving a reasonable demand in writing and on tender of the sum of three *ringgit* and five *ringgit* respectively for expenses.⁵¹¹ The statement of account shall conform to the First Schedule of the moneylending agreement and contain the following particulars:⁵¹²

- “Date of loan, amount of the principal of the loan and rate per centum per annum or the amount of interest charged;
- The amount of any payment already received by the moneylender in respect of the loan and the date on which it was made;
- Arrears on the principal amount and interest; and
- The amount of every sum not yet due which remains outstanding and the date upon which it will become due.”

A serious consequence is borne by the moneylender if he fails without reasonable excuse to fulfil the statutory demand of the borrower.⁵¹³ He will be deprived of his right to sue for recovery of any sum due under the moneylending agreement while his default continues. In addition, interest cannot be charged in respect of the default

⁵¹¹ MLA 2003, s 19(1) & (2). These amounts are equivalent to 45 pence and 50 pence respectively. Under the old law, the expenses charges were only fifty cents (equivalent to five pence).

⁵¹² MLA 2003, s 19(1)(a-d).

⁵¹³ MLA 2003, s 19(3).

period. Moreover, if the default continues after proceedings have ceased to lie in respect of the loan, the moneylender is liable to a fine not exceeding fifty *ringgit* for every day on which the default continues.⁵¹⁴ Surprisingly, the low amount of the fine was retained in the new law. This is the only amount of fine which has not been increased by the amendment.

5.2.2.7 Duty to charge authorised expenses only

Under the old law, the only expenses that could be legally charged to the borrower were stamp duties, fees payable by the law and legal costs relating to the loan transaction. Other expenses were deemed to be illegal and any such payment was recoverable as a debt due to the borrower. In cases where a loan had been completed, the sum due that had yet to be recovered could be set off against the amount actually lent. This provision has been retained, with only a slight change under section 23 of the MLA 2003.

5.2.2.8 Duty to provide receipt

The moneylender has a duty to provide a receipt to the borrower after receiving payment.⁵¹⁵ Any breach of this duty is an offence, and if convicted, the moneylender is liable to be fined or imprisoned or both.⁵¹⁶ This amended provision certainly removes the absurdity in the old law whereby receipts were not given as a matter of course or right. There had to be a demand by the borrower and if there was no demand, no receipt was issued.⁵¹⁷ It is submitted here that the amendment is timely

⁵¹⁴ MLA 2003, s 19(3).

⁵¹⁵ MLA 2003; s 19(4).

⁵¹⁶ Ibid.

⁵¹⁷ MLA, s 19(4).

and definitely in line with the commercial practice whereby a receipt must be issued as a proof of payment.

5.2.2.9 Duty in regard to security

It is provided that the moneylender is required to exercise the same care and diligence over the security in his custody as would a prudent owner over his own property.⁵¹⁸

The moneylender is also responsible for any loss or damage caused by fire, theft, negligence or otherwise that occurs during the tenure of security.⁵¹⁹ In cases where any security is damaged or destroyed by fire, the value of the security shall, for the purpose of compensation to the borrower, be assumed to be one quarter more than the value of the security so lodged.⁵²⁰ It is also a duty of the moneylender not to encumber the security for whatever purpose.⁵²¹

5.2.2.10 Duty to serve documents

The moneylender is obliged to provide the borrower with a copy of an agreement that is duly signed and stamped before money is lent.⁵²² Further, the moneylender or his solicitor is also obliged to serve any notice, request or demand under a moneylending agreement. Such duty is deemed to be fulfilled either by sending the said document by A.R.⁵²³ registered post or delivered personally.⁵²⁴ This amended provision is more relaxed than the old section 16, which required a copy of the memorandum authenticated by the moneylender or his agent to be delivered to the borrower. The requirement for authentication meant that not only had a signed copy of the

⁵¹⁸ MCLR, Schedule K, item 4(1).

⁵¹⁹ Ibid, item 4(2).

⁵²⁰ Ibid, item 4(3).

⁵²¹ Ibid, item 4(4).

⁵²² MLA 2003, s 16.

⁵²³ A.R. stands for acknowledgement receipt

⁵²⁴ MLA 2003, s 29E; MCLR, Schedule J, item 6 and Schedule K, item 8.

memorandum to be delivered to the borrower but the moneylender had also to endorse it, certifying that the borrower had received the copy of the original memorandum.⁵²⁵ It may be suggested here that authentication of documents as required in the past was mainly to ensure that the borrowers received the documents safely. At present, such practice may be abandoned since proof of receipt can be determined by a ruling that documents sent by A.R. registered post shall be deemed to have been received upon the expiry of a period of five days of posting.⁵²⁶ Further, A.R. registered post is a highly secure service for important documents and enables the sender to receive an acknowledgement of receipt of the items by the borrower.

5.2.2.11 Duty not to fraudulently induce any person to borrow

Section 29 of the MLA 2003 expressly provides that it is an offence to fraudulently induce or attempt to induce any person to borrow money or to agree to the terms on which money is borrowed. The law further states that false inducement may occur through any false, misleading or deceptive statement, representation or promise or, by any dishonest concealment of material facts. This provision applies to an individual moneylender or his employee, a moneylending company, including the director, general manager, manager or officer of the company, a moneylending society, including the president, vice-president, secretary, treasurer or other officer of a society, and a moneylending firm, including the partner or member, or other officer.

5.2.2.12 Duty to comply with relevant written law

The MLA 2003 and the subsidiary legislation made thereunder constitute the most important laws in regulating moneylenders' conduct in the moneylending transaction.

⁵²⁵ L. H. Singh, *Law of Moneylenders in Malaysia and Singapore*, Sweet & Maxwell Asia, Kuala Lumpur, 2003, p. 6.

⁵²⁶ MCLR, Schedule J, item 6 and Schedule K, item 8.

Apart from the MLA 2003, the moneylender is also obliged to observe the provisions and requirements of any other written law affecting the moneylending business.⁵²⁷ Such laws are for example, the Contract Act 1950 and the Penal Code.

In concluding the discussion on rights and duties of moneylenders and borrowers in a moneylending transaction, it is envisaged that the imposition of statutory rights and duties for both moneylenders and borrowers are likely to instil awareness in both parties of their respective roles in the moneylending transaction, so that both parties are satisfied with the contract they entered into. The statutory rights of a borrower include receiving correct information regarding the moneylending transaction before and after he entered into the contract. Along with the rights, the law also imposes certain duties, such as the duty to observe repayments. Likewise, a moneylender has the right to take certain actions when the borrower defaults in his duties, and also many duties to be observed to ensure that the rights of borrowers in a moneylending transaction are protected.

This chapter now moves to the topic of interest.

5.3 Interest

Interest is perhaps another significant aspect in the conduct of moneylending business that should be further examined. As stated by Singh, “interest is at the heart of a moneylending transaction.”⁵²⁸ The discussion will involve looking at the effect of the two new amendments brought by the MLA 2003; the fixed ceiling interest rate and interest on default payments. Another issue that requires further investigation is the

⁵²⁷ MCLR, Schedule J, item 4; Schedule K, item 6.

⁵²⁸ Awther Singh, *Sale of Goods, Hire-Purchase and Moneylending in Malaysia*, Quins Pte. Ltd, Singapore, 1980, p. 207.

old provision on reopening of a moneylending transaction. This regulation will be scrutinised in the light of the CCA concept of extortionate credit bargains as well as the new unfair relationships test.

The issue of interest is crucial to the law on moneylenders since interest is the profit element for moneylenders, whereas on the other hand, it is a burden to the borrowers. As it is a source of income for moneylenders, history shows that borrowers have been exploited and abused by the charging of excessive rates of interest by rogue moneylenders. Hence, the need of a mechanism to ensure that borrowers are not exploited by excessive interest rates.

According to section 2 of the MLA 2003, interest is defined as follows:

“(I)nterest” does not include any sum lawfully charged in accordance with this Act by a moneylender for or on account of stamp duties, fees payable by law and legal costs but, save as aforesaid, includes any amount by whatsoever name called in excess of the principal paid or payable to a moneylender in consideration of or otherwise in respect of a loan.’

This was the original definition of interest and was retained in the MLA 2003. The first part of the definition clearly spells out the non-interest items. It also seems that expenses such as service charges, introductory fees as well as surveyors’ fees could not be included as interest. However, as pointed out by Singh, the positive definition of interest as “any amount by whatsoever name called in excess of the principal” is almost excessively general.⁵²⁹ It may pose a danger of having the effect of catching any and every such sum paid in the loan, except those exempted items.

⁵²⁹ Awther Singh, *Sale of Goods, Hire-Purchase and Moneylending in Malaysia*, Quins Pte. Ltd, Singapore, 1980, p. 203.

There are six important elements on the topic of interest, as provided under the MLA 2003. First, the maximum rate of interest is set to be 12% per annum for secured loans and 18% per annum for unsecured loans.⁵³⁰ Second, the amount of interest should not exceed the amount of the principal.⁵³¹ Third, the interest charged must not be excessive and “harsh and unconscionable or substantially unfair.”⁵³² Fourth, compound interest is totally prohibited.⁵³³ Fifth, the moneylender is entitled to charge default interest calculated at the rate of eight per centum per annum from day to day of default in payment of the sum or instalment until that sum or instalment is paid.⁵³⁴ Finally, if the moneylender defaults in the supply of a copy of the accounts statement requested by the borrower, the moneylender cannot levy interest during the period of the default.⁵³⁵

The following discusses the first improvement introduced by the new law: the implementation of a maximum interest rate.

5.3.1 Fixed ceiling interest

Under the old moneylenders law, there was no statutory restriction upon the rate of interest. However, the law did control the interest rates through section 22 of the MLA which assumed that interest above 12% per annum for a secured loan or 18% per annum for an unsecured loan was excessive and the transaction was harsh and unconscionable and substantially unfair. This presumption was, nevertheless, subject

⁵³⁰ MLA 2003, s 17A(1).

⁵³¹ Ibid, s 17A(2).

⁵³² MLA 2003, s 21(2). This is the most important s as to the powers of the Court to reopen a transaction. As to what is harsh and unconscionable, this is a question to be determined by the Court, “having regard to the risk and all the facts and circumstances (including facts and circumstances arising or coming to the knowledge of the parties after the date of the transaction;” See further in MLA 2003; s 21(2).

⁵³³ MLA 2003, s 17(1).

⁵³⁴ Ibid.

⁵³⁵ MLA 2003, s 19(3).

to the power of the court under section 21. Section 21(2) empowered the court to reopen a transaction that was harsh and unconscionable and substantially unfair. In cases where interest charged on the loan was not expressed in terms of a rate, section 24 of the MLA provided a formula for the calculation of interest.

Based on the above, it may be suggested that the rate of interest was controlled through an unconscionability standard, but there was nothing in the statutory provisions which made it illegal for moneylenders to charge more than the presumptive limit. Thus, in cases where borrowers were charged excessive interest rates, the only remedy for them was when the court reopened the transaction and ordered payment to be made to them, or set aside or altered any security given. Regrettably, there is no record of successful reopenings under section 21 of the MLA.⁵³⁶ Thus, it may be suggested that this was the reason why such presumption was taken away by the MLA 2003 and a fixed ceiling of interest was set. Based on this premise, it may be further suggested that the move to abolish the presumption of excessive interest is creditable as the capping regime is clear and simple and may prevent the charging of exorbitant interest. Further, the abolition of section 24, which provided for calculation of interest, was also commendable as the method of calculation was not only complicated but also confusing.

Section 17A of the MLA 2003 has fixed the interest rate for secured and unsecured loans not exceeding 12% per annum and 18% per annum respectively. If the rate imposed exceeds the fixed rate, the consequence is that the loan agreement signed

⁵³⁶ Reopening of moneylending transaction is further discussed in 5.1.6.3.

shall be void and no effect and unenforceable.⁵³⁷ The high interest rate may perhaps be justified because of the high credit risk that the moneylender has to absorb in relation to the uncertainty of repayment of loans.⁵³⁸ The capping regime is certainly called for, as the serious problems of loan sharks in Malaysia require greater legal controls over interest rates.⁵³⁹

As the fixed ceiling interest rate was recently introduced by the MLA 2003, there may be some concern that the maximum rate would become the prevailing rate. An analysis of the moneylending advertisements as discussed in Chapter Three suggests that this is the common practice among moneylenders. On the other hand, it could be argued that it is anticipated that the maximum limit will be employed by the moneylenders, and therefore, it has been decided that the maximum limit is reasonable, in light of the high credit risks mentioned above. Although this study agrees that a fixed interest ceiling will prevent the charging of excessive interest, there are opponents of fixed interest ceilings. The arguments against fixed ceilings are the danger of it becoming a prescribed rate,⁵⁴⁰ the use of 'strong-arm' tactics to enforce repayment⁵⁴¹ and the impossibility of determining an appropriate rate ceiling.⁵⁴²

In contrast to Malaysia, the UK has not had rate ceilings since the introduction of the CCA, which is a clear departure from the English Moneylenders Acts. The Crowther

⁵³⁷ MLA 2003, s 17A(3).

⁵³⁸ SY Kok, "Who is a moneylender in year 2003?" [2004] 3 *MLJ* cxxi. Further, it is acknowledged that the doorstep collection credit market in the UK also faces high interest rate charges; see CC White Paper, para. 3.54.

⁵³⁹ Bently and Howells seem to agree that rate regulations are needed to control loan sharks problems; see L. Bently and G. Howells, "Loansharks and Extortionate Credit Bargains-2" *Conveyancer and the Property Lawyer*, July-August 1989, p. 238.

⁵⁴⁰ R.M. Goode (edit.), *Consumer Credit*, Leyden/Boston, A.W. Sijthoff, 1978, p. 138.

⁵⁴¹ L. Bently and G. Howells, "Loansharks and Extortionate Credit Bargains-2", *Conveyancer and the Property Lawyer*, July-August 1989, p. 240.

⁵⁴² White Paper, *The Report of the Law on Consumer Credit*, 1973, Cmnd. 5427, para. 68.

Committee were in favour of control of interest rates and proposed a presumption that a particular rate of interest be deemed to be excessive, but such recommendation was rejected by the UK Government.⁵⁴³ There were suggestions a maximum interest rate should be fixed in the UK as it was proposed that an interest rate ceiling might overcome exploitative lending, enhance consumer protection and tackle poverty.⁵⁴⁴ However, this recommendation was also rejected by the UK Government.⁵⁴⁵ According to the Government, the capping regime is not the right approach to shield borrowers from excessive credit costs. Among the reasons given were the practical difficulties of introducing fixed ceiling rates in the UK's 'sophisticated and diverse credit market', the possibility that creditors could always increase the cost of credit with other techniques and the concern that the maximum rate would be the established rate.⁵⁴⁶

Another research study was conducted in 2004 on the effect of interest rate controls in the United States, France and Germany, during the intense debate in the UK about "affordable credit for all" and the suggestion of introducing rate ceilings.⁵⁴⁷ The study of the United States, for example, shows that the state Governments have a tradition of fixing rate ceilings which is intended to prevent loan sharking. Nevertheless, the findings of this research too failed to convince the UK Government to introduce maximum limits on interest rates in the UK. It may be pointed out that

⁵⁴³ Crowther Report, pp. 275-276; White Paper, *The Report on the Law on Consumer Credit*, 1973, Cmnd. 5427, pp. 19-20.

⁵⁴⁴ Elaine Kempson and Claire Whyley, *Extortionate Credit in the UK (A Report to the DTI)*, Personal Finance Research Centre, London, 1999. Available: <http://www.dti.gov.uk/ccp/topics1/extortionate.htm> (accessed May 2004) (hereafter "UK Extortionate Credit Report").

⁵⁴⁵ CC White Paper, paras. 3.50 – 3.51; DTI, *Discussion paper on the Extortionate Credit Provisions in the Consumer Credit Act 1974*, 2000.

⁵⁴⁶ CC White Paper, para. 3.50.

⁵⁴⁷ DTI, *The effect of interest rate controls in other countries*, August 2004. Available: <http://www.dti.gov.uk/ccp/topics1/pdf1/creditpolicis1.pdf> (accessed 19 June 2005).

one of the interesting outcomes of the research is that no evidence was found that rates tend to climb towards the ceilings in the USA, France and Germany. Unfortunately, this finding is not consistent with the practice in Malaysia.

5.3.2 Interest on default payments

Apart from the capping regime, another commendable amendment made by the MLA 2003 is to fix the rate to be charged on default payments. Upon occurrence of such an event, a daily interest rate of eight per centum per annum, to be calculated on the outstanding balance to be repaid, may be charged by the moneylender on the borrower.⁵⁴⁸ This new law has replaced the old law which authorised the charging of simple interest “at a rate not exceeding the rate payable in respect of the principal” of any default payment.⁵⁴⁹ It may be pointed out that under the old law, moneylenders were permitted to charge excessive amount of default interest, so long as it did not exceed the amount of the principal of the loan. Borrowers may suffer from paying huge sums of interest, and therefore, the abolition of the old calculation of default interest is certainly called for. With the restriction under the new law, moneylenders can no longer impose interest rates as they please on unsettled loans.

It is interesting to highlight the difference between compound interest and simple interest as it may be argued that charging of default interest is also some sort of compound interest. As mentioned earlier, charging compound interest is prohibited by section 17(1), but charging default interest is permissible by virtue of the proviso to section 17(1). According to Singh, it was ironic that compound interest was prohibited under section 17 when the proviso to section 17 seemed to allow the

⁵⁴⁸ MLA 2003, proviso to s 17(1).

⁵⁴⁹ MLA, proviso to s 17(1).

manipulation of interest.⁵⁵⁰ This misunderstanding may be removed if the definitions of compound interest and simple interest are examined. Compound interest may be defined as “a system of paying interest in which interest is paid both on the original amount of money invested or borrowed and on any interest which that original amount has collected over a period of time,” while simple interest means “money that is paid only on an original amount of money that has been borrowed or invested, and not on the additional money that the original sum earns.”⁵⁵¹ Based on the interpretation above, it is clear that the charge of default interest under the proviso to section 17(1) is not compound interest.

5.3.3 Reopening of Moneylending Transactions

If a moneylender wishes to enforce a moneylending agreement or a security or to recover any debt owed by the borrower, he has to file a Court action.⁵⁵² The moneylender must also produce a statement of his account as prescribed in section 19 of the MLA 2003. If the Court finds evidence that the interest charged in respect of the sum actually lent is excessive and that the transaction is harsh and unconscionable or substantially unfair, the Court must reopen the transaction.⁵⁵³ In other words, when a borrower is sued by the moneylender for not making repayments, the borrower may plead section 21(2), if applicable; and the court has a duty to relieve borrowers against excessive interest by reopening moneylending transactions.

⁵⁵⁰ Awther Singh, *Sale of Goods, Hire-Purchase and Moneylending in Malaysia*, Quins Pte. Ltd, Singapore, 1980, pp. 208–210.

⁵⁵¹ See <http://dictionary.cambridge.org/define.asp?key=15732>

⁵⁵² MLA 2003, s 21(1); in cases where the balance outstanding is below RM250000, the claim shall be in accordance with Order 45 of the Subordinate Court Rules 1980, and in cases where the balance outstanding is above RM250 000, the claim shall be made under Order 79 of the Rules of the High Court 1980. Both Order 45 and Order 79 deal with moneylenders' actions.

⁵⁵³ MLA 2003, s 21(2).

Basically, the doctrine of "harsh and unconscionable" is a principle applied under the law of contract. The concept of unconscionability is not new in Malaysia and the term "unconscionable" has been used in Malaysian cases. Besides the MLA, the concept of unconscionability is also statutorily provided under the HPA.⁵⁵⁴ Unfortunately, it may be suggested that these provisions have not been well utilised, due mainly to a lack of legislative guidance and the conservatism of both the courts and legal profession. Originally, the power of the court to reopen harsh and unconscionable or substantially unfair moneylending transactions was included under section 21(2) and section 22 of the parent Act. Section 21(2) was retained under the new law, but section 22, which dealt with presumption of excessive interest, was deleted. Section 21(2) of the MLA 2003 states that:

"Where there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive and that the transaction is *harsh and unconscionable or substantially unfair*, the court shall reopen the transaction and take an account between the moneylender and the person sued and shall, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken between them and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest and legal costs as the court, having regard to the risk and all the facts and circumstances (including facts and the circumstances arising or coming to the knowledge of the parties after the date of the transaction) may adjudge to be reasonable, and, if any such excess has been paid or allowed in account by the debtor, may order the creditor to repay it and may set aside either wholly or in part or revise or alter any security given or moneylending agreement made in respect of money lent by the moneylender and, if the moneylender has parted with the security, may order him to indemnify the borrower or the other person sued.

Provided that nothing in this subsection shall prevent any further or other relief being given in circumstances in which a Court of equity would give such relief."⁵⁵⁵

Section 21(2) is a very broad section: its main element is that the court has jurisdiction to reopen a moneylending contract on the basis that the interest is excessive and the transaction harsh and unconscionable or substantially unfair. This

⁵⁵⁴ S 33(1) of the Hire-Purchase Act provides for the court to reopen a hire-purchase transaction which is harsh and unconscionable or is otherwise such that it will be just to give relief.

⁵⁵⁵ Italics inserted.

provision empowers the court to revise the contractual terms between the parties and modify the terms, if necessary. It could be argued that such statutory power represents a significant departure from the law of contract, whereby the court could only interfere in a contractual transaction if the long-established elements of mistake, undue influence, misrepresentation, incapacity or illegality were present in the said contract.

There are two circumstances which justify a court in reopening a moneylending transaction. The first is where the interest charged is excessive and the transaction harsh and unconscionable. Alternatively, the court could also reopen a moneylending transaction if the interest charged is excessive and the transaction is substantially unfair. In both situations, it must be proved that the interest charged in respect of the sum actually lent *is* excessive. Section 21(2) corresponds, with some variation, to the English, Australian, New Zealand, Singaporean and Sri Lankan Moneylenders' Acts.⁵⁵⁶ However, there are no reported decisions under this section in Malaysia, Singapore and Sri Lanka.

5.3.3.1 Excessive Interest

It is important to analyse the two circumstances that empower the court to reopen a moneylending transaction and to see the changes brought by the MLA 2003 regarding this situation. The main factor that enabled the reopening of a transaction, as provided under section 21(2), is proof of excessive interest charged on the sum borrowed. The importance of establishing excessive interest is crucial because of the

⁵⁵⁶ See the respective Moneylenders Acts: in England, s 1 of the Act of 1900 and s 10(1) of the Act of 1927; in Australia, NSW Act (1941-1961) s 30; Victoria (1958) s 28; Southern Australia (1940-1960) s 32; Queensland (1916-1962) s 4; in New Zealand (1908) s 3; in Singapore (Chap. 188) s 22(2); in Sri Lanka; Ord. No. 2 of 1918 s 2. The laws in England, Australia and New Zealand have now been repealed.

conjunctive “and” after the word “excessive” in section 21(2). Under the old moneylenders law, interest above 12% per annum for a secured loan or 18% per annum for an unsecured loan was presumed to be excessive and in such a case the transaction could be considered harsh and unconscionable or substantially unfair.⁵⁵⁷ This presumption was, however, removed under the new law. Therefore, it may be assumed that once the interest rate goes higher than the maximum, it is evidence of excessive interest. Thus, the onus is on the moneylender to show that the interest was not excessive and the transaction was not harsh and unconscionable.⁵⁵⁸

It is also important to discuss the relationship between section 21(2) and section 17A(3). The former empowers the court to reopen a moneylending transaction if there is evidence of excessive interest rates charged on the loan and other factors discussed above, whereas the latter explicitly provides that where interest is charged above the maximum limit, the agreement shall be void, of no effect and unenforceable and the moneylender is also liable to fines and imprisonment. It could be argued that if the interest charged is above the ceiling rate, the interest is deemed to be excessive, and therefore the moneylending agreement is deemed to be void, of no effect and unenforceable. Therefore, section 21(2) cannot be invoked at all. It should be emphasised that once a contract is declared to be void, of no effect and enforceable by the Court, no further action can be taken by the parties. Further, it should be noted that under the old moneylenders law, it was not illegal to charge excessive interest rates but that such practice is prohibited under the new law. Hence, the need of section 21(2) to protect borrowers against credit costs. Thus, the question may be raised: is there any need to retain section 21(2) in the new law?

⁵⁵⁷ The MLA, s 22(1).

⁵⁵⁸ This test was established in *Reading Trust Ltd v Spero* [1930] 1 KB 492, p. 509.

This study here believes that although there is direct control over interest rates, there is every need to preserve section 21(2) in the MLA 2003. It is suggested here that borrowers may want to invoke section 21(2) even if the transaction does not exceed the limit. Borrowers may argue that the maximum rate of 12% per annum for a secured loan or 18% per annum for an unsecured loan is excessive and the transaction is harsh and unconscionable and substantially unfair, hence, the necessity to maintain section 21(2), to meet the need of the borrowers.

5.3.3.2 Harsh and unconscionable transaction

'Harsh and unconscionable' is a phrase that combines aspects of both severity and immorality in one transaction. It does not merely connote an unreasonable transaction: the degree is much higher; the terms are "so unfair to be oppressive".⁵⁵⁹ In *Alec Lobb Ltd v Total Oil GB Ltd*,⁵⁶⁰ Peter Millet Q.C, after referring to counsel's contention of the transaction being harsh and unconscionable, said:

"...; for the word 'unconscionable' seems to relate both to the terms of the bargain and to the behaviour of the stronger party. It is not enough to show that the bargain was a hard or unreasonable one; it must be shown that 'one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience'".⁵⁶¹

In the UK, most of the cases where the courts intervened were cases in which the interest levied was excessive. There is, however, a limited class of cases where the court gave relief more generally. Failure on the part of the debtor to understand the transaction,⁵⁶² taking advantage of the borrower's necessity,⁵⁶³ improperly tempting a

⁵⁵⁹ See R.M. Goode, *Consumer Credit Law*, London, Butterworths, 1989, p. 756.

⁵⁶⁰ [1983] 1 All ER 944, at p. 961.

⁵⁶¹ *Multiservice Bookbinding Ltd v Marden* [1978] 2 All ER 489 at 502, per Browne-Wilkinson J.

⁵⁶² *Halsey v Wolfe* [1915] 2 Ch 330.

⁵⁶³ *Blair v Buckworth* (1908) 24 TLR 474.

borrower,⁵⁶⁴ misrepresentation by the lender during negotiations,⁵⁶⁵ and lack of independent advice to a daughter who was guaranteeing her mother's loan,⁵⁶⁶ or a solicitor acting for both parties,⁵⁶⁷ have all been held to be harsh and unconscionable. Hence, the court can create a fresh bargain between the parties in place of the impeached one. A useful summary of the principle applicable was provided by Dwyer J in *Lean Ltd v Dale*.⁵⁶⁸

'Before granting relief the court is to be satisfied that the transaction is in fact harsh and unconscionable. This means something more than that it imposed hard terms on the borrower: it suggests in addition to the existence of circumstances which enable the lender to impose such terms, something in the nature of oppression and abuse of power referred by Lord Loreburn. I see nothing unconscionable in a lender prescribing the conditions on which he is willing to lend his money, if the borrower is quite free to take it or leave it; but a transaction becomes unconscionable when a lender is in a position of undue advantage, and uses it to treat a borrower unfairly or extortionately. Such a provision may arise when the borrower is helpless or ignorant or inexperienced or unfit for business affairs; or where he is in extreme need, without alternative, and unable to exercise any real choice; or where he has been tempted into extravagance or improvidence; or from other similar causes. In such cases the parties are not really on equal footing; and where the borrower undertakes to pay what has been sometimes called a monstrous or outrageous rate of interest, or even a rate substantially greater than what other borrowers pay, that may well justify an inference that some such circumstances may have been, and presumably were, present.'

5.3.3.4 Substantially unfair

The phrase 'substantially unfair' can only be found in the moneylenders laws in Malaysia, Singapore and Sri Lanka. Unfortunately, there are no previous judgments on this provision recorded. It may be suggested that the addition of these words to the Malaysian law showed that the intention of Parliament was to broaden the grounds on which the court may reopen a transaction. Theoretically, providing another alternative to reopen a transaction may show the genuine purpose of the law to protect

⁵⁶⁴ *Lewis v Mills* (1914) 30 TLR 438.

⁵⁶⁵ *Victoria Daylesford Syndicate Ltd v Dott* (1905) 21 TLR 742, *Harrison v Gremlin Holdings Pty Ltd* [1962] NSW 112.

⁵⁶⁶ *Lancashire Loans Ltd v Black* [1934] 1 KB 380 (CA).

⁵⁶⁷ *Jennings v Seeley* (1924) 40 TLR 97; cp *Adams v Kingsway Home Finance Co Pty Ltd* [1966] 1 NSW 683.

⁵⁶⁸ (1936) 39 WALR 22, 26-27.

borrowers in moneylending transactions, as it would probably be easier to prove a transaction to be “substantially unfair” than “harsh and unconscionable”. However, it is submitted here that in actual fact, it is difficult to distinguish a situation to which “substantially unfair” would apply but not “harsh and unconscionable”, or vice versa. Furthermore, since there were no decided cases to refer to, it may be presumed that the court would be more comfortable to find a transaction “harsh and unconscionable”, as there are precedents under the English law. Therefore, there may be room to argue that the words “substantially unfair” are redundant.

As mentioned earlier, section 21(2) was rarely used by the court, evidenced by the fact that there were no successful reopenings of moneylending transactions. For example, in the case of *Soh Eng Keng v Lim Chin Wah*⁵⁶⁹ the Court admitted that the claimant had loaned out money at excessive interest contrary to section 22 of the MLA. However, the transaction was never reopened since the Court found that the moneylenders were unlicensed, and therefore the contract was rendered unenforceable. In an unreported case of *Lien Chong Credit and Leasing Sdn Bhd v Srisaga Holdings Sdn Bhd & Ors*,⁵⁷⁰ the High Court in determining an application for summary judgment said that there was a clear inference that the interest charged in the said case was excessive and that the transaction was harsh and unconscionable and substantially unfair. The Court also stated that if the suit went for trial, it would enable the Court, in accordance with section 21(2) of the MLA, to reopen the transaction. Unfortunately, the case never went to trial.

⁵⁶⁹ [1979] 2 MLJ 91

⁵⁷⁰ Civil Suit No. 22-189 of 1993

Based on the discussion above, it is important to determine why there does not appear to be a single reported case where interest has been found to be harsh and unconscionable throughout the years. This may be because loans might have been held irrecoverable for other reasons such as failure to obtain moneylending licence, non-compliance of moneylending contract or failure to maintain proper accounts. On the other hand, it may also be intended that statutory intervention is discouraged, by narrowing the scope with a high intervention threshold. Furthermore, it was mentioned earlier that the doctrine of “harsh and unconscionable” has not been well utilised, even under the law of contracts. Likewise, a similar phenomenon has been seen in the English law, where the court has rarely set aside harsh and unconscionable bargains.⁵⁷¹ More than twenty years ago in the UK, the CCA introduced the wider term of “extortionate credit bargains” to replace “harsh and unconscionable” bargains.

5.3.4 Extortionate credit bargains

The provision on extortionate credit bargains entered into force on May 16, 1977⁵⁷² to replace the term “harsh and unconscionable” transaction, although no criticism was found in the literature of the phrase “harsh and unconscionable” transaction to justify such a change.⁵⁷³ The CCA empowers the court to reopen extortionate bargains⁵⁷⁴ and remedy such bargains.⁵⁷⁵ This statutory intervention has since become the most controversial power given to the court by the legislation.⁵⁷⁶

⁵⁷¹ R.M. Goode, *Consumer Credit Law*, London, Butterworths, 1989, p. 752.

⁵⁷² CCA, schedule 3, para 2.

⁵⁷³ H.W. Wilkinson, “Extortionate Credit Bargains under the Consumer Credit Act 1974”, (1979) 8 *Anglo-Am. Law Rev.* 240 at p. 241.

⁵⁷⁴ CCA, s 139.

⁵⁷⁵ As provided in ss 137 and 138. See also H.W. Wilkinson, “Extortionate Credit Bargains under the Consumer Credit Act 1974”, (1979) 8 *Anglo-Am. Law Rev.* 240 at p. 260.

⁵⁷⁶ G. Stephenson, *Consumer Credit*, Collins Professional Books, London, 1987, p. 166; D. Oughton and J. Lowry, *Textbook on Consumer Law*, 2nd ed, Blackstone Press Limited, London, 2000, p. 370.

According to section 138(1), a bargain is extortionate if the payments to be made by the debtor are grossly exorbitant or otherwise grossly contravene ordinary principles of fair dealing. Section 138(2) of the CCA sets out the particular conditions to which the court ought to have regard, provided these are established by evidence. These criteria include the prevailing interest rates at the time of the transaction, and factors relevant to the debtor or creditor. The factors affecting the debtor are his age, experience, and business capacity and state of health.⁵⁷⁷ The pressure on the debtor at the time of making the credit bargain is also considered but such pressure must be genuine.⁵⁷⁸ The degree of risk taken by the creditor in regard to the security and the relationship between the debtor and creditor is also assessed.⁵⁷⁹ Alternatively, even if the transaction cannot be challenged on any of the foregoing grounds, the court can intervene, where the transaction “otherwise grossly contravenes ordinary principles of fair dealing.” The burden of disproving that the bargain is extortionate is on the creditor, once the debtor has made such an allegation with prima facie evidence.

Professor Goode and Perks J. in *Castle Phillips Finance Co. Ltd. v Khan*⁵⁸⁰ were of the view that the terms ‘harsh and unconscionable’ and ‘extortionate credit’ both bear the same meaning. Likewise, Bennion, the drafter of the CCA, opined that there was no significant change in the meaning as “the term is a more up-to-date version of the expression ‘harsh and unconscionable’”.⁵⁸¹ Similarly, Professor Guest and Lloyd were of the opinion that the term “grossly exorbitant” may be construed in the light of

⁵⁷⁷ CCA, s 138(3). The creditor taking “advantage” of the debtor is also a qualification to reopen the transaction, see *Ketley Ltd. v Scott* [1981] ICR 241.

⁵⁷⁸ *Ketley Ltd. v Scott* [1981] ICR 241.

⁵⁷⁹ CCA, s 138(4)(a)-(c).

⁵⁸⁰ [1980] C.C.L.R. 1.

⁵⁸¹ F.A.R. Bennion, *Consumer Credit Manual*, 2nd ed, Oyez, London, 1981, p. 59.

“harsh and unconscionable” cases.⁵⁸² However, Edward Nugee Q.C in *Davies v Directloans Ltd.*⁵⁸³ rejected these views and his opinion was supported by Bently and Howells.⁵⁸⁴

Decided cases suggest that the courts are quite reluctant to use their statutory discretion and intervene. Further, the courts are inclined to accept the creditor’s assessment of risk involved, but have been unsympathetic to the plight of debtors.⁵⁸⁵

The strict ‘extortionate credit bargain’ test has therefore resulted in very few successful challenges to credit agreements under the CCA; the DTI discovered only thirty cases of extortionate credit bargains from 1977 to 2004; and out of those, the consumer was successful only in eleven cases.⁵⁸⁶ Thus the DTI,⁵⁸⁷ the OFT⁵⁸⁸ and the Citizens Advice Bureau⁵⁸⁹ have proposed for reform and replaced the extortionate credit bargain test with a less stringent test.

Research studies have identified six factors in the lack of use of the ‘extortionate credit’ provision in the courts. First, the burden was placed on the borrower to instigate a legal proceeding, and it is well-known that consumers who enter extortionate credit agreements are among those least likely to choose to go to court;

⁵⁸² Guest & Lloyd, *The Consumer Credit Act 1974*, Sweet & Maxwell, London, 1975, para 39/133.

⁵⁸³ [1986] 1 W.L.R. 823

⁵⁸⁴ L. Bently and G. Howells, “Judicial Treatment of Extortionate Credit Bargains”, *Conveyancer and the Property Lawyer*, May-June 1989 164; at p. 166, it was said “...but if the Parliament had intended the same test to apply it should have used the same wording”.

⁵⁸⁵ *Davies v Directloans Ltd.* [1986] 1 W.L.R. 823; see also *Ketley v Scott* (1981) ICR 241; *Wills v Wood*, *The Times*, 24 March 1984; G. Howells and S. Weatherill, *Consumer Protection Law*, 2nd ed, Ashgate, Hants, 2005, p. 343

⁵⁸⁶ DTI, *Consumer Credit Bill: Full Regulatory Impact Assessment*. Available: <http://www.dti.gov.uk/ccp/creditbill/pdfs/creditbillria2.pdf> (accessed 9 October 2005), p. 31 (hereafter “the DTI, *Consumer Credit Bill: Full Regulatory Impact Assessment*”). Examples of successful cases are *Barcabe v Edwards* [1983] CCLR 11 (100% reduced to 40%) and *Castle Phillips Finance Co. Ltd. v Wilkinson* [1992] CCLR 83 (4% per month reduced to 20% per annum).

⁵⁸⁷ The UK Extortionate Credit Report.

⁵⁸⁸ OFT, *Unjust Credit Transactions*, 1991.

⁵⁸⁹ Citizens Advice Bureau, *Daylight Robbery - The CAB case for effective regulation of extortionate credit*, 2000.

thus the difficulty for consumers in bringing claims to court.⁵⁹⁰ Second, few cases have reached the court, mainly because the standard of “extortionate” is too high and the wording of the Act is very primitive, vague and unclear.⁵⁹¹ Third, preceding judgments were based on a restrictive interpretation of the test; for example, the court has placed more importance on the interest rates charged and overlooked the factors affecting debtor and creditor.⁵⁹² Fourth, the penalties provided under the CCA were insufficient to curb extortionate practices.⁵⁹³ Fifth, difficulties in licensing and enforcement were also identified as factors contributing to the poor utilisation of extortionate credit bargains.⁵⁹⁴ Finally, Scott and Black stated that the extortionate credit provision has always been used “as a shield when consumers are sued and not as a sword to challenge a wide range of interest rates.”⁵⁹⁵

In sum, it may be concluded that the ‘extortionate credit bargain’ test is clouded with weaknesses. It may also be suggested that the factors contributing to such failure were quite similar to the factors leading to the failure of the provision on ‘harsh and unconscionable or substantially unfair’ transactions under the MLA. Fortunately, the UK Government has taken steps to find a solution to replace it.

⁵⁹⁰ See L. Bently and G. Howells, “Loansharks and Extortionate Credit Bargains-2”, *Conveyancer and the Property Lawyer*, July-August 1989 234; UK Extortionate Credit Report; DTI, *Consumer Credit Bill: Full Regulatory Impact Assessment*, p. 3; CC White Paper, para. 3.31.

⁵⁹¹ Professor Eva Lomnicka, ‘The Future of Consumer Credit Regulation’, *CIL*, vol. 7, issue 2, 2003/2004, p. 197; the CC, para. 3.31; OFT, *Unjust Credit Transactions*, Report by the Director General of Fair Trading, 1991 where a test is proposed to make agreements easier to challenge; Citizens Advice, *Summing Up - bridging the financial literacy divide*, 2001; see also Citizens Advice Bureau, *Daylight Robbery - The CAB case for effective regulation of extortionate credit*, 2000; DTI, *Consumer Credit Bill: Full Regulatory Impact Assessment*, p. 31.

⁵⁹² *Wills v Wood*, *The Times*, 24 March 1984; see also *Ketley v Scott* (1981) ICR 241.

⁵⁹³ See the UK Extortionate Credit Report.

⁵⁹⁴ *Ibid*; in regard to licensing, the TSDs and the OFT lacked resources to collect evidence to revoke a licence or to prosecute the unlicensed moneylenders, while in terms of enforcement, the borrowers are usually reluctant to co-operate with the prosecution.

⁵⁹⁵ C. Scott and J. Black, *Cranston's Consumers and the Law*, 3rd ed, Butterworths, London, 2000, p. 257.

5.3.5 Unfair relationships

As mentioned above, the UK Government is aware of the weaknesses of the 'extortionate credit' test. Case studies and consultation were therefore conducted to analyse the problems, and reforms were proposed.⁵⁹⁶ The 1991 report on *Unjust Credit Transactions*,⁵⁹⁷ for example, proposed a more relaxed approach of 'unjust credit transaction' to replace the 'extortionate credit' test. Finally, the White Paper agreed to lower the threshold of the 'extortionate credit bargain' test and the courts can reopen credit agreements based on an 'unfairness' test, abandoning the rigid 'extortionate credit bargain' test.⁵⁹⁸ The substance of the 1991 report can be seen in the White Paper. The new 'unfairness' test incorporates unfair practices as well as the cost of credit whereby all circumstances affecting the use of credit are taken into consideration. The proposed changes also emphasise responsible lending, which includes the creditor making sure that the borrower is capable of meeting his obligations under the agreement. To address the problems of the reluctance of the courts to reopen credit agreements, the White Paper recommended Alternative Dispute Resolution techniques for consumers to question unfair agreements and to seek redress.⁵⁹⁹

The recommendations in the White Paper were finally accepted in the CCA 2006. Sections 137 – 140 of the CCA will be repealed and replaced with a new and wider concept of unfair relationships provisions. The new section 140A will provide three conditions that may determine that the relationship between the creditor and debtor

⁵⁹⁶ DTI, 'Tackling loan sharks - and more! A consultation document on making the extortionate credit provisions within the Consumer Credit Act 1974 more effective'. March 2003. CCP 007/03; UK Extortionate Credit Report; Citizens Advice, *Daylight Robbery - The CAB case for effective regulation of extortionate credit*, 2000.

⁵⁹⁷ OFT, 1991.

⁵⁹⁸ CC White Paper, para. 3.37.

⁵⁹⁹ ADR is discussed depth in Chapter Seven.

arising out of the credit agreement is unfair to the debtor. Thus, “fairness” is assessed based on the following:

- the terms of the agreement; or
- the way in which the agreement is operated by the creditor; or
- any other thing done or not done by or on behalf of the creditor before or after the agreement was made.

Further, the court may take into consideration all matters it thinks relevant (including those related to the debtor and creditor) in deciding whether the relationship is unfair.⁶⁰⁰ It is interesting that the post-contract behaviour of the creditor is also considered under the new test. This is due to the nature of long-term credit agreements, and the vulnerability of borrowers to the behaviour of creditors after the agreement was concluded.⁶⁰¹ Hence, the creditor may vary the terms of the agreements to the borrower’s detriment or may enforce his rights harshly for late payments.⁶⁰² Thus, section 140A aims to control the conduct of the creditor.

Indeed, the CCA 2006 has embraced a new and wider “unfairness” test to replace the limited “extortionate” test.⁶⁰³ The flexible approach of the new test is reflected in the new section 140A. Section 140B will further provide a broad range of seven types of order to remedy the unfairness. Based on the great potential promised by section 140A, it is suggested that the MLA 2003 should abandon the old ‘harsh and unconscionable’ or ‘substantially unfair’ tests and instead move ahead with the ‘unfairness’ test.

⁶⁰⁰ CCA, s 140A(2), as inserted by CCA 2006, s 19.

⁶⁰¹ Professor Eva Lomnicka, ‘The Future of Consumer Credit Regulation’, *CIL*, vol. 7, issue 2, 2003/2004, p. 198

⁶⁰² *Ibid.*

⁶⁰³ CCA 2006, ss 19-22.

5.4 Conclusion

The MLA 2003 has introduced significant development in the conduct of moneylending business and displays genuine concern to protect the interest of borrowers in the moneylending contract. Major reforms such as the introduction of a prescribed agreement under section 10P of the MLA 2003 have certainly brought an innovative episode in moneylending transactions. Prescribed agreements have rightly rectified a serious defect in the past where borrowers were exploited through lack of uniformity of agreement. The far-reaching effect brought by Schedules J and K will better facilitate moneylending transactions, assist the enforcement process, and protect borrowers' interests. However, despite the ground-breaking effort, apparent weaknesses in the structure and the content of Schedule J and K are major barriers in safeguarding the borrowers' interest in the moneylending transaction. Lack of regulation on four aspects, regarding legibility of the agreement, usage of language, requirement for withdrawal as well as statement of protection and security warning, are all serious flaws that must be urgently addressed. Apart from that, the new requirement on attestation which imposes an obligation on attestators who are qualified professionals to explain the contents of the moneylending agreement to the borrower, irrespective whether the borrower understands the language in which the note is written, is indeed very helpful in assisting the borrower's understanding of the terms and conditions of the contract.

In furtherance to the moneylending agreement, this chapter has also examined the statutory rights and duties of both the moneylenders and the borrowers which are derived from the moneylending agreement and the moneylending laws. It is submitted here that the imposition of statutory rights and duties on both moneylenders

and borrowers is likely to assist both parties to appreciate their respective roles in the moneylending transaction, and hence, lead to a satisfying outcome of the contract.

Finally, in regard to the interest aspect, it is submitted here that a substantial reform has been made by the MLA 2003 by introducing a fixed ceiling interest rate for secured and unsecured loan transactions. It is further submitted that the move to take away the presumption of excessive interest is creditable, as the capping regime is clear and simple and may prevent the charging of exorbitant interest as well as controlling illegal moneylending. The introduction of a maximum ceiling has indeed removed many abuses and problems of the past. Another transformation was brought about by section 17 fixing the rate to be charged on default payments at eight per centum per annum, to be calculated on the outstanding balance to be repaid. With the new restriction, moneylenders can no longer impose interest rates as they please on unsettled loans. Despite the excellent improvement above, the MLA 2003 has regrettably retained the old “harsh and unconscionable or substantially unfair” provision under section 21(2), although the doctrine has not been well utilised. However, there is less need of it in view of the new fixed ceiling interest. Nevertheless, in light of the development under the CCA, this study urges the Malaysian Government further to analyse and seriously consider the new and potential “unfair relationships” test in order to move forward with modern credit practice.

Chapters Three, Four and Five have discussed all aspects of moneylending business, except the sanctions provided for breach and offences under the MLA 2003. This is the subject of the next chapter.

Chapter Six

CRIMINAL AND CIVIL SANCTIONS

6.0 Introduction

As discussed in Chapters Three and Five, the MLA 2003 has provided various legal means to protect borrowers in a moneylending transaction, such as the requirement to obtain valid moneylending licences and advertising permits and the obligation to use prescribed moneylending agreements. Apart from that, Chapter Four illustrated the powers given by the MLA 2003 to Inspectors and the police to curb illegal moneylending. All these mechanisms are supported and enforced by both criminal and civil sanctions, to ensure that the objectives of the moneylenders law are achieved. Any prosecution of an offence or civil claim under the MLA 2003 is to be heard in the Court of a First Class Magistrate.⁶⁰⁴ The Magistrate is given jurisdiction to try any moneylending offences and to impose the full punishment for any such offence.⁶⁰⁵

In view of the above, it is the aim of this chapter to discuss both the public and private law sanctions provided under the MLA 2003 and to determine whether they provide sufficient measures to regulate and control the business of moneylending, to protect the borrowers in the course of moneylending transactions and to control illegal moneylending.

As regards the public law sanctions, this chapter aims to analyse the revised provisions in respect of criminal sanctions under the MLA 2003. The Act employs

⁶⁰⁴ MLA 2003, s 29G; see Subordinate Court Act 1948, s 90, where it states that “subject to the limitations contained in this Act, a First Class Magistrate shall have jurisdiction to try all actions and suits of a civil nature where the amount in dispute or value of the subject-matter does not exceed twenty five thousand ringgit”.

⁶⁰⁵ MLA 2003, s 29G.

strict liability criminal law sanctions as a measure to protect borrowers in the moneylending transaction and to control illegal moneylending. Reviewing the criminal sanctions was one of the purposes of the central reform of the old moneylenders law since the preceding criminal penalties had been openly criticised as ineffective in controlling loan sharks' activities. The MLA 2003 has therefore significantly revised the penalties as regards the amount of fines and the terms of imprisonment. The punishment of whipping was also introduced for serious offences such as causing bodily injuries and certain repeat offences such as operating unlicensed moneylending businesses and not adhering to the prescribed form. This study here takes the view that strict liability criminal sanctions are essential to support the enforcement of the MLA 2003 and to compensate for the evident weaknesses of the private law.

Discussion on private law sanctions will focus on the civil law sanctions provided under the MLA 2003. Civil law sanctions could render a moneylending agreement void or of no effect or unenforceable, or all the above. Apart from that, this chapter will also discuss the remedy of restitution. Although the civil law remedies provide relief to borrowers when the moneylenders laws are breached or when the terms in the moneylending agreement are infringed, this study here believes that there are limitations in enforcing the remedies, since the civil law has to be enforced by the borrowers, and there is understandable reluctance to pursue civil remedies.

In view of the latest development in the UK under the CCA 2006, this chapter also investigates another type of sanction in consumer protection; administrative control through imposition of civil sanctions. Two types of sanctions are introduced, civil

penalties by the OFT and injunctions under Part 8 of the Enterprise Act 2002. Since these measures are only available in the UK, it is hoped that further discussion on this topic will provide some guidance to Malaysia on how to enhance the sanctions regime under the MLA 2003.

6.1 Criminal Sanctions

Generally, there are two types of crime, 'real crime' and 'quasi crime'. The former covers offences which the public generally recognises as being criminal, such as murder and robbery, whereas the latter include acts 'which are not criminal in any real sense, but are acts which, in the public interest, are prohibited under a penalty'.⁶⁰⁶ Quasi crime is also known as 'regulatory crime' and it usually involves 'strict liability' in statutory offences. The advantage of strict liability criminal offences is that the prosecution does not have to prove *mens rea*, otherwise it would be very difficult to prove the crime. According to Ashworth, these are offences 'for which criminal liability is merely imposed by Parliament as a practical means of controlling an activity',⁶⁰⁷ whereas Borrie pointed out that strict liability offences enforced by public officials help to ensure high trading standards.⁶⁰⁸

In line with Borrie's opinion, Governments normally use strict liability criminal offences to protect consumers from business malpractices and to achieve high standards in business conduct. For example, both the Malaysian and UK

⁶⁰⁶ per Wright J in *Sherras v. De Rutzen* [1895] 1 QB 918 at p. 922.

⁶⁰⁷ Andrew Ashworth, *Principles of Criminal Law*, 3rd ed, Oxford University Press, 1999, p. 1.

⁶⁰⁸ G. Borrie, 'Legal and Administrative Measures of Consumer Protection in the United Kingdom,' in N. Eastham and B. Krivy (edit), *The Cambridge Lectures 1981*, Butterworths, Toronto, 1982, p. 67.

Governments are keen to use criminal law as a consumer protection measure.⁶⁰⁹ In the UK, strict liability offences have been said to contribute to the success of consumer protection laws.⁶¹⁰ The most common strict liability criminal sanctions are a fine for a first conviction and imprisonment (with or without a fine) for a subsequent offence. In some countries like Malaysia, whipping is also a familiar criminal sanction. Each type of punishment is said to serve some goal of punishment, such as deterrence, incapacitation, rehabilitation, retribution and restoration.⁶¹¹

Despite the advantages of strict liability offences as consumer protection measures, there are critics of the use of strict liability in consumer protection laws.⁶¹² The objections are basically derived from the reluctance to accept strict liability offences in the realm of criminal law. Some also argue that strict liability offences contravene the basic principle of the criminal law, as they involve the punishment of the morally blameless.⁶¹³

⁶⁰⁹ Examples of such laws in Malaysia are the MLA, CPA, DSA, HPA and TDA; examples from the UK are the CCA, TDA, Weights and Measures Act 1985 and Consumer Protection Act 1987 (Parts II and III).

⁶¹⁰ In G. Borrie, 'Law and Codes for Consumers,' [1980] *JBL* 315, p. 320; the former Director General of OFT said that:

"I think that the Trade Descriptions Act, the Weights and Measures legislation, and the Food and Drugs Act have been so successful in reducing deceptive or dangerous trading practices because they are part of the criminal law, enforced by public officials as a duty at public expense for the public benefit and do not depend on individual citizens wondering whether they can afford to go to court and whether they are eligible for legal aid in order to ensure that what is written in the law books is in fact enforced."

⁶¹¹ Peter Cartwright, *Consumer Protection and the Criminal Law: Law, Theory and Policy in the UK*, Cambridge University Press, Cambridge, 2001, pp. 75-78.

⁶¹² A wide discussion on the pros and cons of strict liability criminal offences can be seen in P. Cartwright, *Consumer Protection and the Criminal Law: Law, Theory and Policy in the UK*, Cambridge University Press, Cambridge, 2001; Glanville Williams, *Textbook of Criminal Law*, 2nd ed, Stevens & Sons, London, 1983; J. Horder, 'Strict Liability, Statutory Construction, and the Spirit of Liberty' (2002) 118 *LQR* 458.

⁶¹³ D. Oughton & J. Lowry, *Textbook on Consumer Law*, 2nd ed, Oxford University Press, Oxford, 2000, p. 413.

The arguments against using strict liability offences as sanctions for technical measures in consumer protection law can be summed up as follows. First, it is said that if traders are regularly convicted for strict liability offences, they may adopt an attitude of indifference and repeated offences may amount to disrespect of the law.⁶¹⁴ Further, businesses may regard such regulatory crimes as an inevitable part of business life and the fines as a business expense.⁶¹⁵ Eventually, the deterrent effect of the law may be diminished. Second, the attitude of the judiciary is to treat regulatory offences as not as morally reprehensible as murder or robbery, urging the enforcement authorities to be selective and only bring cases that need legal clarification.⁶¹⁶ There is also the tendency of the judiciary to impose nominal fines for the commission of a regulatory crime since 'the very fact of being convicted of a crime is sometimes considered enough punishment.'⁶¹⁷ The judiciary may sympathise with technical offenders, since they are not 'real' criminals, but yet sanctioned under criminal law.⁶¹⁸ The third criticism is aimed at the 'all or nothing at all' approach of the criminal law.⁶¹⁹ It means that the offender may be prosecuted, convicted and fined for a strict liability criminal offence, or he may be discharged of the offence based on a technicality and basically get away with the wrongdoing completely. In minor cases, the prosecuting authority usually decides whether or not to prosecute on their discretion.⁶²⁰ Fourth, the comment is also made that the stigma of criminality is attached to the offender, although he commits a regulatory offence, and not a criminal

⁶¹⁴ G. Williams, *Textbook of Criminal Law*, 2nd ed, Stevens & Sons, London, 1983, p. 931; David Tench, *Towards a Middle System of Law*, Consumers' Association, London, 1981, p. 20.

⁶¹⁵ G. Williams, *Textbook of Criminal Law*, 2nd ed, Stevens & Sons, London, 1983, p. 931; G. Borrie, "Law and Codes for Consumers", [1980] *JBL* 315, p. 320.

⁶¹⁶ See the statement of Wright J in *Sherras v De Rutzen* [1895] 1 QB 918, p 922, describing that breaching of the licensing laws as 'acts which are not criminal in the real sense'; see also *Wings Ltd v Ellis* [1985] AC 272, 290 per Lord Hailsham of St Marylebone LC; *Smedleys Ltd v Breed* [1974] AC 839, 856 per Viscount Dilhorne.

⁶¹⁷ D. Tench, *Towards a Middle System of Law*, Consumers' Association, London, 1981, pp. 20-21.

⁶¹⁸ *Ibid.*, p. 20.

⁶¹⁹ *Ibid.*

⁶²⁰ *Ibid.*

offence.⁶²¹ The offender is still perceived as a criminal by the public, and this would certainly have adverse impact on him, especially if he is a trader. Further, his reputation may be tarnished and his business affected.

The objections against strict liability offences in consumer protection laws have led to the development of a school of thought that advocates a disconnection of strict liability offences with criminal law.⁶²² A middle system of law was suggested, to the benefit of the enforcement agencies, the consumers and the traders.⁶²³ The suggestion developed from the notion that regulatory crimes are not crimes in the real sense, therefore, should be replaced with civil penalties, so that businesses would be more obliged to comply with the law.⁶²⁴ A deeper analysis of this argument illustrates a whole new ambience if the consumer protection law is decriminalised. Accordingly, paying a civil sanction fine would not feel the same as paying a fine under criminal penalties, although the amount may be the same.⁶²⁵

Despite the above comments, it is here submitted that in the context of moneylenders law, regulatory crimes should stay as they are, as they do serve a useful enforcement role. It was the limitation in enforcing private law remedies that has led to increasing pressure over the years for the intervention of public law through strict liability

⁶²¹ See the case of *Sweet v Parsley* [1970] AC 32; In this case, Ms Sweet had been convicted, at first instance, for the offence of 'managing premises used for the purposes of smoking cannabis.' She owned the premises but it was her tenants who smoked cannabis. Although the conviction was overturned on appeal, Ms Sweet was still branded as a criminal and had lost her job; see also D. Oughton & J. Lowry, *Textbook on Consumer Law*, 2nd ed, Oxford University Press, Oxford, 2000, p. 414.

⁶²² D. Tench, *Towards a Middle System of Law*, Consumers' Association, London, 1981, pp. 20-21.

⁶²³ *Ibid.*

⁶²⁴ *Ibid.*; see also G. Howells and S. Weatherill, *Consumer Protection Law*, 2nd ed, Ashgate, Hants, 2005, p. 491.

⁶²⁵ D. Tench, *Towards a Middle System of Law*, Consumers' Association, London, 1981, p. 20.

crimes.⁶²⁶ The need to maintain strict liability offences in consumer protection is mainly due to the reluctance of private individuals to pursue civil remedies in courts. It may be suggested that consumers would not gain much benefit from the civil sanctions as they are the party who initiates the claim, and research studies have pointed to several aspects such as financial, procedural complexity, practical, psychological and cultural barriers as obstacles faced by consumers in filing civil claims.⁶²⁷

Strict liability criminal sanctions are the central form of punishment under the MLA 2003 and the MCLR. Since lack of stern criminal sanctions in the old moneylenders law was said to contribute to the failure of the MLA in controlling loan sharks' activities, the new law seems to address this issue. Thus the trend of adopting substantial fines can be seen under the new criminal sanctions. The maximum fine under the MLA 2003 is RM100,000⁶²⁸ while the maximum term of imprisonment is five years. This is in contrast to the old moneylenders law, where the highest fine was only RM1,000⁶²⁹, and the term of imprisonment did not exceed two years. Such a small fine did not serve the purpose of the punishment and did not even sound reasonable, in view of the current standard of living and commercial practices. It is anticipated that the increase of the amount of fine and imprisonment term will provide better control of moneylending business and deter loan sharks' activities.

⁶²⁶ D. Harris, D. Campbell & R. Halson, *Remedies in Contract and Tort*, 2nd ed, Butterworths, London, 2002, p. 68.

⁶²⁷ DTI, *Consumer Credit Bill: Full Regulatory Impact Assessment*, p. 31; DTI, "Consultation on the provision of Alternative Dispute Resolution for disputes arising under the Consumer Credit Act 1974: Regulatory Impact Assessment," p. 1. Available: <http://www.dti.gov.uk/ccp/consulfpdf/creditadria.pdf> [accessed 20 December 2004]; FSA 2002-2003 Annual Report. Available: http://www.fsa.gov.uk/pubs/annual/ar02_03/ar02_02pdf (accessed 15 October 2005) (hereafter "FSA Annual Report 2002-2003"); D. Harris, D. Campbell & R. Halson, *Remedies in Contract and Tort*, 2nd ed, Butterworths, London, 2002, p. 68. Further discussion of this issue is in Chapter Seven.

⁶²⁸ Equivalent to £14,200.

⁶²⁹ Equivalent to £142.

.....continued

**Regulation	Offence	Penalties
<p>29A (1)(a)</p> <p>(b)</p> <p>(d)</p> <p>(e)</p> <p>(f)</p> <p>(g)</p> <p>(h)</p>	<p>Making a false, incorrect or misleading statement or declaration for the purpose of the issuance of a licence to himself or to other person, or preventing the imposition of any condition in relation to such licence</p> <p>Furnishing any false, incorrect or misleading particulars or documents in relation to an application for the issuance of a licence</p> <p>Altering, tampering with, defacing or mutilating any licence which is required to be displayed on a moneylenders business premises, or lending or allowing such licence to be used by any other person</p> <p>Forging a licence</p> <p>Altering any entry made in a licence</p> <p>Exhibiting a licence that has been altered, tampered with, defaced or mutilated</p> <p>Exhibiting an imitation of a licence on the moneylender's business premises</p>	<ul style="list-style-type: none"> - fine not exceeding RM50,000 - imprisonment not exceeding twelve months or - both
<p>11(2)</p>	<p>Moneylending advertisement without permit</p>	<ul style="list-style-type: none"> - fine not exceeding RM10,000 or - imprisonment not exceeding twelve months or - both

....continued

**Regulation	Offence	Penalties
3 and Schedule A	Providing a misleading statement, false representation or description of the particulars or information required in the application for a licence	- fine not exceeding RM50,000 - imprisonment not exceeding twelve months or - both
4 and Schedule C	Providing a misleading statement, false representation or description of the particulars or information required in the statutory declaration	
5 and Schedule D	Providing a misleading statement, false representation or description of the particulars or information required in the licence renewal application	

* refers to MLA 2003
** refers to MCLR

Table 6.1 shows ten provisions detailing the criminal licensing offences which aim to control the conduct of moneylenders, to ensure that only fit persons can carry on moneylending businesses and to protect borrowers' interest in moneylending transactions. As discussed in Chapter Three, licensing is a "potentially powerful regulatory weapon"⁶³⁰ to monitor moneylenders; therefore, breach of the law is penalised with high fines and imprisonment terms. According to Table 6.1, licensing sanctions punish a moneylender who operates a moneylending business without a valid licence, who provides false or misleading information in the application for a licence, who fails to comply with the conditions in the licence, who fails to take out a licence under his true name, who carries on business in any name other than authorised name or at any place other than authorised address and who fails to display the moneylenders' licence in the business premises. Table 6.1 also illustrates that it is also an offence to lend money to minors. The offences prescribed under section

⁶³⁰ B.W. Harvey and D.L. Parry, *The Law of Consumer Protection and Fair Trading*, 6th ed, Butterworths, London, 2000, p. 306.

29A(1) and section 8 of the MLA 2003 as well as regulation 3, 4 and 5 of the MCLR may be considered as 'criminal in a real sense' as they may involve the elements of fraud. However, the rest of the offences under licensing and advertising permits are all technical offences that were prescribed to facilitate and 'to ensure high standards and responsibility in trading.'⁶³¹

The most severe penalty under the Act is for the offence of operating an unlicensed moneylending business. A convicted offender is liable to a fine of between RM20,000 and RM100,000, or to imprisonment for a term not exceeding five years, or to both.⁶³² A subsequent offence under this section invokes the punishment of whipping, in addition to a fine and imprisonment. Prior to the MLA 2003, unlicensed moneylenders were only liable to be fined up to RM1,000. Such a small amount was certainly easy to be settled by the offender. Hence, it is assumed that there was a tendency to repeat the same offence. Further, the penalty for subsequent offences could also be paid without difficulty, since the offender was only liable to the same amount of fine or a custodial sentence not exceeding twelve months. Although there are no statistics to verify the incidence of repeat offences, it is presumed that the increase in the amount and term of penalties as well as the introduction of the stern punishment of whipping in the new law will reinforce the deterrent effect, to prevent an offender from repeating the same crime. Of the three types of penalties, it is apparent that the amendment has significantly increased the monetary penalty, making it twenty to a hundred times higher than under the old moneylenders law. It seems that the stiff penalties under the MLA 2003 have proved to cause concern and anxiety to illegal moneylenders. As mentioned in Chapter Three, a group of twenty-

⁶³¹ G. Borrie, "Law and Codes for Consumers", [1980] *JBL* 315, p. 321.

⁶³² MLA 2003, s 5.

two loan sharks pleaded with the Ministry to give them moneylending licences as they were worried about the new penalties.⁶³³

6.1.2 Criminal penalties for offences under investigation, search, seizure and arrest

As discussed in Chapter Four, the provisions for investigation, search, seizure and arrest are all newly introduced under the MLA 2003. This part of the law aims to give more power to the enforcement officers and the police to enforce the Act. In order to facilitate the enforcement process, persons who impede that process are punishable under the law. The types of offences usually committed under this part are related to obstructing the enforcement officer or the police in performance of his duty, such as by defying his order, tampering with evidence and also causing hurt to the officer.

Table 6.2 shows the sanctions provided for such offences:

Table 6.2 – Criminal penalties for enforcement offences

<i>Section</i>	<i>Offence</i>	<i>Penalties</i>
10C(8)	Defying Inspector/police officer's power to examine persons	<ul style="list-style-type: none"> - fine not exceeding RM50,000 or - imprisonment not exceeding fifteen months or - both
10D(6)	Unlawful breaking, tampering with or damaging of the seal of "evidence"	<ul style="list-style-type: none"> - fine not exceeding RM50,000 or - imprisonment not exceeding fifteen months or - both

⁶³³ Pauline Almeida, "Give us licence, say loan sharks", *The Malay Mail*, 9 December 2002; Dennis Chua, "Do not make it easy for them", *The Malay Mail*, 9 December 2002; see further in Chapter Three.

....continued

<i>Section</i>	<i>Offence</i>	<i>Penalties</i>
10I(1)	Obstructing inspection or search	<ul style="list-style-type: none"> - fine not exceeding RM20,000 or - imprisonment not exceeding twelve months or - both
10I(2)	Abetting the commission of the obstruction of inspection or search	<ul style="list-style-type: none"> - fine not exceeding RM20,000 or - imprisonment not exceeding twelve months or - both
10I(3)	Causing hurt to an enforcement officer on duty	<ul style="list-style-type: none"> - fine not exceeding RM20,000 or - imprisonment not exceeding twelve months and - whipping

Like Table 6.1, Table 6.2 shows that the MLA 2003 sets high fines, in this case for those who are convicted of obstructing enforcement duties. The new law also provides detailed explanation of the acts that may amount to obstruction of inspection and search under section 10I (a)-(g). Such acts include refusal of access to business premises,⁶³⁴ failure to produce or concealment of any relevant document,⁶³⁵ and also destruction of items in order to prevent their seizure.⁶³⁶ The punishment of whipping is also imposed upon an offender who causes hurt to an enforcement officer or the police on duty.⁶³⁷ All these penalties are aimed to protect the enforcement officers and the police and ensure an efficient enforcement process. It may be suggested all these offences are indeed criminal in the real sense, and not technical offences.

⁶³⁴ MLA 2003, s 10I(1)(a).

⁶³⁵ MLA 2003, s 10I(1)(b).

⁶³⁶ MLA 2003, s 10I(1)(g).

⁶³⁷ MLA 2003, s 10I(3).

6.1.3 Offences under conduct of moneylending business

Breach of moneylenders law may take place while undertaking a moneylending contract. The moneylender is liable for these offences if he fails to observe his duties as a lender. Table 6.3 summarises the criminal sanctions for offences committed in the course of moneylending.

Table 6.3 - Criminal penalties for offences under conduct of moneylending business

<i>Section</i>	<i>Offences</i>	<i>Penalties</i>
10P(2)	Moneylending agreement not in prescribed form	<p>First offence</p> <ul style="list-style-type: none"> - fine between RM10,000 to RM50,000 or - imprisonment not exceeding five years or - both <p>Subsequent offence</p> <ul style="list-style-type: none"> - whipping, in addition to the above
16	Failure to deliver to the borrower a moneylending agreement that has been signed by all parties and duly stamped	<ul style="list-style-type: none"> - fine not exceeding RM10,000 or - imprisonment not exceeding twelve months or - both
17A	Contravening the provision for interest	<ul style="list-style-type: none"> - fine not exceeding RM20,000 or - imprisonment not exceeding eighteen months or both
18	Failure to keep accounts in permanent books	<p>First offence</p> <ul style="list-style-type: none"> - fine not exceeding RM10,000 <p>Continuing offence</p> <ul style="list-style-type: none"> - fine not exceeding RM1,000 for each day
19(4)	Failure to provide a receipt upon receiving payment	<ul style="list-style-type: none"> - fine not exceeding RM10,000 or - imprisonment not exceeding ten months or - both

Table 6.3 shows that the most serious offence in the conduct of moneylending business is non-conformity with the prescribed moneylending agreement. The emphasis on huge fines and lengthy imprisonment terms for convicted offenders also prevails here. It is submitted that the role of strict liability criminal offences in controlling the conduct of moneylending businesses is to protect the interest of the borrower in a moneylending transaction. Hence a moneylender who charges excessive interest to the borrower or fails to provide a receipt upon receiving payment or fails to deliver the duly signed and stamped moneylending agreement or any related document on demand will be duly punished, although he may not be aware of the offence he has committed. Nevertheless, such stern punishments serve as a preventive measure, so that the moneylender will be more aware of his duties and obligations under the MLA 2003, to the advantage of the borrower.

6.1.4 Other criminal offences

Apart from the regulatory offences discussed above, two other offences under sections 29 and 29B are identified as being significantly important to consider; making false statements or representations to induce borrowing and also harassment or intimidation of borrower. Table 6.4 provides a summary of the relevant offences and the punishments provided.

Table 6.4: Other criminal offences

<i>Section</i>	<i>Offences</i>	<i>Penalties</i>
29	Fraudulently inducing or attempting to induce any person to borrow money	<ul style="list-style-type: none"> - fine not exceeding RM20,000 or - imprisonment not exceeding two years or - both
29B(1)	A moneylender harassing or intimidating a borrower or family member or person connected to him	<p>First offence</p> <ul style="list-style-type: none"> - fine not exceeding RM100,000 or - imprisonment not exceeding fifteen months or - both <p>Subsequent offence</p> <ul style="list-style-type: none"> - whipping, in addition to the above
(2)	A moneylender's runner harassing or intimidating a borrower or family member or person connected to him	<ul style="list-style-type: none"> - fine not exceeding RM20,000 or - imprisonment not exceeding twelve months or - both
(3)	Causing hurt to another while committing the offence of harassment or intimidation	<ul style="list-style-type: none"> - imprisonment not exceeding two years and whipping

As shown in brief in Table 6.4, section 29 says that the crime of making false statements or representations to induce borrowing from a moneylender may be committed by an individual moneylender or his employee, the management team of a moneylending company, the committee members of a moneylenders' society or a partner or a member of a partnership or moneylending firm. The offence may be committed by providing any false, misleading or deceptive statement, representation or promise or by dishonest concealment of material facts. Although this is an old provision which is retained in the MLA 2003, the monetary penalty was, however, amended. In order to deter such offence, the amount of fine for a convicted offender has been increased. It is interesting to note that under the old moneylenders law, this offence carried the highest fine, which was five times higher than that for the offence

of carrying a moneylending business without a valid licence.⁶³⁸ However, the maximum imprisonment term of two years was not affected by the amendment. In the formulation of the previous law, it may have been the view of the legislators that the offence of fraudulently inducing or attempts to induce any person to borrow money is much more serious than the offence of running a moneylending business without a valid licence. This opinion, however, did not prevail under the MLA 2003, as illegal moneylending activities are deemed to be such a grave offence and the authorities are fighting this crime seriously.

Table 6.4 also illustrates the punishment for harassing or intimidating the borrower or his family members. This new provision is referred to in section 29B. Harassment and intimidation by loan sharks are some of the crimes most frequently reported in the national newspapers, and it is a big concern to the Government and the police.⁶³⁹ Indeed, it was also reported that the loan sharks admitted to acting violently against the borrowers, as the last resort to claim repayments.⁶⁴⁰ The introduction of the new offence of harassment and intimidation in the field of moneylending was therefore important and eagerly awaited, in order to overcome this menace. According to SY Kok, section 29B is a good and far-sighted regulation that aimed to prevent the loan

⁶³⁸ A person liable for giving false statements or representations to induce borrowing under the old law was liable to a fine not exceeding RM5,000.

⁶³⁹ See Chapter One; see also Timothy Leonard, "Extent of loan sharks' involvement investigated", *The Malay Mail*, 1 December 2002; Timothy Leonard, "Heartless Act: loan sharks break into borrower's shop a day after his death", *The Malay Mail*, 1 December 2002; Neville Spykerman, "Ah Longs will come after us: Family of suicide victim Prakash Kasavan worried...", *The Malay Mail*, 14 November 2003; Marsha Tan, "Grieving family harassed by loan sharks", *The Star*, 9 November 2003; Neville Spykerman, "Hawker in the soup: Woman in debt found hanged from the staircase", *The Star*, 8 November 2003; Timothy Leonard, "Why? Son-in-law dead, daughter critical", *The Malay Mail*, 7 October 2003; Timothy Leonard, "Previous case also a Manimaran", *The Malay Mail*, 7 October 2003; Timothy Leonard, "LIES to make suicide bid victim live", *The Malay Mail*, 7 October 2003; Simon Khoo and Devid Rajah, "Loan control: Moneylending activities to come under Housing and Local Govt Ministry", *The Star*, 9 December 2003; Chow Kum Hor, "New law to fine, jail loan sharks", *New Straits Times*, 4 December 2002; Foong Pek Yee, "Stiffer penalties for loan sharks", *The Star*, 4 December 2002; "Jail, rotan for loan sharks", *New Straits Times*, 2 December 2002.

⁶⁴⁰ "Agensi pemberi pinjam mengaku bertindak ganas" (Moneylending agencies admitted to violent acts), *Utusan Malaysia*, 2 October 2004.

sharks from hounding borrowers who could not repay the loans and accrued interest.⁶⁴¹ It also serves as a warning to loan sharks that the proper recourse to recover defaulting loans is in the court. It is evident that section 29B was developed from the former section 30 which provided for the offence of besetting the residence or place of employment with a view to harass or intimidate the borrower or his family members. Unfortunately, no reported case has been found under the old section 30.⁶⁴² Thus, it may be suggested that the former section 30 has failed to protect the borrowers from being harassed or intimidated by moneylenders, and the new section 29B is formulated to amend this failure.

According to section 29B(4), harassment or intimidation is defined as “including the making of statements, sounds or gestures, or exhibiting of any object intending that such word shall be heard or that such gesture or object shall be seen by such person or intruding the privacy of such person.” This includes acts that will offend or humiliate a person by annoying, irritating, molesting and pestering him.⁶⁴³ As illustrated in Table 6.4, three types of punishment are provided under section 29B, the first for a moneylender who harasses or intimidates a borrower or his family members; the second for his runners, usually hired thugs who commit the same crime; and the third penalty for any person who causes hurt while carrying out such a crime.

⁶⁴¹ SY Kok, “Who is a moneylender in year 2003?” [2004] 3 *MLJ* cxxi.

⁶⁴² S 30 of the MLA stated that “Any moneylender, who, with a view to harassing or intimidating his debtor or any member of the debtor’s family, either personally or by any person acting on his behalf, watches or besets the residence or place of business or employment of the debtor, or any place at which the debtor receives his wages or any other sum periodically due to him, shall be guilty of an offence, and shall be liable to a fine not exceeding two hundred and fifty ringgit, or to imprisonment for a term not exceeding three months: Provided that an offender being a company shall be liable to a fine of one thousand ringgit”.

⁶⁴³ MLA 2003, s 29B(5).

To date, the Ministry has yet to receive any complaints under this provision. However, there was a reported case of ten people, believed to be loan shark runners, accused of intimidating a 73 year old man over a debt of RM1,000 owed by his son.⁶⁴⁴ All were charged under section 503 of the Penal Code with committing criminal intimidation by threatening to burn down the old man's house. It is assumed that these men were not charged under the MLA 2003 because it was the police and not the Inspectors of Moneylenders who received and acted on the complaint. It may be suggested that the thugs were really violent, as the police who went to the rescue were also attacked with bamboo canes and golf clubs by them.⁶⁴⁵ It is submitted here that, since the Penal Code also has a similar provision on harassment and intimidation, and the public is not informed about this new provision under the MLA 2003, they will be more inclined to complain to the police about such offences. It should be noted however, that the Penal Code prescribes a higher term of imprisonment for the offence of causing criminal intimidation compared to the MLA 2003. Nevertheless, the Penal Code does not provide for the punishment of whipping.⁶⁴⁶

6.1.5 Compoundable Offences

Under the MLA 2003, some offences may be compounded: the offender may settle for an amount less than the penalty. With a view to reducing court cases and expediting the resolution of cases, section 29F authorises the Registrar or Inspector to

⁶⁴⁴ C. Kaur, "10 charged with criminal intimidation", *The Star*, 28 September 2004; It was reported that these loan shark runners tried to burn down the house of the father of the borrower.

⁶⁴⁵ Syahril Kadir, "Anggota polis cuba selamatkan warga tua diserang 'along'" (Police attacked in attempt to rescue old man), *Utusan Malaysia*, 16 September 2004.

⁶⁴⁶ S 506 of the Penal Code states that "Whoever commits the offence of criminal intimidation shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both; and if the threat is to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both".

compound some offences by accepting a sum of money not exceeding fifty per centum of the maximum fine for that offence.⁶⁴⁷ The offer to compound must be approved by the Public Prosecutor before any prosecution is instituted.⁶⁴⁸ Once an offence has been compounded, no further proceedings will be taken against that person.⁶⁴⁹ The Moneylenders (Compounding of Offences) Regulations 2003 (hereinafter “the MCOR”) provided that the following offences may be compounded:

Table 6.5: Compoundable Offences

<i>Section</i>	<i>Offence</i>
5F(2)	Breach of requirement to display licence in a conspicuous place at business premises
9E(3)	Applying for subsequent licence pending appeal on earlier application
9F(2)	Failure to surrender licence upon revocation of licence or rejection of appeal
9G(4)	Transferring or assigning licence to another person
11(2)	Advertisement without advertising permit
16(2)	Failure to deliver moneylending agreement to borrower
18(2)	Accounts not being kept in permanent books
19(4)	Failure to provide receipt upon receiving payment
25(1)	Failure to give notice and information on assignment of moneylender’s debts
<i>Regulation</i>	<i>Offence</i>
3(2)	Providing any misleading statement, false representation or description in the application for a licence
5(4)	Providing any misleading statement, false representation or description in the statutory declaration
6(4)	Providing any misleading statement, false representation or description in the application for an advertising permit
6(10)	Changing, amending and modifying advertisement permit without the approval of the Registrar

⁶⁴⁷ Compoundable offences are offences under subsections 5F(2), 9E(3), 9F(2), 9G(4), and regs 3(2) and 5(4).

⁶⁴⁸ MLA 2003, s 29F(2).

⁶⁴⁹ MCOR, reg 3(2).

From Table 6.5, it can be deduced that compoundable offences are those offences punishable with fines not exceeding RM10,000 and RM20,0000 respectively and terms of imprisonment not exceeding three, six, ten and twelve months. The legislators may not regard these offences as very serious, although it can be argued that offences under sections 5(F)(2), 11(2), 16(2), 18(2) and 19(4) could have an adverse effect on a moneylending business or a moneylending agreement. Compoundable monies will go into the Federal Consolidated Fund.⁶⁵⁰ A point to emphasise here is that although the law provides the maximum amount that may be compounded, however, the minimum amount is not stated. The *lacuna* in this aspect of the law may have a damaging effect, as it is feared that if a very low compound is imposed on the offender, the aim of the penalty and the objective of the law, to protect the interest of the borrower, will be defeated.

In concluding the discussion on the public law sanctions under the MLA 2003, it is suggested here that the criminal sanctions demonstrate a blend of technical and criminal offences placed under the umbrella of strict liability criminal offences. The substantial reform in reviewing the criminal sanctions is the increase of the monetary penalties and term of imprisonment, as well as the introduction of the punishment of whipping. It was pointed out in Chapter Three that some loan sharks were concerned about the new strict penalties and pleaded with the Government to legalise their business. It is also expressly provided under the MLA 2003 that moneylending companies, moneylending societies and moneylending firms are also liable to be whipped and imprisoned.⁶⁵¹ In such cases, the management team such as the director,

⁶⁵⁰ MLA 2003, s 29F(5).

⁶⁵¹ MLA 2003, s 29C.

general manager, manager, president, vice-president, secretary, treasurer or partners shall be liable for the offences committed by their companies, societies or firms.

Despite the significant revision of criminal penalties, there are suggestions by consumer advocates that more punitive penal sanctions such as life imprisonment and confiscation of assets should be introduced.⁶⁵² It is submitted here that these ideas are given further attention by the Government as it may enhance the deterrent effect on illegal moneylending. In sum, although there are arguments against technical offences being placed under the crimes of strict liability, it is submitted that criminal sanctions is the best way to enforce the moneylenders laws and to achieve the aim to protect the borrowers in the moneylending transactions as well as to eliminate illegal moneylending.

The position in the UK will now be considered.

6.2 Criminal Sanctions under the CCA

In the UK, most offences under the CCA are tried either in the Magistrates' courts or the Crown Court. Maximum fines are ranged on five levels according to the seriousness of the offence. In most cases, Magistrates' courts jurisdiction is limited to a maximum of £5,000,⁶⁵³ but the Crown Court has no overall limit.

This study has selected the relevant criminal sanctions under the CCA, as illustrated in Table 6.6.

⁶⁵² "We can supervise activities, control licences", *New Straits Time*, 2 December 2002.

⁶⁵³ Equivalent to RM35,000.

Table 6.6 - Schedule 1; Prosecution and Punishment of Offences

<i>Section</i>	<i>Offence</i>	<i>Mode of prosecution</i>	<i>Imprisonment/fine</i>
7	Knowingly or recklessly giving false information to OFT	<ul style="list-style-type: none"> • Summarily • On indictment 	£5,000 2 years or fine or both
9(1)	Engaging in activities requiring a licence when not a licensee	<ul style="list-style-type: none"> • Summarily • On indictment 	£5,000 2 years or fine or both
9(2)	Carrying on a business under a name not specified in licence	<ul style="list-style-type: none"> • Summarily • On indictment 	£5,000 2 years or fine or both
39(3)	Failure to notify changes in registered particulars	<ul style="list-style-type: none"> • Summarily • On indictment 	£5,000 2 years or fine or both
45	Advertising credit where goods etc not available for cash	<ul style="list-style-type: none"> • Summarily • On indictment 	£5,000 2 years or fine or both
46(1)	False or misleading advertisements	<ul style="list-style-type: none"> • Summarily • On indictment 	£5,000 2 years or fine or both
47(1)	Advertising infringements	<ul style="list-style-type: none"> • Summarily • On indictment 	£5,000 2 years or fine or both
49(1)	Canvassing debtor-creditor agreements off trade premises	<ul style="list-style-type: none"> • Summarily • On indictment 	£5,000 1 years or fine or both
49(2)	Soliciting debtor-creditor agreements during visits made in response to previous oral requests	<ul style="list-style-type: none"> • Summarily • On indictment 	£5,000 1 years or fine or both
50(1)	Sending circulars to minors	<ul style="list-style-type: none"> • Summarily • On indictment 	£5,000 1 years or fine or both
77(4)	Failure of creditor under fixed-sum credit agreement to supply copies of documents etc	<ul style="list-style-type: none"> • Summarily 	£2,500
97(3)	Failure to supply debtor with statement of amount required to discharge agreement	<ul style="list-style-type: none"> • Summarily 	£1,000
103(5)	Failure to deliver notice relating to discharge of agreement	<ul style="list-style-type: none"> • Summarily 	£1,000
107(4)	Failure of creditor to give information to surety under fixed-sum credit agreement	<ul style="list-style-type: none"> • Summarily 	£2,500
110(3)	Failure of creditor/owner to supply a copy of any security instrument to debtor/hirer	<ul style="list-style-type: none"> • Summarily 	£2,500
162(6)	Impersonation of enforcement authorities officers	<ul style="list-style-type: none"> • Summarily • On indictment 	£5,000 2 years or fine or both
165(1)	Obstruction of enforcement authorities officers	<ul style="list-style-type: none"> • Summarily 	£2,500
165(2)	Giving false information to enforcement authority officers	<ul style="list-style-type: none"> • Summarily • On indictment 	£5,000 2 years or fine or both
167(2)	Contravention of regulations under: s44 – form and content of advertisements s52 – quotations s53 – duty to display information s54 – conduct of business regulations , s112 – realisation of securities	<ul style="list-style-type: none"> • Summarily • On indictment 	£5,000 2 years or fine or both
174(5)	Wrongful disclosure of information	<ul style="list-style-type: none"> • Summarily • On indictment 	£5,000 2 years or fine or both

Source: CCA, Schedule 1

Table 6.6 shows that monetary penalties are the main form of criminal sanction under the CCA. The fine is the standard penalty for summary offences, and may be imposed for almost any indictable offence.⁶⁵⁴ Since whipping is not prescribed under the CCA, offenders are only liable to fines and imprisonment. The DTI admitted that the CCA provides very few criminal sanctions and they are not adequate to address the problems and wrongdoings under the law.⁶⁵⁵

6.3 Civil sanctions

This section seeks to investigate the provisions under the MLA 2003 that provides for civil sanctions. The remedy of restitution, which may be applicable once a contract is found void and unenforceable, is also included in this discussion. Further, the application of civil sanctions under the CCA will also be considered.

6.3.1 Civil sanctions under the MLA 2003

While criminal sanctions are widely used as a means to regulate and control the business of moneylending and to impose punishment on rogue moneylenders and loan sharks, the civil law sanctions serve to provide a negative impact on the moneylending contract itself. The civil sanctions imposed by the law under the MLA 2003 vary from making the agreement void, to illegality, and to unenforceability. If a contract is void because of its objects or terms, the primary and obvious consequence is that it cannot be sued upon and enforced as an ordinary legal contract.⁶⁵⁶ An unenforceable contract is also a void contract.⁶⁵⁷ On the other hand, an illegal contract is expressly or implicitly forbidden by statute, and express statutory provision

⁶⁵⁴ A. Ashworth, *Sentencing and Criminal Justice*, Weidenfeld and Nicolson, London, 1992, p. 252; C. Emmins, *A Practical Approach to Sentencing*, Financial Trading, London, 1985, pp. 174 – 181.

⁶⁵⁵ DTI, *Consumer Credit Bill: Full Regulatory Impact Assessment*, pp. 21 & 42.

⁶⁵⁶ P.S. Atiyah, *An Introduction to the Law of Contract*, 5th ed, Clarendon Press, Oxford, 1995, p. 340.

⁶⁵⁷ Malaysian Contract Act, 1950, (Act 136) s 2(g) (hereinafter “the Contracts Act”).

is not unusual nowadays.⁶⁵⁸ It should be noted that certain assignees of the moneylender may not be affected by the effects of the civil sanctions.⁶⁵⁹ Table 6.7 illustrates the provisions under both the MLA 2003 and MCLR, which provide civil sanctions.

Table 6.7: The civil sanctions under the MLA 2003

<i>*Section</i>	<i>Offence</i>	<i>Consequences</i>
6(2)	Licence taken out in a name other than the moneylender's true name	Licence void
10P(3)	Failure to comply with the prescribed moneylending agreement	Moneylending agreement void, of no effect and unenforceable
15	Moneylending agreement concluded by unlicensed moneylender	Moneylending agreement unenforceable
16	Moneylending agreement not signed by all parties, stamped and delivered to the borrower before money is lent	Moneylending agreement unenforceable
17	Charging compound interest	Moneylending agreement illegal
17A(3)	Interest charged in the moneylending agreement above the maximum	Moneylending agreement void, of no effect and unenforceable
18(2)	Accounts of moneylending transactions not kept in permanent books	Not entitled to enforce any claim in respect of any transaction in regard to the default
19(3)	Failure to comply with demand to supply a copy of moneylending documents	Not entitled to sue for or recover any sum due under the moneylending agreement
23	Charging charges other than stamp duties, legal fees and legal costs	The said sum recoverable as debt due
27	Moneylending agreement not attested	Moneylending agreement void, of no effect and unenforceable
<i>**Regulation</i>	<i>Offence</i>	<i>Consequences</i>
10	Modifying or varying any provision in Schedule J or K without prior consent of the Registrar	Moneylending agreement void, of no effect and unenforceable
12	Term or condition in a moneylending agreement does not conform to the particulars stated in the advertisement	Term or condition in the moneylending agreement void

* refers to MLA 2003

** refers to MCLR

⁶⁵⁸ M. Furmston, *Cheshire, Fifoot & Furmston's Law of Contract*, 14th ed, Butterworths, London, 2001, p. 399.

⁶⁵⁹ MLA 2003, s 26. This has been discussed in Chapter 3.2.9.

Table 6.7 illustrates twelve breaches that may incur civil consequences which either have an adverse effect on the moneylending agreement or prevent the moneylender from enforcing any claim under the contract. Table 6.7 shows that breaches of sections 6(2), 10P(3), 15, 16, 17A(3) and 18(2) are considered serious under the Act as those actions may incur both civil and criminal sanctions, although the wrongdoings under section 16 and 18(2) are compoundable offences. Those provisions are not only punitive but also restrictive in nature, as they serve to punish the moneylender with imprisonment, as well as to prevent moneylenders from obtaining illegal interest.

A moneylending agreement that fails to comply with the prescribed form,⁶⁶⁰ or is concluded by an unlicensed moneylender,⁶⁶¹ not duly signed, stamped and delivered to the borrower,⁶⁶² not attested by qualified persons,⁶⁶³ or modified without prior consent of the Registrar,⁶⁶⁴ will be rendered void, of no effect and unenforceable. If a moneylender advertises some terms or conditions of the moneylending agreement that do not conform to the terms or conditions in the actual agreement, such terms or conditions in the agreement will be invalid.⁶⁶⁵ Further, a moneylender charging compound interest on the borrower will render the moneylending agreement illegal. The general principle is that no person can claim any right or remedy under an illegal transaction in which he has participated.⁶⁶⁶ The maxim *ex turpi causa non oritur actio* applies. An illegal contract is void *ab initio*; the law treats such a contract as if

⁶⁶⁰ MLA 2003, s 10P(3).

⁶⁶¹ MLA 2003, s 15.

⁶⁶² MLA 2003, s 16 (1).

⁶⁶³ MLA 2003, s 27.

⁶⁶⁴ MCLR, reg 10.

⁶⁶⁵ MCLR, reg 12.

⁶⁶⁶ *Gordon v Metropolitan Police Chief Comr* [1910] 2 KB 1080 at 1098, per Buckley LJ.

it had not been made at all.⁶⁶⁷ Section 5 provides that all moneylenders must be licensed under the law, as this is evidence of a valid moneylending business. When a moneylender initiates any proceedings under the MLA 2003, the claim must be endorsed with a statement that at the making of the loan in question, the lender was a licensed moneylender.⁶⁶⁸ However, if the licence is taken out not in the moneylender's true name⁶⁶⁹ as stated in the identification card,⁶⁷⁰ or upon incorporation of a company,⁶⁷¹ the licence is deemed to be void. Once a licence is void, all moneylending transactions concluded under that licence are also void.

It is envisaged that all twelve provisions that provide for civil sanctions under the MLA 2003 and the MCLR have legitimate concerns in protecting the interest of borrowers in moneylending transactions. Most of the sanctions relate to the failure of the moneylender to fulfil his statutory obligations under the moneylenders laws. Regrettably, although the law is good and protective, it is questionable whether the borrowers will ever pursue civil claims. As mentioned in 6.1, the doubt is due to the limitations in terms of finance, procedural complexity, practical, psychological and cultural barriers.⁶⁷² Nevertheless, such concern will not prevent further discussion on the consequences of void and unenforceable moneylending agreement.

⁶⁶⁷ *Mogul Steamship Co v McGregor, Gow & Co* [1892] AC 25 at p. 39, per Lord Halsbury.

⁶⁶⁸ For the procedural requirement in the subordinate courts, see the Subordinate Courts Rules 1980, Ord 45 r 2; for actions in the High Court, see the Rules of the High Court 1980, Ord 79 r 2.

⁶⁶⁹ MLA 2003, s 6(2).

⁶⁷⁰ In the case of an individual moneylender.

⁶⁷¹ In the case of a company.

⁶⁷² DTI, *Consumer Credit Bill: Full Regulatory Impact Assessment*, p. 31; see also the DTI, "Consultation on the provision of Alternative Dispute Resolution for disputes arising under the Consumer Credit Act 1974: Regulatory Impact Assessment," p. 1. Available: <http://www.dti.gov.uk/ccp/consulpdf/creditadrrria.pdf> [accessed 20 December 2004]; FSA Annual Report 2002-2003; D. Harris, D. Campbell & R. Halson, *Remedies in Contract and Tort*, 2nd ed, Butterworths, London, 2002, p. 68. Further discussion on this issue is in Chapter Seven.

6.3.2 Consequences of an unenforceable moneylending agreement

The Malaysian Contracts Act provides the consequences of a void and unenforceable contract. As moneylending contracts are also contracts under which the Contracts Act applies, there are two provisions under the Contracts Act which are very relevant when discussing the effect of void and unenforceable moneylending agreement. Section 24 of the Contracts Act provides that an agreement which is unlawful is void, and section 2(g) provides that a void contract is an agreement not enforceable by law. Taking both provisions into account, it may be suggested that a court of law would not enforce a void and unenforceable moneylending agreement. However, section 66 of the Contracts Act provides an exception in the form of restitution in order to overcome the strict application of the law, especially in compassion for the innocent party to the contract.

6.3.3 The remedy of restitution

Although section 66 lays down a restitution provision, the remedy granted under this section is not founded strictly on the principles of contract. Section 66 reads as follows:

“When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.”

This provision has been applied in many leading cases,⁶⁷³ and it has been established that section 66 applies to an agreement which is void *ab initio*, or even to an agreement which is void under section 24 of the Contracts Act. There is no direct parallel of section 66 under the English law, as the Contracts Act was derived from

⁶⁷³ See for example, *Harnath Kaur v Indur Bahadur Singh* (1922) 50 IA 75 and *Menaka v Lum Kum Chum* [1977] 1 MLJ 91.

the Indian Contract Act 1872. (The antecedent of the legislation was said to be the American New York Code, and in American literature, the principle embodied in section 66 is referred to as 'the rule against unjust enrichment'.⁶⁷⁴ The principle of restitution appears to be based on the Roman law principle, *condictio causa data causa non secuta*.⁶⁷⁵) For the above reason, Indian authorities will also be referred to in the following discussion.

In the Indian appeal case of *Babu Raja Mohan Manucha v Babu Manzoor Ahmad Khan*,⁶⁷⁶ the Privy Council stated that a right to restitution may arise out of the failure of a contract, even though the right is not itself a matter of contractual obligation, as is the principle underlying section 65 of the Indian Contract Act 1872, which is identical to section 66 of the Malaysian Contracts Act. In light of the above case, it is very clear that section 66 was not founded upon the original contract but arises in connection with the contract or upon the "superimposed rule of law."⁶⁷⁷ In Malaysia, the authoritative decision on the consequences of section 66 is the case of *Menaka v Lum Kum Chum*⁶⁷⁸ whereby the Privy Council held that the appellant moneylender was entitled to restitution although the moneylending contract was held to be void and unenforceable under the MLA.

⁶⁷⁴ Awther Singh, *Sale of Goods Hire-Purchase and Moneylending in Malaysia*, Quins Pte Ltd, Singapore, 1980, at p. 240. The remedy of restitution is however, available under Scottish law; see *Cantiere San Rocco v Clyde Shipbuilding and Engineering Co* (1924) A.C. 226 (also referred to in *Menaka v Lum Kum Chum* [1977] 1 MLJ 91, PC.)

⁶⁷⁵ *Cantiere San Rocco v Clyde Shipbuilding and Engineering Co* (1924) A.C. 226.

⁶⁷⁶ (1942) LR 70 Ind App 1.

⁶⁷⁷ See also Awther Singh, *Sale of Goods Hire-Purchase and Moneylending in Malaysia*, Quins Pte Ltd, Singapore, 1980, at p. 241.

⁶⁷⁸ [1977] 1 MLJ 91 PC; this case was discussed in Chapter 3.

6.3.4 Conditions to be fulfilled before applying for restitution

Decided cases have established two elements to be fulfilled before pleading restitution:

- a) both parties are unaware of the illegality at the time the contract was made;
and
- b) the illegality was only discovered at a later stage.⁶⁷⁹

The test above raises three different situations for consideration. The court will have to decide, based on the circumstances, where both parties are unaware of the illegality; where only one party has knowledge of the illegality; and finally, where both parties are *pari delicto*.

6.3.4.1 Both parties are unaware of the illegality

Relief of restitution may be granted to both parties to the contract if neither was aware of the illegality. If the court is satisfied of the fact, the benefits gained under the illegal contract will be restored to both parties under section 66. Lord Tullybelton, in granting relief, stated that:

“Their Lordships are therefore of opinion that the contract and the security, having been made in contravention of section 8, are unenforceable. As the contract is not enforceable by law, it is void under section 2(g) of the Contracts (Malay States) Ordinance 1950. Neither party was aware of the illegality at the time of making the loan transaction and the documents were prepared and executed on both sides in complete good faith. The contract was ‘discovered’ to be void only after these proceedings had been started. Section 66 of the Contracts Ordinance therefore applies...”⁶⁸⁰

⁶⁷⁹ *Menaka v Lum Kum Chum* [1977] 1 MLJ 91, PC; *Soh Eng Ken v Lim Chin Wah* [1979] 2 MLJ 91; *Yeap Mooi v Chu Chin Chua & Ors* [1981] 1 MLJ 14; *Wong Yoon Chai v Lee Ah Chin* [1981] 1 MLJ 219; *Kasumu & Ors v Baba-Egbe* [1956] 3 All ER 266.

⁶⁸⁰ *Menaka v Lum Kum Chum* [1977] 1 MLJ 91, at p. 94.

6.3.4.2 One party has no knowledge of the illegality

In a number of decided cases, the innocent party who had no knowledge of illegality was held to be entitled to recover the money lent through the remedy of restitution. In the case of *Yeap Mooi v Chu Chin Chua & Ors*,⁶⁸¹ the learned President, who heard the case in the first instance, took the view that the deposit transaction between the appellant and the deceased pawnbroker was a void contract because the transaction was illegal under the MLA. He held that the appellant was an unlicensed moneylender and the contract was illegal and as such unenforceable and she was therefore left without remedy. On appeal to the High Court, Abdul Razak J. upheld this decision and he likewise held that the appellant was not entitled to the restitution because the appellant was as much *pari delicto* as the deceased in that, despite her knowledge that she had no licence to act as a moneylender at all relevant times, she did lend money to the deceased. The decision of the Appeal Court was, however, overturned by the Federal Court. Salleh Abbas FJ said:

“She became aware of the fact only after the suit had started because the statements of defence filed by the respondent claimed that the transaction was void and unenforceable. In fact throughout the trial and appeals she maintained that the deposit was perfectly in order. In our view this case fits in squarely with the words of section 66 as an agreement which is ‘discovered to be void’”.

The case of *Yeap Mooi v Chu Chin Chua & Ors*,⁶⁸² however, should be distinguished from the case of *Wong Yoon Chai v Lee Ah Chin*.⁶⁸³ In the latter case, the appellant, who was a licensed moneylender, had applied for foreclosure of charged land arising from a moneylending transaction and the application had been dismissed. No consequential orders were made. Subsequently the respondent applied by summons in chambers for an order of the delivery of the issue document of title, the discharge

⁶⁸¹ [1981] 1 MLJ 14

⁶⁸² Ibid.

⁶⁸³ [1981] 1 MLJ 219

of the charge and the cancellation of the memorial of the charge. In the same proceedings the appellant claimed restitution. The learned judge of the High Court gave orders in terms of the respondent's application but dismissed the appellant's claim for restitution. The appellant appealed. The Federal Court dismissed the appeal and stated that in this case, as the appellant had been a licensed moneylender for a period of years, he could not have been ignorant of the fact that he had breached the MLA and therefore there could not be an order for restitution.

6.3.4.3 Parties are in *pari delicto*

Where both parties have full knowledge of the illegality, neither is entitled to the relief of restitution. Indeed, it would be against public policy to grant relief to parties who knowingly entered into an illegal contract. In *Suu Lin Chong v Lee Yaw Seong*,⁶⁸⁴ the High Court held that the trial judge had misapplied the principle of restitution when he ordered the appellant to reimburse the respondent, although both parties were fully aware that the contract was void *ab initio*. Wan Yahya J observed that:

“The impression I get from reading this section is that the section is not intended to apply *ex abundante* to all void contracts. On the contrary, it is restricted in its application to agreements 'discovered' to be void or to contracts which 'become' void. The term 'discover' here clearly indicates something which the parties were not aware of at the time of making the agreement and which they gained sight of or detected only subsequently. Similarly the word 'becomes' refers to something not present when the contract was signed but came into being at a later stage. In this case there is no element of discovery or change involved. The defendant/appellant had all along averred not only that the transaction was a moneylending contract but also that the interests were excessive.”

In the case of *Soh Eng Keng v Lim Chin Wah*, which was coincidentally also decided by Wan Yahya J, an unlicensed moneylender was unsuccessful in claiming the principal borrowed and interest from the defendant as the loan transaction had

⁶⁸⁴ [1979] 2 MLJ 48, HC.

contravened section 15 of the MLA. The remedy of restitution was also denied as the claimant was aware of the nature of his transactions from the very beginning. The learned Judge stated that:

“To my mind, this section has to be applied with care and is not open to indiscriminate use by unlicensed moneylenders whose claims have been defeated by reason of the contravention of the provisions of the Moneylenders Ordinance, 1951. Section 66 of the Contracts Act is not intended to override those provisions of the Moneylenders Act which make contracts in moneylending transactions void but is meant to provide some relief to a party whose right in an agreement has become unenforceable through no fault of his own making.....I am also of the opinion that the effect of interpreting section 66 otherwise would be tantamount to rendering section 8 and 15 of the Moneylenders Ordinance nugatory and defeating the object of that legislation. If that be the law, then the statutory restriction over the vice of uncontrolled moneylending will be forever removed and unlicensed moneylenders will rejoice at the prospect of getting a second bite at the cake. Even if caught by the provisions of the Moneylenders Ordinance, the offender has yet the Contracts Act to fall on for the restitution and possibly for the future use of his nefarious implement.”⁶⁸⁵

6.3.5 Award of interest under section 66

In *Menaka v Lum Kum Chum*,⁶⁸⁶ the Privy Council raised the concern whether the court has jurisdiction to award interest under section 66. There were two issues clarified by the Privy Council in rejecting the appellant’s argument to claim for an award of interest at the full contractual rate of 12% per annum from the date of the loan. Lord Tullybelton stated that if the interest at the full rate were awarded to the appellant, the practical result would be the same as if the contract were to be enforced, and this might frustrate the intention of the MLA. Secondly, their Lordships found no merit in the argument that section 66 should “make compensation for” the “advantage” which had been received by the borrower, which consisted of the loan and the *use* of the sum of money since he (the borrower) had received it. In reference

⁶⁸⁵ [1979] 2 MLJ 91, at p. 92.

⁶⁸⁶ [1977] 1 MLJ 91, PC.

to several Indian authorities,⁶⁸⁷ their Lordships assumed that the courts have jurisdiction to award interest from a date prior to the institution of the proceedings. The award of interest is, however, a matter for the discretion of the court. The Privy Council accordingly agreed with the award of Federal Court that interest should be paid at 6% from the date of raising proceedings.

It is believed that although a moneylending contract is deemed to be void and unenforceable under sections 10P(3), 15, 16, 17A(3) and 27 of the MLA 2003 or regulation 10 of the MCLR, *a separate cause of action divorced from the provisions contravened* is available under section 66 of the Contracts Act. The discussion above shows that there is a remedy for a void and unenforceable contract. Thus one might argue that a void and unenforceable moneylending contract could be enforced under this restitution provision, and it may defeat the intention of the MLA in protecting the interest of borrowers in a moneylending transaction. In sum, the issue is whether the application of section 66 overrides the MLA. To answer the question, it is here submitted that the remedy of restitution does not exist under the MLA. It is subject to a restricted discretion of the court whether to award the remedy based on two crucial factors provided under section 66, i.e. when the 'agreement is *discovered* to be void or when a contract *becomes* void'.

In concluding the discussion on the civil sanctions under the MLA 2003, it is suggested that the Act has genuine intention in protecting the borrowers in the moneylending transaction. If the moneylenders are found guilty of breaching their statutory duties, they will have to face the consequences of having the moneylending

⁶⁸⁷ *Harnath Kaur v Indur Bahadur Singh* (1922) LR 50 Ind App 69; *Babu Raja Mohan Manucha v Babu Manzoor Ahmad Khan* (1942) LR 70 Ind App 1, 10; *Suganchand v Balchand* AIR 1957 Rajasthan 89.

agreement rendered void and unenforceable, and lose their money. Although there is a remedy of restitution for moneylenders, this is a separate cause of action and it does not apply generally to all void contracts. Thus, theoretically, the law seems flawless in achieving its purpose. Unfortunately, this is idealistic theory. In practice, civil sanctions may not be enforced by the majority of borrowers. Besides the limitations discussed earlier, it is suggested here that most borrowers are unaware of the moneylenders law. Borrowers may enter into a moneylending agreement without knowing the legal requirements imposed on moneylenders, such as the requirement to have a valid moneylending licence and advertisement permits to advertise, to use a prescribed moneylending agreement and not to charge interest exceeding the prescribed limit, etc; hence, the significant role of the strict liability criminal sanctions in addressing this issue.

6.4 Civil Sanctions under the CCA

The principal form of civil consequences under the CCA is to render the consumer credit agreement unenforceable without a court order.⁶⁸⁸ The unenforceability of the agreement occurs in several situations, for example, when the agreement is not properly executed under sections 61 to 64 of the CCA.⁶⁸⁹ A regulated agreement is not “properly executed” unless it fulfils the requirements relating to form, content, signatures and legibility.⁶⁹⁰ An agreement is also deemed “improperly executed” when a copy of the executed or unexecuted agreement is not supplied to the debtor or hirer.⁶⁹¹ Failure of the creditor to provide a notice of cancellation rights will also give

⁶⁸⁸ CCA, s 61.

⁶⁸⁹ S 65 must be read with s 127 (enforcement orders in cases of infringement) and s 173(3) (the enforcement order is not necessary if the debtor or hirer consented to the enforcement of the agreement).

⁶⁹⁰ CCA, s 61.

⁶⁹¹ CCA, ss 62 and 63.

rise to an “improperly executed” agreement. It should be noted that the effect of unenforceability is that the agreement is merely unenforceable against the debtor or hirer. The agreement is not void or illegal, as according to the general principles of contract: unenforceable contracts are valid in all respects except that one party (sometimes both) cannot be sued on the contract.⁶⁹² The effect is that the contract is good and all the legal consequences of a contract will follow.⁶⁹³ There are, however, two factors that will force the court to refuse an enforcement order; failure to sign the agreement and the prescribed terms in the agreement being left blank.⁶⁹⁴ Thus section 65 has only limited effect, since it is only a consumer protection measure, intended to protect a debtor or hirer who has not been properly informed of his obligations.⁶⁹⁵ Furthermore, section 173(3) enables the debtor or hirer to consent to the enforcement of the agreement without the court order. Moreover, no sanction is provided for breach of section 65 as supported by the rule in section 170(1) which means that enforcement of an improperly executed agreement without an order of the court incurs no civil or criminal sanction as being such a breach.⁶⁹⁶

The civil sanction for not obtaining a licence is that any regulated agreement not being a non-commercial agreement is unenforceable against the debtor or hirer.⁶⁹⁷

The OFT, however, is empowered to remedy the situation by making an order considering regulated agreements made during the unlicensed period as if they had

⁶⁹² A.G. Guest and M.G. Lloyd, *Encyclopedia of Consumer Credit Law*, Sweet & Maxwell, London, 1975 - , para. 2-066; see also the case of *Wilson v SS for Trade and Industry* [2003] UKHL 40, where Lord Scott substantiated that an agreement rendered unenforceable by s 65 is “not void or unlawful” (para 164) and Lord Nicholls stated that the like s “does not deprive a regulated agreement of all legal effect” (para 131).

⁶⁹³ *Taylor v GER* [1901] 1K.B. 174.

⁶⁹⁴ CCA, s 127(3).

⁶⁹⁵ *Wilson v State of Secretary for Trade and Industry* [2003] UKHL 40

⁶⁹⁶ S 170(1) is criticised by Howells and Weatherill for the “general weakness of the enforcement powers” of the CCA; see G. Howells and S. Weatherill, *Consumer Protection Law*, 2nd ed, Ashgate, Hants, 2005, p. 320.

⁶⁹⁷ CCA, s 40. This is also a criminal offence under s 39.

been licensed.⁶⁹⁸ Before exercising its authority, the OFT must consider several relevant factors, such as the degree of prejudice suffered by the debtor or hirer as a result of the creditor's conduct.⁶⁹⁹

In contrast to civil sanctions under the moneylenders laws, infringements of the provisions under the CCA will not render the agreement void or illegal. The imposition of civil sanctions under the CCA may be considered as quite flexible, as it gives the parties more freedom to determine the contract. However, according to learned writers, the sanctions for infringing the CCA remain "weak and at best obscure."⁷⁰⁰ Nevertheless, in order to balance the limitation of the civil sanction, there are quite often parallel criminal sanctions under the CCA. Recently, the CCA 2006 has introduced civil penalties to be enforced by the OFT further to enhance consumer protection.

6.5 Administrative Control

It was pointed out that the criminal and civil sanctions discussed above seek to satisfy the three objectives of the MLA 2003: to regulate and control the business of moneylending; to protect borrowers in the moneylending transactions; and to eliminate loan sharks. It is also acknowledged that to a certain extent, the criminal and civil sanctions do provide some protection to borrowers in a moneylending transaction. However, certain issues such as enforcement of civil sanctions as well as borrowers not getting individual redress in criminal sanctions show that the protection is insufficient. Further, neither the civil nor the criminal law enhances consumers'

⁶⁹⁸ CCA, s 40(2).

⁶⁹⁹ CCA, s 40(4).

⁷⁰⁰ G. Howells and S. Weatherill, *Consumer Protection Law*, 2nd ed, Ashgate, Hants, 2005, p. 321.

awareness of their rights.⁷⁰¹ Thus it is the aim of this section of the thesis to investigate the third weapon of consumer protection: administrative control through imposition of civil sanctions. This includes civil penalties enforced by the OFT under the CCA 2006 and injunctions under Part 8 of the Enterprise Act 2002 (hereinafter “the Enterprise Act”). Since these measures are only available in the UK, it is hoped that discussion of this topic will provide some guidance to Malaysia.

6.5.1 Civil penalties under the CCA

New rules on licensing are to be introduced by the CCA 2006 under sections 33A-33E. In addition to the power to revoke, suspend or vary licences, section 33A will add an intermediate power to impose a requirement on a licensee to do or not to do anything specified. The requirement may be imposed by the OFT by notice, if it is dissatisfied with any matter in connection with:⁷⁰²

- a business being carried on, or which has been carried on, by a licensee or associate or former associate of the licensee;
- a proposal made by a licensee, or associate or former associate of the licensee, to carry on a business; or
- any other conduct of such person.

If the licensee fails to comply with the new rules on licensing, the OFT may impose monetary penalties on such person. The person who commits such breach is called a ‘defaulter’ and upon giving a penalty notice, the OFT may impose on him a penalty of up to £50,000 for every breach of the rules.⁷⁰³ The penalty notice informs the

⁷⁰¹ R. Lowe and G. Woodroffe, *Consumer Law and Practice*, 6th ed, Thomson, Sweet & Maxwell, London, 2004, p. 313.

⁷⁰² CCA, s 33A(1)(a-c), as inserted by CCA 2006, s 38.

⁷⁰³ CCA, s 39A (1) & (3), as inserted by CCA 2006, s 52.

defaulter of the amount of penalty imposed, the reasons for imposing the penalty, how to pay the penalty and the time-frame within which to make payment.⁷⁰⁴ However, the CCA also provides that the OFT must give notice to the defaulter before imposing a penalty on him.⁷⁰⁵ Among other things, the notice must invite the defaulter to make representations in accordance with section 34 of the CCA.

Section 39C will impose an obligation on the OFT to publish its statement of policy in relation to the civil penalties.⁷⁰⁶ Among other things, the OFT must prepare and publish a statement of policy on how it will exercise its powers under section 39A, subject to the approval of the Secretary of State⁷⁰⁷ The policy statement must also be revised from time to time, and the OFT must consult suitable persons in conducting the revision.⁷⁰⁸ The OFT must not impose any civil penalties under section 39A unless the statement of policy is published.⁷⁰⁹

6.5.2 Part 8 of the Enterprise Act 2002

Part 8 of the Enterprise Act has introduced a new enforcement regime which came into force from 20 June, 2003.⁷¹⁰ It replaces Part III of the Fair Trading Act 1973 and the Stop Now Orders (EC Directive) Regulations 2001. This injunctions approach under Part 8 improves consumer protection by giving certain bodies strengthened powers to apply to the courts for an enforcement order to stop businesses from infringing a wide range of consumer protection legislation, where the breach harms

⁷⁰⁴ CCA, s 39A (2), as inserted by CCA 2006, s 52.

⁷⁰⁵ CCA, s 39B (1), as inserted by CCA 2006, s 53.

⁷⁰⁶ CCA, s 39C, as inserted by CCA 2006, s 54.

⁷⁰⁷ CCA, s 39C(1) & (3), as inserted by CCA 2006, s 54.

⁷⁰⁸ CCA, s 39C(2) & (5), as inserted by CCA 2006, s 54.

⁷⁰⁹ CCA, s 39C(7), as inserted by CCA 2006, s 54.

⁷¹⁰ SI 2003/1397

the collective interests of consumers.⁷¹¹ However, Part 8 is not a mechanism to seek individual redress since collective harm must affect, or have the potential to affect, consumers generally or a group of consumers.⁷¹² The scope of breach under Part 8 covers a domestic infringement and a Community infringement. The former refers to UK enforcement while the latter is concerned with cross-border enforcement. Part 8 applies to the CCA.⁷¹³

6.5.2.1 Domestic Infringements

A domestic infringement is a breach that is committed by a person in the course of business⁷¹⁴ that harms the collective interests of consumers in the UK⁷¹⁵ and falls within the exhaustive list in section 211(2)(a)-(g). Examples of the breach are contravention of a law enforceable by criminal proceedings; breach of contract; and breaches of non-contractual duties.

6.5.2.2 Community Infringements

A Community infringement is a breach that harms the collective interests of consumers and contravenes the laws, regulations or administrative provisions of a European Economic Area (EEA) state, giving effect to one of the listed Directive in Schedule 13.⁷¹⁶ Community infringements may result in enforcement in the UK or in a European Economic Area (EEA) state. In regard to the CCA, provisions applying to

⁷¹¹ Enterprise Act, ss 210-211; OFT, *Enforcement of consumer protection legislation: Guidance on Part 8 of the Enterprise Act, 2003* (hereafter “the OFT Guidance”). Available: <http://www.of.gov.uk/NR/rdonlyres/07F55E7B-8E74-4FF9-823D-FC32C1FBD793/0/OFT512.pdf> (accessed 1 April 2006). This guidance was published by the OFT in fulfilling its obligation to issue guidance explaining the consumer protection provisions how they are expected to work; Enterprise Act, s 229.

⁷¹² This is explained by the OFT Guidance, since collective harm is not defined under the Enterprise Act.

⁷¹³ Enterprise Act, schedule 13.

⁷¹⁴ Enterprise Act, s 211(1)(a).

⁷¹⁵ Enterprise Act, s 211(1)(b).

⁷¹⁶ Enterprise Act, s 211(1).

consumer hire agreements and extortionate credit bargain are not included under the Directive.⁷¹⁷

6.5.2.3 Enforcers

There are three types of enforcers under Part 8 of the Enterprise Act: general enforcers, designated enforcers and community enforcers. General enforcers refer to the OFT and every local weights and measures authority i.e. TSDs and the Department of Enterprise, Trade and Investment in Northern Ireland.⁷¹⁸

A designated enforcer is selected by the Secretary of State by order, if he thinks that it “has as one of its purposes the protection of the collective interests of consumers”.⁷¹⁹

It may be either be a public or a private body. Examples of designated enforcers from the public bodies are the Water Services Regulation Authority and the Gas and Electricity Markets Authority.⁷²⁰ Private bodies, such as the Consumers Association, must comply with certain criteria specified by the Secretary of State before being designated. This include independence, impartiality, experience, competence, expertise, ability, capability and readiness to follow best practice and to co-operate with the OFT, other enforcers and regulators.⁷²¹

⁷¹⁷ Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003, Schedule Listed Directives, Article 3.

⁷¹⁸ Enterprise Act, s 213(1)

⁷¹⁹ Enterprise Act, s 213(2)

⁷²⁰ Enterprise Act 2002 (Part 8 Designated Enforcers: criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions) Order 2003, reg 5 and Schedule.

⁷²¹ Ibid, reg 3.

Community enforcers refer to qualified entities specified in the Official Journal.⁷²²

They do not include general and designated enforcers, thus, they may refer to enforcers from other EEA states.

6.5.2.4 Enforcement Procedure

a) Coordination

In order to avoid any risk of overlap and repetition of proceedings, the OFT is appointed as the coordinator.⁷²³

b) Consultation

Before seeking court action, an enforcer must consult with the business and the OFT (if it is not the enforcer) in order to stop the infringement.⁷²⁴ However, in very urgent cases, an immediate application may be made without consultation.⁷²⁵

c) Undertakings

An enforcer may accept an undertaking from any business against which proceedings could be brought. The undertaking must require that the business “does not continue or repeat the conduct or does not engage in the conduct in the course of his business, or another business or does not consent or connive in the carrying out of such conduct by a body corporate with which he has a special relationship.”⁷²⁶ The undertaking may include further undertaking to require publication of the terms of the undertaking

⁷²² Enterprise Act, s 213(5)

⁷²³ Enterprise Act, s 216

⁷²⁴ Enterprise Act, s 214(1)

⁷²⁵ Enterprise Act, s 214(3)

⁷²⁶ Enterprise Act, s 219(4)(a)-(c)

or a corrective statement.⁷²⁷ Failure to comply with an undertaking can result in an application for an enforcement order.⁷²⁸

d) Enforcement orders

An application for an enforcement order must be made to the High Court or the county court.⁷²⁹ In cases of domestic infringements, the enforcer may apply for an enforcement order when an infringement is found.⁷³⁰ However, the threshold in Community infringements is lower; thus the enforcer may also make an enforcement order where it is likely to be a Community infringement.⁷³¹ In applying its discretion to make an enforcement order, the court will consider whether any undertaking was given and whether it was complied with.⁷³² An enforcement order requires the person not to continue nor repeat the conduct or not to engage in the conduct in the course of his business, or another business or not to consent or connive in the carrying out of such conduct by a body corporate with which he has a special relationship.⁷³³ The enforcement order can also require the order or corrective statement to be published.⁷³⁴ Failure to comply with an enforcement order may result in contempt of court.

Table 6.8 summarises the procedure for Part 8 of the Enterprise Act.

⁷²⁷ Enterprise Act, s 217(9)-(10)

⁷²⁸ Enterprise Act, s 220

⁷²⁹ Enterprise Act, s 215(5)

⁷³⁰ Enterprise Act, s 215(1)

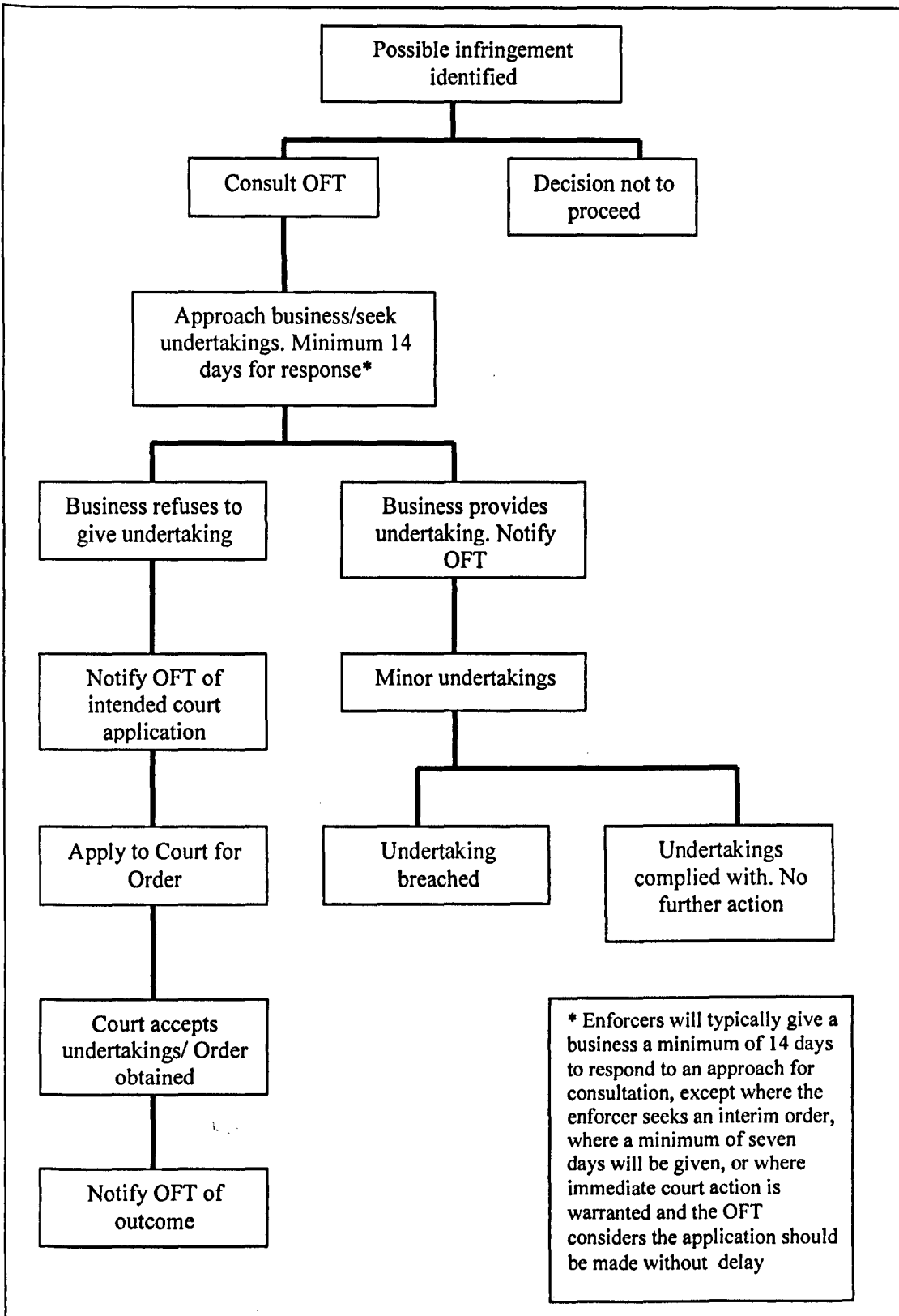
⁷³¹ Enterprise Act, s 215(1)(b)

⁷³² Enterprise Act, s 217(4)

⁷³³ Enterprise Act, s 217(6)(a)-(c)

⁷³⁴ Enterprise Act, s 217(8)

Table 6.8: Procedure for Part 8 action by an enforcer



Source: *The OFT, Enforcement of consumer protection legislation: Guidance on Part 8 of the Enterprise Act*

In sum, this study here believes that the civil penalties provided under the CCA 2006 have great potential to enhance the regulation and control of consumer credit industry. It seems that the consumer credit law is moving away from the traditional criminal sanctions by moving towards the middle law, which has been discussed earlier in this chapter. Perhaps, it could be suggested that civil sanctions imposed by regulators might be the right answer to the dissatisfaction over strict liability criminal sanctions that was discussed earlier. The advantage is that the enforcement of the sanction is an 'internal' process and the regulator and the defaulter can avoid the complexities of litigation. In the words of Leder and Shears:⁷³⁵

"The consumer's private law rights can often be rather illusory: he may be ignorant of his rights, he may lack the initiative or confidence to seek a civil law remedy, he may lack time or money to seek proper legal advice and then to institute legal proceedings, with all their attendant delays and risks. So regulation by administrative authority offers better prospects for the protection of consumers at large"

Malaysia might want to consider this revolutionary power in order to strengthen its enforcement role. In regard to Part 8, it seems that to a certain extent, the UK law is moving away from the criminal law into a new direction, perhaps due the requirement of the EU that Member States have an injunctions procedure. However, learned writers recognised that Part 8 has a useful role and that it might be the answer if the use of the criminal law is not appropriate or ineffective.⁷³⁶ Nevertheless, it is suggested that an injunction approach is quite ambitious to be adopted in Malaysia, since an injunction is a more complicated form of measure than criminal sanctions.

⁷³⁵ M. Leder and H. Shears, *Consumer Law*, 4th ed, Financial Times/Pitman Publishing, London, 1996, p. 165.

⁷³⁶ "The Changing Face of UK Consumer Law: A symposium to mark Deborah Parry's contribution to Consumer Law scholarship", University of Hull, 11 April 2006. This is the view of Professor Geraint Howells, Professor Peter Cartwright, Dr Christian Twigg-Flesner and Mr. Richard Bragg.

6.6 Conclusion

Reform under the MLA 2003 has certainly strengthened the criminal sanctions, with the increase of the monetary penalties and terms of imprisonment, as well as the introduction of the punishment of whipping. Loan sharks and errant moneylenders will not escape the punishments of whipping and imprisonment since the law has also extended them to the director, president, partners and other members of the management team of moneylending companies, societies and firms. Further, the provision for criminal sanctions for obstruction of enforcement duties will ensure that performance of those duties will not be interrupted. Moreover, moneylenders are expected to discharge their duties in a moneylending contract faithfully; failure to observe their obligations is punishable with criminal sanctions. Furthermore, the introduction of criminal sanctions for harassing or intimidating a borrower serves as a statutory warning to loan sharks and moneylenders not to resort to strong arm tactics in recovering repayments from borrowers. Finally, the power to compound some offences will accelerate the resolution of cases and reduce court cases. It was also pointed out that some loan sharks were concerned over the new strict punishments. Nevertheless, the Government might also consider other punitive penal sanctions such as life imprisonment and confiscation of the assets of loan sharks to enhance the deterrent effect on illegal moneylending.

Civil sanctions mechanisms have also been shown to serve a legitimate interest in protecting borrowers in moneylending transaction. Civil law sanctions could render a moneylending agreement void or of no effect or unenforceable, or all the above. Unfortunately, the main drawback of civil sanctions is that the majority of borrowers might not enforce civil sanctions due to the limitations discussed. Nevertheless, it is

also commendable that serious offences such as failure to comply with the prescribed moneylending agreement, moneylending agreement concluded by unlicensed moneylender and charging interest beyond the maximum limit may incur both civil and criminal sanctions.

Although this study here takes the view that criminal sanctions are essential to support the enforcement of the MLA 2003 and to compensate the evident weaknesses of the private law, nevertheless, there are limitations of criminal sanctions. Oughton and Lowry, for example, say that the main function of the criminal law is to promote trading standards and not to provide compensation to aggrieved consumers.⁷³⁷ Likewise, an immense and explicable reluctance to enforce civil sanctions still remains.⁷³⁸ Thus, does regulation by administrative authority offer better prospects for the protection of borrowers in moneylending transactions? In view of the latest development in the UK, Malaysia might want to consider civil penalties that are being introduced by sections 39A-39C of the CCA 2006. Administrative control might provide another prospective alternative to strengthen the Ministry's enforcement role, although it might not be the right answer to the weakness in the enforcement of civil sanctions.

Due to the limitation in civil sanctions, the next chapter will discuss the alternatives that might benefit the borrowers in moneylending transactions.

⁷³⁷ D. Oughton & J. Lowry, *Textbook on Consumer Law*, 2nd ed, Oxford University Press, Oxford, 2000, p. 88.

⁷³⁸ G. Borrie, "Law and Codes for Consumers", [1980] *JBL* 315, pp. 317-318.

ALTERNATIVE DISPUTE RESOLUTION

7.0 Introduction

This study has examined the relevant issues in the MLA 2003 in order to determine whether the objectives of the Act, to regulate and control the moneylending business, to protect the interest of the borrowers in the moneylending transactions and to eliminate illegal moneylending, could be achieved. Chapter Two investigated the background of the moneylending laws, the institutional framework for consumer credit as well as the terminology aspects while Chapter Three discussed how the law controls the conduct of moneylenders through licensing and advertisement permits. Chapter Four analysed the enforcement powers granted to the enforcement officers and the police while Chapter Five examined the conduct of moneylending business. Finally, Chapter Six investigated the criminal and civil sanctions provided under the MLA 2003 and its regulations.

In analysing the moneylenders laws, it becomes obvious that, in the event of dispute, the only mechanism available to borrowers to get a remedy is through civil claims. It is therefore necessary to discuss whether borrowers in moneylending transactions should be provided with alternative redress mechanisms. Although the discussion in Chapter Six has shown quite a number of remedies in their interest, in reality, borrowers do not gain much benefit from criminal and civil sanctions. Criminal sanctions do not provide individual redress for borrowers, while civil sanctions are rarely pursued by them; hence the importance of exploring other kinds of dispute resolution mechanisms.

It is, therefore, the aim of this chapter to analyse the issue of access to justice for consumers in Malaysia, the aspects of alternative dispute resolution (ADR), the existing ADR mechanisms in consumer disputes, and whether there should be a separate ADR body for moneylending disputes. This chapter will also examine the application of ADR for consumer credit in the UK as a basis for evaluating the practice in Malaysia and suggesting whether further reform is needed.

7.1 Access to Justice

Settlement of disputes between the consumers and businesses has long been recognised as a major issue in the field of consumer protection.⁷³⁹ A survey conducted by the OFT shows that although approximately three out of four consumers took some action about their grievances, only some went beyond a complaint to the supplier.⁷⁴⁰ Fewer than one in a thousand of all consumers, or under one quarter of a percent of those with complaints, resorted to any kind of redress mechanism.⁷⁴¹ Based on the problems of which consumers are aware, the OFT has estimated that consumer detriment is running at a minimum of £8.3billion per annum.⁷⁴² These findings are alarming and, therefore, need immediate viable action. As there are no statistics to determine the situation in Malaysia, the findings in the UK might be adopted, as it is assumed that the circumstances in Malaysia are at least equally disadvantageous.

⁷³⁹ W.C.H. Irvine, *Consumer Law in Scotland*, W. Green & Son Ltd, Edinburgh, 2000, pp. 286-287; OFT, *Consumer Redress Mechanisms: A Report by the Director General of Fair Trading into systems for resolving consumer complaints*, 1991.

⁷⁴⁰ OFT, *Consumer Dissatisfaction Report*, 1986.

⁷⁴¹ OFT, *Consumer Redress Mechanisms: A Report by the Director General of Fair Trading into Systems for Resolving Consumer Complaints*, 1991; Iain Ramsay, *Rationales for Intervention in the Consumer Marketplace*, Unpublished Paper prepared for the OFT, 1984, pp. 38-39.

⁷⁴² OFT, "Consumer Detriment," (OFT 296), February 2000, p. 3.

From the above, it might be inferred that consumers are reluctant to pursue their claims in the court, although they may get their remedies from civil sanctions. Thus, it might be suggested that the issue in question is the problem of lack of access to justice. This predicament eventually prevents the court system from being able to resolve consumer disputes. The focal point of such ineffectiveness is the failure to facilitate easier usage by consumers with legal claims.⁷⁴³ The main barrier to pursuing civil claims is “expense, or the fear of it”.⁷⁴⁴ The rationale behind this opinion is the disparity between the low economic value of many consumer claims and the substantial cost and duration of their eventual settlement.⁷⁴⁵ Nevertheless, the small value of a consumer complaint should not overshadow the right to redress.⁷⁴⁶ On the other hand, several doctrinal and empirical studies have pointed not only to the financial and procedural complexity aspects, but also to practical, psychological and cultural barriers to the settlement of disputes arising out of relations between consumers and businesses in the court of law.⁷⁴⁷ Thus, it may be suggested that there are several external factors discouraging consumers from going to court: these are the obstacles that contribute to lack of access to justice.

⁷⁴³ In England and Wales, criticisms of the civil court have led to a major review of the rules and civil procedures. The Woolf Report entitled *Access to Justice* was published in June 1995.

⁷⁴⁴ W.C.H. Irvine, *Consumer Law in Scotland*, W. Green & Son Ltd, Edinburgh, 2000, p. 289.

⁷⁴⁵ R. Lowe and G. Woodroffe, *Consumer Law and Practice*, 6th ed, Thomson, Sweet & Maxwell, London, 2004, p. 218.

⁷⁴⁶ The consumer's right to redress was adopted by Consumers International, one of the oldest consumer organizations in the world. There are eight rights propagated by Consumers International: the right to safety, the right to be heard, the right to choose, the right to redress, the right to be informed, the right to consumer education, the right to satisfaction of basic needs and the right to a healthy environment. The right to redress connotes the entitlement of consumer to obtain damages for defective goods or unsatisfactory services.

⁷⁴⁷ DTI, *Consumer Credit Bill: Full Regulatory Impact Assessment*, 2004, p. 31; DTI, “Consultation on the provision of Alternative Dispute Resolution for disputes arising under the Consumer Credit Act 1974: Regulatory Impact Assessment,” p. 1. Available:

<http://www.dti.gov.uk/ccp/consulfpdf/creditadrria.pdf> [accessed 20 December 2004]; FSA Annual Report 2002-2003.

Increased emphasis on consumer rights and redress, as well as the unsuitability of the traditional court procedure as a means of settling consumer disputes, was the impetus for various pieces of research on access to redress.⁷⁴⁸ The results of these works have identified the factors contributing to the failure of the court system. Lord Woolf named the three key problems facing civil justice: cost, delay and complexity.⁷⁴⁹ Rachagan also suggested delay, costs and complexity as the factors deterring complainants from seeking redress in the courts.⁷⁵⁰ Sakina listed five inefficiencies of the court system: formality, complexity, delay, cost and psychological deterrence.⁷⁵¹ Likewise, Hondius⁷⁵² described five obstacles faced by consumers when seeking redress before the court: cost, delay, psychological restraint and complication. A survey by the OFT discovered that in 45% of cases, the emotional impact of dealing with the problem was assessed as “severe,” in 30% as “medium,” and in 26% as “mild.”⁷⁵³ Viitanen suggested that the cost of litigation was the biggest obstacle, followed by the complexity of normal civil litigation and the slowness of the procedure, as well as the psychological barriers.⁷⁵⁴

7.2 Small Claims Procedure

The difficulties faced by consumers in bringing their claims to court have led to different kinds of reforms in many countries. Basically, two options have been considered to overcome this issue; to transform the court procedures to be more

⁷⁴⁸ Klaus Viitanen, ‘Consumer Redress’ [1995] *Consum. L. J.*, p. 11.

⁷⁴⁹ Woolf Report, Lord Chancellor’s Department, London, June 1995, para 3.1.

⁷⁵⁰ S. Rachagan, Consumer Protection in the Rapidly Developing Economies of South-East Asia: A Case Study from Malaysia. Ins. Ramsay. I. (edit). *Consumer Law in the Global Economy: National and International Dimensions*, Ashgate Publishing Ltd., Hants, 1997, p. 110.

⁷⁵¹ Sakina Sheik Ahmad Yusoff, *Pengguna dan Akses Kepada Keadilan: Mekanisma Tebusrugi Bagi Pertikaian Perdagangan* (Consumers and Access to Justice: Alternative Dispute Resolution for Commercial Disputes), paper presented at the Sixth National Malaysian Consumer and Family Economics Association (MACFEA) Seminar, 29 Sept. 2001, p. 3.

⁷⁵² Ewoud H. Hondius, “Consumer Redress Schemes: An Outline”, [1995] *Consum. L. J.*, pp. 2-3.

⁷⁵³ OFT, “*Consumer Detriment*,” (OFT 296) February 2000, p. 3.

⁷⁵⁴ K. Viitanen, “Consumer Redress,” [1995] *Consum. L.J.*, pp. 11-12.

consumer-friendly or, alternatively, to supplement the court system by ADR procedures.⁷⁵⁵ In Malaysia, the former is exemplified by the small claims procedure implemented in the Magistrate's Court.

The 'small claims' is a simplified procedure established in the Magistrate's Court since 1987. According to the Subordinate Courts Rules 1980, the small claims procedure is to be used only where the amount claimed or the value of the subject matter of the claim does not exceed RM5,000.⁷⁵⁶ Although the small claims procedure was established nearly twenty years ago, it may be suggested that it has failed to provide access to justice to consumers, for several reasons to be explained later on. The malfunction may be attributed to the system itself. The task of hearing a small claims procedure is allotted to the Magistrates' Court. The Magistrates' Courts hear all civil matters in which the claim does not exceed RM25,000. In criminal matters, First Class Magistrates' Courts generally have power to try all offences for which the maximum term of imprisonment does not exceed 10 years or which are punishable with a fine only, but may pass sentences of not more than five years imprisonment, a fine of up to RM10,000, and/or up to twelve strokes of the cane.

As the small claims procedure adopts the inquisitorial style of hearing as opposed to the normal adversarial system, the Magistrates and staff concerned faced difficulties in adjusting their manner and approach to achieve its objectives.⁷⁵⁷ The discouraging atmosphere and the circumstances of the court system, such as delays of hearings,

⁷⁵⁵ G. Howells, "Editorial," [1995] *Consum. L.J.* 1; according to the writer, it is a matter of debate and research to determine whether ADR is faster, more informal and independent than going to court.

⁷⁵⁶ Order 54 rule 2.

⁷⁵⁷ Malaysian Consumer Law Reform, para. 8.8.14.

long sitting hours, and the appearance of Magistrates and lawyers with their conventional sombre costume and the settings of courtrooms, proved to intimidate prospective claimants.⁷⁵⁸ All these factors acted as barriers and an ordinary consumer, lacking any technical advice and uncertain as to the strength of his case and ignorant of the law will, understandably, be reluctant to incur the considerable trouble of pursuing his claim. It is critical to overcome the weakness of the traditional court procedure, as the provision of adequate avenues for redress is important to enable consumers to resolve conflicts through a fair and equitable process. Facts and research have demonstrated the weaknesses of the traditional court system as the consumers' dispute resolution mechanism. A pragmatic response to this acknowledged inadequacy of the conventional court system is the implementation of ADR mechanisms, which, in contrast, offer flexibility in terms of procedures with more informal resolutions of problems by intermediaries who are acquainted with the industry concerned, lower costs, more confidentiality and a faster result than the litigation process.

It is against this background that efforts have been made to strengthen ADR mechanisms in Malaysia for consumer disputes. ADR comprises several methods that

⁷⁵⁸ Ibid, para. 8.8.15. In Malaysia, the weakness of the conventional court system is evidenced with the statistics on the problem of delay in the disposal of cases. According to the former Chief Justice, Tun Eusoff Chin, 646,174 cases (173,898 civil cases and 472,276 criminal cases) were pending in the courts; see "Justice first", *The Sun*, 21 March 2000, p. 1; see also the statement of a former Minister at the Prime Minister's Department in "Rais: Backlog of cases a national woe", *The Star*, 24 March 2000; "Rais: More than half of backlog of cases cleared up", *The Star*, 24 March 2000.

Further, adjournment was identified as one of the major causes for delay. In June 2004, for example, all courts in Malaysia for various reasons caused 5191 postponements whilst the prosecution caused 4313 postponements and defence lawyers caused 6750 postponements. In January 2005, courts caused 4560 postponements, prosecution 6499 postponements and defence 6537 postponements. The problem of shortage of superior court judges as well as judicial officers also contributes to delay. According to the Chief Justice of Malaysia, there were 55 vacancies for Magistrates and Senior Assistant Registrars as at 1 March 2005; see Ahmad Fairuz S. A. Halim, *Keynote Address by the Right Honourable Tan Sri Dato' Sri Ahmad Fairuz bin Dato' Sheikh Abdul Halim Chief Justice of Malaysia at SUHAKAM Forum on the Right to an Expeditious and Fair Trial*, 7-8 April 2005. Available: <http://www.kehakiman.gov.my> [accessed 3 October 2005].

complement and/or replace litigation for resolving disputes. The application of ADR for consumer disputes in Malaysia is quite recent, beginning with the introduction of the Insurance Mediation Bureau in 1992. Despite being a late-starter, Malaysia is working towards recognising and employing ADR to complement the court system. The Government, as well as the Judiciary and the legal fraternity, have encouraged and supported the usage of ADR as a medium for resolving disputes. For example, the former Chief Justice of Malaysia has strongly encouraged the use of ADR for civil cases.⁷⁵⁹ Further encouragement was also displayed by the former President of the Malaysian Bar.⁷⁶⁰

7.3 ADR

The growth and usage of ADR may be described as a global phenomenon, extensively used by large corporations and international organizations⁷⁶¹ as well as developed countries such as the United States and the United Kingdom. These positive developments have also sparked interest in Asia, where ADR is enthusiastically promoted.⁷⁶²

⁷⁵⁹ Ahmad Fairuz S. A. Halim, *Keynote Address by the Right Honourable Tan Sri Dato' Sri Ahmad Fairuz bin Dato' Sheikh Abdul Halim Chief Justice of Malaysia at SUHAKAM Forum on the Right to an Expedient and Fair Trial*, 7-8 April 2005.

⁷⁶⁰ Address by the President of Malaysian Bar during the 11th Malaysian Law Conference, 22-24 November 2001, <http://www.malaysiabar.org.my>. The Judiciary has also sent two High Court judges to the United States to study the ADR system implemented in the said country.

⁷⁶¹ The World Trade Organisation, the World Intellectual Property Organisation and the World Bank for example, have been using ADR to resolve disputes.

⁷⁶² A general account of the development of ADR in Asian countries can be found in a series of overviews published in the *Asia Business Law Review* volumes of 1998. See Margaret L Kwan on Hong Kong vol 22 (1998), p 32; Vicot P Lazatin on the Philippines, vol 22 (1998) p 36; Tae Hee Lee on South Korea, vol 22 (1998), p 43; Graham B Harford on New Zealand, vol 21 (1998), p 30; Henry J Uscinski, Jessica L Su and Sharon Xiao Zhang on China in vol 21 (1998), p 30; Nigel NT Li and Vivian PH Chiang on Taiwan, vol 21 (1998), p 37; Gerald P McAlinn on Japan, vol 20 (1998), p 46; Ron Cristal on Thailand, vol 20 (1998), p 30; Hung Tien Lee on Vietnam, vol 20 (1998), pp 32-34; Vikram Raghavan on India, vol 19 (1998), p 37; Arief T Surowidjojo on Indonesia, vol 19 (1998), p 42; Andrew Chan on Singapore, vol 19 (1998), p 53. To find more on the perspective of ADR in Malaysia, see Aida Othman, "Introducing Alternative Dispute Resolution in Malaysia: Prospects and Challenges" [2002] 2 *MLJ* ccxxiv.

According to Ervine, there is no definitive or agreed definition of ADR, but one that might be used is that it is any means of providing a resolution of a dispute between two or more parties which does not involve traditional court procedures.⁷⁶³ Henry and Marriot defined ADR as “a range of procedures that serve as alternatives to litigation through the courts for the resolution of disputes, generally involving the intercession and assistance of a neutral and impartial third party”.⁷⁶⁴ Rachagan simply called them “court substitutes”. According to him, “ADR involve a range of permutations with only one factor in common - they each do not involve court-based litigation.”⁷⁶⁵ According to Chandran and Balasingham, “ADR is a device aimed at resolving disputes between the parties in a manner so as to find a resolution expeditiously and economically.”⁷⁶⁶ It appears that all the definitions above share the same premise, i.e. the settlement of disputes by a variety of techniques without resort to litigation in court. These methods also attempt to overcome the common problems faced by the courts: cost, delay and complexity. The trend towards ADR has certainly been inspired and driven by one common triggering factor, the failure of the traditional court system as a medium for resolution of disputes.

As depicted by its name, ADR is an alternative, not a revolution. Much of its method has long been used by humankind to resolve disputes. The roles of arbitrator, mediator and adjudicator of conflicts have been employed by the elders, headmen and

⁷⁶³ W.C.H. Ervine, *Settling Consumer Disputes: A review of alternative dispute resolution*, National Consumer Council, 1993, pp. 2-3.

⁷⁶⁴ H. Brown & A. Marriot, *ADR Principles and Practice*, Sweet & Maxwell, London, 1999, p. 12.

⁷⁶⁵ S. Rachagan, “Criteria for Appraising Efficacy”, a paper presented at the *Conference on Consumer Redress Mechanism*, 26 April 2000, Hong Kong, p. 3.

⁷⁶⁶ R. Chandran & C. Balasingham, “Alternative Dispute Resolution – The Vision of Tomorrow”, [1998] 2 *MLJ* iv.

religious leaders in traditional societies to settle disputes.⁷⁶⁷ Mediation, for example, was utilised in most oriental cultures such as Japan and China years ago as a means of resolving conflicts.⁷⁶⁸

Due to the numerous types of complaints, the variety of ADR techniques has tremendous potential to assist consumers to solve their disputes. This is based on the notion that most consumer disputes do not involve large amounts of money or difficult points of law. Moreover, different disputes need different types of solution. Negotiation, mediation and med-arb, to name a few methods of settlement, are always preferred in small claims disputes and their usage should be fully encouraged and supported. A wide range of remedies is also available in ADR methods besides monetary awards. For some consumers, apologies and explanations are more important than financial awards. Thus, the appealing features of ADR, which make it more humane, suggest a promising future for it as an effective mechanism for consumer redress.

7.3.1 ADR Techniques

A number of writers and judges have written on the techniques of ADR. It is notable that there are various types of ADR to accommodate diverse conflicts. The

⁷⁶⁷ Tan Ngoh Tiong & Lee-Patridge Joo Eng, "Conflict Theory and Forms of Dispute Resolution", In: Tan Ngoh Tiong & Lee-Patridge Joo Eng (edit). *Alternative Dispute Resolution in Business, Family and Community: Multidisciplinary Perspectives*. Pagesetters Services Pte. Ltd., Singapore, 2000, p. 9.

⁷⁶⁸ Liew Thiam Leng, *Alternative Dispute Resolution in Singapore* at <http://www.e-adr.org.sg>. Japan, for example, has a tradition of ADR, as opposed to litigious process. For centuries the main systems used in Japan were conciliation, compromise and mediation. Litigation was not known until it was introduced by Western lawyers in the late 1800s; see E. J. Jardine, "Alternative Dispute Resolution in the Japanese Court System", [1996] 7 *ADRJ* 205.

techniques discussed by the writers are:⁷⁶⁹

- Arbitration
- Mediation
- Conciliation
- Early neutral evaluation
- Summary jury trial
- Mini-trial
- Judicially hosted settlement conferences
- Fact finding processes
- Med-arb
- Private judges
- Court-annexed arbitration
- Rent a judge system

7.4 The Benefits of ADR

The following section discusses five advantages of ADR as a dispute resolution mechanism.

7.4.1 A complement to the court system

The alarming backlog in court cases has long been the subject of complaints by the public. The courts, therefore, should not be the main source of justice for the borrowers, but rather the very last option. Notwithstanding the various measures taken to improve the court performance by the Judiciary, it is unlikely that the

⁷⁶⁹ C. B. Renfrew, "The American Experience with Dispute Resolution in all its forms", [1997] 16 *CJQ* pp. 147- 149, R. S. Banks, "Alternative Dispute Resolution: A Return to Basics", (1987) 61 *ALJ* 573-575 and R. Chandran & C. Balasingham, "Alternative Dispute Resolution – The Vision of Tomorrow", [1998] 2 *MLJ* pp. iv-v.

Malaysian court will improve in the near future.⁷⁷⁰ The intense need for ADR techniques such as arbitration, conciliation and mediation to resolve consumer disputes, in addition to the court system in Malaysia, has been emphasised by many writers.⁷⁷¹ In the case of moneylending, borrowers and moneylenders alike would be spared the anguish of delay as well as the high cost of litigation by having a particular dispute resolution mechanism to resolve their disputes.

7.4.2 Cost effectiveness, time saving and flexibility

ADR techniques may provide a better option for the majority of disputes, considering the traumatic experience of going through the litigation process. Its flexibility whereby parties are able to control and modify the dispute resolution process to suit their needs would probably be well-suited to the nature of most disputes. ADR may significantly reduce the time taken to resolve disputes. In comparison to the litigation process, ADR is also cost-effective as it is an informal process and therefore cuts down the expenses. With regard to moneylending, experts in this area may solve disputes without using incomprehensible procedural rules and burdening the parties with too many documents.

7.4.3 Guaranteed privacy

The litigation process is open to the public. This is to encourage transparency in the proceedings. However, most parties involved in disputes would prefer to avoid the

⁷⁷⁰ *The Star*, 23 February 2001, p. 18.

⁷⁷¹ See S. Rachagan, "Criteria for Appraising Efficacy", a paper presented at the Conference on Consumer Redress Mechanism, 26 April 2000, Hong Kong; S. Rachagan, "Role of Lawyers and Bar Council in Society" [1995] 2 *MLJ* xxix; Sakina S. A. Yusoff, *Pengguna dan Akses Kepada Keadilan: Mekanisma Tebusrugi Bagi Pertikaian Perdagangan* (Consumers and Access to Justice: Alternative Dispute Resolution for Commercial Disputes), paper presented at the Sixth National Malaysian Consumer and Family Economics Association (MACFEA) Seminar, 29 Sept. 2001; R. Chandran & C. Balasingham, "Alternative Dispute Resolution – The Vision of Tomorrow", [1998] 2 *MLJ* iv; Aida Othman, "Introducing Alternative Dispute Resolution in Malaysia: Prospects and Challenges" [2002] 2 *MLJ* ccxxiv.

glare of publicity and settle their disputes in private. The confidentiality of the parties may be protected by the ADR process. Such privacy, however, does not mean that ADR techniques are questionable. There are matters that the disputed parties may wish to be kept confidential, and the ADR process can provide the confidentiality needed. Privacy is more sought after in moneylending cases, as the transaction involves money and the reputation of the parties.

7.4.4 Enhanced access to justice

By introducing ADR as an alternative to the court system, the less fortunate would be enabled to seek justice through a simple process, rather than having only legal aid services to rely on. This would give the poor and uneducated greater options to alleviate their misery. It is envisaged that the consumers who borrow money from moneylenders are usually the people who have no credibility to borrow elsewhere. Moneylenders are the only persons they can go to, as they need money quickly without going through the bureaucratic procedure of obtaining a bank loan. Further, these borrowers usually have no means to go to court when a dispute arises. By providing a separate ADR body for moneylending disputes, borrowers would have more opportunity to bring their disputes to the authorities.

7.4.5 High rate of compliance

The most important function of the ADR process is to meet the terms of the settlement. It may be suggested that parties who have reached their own agreement in an ADR process are generally more likely to follow through and comply with its terms than those whose resolution has been imposed by a third-party decision maker.

7.5 The Limitations of ADR

Although ADR has advantages that might attract consumers to use it as a dispute resolution mechanism, it also has its own weaknesses. However, it may be suggested that the advantages of ADR outweigh its weaknesses. The following discusses three limitations of the ADR process.

7.5.1 Straightforward issues

ADR provides a forum to resolve disputes in a fast, cost-effective and flexible manner. This objective can only be achieved when solving disputes that have simple and uncomplicated issues. The limitations are in terms of the jurisdiction of the ADR bodies, such as the monetary limit to qualify for usage of the mechanism, as well as the award to the winning party. This is an obvious obstacle for consumers, as not all cases qualify to be heard by the said bodies. On the other hand, if ADR bodies were allowed to settle all kinds of disputes without any limitation, they would eventually become no different from the court procedures which the consumers seek to avoid. Nevertheless, this limitation is justified for the benefit of the greater part of the public. It is assumed that a moneylending dispute resolution mechanism should also have such limitations, in order to deliver a speedy and economical service.

7.5.2 Procedural problems

Widespread usage of ADR might incur the same disadvantages faced by the court system. It is foreseeable that the ADR bodies might not be able to handle a volume of cases in a short period of time, because of shortage of personnel to handle cases. In due course, delays will be inevitable, costs of proceedings will increase and procedures will not be so flexible. In short, the ADR bodies will be unable to deliver

as promised. This has happened in the past when the Malaysian Tribunal for Consumer Claims gained the confidence of the public: the former President and her Deputy were not able to handle all the cases as numerous cases were filed at the Tribunal. To its credit, the Tribunal, however, found a solution to this problem, whereby experienced lawyers were also appointed to solve disputes. The experience of the Consumer Tribunal showed that proper preparation has to be made before an ADR body is set up. The authority should be able to foresee how the public will react to it. This arrangement should include a suitable budget, a sufficient allocation of staff and proper logistics to ensure easy access for the public at large.

7.5.3 Antagonism and Bitterness

ADR is not a forum in which to display hostility and resentment to the other party. This will be the main factor in the failure of a resolution process. If the parties are looking for such a forum, litigation would be a better prospect for them. ADR is therefore a disadvantage to them. Parties who wish to resolve their disagreements through an ADR body should enter into the proceedings in good faith. In moneylending disputes, borrowers who are cruelly harassed and intimidated by loan sharks may bear a grudge against them. The borrowers would have to give up their desire for vindication. Likewise, a disgruntled moneylender should not use the ADR body as a place for an aggressive, hostile and emotional attack on the borrower.

7.6 Existing ADR Mechanisms in Malaysia

There is a growing trend towards the use of ADR mechanisms for consumers in Malaysia. There are two types of existing forum, the industry-based and the statutory-based ADR bodies. The former refers to the Insurance Mediation Bureau

and the Banking Mediation Bureau while the latter comprise the Tribunal for Consumer Claims and the Tribunal for Homebuyer Claims. The success of both the Insurance and Banking Mediation Bureaux has paved the way to the launch of the Financial Mediation Bureau on 20th January 2005 by the Governor of the Central Bank of Malaysia. Both the Insurance and Banking Mediation Bureaux were wound up when integrated into the Financial Mediation Bureau.

7.6.1 Insurance Mediation Bureau (IMB)

The IMB was officially established in 1992 as a company limited by guarantee, with the main objective of settling disputes regarding the enforcement of insurance terms and policies that arise between policyholders and insurance companies. The Bureau had a three-tiered structure consisting of the Board of Directors over the Council and the Mediator, of whom the former was responsible for the administrative aspects while the latter was in charge of the mediation process.⁷⁷² The Council was composed of six members; two from the Board of Directors, one from the Federation of Malaysian Consumers' Associations (FOMCA), one university representative, one Muslim scholar⁷⁷³ and one 'fit and proper' person⁷⁷⁴ who was not from the above sectors. The IMB was modelled upon the UK Insurance Ombudsmen Bureau.⁷⁷⁵

⁷⁷² The Board of Directors runs the IMB, the Council appoints and assists the Mediator, who investigates claims against the Members and settles disputes.

⁷⁷³ In January 2001, the IMB passed a special resolution to amend its Memorandum and Articles of Association to allow *takaful* (Islamic insurance) operators to be members of the IMB and to include referrals in relation to complaints, disputes and claims arising from general and family businesses. Following these amendments, the Council of IMB was increased to six members, to include a Muslim scholar; see IMB Annual Report 2001 at p. 4.

⁷⁷⁴ A "fit and proper" person means "a highly respectable person whose integrity is unquestionable"; see IMB Annual Report, 2001.

⁷⁷⁵ The UK Financial Services and Markets Act 2000 established a single ombudsman scheme for all regulated financial service known as the Financial Ombudsman Scheme. By virtue of this scheme, the UK Insurance Ombudsmen Bureau is no longer in existence.

Under the IMB structure, a mediator heard the disputes. The Council guaranteed the independence of the mediator, as he only reported to the Council. The mediator played the role of counsellor or conciliator, investigator or adjudicator, as the case might be. Any award granted by the mediator was limited to an amount not more than RM100,000. The mediator's decision bound the insurance company, but not the insured. There was no appeal process; thus, the insured could reject the award granted by the mediator and proceed to file a claim in the court or refer to arbitration. The mediator was also not empowered to enforce his decision. Table 7.1 shows the number of complaints accepted, solved and pending in the IMB for the year 1996-2004. The IMB was put into liquidation in 2004 to pave the way for the establishment of the Financial Mediation Bureau.

Table 7.1: Insurance Mediation Bureau - Statistics of Complaints from 1996 - 2004

<i>Year</i>	<i>No. of cases received</i>	<i>No. of cases resolved</i>	<i>Insurer's Decisions revised in favour of Policyholders</i>	<i>Insurer's Decisions upheld against Policyholders</i>
1996	152	117	54 (46%)	63 (54%)
1997	279	290	67 (23%)	223 (77%)
1998	383	392	85 (22%)	307 (78%)
1999	463	454	77 (17%)	377 (83%)
2000	515	465	73 (16%)	392 (84%)
2001	726	658	161 (24%)	497 (76%)
2002	932	912	162 (18%)	750 (82%)
2003	1070	1063	216 (20%)	847 (80%)
2004	1105	1114	225 (20%)	889 (80%)

Source: IMB Annual Report 1997-2004

Table 7.1 illustrates a steady increase in the number of complaints received during the nine years the IMB operated. This reflected continued confidence in the Bureau on the part of the consumers. A large majority of consumers also accepted the decision of the Mediator, as it was reported in 2001 that only two cases were referred by

aggrieved consumers to the court of law.⁷⁷⁶ The Central Bank also expressed its confidence in the performance of the IMB and widened its jurisdiction to Islamic insurance.

7.6.2 Banking Mediation Bureau (BMB)

After the establishment of the IMB, a group of banks and financial institutions founded the BMB as a company limited by guarantee in 1996. The primary goal of the BMB was to provide a simple dispute resolution mechanism free of costs to customers of banks and financial institutions which were members of the BMB. Like the IMB, the BMB was also composed of the Board of Directors, the Council and the Mediator. Likewise, the mediator functioned as a counsellor, conciliator, adjudicator or arbitrator in solving disputes between customers and bankers. However, on deciding a claim, the BMB had power to award only to the maximum amount of RM25,000. The power to make an award did not include the power to award interest and costs of the mediation proceedings. The decision of the mediator was not binding on the customer, but only on the bank. Thus, if a customer rejected the award, he could pursue resolution of his grievance at the venue of his choice, either in court or in arbitration.

In cases where customers were not satisfied with the bank's response to their complaints, the banks would inform customers that they could refer the matter to the BMB. The BMB handled complaints from customers who were not satisfied with the decisions of the banks or finance companies on their complaints involving monetary

⁷⁷⁶ IMB Annual Report 2001.

loss as the result of their dealing with them. However, the areas of dispute that could be referred to the mediator were restricted to the following matters:⁷⁷⁷

- The charging of excessive fees, interest and penalties
- Misleading advertisements
- Automated teller machine withdrawals
- Unauthorised use of credit cards
- Unfair practice of pursuing actions against guarantors
- Other matters

The Mediator could only entertain a complaint that had been considered by the senior management of the bank or financial institution where an offer of settlement had been rejected by the complainant. The said complaint had to be referred to the Mediator within six months after refusal of settlement. If either party to the dispute had instituted legal proceedings or had referred the dispute to arbitration, the Mediator had to reject the referral. The guidelines provided that a dispute had to be resolved within three months of receipt of a complaint.

The table below shows the number of complaints accepted, solved and pending in BMB for the year 1997-2003.

⁷⁷⁷ Memorandum and Articles of Association of Banking Mediation Bureau, Object 3 (a).

Table 7.2: Banking Mediation Bureau - Statistics of Complaints from 1997 - 2003

<i>Year</i>	<i>Brought forward</i>	<i>Received</i>	<i>Resolved</i>	<i>Pending</i>
1997	-	87	59	28
1998	28	134	128	34
1999	34	325	195	164
2000	164	447	445	166
2001	166	346	425	87
2002	87	496	427	156
2003	163	468	478	153

Source: BMB Annual Report 1998 – 2003

Table 7.2 shows a total of 2,303 cases received by the BMB during its seven-year service. The table illustrates a steady increase in the number of complaints. However, there is a decline in the number of referrals in 2001. This figure, however, is not an indication that the public lost faith in the BMB. According to the BMB, the reduction in the number of cases can be attributed to the lower incidence of cloned cards complaints.⁷⁷⁸ The overall performance of the BMB from 1997-2003 can be seen in Table 7.3 below.

Table 7.3: Statistics of cases resolved for 1997 – 2003

<i>Received 1997-2003</i>	<i>Settled by bank</i>	<i>Withdrawn by complainant</i>	<i>Awarded in favour of complainant</i>	<i>Rejected</i>
2,303	192	157	636	1,172
Percentage	8.31%	6.80%	27.53%	50.73%

Source: BMB Annual Report 2003

The statistics above show that an average of 27.5% of cases was resolved in favour of the complainants, with 50.7% in favour of the financial institutions. The remaining cases were successfully settled by the bank or withdrawn by the complainant.

⁷⁷⁸ BMB Annual Report 2001.

Although the percentage of cases resolved in favour of the complainant is quite low, the Central Bank was satisfied with the performance of the Bureau and widened its jurisdiction in regard to types of claims. The BMB was wound up in 2004 to pave the way for the establishment of the Financial Mediation Bureau.

7.6.3 The Financial Mediation Bureau (FMB)

Both the IMB and the BMB were proved to offer far-reaching benefits to consumers. Their success was the result of the enjoyment of a wide discretion and the power to make decisions in accordance with principles of fairness rather than strict law. In order to strengthen the financial industry as a whole and with a view to the provision of adequate avenues for consumers using the financial services through a fair and impartial process, the Central Bank of Malaysia moved forward to establish the FMB. The FMB was incorporated on 30th August 2004 and was officially launched on 20th January 2005. It was formed by the amalgamation of the IMB and the BMB. According to the Governor of the Central Bank, “the creation of an integrated bureau is necessary for the resolution of a broad range of consumer issues raised in relation to the diverse range of financial institutions under the supervision of Bank Negara”.⁷⁷⁹ The Central Bank has opted to abide by the international trends towards such resolution centres, and in the establishment of FMB, it has learned from the experience of the United Kingdom, Canada and Australia.

The FMB’s terms of reference are very similar to those of the IMB and BMB. The FMB is governed by a Board of Directors comprising nine members, of whom five are independent directors, with the balance from the banking and insurance industries.

⁷⁷⁹ Governor’s Speech at the Launch of Financial Mediation Bureau. Available: <http://www.bnm.gov.my/index.php?> [accessed 28 January 2005].

The operational costs of the bureau are equally funded by the industry, so that services provided by the bureau are free of charge to consumers. As an integration of the IMB and BMB, the FMB provides a uniform approach to consumer grievances for the entire industry and ensures improved access for consumers by providing a single point of entry. For banking and other financial institutions, the FMB will handle claims not exceeding RM100,000 for both consumer and corporate banking related businesses. For fraud cases involving credit cards, charge cards and cheques, the FMB will handle cases not over RM25,000. For insurance or *takaful* disputes, the FMB covers claims not exceeding RM200,000 for motor and fire insurance, claims not exceeding RM5,000 for third party property damage and a claim not exceeding RM100,000 for other matters.

Although the idea of forming the FMB may have come from the UK Financial Ombudsman Service (FOS), the basis of its establishment differed. While the former is an industry-based forum, the latter was created by the Financial Services and Markets Act 2000. In the UK, the worry was expressed that the new FOS, due to its statutory basis, would run the risk of having its decisions subjected to judicial review and would inevitably require more formality.⁷⁸⁰ The FMB, on the other hand, is not subject to such control because it represents an informal and independent procedure for dispute resolution.

7.6.4 The Consumer Claims Tribunal

The implementation of the Consumer Protection Act 1999 ('the CPA') paved the way to the establishment of the Tribunal for Consumer Claims (hereinafter 'the Consumer

⁷⁸⁰ Ballard, M. A. C. *The reform of insurance contract law for the protection of the consumer*, PhD thesis, Nottingham University, 2003, p. 325.

Tribunal'). The Consumer Tribunal was set up under section 85 of the CPA as an alternative redress mechanisms avenue, with the aim of resolving consumer disputes in an informal, economical and speedy manner. This independent body has the primary function of hearing and determining claims lodged by consumers in respect of any goods or services purchased or acquired under the Act and subject to its provisions. The Consumer Tribunal consists of a President and a Deputy President and not fewer than five other members appointed by the Minister for Domestic Trade and Consumer Affairs.⁷⁸¹ In order to provide easy access for members of the public, the Tribunal sits in every state in Malaysia. The jurisdiction of the Consumer Tribunal is limited by two main considerations: the monetary size of claims and the types of claims. In regard to the former, only claims not exceeding RM25,000 are covered, whereas regarding the latter, the Tribunal has no jurisdiction to hear claims arising from personal injury or death, recovery of land, entitlement under a will and certain other matters.⁷⁸² A claim must also be based on a cause of action occurring within three years of the claim.⁷⁸³

In order to save cost and time, neither the claimant nor the respondent shall be legally represented at the hearing.⁷⁸⁴ Oddly, the statute provides that a company may be represented by a full-time paid employee,⁷⁸⁵ which means that a company may still be represented by its legal officer. Nevertheless, the statute acknowledges the disadvantage of this provision and therefore provides that when such a case arises, the

⁷⁸¹ This is the Ministry that governs the CPA.

⁷⁸² CPA, ss 98(1) and 99. By virtue of the Consumer Protection (Amendment) Act 2003 (Act A1199), s 98(1) of the principal Act was amended to increase the maximum limit of amount of claim from RM10,000 to RM25,000 effective from 1 September 2003. This move was in response to the public demand of an increase so that more cases could be brought to the Tribunal.

⁷⁸³ CPA, s 99.

⁷⁸⁴ CPA, s 108(2).

⁷⁸⁵ CPA, s 108 (3).

Consumer Tribunal may impose such conditions as it considers necessary to ensure that the other party to the proceedings is not substantially disadvantaged.⁷⁸⁶

Briefly, an aggrieved consumer (the claimant) may file a complaint with the Tribunal by filing a form.⁷⁸⁷ There is a small charge of RM5 for filing a claim. The claimant has to give one copy of the same to the respondent (the seller or the company). The Tribunal will then arrange for a hearing. The decisions of the Consumer Tribunal take the form of awards. The Tribunal must make an award and give reasons for the award within 60 days from the first day the hearing commences.

Negotiation as a method of settlement is always preferred in small claims. Section 107(1) of the CPA therefore, makes it mandatory for the Consumer Tribunal to assess whether, in all the circumstances, it is appropriate for the Tribunal to assist the parties to negotiate an agreed settlement in relation to a claim. In making an assessment, the Consumer Tribunal must have regard to any factors that, in its opinion, are likely to impair the ability of either or both of the parties to negotiate an agreed settlement.⁷⁸⁸ Where the parties reach an agreed settlement, the Consumer Tribunal must approve and record the settlement to take effect as an award of the Consumer Tribunal.⁷⁸⁹ However, where it appears to the Consumer Tribunal that it would not be appropriate for it to assist the parties to negotiate an agreed settlement in relation to the claim, the Consumer Tribunal must proceed to determine the dispute.⁷⁹⁰ It is interesting to note that the Tribunal has the jurisdiction to impose criminal penalties for failure to

⁷⁸⁶ See Form 1, the statement of claim.

⁷⁸⁷ This refers to Form 1, the statement of claim.

⁷⁸⁸ CPA, s 107(2).

⁷⁸⁹ CPA, s 107(3).

⁷⁹⁰ CPA, s 107(4).

comply with the award after fourteen days the award delivered.⁷⁹¹ This is indeed a significant development, as the most important process of a Tribunal hearing is the enforcement of the award. This distinguishes the Tribunal hearing from practice in the FMB, BMB or IMB, which have no power to enforce the decision of the Mediator.

In the early years after the launch of the Consumer Tribunal, the Ministry of Domestic Trade and Consumer Affairs and the members of Consumer Tribunal worked very hard to introduce it to the public. Road shows and seminars, for example, were held in every state to create awareness of this service. It seems that the effort has not been wasted. At present, the Consumer Tribunal is steadily gaining the confidence of consumers at large. Since its inception on 15 November 1999, a total of 16,916 cases have been filed, involving the amount of RM54, 833 926. Table 7.4 shows the statistics of hearings of the Consumer Tribunal.

Table 7.4: Consumer Claims Tribunal – Statistics of hearing Jan 2000 – Aug 2005

Year	Claims Filed	Tribunal's Approach			Resolved	Pending
		Withdrawn	Negotiation	Hearing		
2000	291	107	55	129	291	-
2001	1155	340	225	590	1155	-
2002	2649	1088	495	1066	2649	-
2003	4150	1685	537	1928	4150	-
2004	5076	2030	556	2490	5076	-
2005	3595	1125	219	1098	2629	966

Source: The Consumer Claims Tribunal, 2005

⁷⁹¹ CPA, s 117: on conviction, an offender is liable to a fine not exceeding RM5,000 or to imprisonment for a term not exceeding two years or to both. In the case of a continuing offence, the offender shall, in addition to the penalties above, be liable to a fine not exceeding RM1,000 for each day or part of a day during which the offence continues after conviction.

The statistics above show an excellent record of accomplishment, as there is no case pending in any year except 2005. The number of 966 pending cases for 2005 should be excused as the figure released was as at October and it is strongly believed that all complaints would have been resolved by the end of the year.

7.6.5 The Homebuyer Claims Tribunal

Since 1 December 2002, disputes between homebuyers and housing developers can be pursued in the Tribunal for Homebuyer Claims (Homebuyer Tribunal). The Tribunal was established by virtue of section 16B of the Housing Developers (Control and Licensing) Act 1966 (the HDA).⁷⁹² The establishment and membership of this Government based Tribunal are similar to those of the Consumer Tribunal. This similarity is for the purpose of preserving uniformity of laws between these two bodies.⁷⁹³

The Homebuyer Tribunal will hear claims brought by a homebuyer.⁷⁹⁴ Its jurisdiction is limited to the total amount of RM25,000 for one cause of action.⁷⁹⁵ Alternatively, the homebuyer is advised to file claims in excess of RM25,000 at the Sessions Court. The Tribunal has no authority to hear any claim in respect of recovery of land, or any estate or interest in land; the entitlement of any person under a will or settlement, or

⁷⁹² S 16B is an amended provision, which refers to the Housing Developers (Control and Licensing) (Amendment) Act 2002 (Act A1142) which came into effect from 1 December 2002.

⁷⁹³ See Shamsulbahri Ibrahim and Roger Tan Kor Mee, 'Housing Developers (Control and Licensing) Amendment) Regulations 2002, Housing Developers (Housing Development Account) Amendment) Regulations 2002, Housing Development (The Tribunal for Homebuyer Claims) Regulations 2002 and Housing Development (Compounding of Offences) Regulations 2002'. Available: <http://www.mlj.com.my/free/articles/shamsul&roger2a.htm> [accessed 21 February 2005].

⁷⁹⁴ S 16A of the HDA defines a homebuyer as a party that has brought a property directly from a licensed housing developer. The definition also covers claims by a second purchaser who has bought the property from the first purchaser. A third or subsequent purchaser of a property is however, excluded from the Tribunal's jurisdiction.

⁷⁹⁵ HDA, s 16M(1). A homebuyer may bring the housing developer to the Tribunal a number of times for different causes of action.

on any intestacy; goodwill; any trade secret or other intellectual property or any claim arising out from personal injury or death.⁷⁹⁶ The homebuyer must be aware of the limitation period for bringing a claim.⁷⁹⁷

Unlike the Consumer Tribunal, where legal representation is barred, expert legal representation is permissible in the Homebuyer Tribunal if the Tribunal believes that the matter in question involves complex issues of law and one party will suffer severe financial hardship if he is not legally represented.⁷⁹⁸ In such a case, the other party may at its discretion appoint its own legal representation.

The Homebuyer Tribunal will always attempt to assist the disputing parties to negotiate a settlement before it proceeds to resolve the dispute itself.⁷⁹⁹ A homebuyer may lodge with the Tribunal a claim in the prescribed form with the prescribed fee claiming for any loss suffered or any matter concerning his interests as a homebuyer under the Act.⁸⁰⁰ The Homebuyer Tribunal must make an award and give reasons for the award within 60 days after a hearing starts. Similar to the Consumer Tribunal,⁸⁰¹ the Homebuyer Tribunal is also empowered to impose criminal penalties for failure to comply with the award after fourteen days the award delivered.⁸⁰² The following Table 7.5 shows the statistics of the Homebuyer Tribunal.

⁷⁹⁶ HDA, s 16N(1).

⁷⁹⁷ S 16N(2) of the HDA provides that any claims brought before the Tribunal must be based on a cause of action arising out of the sale and purchase agreement or a previous dealing between the homebuyer and the developer no latter than twelve months from the date of issuance of the CFO for the property or the expiry date of the defects liability period as set out in the sale and purchase agreement.

⁷⁹⁸ HDA, s 16U(2).

⁷⁹⁹ HDA, s 16T.

⁸⁰⁰ HDA, s 16L.

⁸⁰¹ HDA, s 16AA.

⁸⁰² HDA, s 16AD; on conviction, an offender is liable to a fine not exceeding RM5,000 or to imprisonment for a term not exceeding two years or to both. In the case of a continuing offence, the offender shall, in addition to the penalties above, be liable to a fine not exceeding RM1,000 for each day or part of a day during which the offence continues after conviction.

Table 7.5: Homebuyer Tribunal Statistics: Dec 2002 – Dec 2005

<i>Year</i>	<i>No of cases filed</i>	<i>Solved</i>	<i>Pending</i>
2002	-	-	-
2003	3554	3554	-
2004	6520	6301	219
2005	5624	5041	583

Source: The Ministry for Housing and Local Government, 2006.

Since its inception in December 2002 until July 2005, a total number of 13,918 cases have been filed at the Tribunal. Although 1066 cases have been withdrawn during the said period, the Tribunal has managed to solve 88% of the cases, which is an excellent achievement for this newly established Tribunal. It also shows that the Tribunal has been well prepared to entertain thousands of cases and in the year 2003, it had a successful 100% record of resolution of cases.

7.7 Comparison of the ADR Schemes in Malaysia

Basically, there are two types of ADR bodies to entertain consumer disputes in Malaysia: the industry-based bureau and the statutory-based tribunals. The two will be compared and contrasted in order to see their scope and limitations and to suggest the best mechanism for moneylending disputes.

Among industry-based ADR, only banking and insurance customers have the facilities to complain to these institutions to seek redress or remedy. The facility to complain is not available to the financial institutions and insurance companies. This is because the former IMB and BMB and the FMB were set up by the industry to entertain complaints by customers and not to seek recourse against them. Likewise, both the Consumer Tribunal and the Homebuyer Tribunal were also established to give access to consumers, to file complaints against businesses and housing

developers. However, the respondent is allowed to file a counter-claim and there have been instances where the Tribunals have given awards to respondents.

In terms of jurisdiction of the Bureaux and the Tribunals, both have limited authority as regards the types of claim they are empowered to deal with. Complicated cases that include personal injury or death, for example, are excluded from the Tribunals' jurisdiction. The rationale behind such restraint of power may be appreciated from the main objective of these bodies, i.e. to resolve disputes in a fast and economical manner. If wide authority were given to them, it is foreseeable that many complex cases would be filed by the consumers. It is feared that under such circumstances, consumer disputes may not be dealt with efficiently and expeditiously. In addition, the consumers might also take advantage by filing complicated cases that should have been filed in the law-courts. Such actions might add to the administrative burden of the Tribunals.

Another aspect of jurisdiction that can be observed is the monetary limits of the Bureaux and the Tribunals. Neither Tribunal may make awards over RM25,000 whereas the FMB has power to handle claims not exceeding RM100,000 for both consumer and corporate banking related businesses, claims not exceeding RM25,000 for fraud cases involving credit cards, charge cards and cheques, and claims not exceeding RM200,000 for insurance or *takaful* disputes. At present, such limitation is satisfactory in the context of the situation of these ADR bodies, although those with big claims will be deterred from going to these bodies. The limit, however, should be revised from time to time, given the dynamic market environment and growing consumer awareness.

A point of difference between the Bureaux and the Tribunals is the process involved in dispute resolution. The approach to the determination of dispute is different in that in the IMB, BMB and FMB, the mediator can act as counsellor, conciliator, adjudicator or arbitrator whereas in the Tribunals, the President can only act as a facilitator in the dispute resolution process. Mediation is a process in which an impartial Mediator facilitates the resolution of a dispute by promoting agreement by the parties to the dispute. If the parties fail to reach an agreement, the Mediator, acting as an adjudicator, will make a decision. The President of a Tribunal cannot perform all those functions, as is allowed in the Bureaux, but can only assist the parties to negotiate towards a settlement. This is the basic difference between the two bodies in terms of method of resolution. The consequence is that the process in the Bureaux may take a longer time if the Mediator has to carry out fact-finding, investigate and form an opinion in order to counsel, adjudicate or arbitrate.

Another difference is the legal effect of an award. The award of the Tribunals is final and legally binding on all parties to the proceedings. It has the effect of a Magistrate's Court order and is enforced accordingly by any party to the proceedings.⁸⁰³ Failure to comply with the award is a criminal offence. On the other hand, under the Bureaux, the decision of the Mediator binds the bank or insurance company but not the complainant. A customer who is not satisfied with the award may abandon the award and file a fresh claim at the court. The bank or the insurance company, however, is bound to accept the award. The award when paid and settled by the bank or the insurance company constitutes a full settlement of the claim against the institution and the complainant has no right to institute legal proceedings. Since

⁸⁰³ The Secretary to the Tribunal shall send a copy of the award made by the Tribunal to the Magistrate's Court having jurisdiction in the place to which the award relates for the purpose of record.

the award by the Bureaux cannot be enforced, it could simply be abandoned by the complainant; this factor may constitute a weakness of the Bureaux. On the other hand, the effectiveness of the enforcement of the Tribunal's award can be seen with the imposition of criminal penalties for failure to comply with the award within prescribed period.⁸⁰⁴

In regard to the appeal process, there is no provision for an appeal procedure to enable a complainant to make an appeal to a higher authority within the Bureaux. Any party to the Tribunal proceeding who is not happy with the decision of the Tribunal can only appeal to the court of law but only on questions of law, not questions of fact.

It was pointed out that the Central Bank was satisfied with the performance of the defunct IMB and BMB. Nevertheless, this does not mean that these bodies were free of criticism. The Penang Consumers' Association (CAP) for example, voiced its concern about the fairness and impartiality of the Mediators of both the Bureaux.⁸⁰⁵

According to CAP, these Bureaux were not independent, as the Mediators were appointed by the industry. The CAP then suggested a 'financial ombudsman' appointed by the Ministry of Finance to replace these Bureaux. The negative reaction by CAP was dismissed by the Bureaux in their 2001 Annual Reports. The Chairmen of the Bureaux emphasised that although the Bureaux were funded by the industries, the independence and impartiality of the Mediators was assured and seen to be so. Further, Table 7.1 and Table 7.3 also proved that over 50% of the IMB and BMB's decision were against the policyholders. Likewise, an eminent lawyer in Malaysia

⁸⁰⁴ The owner of a housing equipment and renovation company was fined RM600 (approximately £86) or one month imprisonment after he pleaded guilty of failing to pay damages to the complainant customer; see "Interesting facts regarding the Consumer Tribunal since its inception", *Utusan Malaysia*, 6 May 2002.

⁸⁰⁵ S M Mohamed Idris, "Appoint financial ombudsman", *The New Straits Times*, 5 April 2002.

has attested the independence and fairness of the IMB and its benefits to the consumers.⁸⁰⁶

The following section considers the position in the UK.

7.8 ADR for Consumer Credit in the UK

The UK experienced smooth development in providing an ADR forum for consumer credit in the UK. The strong support from the Government has led to the extension of the FOS jurisdiction to hear credit disputes.

7.8.1 From the White Paper to the CCA 2006

ADR development in consumer credit in the UK is attributed to the CC White Paper. The impetus was the issue of extortionate credit bargains, since the Government believed that the CCA provisions on extortionate credit were inefficient. As discussed in Chapter Five, only a small number of thirty cases of extortionate credit reached the court, and of those, no more than 10 cases were successful.⁸⁰⁷ Besides the ineffectiveness of the CCA provisions, the weaknesses of the court system were also identified as a contributing factor and there was overwhelming support for an ADR body for all consumer credit cases in the UK.⁸⁰⁸

⁸⁰⁶ Cecil Abraham, "Mediation and Alternative Dispute Resolution: Developments in the Various Jurisdictions - Have the Lawyers Caught on?" (2000) XXIX No 1 *INSAF* 75.

⁸⁰⁷ DTI, "The provision of Alternative Dispute Resolution for disputes arising under the Consumer Credit Act 1974: A Consultation Document," December 2003, p. 6. Available: <http://www.dti.gov.uk/ccp/consulfpdf/adrcondoc.pdf> [accessed 20 December 2004].

⁸⁰⁸ CC White Paper, paras. 3.43-3.44; OFT, "A note by the Office of Fair Trading in response to the DTI's consultation document on extortionate credit," 12 June 2003, pp. 6-7; OFT, "Summary of responses to the consultation document on making the extortionate credit provisions within the Consumer Credit Act 1974 more effective," CCP 007/03, pp. 1 & 2; DTI, "Review of the Consumer Credit Act: Progress Report," August 2002, pp. 1, 3 & 4. Available: <http://www.dti.gov.uk/ccp/topics1/pdf1/creditreport1.pdf> [accessed 1 May 2004].

Discussion of ADR as an alternative to the court system took place after the publication of the White Paper on Consumer Credit.⁸⁰⁹ Following consultation on ADR for consumer credit disputes, the DTI suggested that the FOS should be the provider for ADR scheme. It was argued that a new jurisdiction for consumer credit that was consistent with the prevailing FOS rules should be established to settle consumer credit issues, free of charge to consumers.⁸¹⁰ The ADR body should cover all standard consumer credit licence businesses, with a wide scope covering all kinds of disputes relating to consumer credit transactions.⁸¹¹ Ironically, however, the FOS refused to handle disputes on excessive interest rates *per se*, as it felt that the matter was more appropriately dealt by the courts.⁸¹² It is submitted that this should not be the case as the driving factor to develop an ADR body for consumer credit was the *issue* of extortionate credit bargains. It is unfortunate that consumers facing this problem must go to court to claim their remedies.

The OFT fully approved of the proposal for ADR body for consumer credit as an alternative to the court system. According to the OFT, the ADR body would bring positive impact to all parties and the industry alike. It should boost standards of behaviour in the consumer credit market by increasing consumers' confidence, and provide effective redress mechanisms for consumers as well as benefiting businesses

⁸⁰⁹ The discussion started with a consultation; DTI, "*The provision of Alternative Dispute Resolution for disputes arising under the Consumer Credit Act 1974: A Consultation Document*," December 2003; followed by DTI, "*Consultation on the provision of Alternative Dispute Resolution for disputes arising under the Consumer Credit Act 1974: Regulatory Impact Assessment*." Available: <http://www.dti.gov.uk/ccp/consul/pdf/creditadrria.pdf> [accessed 20 December 2004]; A summary of responses on the consultation came next, Available: <http://www.dti.gov.uk/ccp/topics1/pdf1/creditadrconresp.pdf> [accessed 20 December 2004]; finally, a response by the OFT to the DTI's consultation paper (OFT712b) was published on 17 March 2004.

⁸¹⁰ The DTI, "*Consultation on the provision of Alternative Dispute Resolution for disputes arising under the Consumer Credit Act 1974: A Summary of Responses*," p. 8. A free service for consumer means that the businesses have to contribute to the running costs. The DTI and OFT are aware of the predicament that would be faced by small firms and suggested that annual levies should be based on the size of businesses.

⁸¹¹ *Ibid.*

⁸¹² *Ibid.*

by promoting best trade practice.⁸¹³ The OFT agreed with the general principles of the ADR body suggested by the DTI. However, the OFT emphasised effective in-house complaints, whereby consumers should first complain to the firm and not automatically to the ADR body.⁸¹⁴ Further, the OFT was not in favour of any appeal system: consumers would be free to pursue legal actions in courts.⁸¹⁵ The relationship between the OFT as the regulator of consumer credit and the ADR body was agreed to be at arm's length, as they have different roles and functions.⁸¹⁶ Sharing of information, especially on the "fitness" of the trader, however, was welcomed by the OFT. The OFT wanted to guarantee the independence of the ADR body from industry regulators, Government and industry. Prompt and fair hearings were also advocated by the OFT, as the complainant still has to make payments to the business while the complaint is being attended to. Finally, the OFT advised the DTI to formulate a strategy to publicise and disseminate information regarding the ADR body.⁸¹⁷ Adequate expertise of the ADR in credit matters was also asserted to be an important factor to balance the inequality of bargain between the consumers and businesses.⁸¹⁸

The proposal for an ADR for consumer credit was finally accepted and one of the key features of the CCA 2006 is the ombudsman scheme. The CCA 2006 has amended the Financial Services and Markets Act 2000 ("the FSMA") to introduce consumer credit jurisdiction under the FOS.⁸¹⁹ A new Part 3A will be inserted into Schedule 17

⁸¹³ OFT, *"The provision of Alternative Dispute Resolution for disputes arising under the Consumer Credit Act 1974: A response by the OFT to the DTI's consultation paper"*, OFT 712b, p.1.

⁸¹⁴ Ibid.

⁸¹⁵ Ibid, p.6.

⁸¹⁶ Ibid, p.7.

⁸¹⁷ Ibid, p.1.

⁸¹⁸ Ibid, p.8.

⁸¹⁹ FSMA, s 226A, as inserted by CCA 2006, ss 59, 60, 61.

of FSMA to explain the FOS's consumer credit jurisdiction and the requirement for FOS to make procedural rules for the consumer credit jurisdiction.⁸²⁰ Under the new section 226A of the FMSA, several requirements will have to be satisfied before the FOS can entertain a complaint. The FOS may only exercise its consumer credit jurisdiction if:

- the complainant meets the eligibility criteria and wishes the FOS to hear the complaint;
- the complaint is specified under the FOS consumer credit rules;⁸²¹
- the respondent was licensed under the CCA and falls within the ambit of consumer credit jurisdiction; and
- the complaint could not be dealt with under the existing FOS compulsory jurisdiction.

In regard to the funding arrangements for the FOS, the amount of the fund is to be determined by the FOS, but with the approval of the OFT.⁸²² The role of the OFT in this aspect is important as the OFT is empowered to levy fees on licensees to meet the costs of establishing and operating the consumer credit jurisdiction. The OFT may also impose requirements, provide exceptions and make provision for refunds in exceptional circumstances.⁸²³

7.8.2 An ADR provider for consumer credit in the UK: A critical review

The account above showed a smooth ride in the introduction of an ADR body for consumer credit in the UK. A great deal of support from the Government is a bonus

⁸²⁰ FSMA, Part 3A, Schedule 17, as inserted by CCA, Schedule 2.

⁸²¹ S 226A(7) of the FSMA allows the FMSA to make the consumer credit rules.

⁸²² FSMA, s 234A, as inserted by CCA 2006, s 60.

⁸²³ FSMA, s 234A(7)(a)-(d), as inserted by CCA 2006, s 60.

factor that should be well-appreciated. Deciding on the FOS with an extended jurisdiction for consumer credit is a sound move as the service is free for consumers and the FOS has already gained public confidence in discharging its existing duties. Its integrity and reliability will further convince consumers to approach the body to resolve their disputes with businesses.

Since the costs of dispute resolution are borne by the firm, care should be taken so that small businesses are not burdened by this requirement. Section 234A of the FMSA says that the FOS and the OFT must agree on the amount of contribution; thus, it may be suggested that the interest of small firms should not be overlooked. Further, the current funding system adopted by the FOS depends on the size of the firm: it can range from under £100 a year for a small firm of financial advisers to £300,000 for a high-street bank or large insurance company.⁸²⁴

One uncertain area regards the scope of ADR: whether an extortionate credit transaction is within the consumer credit jurisdiction. As mentioned before, the FOS refused to entertain extortionate credit complaints.⁸²⁵ According to section 226A of the FMSA, a complaint only falls within the consumer credit jurisdiction if it falls within a description specified in a consumer credit rule.⁸²⁶ It further says that the consumer credit rules refer to the rules made by the FOS with the approval of the OFT.⁸²⁷ Since there is no certain answer to the question above until the consumer credit jurisdiction is implemented, it might be worth referring to the White Paper to

⁸²⁴ FOS website. Available: <http://www.financial-ombudsman.org.uk/faq/research.htm#6> (accessed 5 April 2006).

⁸²⁵ DTI, "Consultation on the provision of Alternative Dispute Resolution for disputes arising under the Consumer Credit Act 1974: A Summary of Responses," p. 8.

⁸²⁶ FMSA, s 226A(2)(b).

⁸²⁷ FMSA, s 226A(7).

seek some immediate answers. The White Paper has proposed lowering the threshold of the extortionate credit bargain test and replace it with an ‘unfairness’ test so that consumers can challenge unfair credit agreements and seek redress through an ADR system.⁸²⁸ As the suggestion to replace the extortionate credit bargain with an unfair relationship was accepted and incorporated in the CCA 2006,⁸²⁹ it is likely that the FOS will accept complaints on unfair credit agreements.

It is also a current requirement of the FOS that complainants must complain to the firms first before they approach the FOS.⁸³⁰ The requirement for an internal complaints procedure is a commendable move as an efficient filter to the cases that go to the FOS. The FOS would be swamped with numerous cases if an automatic system were adopted and there were no in-house complaints procedure. Likewise, such an attempt also encourages good trade practice for the businesses.

It was mentioned in the response to the consultation paper for ADR that the consumer groups wholeheartedly agree that a business licence should be automatically terminated if a particular business refuses to comply with the ADR decision; but both the DTI and the OFT chose to differ.⁸³¹ According to the licensing regime, the OFT has to investigate the “fitness” of the trader before a licence is revoked. While termination of licences may teach a good lesson to a defiant trader, nevertheless, an automatic revocation would be overriding the licensing procedures and remove a legal business. Thus, the opposing view of the DTI and the OFT is justifiable.

⁸²⁸ CC White Paper, paras. 3.32-3.37.

⁸²⁹ CCA, ss 140A -140D, as inserted by CCA 2006, ss 19-22.

⁸³⁰ FOS website. Available: <http://www.financial-ombudsman.org.uk/faq/index.htm#1> (accessed 5 April 2006).

⁸³¹ OFT, “*The provision of Alternative Dispute Resolution for disputes arising under the Consumer Credit Act 1974: A response by the OFT to the DTI’s consultation paper*” (OFT712b), p. 1.

Finally, it is here submitted that both the DTI and the OFT have made a commendable and significant contribution to the area of consumer protection by proposing an ADR provider for consumer credit. It also important to note what Malaysia can learn from the UK experience.

7.9 The Feasibility of Introducing an ADR Forum in the Moneylending Area in Malaysia

The enthusiastic support for ADR for consumer credit in the UK may possibly encourage the move to set up an ADR forum for moneylending disputes in Malaysia as well. Regulatory control over the business of moneylending was provided mainly by the MLA 2003. A distinction should be drawn between regulatory action and consumer redress. As explained in Chapter Six, criminal sanctions are the central form of punishment under the MLA 2003 and its regulations. Although the terms of sentencing have been significantly improved under the new moneylenders laws, aggrieved small borrowers would remain uncompensated. The MLA 2003, along with the other 29 consumer protection measures in Malaysia, only provides protection under the criminal law, whereby the party at fault may be prosecuted in court. The enforcement of regulatory offences is by the public prosecutor; its method is of a public penal nature. Proceedings can result in a fine or imprisonment for the guilty offenders, but do not necessarily provide a remedy or damages to the consumer. On the other hand, by the nature of the private law, enforcing a civil law sanction is at the instance of the borrower himself. Earlier discussion in this chapter showed that it is not easy for borrowers to bring a civil action. It was also mentioned that a large majority of borrowers have recourse to moneylenders because they have no other option, as they are not eligible to borrow from financial institutions. With such a

deprived background, a borrower would not be able to afford to enter into litigation. Hence, it is submitted here that it is only rational for borrowers to have an independent and informal way to solve disputes which will promote their interest in a cost-effective way.

It is the aim of section 7.9 to discuss the feasibility of setting up an ADR body for moneylending disputes. The attributes of existing consumer ADR bodies have been explained above and it is important to consider whether their features are applicable to moneylending disputes. This study has formulated four options to be considered. The first is the formation of a Moneylending Mediation Bureau subsidised by the Association of Licensed Moneylenders. This would take in the form of an industry-based dispute resolution body similar to those of IMB, BMB or FMB. The second is a statutory-based tribunal, similar to the Consumer Tribunal and Homebuyer Tribunal, as a potential ADR body for moneylending. The third option is to include moneylending disputes under the FMB. The last option is to incorporate moneylending disputes under the Consumer Tribunal.

7.9.1 A Moneylending Mediation Bureau

It is appreciated that moneylending businesses are not highly commercialised, like banks and financial institutions. Although 2876 licences were approved by the Ministry from 2004 to 2005 throughout the Peninsula of Malaysia, moneylending businesses are not as vast as banks and financial institutions, as they only offer one product: personal loans. In fact, moneylending is a very small, close-knit and long-standing industry, mostly run by families. It would be a burden for the moneylenders to provide a free dispute resolution service for the borrowers. Thus, it is anticipated

that the moneylenders would be reluctant to finance a Moneylending Mediation Bureau such as the IMB, BMB or FMB, as it would incur unnecessary cost for their businesses. Furthermore, most problems faced by borrowers, such as charging excessive interest rates and providing misleading advertisements, are caused by loan sharks. Obviously, loan sharks are not qualified to be members of the Association of Licensed Moneylenders. Therefore, borrowers facing disputes with illegal moneylenders would be unable to bring their complaints to a moneylending bureau. For this reason, a mediation bureau backed by the industry would be unsuitable for moneylending disputes.

7.9.2 A Moneylending Tribunal

Another option would be a statutory-based tribunal, similar to the Consumer and Homebuyer Tribunals. The establishment, membership and method of dissolving disputes should be consistent with those of these two Tribunals. A Moneylending Tribunal should have its own jurisdiction in terms of monetary limit and types of cases to be referred to it. It is reasonable that a Moneylending Tribunal should be empowered to settle disputes to the maximum amount of RM25,000, like the Consumer and Homebuyer Tribunals. In regard to the types of complaints to be referred to a Moneylending Tribunal, reference may be made to the jurisdiction of the former BMB. Hence, it is suggested here that complaints regarding the charging of excessive interest rates and misleading advertisements might be worth consideration:

This second option sounds quite appealing but in order to achieve it, it would be necessary to amend the existing law in order to incorporate the establishment of a Moneylending Tribunal. Apart from that, another factor to be taken into

consideration is the financial aspect involved in realising this recommendation. The cost of setting up a Moneylending Tribunal and the allocation of staff to administer the tribunal may be found to be too daunting. Furthermore, the proposed Moneylending Tribunal would only cater for a small section of the public, with a very limited scope of action, as not all consumers resort to moneylending transactions in order to get a loan. In contrast, the Consumer Tribunal and the Homebuyer Tribunal provide a venue of redress for a large section of society.

7.9.3 The FMB

Another alternative is to provide a moneylending jurisdiction under the FMB. As it is an industry-based forum, it is here suggested that the Association of Licensed Moneylenders be a member of the FMB. Since the FMB was established to widen its scope in strengthening consumer protection infrastructure and to provide adequate avenues for redress,⁸³² it is timely that the FMB should broaden its wings to cover moneylending disputes as well. The jurisdiction proposed to cover the types of cases to be referred is also similar to those of banking disputes' terms of reference. Moneylending disputes would therefore be handled by an experienced mediator who is skilled and knowledgeable in the aspects of finance. If this option is accepted, borrowers will encounter a free and informal dispute resolution process. However, the nature of a mediation bureau is such that there is no method to enforce a mediator's decision, even though enforcement is the most important element once an

⁸³² See the speech of the Governor of Malaysian Central Bank at the Launch of the Financial Mediation Bureau. Available: <http://www.bnm.gov.my/index.php?> [Accessed 28 January 2005].

award is delivered.⁸³³ In other words, there is no certainty in enforcing a judgment in the mediation process.

7.9.4 The Consumer Tribunal

As discussed in 7.6.4, the attributes of the Consumer Tribunal may fit well to the accommodation of moneylending disputes. The CPA also sets a limit on the monetary size of claims and types of claims. The financial limit of RM25,000 would not be an issue, as in moneylending transactions, borrowers usually borrow small amounts. Further, there is no limitation of jurisdiction in the CPA that constitutes an impediment to hearing moneylending disputes.⁸³⁴ There would be many advantages if moneylending disputes could be heard in the Consumer Tribunal. First, the President or Deputy President who presides over the Tribunal has a strong legal background, as they have to be members of the Judicial and Legal Service.⁸³⁵ Second, the Tribunal is established in every state; location would therefore not be an issue for borrowers. Third, no legal representation is needed, and negotiation is the method used to reconcile the dispute. Fourth, the small filing fee would not be a burden to borrowers. Finally, the Tribunal has gained public recognition. Despite the strengths explained above, nevertheless there is one problem regarding the jurisdiction of the Tribunal. Although it is an independent body, the Tribunal is established under the CPA, and the CPA is actually under the jurisdiction of the Ministry of Domestic Trade and Consumer Affairs. Thus, the issue is whether the Tribunal would be capable of hearing moneylending disputes, since the moneylenders laws are regulated by the Ministry of Housing and Local Government.

⁸³³ See the statement of the President of Education and Research Association for Consumers Malaysia in H. Ramli and H. Mahmud, "Tribunal popular di kalangan pengguna adu masalah" (Tribunal popular amongst consumers to voice complaints), *Utusan Malaysia*, 6 May 2002.

⁸³⁴ CPA, s 99.

⁸³⁵ CPA, s 86.

7.9.5 Which approach?

A careful evaluation of the four alternatives shows that the Consumer Tribunal has every potential to hear moneylending disputes. An addition of another type of claim may not cause a problem as the Consumer Tribunal also hears consumer credit claims, such as hire-purchase disputes. Unfortunately, the problems lie in the fact that the Tribunal is established under the CPA and the CPA is regulated by the Ministry of Domestic Trade and Consumer Affairs. It is foreseeable that the Tribunal will have difficulties in accommodating moneylending disputes unless the responsibility for regulating moneylenders laws is also assigned to the Ministry of Domestic Trade and Consumer Affairs.

It is not feasible to establish a separate ADR body other than the Consumer Tribunal, which hears many types of consumer claims, in the moneylending context, as none of the options are practical and realistic in the moneylending situation. The main concern is that the core issue in moneylending is loan sharks, who accounted for 73.8% of complaints in 2004. An ADR body with ADR techniques may be the best answer to overcome illegal moneylending problems. Other types of complaints received by the Ministry are charging high interest rates, accounting for 21.5% of complaints, followed by 'others', which only represent 4.6% of total complaints.⁸³⁶ The records of the Ministry also show that there has been no complaint regarding failure to abide by the moneylenders rules and regulations or causing intimidation and harassment. The following statistical Table shows the pattern of moneylending complaints in 2004.

⁸³⁶ The Ministry of Housing and Local Government, *Statistics of Complaint in Moneylending*, 2004.

Table 7.6: Statistics of Complaint in 2004

Types of complaints	J	F	M	A	M	J	J	A	S	O	N	D	Total
No licence	8	4	5	10	5	2	5	3	1	2	1	2	48
High interest rate	2	1	1	1	-	-	2	-	4	2	-	1	14
Failure to abide to rules	-	-	-	-	-	-	-	-	-	-	-	-	0
Harassment and intimidation	-	-	-	-	-	-	-	-	-	-	-	-	0
Others	-	1	-	-	-	1	-	-	1	-	-	-	3

Source: The Ministry of Housing and Local Government, 2005

It is also envisaged that a separate ADR body is not suitable for moneylending disputes as the business only offers one product, i.e. personal loans. It therefore only covers very limited causes of action, and, judging by the former BMB's categories of complaints, moneylending disputes will only involve complaints regarding high interest rates and misleading advertisements. To support the findings of the disadvantages of setting up a separate ADR body, a comparison may be made between the proposed cause of action for moneylending disputes and the 2004 statistics of complaint from the Ministry. It is obvious that if an ADR body for moneylending is established, it might be a waste of money, impractical and also unproductive. This is because only very few cases will be referred to the ADR body, and the disputes would only be about high interest rates. However, on the positive side, it is anticipated that if a new ADR body were set up, it is likely that there would be genuine interest in trying the service. The success of the Consumer Tribunal supports such a view. Nevertheless, considering all relevant aspects, it is submitted that the limitations outweigh the benefits of a separate ADR body.

There are constant reports by the media of loan sharks harassing and intimidating borrowers. The question posed by this study is whether it is suitable to refer such complaints to an ADR body. Would these gangsters willingly turn up in an ADR forum and negotiate with the borrowers? This study is quite certain that there would be no authority to supervise the attendance of loan sharks at the ADR forum. If illegal moneylenders failed to turn up, it is feared that no action could be taken against them. Another big concern is whether the borrowers would be brave enough even to file a complaint for harassment and intimidation to an ADR body. It is envisaged that no protection would be offered to these borrowers. Further, there has been no report of harassment and intimidation received by the Ministry to date, although it is well-known that such behaviour is rampant. It is believed that the public prefers to bring complaints about such offences to the police. The above arguments obviously show that the nature of the offences of harassment and intimidation are not suitable for reference to an ADR body. These cases are of a criminal nature and they should be under the jurisdiction of the police and the courts. This view is in line with the opinion of the Deputy to the Kuala Lumpur Police Chief, who said that in order to take overall action against loan sharks' activities, such activities must be categorised as those of a premeditated criminal syndicate and not moneylending *per se*.⁸³⁷

7.10 An Alternative Suggestion

The findings of this chapter show that apart from the Consumer Tribunal, a sole ADR body for moneylending disputes is not viable. Therefore to what kind of redress mechanism could the borrowers resort? This thesis suggests two answers to this question. The short-term plan elaborates on how and where borrowers could file a

⁸³⁷ "Kegiatan ceti haram jenayah terancang", (Loan sharks' activities are premeditated crime), *Berita Harian*, 30 September 2004.

complaint against moneylenders and get positive feedback. The long-term plan explains alternative ways to obtain loans.

7.10.1 Short-Term Plans

There are potential fora for borrowers to file complaints over moneylending disputes in Malaysia. However, they are limited in number and their services could be further improved. This section examines the role of the Ministry in receiving public complaints because the first and the right body to receive and to act on complaints is the Ministry itself. The advantage of filing complaints directly to the Ministry is that the Ministry has the responsibility for receiving, and authority to act on, such complaints. The method of complaining could also be improved and varied. At present, the Ministry has a Public Complaints management system to handle public complaints but it only operates once a month. This programme is called 'A day with clients', adopting an 'open house' concept where the public is free to deal directly with the heads of departments and senior officers in resolving their problems.⁸³⁸ Teleconferencing will be used where necessary to facilitate easier communication and discussion between the Ministry's officers so that prompt action can be taken to respond to problems. The Ministry should be given credit for this effort because, without it, it would not be easy for the public to meet face-to-face with senior officers and have prompt action taken over issues. Apart from that, the Ministry has made public the entire list of the licensed moneylenders on its website.⁸³⁹ One only has to log on onto the Ministry's website and carry out a search using the moneylender's licence number and company name. According to the Ministry, this system has a two-pronged strategy; to clip the wings of the loan sharks and to encourage borrowers

⁸³⁸ <http://www.kpkt.gov.my/kpkt/main>

⁸³⁹ <http://www.kpkt.gov.my/along>; see also "War against Ah Longs starts", *The Star*, 15 March 2006.

to use the services of licensed moneylenders.⁸⁴⁰ Perhaps this is a good way to trace illegal moneylenders, since the names of all licensed moneylenders are available and updated as soon as their licences are issued or renewed.

Despite the efforts of the Ministry, there is concern about whether the public is aware of this service. It is suggested here that the complaints system should be strengthened and a complaints unit should be established so that the public could complain at any time during office hours. The Ministry should develop a 'moneylending legal clinic', similar to the 'housing legal clinic' which it runs. Since the Enforcement Division of the Ministry presides over the housing legal clinic, the idea of developing a moneylending legal clinic would not be so difficult, as the same division already handles moneylending complaints. The aim and function of the housing legal clinic would be an excellent basis on which to develop a similar legal clinic for moneylending disputes. The former provides opinions, advice and ways of resolving housing disputes between buyers and developers, giving priority to those who cannot afford legal advice and counsel.⁸⁴¹

Apart from that, it is further suggested that borrowers should also be able to file complaints online via the telephone or the internet or through the mobile messaging system. Complaints are received by mobile by the Ministry of Domestic Trade and Consumer Affairs. The service is called '*e-aduan*' (e-complaint). Complaints will be investigated within three weeks and the complainant may check the status of the complaint through the mobile messaging system.⁸⁴²

⁸⁴⁰ "War against Ah Longs starts", *The Star*, 15 March 2006.

⁸⁴¹ See further in [www.http://www.kpdnhep.gov.my/index](http://www.kpdnhep.gov.my/index)

⁸⁴² Ibid.

Apart from providing facilities for borrowers to complain, another very important duty of the Ministry is to publicise its service. A large majority of consumers are not aware of the function of the Ministry as the regulator of moneylenders laws. This is evidenced by the discussion in Chapter Four, where Table 4.1 shows that borrowers tend to lodge complaints at other organisations such as the Central Bank, the Ministry of Domestic Trade and Consumer Affairs, the police and so on. Thus it is the duty of the Ministry to disseminate information about its role. In the UK, under the CCA, the OFT is obliged to publicise information and advise the public about its scope, function and operation.⁸⁴³ This thesis suggests that the same obligation is imposed on the Ministry of Housing and Local Authorities.

7.10.2 Long-Term Plans

According to the estimation of the Federation of Hawkers and Petty Traders, about 40% out of 300,000 hawkers and petty traders were in debt with loan sharks.⁸⁴⁴ The Klang Valley Association of Taxi Entrepreneurs also reported that 40% of 23,000 taxi drivers in the Klang Valley were involved in borrowing from loan sharks.⁸⁴⁵ People who turn to loan sharks for quick money often have nowhere else to borrow from, have a zero or low credit rating and do not have the collateral required by financial institutions. Their prime concern is to obtain much-needed money, and worry later, although they realise the risks involved and the consequences of having to pay extremely high interest. Ironically, they also know the threats and agony their family have to endure when they default in repayments. They have no choice but to go to

⁸⁴³ CCA, s 4.

⁸⁴⁴ Y. Sahat and Suhana A. Mutalib, "40% penjaja kecil terlibat ceti haram" (40% petty traders turn to loan sharks to settle debts), *Berita Harian*, 1 December 2002.

⁸⁴⁵ *Ibid.*

loan sharks because of an urgent need, such as to pay off a debt or save a business from closure, or a sudden illness in the family and other important matters.

7.10.2.1 The banking industry

Low-income earners resort to loan sharks to solve their cash-flow problems, mainly because loan sharks offer easy loans with daily repayment terms. Petty traders and hawkers, for example, conduct businesses on a daily cash basis, using income for immediate purchases. They do not have reliable accounting systems for tracking their daily takings, let alone assets for collateral; hence, the dependence on loan sharks. On the other hand, the present banking system has made it almost impossible for low-income earners to get loans. The banking industry should realise that they have a moral obligation to the public and should not take a back seat. It is time that they reviewed their policies to see how they can initiate creative and purposeful options for the man-in-the-street. Thus, the banking industry should make it easier to apply for small loans, by relaxing the conditions for loan approval.

It is suggested here that the banking industry should revise its policies to help low-income earners by considering the documentation, the requirements for guarantors and the time taken to process loan applications. The reasons are summed up as follows: first, unlike corporation and salaried workers who have documentation, many people have no papers to show to banks and financial institutions. Therefore, they do not qualify for personal loans. Second, banks and financial institutions usually require a guarantor to guarantee the loans. However, it is not easy for low-income earners to find guarantors. Therefore, it is suggested here that this requirement should be abolished. Third, the application process, which usually takes up to three months,

should also be looked into. This is because low-income earners usually need fast cash, and they turn to loan sharks because they can get immediate cash from illegal moneylenders.

The Malaysian Youth Council, for instance, suggested that the Central Bank impose an obligation on all commercial banks to allocate a minimum of 5% of the bank loan fund to establish an easy loan scheme.⁸⁴⁶ The solution lies with the banks and financial institutions. While banks and financial institutions have the courts to help them recover loans from defaulters, loan sharks resort to debt collectors, who are members of triads, to do the dirty work. It is time for the banks to fulfil their moral obligation to free desperate borrowers from their financial problems and the clutches of the loan sharks.

7.10.2.2 Government micro-credit funds

Micro-credit offers financing to individuals who want to do business but do not have the necessary credit record or collateral.⁸⁴⁷ The history of micro-credit funds can be traced back in Bangladesh with the establishment of the *Grameen* Bank. *Grameen* Bank (literally “bank of the villages”) has reversed conventional banking practice by removing the need for collateral and created a banking system based on mutual trust, accountability, participation and creativity.⁸⁴⁸ The system is based on the idea that the poor have skills that are underutilised: it was a strategy to improve the rampant rural poverty in Bangladesh.⁸⁴⁹ One of the objectives of the *Grameen* Bank project was to

⁸⁴⁶ Akmar H. Mokhles, “MBM syor bank peruntuk 5% skim pinjaman kecil” (*MBM suggest banks to allocate 5% for small loan scheme, Utusan Malaysia*, 2 December 2002).

⁸⁴⁷ Zainul Ariffin, “Micro-credit way to slay the ‘Ah Longs’”, *New Straits Times*, 24 December 2002.

⁸⁴⁸ <http://www.grameen-info.org/bank/index.html>

⁸⁴⁹ http://en.wikipedia.org/wiki/Grameen_Bank

eliminate exploitation of the poor by moneylenders.⁸⁵⁰ This model has been adopted in over 43 countries in the world, including Malaysia.⁸⁵¹

In Malaysia, there are several micro-credit funds, which include the Credit Guarantee Corporation, National *Tekun* Foundation, *Amanah Ikhtiar Malaysia* and *Majlis Amanah Rakyat*. Generally, their objective is to accommodate small and medium enterprises by giving them access to financing. However, there are also several requirements to be met before one is eligible to borrow. Regrettably, personal loans do not qualify under these funds. The Credit Guarantee Corporation, for example, was established to assist small and medium enterprises that have no track record or collateral, or inadequate collateral, to obtain credit facilities from financial institutions by providing guarantee cover for such facilities.⁸⁵² In order to apply for a Direct Access Guarantee Scheme (DAGS) for instance, the applicant will need statutory documents, financial and management documents as well as other documents. These include the memorandum and articles of association, a copy of the latest income tax statement, audited financial statements, a cash flow projection for the next three years, copies of bank statement for the last six months, valuation reports on property to be charged, a copy of the tenancy agreement and so on.

Although personal loans are not offered under the above-mentioned micro-credit funds, the National *Tekun* Foundation may be relevant to hawkers and small traders.⁸⁵³ They may apply for a loan if they are aged between 18 and 60, have valid business licences or permits, have no bad records with any financial institutions or

⁸⁵⁰ <http://www.grameen-info.org/bank/index.html>

⁸⁵¹ http://en.wikipedia.org/wiki/Grameen_Bank

⁸⁵² Central Bank of Malaysia, *General Information on Credit Guarantee Corporation*, 2004.

⁸⁵³ <http://www.tekun.gov.my/index2.htm>

Government agencies and have been in business for at least six months. Priority is given to small businesses such as night market operators, hawkers, grocery shop owners, school bus operators etc. First-time applicants may apply for a loan of RM1,0000 up to RM10,0000. Repayment schemes range from 26 weeks to 156 weeks. Applicants do not face an unnecessary burden as the documentation needed is minimal, such as a copy of the applicant's identity card, photo of the business premises, a copy of the business licence or permit, a copy of a bank statement, a copy of a utility bill and a copy of the business premises tenancy agreement.

7.10.2.3 Co-operative societies

An alternative to the banks and financial institutions or Government funds are co-operatives. According to Rachagan, this is a self-help way of providing credit for members of the co-operatives where members pay into co-operative funds and agree to lend the money to each other at an agreed rate of interest.⁸⁵⁴ Co-operatives can help curb the activities of loan sharks by providing loans at a lower interest rate. The Ipoh Civil Servants Co-operative, for instance, only required two days to process and approve a RM5,000 loan to its members.⁸⁵⁵ Low interest (4% per annum) is charged and the repayment period varies between three and five years. According to the former Deputy Land and Co-operative Development Minister, the co-operatives should recruit more members and possess strong financial standing in their accounts in order to move forward in tandem with their involvement in economic activities.⁸⁵⁶

⁸⁵⁴ Malaysian Consumer Law Reform Report, para. 5.3.19.

⁸⁵⁵ S. Khoo, "Weed out loan sharks, co-ops told", *The Star*, 7 January 2003.

⁸⁵⁶ Ibid.

The *Bank Rakyat* co-operative, for example, has about 400,000 members and recorded a profit of RM401 million in 2003.⁸⁵⁷ This co-operative offers a unique product with simple procedure and timely delivery. It aims to contribute towards social development and members' needs. The *Aslah Personal Financing-I* can assist individuals in meeting financial obligations; down-payments for a car, house or home renovations and others.⁸⁵⁸ All Malaysian citizens between the ages of 18 and 55 years are eligible to apply for this credit facility. The minimum income to qualify for this loan is RM700 and RM800 for Government employees and public sector employees respectively.

7.10.2.4 Employers' loan scheme

Another proposal is to promote more awareness amongst employers to set up loan schemes to help their employees with financial problems. An example is the step taken by the Westport Malaysia *Berhad* which introduced a fund of RM1 million as an alternative loan scheme for its employees.⁸⁵⁹ This step was taken to prevent loan sharks from collecting debts at the work place, since harassment from loan sharks affects performance quality. According to the general manager of Westport, the loan scheme is offered to permanent employees. The maximum loan is up to two months salary and repayment is through deduction from monthly wages.

7.10.2.5 Payment of wages fortnightly

One suggestion came from the Malaysian Indian Congress President, who urged employers to consider paying fortnightly wages to employees who are earning

⁸⁵⁷ <http://www.bankrakyat.com.my>

⁸⁵⁸ Ibid.

⁸⁵⁹ "Hukuman berat bukan penyelesaian menyeluruh" (Stiff penalty not thorough resolution), *Berita Harian*, 5 December 2002.

RM1,000 and below, in an effort to help those in the lower income group.⁸⁶⁰ It is Malaysian employers' standard practice to pay salaries at the end of each month. Receiving wages fortnightly will help prevent employees resorting to borrowing from loan sharks to tide them over while waiting at the end of the month for their salaries.

7.11 Conclusion

In analysing the MLA 2003, it is apparent that the only mechanism available for borrowers to get individual remedies is through civil claims. It is also acknowledged that consumers are reluctant to pursue civil actions. This is due to the discrepancy between the small amount of claim and the complexities of going to court. The difficulties include financial, practical, psychological, as well as cultural barriers. This predicament has led to the development of ADR. The existing consumer ADR bodies in Malaysia, whether industry-based or statutory, have shown the great potential of alternative mechanisms to seek redress. The advantages offered are certainly appealing: they are cost-effective, flexible and provide speedy resolution. Thus it was the intention of this chapter to discover whether there should be a separate ADR body for moneylending disputes.

After evaluating the consumer ADR bodies in Malaysia, as well as the new Ombudsman scheme under the FOS's consumer credit jurisdiction, it is realised that the idea of establishing a separate ADR body for borrowers in moneylending disputes is not quite feasible, as it would not provide a complete solution. This is due to the limited cause of action, as only one product is offered, i.e. personal loans. A reference to the statistics of complaints from the Ministry in Table 7.6 also shows that

⁸⁶⁰ A. Letchumanan, "Pay fortnightly wages to low income owners", *The Star*, 6 December 2002.

the most common type of complaint is illegal moneylending, followed by high interest rates. Further, moneylending disputes may also involve criminal elements, when the borrower is harassed or intimidated.

In view of the above, this study here proposes some short-term and long-term solutions. It is envisaged that immediate actions may be taken by the Ministry to assist the borrowers in moneylending disputes in resolving their problems. It was also argued that it is important for the Ministry to establish a 'moneylending legal clinic' for this purpose, since the Ministry is empowered to act against loan sharks and the problems brought by their illegal activities. It is anticipated that the Enforcement Division of the Ministry is fully capable of carrying out this task, based on its experience in handling the housing legal clinic. The long term plans may also help lessen the financial burden of ordinary workers and small traders. These include some propositions for the banking industry, the Government's micro-credit funds, co-operative societies, employers' loan schemes and payment of wages fortnightly.

The next chapter concludes the study and draws out the findings of the thesis.

CONCLUSIONS

8.0 Introduction

This final chapter summarises the strengths and weaknesses of the MLA 2003 and its regulations. The arguments for the contribution made by and the drawbacks of the new moneylenders laws have been derived from comparison with the CCA and its regulations. The strengths and limitations of the points of comparison have been analysed with a view to suggesting ways to optimise the strengths and minimise the limitations. This chapter also submits the findings of this thesis, suggests further reforms and recommends further research.

8.1 The Strengths and Limitations of the MLA 2003

The main aim of this thesis was to examine the extent to which the MLA 2003 has rectified the defects of its parent Act in regulating and controlling the business of moneylending as well as protecting borrowers in moneylending transactions. It also sought to determine whether the amendment has accomplished its aim of eliminating illegal moneylending by extending the scope of the Act to unlicensed moneylenders. The achievement of the MLA 2003 is measured by comparison with the CCA and its regulations and the CCA 2006.

8.1.1 Sources of Law

Chapter Two looked into the legislative framework of the Malaysian moneylenders law and the UK's consumer credit law, the institutional framework for consumer credit, interpretations of the important terms in the thesis and exemptions provided under the MLA 2003.

Strengths

The major overhaul of the MLA 2003 has indeed brought significant transformation in the legislative and institutional framework of the moneylenders law, as follows. First, the MLA 2003 has widened the definition of a moneylender to include illegal moneylenders. The new simple definition of a moneylender implies that a moneylender under the Act need not necessarily be licensed. This is an excellent approach to extend the application of the law to illegal moneylending. Second, the exercise to take away section 2A(1)(h), which exempted genuine businesses whose primary object of business is not moneylending, was highly creditable as moneylenders took advantage of the exception of “*bona fide* persons” to avoid the requirement to obtain moneylending licences, thereby conducting business irresponsibly without being regulated by any specific law. Third, the attempt to appoint the Ministry of Housing and Local Government as the sole regulator of the MLA 2003 is certainly remarkable, as previously, the Ministry only played a nominal role. The former practice of employing local authorities to regulate the moneylenders law had invited many problems and inconsistencies in terms of procedures and enforcement.

Weaknesses

Although the strengths of the MLA 2003 are evident as described above, there are indeed some major drawbacks in the legislative and institutional framework that need urgent attention. First, despite the redefinition of ‘moneylender’, the review has cast the net too wide, which questions whether other types of loans such as those between a company and its subsidiaries and between employers and their employees are also caught under the purview of the MLA 2003. Second, the new law has retained

section 2A(2) which confers a wide discretion on the Minister to exercise the power of exemption. It has caused some concern since such power may create exposure to risks, corruption and bribery, if not carefully guarded. Third, the current institutional framework of consumer credit has apparent flaws that may affect borrowers' interests. It was pointed out that the Ministry of Housing and Local Government regulates the moneylending and pawnbroking laws, while the Ministry of Domestic Trade and Consumer Affairs regulates the hire-purchase laws. Having two different agencies regulating consumer credit laws has resulted in different application, different rules and different enforcement. Assigning the Ministry of Housing and Local Government to regulate the moneylenders law has proved to be a disappointment since, after more than fifty years of operation, the public is still unaware of the role of the Ministry in governing the MLA. The Government should have realised that the main reason for this ignorance is that the name of the Ministry is associated with neither finance nor consumers. Further, due to the fragmentary approach, hire-purchase disputes could be referred to the Consumer Tribunal but not moneylending disputes, since they are regulated under different statutes and Ministries.

Submission

In sum, apart from the exception by the Minister, the mechanisms in defining the relevant terms under the MLA 2003 and providing certain exceptions are perhaps innovative and likely to satisfy the objectives of the statute to regulate and control the business of moneylending, to protect the borrowers in moneylending transactions and to eliminate illegal moneylending. It is understood that the exception by the Minister has to be retained, in order to address the issue of the disparity of consumer and commercial moneylending transactions. However, it is submitted here that the

definition of 'moneylender' under the MLA 2003 needs more clarification, by further review or further guidelines. With regard to the institutional framework for consumer credit, it is envisaged that identifying a single authority to enforce consumer credit laws would be advantageous for consumers. The problems highlighted above show that consumers become victims under the existing institutional framework. It is considered that since the Ministry of Domestic Trade and Consumer Affairs is synonymous with consumers in Malaysia, and the Ministry has a large enforcement unit, it might be a sound suggestion if the moneylending jurisdiction were to be relocated to the Ministry.

8.1.2 Licensing and Advertisement Permits

The MLA 2003 emphasises the importance of moneylending licences and advertising permits as mechanisms for monitoring moneylenders and supervising their activities. Section 5 of the MLA 2003 is the impetus of the whole reform and explicitly states the importance of the licensing requirement. This aspect was discussed at length in Chapter Three.

Strengths

The vital requirement for a moneylending business is possessing a valid moneylending licence and advertisement permits, and the MLA 2003 has significantly strengthened this requirement. The strength of this new law of licensing and permits regulations can be explained as follows. First, the reform has removed the local authorities from regulating the licensing regime and made the Ministry of Housing and Local Government the sole regulator. Second, the most important improvement brought by the amendment is the extension of the licensing system to loan sharks.

This move has considerably rectified the common former problem where actions could not be taken against loan sharks for the simple reason of lack of legal power. Third, several licensing provisions such as those concerning fees, duration and renewal, displaying the licence in the business premises, conducting moneylending transactions at the moneylenders' premises and revocation as well as suspension of licences have been either amended or freshly formulated to keep up with current commercial standards and safeguard the borrowers' interests. Fourth, the law has also extended the advertisement permits requirement to loan sharks so that they cannot easily induce the public to borrow from them by using improper and unethical advertising techniques. Fifth, the vetting process under the advertising permits regime is indeed an innovative approach as each proposed advertisement is vetted specifically. Finally, the MLA 2003 encourages the moneylender to adopt good advertising ethics by providing that non-conformity of particulars in advertisements with the terms or conditions in the moneylending agreement will render such terms or conditions void.

Weaknesses

Although the MLA 2003 notably reformed the licensing and advertising rules, nevertheless, several weaknesses are also evident. First, the amendment has failed to provide clear criteria to determine whether the applicant should be given a moneylending licence. The concept of a "fit and proper person" under section 9 was not fully emphasised and developed, whereas in the UK, the fitness test is the backbone of the licensing system. Second, moneylenders who operate in good faith complained that the new strict requirement that moneylending transactions can only be conducted at business premises has badly affected their businesses as they cannot

collect repayments at the borrower's home. The new rule also means that they cannot contact borrowers to remind them to make repayments. Third, there is no provision for termination of licences for individuals in cases of death or insanity, although such provision is available under the CCA. Fourth, there is also no provision under the MLA 2003 to hold the publisher of an illegal moneylending advertisement liable for the content of the advertisement, as provided in the CCA. Such a grave loophole is considered as a green light to illegal advertisements. Fifth, there are apparent weaknesses in the advertising rules. In contrast to the UK Consumer Credit (Advertisements) Regulations 2004, the advertising rules under the MLA 2003 are so general that important elements that should protect the interests of borrowers such as presentation of interest rates, content and structure of moneylending advertisements and provision on security warnings are overlooked. Sixth, based on the analysis of the moneylending advertisements in Table 3.4, it could be deduced that although the requirement for vetting proposed advertisements is revolutionary and has potential to control moneylending advertisements, regrettably, the vetting process is clearly flawed. Finally, it is submitted that loan sharks' advertisements using unregulated media are causing a serious threat to society, as those advertisements are everywhere and can easily reach the public. The law is incompetent to monitor such moneylending advertisements as there are too many types of unofficial advertisements in many diverse locations. Hence loan sharks are becoming bolder, as the law does not provide a preventive measure to stop them from promoting their businesses.

Submission

It is submitted that reform under the MLA 2003 has indeed brought great changes in the moneylending business, by strengthening the licensing regime and further

introduced the advertisement permits regime. Both are dynamic and powerful regulatory mechanisms to identify and keep out dishonest moneylenders, and screen out misleading and vague moneylending advertisements as well as to maintain high standards in business. The move toward a centralised system, the improvement in licensing provisions, extending the licensing system and advertisement permits regime to loan sharks, and introducing the vetting process are the main strengths of the new law. Its impact is reflected in the report that some loan sharks are concerned over the new strict licensing regime, and have pleaded with the Ministry to give them licences.

However, in comparison to the relevant licensing and advertising rules in the UK, the MLA 2003 clearly suffers serious drawbacks that may impede the effectiveness of the licensing and advertising regime. It is submitted that the following weaknesses should be immediately addressed. First, the criteria of a “fit and proper person” should be further developed, as this is the key to determine whether the applicant is suitable to carry on a moneylending business. In the light of practice in the UK, factors such as consumer complaints, evidence of unfair business practices and discriminatory practices should be considered under the MLA 2003. The new requirement of skills, knowledge and experience under the CCA 2006 also shows promising ability to keep out incompetent applicants and may also be considered. Further, as practised in the UK, the Ministry should review the test from time to time, publish guidance on the test, revise the guidance and consult suitable persons in preparing and revising the guidance.

Second, the concern of moneylenders over the new requirement to restrict the conduct of moneylending transactions to business premises could be addressed by the Ministry by arranging a consultation with the moneylenders. It is necessary to discuss their predicament under the new law, as the law was meant to restrict illegal moneylenders from harassing and intimidating borrowers and not to jeopardise those operating in good faith. Third, it is suggested here that the provision for termination of licences for individuals in cases of death or insanity is important, to clarify further actions in such an event. Further, it should also be emphasised that in order to protect the interest of borrowers, such termination should not affect existing moneylending contracts.

Fourth, in view of the weaknesses of the advertising rules as well as practice under the UK Advertisements Regulations, it is submitted here that further reform is needed to improve the moneylending advertising rules. Among the suggestions are: to provide further clarification on how to quote the interest rates, to enhance the content and structure of moneylending advertisements by using easily legible, plain and intelligible language and restrict confusing expressions; to include the provision on security warnings and to implicate publishers if they publish illegal advertisements. Further, there is an urgent need to strengthen the vetting process and utilise its potential in screening out misleading and illegal moneylending advertisements. Finally, there is a variety of media in advertising, such as newspapers, magazines, flyers, posters, pamphlets, business cards, lucky draw letters, hoax bank letters, internet and sending messages through mobiles. These include legal and illegal methods. The concern of the thesis here is advertisements using unregulated media, since they are placed everywhere and easily available. This is further aggravated by

outrageous advertising tactics. It is also a concern of this thesis that the public may easily fall prey to such advertisements. Thus, it is suggested here that the Ministry formulate a strategy on how to tackle this issue. The Ministry may also disseminate more information at public places, such as the *pasar malam* (night market) and community centres, on how people can obtain easy loans from authorised agencies.

8.1.3 The Enforcement System

Chapter Four dealt with the enforcement system. The newly introduced enforcement measures under the MLA 2003 were aimed to empower the Inspector and police officers to control and regulate the business of moneylending, to protect the borrowers in the course of moneylending transactions and to eliminate illegal moneylending. In distinction from Chapters Three, Five and Six, Chapter Four analysed the enforcement provisions under the MLA 2003 in the light of other consumer protection laws in Malaysia, apart from the CCA, to determine the standard practice of the enforcement system.

Strengths

The remarkable contribution of Part III and Part IV of the MLA 2003 is the formulation of adequate provisions on investigation, examination, search, seizure and arrest, as well as rules on evidence. The new law has formed an effective enforcement mechanism to achieve the following objectives of the Act. The first effect of the MLA 2003 is certainly the appointment of enforcement officers, also known as Inspectors of Moneylenders, as well as senior police officers in the Enforcement Division of the Ministry, to enforce the moneylenders law.

Second, the Ministry's enforcement machinery was further strengthened with the introduction of sections 10A – 10K, which granted sufficient powers to Inspectors and the police to investigate, examine, search, seize and arrest. These new provisions have indeed rectified the failings in the past where the law was silent on enforcement issues and the authorities had no legal power to act against illegal moneylending. Hence, the new law has provided the necessary enforcement machinery to eliminate loan sharks.

Third, the recognition of *agents provocateurs* under the new law enables enforcement officers to restrain loan sharks' activities. Any person may act as an *agent provocateur* and is authorised to approach the loan sharks for loans, and act as a witness later. Fourth, in order to encourage co-operation from the public, the MLA 2003 also provides statutory protection for informers, and extends such protection to the information given by them. Finally, a monetary reward is introduced to encourage the public to give information regarding illegal moneylending.

Weaknesses

Despite the significant contribution of the MLA 2003 in establishing strong enforcement machinery, there are indeed certain flaws in the search and arrest provisions that need urgent attention. First, lack of provision on arrest without warrant is an oversight on the part of the legislators that may affect an investigation, especially when conducting raids. The weakness of the law is evident and the opportunity to apprehend loan sharks might easily slip away. However, the Ministry has admitted this error and an effort to amend the law to include arrest without warrant is under way.

Second, the MLA 2003 does not impose any obligation on the Inspector or the police to ensure that the premises under search are effectively secured against trespassers. A moneylender's office may contain important information and documents relating to borrowers, and borrowers may be faced with potential danger if their private documents fall into wrong hands. Such provision is available under other consumer protection laws in Malaysia and also the CCA.

Third, the law is also silent on protection of enforcement officers from any action or prosecution whilst carrying out their duties, although such protection is provided under other consumer protection laws in Malaysia. Finally, lack of any saving clause to validate a warrant despite any defect, mistake or omission is apparent. This might disrupt an investigation, and may lead to cases being disqualified merely on technicalities.

Besides the above shortcomings, this thesis also discovered that it is highly probable that the public is unaware of the existence of the Enforcement Division, let alone that it is under the jurisdiction of the Ministry. It may be suggested here that such ignorance is due to the current institutional framework of consumer credit, as discussed in Chapter Two. It was pointed out that the name of the Ministry does not relate to finance or consumers, and therefore, in most cases, the public is inclined to file complaints over illegal moneylending or moneylending disputes to the police. It is suggested here that such ignorance is a loss to consumers and the Ministry as well.

Submission

It is submitted that the MLA 2003 has formed a strong enforcement mechanism to control and regulate the business of moneylending, to fight loan sharks' activities and to protect borrowers in moneylending transactions. The appointment of enforcement officers and senior police officers in the Ministry's Enforcement Division with the powers to investigate, examine, search, seize and arrest is indeed a significant contribution to enforcing the moneylenders laws. It was also pointed out that the Ministry has started investigating more than 150 illegal moneylenders and several were prosecuted in 2005. Further, the impact brought by the implementation of the Act has led the police to launch an all-out campaign to fight illegal moneylending.

However, in order to strengthen the enforcement machinery and to enhance its efficiency, further reform is essential. Thus, it is suggested here that the Ministry takes immediate action to address the issues of lack of provision on arrest without warrant, the obligation to secure the premises under search against trespassers, protection of enforcement officers from any action or prosecution whilst carrying out their duties and lack of any saving clause to validate a search warrant.

In regard to ignorance of the public over the role of the Ministry, Chapter Two suggested that a single authority should regulate consumer credit laws. However, Chapter Four provided an alternative, or an immediate action to overcome this issue. It was proposed that the Ministry promotes public awareness over its function, introduce a financial literacy programme to the public and utilise the significant role of the media in disseminating information about the role of the Ministry in regulating moneylenders laws.

8.1.4 Conduct of Moneylending Business

The aim of Chapter Five was to investigate whether sufficient protection is given to the borrowers in the course of moneylending transactions. There were three main focuses in this chapter: the moneylending agreement, the rights and duties of the parties and the law regarding interest.

Strengths

The MLA 2003 has introduced significant reform in the conduct of moneylending business and displays genuine concern to protect the interest of borrowers in the moneylending contract. There are five major contributions of the new law in this area. First, the introduction of a prescribed agreement under section 10P of the MLA 2003 has certainly brought great improvement in moneylending transactions. The obligation to conform to prescribed agreements provided under the respective Schedule J and K has rightly rectified a serious defect in the past where borrowers were exploited through lack of uniformity of agreement. Prescribed agreements have put an end to the practice of oppressing borrowers by providing unfair and confusing terms as well as omitting important details such as the amount of the loan, interest rates, repayment period and value of the security. The far-reaching effect brought by Schedules J and K will better facilitate moneylending transactions and assist the enforcement process, as well as protecting borrowers' interests.

Second, the new requirement on attestation is indeed a notable attempt. The new law imposes an obligation on attestators who are qualified professionals to explain the contents of the moneylending agreement to the borrower, irrespective whether the borrower understands the language in which the note is written. It should certainly

ensure that the borrowers are aware of the contents of the moneylending agreement and the risks and obligations placed on them by agreeing to borrow. Third, the imposition of statutory rights and duties for both moneylenders and borrowers which are derived from the moneylending agreement and the moneylending laws are likely to assist both parties to appreciate their respective roles in the moneylending transaction, and hence, lead to a satisfying outcome of the contract.

Fourth, the abolition of the presumption of excessive interest and the introduction of a fixed ceiling interest is also a substantial reform to prevent the charging of exorbitant interest as well as controlling illegal moneylending. The capping regime has plugged a much abused loophole and provides better consumer protection. Finally, another transformation was brought by section 17 by fixing the rate to be charged on default payments at eight per centum per annum, to be calculated on the outstanding balance to be repaid. This new rule has added strength to the law and has put a stop to the widespread practice of imposing exorbitant interest rates on unsettled loans.

Weaknesses

Despite the significant improvement in the conduct of moneylending business under the MLA 2003, there are several weaknesses in the law that may hamper its effectiveness. Although the prescribed moneylending agreement has had a positive impact on moneylending transactions, in view of the practice under the UK Consumer Credit (Agreements) Regulations 1983, apparent weaknesses in the structure and the content of Schedules J and K have posed major barriers to safeguarding borrowers' interests in the moneylending transaction. Lack of regulation on four aspects regarding legibility of the agreement, use of language, requirement for withdrawal as

well as statement of protection and security warning are all serious flaws that must be urgently addressed.

First, in regard to the legibility of the agreement, the new law fails to impose a requirement of easy readability on the moneylending agreement. It is a concern that if the agreement is produced in a small font, this would discourage the borrower from reading and understanding the agreement. Such a rule can be seen as a useful facilitative technique to assist borrowers and therefore, it is quite surprising that such a requirement is not found under the MLA 2003. Second, there is no provision that the agreement should be in the National language, although such a provision was available under the old moneylenders law. Since the language of commerce in Malaysia is English, the main concern is whether the borrower would understand the terms and conditions of the agreement if he does not read English. Third, the MLA 2003 is also silent on the aspect of withdrawal from the moneylending contract, although this is obviously the right of the borrower. The right to withdraw is in line with the rules of offer and acceptance in contract law. Finally, a statutory wealth warning as used in the consumer credit agreement in the UK is also lacking under the MLA 2003, even though it is obvious that the moneylending agreement applies to agreements both with and without security.

Apart from the agreement, another aspect also suggests the weakness of the new law. The MLA 2003 has regrettably retained the old “harsh and unconscionable or substantially unfair” provision under section 21(2), although the doctrine has not been well utilised. Under section 21(2), if the Court finds evidence that the interest charged in respect of the loan is excessive and that the transaction is harsh and

unconscionable or substantially unfair, the court has a duty to relieve the borrower against excessive interest by reopening the moneylending transaction. Lack of any successful reopenings in the past may indicate that statutory intervention has been discouraged, by narrowing its scope with a high intervention threshold. However, there has been no attempt by the legislators to revise this term to meet the needs of the borrowers. The position in the UK, where a third revision of this old phrase is taking place, shows how far behind Malaysia is in modernising its moneylenders law.

Submission

It is submitted here that the MLA 2003 has successfully streamlined and restructured the important aspects in the conduct of moneylending business. The introduction of a prescribed agreement is indeed a remarkable contribution that has justifiably rectified a former serious defect, due to lack of uniformity in moneylending contracts. The terms of agreement are now dictated so that moneylenders may not extort other benefits and privileges from borrowers. Further, the requirement of attestation also provides great assistance to the borrower's understanding of the terms and conditions of the contract. Moreover, the obligation on both moneylenders and borrowers to observe their statutory rights and duties will ensure that both parties are aware of their respective roles in the moneylending transaction. Furthermore, in the interest aspects, a major development has been attempted by the MLA 2003 by introducing a maximum interest rate for secured and unsecured loan transactions. It is anticipated that many problems such as extortionate credit bargains and illegal moneylending will be removed by this capping regime. Fixing the rate to be charged on default payments at eight per centum per annum, to be calculated on the outstanding balance

to be repaid, is also a creditable effort, as moneylenders are now restricted from charging excessive interest rates.

On the other hand, it also acknowledged that there are apparent weaknesses in the new law that may affect the interests of borrowers and therefore need further reform. It is submitted here that the structure and the content of Schedules J and K are major barriers to safeguarding the borrowers' interest in the moneylending transaction. Lack of regulation on four aspects regarding legibility of the agreement, usage of language, requirement for withdrawal as well as statement of protection and security warning are all serious flaws that must be urgently addressed. In this case, the practice under the UK Agreements Regulations should set a good example to follow. Thus, it may be suggested here that the MLA 2003 should require easy reading, probably specifying a minimum size of type to be used in all moneylending agreements. Further, in regard to the language of the moneylending contract, borrowers should be given the option to choose which language they are comfortable with, either the National language or the English language. Such a requirement is essential to avoid cases where borrowers who do not read English are provided with agreements in the English language. Third, provision for withdrawal from the moneylending contract should also be incorporated in the moneylenders law, as this is a right of the borrower. Fourth, it is also important to include a statutory wealth warning in the moneylending agreement, as this will enhance the borrower's awareness of the risk. Finally, in regard to reopening of moneylending transaction, it is acknowledged that there is less need for section 21(2) since the introduction of fixed ceiling interest. Nevertheless, it is suggested here that the Malaysian

Government should further consider the new unfair relationships test under the CCA, in order to move forward with modern credit practice.

8.1.5 Criminal and Civil Sanctions

The MLA 2003 depends mostly on criminal sanctions to punish loan sharks and errant moneylenders. Civil sanctions are also available under the moneylenders laws and they may have detrimental consequences on moneylending contracts. Chapter Six discussed both the public and private law sanctions provided under the MLA 2003, and considered whether they provide sufficient measures to regulate and control the business of moneylending, to protect the borrowers in the course of moneylending transactions and to control illegal moneylending.

Strengths

Major reform under the MLA 2003 has indeed strengthened the criminal sanctions. The significance of the amendment can be appreciated from several perspectives. First, the increase in fines and imprisonment terms and the addition of whipping are aimed at enhancing the punishment for moneylending offences. Second, loan sharks and errant moneylenders will not escape the punishment of whipping and imprisonment, since the law has also extended these punishments to the director, president, partners and other members of the management team of moneylending companies, societies and firms. Third, the provision of criminal sanctions for obstruction of enforcement duties will ensure that performance of enforcement officers' duties will not be interrupted. Fourth, moneylenders are expected to discharge their duties in a moneylending contract faithfully: failure to observe their obligations is punishable with criminal sanctions. Fifth, the introduction of criminal

sanctions for harassing or intimidating a borrower serves as a statutory warning to loan sharks and moneylenders not to resort to strong-arm tactics in recovering repayments from borrowers. Sixth, the power to compound some offences will accelerate the resolution of cases and reduce court cases.

Apart from that, the civil sanctions mechanisms have also shown commendable intentions to protect borrowers in moneylending transaction. Civil law sanctions could render a moneylending agreement void or of no effect or unenforceable, or all the above. Failure to observe several requirements such as having a valid licence, using prescribed agreements, attestation and the fixed ceiling interest rate may render the agreement unenforceable. It is envisaged that moneylenders will be more guarded in conforming to their duties, to avoid having a void transaction.

Weaknesses

Notwithstanding the contributions of the criminal and civil sanctions to the moneylenders law, there are limitations in achieving the objective of protecting the interest of borrowers. In regard to criminal sanctions, the shortcoming derives from the fact that the main function of the criminal law is to improve trading standards by punishing businesses that breach the law. Unfortunately, criminal sanctions do not provide compensation to aggrieved borrowers, who are left with no personal remedy. On the other hand, although borrowers could benefit by individual redress from civil sanctions, there is understandable reluctance to enforce civil sanctions. The complications and inconvenience can be spelt out in the form of time and financial constraints and psychological and cultural barriers, as well as procedural complexity.

Submission

The MLA 2003 has indeed provided sufficient punishment for the offenders under the moneylenders law. Both criminal and civil sanctions have been revised and significant improvement has been contributed by increasing the amount of fines and imprisonment terms, and also adding whipping for serious and repeat offences. It was also pointed out in Chapter Three that a number of loan sharks were concerned over the new strict punishments and pleaded with the Ministry to give them licences. It could not be denied that criminal sanctions are essential to support the enforcement of the MLA 2003. Nevertheless, in order to strengthen the deterrent effect on illegal moneylending, it is suggested here that the Government might also consider other punitive penal sanctions such as confiscation of the assets of loan sharks.

Further, it is acknowledged that the limitations in enforcing civil sanctions are beyond the borrowers' capacity. It is submitted here that administrative control might provide another potential alternative to strengthen the Ministry's enforcement role, although it might not be the right answer to the weakness in the enforcement of civil sanctions. Thus, in view of the latest developments in the UK, Malaysia might want to consider civil penalties such as those that were introduced under the CCA 2006.

8.1.6 Redress Mechanisms

ADR is quite a new approach to resolve consumer disputes and, in Malaysia, the application of ADR is significant in the area of banking, insurance, housing and small consumer claims. Chapter Seven has considered whether it is necessary and feasible to develop an ADR scheme for moneylending disputes.

Strengths

ADR is a complement to the court system. The need for ADR techniques such as arbitration, conciliation and mediation to resolve consumer disputes is evidenced by the success of the former Insurance and Banking Mediation Bureau, the establishment of the Financial Mediation Bureau and the existing Consumer and Homebuyer Tribunals. The advantages offered are certainly appealing; ADR is cost-effective, flexible and provides speedy resolution. By avoiding the court, parties to the ADR scheme are spared the high cost of a court case, time delays and psychological stress as well as cultural barriers. Further, the ADR process also protects the confidentiality of the parties. With these advantages, it is envisaged that borrowers in moneylending disputes would have more opportunity of bringing their disputes to the authorities and may benefit from individual redress.

Weaknesses

Despite the advantages and the success of an ADR scheme in consumer disputes, it is realised that the idea of establishing a separate ADR body for borrowers in moneylending transactions is not quite feasible. This is due to the limited cause of action, as only one product is offered, i.e. personal loans. A reference to the statistics of complaints from the Ministry in Table 7.6 also shows that the most common type of complaints is illegal moneylending, followed by high interest rates. Further, moneylending disputes may also involve criminal elements, especially when the borrower is also harassed or intimidated. Thus, it is submitted here that although an ADR scheme could assist borrowers in moneylending disputes with its remarkable advantages, nevertheless, in view of the limitations mentioned, an ADR scheme is regrettably not a complete solution for moneylending disputes.

Submission

Although an ADR scheme offers significant advantages in consumer disputes, nevertheless, this study has discovered that it would not provide a complete solution to the issues in moneylending disputes. Therefore, this study proposes some short-term and long-term solutions. It is envisaged that immediate actions may be taken by the Ministry to assist the borrowers in moneylending disputes in resolving their problems. It was also argued that it is important for the Ministry to establish a 'moneylending legal clinic' for this purpose, since the Ministry is empowered to act against loan sharks and the problems brought by their illegal activities. It is anticipated that the Enforcement Division of the Ministry is fully capable of carrying out this task, based on its experience in handling the housing legal clinic. The long term plans may also help to lessen the financial burden of ordinary workers and small traders. This includes some propositions for the banking industry, the Government's micro-credit funds, co-operative societies, employers' loan scheme and payment of wages fortnightly.

8.2 Research Findings

8.2.1 The MLA 2003 does to a certain extent, fulfil its objectives, but further reform is required

It is submitted here that the MLA 2003 has successfully attempted a major overhaul, which has ameliorated the anachronistic moneylenders law remarkably. The new law has notably improved the regulation and control of the business of moneylending, the protection of borrowers in moneylending transaction and is moving towards achieving the aim of eliminating illegal moneylending. Significant development towards modern credit practice is evidenced with the removal of the exception of *bona fide*

persons under section 2A(1)(h), the strengthened licensing regime and the introduction of an advertisement permits system. Further, credit should also be given to the new enforcement machinery and the new enforcement officers known as Inspectors of Moneylenders. Moreover, the implementation of prescribed moneylending agreements, the new requirement of attestation, introduction of fixed ceiling interest and the prescribed daily interest rate for default payments, as well as the significant revision of criminal sanctions, are also significant areas that have undergone major reform.

On the other hand, despite this excellent reform, the MLA 2003 also suffers from acute drawbacks in several important aspects. It is a concern that these limitations may affect the effectiveness of the law in achieving its objectives. The weaknesses include the new interpretation of a 'moneylender', the 'fit and proper person' test and the advertisement vetting process. Further, reform of the advertising rules is also necessary; this includes the presentation of interest rates, the content and structure of moneylending advertisements, restrictions on confusing expressions, provision of security wealth warnings and imposing a duty on publishers to be responsible for the content of their publications. In regard to the enforcement system, there are also certain flaws in the search and arrest provisions that need immediate attention. Moreover, the weaknesses in the structure and the content of the prescribed agreement may jeopardise borrowers' interests in the moneylending transaction. These problems include lack of regulation on legibility of the agreement, usage of language, requirement for withdrawal as well as statement of protection and security warning. Besides that, the archaic doctrine of "harsh and unconscionable or substantially

unfair” has been retained, although it was proved not to have not been well utilised. In view of the above, further reform is urgently called for to strengthen the MLA 2003.

8.2.2 Amendments to the MLA are conducted without prior consultation, research or study

The thesis submits that the amendment to the moneylenders law was carried out without any consultation with relevant bodies, without conducting any survey and research on the impact of the proposed Act on consumers and with no research visits to consumer associations to analyse consumer complaints. Neither did the legislators conduct any study tour to other countries that had used the same old moneylenders laws and had come up with updated versions, such as the UK, Australia and New Zealand. The benefit of such visits is important to analyse the implementation and outcome of the new laws. As a result, the MLA 2003 has been accused of being drafted by inexperienced draftsmen, and the amendment was regarded as a “flip-flop amendment.”⁸⁶¹ Problems were discovered soon after the Act was implemented: the moneylenders were concerned over the new strict regulations⁸⁶² and the Ministry discovered that that the provision on arrest without warrant was lacking.⁸⁶³ Therefore, the MLA 2003 has quite correctly been criticised for being drafted in a ‘slip-shod’ manner.

⁸⁶¹ SY Kok, ‘Who is a moneylender in year 2003?’ [2004] 3 *MLJ* cxxi.

⁸⁶² Para. 3.2.6

⁸⁶³ Para. 4.4.2

8.2.3 The loan sharks are a symptom of a larger problem: the failure of the Malaysian banking system to meet the financing requirement of potential borrowers

As discussed in Chapter Two, small traders, hawkers, taxi drivers and civil servants are said to be frequent customers of loan sharks.⁸⁶⁴ The high interest rates charged by loan sharks do not deter potential borrowers, which suggests that access to funds is a far more important consideration than their cost. Thus it might be argued that the underlying problem is the refusal of local banks to provide small loans, despite the availability of funds. Therefore, it is submitted that imposing stiffer penalties for loan sharks without correcting this basic problem is treating the symptom rather than the disease. As long as legitimate borrowers have little access to the financial system, moneylenders will continue to fill this vacuum.

8.2.4 Alternative financial service

With regard to the above findings, this thesis concluded that an alternative affordable financial service should be established to cater for the underprivileged, as they are certainly disqualified from borrowing from banks and financial institutions. It is argued that the problem of loan sharks will not disappear overnight after the implementation of the MLA 2003. The problem still persists, as the demand is still there. The borrowers will continue be drawn to loan sharks if their applications for loans at other places are turned down. Five possibilities are suggested to overcome this problem. It is anticipated that the Government's micro-credit funds, co-operative societies and employers' loan scheme will provide financial service to needy borrowers with simple requirements and at low interest rates; and that payment of

⁸⁶⁴ Para. 2.5.4

wages fortnightly would also help borrowers to manage their salary. Further, revision of the banking industry's policy may also greatly assist the low income earners.

8.2.5 Financial literacy programme

Financial literacy involves being able to identify and understand the opportunities for income generation, access to funding, and learning how to make the most of the range of financial products available.⁸⁶⁵ It is assumed that the level of financial literacy amongst consumers in Malaysia is still low, especially among the low earners. Hence, it is submitted that the Malaysian consumers need a better understanding of their financial rights and responsibilities, and the associated risks and costs. Further, the Government has to educate the public not to succumb easily to loan sharks' tactics and advertisements, because of their regrettable consequences. Furthermore, the Government also has to develop free debt advice or debt counselling services. In the UK, for example, there are debt advice providers who give free and confidential self-help advice on how to deal with debt problems. They include Citizens Advice Bureaux, National Debtline and the Consumer Credit Counselling Service.

8.2.6 Negotiation with illegal moneylenders

It is acknowledged that the demand for the services of loan sharks is high, as many segments of society are not qualified to borrow from financial institutions. It was also discovered that there are several loan sharks who want to make amends and start anew, by becoming law-abiding moneylenders. In view of the above, the Government might consider negotiating with the loan sharks to encourage them to obtain moneylenders' licences. Although this suggestion might sound outrageous, and the Government has

⁸⁶⁵ Central Bank of Malaysia, *Governor's Special Address at the Citigroup-INSEAD Women's Financial Education Summit 2004 – "The Importance of Financial Literacy among Women in Asia."* Available: <http://www.bnm.gov.my/index.php?ch=9&pg=15&ac=160>, (accessed 15 September 2005).

blankly refused to legitimise loan sharks,⁸⁶⁶ giving repentant loan sharks licences might have long-term benefits in enabling them to be identified and their activities monitored. It may be suggested here that if this proposal is accepted, the right negotiator might persuade them to see the advantages of conducting legal moneylending businesses. In this way, force and violence need not be used to collect default payments. In this regard, it may be suggested here that the Malaysian Chinese Association Public Services and Complaint Department Head, Michael Chong, might be the right person to be the negotiator, as he has a wealth of experience dealing with loan sharks.⁸⁶⁷

8.2.7 Alternative regulator for Moneylenders Laws

One glaring feature of the consumer credit legislation in Malaysia is that different ministries enforce different laws. Banks and financial institutions come under the purview of the Central Bank, the Hire-Purchase Act comes under the jurisdiction of the Ministry of Domestic Trade and Consumer Affairs, and the Housing and Local Government Ministry enforces the MLA 2003 and the Pawnbrokers Act. The current institutional framework has also caused public ignorance over the role of the Ministry of Housing and Local Government. It is appreciated that the public may have no idea that the Ministry is in control of moneylending matters, since moneylending is associated with either finance or consumers. Further, due to the fragmentary

⁸⁶⁶ Para 3.2.10

⁸⁶⁷ Chow Ee-Tan, "Too many cases involving loan sharks, says Chong," *The Malay Mail*, 27 August 2002; "Man tried to commit suicide can now rest easy," *New Straits Times*, 9 December 2002; Chow Ee-Tan, "Harassed by loan sharks," *The Malay Mail*, 11 September 2002; Andrew Sayagam, "Some loan sharks going burst," *The Star*, 9 December 2002; Jasbir Singh, "Loan shark victims seek help," *New Straits Times*, 24 January 2003; Suraya Pauzi, "Debtors' kin at mercy of the loan sharks," *The Malay Mail*, 22 October 2003, Chow Ee-Tan, "Money or kids," *The Malay Mail*, 4 September 2002; Susan Tam, "Go after hobbies, wives urge loan sharks," *The Star*, 25 November 2003; "57 complaints received," *The Malay Mail*, 12 April 2004; "Haunted by scare tactics of loan sharks," *New Straits Times*, 25 May 2004; Nuradzimmah Daim, "Loan Shark's Appeal 'Ask them to pay us back'" – Ah Long, *The Malay Mail*, 30 September 2004; "Chong: Think before going to loan sharks", *The Malay Mail*, 6 February 2006.

approach, hire-purchase disputes, but not moneylending disputes, can be referred to the Consumer Tribunal, since they are regulated under different statutes and Ministries. This piecemeal approach has been commented on and strongly criticised by consumer advocates, as the interest of consumers is at risk with these overlapping functions and enforcement. There are urgent calls to identify a single authority to enforce the laws on consumer credit. This thesis submits that research and consultations should be initiated by the Government to study the potential for identifying one single regulator for consumer credit in Malaysia. Two bodies possess the potential to regulate moneylenders laws: the Central Bank of Malaysia, and the Ministry for Domestic Trade and Consumer Affairs. The latter is recommended, since it is responsible for consumer issues, and it has more enforcement officers.

8.3 Contribution of the Thesis

This thesis has attempted to enrich the wealth of knowledge on Malaysian moneylenders law by conducting a comparative study using UK laws. It is submitted here that this thesis has made three main contributions. First, it is the first original and systematic review of the MLA 2003. It has contributed to understanding of how the Malaysian Moneylenders Act 1951 (Revised 2003) operates in Malaysia. Although other jurisdictions are abandoning the old dichotomy between lender credit and vendor credit and adopting a new order of law based on the substance rather than the form of credit transactions, Malaysia still retains its piecemeal legislation. This thesis has explored and investigated the major reforms brought by the MLA 2003 in improving the regulation and control of the business of moneylending, in protecting the interest of borrowers in moneylending transaction and in eliminating illegal moneylending. This study has also highlighted the significant contribution of the

amendment in extending the law to illegal moneylending, the strengthening of the licensing regime, the introduction of advertisement permits and the new enforcement provisions, as well as the appointment of enforcement officers and senior police officers. Further, this research has also drawn attention to the implementation of a prescribed moneylending agreement, the fixed ceiling interest and prescribed interest rate for default payments, as well as the notable revision in criminal sanctions. However, despite the remarkable improvement, it also highlights the serious flaws of the MLA 2003 in several important aspects. This includes the existing institutional framework and the difficulty of establishing an ADR forum for moneylending disputes. This thesis has suggested further reform in the areas of licensing, advertisement permits, search and arrest as well as the prescribed moneylending agreement.

Second, this thesis has provided a new insight into the possibility of tackling illegal moneylending by extending the MLA 2003 to loan sharks' activities. It has explored the amendments made to accommodate this purpose and there are indeed several provisions that may prove effective in eliminating loan sharks. This includes the ever important section 5, which extends the moneylenders law to illegal moneylenders. Section 5 is the crux of the whole reform and enables the enforcement officers and the police to take actions against loan sharks. Further, the MLA 2003 also restricts moneylending transactions to the moneylenders' business premises and prohibits any doorstep collection to avoid any harassment and intimidation by loan sharks in the borrowers' own home. Apart from that, the role of the enforcement machinery is undeniable. The powers of investigation, search, seizure and arrest comfortably accommodate the aim of eradicating illegal moneylenders. The introduction of the

new offence of harassment and intimidation in the field of moneylending is also innovative. The law has also widened protection against harassment and intimidation to the borrower's family members.⁸⁶⁸ Further, reform has significantly increased the criminal sanctions: the fines have been increased ten to a hundred times the original amount and the punishment of whipping has also been introduced for operating illegal moneylending activities and causing bodily injuries. The punishment of whipping is also applicable to moneylending companies, societies and firms, when the management team would be liable for such punishment.

Third, there has not yet been any review of the MLA 2003. This study has been conducted, *inter alia*, to evaluate whether the revision has managed to address the failure of the parent Act and the huge changes in the moneylending industry since the MLA was first conceived more than fifty years ago. Indeed, based on comparison with current practice under the CCA and the CCA 2006, this thesis has discovered that despite the remarkable reform brought by the MLA 2003, the loopholes are obvious and the new law needs urgent reviewing. Immediate attention and further reform are essential in the areas of licensing, advertisement permits, search and arrest as well as the prescribed agreement. Failure to address these critical issues will undermine the very aims of the reform and could jeopardise the interest of borrowers in the moneylending transactions.

⁸⁶⁸ It has been reported that loan sharks also harassed the borrowers' family members and many parents publicly disowned their children to avoid being harassed or intimidated by loan sharks: V. Shuman, 'Woman disowns son', *New Straits Times*, 6 February 2006; "Painter disowns twin sons", *The Malay Mail*, 21 January 2006; "Retiree disowns son with RM300,000 debt", *The Malay Mail*, 27 March 2006; Chow Ee-Tan, "Harassed by loans sharks", *The Malay Mail*, 11 September 2002; Jasbir Singh, "Loan sharks victims seek help", *New Straits Times*, 24 January 2003; Suraya Pauzi, "Debtors' kin at mercy of the loan sharks", *The Malay Mail*, 22 October 2003; Marsha Tan, "Grieving family harassed by loan sharks", *The Star*, 9 November 2003; Neville Spykerman, 'Ah Longs will come after us', *The Malay Mail*, 14 November 2003; "Retiree and kin living in fear of loan sharks", *The Star*, 13 September 2000.

8.4 Concluding Remarks

The MLA 2003 has been in force for more than two years. It is timely for the Ministry to review the effectiveness and implications of the Act and its regulations. This thesis has shown that several weaknesses are apparent in the new moneylenders law and the Ministry has the competence and the practical capability to overcome such limitations. If the borrower's interest is the main aim of the Act, these weaknesses must be remedied.

8.5 Recommendations for Further Research

It has been pointed out that Malaysia does not have a single consumer credit statute based on substance rather than form, and the legislation is scattered all over a range of statutes. The situation becomes more complex as different law applies to the states of Sabah and Sarawak. At present, consumer credit transactions are governed by the Moneylenders Act 1951 (Revised 2003), the Pawnbrokers Act 1974 (Revised 2004) and the Hire-Purchase Act 1967 (Revised 1992) of which the first two are enforced by the Ministry of Housing and Local Authorities and the other by the Ministry of Domestic Trade and Consumer Affairs. Apart from this legislation, other areas of consumer credit have been overlooked and are not regulated by any specific Act. These include leasing, revolving credit and payment cards. It is therefore proposed that further research be conducted to examine the potential for consolidating the piecemeal legislation into one single consumer credit law. A careful and in-depth study is certainly needed, as it would be necessary to propose and draft legislation that will regulate the substance and not the form of credit transactions. An agency should also be identified to regulate any proposed Malaysian Consumer Credit Act. In that direction, a credit tribunal could hear all types of credit disputes. Although the UK,

the US, Australia and New Zealand have a whole new order in consumer credit law, a wholesale import of their laws into Malaysian legislation is not justified, as the law of the land must reflect the religious, cultural and social values of Malaysian society, as well as take into consideration the corresponding economic and political factors. Indeed, Malaysia has to develop its own measures to meet its specific requirements. Hence, the need to research and move forward.

APPENDIX A

Moneylending Advertisements

Leasing/Loans

CENTRAL MARKET

(Near PUTRA LRT Pasar Seni)

• Negotiable repayment scheme
• Fast approval & Without guarantor
• Min salary RM500
1% per month
\$S TWO MAX ENTERPRISE \$S 01295538-X
Suite 903, 9th Floor, Wisma Hang Sam,
No.1, Jalan Hang Lekir, 50000 K.L.
603-2032 3220 (Office)
013-6771892 / 012-9258255
Licence: WL1003/14/01-1/13/2006 Valid: 14/04/13/2006
Permit: WP1003/14/01-2/13/2006 Valid: 26/10/04-13/06/06

Leasing/Loans

Near Jusco Kepong

0.5% LOAN 1000 GET 995
Per month Per month

\$ For private & government workers
\$ Businessmen or hawkers
\$ Cash or bank transfer
\$ Accept pawn letters and mortgage items
\$ Easy and fast approval

■ 012-3895107 SKY
■ 016-6076766 VK
■ 016-9125501 ELLY
■ 03-6252266/0266 OFFICE

SINMAX SDN BHD
No.8-2, 2nd Floor, Vista Magna Shop
Jln. Metro Prima, Magna Park 52100 Kuala Lumpur

Leasing/Loans

JALAN PUTRA

(Nearby 24-hr KFC)

1.5%

★ LOANS FOR PERSONAL
GOVERNMENT/PRIVATE SECTOR
EMPLOYEES, AND FACTORY WORKERS
★ ACCEPTS DIAMONDS AND GOLD AS
MORTGAGE
★ SIMPLE PROCESS, FAST APPROVAL
Kenny: 012-317 7791
Jasmin: 017-3522 822
Lung: 016-602 6814
Wang: 012-663 3274

03-4041 3188
03-4042 3188

Easypay Capital Sdn Bhd
(590530-X)
Licence No.: WL1409/14/01-1/10/2006
Validity: 12/10/2004-10/08/2006
Ad. Permit No.: WP1409/14/01-1/10/2006
Validity: 12/10/2004-10/08/2006
55A, First Floor,
Jln. Putra, 50350 K.L.

Leasing/Loans

IN Front ISTANA HOTEL

(FULL LOAN)

Interest as low as 1% per mth
• Salary RM500 entitled
• Repayment can be discussed

03-2732 2212
012-911 0008

FIRSTMAX ENTERPRISE
(01292668-D)
Lot 701, Tingkat 7, Wisma Lim
Foo Yung, Jalan Raja Chulan, K.L.
Licence: WL1002/14/01-1/17/2006
Valid: 18/04-17/06
Permit: WP1002/14/01-2/17/2006
Valid: 28/10/04-17/06

Leasing/Loans

IMMEDIATE - FULL LOAN

Near SUNWAY/ PETALING JAYA

X Loan RM1,000 = Get RM 1,000
X 1% monthly - collateral
X 1.5% monthly - w/o collateral
7877 6330
(Day - Night)

Firstmax Enterprise
Suite 1222, Blok 4A, Ball Leisure Commerce
Square, Petaling Jaya, Selangor.
Licence: WL1002/10/01-1/12/2006
Valid: 13/10/04-12/10/06
PERMIT No.: WP1002/10/01-1/12/2006
VALID: 22/25-12/10/06

Leasing/Loans

FINANCIAL PROBLEM?

We are able to help your
financial need.
*From 4% a year without
collateral

Tel: **016-3966524**
012-3743339
03-91320433

SIONG WANG TRADING:
(00141624-X)
16, Jalan Manis 4, Taman Segar,
56100 Kuala Lumpur.
www.pinjaman2u.com
No. Licence: WL1037/14/01-1/20/2006
Tempoh Sale: 21/10/04 - 20/10/06
No Permit: WP1037/14/01-1/20/2006
Tempoh Sah: 1/3/2005 - 20/10/2006

Leasing/Loans

NEAR MONORAIL RAJA CHULAN FULL LOANS

03-2072 2626
012-618 2338
016-292-9882

1% Per Month non collateral
Up to 12 Months Repayment
IMMEDIATE Approval
Confidential Assured

Licence No.: WL507/14/02-1/28/03/07
Validity Period: 29/03/2005-28/03/2007
Permit No.: WP507/14/02-1/28/03/07
Validity Period: 14/05/2005-28/03/2007
Bakti Mentari Enterprise
(SA0002097-K)
5 09 Tingkat 5, Wisma Cosway
Jalan Raja Chulan
50200 Kuala Lumpur

TRADITIONAL MASSAGE FOR
men/ladies experience by
female masseurs. RM38/hr for
Merdeka Promo. 03-23000981.

TRADITIONAL MASSAGE FOR
men's health only. Interested
please call: Mohd Fazil 016-340
0450 KL.

TRADITIONAL MASSAGE
"Man for man" by Malay
male. Please contact Mr Amir
012-6967803.

UDA DARA (001288642-K)
Urut Tradisional at Jalan
Genting Kelang, Setapak, KL:
03-41427528, 019-335720 Ida

ZOUK
Male Body Massage. Clean!
FOC Scrub. Need masseurs.
012-6436601. (1478485-X)

Leasing/Loans

HENTIAN PUDURAYA

* 1% per mth (collateral)
* 1.5% per mth (w/o
collateral)
* Payment can be discussed

LOAN RM 1,000 = GET RM1,000

03-2078 0110 / 012-275 9975

ULTIMAX MANAGEMENT SERVICES
00128442-T

M-12, Hentian Puduraya, Jalan Padu, KL.
Licence: WL1001/14/01-1/11/06 Valid: 12/10/04-11/10/06
Permit: WP1001/14/01-2/11/06 Valid: 11/20/04-11/10/06

LICENCED MONEY LENDER

BESIDE KFC & PIZZA HUT KEPONG

1.0% - 1.5% per month
RM1,000 GET RM995

♦ FAST APPROVAL
♦ COLLATERAL ACCEPTED

017-6812277 Zul (Kepong)
016-3459998 Lina (KL)
03-62529266 / 8277 (Off.)

Sinmax Sdn Bhd (604440-K)
8-2, 2 Floor, Vistana Kepong
Shop Magna Park Kepong 52100 KL
Licence: WL1014/14/01-1/13/076
Validity: 14/07/04-13/07/06
Ad Permit No.: WP1014/01-1/13/076
Validity: 28/09/04-13/07/06

PUCHONG

0.5%
LOAN RM 1000
GET RM 995
per month (collateral)

FAST APPROVAL

• Private Sector & Factory Worker
• Businessmen or Hawkiers
• Easy repayment scheme
• Properties, Gold, Electronics things
and Branded Watch as Deposit

03-5882 5952 / 6760
019-366 6943 (Ida)
012-637 9929 (Y.P.)
012-916 3110 (K-roi)
016-270 3939 (C.J.)

COMMON FORMULA SDN BHD (581690-D)
No.1, 2nd Flr, Jln. Kenan 3, Bdr. Puchong Jaya,
Bt 11 1/2, 47100 Puchong, Selangor
Licence No.: WL 3049/07/01
1/03/2006 Valid Date: 04/04/04 - 03/06/06
Ad Permit No.: WP3049/07/01-1/03/2006
Valid Date: 04/04/04 - 03/06/06

JIE XING TAT S/B

(540079 -W)

BUSINESS PERSONAL VEHICLE LOAN

• Fast Approval
• No Gurantor
• Professional &
Confidential

012-9200886 (KL)
013-6693777 (PJ)

Licence No.: WL1058/04/01-1/27/0906
Valid till: 28/04/04-27/09/06
Advertising Permit No.: WP1058/04/01-1/27/0906
Valid till: 28/11/04-27/09/2006

1.5% PER MONTH

(NO COLLATERAL)

\$ Loan RM1K = Get RM1K
\$ Unlimited Loan
\$ Salary RM500 Above
\$ Monthly Payment neg.
\$ Fast Approval
\$ No Guarantor

03-4041 3855
03-4041 9855

016-3162121 Carmen
012-2712122 Watie

Licence No.: WL3796/14/01-1/31/0806
Valid from: 01/09/2004-31/08/2006
Permit No.: WP3796/14/01-1/31/0806
Valid from: 09/10/2004-31/08/2006
I-Pac Resources S/B (501809-J)
42-3, Bilik 301, Tkt. 3, Bgn. Hing
Yoon, Jln Raja Laut, 50350 KL

SUBANG

Near Taylor College

1% Per Monthly non collateral
Loans up to 5 x monthly salary
Repayment up to 12 months
Full loans
FAST & EASY
Privacy assured

03-5635 0080
012-281 7080
016-633 7977

Licence No.: WL507/14/02-1/28/03/07
Validity Period: 29/03/2005-28/03/2007
Permit No.: WP507/14/02-1/28/03/07
Validity Period: 14/05/2005-28/03/2007
Bakti Mentari Enterprise
(SA0002097-K)
CT-08-11, Level 8, Subang Square
Corporate Tower, Jalan SS 15/4G
47500, Subang Jaya

SELANGOR

PUCHONG

0.5%

* BORROW RM1000
* GET RM995

FAST APPROVAL
MORTGAGE ACCEPTED

03-5882 5925/6737
017-328 2880 (Lisa)
016-246 8388 (Zul)
012-321 0242 (E.K)

COMMON FORMULA SDN BHD (581690-D)
No.1, 2nd Floor, Jalan Kenan, Bdr. Puchong Jaya,
Bt 11(9), 47100 Puchong, Selangor.
Licence No.: WL346/10/01-1/03/06 Valid From: 15/04-03/06
Advertising Permit: WP346/10/01-1/03/06 Valid From: 15/04-03/06

INFRONT OF 1% per month

LOT 10,

JLN SULTAN ISMAIL
(Beside Hotel Istana)

* Loan RM1,000 = Get RM1,000*
* Up to 5 x salary * Flexible repayment -
Scheme * Loan agreement - witness*

EVERLAST ENTERPRISE (00076074-V)
No.17.8, Level 17, Menara Genesis,
No.33, Jln. Sultan Ismail, K. Lumpur.

2144 3110/3220
012-9333 431

Licence No.: WL1004/14/04-1/27/0906
VALIDITY : 28/09/04-27/09/06
PERMIT No.: WP1004/14/04-2/27/0906
VALIDITY : 5/11/04-27/09/06

GOVERNMENT / PRIVATE

• 1.5% ONE MONTH
(unsecured loan)
RM1K-5K/1K=RM98 *12 mths

• 1.0% ONE MONTH
(secured loan)

(outstanding housing loan -
still can be arranged)
RM10K-100K/10K = RM933
*12 mths

PERFECT MILLION CAPITAL SDN. BHD.
59815-A

Licence No.: WL1421/14/01-1/29/0706
Validity: 30/7/2004-29/7/2006
Advertising permit: WP1421/14/01-1/29/0706
Validity: 9/10/2004-29/7/2006

Lot 3A-031, Endah Parade (Carrefour)
Taman Sri Petaling, 57000 KL (Nizam)
KL: 03-9543 4018 / 19
Putrajaya: 012-211 5798

Near B. Bintang & Imbi Monorail

SUNGAI WANG

Infront of Times Square

03-2142 1886
012-927 6222
016-655 6681

1% Per Month non collateral
Repayment up to 12 months
FAST approval
Privacy assured

Licence No.: WL507/14/03-1/28/03/07
Validity Period: 29/03/2005-28/03/2007
Permit No.: WP507/14/03-1/28/03/07
Validity Period: 14/05/2005-28/03/2007

Bakti Mentari Enterprise
(SA0002097-K)
Lot 2-5, 2nd Floor, Wisma SPS
No 32, Jalan Imbi
55100, Kuala Lumpur

Next to

SUBANG PARADE

FULL LOAN

- 1% per month
- Salary RM500 entitled
- FAST Approval

TWO MAX ENTERPRISE (00129538-X)
Room A201, 2nd Floor, West Wing, Wisma
Consplant 2, Subang Jaya, Selangor

5636 8580/019-375 5522

Licence: WL1003/10/01-1/05/0906
Valid: 6/04/04-5/9/06
Permit: WP1003/10/01-2/05/0906
Valid: 26/10/04-5/9/06

PERTAMA COMPLEX

RENTAL SCHEME LMTH - 24MTH

LOAN RM500 - RM20K
LOAN RM5000 GET RM5000
1%-1.5% monthly

Express Loan
FAST APPROVAL

MKLAND ENTERPRISE (127424-W)
4th Flr, Lot 4.31, Partama Komplek,
Jln TAR, 50100 K.L.

Permit Lic: WP2684/14/01-1/30/0606
Tempoh Sah: 22/10/04 - 30/06/06
No Lesen: WL 2684/14/01-1/30/0606
Tempoh Sah: 1/07/04-30/06/06

03-26986818

CIK WATI: 012 9159 986

Next To

PJ HILTON

(FEDERAL HIGHWAY)

IMMEDIATE FULL LOAN

□ 1% monthly (collateral)
□ 1.5% monthly (w/o collateral)
□ Flexible repayment scheme

03-7957 5330
016-288 8810

ULTIMAX MANAGEMENT
SERVICES
5th Floor, Tower 2, Wisma MCIS,
Jln Barat, 46200 P. Jaya, Sel.
LICENCES: WL1001/10/01-1/12/1006
VALID: 13/10/04/12/10/06
LICENCES: WL1001/10/01-1/12/1006
VALID: 22/2/05-12/10/06

PJ

AMCORP MALL

NEAR PUTRA LRT TAMAN JAYA

03-7620 0223
012-919 8266
016-382 1622

\$ FULL LOAN \$
\$ 1% PER MONTH non collateral \$
\$ UNLIMITED LOAN \$
\$ PRIVACY ASSURED \$

Licence No.: WL507/14/01-1/28/03/07
Validity Period: 29/03/2005-28/03/2007
Permit No.: WP507/14/01-1/28/03/07
Validity Period: 14/05/2005-28/03/2007

Bakti Mentari Enterprise
(SA0002097-K)
Suite 901, Level 9, Menara Amcorp
18, Jalan Persiaran Barat,
46050, Petaling Jaya

KLCC

WISMA CENTRAL

03-2163 2266
016-230 3932
016-287-3512

Full Loans
Unlimited loans
Monthly payment neg.
FAST Approval

1% Per Month non collateral

Licence No.: WL507/14/01-1/28/03/07
Validity Period: 29/03/2005-28/03/2007
Permit No.: WP507/14/01-1/28/03/07
Validity Period: 14/05/2005-28/03/2007

Bakti Mentari Enterprise
(SA0002097-K)
Lot 3.17, 2nd Floor, Wisma Central
Jalan Ampang
50450, Kuala Lumpur

GOVERNMENT / PRIVATE

• 1.5% ONE MONTH
(unsecured loan)
RM1K-5K/1K=RM98 *12 mths

• 1.0% ONE MONTH
(secured loan)

(outstanding housing loan -
still can be arranged)
RM10K-100K/10K = RM933
*12 mths

PERFECT MILLION CAPITAL SDN. BHD.
59815-A

Licence No.: WL1421/14/01-1/29/0706
Validity: 30/7/2004-29/7/2006
Advertising permit: WP1421/14/01-1/29/0706
Validity: 9/10/2004-29/7/2006

Lot 3A-031, Endah Parade (Carrefour)
Taman Sri Petaling, 57000 KL (Nizam)
KL: 03-9543 4018 / 19
Putrajaya: 012-211 5798

TO PLACE YOUR LEGAL OR AUCTION ADS

CALL: 03-2282 3380 FAX: 03-2282 2590/2603



APPENDIX B

Internet Advertisement

Vault Credit Co

Home

Apply Now



"...we can help"



Customer Support

Alan : 013-6516799
Kenny : 012-3743339



CON

No Lese : JAVL1037/1401-1/201005
Tempok Sal 21/1004 hingga 20/1005
No Perm It Klas JAVP 1037/1401-1/201005
Tempok Perm It Klas 010305 hingga 20/1005

Refferal Bonus!

When you successfully refer a customer, you will receive up to 1% of their loan.

[Read More](#)

New Rates

Only 12% for collateral and 18% for non-collateral payment.

[Read More](#)

About Us

Vault Credit Co. provides loan at lightning speed whenever you need it. We process your application the very day we received it. Rest assured that your application is confidential and secured. You can apply for all types of loan including personal loan, enterprise loan, commerical loan, corporate loan or even the once in the lifetime bussiness deal you have been waiting for. It is that simple.

We welcome all inquiries about our products and services. Please feel free to contact us using any of the following phone number in the contact us link. We look forward to help you.

- + No Collateral!
- + No Guarantor!
- + Easy Application!
- + Fast Approvals!
- + Low Interest Rates!
- + Full Confidentiality!

Vault Credit Co. is a online branding name for Siang Wang Trading KL (RegNo:001416264K)

[HOME](#) | [APPLY NOW](#) | [FAQ](#) | [PRIVACY POLICY](#) | [CONTACT US](#)

APPENDIX C

**The Malaysian Moneylenders (Amendment) Act 2003
(Act A1193)**

MONEYLENDERS ACT 1951 (Revised 2003)
ACT 400

ARRANGEMENT OF SECTIONS

PART I
PRELIMINARY

Section

1. Short title and application.
2. Interpretation.
- 2A. Non-application of Act and exemption therefrom.
3. *(Deleted)*.
4. Appointment of Registrar, Deputy Registrar, Inspector, and other officers and servants.
- 4A. Delegation of powers of Registrar.

PART II
LICENSING OF MONEYLENDERS

5. Licence to be taken out by moneylender.
- 5A. Application for licence.
- 5B. Grant of a licence.
- 5C. Duration of licence.
- 5D. Conditions attached to licence.
- 5E. Renewal of licence.
- 5F. Requirement to display licence.
6. Particulars to be shown on licences.
7. *(Deleted)*.
8. Offences.
9. Circumstances under which a licence shall not be issued.
- 9A. Revocation or suspension of licence.
- 9B. Opportunity of being heard.
- 9C. Appeal to Minister.
- 9D. Validity of licence extended in successful appeal.
- 9E. Prohibition of subsequent application pending appeal on earlier application.
- 9F. Surrender of licence.
- 9G. Transfer or assignment of licence prohibited.
10. *(Deleted)*.

Part III
INVESTIGATION, SEARCH, SEIZURE AND ARREST

- 10A. Powers of Inspector or police officer in investigation
- 10B. Power to investigate complaints and inquire into information
- 10C. Power to examine persons.
- 10D. Search by warrant.
- 10E. Power of arrest.
- 10F. Search without warrant.
- 10G. Seizure of movable property.
- 10H. Further provisions relating to seizure of movable property.
- 10I. Obstruction of inspection and search.

- 10J. Authority to act.
- 10K. Release of property seized.

PART IV
EVIDENCE

- 10L. Evidence of accomplice and *agent provocateur*.
- 10M. Protection of informers and information.
- 10N. Admissibility of statements by accused persons.
- 10O. Provisions as to evidence.

PART V
CONDUCT OF MONEYLENDING BUSINESS

- 10P. Moneylender and borrower must enter into a moneylending agreement.
- 11. Advertisement by moneylender.
- 11A. Application for advertisement permit.
- 12. No circular implying a banking business to be issued.
- 13. *(Deleted)*.
- 14. *(Deleted)*.
- 15. Contract by unlicensed moneylender unenforceable.
- 16. Moneylending agreement to be given to the borrower.
- 17. Prohibition of compound interest.
- 17A. Interest for secured and unsecured loans.
- 18. Accounts to be kept in permanent books.
- 19. Obligation to supply information as to state of loan and copies of documents relating thereto.

- 20. Provisions as to bankruptcy proceedings for moneylenders' loans.
- 21. Accounts under section 19 to be produced when suing in Court.
- 22. *(Deleted)*.
- 23. Prohibition of charge for expenses on loans by moneylender.
- 24. *(Deleted)*.
- 25. Notice and information to be given on assignment of moneylender's debts.
- 26. Application of Act as respects assignees.

PART VI
MISCELLANEOUS

- 27. Attestation of moneylending agreement.
- 28. *(Deleted)*.
- 29. False statements or representations to induce borrowing an offence.
- 29A. General offences.
- 29B. Harassment or intimidation, *etc.* of borrower.
- 29C. Offences by companies, societies, firms or other body of persons.
- 29D. Prosecution.
- 29E. Service of notification or document.
- 29F. Power to compound.
- 29G. Jurisdiction.
- 9H. Power to make regulations.
- 30. *(Deleted)*.
- 30A. *(Deleted)*.
- 31. *(Omitted)*.

MONEYLENDERS ACT 1951
(ACT 400)

An Act for the regulation and control of the business of moneylending, the protection of borrowers of the monies lent in the course of such business, and matters connected therewith.

[Subs. A1193]

PART I
PRELIMINARY

1. Short title and application.

- (1) This Act may be cited as the Moneylenders Act 1951.
(2) This Act shall apply to the States of West Malaysia only.

2. Interpretation.

In this Act, unless the context otherwise requires-

"authorized name" and "authorized address" mean respectively the name under which and the address at which a moneylender is authorized by a licence granted under this Act to carry on business as a moneylender;

"borrower" means a person to whom money is lent by a moneylender;

[Ins. A1193]

"company" means any body corporate being a moneylender;

"Deputy Registrar" means the Deputy Registrar of Moneylenders appointed under section 4;

[Ins. A1193]

"firm" means an unincorporated body of two or more individuals or one or more individuals and one or more corporations or two or more corporations who have entered into partnership with one another with a view to carrying on business for profit;

"Inspector" means an Inspector of Moneylenders appointed under section 4;

[Ins. A1193]

"interest" does not include any sum lawfully charged in accordance with this Act by a moneylender for or on account of stamp duties, fees payable by law and legal costs but, save as aforesaid, includes any amount by whatsoever name called in excess of the principal paid or payable to a moneylender in consideration of or otherwise in respect of a loan;

"Minister" means the Minister charged with the responsibility for local government;

[Ins. A1193]

"licence" means a moneylender's licence issued under this Act;

"moneylender" means any person who lends a sum of money to a borrower in consideration of a larger sum being repaid to him;

[Ins. A1193]

"moneylending agreement" means an agreement made in writing between a moneylender and a borrower for the repayment, in lump sum or instalments, of money borrowed by the borrower from the moneylender;

[Ins. A1193]

"police officer" means a senior police officer as defined in the Police Act 1967 [Act 344];

[Ins. A1193]

"prescribed" means prescribed by regulations made under this Act;

[Ins. A1193]

"principal" means, in relation to a loan, the amount actually lent to and received by the borrower;

"Registrar" means the Registrar of Moneylenders appointed under this Act.

2A. Non-application of Act and exemption therefrom.

(1) This Act shall not apply to-

- (a) any authority or body established, appointed or constituted by any written law, including any local authority;

(b) any co-operative society registered under the Co-operative Societies Act, 1948*;
**[Now Co-operative Societies Act, 1993 (Act 502).]*
(c) any bank or merchant bank licensed under the Banking and Financial Institutions Act, 1989 or any bank licensed under the Islamic Banking Act, 1983;

[Am. P.U. (A) 406/91]

(d) any insurance company licensed under the Insurance Act, 1963;
(e) any company licensed under the Takaful Act, 1984;
(f) any pawnbroker licensed under the Pawnbrokers Act, 1972;
(fa) a development financial institution prescribed under the Development Financial Institutions Act 2001 *[Act 618]*;

[Ins. A1193]

(g) any licensed finance company as defined in section 2(1) of the Banking and Financial Institutions Act, 1989. or

[Am. A1193]

(h) (deleted)

[Deleted by A1193]

(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.

(3) The Minister may at any time revoke any exemption granted by him under subsection (2) if he is satisfied, after giving the company or society concerned an opportunity to be heard, that the company or the society, as the case may be, has failed to observe any limitation, restriction or condition subject to which the exemption was granted, or that it is otherwise no longer suitable to continue to be granted exemption.

3. (Deleted by Act A1193)

4. Appointment of Registrar, Deputy Registrar, Inspector, and other officers and servants.

(1) For the purposes of this Act, the Minister may appoint a Registrar of Moneylenders and such number of Deputy Registrars of Moneylenders, Inspectors of Moneylenders and other officers and servants as the Minister may deem fit from amongst members of the public service.

(2) The Registrar and Deputy Registrars shall have and may exercise any of the powers conferred on an Inspector by or under this Act.

[Subs. A1193]

4A. Delegation of powers of Registrar.

(1) The Registrar may, in writing, delegate all or any of his powers or functions under this Act, except his power of delegation, to any Deputy Registrar or Inspector appointed under section 4.

(2) Without prejudice to subsection (1), the Registrar may, in writing, delegate any of his powers or functions under this Act in respect of the investigation of offences under this Act and the enforcement of the provisions of this Act to any public officer.

(3) Any delegation under subsection (1) or (2) may be revoked at any time by the Registrar and does not prohibit the Registrar from himself exercising the powers or performing the functions so delegated.

[Ins. A1193]

PART II
LICENSING OF MONEYLENDERS

5. Licence to be taken out by moneylender.

(1) No person shall conduct business as a moneylender unless he is licensed under this Act.

(2) Any person who carries on business as a moneylender without a valid licence, or who continues to carry on such business after his licence has expired or been suspended or revoked shall be guilty of an offence under this Act and shall be liable to a fine of not less than twenty thousand ringgit but not more than one hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both, and in the case of a second or subsequent offence shall also be liable to whipping in addition to such punishment. [Ins. A1193]

5A. Application for licence.

(1) An application for a licence to carry on business as a moneylender shall be made in writing to the Registrar in a prescribed form, and accompanied by such documents or information as may be prescribed.

(2) The Registrar may in writing, at any time after receiving the application but before it is determined, require the applicant to provide within a specified time or any extension of time granted by the Registrar, such additional documents or information as may be considered necessary by the Registrar for the purpose of determining the suitability of the applicant for the licence.

(3) Where any additional documents or information required under subsection (2) is not provided by the applicant within the time specified in the requirement or any extension of time granted by the Registrar, the application shall be deemed to be withdrawn and shall not be further proceeded with.

(4) Without prejudice to subsection (3), the applicant may submit a fresh application for a licence to the Registrar, but such application shall not be made while his application for a licence is still pending before the Registrar. [Ins. A1193]

5B. Grant of a licence.

(1) Notwithstanding subsection 5A(2) or (3), the Registrar may, upon receiving an application for a licence under subsection 5A(1), grant or refuse to grant the licence to the applicant, and the Registrar shall inform the applicant of his decision.

(2) The licence shall be in such form as may be prescribed.

(3) The applicant shall pay the prescribed application fee for the licence to the Registrar upon being informed by the Registrar of the approval of his application for the licence. [Ins. A1193]

5C. Duration of licence.

(1) Subject to section 9D and subsection (3), a licence shall, unless sooner revoked, be valid for a period not exceeding two years.

(2) Where a licence is granted, the Registrar shall specify in the licence the date on which the licence is to come into force and the date of its expiry.

(3) Where on the date of expiry of the licence, an application for the renewal of the licence under section 5E is pending before the Registrar, that licence shall remain in force until the application is disposed of, or sixty days after the date of expiry of the licence, whichever is the earlier.

5D. Conditions attached to licence.

(1) The Registrar may stipulate in the licence such conditions as he may think fit and he may, at any time during the duration of the licence, add to, revoke or vary any of the conditions.

(2) Any person who fails to comply with any of the conditions of the licence shall be guilty of an offence under this Act and shall be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding twelve months or to both. *[Ins. A1193]*

5E. Renewal of licence.

(1) An application for the renewal of a licence shall be made by the holder of the licence at least sixty days before the date of expiry of the licence, and the application shall be accompanied by such documents and information as may be required by the Registrar.

(2) Notwithstanding subsection (1), the Registrar may, subject to the payment of a penalty not exceeding three hundred ringgit imposed on the holder of the licence, allow an application for the renewal of a licence made after the time specified in subsection (1), but no application for such renewal shall be allowed where the application is made after the date of expiry of the licence.

(3) Where the holder of the licence fails to renew the licence before the date of expiry of the licence, he shall not be entitled to make a new application for a licence within a period of two years from the date of expiry of the licence.

(4) The holder of the licence shall pay the prescribed renewal fee for the licence to the Registrar upon being informed by the Registrar of the approval of his application for the renewal of the licence. *[Ins. A1193]*

5F. Requirement to display licence.

(1) A moneylender shall at all times display his licence in a conspicuous place at the premise where he carries out or operates his business.

(2) Any person who contravenes this section shall be guilty of an offence under this Act and shall be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding six months or to both. *[Ins. A1193]*

6. Particulars to be shown on licences.

(1) Every licence granted to a moneylender shall show his true name and the name under which, and the address at which, he is authorized by the licence to carry on business as such. A licence shall not authorize a moneylender to carry on business at more than one address or under more than one name or under any name which includes the word "bank" or otherwise implies that he carries on the business of banking, and no licence shall authorize a moneylender to carry on business under any name except-

(a) his true name;

(b) the name of a firm in which he is a partner; or

(c) a business name, whether of an individual or of a firm in which he is a partner, under which he or the firm has been registered under the Registration of Businesses Act, 1956 *[Act 197]*.

(2) Any licence taken out in a name other than the moneylender's true name shall be void.

[Am. A1193]

7. (Deleted by Act A1193)

8. Offences.

If any person-

(a) takes out a licence in any name other than his true name;
(b) being licensed as a moneylender, carries on business as such in any name other than his authorized name or at any other place than his authorized address or addresses;

[Am. A1193]

(c) in the course of business as a moneylender enters into any moneylending agreement with respect to any advance or repayment of money or takes any security for money otherwise than in his authorized name; or

[Am. A1193]

(d) lends money to a person under the age of eighteen years,

[Ins. A1193]

he shall be guilty of an offence under this Act and shall be liable to a fine not exceeding fifty thousand ringgit and for a second or subsequent offence shall be liable to the fine aforesaid or to imprisonment for a term not exceeding twelve months and an offender being a company, society, firm or other body of persons shall for a second or subsequent offence be liable to a fine not exceeding one hundred thousand ringgit.

[Am. A1193]

9. Circumstances under which licence shall not be issued.

(1) The licence applied for under section 5A shall not be issued—

(a) if—

(i) an applicant;
(ii) a director, general manager, manager or secretary of an applicant or any other person holding a similar office or position, where the applicant is a company;
(iii) a president, vice-president, secretary or treasurer of an applicant or any other person holding a similar office or position, where the applicant is a society; or
(iv) a partner or any member of an applicant or any other person holding a similar office or position, where the applicant is a firm or other body of persons,
is a person convicted of an offence involving fraud or dishonesty, or an offence relating to Chapter XVI or XVII of the Penal Code [Act 574], or is an undischarged bankrupt;

(b) where at the time the application is made—

(i) an applicant;
(ii) a director, general manager, manager or secretary of an applicant, where the applicant is a company;
(iii) a president, vice-president, secretary or treasurer of an applicant, where the applicant is a society; or
(iv) a partner or any member of an applicant, where the applicant is a firm or other body of persons,
has, due to a conviction for an offence under this Act, been sentenced to a fine exceeding ten thousand ringgit or to imprisonment (other than imprisonment in default of a fine not exceeding ten thousand ringgit);

(c) where at the time the application is made, a person who—

(i) had been a director of a company carrying on the business of moneylending or had been directly concerned in the management of the business of the company;
(ii) had been a president, vice-president, secretary or treasurer of a society carrying on the business of moneylending, or had been directly concerned in the management of the business of the society; or
(iii) had been a partner or any member of a firm or other body of persons carrying on the business of moneylending, or had been directly concerned in the management of the business of the firm or other body of persons,
which has been wound up or dissolved by a court, is a director, president, vice-president, secretary, treasurer, partner or member, or is directly concerned in the management of the business

of the applicant, where the applicant is a company, society, firm or other body of persons, respectively;

(d) where the applicant is responsible for the management of his business as a moneylender, and the licence for that business has been revoked;

(e) where satisfactory evidence has been produced regarding the bad character of the applicant, or of the director, president, vice-president, secretary, treasurer, partner or member, or any person responsible for the management of the business of the applicant, where the applicant is a company, society, firm or other body of persons; or

(f) where satisfactory evidence has been produced that the applicant, or the director, president, vice-president, secretary, treasurer, partner or member, or any person responsible for the management of the business of the applicant, where the applicant is a company, society, firm or other body of persons, is not a fit and proper person to hold a licence.

(2) Any person aggrieved by the refusal of the Registrar to issue a licence may appeal to the Minister in the prescribed manner and the decision of the Minister shall be final.

[Subs. A1193]

9A. Revocation or suspension of licence.

(1) If a moneylender—

(a) has been carrying on his business, in the opinion of the Registrar, in a manner detrimental to the interest of the borrower or to any member of the public;

(b) has contravened any of the provisions of this Act or any regulations or rules made under this Act;

(c) has been licensed as a result of a fraud, mistake or misrepresentation in any material particular; or

(d) has failed to comply with any of the conditions of the licence,
the Registrar may, subject to section 9B, revoke the licence issued to the moneylender or suspend the licence for such period as the Registrar thinks fit.

(2) A revocation or suspension of a licence under this section shall not affect any moneylending agreement entered into before such revocation or suspension, other than that in respect of which such revocation or suspension is made.

(3) Where a licence has been revoked or suspended, the licence shall have no effect from the date of revocation of the licence or during the period of suspension of the licence, as the case may be.

[Ins. A1193]

9B. Opportunity of being heard.

(1) Before revoking or suspending a licence under section 9A, the Registrar shall give the holder of the licence a notice in writing of his intention to do so and require the holder of the licence to submit reasons why the licence should not be revoked or suspended.

(2) After considering the reasons submitted by the holder of the licence, the Registrar shall decide whether to revoke or suspend the licence, or to take no further action, and the Registrar shall notify the holder of the licence of his decision.

[Ins. A1193]

9C. Appeal to Minister.

Any person aggrieved by any decision taken by the Registrar under section 9A may, within fourteen days after having been notified of the decision under subsection 9B(2), appeal against that decision to the Minister whose decision is final and shall not be questioned in any court.

[Ins. A1193]

9D. Validity of licence extended in successful appeal.

Where the Minister allows an appeal against the revocation or suspension of a licence under this Act, the validity of the licence shall be extended by a period corresponding to that during which the licence had no effect and such extended period shall be inserted in the licence.

[Ins. A1193]

9E. Prohibition of subsequent application pending appeal on earlier application.

(1) Where an applicant appeals against the refusal of the Registrar to issue a licence to him, or a holder of a licence appeals against the revocation of his licence by the Registrar, he shall not subsequently make an application for a licence until the appeal against the Registrar's decision has been determined by the Minister.

(2) In the event that any licence is issued as a result of a subsequent application made in the circumstances specified in subsection (1), the licence so granted shall be void and shall have no effect.

(3) Any person who contravenes this section shall be guilty of an offence under this Act and shall be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding three months or to both.

[Ins. A1193]

9F. Surrender of licence.

(1) Upon the revocation of the licence under section 9A, or the rejection of an appeal against the revocation of the licence under section 9C, the holder of the licence shall, within 14 days from the date of the notice of revocation, or the notice of rejection of appeal against revocation, being served on him, surrender his licence to the Registrar.

(2) Any person who fails to surrender his licence as required under subsection (1) shall be guilty of an offence under this Act and shall be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding twelve months or to both.

[Ins. A1193]

9G. Transfer or assignment of licence prohibited.

(1) Subject to subsections (2) and (3), the holder of a licence shall not transfer or assign his licence to any other person, or cause or permit any other person to use his licence or provide the services authorized in the licence.

(2) Except with the prior written consent of the Registrar, the holder of a licence shall not appoint any person for the purpose of exercising any of the rights conferred on him under the licence, or cause or permit any such person to exercise any such right.

(3) The Registrar may authorize the transfer of a licence where—

(a) the holder of a licence—

(i) being a company, is liquidated and a receiver or manager is appointed in relation to the moneylending business of the company; or

(ii) being a society, firm or other body of persons is dissolved and a receiver or manager is appointed in relation to the moneylending business of the society, firm or other body of persons;

or

(b) for any reason the Registrar is satisfied that it would be just to do so.

(4) Except where the Registrar has given his consent or authorization under subsection (2) or (3), the holder of a licence who purports to transfer or assign his licence to any other person, or causes or permits any other person to use his licence or to provide the services authorized in the licence, shall be guilty of an offence under this Act and shall be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding twelve months or to both.

[Ins. A1193]

10. (Deleted by Act A1193)

PART III
INVESTIGATION, SEARCH, SEIZURE AND ARREST

10A. Powers of Inspector or police officer in investigation.

(1) Every Inspector or police officer making an investigation under this Act shall have the power to require information, whether orally or in writing, from any person acquainted or supposed to be acquainted with the facts and circumstances of the case under investigation.

(2) Any person who, on being required by an Inspector or police officer to give information under this section, refuses to comply with such requirement or furnishes as true any information which he knows or has reason to believe to be false, shall be guilty of an offence under this Act and shall be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding twelve months or to both.

(3) Where any information furnished by a person to an Inspector or police officer is proved to be untrue or incorrect in whole or in part, it shall be no defence to allege that the information or any part of the information was misinterpreted, or furnished inadvertently or without criminal or fraudulent intent.
[Ins. A1193]

10B. Power to investigate complaints and inquire into information.

(1) Every complaint relating to the commission of an offence under this Act may be made orally or in writing to an Inspector or police officer.

(2) Where a complaint is made orally, it shall be reduced into writing and read over to the person making the complaint.

(3) Every complaint, whether in writing or reduced into writing, shall be signed by the person making the complaint.

(4) Every complaint, whether in writing or reduced into writing, shall be entered in a book kept at the office of the Registrar and there shall be appended to such entry the date and hour on which such complaint was made.

(5) Where an Inspector or police officer has reason to suspect the commission of an offence under this Act following a complaint made under subsection (1) or information otherwise received by him, he shall cause an investigation to be made and for such purpose may exercise all the powers of investigation provided for under this Act.
[Ins. A1193]

10C. Power to examine persons.

(1) An Inspector or police officer investigating an offence under this Act may—

(a) order any person to attend before him for the purpose of being examined orally in relation to any matter which may, in his opinion, assist in the investigation into the offence;

(b) order any person to produce before him any book, document or any certified copy of such book or document, or any other article which may, in his opinion, assist in the investigation into the offence; or

(c) by written notice require any person to furnish a statement in writing made on oath or affirmation, setting out in the notice all such information which may be required, being information which, in the opinion of the Inspector or police officer, would be of assistance in the investigation into the offence.

(2) A person to whom an order under paragraph (1)(a) has been given shall—

(a) attend in accordance with the terms of the order to be examined, and shall continue to attend from day to day as directed by the Inspector or police officer until the examination is completed; and

(b) during such examination, disclose all information which is within his knowledge, or which is available to him, or which is capable of being obtained by him, in respect of the matter in relation to which he is being examined, whether or not any question is put to him with regard to such matter, and where any question is put to him he shall answer the question truthfully and to the best of his knowledge and belief.

(3) A person to whom an order has been given under paragraph (1)(b) shall not conceal, destroy, alter, remove from or send out of Malaysia, or deal with, expend, or dispose of, any book, document or article specified in the order, or alter or deface any entry in any such book or document, or cause such act to be done, or assist or conspire to do such act.

(4) A person to whom a written notice has been given under paragraph (1)(c) shall, in his written statement made on oath or affirmation, furnish and disclose truthfully all information required under the notice which is within his knowledge, or which is available to him, or which is capable of being obtained by him.

(5) A person to whom an order or a notice is given under subsection (1) shall comply with such order or notice and with the provisions of subsection (2), (3) or (4) in relation to the order or notice, but nothing contained in subsection (2), (3) or (4) shall be construed as compelling the person who is being examined under this section to disclose any information, book, document or article which may incriminate him for any offence under this Act or any other written law.

(6) An Inspector or police officer examining a person under paragraph (1)(a) shall record in writing any statement made by the person and the statement so recorded shall be signed by the person being examined or affixed with his thumbprint as the case may be, after it has been read to him in the language in which he made it and after he has been given an opportunity to make any corrections he may wish, and if such person refuses to sign the record, the Inspector or police officer shall endorse on the record under his hand the fact of such refusal and the reasons for such refusal, if any, stated by the person being examined.

(7) The record of an examination under paragraph (1)(a), or a written statement on oath or affirmation made pursuant to paragraph (1)(c), or any book, document or article produced under paragraph (1)(b) or in the course of an examination under paragraph (1)(a) or under a written statement on oath or affirmation made pursuant to paragraph (1)(c) shall, notwithstanding any written law or rule of law to the contrary, be admissible in evidence in any proceedings in any court for an offence under this Act, regardless whether such proceedings are against the person who was examined, or who produced the book, document or article, or who made the written statement on oath or affirmation, or against any other person.

(8) Any person who contravenes this section shall be guilty of an offence under this Act and shall on conviction be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding fifteen months or to both.

[Ins. A1193]

10D. Search by warrant.

(1) If it appears to a Magistrate, upon written information and after such inquiry as he considers necessary, that there is reasonable cause to believe that an offence under this Act has been committed or is being committed on or in respect of any premises, the Magistrate may issue a warrant authorizing an Inspector or police officer named in that warrant to enter such premises with such assistance as may be required, and if necessary by force.

(2) An Inspector or police officer may, in the premises entered under subsection (1), inspect—

(a) any book, account or document, including computerized data, which contains or is reasonably suspected to contain any information regarding any offence suspected to have been committed under this Act; and

(b) any mark, signboard, card, letter, pamphlet, item, thing, article or goods that are reasonably believed to furnish evidence regarding the commission of such offence,

and may seize such book, account, document or data or any copy or extract of such book, account, document or data, or such mark, signboard, card, letter, pamphlet, item, thing, article or goods.

(3) An Inspector or police officer conducting a search under subsection (1) may, if in his opinion it is reasonably necessary to do so for the purpose of investigating the offence, search any person who is in, or on, such premises and detain such person and remove him to such place as may be necessary to facilitate such search.

(4) An Inspector or police officer making a search of a person under subsection (3) may seize or take possession of any book, account, document, card, letter, pamphlet, item, thing, article or goods found on the person for the purpose of the investigation being carried out by the Inspector or police officer.

(5) Where, by reason of their nature, size or amount, it is not practicable to remove any book, account, document, mark, signboard, card, letter, pamphlet, item, thing, article or goods seized under this section, the Inspector or police officer making the seizure shall, by any means, seal such book, account, document, mark, signboard, card, letter, pamphlet, item, thing, article or goods in the premises or container in which they are found.

(6) A person who, without lawful authority, breaks, tampers with or damages the seal referred to in subsection (5) or removes any book, account, document, mark, signboard, card, letter, pamphlet, item, thing, article or goods under seal, or attempts to do so shall be guilty of an offence under this Act and shall be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding fifteen months or to both.

(7) Whenever it is necessary so to do, an Inspector or police officer exercising any power under subsection (1) may—

(a) break open any outer or inner door or window of any premises and enter into the premises, or otherwise forcibly enter into the premises and every part of the premises;

(b) remove by force any obstruction to such entry, search, seizure, detention or removal as he is empowered to effect; or

(c) detain any person found on any premises searched under subsection (1) until such premises have been searched.

(8) No person shall be searched under this section except by an Inspector or police officer who is of the same gender as the person to be searched. *[Ins. A1193]*

10E. Power of arrest.

If any person is found committing an offence under this Act, or is reasonably suspected of having committed, or has attempted to commit, or is about to commit, such an offence, he may be arrested by an Inspector or police officer with a warrant and shall be brought immediately before a Magistrate to be dealt with according to the law.

[Ins. A1193]

10F. Search without warrant.

If the Inspector or police officer in any of the circumstances referred to in section 10D has reasonable cause to believe that by reason of delay in obtaining a search warrant under that section the investigation would be adversely affected or the evidence of the commission of the offence is likely to be tampered with, removed, damaged or destroyed, the Inspector or police officer may enter the premises and exercise in, and in respect of the premises, all the powers referred to in section 10D in as full and ample a manner as if he were authorized to do so by a warrant issued under that section. *[Ins. A1193]*

10G. Seizure of movable property.

(1) In the course of an investigation into an offence under this Act, an Inspector or police officer may seize any movable property which he has reasonable grounds to suspect to be the subject

matter of an offence under this Act or evidence relating to the commission of an offence under this Act.

(2) The occupant of the place searched or, any person on his behalf, shall in every instance be permitted to attend during the search and a list of all movable property seized pursuant to subsection (1) and of the places in which such property are respectively found shall be prepared by the Inspector or police officer effecting the seizure and signed by him.

(3) A copy of the list referred to in subsection (2) shall be served on the owner of such property or on the person from whom the property was seized as soon as possible and shall be signed by such owner or person. *[Ins. A1193]*

10H. Further provisions relating to seizure of movable property.

(1) Where any movable property is seized under this Act, the seizure shall be effected by removing the movable property from the possession, custody or control of the person from whom it was seized and placing it under the custody of such person or authority and at such place as an Inspector or police officer may determine.

(2) Where it is not practicable, or it is otherwise not desirable, to effect the removal of any property under subsection (1), the Inspector or police officer may leave it at the premises in which it is seized under the custody of such person as he may determine for the purpose. *[Ins. A1193]*

10I. Obstruction of inspection and search.

(1) Any person who—

(a) refuses any Inspector or police officer access to any premises or any part of such premises, or fails to submit to a search of his person by a person authorized to search him under this Act;

(b) assaults, obstructs, hinders or delays an Inspector or police officer in the execution of his duty under this Act;

(c) fails to comply with any lawful demand, notice, order or requirement of an Inspector or police officer in the execution of his duty under this Act;

(d) omits, refuses or neglects to give to an Inspector or police officer any information which may reasonably be required of him and which he is empowered to give;

(e) fails to produce to, or conceals or attempts to conceal from an Inspector or police officer any book, account, document, data, mark, signboard, card, letter, pamphlet, item, thing, article or goods in relation to which such Inspector or police officer has reasonable grounds for suspecting that an offence under this Act has been or is being committed, or which is liable to seizure under this Act;

(f) rescues or endeavours to rescue or causes to be rescued any thing which has been duly seized; or

(g) destroys any thing to prevent the seizure or the securing of the thing,
shall be guilty of an offence under this Act and shall be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding twelve months or to both.

(2) Any person who abets the commission of any offence as specified under subsection (1) shall be guilty of an offence under this Act and shall be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding twelve months or to both.

(3) Any person who, while committing or abetting the commission of any offence under subsection (1) or (2), causes hurt to an Inspector, police officer or any public officer who is carrying out the enforcement of this Act shall be guilty of an offence under this Act and shall be liable to the punishment as specified in subsection (1) or (2), respectively, and to whipping. *[Ins. A1193]*

10J. Authority to act.

An Inspector when acting under this Part, shall on demand, declare his office and produce to the person against whom he is acting such written authorization as the Registrar may direct to be carried by such Inspector.

[Ins. A1193]

10K. Release of property seized.

(1) Where any property has been seized under this Act, an Inspector or police officer superior in rank to the police officer who effected the seizure, may, if there is no prosecution for an offence under this Act, or upon the completion of proceedings for such offence, or if it is not otherwise required for the purpose of any proceedings under this Act, release the property to its owner, or to the person from whose possession, custody or control it was seized, or to such person who may be entitled to the property, and in such event the officer effecting the seizure, the Government, or any person acting on behalf of the Government, shall not be liable to any proceedings by any person if the seizure of the property and the release of the property had been effected in good faith.

(2) A record in writing shall be made by the officer effecting any release of the property under subsection (1) in respect of such release specifying in detail the circumstances of, and the reasons for such release.

[Ins. A1193]

PART IV EVIDENCE

10L. Evidence of accomplice and agent provocateur.

(1) Notwithstanding any written law or rule of law to the contrary, in any proceedings against any person for an offence under this Act—

(a) no witness shall be regarded as an accomplice by reason only of such witness having—

(i) accepted, received, obtained, solicited, agreed to accept or receive, or attempted to obtain any sum of money from a moneylender; or

(ii) been in any manner concerned in the commission of such offence or having knowledge of the commission of the offence;

(b) no *agent provocateur*, whether or not he is an Inspector or police officer, shall be presumed to be unworthy of credit by reason only of his having attempted to commit or having abetted the commission of, or having abetted or having been engaged in a criminal conspiracy to commit, such offence if the main purpose of the attempt to commit, abetment in the commission of, or abetment or engagement in the criminal conspiracy to commit, the offence was to secure evidence against such person; and

(c) any statement, whether oral or written, made to an *agent provocateur* by such person shall be admissible as evidence at his trial.

(2) Notwithstanding any written law or rule of law to the contrary, a conviction for any offence under this Act solely on the uncorroborated evidence of any accomplice or *agent provocateur* shall not be illegal and no such conviction shall be set aside merely because the court which tried the case has failed to refer in the grounds of its judgement to the need to warn itself against the danger of convicting on such evidence.

[Ins. A1193]

10M. Protection of informers and information.

(1) Except as hereinafter provided, no complaint as to an offence under this Act shall be admitted in evidence in any civil or criminal proceedings, and no witness shall be obliged or permitted to disclose the name or address of any person who gave the information, or the substance and nature of the information received from him, or state any matter which might lead to his discovery.

(2) If any application, particular, return, account, document or written statement which is given in evidence or liable to inspection in any civil or criminal proceedings contains any entry in which any person who gave the information is named or described, or which might lead to his discovery, the court before which the proceedings are held shall cause all such entries to be concealed from view or to be obliterated so far as may be necessary to protect such person from discovery, but no further.

(3) If in any proceedings relating to any offence under this Act, the court, after full inquiry into the case, is of the opinion that the person who gave the information wilfully made in his complaint a material statement which he knew or believed to be false or did not believe to be true, or is of the opinion that justice cannot be fully done between the parties to the proceedings without the discovery of the person who gave the information, the court may require the production of the original complaint, if in writing, and permit inquiry and require full disclosure concerning that person.

[Ins. A1193]

10N. Admissibility of statements by accused persons.

(1) In any trial or inquiry by a court into an offence under this Act, any statement, whether the statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after the person is charged and whether in the course of an investigation or not and whether or not wholly or partly in answer to questions, by an accused person to or in the hearing of any Inspector or police officer, whether or not interpreted to him by any other Inspector or police officer or any other person, whether concerned or not in the arrest of that person, shall, notwithstanding any written law or rule of law to the contrary, be admissible at his trial in evidence and, if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.

(2) No statement made under subsection (1) shall be admissible or used as provided for in that subsection if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the person, proceeding from a person in authority and sufficient in the opinion of the court to give that person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

(3) Where any person is arrested or is informed that he may be prosecuted for any offence under this Act, he shall be served with a notice in writing, which shall be explained to him, to the following effect:

"You have been arrested/informed that you may be prosecuted for ...(the possible offence under this Act). Do you wish to say any thing? If there is any fact on which you intend to rely in your defence in court, you are advised to mention it now. If you hold it back till you go to court, your evidence may be less likely to be believed and this may have a bad effect on your case in general. If you wish to mention any fact now, and you would like it written down, this will be done."

(4) Notwithstanding subsection (3), a statement by any person accused of any offence under this Act made before there is time to serve a written notice under that subsection shall not be rendered inadmissible in evidence merely by reason of no such written notice having been served on him if such written notice has been served on him as soon as is reasonably possible after the statement was made.

(5) No statement made by an accused person in answer to a written notice served on him pursuant to subsection (3) shall be construed as a statement caused by any inducement, threat or promise as is described in subsection (2), if it is otherwise voluntary.

(6) Where in any criminal proceedings against a person for an offence under this Act, evidence is given that the accused, on being informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time he could reasonably have been expected to mention when so informed, the court, in determining whether the prosecution has

made out a *prima facie* case against the accused and in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure to appear proper; and the failure may, on the basis of those inferences, be treated as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure is material.

(7) Nothing in subsection (6) shall in any criminal proceedings—

(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of any thing said in his presence relating to the offence in respect of which he is charged, in so far as evidence thereof would be admissible apart from that subsection; or

(b) be taken to preclude the drawing of any inference from any silence or other reaction of the accused which could be drawn from that subsection. [Ins. A1193]

100. Provisions as to evidence.

(1) A copy of a licence, certified by the Registrar to be a true copy of such licence, shall be admissible as evidence for all purposes for which the original of such copy would have been admissible had such original been produced and admitted as evidence, without proof of the signature or authority of the person signing the licence or the copy of the licence.

(2) When in any proceedings for an offence under this Act it is necessary to prove that a person was, or was not, the holder of a licence, a certificate purporting to be signed by the Registrar and certifying that the person was or was not, the holder of a licence, shall be admissible as evidence and shall constitute *prima facie* proof of the facts certified in such certificate, without proof of the signature or the authority of the Registrar to issue the certificate.

PART V CONDUCT OF MONEYLENDING BUSINESS

10P. Moneylender and borrower must enter into a moneylending agreement.

(1) A moneylender who intends to lend money to a borrower shall enter into a moneylending agreement with the borrower, and that agreement shall be in the prescribed form.

(2) Any moneylender who contravenes this section shall be guilty of an offence under this Act and shall be liable to a fine of not less than ten thousand ringgit but not more than fifty thousand ringgit or to imprisonment for a term not exceeding five years or to both, and in the case of a second or subsequent offence shall also be liable to whipping in addition to such punishment.

(3) Any moneylending agreement which does not comply with the prescribed form shall be void and have no effect and shall not be enforceable. [Ins. A1193]

11. Advertisement by moneylender.

(1) No advertisement regarding the business of moneylending carried on by a moneylender shall be issued or published or caused to be issued or published by the moneylender, unless an advertisement permit in respect of that advertisement has been granted by the Registrar.

(2) Any person who contravenes this section shall be guilty of an offence under this Act and shall be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding twelve months or to both. [Subs. A1193]

11A. Application for advertisement permit.

An application for an advertisement permit by a moneylender shall be made in writing to the Registrar in the prescribed form and accompanied by such particulars and documents as may be prescribed. [Ins. A1193]

12. No Circular implying a banking business to be issued.

If a moneylender for the purpose of the business carried on by him as such issues or publishes or causes to be issued or published any advertisement, circular or document of any kind whatsoever containing expressions which might reasonably be held to imply that he carries on the business of banking he shall be liable to a fine not exceeding ten thousand ringgit and on a second or subsequent offence shall be liable to the fine aforesaid or to imprisonment for a term not exceeding twelve months or to both and an offender being a company, society, firm or other body of persons shall for a second or subsequent offence be liable to a fine not exceeding five thousand ringgit. *[Am. A1193]*

13. (Deleted by Act A1193)

14. (Deleted by Act A1193)

15. Contract by unlicensed moneylender unenforceable.

No moneylending agreement in respect of money lent after the coming into force of this Act by an unlicensed moneylender shall be enforceable. *[Am. A1193]*

16. Moneylending agreement to be given to the borrower.

(1) No moneylending agreement shall be enforceable unless the agreement has been signed by all the parties to the agreement and a copy of the agreement duly stamped is delivered to the borrower by the moneylender before the money is lent.

(2) A moneylender who executes a moneylending agreement which does not comply with this section shall be guilty of an offence under this Act and shall be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding twelve months or to both.

[Subs. A1193]

17. Prohibition of compound interest.

(1) Any moneylending agreement made on or after the commencement of this Act, for the loan of money by a moneylender shall be illegal in so far as it provides, directly or indirectly, for the payment of compound interest, or for the rate or amount of interest to be increased by reason of any default in the payment of sums due under the moneylending agreement: *[Am. A1193]*

Provided that provision may be made in any such moneylending agreement that if default is made in the payment upon the due date of any sum or instalment payable to the moneylender under the moneylending agreement, whether in respect of principal or interest, the moneylender shall be entitled to charge simple interest on the unpaid sum or instalment which shall be calculated at the rate of eight per centum per annum from day to day from the date of default in payment of the sum or instalment until that sum or instalment is paid, and any interest so charged shall not be reckoned for the purposes of this Act as part of the interest charged in respect of the loan. *[Subs. A1193]*

(2) This section shall not apply to transactions known as *Thavannai* transactions, between one moneylender and another moneylender, provided that any such transaction is evidenced by a written document duly stamped.

(3) (Deleted)

[Deleted by A1193]

17A. Interest for secured and unsecured loans.

(1) For the purposes of this Act, the interest for a secured loan shall not exceed twelve per centum per annum and the interest for an unsecured loan shall not exceed eighteen per centum per annum.

(2) Notwithstanding subsection (1), interest shall not at any time be recoverable by a moneylender of an amount in excess of the sum then due as principal unless a Court, having regard to all the circumstances, otherwise decrees.

(3) Where in a moneylending agreement the interest charged for a secured loan or an unsecured loan, as the case may be, is more than that specified in subsection (1), that agreement shall be void and have no effect and shall not be enforceable.

(4) Any moneylender who contravenes this section shall be guilty of an offence under this Act and shall be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding eighteen months or to both. *[Ins. A1193]*

18. Accounts to be kept in permanent books.

(1) Every moneylender shall keep or cause to be kept a regular account of each loan made after the commencement of this Act clearly stating in plain words and in English numerals with or without the numerals of the script otherwise used the terms and transactions incidental to the account entered in a book pagged and bound in such manner as not to facilitate the elimination of pages or the interpolation or substitution of pages.

(2) If any person subject to the obligations of this section fails to comply with any of the requirements thereof, he shall not be entitled to enforce any claim in respect of any transaction in relation to which default shall have been made. He shall also be guilty of an offence under this Act and shall be liable to a fine not exceeding ten thousand ringgit, or in the case of a continuing offence, to a fine not exceeding one thousand ringgit for each day or part of a day during which such offence continues. *[Am. A1193]*

19. Obligation to supply information as to state of loan and copies of documents relating thereto.

(1) In respect of every moneylending agreement with regard to money lent by a moneylender whether made before or after the commencement of this Act the moneylender shall, on any reasonable demand in writing being made by the borrower at any time during the the continuance of the moneylending agreement and on tender by the borrower of the sum of three ringgit for expenses, supply to the borrower or, if the borrower so requires, to any person specified in that behalf in the demand, a statement of account in English figures signed by the moneylender showing- *[Am. A1193]*

(a) the date on which the loan was made, the amount of the principal of the loan and the rate per centum per annum or the amount of interest charged; and

(b) the amount of any payment already received by the moneylender in respect of the loan and the date on which it was made; and

(c) the amount of all sums due to the moneylender for principal but unpaid and the dates upon which they became due and the amount of interest due and unpaid in respect of each such sum; and

(d) the amount of every sum not yet due which remains outstanding and the date upon which it will become due.

A statement of account given in the form in the First Schedule shall be deemed to comply with the requirements of this subsection.

(2) A moneylender shall, on any reasonable demand in writing by the borrower and on tender of the sum of five ringgit, supply a copy of any document relating to a loan made by him or any security therefor to the borrower or if the borrower so requires, to any person specified in that behalf in the demand. *[Am. A1193]*

(3) If a moneylender to whom a demand has been made under this section fails without reasonable excuse to comply therewith within one month after the demand has been made he shall not, so

long as the default continues, be entitled to sue for or recover any sum due under the moneylending agreement on account either of principal or interest, and interest shall not be chargeable in respect of the period of the default and, if such default is made or continued after proceedings have ceased to lie in respect of the loan, the moneylender shall be liable to a fine not exceeding fifty ringgit for every day on which the default continues. *[Am. A1193]*

(4) A moneylender receiving any payment of money from a borrower under a moneylending agreement for the repayment of money lent shall give, upon receiving the payment, a receipt to the borrower and any person acting in contravention of this subsection shall be guilty of an offence under this Act and shall be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding ten months or to both. *[Subs. A1193]*

20. Provisions as to Bankruptcy Proceedings for Moneylenders' Loans.

(1) Where a debt due to a moneylender in respect of a loan made by him after the commencement of this Act includes interest, that interest shall, for the purposes of the Bankruptcy Act 1967 (Act 360) relating to the presentation of a bankruptcy petition, voting at meetings, compositions and schemes of arrangement and dividend, be calculated at a rate not exceeding eight per centum per annum, but nothing in the foregoing provision shall prejudice the right of the creditor to receive out of the estate, after all the debts proved in the estate have been paid in full, any higher rate of interest to which he may be entitled.

(2) No proof of a debt due to a moneylender in respect of a loan made by him shall be admitted for any of the purposes of the Bankruptcy Act 1967 unless the affidavit verifying the debt has exhibited thereto a statement which complies with section 19 and shows, where the amount of interest included in the unpaid balance represents a rate per centum per annum exceeding eight per centum, the amount of interest which would be so included if it were calculated at the rate of eight per centum per annum.

(3) General rules may be made under the Bankruptcy Act 1967 for the purpose of carrying into effect the objects of this section.

21. Accounts under Section 19 to be Produced when Suing in Court.

(1) Where proceedings are taken in any Court by a moneylender for the recovery of any money lent after the commencement of this Act or the enforcement of any moneylending agreement or security made or taken after the commencement of this Act in respect of money lent either before or after the commencement of this Act, he shall produce a statement of his account as prescribed in section 19. *[Am. A1193]*

(2) Where there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive and that the transaction is harsh and unconscionable or substantially unfair, the Court shall reopen the transaction and take an account between the moneylender and the person sued and shall, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken between them and relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest and legal costs as the Court, having regard to the risk and all the facts and circumstances (including facts and the circumstances arising or coming to the knowledge of the parties after the date of the transaction) may adjudge to be reasonable, and, if any such excess has been paid or allowed in account by the debtor, may order the creditor to repay it and may set aside either wholly or in part or revise or alter any security given or moneylending agreement made in respect of money lent by the moneylender and, if the moneylender has parted with the security, may order him to indemnify the borrower or other person sued: *[Am. A1193]*

Provided that nothing in this subsection shall prevent any further or other relief being given in circumstances in which a Court of equity would give such relief.

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

(4) On any application relating to the admission or amount of a proof by a moneylender in any bankruptcy proceedings the Official Assignee shall exercise the like powers as may be exercised by the Court under this section when proceedings are taken for the recovery of money:

Provided that if the moneylender is dissatisfied with the decision of the Official Assignee the Court may, on the application of the moneylender made under the Bankruptcy Act 1967 reverse or vary that decision.

(5) The foregoing provisions of this section shall apply to any transaction whatever its form may be that is substantially one of moneylending by a moneylender.

(6) Nothing in the foregoing provisions of this section shall affect the rights of any *bona fide* assignee or holder for value without notice.

(7) Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any Court.

(8) For the purposes of this section, interest charged in respect of money lent by a moneylender is excessive when the rate of that interest exceeds the maximum rate of interest permitted under this Act.

22. (Deleted by Act A1193)

23. Prohibition of Charge for Expenses on Loans by Moneylender.

Any moneylending agreement between a moneylender and a borrower or intending borrower for the payment by the borrower or intending borrower to the moneylender of any sum on account of costs, charges or expenses other than stamp duties, fees payable by law and legal costs incidental to or relating to the negotiations for or the granting of the loan or proposed loan shall be illegal, and if any sum is paid to a moneylender by a borrower or intending borrower as, for or on account of any such costs, charges or expenses other than as aforesaid that sum shall be recoverable as a debt due to the borrower or intending borrower, or in the event of the loan being completed, shall, if not so recovered, be set off against the amount actually lent and that amount shall be deemed to be reduced accordingly. [Am. A1193]

24. (Deleted by Act A1193)

25. Notice and Information to be Given on Assignment of Moneylender's Debts.

(1) Where any debt in respect of money lent by a moneylender, whether before or after the commencement of this Act or in respect of interest on any such debt, or the benefit of any moneylending agreement made or security taken in respect of any such debt or interest, is assigned to any assignee, the assignor (whether he is the moneylender by whom the money was lent or any person to whom the debt has been previously assigned) shall, before the assignment is made-

[Am. A1193]

(a) give to the assignee notice in writing that the debt, moneylending agreement or security is affected by the operation of this Act; and

[Am. A1193]

(b) supply to the assignee all information necessary to enable him to comply with this Act relating to the obligation to supply information as to the state of loans and copies of documents relating

thereto, and any person acting in contravention of this section shall be liable to indemnify any other person who is prejudiced by the contravention and shall also be guilty of an offence against this Act and shall in respect of each offence be liable to imprisonment for a term not exceeding one year or to a fine not exceeding five thousand ringgit or to both: [Am. A1193]

Provided that an offender being a company, society, firm or other body of persons shall in respect of each offence be liable to a fine of ten thousand ringgit. [Am. A1193]

(2) In this section the expression "assigned" means assigned by any assignment *inter vivos* other than an assignment by operation of law, and the expressions "assignee" and "assignor" have corresponding meanings. [Ins. A1193]

26. Application of Act as Respects Assignees.

(1) Subject as hereinafter provided this Act shall continue to apply as respects any debt to a moneylender in respect of money lent by him after the commencement of this Act or in respect of interest on money so lent or of the benefit of any moneylending agreement made or security taken in respect of any such debt or interest notwithstanding that the debt or the benefit of the moneylending agreement or security may have been assigned to any assignee and, except where the context otherwise requires, references in this Act to a moneylender shall accordingly be construed as including any such assignee as aforesaid. [Am. A1193]

(2) Notwithstanding anything in this Act--

(a) any moneylending agreement with or security taken by a moneylender in respect of money lent by him after the commencement of this Act shall be valid in favour of any *bona fide* assignee or holder for value without notice of any defect due to the operation of this Act and of any person deriving title under him; and [Am. A1193]

(b) any payment or transfer of money or property made *bona fide* by any person whether acting in a fiduciary capacity or otherwise, on the faith of the validity of any such moneylending agreement or security without notice of any such defect shall, in favour of that person, be as valid as it would have been if the moneylending agreement or security had been valid: [Am. A1193]

Provided that in every such case the moneylender shall be liable to indemnify the borrower or any other person who is prejudiced by virtue of this section and nothing in this subsection shall render valid a moneylending agreement or security in favour of or apply to proceedings commenced by an assignee or holder for value who is himself a moneylender. [Am. A1193]

(3) Notwithstanding anything contained in this Act, for the purpose of this section an assignee or holder for value or person making any such payment or transfer as aforesaid shall not be prejudicially affected by notice of any such defect as aforesaid unless-

(i) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(ii) in the same transaction, with respect to which a question of notice to such assignee or holder for value or person arises, it has come to the knowledge of his counsel as such or of his solicitor or other agent as such, or would have come to the knowledge of his solicitor or other agent as such if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent. [Am. A1193]

(4) Nothing in this section shall render valid for any purpose any moneylending agreement, security or other transaction which would, apart from this Act, have been void or unenforceable. [Am. A1193]

27. Attestation of moneylending agreement.

(1) A moneylending agreement shall be attested by an Advocate and Solicitor of the High Court, an officer of the Judicial and Legal Service, a Commissioner for Oaths, District Officer, Justice of the Peace or such other person as may be appointed by the Minister generally for such purpose.

(2) The attester shall explain the terms of the moneylending agreement to the borrower, and shall certify on the agreement that the borrower appears to understand the meaning of the terms of the agreement.

(3) Any moneylending agreement which is not attested in accordance with this section shall be void and have no effect and shall not be enforceable. *[Subs. A1193]*

28. (Deleted by Act A1193)

29. False Statements or Representations to Induce Borrowing an Offence.

If any moneylender or any manager, agent or clerk of a moneylender or if any person being a director, manager or other officer of any company, by any false, misleading or deceptive statement, representation or promise or by any dishonest concealment of material facts fraudulently induces or attempts to induce any person to borrow money or to agree to the terms on which money is or is to be borrowed, he shall be guilty of an offence and shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding five thousand ringgit or to both.

PART VI
MISCELLANEOUS

29A. General offences.

(1) Any person who—

(a) for the purpose of the issuance of a licence to himself or to any other person, or for preventing the imposition of any condition in relation to such licence, makes any statement or declaration which to his knowledge is false or incorrect, either in whole or in part, or is misleading in any material respect;

(b) furnishes any particulars or documents in relation to an application for the issuance of a licence which to his knowledge are false or incorrect or misleading in any material respect;

(c) makes any entry in a register, record, return, account or any other document required to be kept, maintained or furnished under this Act, which is false or incorrect or misleading in any material respect;

(d) alters, tampers with, defaces or mutilates any licence or other document which is required to be exhibited on a moneylender's premises, or lends or allows such licence or document to be used by any other person;

(e) forges, or has in his possession with intent to deceive a document that so closely resembles a licence, record, return, account or any other document that is required to be kept, maintained, or furnished under this Act;

(f) alters any entry made in a register, licence, record, return, account or any other document that is required to be kept, maintained or furnished under this Act;

(g) exhibits on a moneylender's premises a licence or any other document that is required to be exhibited on those premises, where such licence or document has been altered, tampered with, defaced or mutilated;

(h) exhibits on a moneylender's premises an imitation of a licence or other document that is required to be exhibited on those premises;

(i) prepares, maintains or authorizes the preparation or maintenance of false records, returns, accounts or any other documents that are required to be furnished under this Act; or

(j) falsifies or authorizes the falsification of records, returns, accounts or any other documents that are required to be furnished under this Act,

shall be guilty of an offence and shall be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding twelve months or to both.

(2) In any prosecution under this section, when it has been proved that any application, statement, declaration, particular, return, account, record or other document is false or incorrect in whole or in part, or is misleading in any material respect, it shall be presumed, until the contrary is proved, that such application, statement, declaration, particular, return, account, record or other document

was false or incorrect, or misleading in any material respect, to the knowledge of the person making, preparing, maintaining, signing, delivering or supplying it.

(3) Notwithstanding paragraph (1)(g) or (h), a person shall not be found guilty of an offence if he proves that he had acted in good faith and had no reasonable grounds for supposing that the licence or any other document exhibited on his premises had been altered, tampered with, defaced, or mutilated, or that such licence or document was an imitation.

(4) If an Inspector or police officer has reasonable cause to believe that a licence or any other document exhibited on a moneylender's premises, or a licence, record, account, return or any other document produced to him in pursuance of this Act by the person in charge of those premises is a licence, record, account, return or document in relation to which an offence under this section has been committed, he may seize the licence, record, account, return or document.

[Ins. A1193]

29B. Harassment or intimidation, etc of borrower.

(1) Any moneylender who, either personally or by any person acting on his behalf, harasses or intimidates a borrower or any member of the borrower's family or any other person connected with the borrower at, or watches or besets, the residence or place of business or employment of the borrower, or any place at which the borrower receives his wages or any other sum periodically due to him, shall be guilty of an offence under this Act and shall be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding fifteen months or to both, and in the case of a second or subsequent offence shall also be liable to whipping in addition to such punishment.

(2) Any person who, acting on behalf of the moneylender, commits or attempts to commit any of the acts specified in subsection (1), shall be guilty of an offence under this Act and shall be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding twelve months or to both.

(3) Any person who, while committing, or attempting to commit any offence under subsection (1) or (2), causes hurt to a person, shall be guilty of an offence under this Act and shall be liable to imprisonment for a term not exceeding two years and whipping.

(4) For the purposes of subsection (1), the doing of an act of harassment or intimidation upon another person includes the making of statements, sounds or gestures, or exhibiting of any object intending that such word or sound shall be heard or that such gesture or object shall be seen by such person or intruding upon the privacy of such person.

(5) For the purposes of this section and subsection 10I(3)—

(a) "causes hurt" means doing any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person;

(b) "harassment" includes aggravation, annoyance, badgering, bedevilment, bother, hassle, irritation, molestation, nuisance, persecution, pestering, torment, trouble or vexation in circumstances in which a reasonable person, having regard to all or any of the circumstances would be offended, humiliated or intimidated; and

(c) "intimidation" shall have the meaning as assigned to "criminal intimidation" in section 503 of the Penal Code.

[Ins. A1193]

29C. Offences by companies, societies, firms or other body of persons.

(1) Where an offence under this Act has been committed by a moneylender—

(a) being a company, any person who at the time of the commission of the offence was a director, general manager, manager, secretary or other similar officer of the company, or was purporting to act in any such capacity;

(b) being a society, any person who at the time of the commission of the offence was a president, vice-president, secretary, treasurer or other similar officer of the society, or was purporting to act in any such capacity;

(c) being a firm or other body of persons, any person who at the time of the commission of the offence was a partner or member or other similar officer of the firm or other body of persons, or was purporting to act in any such capacity,

shall be deemed to have committed the offence, unless he proves that the offence was committed without his knowledge, consent or connivance, and that he took reasonable precautions and had exercised due diligence to prevent the commission of the offence.

(2) The prosecution of any person under subsection (1) for an offence shall not prevent the prosecution of the company, society, firm or other body of persons for that offence.

(3) Unless expressly provided otherwise, any act or omission by an employee of a moneylender shall, for the purpose of any prosecution or proceeding under this Act, be deemed to be the act or omission of the moneylender, unless the court is satisfied that the act or omission was committed without the moneylender's knowledge, or that all reasonable steps and precautions had been taken to prevent the commission of such act or omission.

(4) In the event of any act or omission by an employee of a moneylender which would have been an offence under this Act if committed by the moneylender, the employee of the moneylender shall also be guilty of that offence. *[Ins. A1193]*

29D. Prosecution.

No prosecution for an offence under this Act shall be instituted except by or with the written consent of the Public Prosecutor. *[Ins. A1193]*

29E. Service of notification or document.

(1) Any notification or document required to be given or served under this Act shall be sent by prepaid registered post to the person to or upon whom the notification or document is required to be given or served.

(2) Where a notification or document is given or served in accordance with subsection (1), it shall be deemed to have been given or served on the person to whom it is addressed on the day succeeding the day on which the notification or document would have been received in the ordinary course of post, if the notification or document is addressed to the authorized address of the person to whom the notification or document is intended to be sent to. *[Ins. A1193]*

29F. Power to compound.

(1) The Registrar or any Inspector specifically authorized in writing by name or by office in that behalf by the Registrar may, with the consent of the Public Prosecutor, compound any offence under this Act which is prescribed to be a compoundable offence by accepting from the person reasonably suspected of having committed the offence and to whom an offer to compound has been made, a sum of money not exceeding fifty per centum of the amount of the maximum fine for that offence.

(2) An offer to compound under subsection (1) may be made at any time after the offence has been committed but before any prosecution for it has been instituted.

(3) Where the amount specified in the offer to compound is not paid within the time specified in the offer, or within such extended period as may be granted by the Registrar or an Inspector specifically authorized under subsection (1), prosecution for that offence may be instituted at any time after such period against the person to whom the offer to compound was made.

(4) Where an offence has been compounded under subsection (1), no prosecution shall, within the time specified in subsection (3), be instituted in respect of the offence against the person to whom the offer to compound was made.

(5) All monies paid to the Registrar or to an Inspector specifically authorized under subsection (1) shall be paid into and form part of the Federal Consolidated Fund. *[Ins. A1193]*

29G. Jurisdiction.

Notwithstanding any written law to the contrary, a Court of a Magistrate of the First Class shall have jurisdiction to try any offence under this Act, and to impose the full punishment for any such offence. *[Ins. A1193]*

29H. Power to make regulations.

(1) The Minister may make such regulations as may be expedient or necessary for the purpose of giving full effect to the provisions of this Act, or for carrying out or achieving the objects and purposes of this Act.

(2) Without prejudice to the generality of subsection (1), the Minister may make regulations for or in respect of all or any of the following matters:

(a) the procedure to be followed in making an application for a licence, including the forms to be used, conditions to be complied with, and documents and information to be furnished in respect of such an application;

(b) the matters to be considered in respect of the granting of a licence to a person;

(c) the procedure regarding the surrender, suspension and revocation of licences;

(d) the procedure for the issuance of copies of a licence, where the licence is lost or destroyed;

(e) the offences which may be compounded and the procedure for compounding such offences;

(f) the fees to be paid, the manner for the payment of fees and the persons liable to pay the fees, the exemption of any person or classes of persons from payment of such fees, or the reduction of such fees;

(g) the form of register and other records to be kept and maintained by the Registrar, the procedure and other matters relating to the opening, maintenance and closure of the register, the inspection and taking of extracts from the register or records, the supply of copies of the register or records and the fees to be paid for such inspection, extracts and copies; or

(h) the form of moneylending agreements to be used by a moneylender and a borrower and other matters relating to such agreements.

(3) Any regulations made under this section may provide that any contravention of the provisions of such regulations shall be an offence and may provide for the imposition of a fine not exceeding ten thousand ringgit or a term of imprisonment not exceeding twelve months or to both.

30. (Deleted by Act A1193)

31. (Omitted).

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