

The Licensing System under the Malaysian Moneylenders Act 2003

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ABSTRACT

Moneylending business is a longstanding industry that had served consumers from various backgrounds in Malaysia. This industry is regulated by the Moneylenders Act 1951, which has gone through a major amendment in 2003. One of the main areas of reform is the licensing regime. Licensing identifies competent traders and excludes the incompetent and dishonest. The old licensing system was criticised of being too general, lenient and outdated. This article will examine and analyse the new licensing system to determine whether these weaknesses have been rectified.

Keywords: Moneylending, moneylenders, Moneylenders Act and Licence.

INTRODUCTION

The Moneylenders Act 1951 (Act 400) was the main law that regulated the business of moneylending in Malaysia. It has gone through a major amendment in 2003. The Malaysian Moneylenders (Amendment) Act 2003 (Act A1193 of 2003) (“MLA 2003”) was gazetted on 29 May 2003 while enforcement took effect on 1 November 2003. Besides the Act, there were also two regulations enacted in the same year; the Moneylenders (Control and Licensing) Regulations 2003 (“MCLR”) and the Moneylenders (Compounding of Offences) Regulations 2003. The Ministry of Housing and Local Government enforces these laws (“the Ministry”).

The reform of the moneylenders law has, among other things, improved the licensing regime. The old licensing regime was said to be too general and lenient, and it was asserted that licences were easy to obtain (S. Sulaiman, 1997). The annual licensing fee of RM120 was very low and did not correspond to the

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Any remaining errors or omissions rest solely with the author (s) of this paper.

current monetary value. Moreover, the licensing regime was regulated by the local authorities and there were reports on the serious problem of administrative discrepancy (S. Sulaiman, 1997). Thus, it can be seen that there were problems under the old law and the licensing regime under the MLA failed to regulate the moneylending business and protect the borrowers in moneylending transactions. In view of the above, it is the purpose of this article to examine and analyse the licensing provisions under the MLA 2003 in order to determine whether the defects of the MLA are remedied.

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.² 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 (R.M. Goode, 1989, 1979). 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. In fact, 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.

Literature in the United Kingdom commended the licensing system under the Consumer Credit Act 1974 (“CCA”) as “an effective weapon against unscrupulous traders” (Office of Fair Trading, 1993), a “potentially powerful regulatory weapon” (B. Harvey and D. Parry, 2000), “the most far-reaching type of licensing in Britain today” (C. Scott and J. Black, 2000) and “central to the success of the Consumer Credit Act 1974” (G. Howells, 1997, D. Tench, 1993). 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 (G. Borrie, 1983). 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

² See Nick McBride, “Consumer Credit Regulation”, a 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.

suspended or revoked. In sum, it is suggested that the strength of licensing lies in the identification of competent traders and the exclusion of the incompetent and dishonest. This article will argue that reform under the MLA 2003 has also improved the moneylending licensing regime.

Historically, in Malaysia, the initial objective of the establishment of the licensing system was to safeguard the interest of borrowers. 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 interest and no form of business which is capable, if abused, of causing so much misery and social corruption.” Apparently, this statement is still relevant and was the main argument for reforming the MLA. The need for more care and control over moneylending business is certainly greater, due to the many changes brought about by modern commercial transactions (Parliamentary Debate on Moneylenders Bill 2003).

Over fifty years after the MLA was first enacted, the need for enhanced control over moneylending business was recognised. The 2003 Parliamentary Debate on the Moneylenders Bill 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 is on licensing as a measure to achieve better control over the business. According to section 5 of the MLA 2003, a moneylender is obliged to acquire a valid licence before operating any moneylending business. 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 premise (Section 6, MLA 2003). A separate licence must therefore be obtained for every address at which the moneylender carries on business (Regulation 3(5), MCLR).

It is suggested here that licensing also serves two purposes: to help the authorities identify persons competent 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 intention of the Government to rectify the weaknesses of the MLA in 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.³

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 six licensing provisions under the old law. The Malaysian Government may want licensing to be a dynamic and powerful regulatory weapon, as it has every

³ See sections 10A-H, MLA 2003.

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 for controlling the licensing regime, and the MLA 2003 provides stern punishments for failure to obtain valid licences. The importance of possessing a valid moneylending licence is emphasised by section 5 of the MLA 2003. The MLA 2003 clearly states that if a person is convicted of running an unlicensed moneylending business, he is liable to be fined between RM20,000 and RM100,000 or to imprisonment for a term not exceeding five years or both; further, a subsequent offence is liable to whipping (Section 5(2), MLA 2003). 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 (Section 8, MLA). The increase of the monetary penalty illustrates the seriousness of the offence and seeks to deter moneylenders from carrying on illegal moneylending businesses. Based on the above, this paper will analyse whether the revised licensing system has addressed the weakness of the old licensing regime, which was accused of being too lenient, and allegedly made licences too easy to obtain. Further, it will investigate whether the problem of administrative inconsistencies in running the licensing regime has been dealt with.

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 (Section 29H, MLA 2003).⁴ The licensing regime includes the issuance (Section 5B, MLA 2003), renewal (Section 5E, MLA 2003) and suspension and revocation of licences (Section 9A, MLA 2003), subject to rights of appeal to the Minister (Section 9C, MLA 2003). The MLA 2003 has introduced a centralised system that vests the sole right to issue licences to moneylenders in the Ministry, in contrast to the preceding decentralised system. Under the new law, the local authorities no longer process application for moneylending licences. This new system would appear to have addressed the issue of administrative discrepancy under the old moneylenders law, as mentioned earlier in this article. This discrepancy arose because some states had no written rules and guidance on application for licences, whereas others like the state of Perak had laid down in detail the process of application, which included written examination

⁴ The MCLR and the Moneylenders (Compounding of Offences) Regulations 2003 are the regulations made in exercise of the powers conferred by s 29H

and interview, as well as grant of a licence. Thus, licences were easier to obtain in some states as compared to others.

According to the Ministry, there were 2719 licensed moneylenders in operation in 2002 (before the commencement of the 2003 Act). Quite a number of licensed moneylenders were located 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 due to the majority of the population are Muslims and they believed 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 (<http://www.kpkt.gov.my/kpkt>). They are 2988 licensed moneylender in business until June 2008. The renewal process is not automatic, as the Ministry will review the renewal applications to ensure that moneylenders were genuinely eligible and free from any misconduct. Since there are also new applications, 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.⁵

It was mentioned earlier that among the problems under the old law were the generality and leniency of the licensing regime, the ease with which licences could be obtained and the low amount of licensing fees. This paper will further consider whether the new licensing regime has solved these various problems under the old law.

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. No licence shall be granted unless the applicant has an issued and paid-up capital in cash of not less than RM1, 000 000 for a new application and RM500,000 profit for three consecutive years to renew a licence.⁶ This new ruling will ensure that moneylenders are financially competent to undertake a moneylending business. The

⁵ 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.

⁶ Dasar Dan Kriteria Pengeluaran Lesen Baru Pemberi Pinjam Wang. Available: <http://www.kpkt.gov.my/kpkt/main.php?Content=sections&SectionID=163>

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 (Regulation 4, MCLR). The statutory declaration certifies, *inter alia*, that the applicant has attained the age of majority, is not an undischarged bankrupt, and has never been associated with a moneylending business which has been wound up or dissolved by the court.

Apart from the above, 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 (Section 5A(2), MLA 2003). If no such prerequisite is supplied, the application is deemed to have been withdrawn (Section 5A(3), MLA 2003). The granting of a licence is at the discretion of the Registrar, but he may impose conditions or refuse to grant a licence (Section 5B, MLA 2003; Regulation 3(3), MCLR). The law also provides that it is an offence to supply any misleading statement, false representation or description of the particulars or information required (Section 29A(1)(a), MLA 2003; Regulation 3(2), MCLR). The new section 5A has clarified in detail the procedure to apply for a moneylending licence, whereas the old law was silent on this matter. Section 5A has also solved the problem of administrative discrepancies under the old law where some states had written rules and guidance on application for licences and other had none.⁷

The “Fit and Proper Person” Test

The “fit and proper person” test is very crucial in determining whether an applicant should be given a moneylending licence. The grounds for refusing a licence under the old law were said to be too lenient, offered very limited information to the Registrar of Moneylenders to determine an application for a moneylending licence, and triggered allegations that licences were very easy to obtain. The said grounds were as follows; no evidence of good character, not a “fit and proper person”, disqualified by a Court from holding a licence, failure to comply with the application rules and has lent money to a person under the age of eighteen. This article will argue whether the new “fit and proper person” test has addressed this problem.

The new section 9 of the MLA 2003 has provided six grounds for refusal of a licence. This includes a conviction under the Penal Code or the MLA 2003, a bankrupt, revocation of a moneylending licence, evidence of bad character and not a “fit and proper person” to hold a licence. These circumstances apply to an

⁷ 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; S. Sulaiman, *Akta Pemberi Pinjam Wang 1951: Satu Kajian Keberkesanan Akta dan Keperluan Pindaanya* (The MLA 1951: A Study on the Effectiveness of the Act and the Need for Further Reform), *Unpublished Report*, 1997, pp. 70-71 and annexure 16.

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.

The above conditions may also determine whether an applicant is a “fit and proper person” to be given a moneylending licence. Most of these circumstances are incorporated in the statutory declaration mentioned earlier. 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.

It is interesting to argue the usage of evidence of “good character” under the old law and “bad character” in the new law. It may be 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 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. It is assumed that bad character may be proven with police records, whilst good character is quite subjective.⁸

Besides the conditions under section 9 of the MLA, 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 can be seen that the “fit and proper person” test still offers very limited information to the Registrar to determine an application for a moneylending licence, and there was no attempt to identify the nature of a “fit and proper person”. Thus, the 2003 Act has not addressed the problem of the MLA being too lenient in deciding an application. The test has not been fully utilised under the MLA 2003 to ensure that only skilled and competent people practise in a certain area, by excluding the unskilled, incompetent and unwanted.⁹ Despite the guidelines mentioned above, 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.

The Practice in the United Kingdom

The positive licensing system in the United Kingdom 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 Office of Fair Trading (OFT) as to his fitness. In essence, the fitness test means that an applicant must satisfy the OFT that he will

⁸ *PP v Iran bin Sakdon* [1998] 7 MLJ 503; *Re Alan Wong Hoi Ping* [1988] 3 MLJ 25.

⁹ See G. Borrie, “Licensing Practice under the Consumer Credit Act” [1982] *JBL* 91, pp. 101-102.

trade “honestly, lawfully and fairly” with the consumers (Department of Trade and Industry, 2003). In considering “fitness”, the CCA took into account a number of factors including certain offences, evidence of unfair business practices and evidence of discrimination on grounds of sex, colour, race or ethnic/national origin.¹⁰

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” (G. Howells, 1994).

However, the UK Government regarded the original 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 (Department of Trade and Industry, 2003). According to Lomnicka, “the CCA licensing regime has long been regarded as ineffective, both in its design and in its operation” (Eva Lomnicka, 2004). The Consumer Credit White Paper therefore suggested a strengthened “fitness” test to overcome this weakness. In addition to the past failings of the applicant, future capability would be taken into account.

These suggestions are incorporated in the Consumer Credit Act 2006 (“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.¹¹ Besides those factors, the OFT will also take into account any evidence of:¹²

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

The CCA 2006 also imposes an obligation on the OFT to prepare and publish guidance on the requirements of the new fitness test, and is empowered to revise

¹⁰ CCA, s 25(2); The OFT also published guidance for the fitness test, *Consumer credit licences - Guidance for holders and applicants*, OFT 329.

¹¹ CCA, s 25(2), as amended by CCA 2006, s 29(2).

¹² CCA, s 25(2A), as inserted by CCA 2006, s 29(2).

the guidance as needed.¹³ Furthermore, the OFT is required to consult any persons it thinks fit in preparing or revising the guidance.¹⁴

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 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.

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 (Section 5B(3), MLA 2003; Regulation 3(4), MCLR). This reasonable amount was the first increase from RM120 per year, as practised in the last fifty years under the MLA. As mentioned earlier, the low amount was a problem, since it was too small, did not correspond to the current monetary value, was not proportionate to the profit accumulated by the moneylender, and was insufficient to cover the local authorities' administrative costs. It is suggested that the MLA 2003 has solved this problem, as the increased amount of the fees is a remarkable improvement. Apart from the application fee, there is also a fee for the renewal of the licence (Section 5E(4), MLA 2003).

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 (Section 5(5), MLA). 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 (Section 5E(2), MLA 2003). 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 (The Star, 2004).

¹³ CCA, s 25A, as inserted by CCA 2006, s 30. For the current guidance see *Consumer Credit Licensing – General guidance for licensees and applicants on fitness requirements*, OFT 969, January 2008.

¹⁴ *Ibid.*

A moneylender must pay a renewal fee of RM2000 upon application for renewal (Regulation 5(3), MCLR). This amount was also increased, to meet the current monetary value and to cover administrative costs. 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 (Section 5E(1), MLA 2003). A penalty of RM300 is imposed for an application made after the said period (Section 5E(2), MLA 2003). 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 (Section 5E(3), MLA 2003). This two-year suspension period will definitely cause hardship to the moneylender, as he will be deprived of his livelihood (R.M. Goode, 1989). 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 will perhaps reduce the administrative burden on the Ministry.

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 "true name" and specify an "authorised address" at which he must conduct his business. A "true name" is the name acquired at birth: for an individual, the name stated in the identification card (or the name registered on incorporation/registration in the case of a company or firm) (A. Singh, 1980).¹⁵ An "authorised address" is the address stated in the licence, at which the moneylender is authorised to carry on business (Section 6(2), MLA 2003). A moneylender who takes out a licence in a name other than the true name is liable to both criminal and civil sanctions (Section 8, MLA 2003). It is suggested that this provision protects the borrower from corrupt moneylenders who carry on moneylending business under disguised names.

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 the name might not infringe the statutory provision, if it is not

¹⁵ 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 some 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 G. Stone and D. Meston, *The Law Relating to Moneylenders*, 5th ed, Oyez Publications, London, 1968, p. 33.

such as to mislead.¹⁶ In the leading case of *Menaka v Ng Siew San* ([1977] 1 MLJ 91, PC), 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 a name other than her authorised name and had taken a security for money other than in the authorised name, which are offences under sections 8(b) and (c) of the MLA.¹⁷ 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* ([1966] 2 MLJ 54) 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."

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 2003.¹⁸ It certainly protects the borrower from any dishonest moneylender disguised under a false name. Section 6 and decided cases have proved that if the moneylender commits such an offence, he must face the consequence of a void and unenforceable moneylending contract.

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 (Section 5F(1), MLA 2003). This new requirement replaced the original provision which required a licensed moneylender to affix a board bearing the words "Licensed Moneylender"

¹⁶ As established in the UK Court of Appeal decision of *Peizer v Lefkowitz* [1912] 2 KB 235. This case is referred to as an example of a case-law interpreting section 6 of the MLA 2003.

¹⁷ 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.

¹⁸ 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.of.gov.uk/news/Annual+Report/2004/49-04.htm> [accessed 15 November 2004].

in a conspicuous position outside his authorised address (Section 14, MLA). It is an offence for a moneylender to alter, tamper with, deface or mutilate the licence which is required to be displayed (Section 29A(d)(1), MLA 2003). Further, exhibiting a forged or imitated or altered licence is equally prohibited (Section 29A(1)(e),(f) and (h), MLA 2003). It is suggested that this new requirement in section 5F has improved the old law and is intended to safeguard the interest of borrowers so that they know that they are dealing with authorised moneylenders.

However, section 5F may cause ambiguity and might raise two questions. The first is whether the original licence must be displayed, or it is 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 is 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 (L.H. Singh, 2003).

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. Although the MLA 2003 and the MCLR do not directly state that debt collection must be effected at the moneylenders' premises, it seems that this is the interpretation of the Ministry. It appears that the new law does not only confine a moneylending transaction, i.e. the making of the agreement and release of the principal loan, to the moneylender's premises, but also seems to require repayment of the loan and debt-collection to be effected at his office.¹⁹ Non-compliance will render the offending moneylender liable to criminal prosecution but will not invalidate the moneylending transaction because regulation 15 makes no such invalidating provision (Section 5F(2), MLA 2003).

The rationale behind this ruling is presumably that when business dealings are transacted in a business premises, it will instil awareness in 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 (Koh Lay Chin, 2002). Indeed,

¹⁹ MLA 2003, s 5F; MCLR, reg 15; Ministry for Housing and Local Government, *Unpublished Report*, 2003, p. 5; SY Kok, "Who is a moneylender in year 2003?" [2004] 3 MLJ cxxi; footnote 14. This was the concern of the moneylenders during the briefing of the implementation of the 2003 Act, held with the police and the Ministry officers; see "Moneylenders concerned over amended Act", *The Star*, 6 September 2003; "Johor Sikh money lenders seek easier rules on licences," *The New Straits Times*, 24 January 2003; Syahril Kadir, "Peminjam berlesen mungkin gulung tikar" (Licensed moneylenders may be forced out of business), *Utusan Malaysia*, 1 October 2004. In response, 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; "Modernise business, moneylenders urged", *The Star*, 20 April 2006.

this is the response to the common problems of borrowers being intimidated by loan sharks and errant moneylenders as frequently reported by newspapers.²⁰ Thus, it is a commendable move to shield borrowers from such deceitful and ruthless tactics. Perhaps, the new rule also may serve 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, and moneylenders might use persuasive techniques to influence borrowers to accept the loan or to extend a subsisting loan (S. Rachagan, 1992). 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, it seems that this strict requirement of conducting the business of moneylending within the confines of the moneylender's office has caused great concern among the moneylenders. According to them, the restriction imposed on visiting borrowers at home is a major setback in the new law.²¹ 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 (K. Rowlingson, 1994). 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 (Syahril Kadir, 2004). 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 protective shield over the borrowers against any untoward consequences.

²⁰ N. Spykerman, "Hawker in the soup: Woman in debt found hanged from the staircase," *The Star*, 8 November 2003; N. Spykerman, "Ah Longs will come after us," *The Malay Mail*, 14 November 2003; Suraya Pauzi, "Debtors' kin at mercy of the loan sharks," *The Malay Mail*, 22 October 2003; M. Tan, "Grieving family harassed by loan sharks," *The Star*, 9 November 2003; C. Ee-Tan, "Harassed by loan sharks," *The Malay Mail*, 11 September 2002; C. Ee-Tan, "Money or kids," *The Malay Mail*, 4 September 2002.

²¹ "Moneylenders concerned over amended Act", *The Star*, 6 September 2003; "Johor Sikh money lenders seek easier rules on licences," *The New Straits Times*, 24 January 2003.

In this regard, restricting debt collection within the moneylenders' business premises is a brave step to deal with the problem of loan sharks. However, the MLA 2003 should be amended to clarify this situation, since the ruling is based on the Ministry's interpretation of section 5F of the 2003 Act and regulation 15 of the MCLR. The 2003 Act must be clear on this issue since the new law has created difficulties to licensed moneylenders. Nevertheless, if this is the case, restriction of doorstep collection could be overcome by resorting to other means of repayment collection, such as requesting borrowers to pay repayments into moneylenders' bank accounts and accepting postal orders or cheques from borrowers. In this respect, 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.²²

Revocation or Suspension of Licence

Section 9A is a new provision that empowers the Registrar to revoke or suspend a moneylending licence upon the occurrence of the stipulated conditions provided under this section. It clarifies the situations under which a licence may be revoked or suspended, since the old law was silent on this matter.²³ Section 9A(1) authorises the Registrar to revoke or suspend a moneylending licence in the event that a moneylender:

- 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;
- has contravened any of the provisions of the MLA or any regulations or rules made under MLA;
- has been licensed as a result of a fraud, mistake or misrepresentation in any material particular; or
- 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 (R.M. Goode, 1989). 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

²² "Modernise business, moneylenders urged", *The Star*, 20 April 2006; R. Hammim, "Hotline to run check on moneylenders", *New Straits Times*, 7 April 2006.

²³ S 10 of the MLA only explained the consequences when a licence was suspended or forfeited.

or suspended (Section 9B, MLA 2003). 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 (Section 9F(1), MLA 2003). 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 (Section 9A(3), MLA 2003).

As has been illustrated above, there are several occasions where the Registrar is authorised to exercise his power to revoke or suspend a licence. By conferring on the Registrar such power to see that the Act is obeyed, the MLA 2003 creates the mechanism to make certain its effectiveness.²⁴ It will ensure that the moneylender does not obtain his licence by corrupt means, carries on his business honestly, and complies with the conditions of the licence as well as the provisions in the Act. Although such administrative control is described as a “latent” power to manage the conduct of businesses (J.K. Macleod & M. Cronin, 1978), however, it provides a continuing incentive to moneylenders to comply with the provisions of the moneylenders law and to trade honestly (A. Hill-Smith, 1985). It is indeed an excellent measure to support the enforcement of the licensing regime and to ensure that moneylenders maintain a high standard of trading, or suffer the consequences. Thus, it is suggested that section 9A has further strengthened the new licensing regime.

Further, section 9A also supports 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. 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.

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 (Regulation 13(2) and (3), MCLR). 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 (Regulation 13(4) and (5), MCLR). 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

²⁴ See F. Bennion, *Consumer Credit Act Manual*, 3rd ed, Longman, London, 1986, p. 213.

be questioned in any court.²⁵ 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. In order to overcome this *lacuna*, court decisions on the meaning of the same in other statutes, such as the National Land Code, are referred to.²⁶ After considering the relevant cases, 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 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.²⁷ This clause indicates that the decision is conclusive on the facts, but not final on the law.²⁸ In the words of Gopal Sri Ram JCA:²⁹

If the decision is not according to law, the court would invariably interfere with it. To my mind, a decision not according to law is no decision at all. In the present case, I would say that the decision of the Minister can be questioned if it can be shown that it was reached as a result of no proper inquiry, or of failure to comply with the prescribed procedure for an enquiry, or if it can be shown that the decision was a nullity for lack of jurisdiction or for failure to comply with the law. (Emphasis added).

Decided cases have shown that despite finality and ouster clauses, courts are prepared to perform administrative review where jurisdictional error has resulted in miscarriage of justice.³⁰ Such a move is in line with constitutional functions and upholds the principle of natural justice, in respect of which a person aggrieved by

²⁵ 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.”

²⁶ 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; *Nanyang Development (1966) Sdn Bhd v How Swee Poh* [1970] 1 MLJ 145 at p. 147.

²⁷ *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317, COA; *Selangor Omnibus Co. Ltd v Perumal* [1981] 2 MLJ 124, FC.

²⁸ *Nik Mohd Salleh bin Nik Mat v Timbalan Ketua Polis Pahang & Anor* [2006] MLJU 199

²⁹ *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317, pp. 336-337.

³⁰ 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; see also the English cases of *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 All ER 796; *Anisminic Ltd. v Foreign Compensation Commission* [1969] 2 AC 147.

the decision of the Registrar may file for a writ of *certiorari* in the High Court.³¹ In view of the above, it is suggested 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 for inserting such a 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 1999.³²

Transfer or Assignment of Licence

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. Further, section 26(2)(a) of the MLA 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 (Section 26(2)(b), MLA 2003). 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 (Section 9G(3), MLA 2003). 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

³¹ 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.

³² Direct Sales Act 1993, s 16; Consumer Protection Act 1999, s 116.

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. Does this mean that the 2003 Act has created any new difficulties? The new Act might indeed have made things worse, if the Registrar does not exercise his discretion wisely, and section 9G(3)(b) is likely to be a back door way to get licences. It is also 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 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.

Conclusion

It has already been seen that a licensing regime is very significant in regulating the moneylending and consumer credit industry. The MLA 2003 has reviewed the licensing systems in order to strengthen the regime and provide better control over the businesses. In this regard, the new law has addressed the concern that the licensing regime was too general. Several aspects such as the procedure for application for licence, 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 solve the problems experienced in the past, 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. This article will only focus on the fitness test and the practice in the UK will be referred to as an inspiration to critically evaluating the MLA 2003.

This article has argued 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. The factors to determine whether an applicant is a suitable person are derived from a statutory declaration which incorporates the gist of section 9 of the MLA 2003 and a corroboration letter demonstrating his suitability. It is here 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. 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 is 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”.

For example, factors such as evidence of unfair business practice, discrimination and consumer complaints, as provided under the CCA, could be considered in the

“fit and proper person” test. These elements will further support the objective of licensing, i.e. to ensure that only skilled and competent people practise in a certain area, by excluding the unskilled, incompetent and unwanted (G. Borrie, 1982). 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 and religious 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 suitable persons in preparing and revising the guidance is also an ideal practice.³³ 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.

This article has also argued that the licensing system has gone through major reform under the MLA 2003, in order to solve the problems of administrative discrepancies and the licensing provisions being too general, lenient and outdated, which were brought by the MLA. 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. This move has addressed the old problem of administrative discrepancies and will enhance supervision and co-ordination in the licensing system. Several aspects such as the procedure for application for licence, 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 freshly formulated to solve the problems in the past that the licensing regime were too general, lenient and obsolete, to keep up with the current credit practice and safeguard the borrowers’ interest. In this regard, the MLA 2003 has addressed the concern that the old licensing regime was too general. However, in light of development under the CCA, several weaknesses under the MLA 2003 become apparent; especially the “fit and proper person” test was not fully developed, although this is the key factor that would distinguish an honest from a crooked applicant.

³³ CCA, s 25A, as inserted by CCA 2006, s 30.

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