Singapore Journal of Legal Studies
[1993] 1 – 15

THE CREDIT AND CHARGE CARD TRANSACTION: IS IT MONEYLENDING?

An increasing number of credit and charge cards are issued every year. It has been reported that there are currently 1.01 million cards in circulation in Singapore (Business Times, 12 October 1992). Is a credit or charge card transaction one of moneylending? If so, does it fall within the Moneylenders Act? Would card issuers be in breach of the Act if they are not registered as moneylenders under the Act? These issues are considered in this article. The topic of moneylending is also examined. It is argued that the Moneylenders Act is an archaic legislation that needs review. In this review, it is suggested that the pan of the UK Crowther Report on Consumer Credit which recommended that a new and comprehensive regime be introduced to replace the present piece-meal approach be seriously considered.

AN important question in commercial law remains unresolved: is the legal analysis underlying a credit or charge card transaction one of moneylending or assignment?[1] In the moneylending analysis, the rights of the issuer *vis-à-vis* the cardholder arise directly from the agreement between them. The issuer lends money to the cardholder (albeit payment is made to the supplier, not the cardholder), in settlement of the cardholder's "debt" owed to the supplier that arises from the supply of goods by the supplier to the cardholder (the "direct" theory). In the assignment analysis, the rights of the issuer are derived from the sale contract between the supplier and cardholder. The supplier assigns the debt owed him by the cardholder to the issuer who subsequently collects it directly from the cardholder (the "derivative" theory). The analysis is not unlike that of a factoring of book debts, except that there is, in addition to the contract of assignment and the underlying contract of sale, a contract between the issuer and cardholder. The legal effect of this contract is an important consideration.[2]

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[1] The term "credit card" is very often used genetically to include charge cards. Operationally, there is an important difference between the two which may have some legal significance *(supra,* note 23). In a credit card transaction, payment may be deferred whereupon interest is charged; in a charge card transaction, no allowance is made for deferring payment and therefore no interest is charged although a late payment charge may be levied. Examples of credit and charge cards are VISA and American Express respectively.

[2] This uncertainty remains despite earlier academic writings such as RM Goode, "A Note on the Legal Aspects of Credit Cards" in *Instalment Credit* (Diamond ed, 1970); Chappenden, "Credit Card: Some Legal Problems" ALJ (1974) Vol 48, 306; Sharma, "Credit

Whether the correct analysis is that of moneylending or assignment is important for the following reasons: firstly, to determine whether it is a moneylending transaction, which may render it void under the Moneylenders Act;[3] secondly, to determine the legal nature of the relationships between cardholder and issuer, supplier and issuer[4] and cardholder and supplier (of these three relationships, the issuer-cardholder relationship is of greatest importance for our purposes);[5] thirdly, to ascertain whether the cardholder can raise any equity he has against the supplier such as a set-off in price for defective goods against the issuer; fourthly, to decide, when the issuer defaults in paying the supplier and the supplier calls on the cardholder to pay him instead of the issuer, whether the cardholder is under any legal obligation to do so.

One reason for this continuing uncertainty is a dearth of judicial authorities on the issue. There is only one local decision on credit cards – decided in 1976![6] English decisions are also rare. Thus, there is neither clear judicial authority nor much persuasive authority for Singapore jurists and lawyers to turn to.[7] However, *dicta* in two recent important English decisions indicate strong support for the moneylending analysis.

Cards in Australia: Some Predictable Legal Problems" Lawasia [1972] Vol 3, 106; Corkery, "Credit Cards in New Zealand: Some Potential Problems" NZLJ 1 Feb 1977, 30 and KF Tan, "Credit Cards and Moneylending" [1976] 2 MLJ cxi. Not many books have been written in the area. A few notable ones are Sayer, *Credit Cards and The Law* (1988); Drury & Ferrier, *Credit Cards* (1984) and Jones, *The Law Relating to Credit Cards* (1989).

[3] Cap 188, 1985 Rev Ed. See discussion *infra.*

[4] The legal significance of the issuer-supplier relationship was a primary focus of the court's deliberations in *Customs and Excise* v *Diners Club Ltd* [1989] 2 All ER 385. The court held that based on the construction of the agreements between the two issuers and the suppliers in that case ("retail Establishments") the issuers had made supplies of services to the retail Establishments within the meaning of the UK Value Added Tax Act 1893.

[5] For purposes of this article, we will focus on the 3-party rather than 2-party paradigm. A 2-party situation commonly involves a department store or petrol station which issues regular customers with cards to pay for their purchases. This is clearly a moneylending transaction where credit is furnished by the store to its customers who then pay the total bill at the end of a designated period, usually a month. In a 3-party situation, the *issuer* enters into an agreement with a *supplier* whereby the latter agrees to "accept" as payment the tender of a card issued by the issuer to a *cardholder.* The issuer also enters into an agreement with a cardholder whereby the cardholder agrees that he would pay to the issuer the total amount accumulated through use of the card at the end of a designated period, usually a month.

[6] This is the decision of Chang Min Tat J in *Victor Kee Yong Poey* v *Diners Club Malaya Sdn Bhd* [1970] MLJ 30. For a critique of the case, see KF Tan, "Credit Cards and Moneylending" [1976] 2 MLJ cxi. See also Chan, "More Control on the Cards" *Malaysian Business,* Mar 1984, 61.

[7] Academic writers' preference is for the moneylending analysis. See, *eg*, Goode, "A Note on the Legal Aspects of Credit Cards" in *Instalment Credit* (Diamond ed, 1970) at 87 and *Hire Purchase Law and Practice* (2nd ed, 1970) at 902. See also KF Tan, "Credit Cards and Moneylending" [1976] 2 MLJ at cxi. The Crowther Committee in its report on Consumer

In *Re Charge Card Services Lte*[8] the issuer ("*I*") had become insolvent without paying the supplier ("*S*") who had supplied fuel to cardholders ("*C*").[9] This was in breach of clause 5 in the agreement between *I* and *S* (called "the franchise agreement" in the judgments). *I* had assigned to C Ltd all outstanding debts owed to it. The contest was between *S* and C Ltd. The issue that arose was whether the sums yet unpaid by the cardholders were due to *S* (based on the contract of sale of fuel between *S* and *C* and on the basis that *I* had not yet paid *S*) or *C* Ltd (based on the assignment of debts given by *I* to *C* Ltd). *S* argued strenuously that *C*'s liability to pay *I* (which would have been in accordance with the terms of the agreement between *I* and *C* – called "the subscriber agreement" in the judgments) was a conditional one; in other words, *C* was liable to pay *I* only if *I* made payment to *S*. If *I* failed to pay *S* (as was the case),[10] *C* was not liable to pay *I* but should pay *S*. In essence, the critical issue was on what basis did *C*'s liability to pay *I* arise?

Millet J in the court of first instance decided for C Ltd. His analysis of the three separate agreements – the franchise agreement between *I* and *S*, the subscriber agreement between *I* and *C* and the forecourt agreement between *C* and *S* – was that *S* and *C* had, for their mutual convenience, each previously arranged to open separate accounts with *I*. They had agreed that any account between themselves could, if *C* wished, be settled by crediting *S*'s and debiting *C*'s account with *I*. That process did not depend on *I*'s solvency and *C*'s liability to *S* was discharged at the latest when *S*'s account was credited, not when *S* was paid. *S* also submitted that a general principle of law existed that, whenever a method of credit payment was adopted which involved a risk of non-payment to the payee, there was

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Credit (Cmnd 4596, 1971) takes an interesting approach, classifying the transaction as a hybrid between one of moneylending and sale (see paras 4.1.10 and 6.12.3). However, its basic orientation is still towards moneylending as it classifies the issuer as a moneylender. New Zealand and Australian decisions have adopted the moneylending analysis. See *Goldberg* v *Tait* [1950] NZLR 976 and *Allchurch* v *Popular Cash Order Co Ltd* [1929] SASR 212. On the other hand, American courts have held that the rights of the issuer against the cardholder are derivative rather than arising directly between cardholder and issuer. See, *eg, Gulf Refining Co* v *Williams Roofing Co* (1945) 208 Ark 362, 186 SW 2d 790, *Union Oil Co of California* v *Lull* (1960) 220 Ore 412, 349 P 2d 243 and *Diners Club* v *Whited* (1964) Cir Co, A 10872 LA Supreme Court.

[8] Decided by Millet J at court of first instance at [1986] 3 All ER 289 and the Court of Appeal *(per* Sir Nicholas Browne-Wilkinson VC, Nourse LJ and Stuart-Smith LJ) at [1988] 3 WLR 764. The case was applied in *Customs and Excise Commissioners* v *Diners Club Ltd and Anor (infra,* note 15) and *R* v *Dept of Social Security, ex pane Overdrive Credit Card* (1991) STC 129.

[9] For purposes of uniformity in this note, "*I*","*S*" and "*C*" will be considered in the singular sense.

[10] This was unusual as, in the paradigm situation, the issuer would pay the supplier shortly after credit is extended to the cardholder through the use of his card.

a presumption that such method constituted conditional payment only so that the risk of default would lie on the payor, not on the payee: in other words, in the absence of an agreement to the contrary, either express or implied, failure of the agreed method of payment would leave the payor's liability to pay undischarged. The examples of cheques, bills of exchange and other negotiable instruments were cited. Millett J held that there was no such principle. He said:

> the cases ... demonstrate [that] the approach of the courts to this question has not been conceptual or based on any such supposed principle, but has been strictly pragmatic. As each new method of payment has fallen to be considered, its nature and the surrounding circumstances have been examined to see whether a presumption of conditional payment should be made.[11]

The Court of Appeal affirmed Millett J's decision. The weight of the decision rested on two bases: firstly, that there was no presumption of conditional payment when a method of payment was adopted which involved a risk of non-payment by a third party and, secondly, that, on the facts, the acceptance of the card by *S* did not constitute merely conditional payment but was an absolute one. Sir Nicholas Browne-Wilkinson VC, delivering the court's judgment, said on the first point that:

> Each method of payment has to be considered in the light of the consequences and other circumstances attending that type of payment. When, as with credit cards, a new form of payment is introduced applicable to new sets of circumstances, it is necessary to consider whether such payment should be treated as absolute or conditional in the light of the consequences and circumstances of such new type of payment, not according to any general principle.[12]

On the second point, the facts that the court took into consideration were these. Firstly, the contractual scheme that underlaid the three separate agreements – subscriber, franchising and forecourt agreements. Even though the parties did not have specific knowledge of the terms of each contract, they knew of the "underlying contractual structure".[13] In particular, when *C* tendered and *S* accepted the card as payment in lieu of cash, it was on the basis that *S* would look to *I* for payment. As Sir Brown-Wilkinson VC put it:

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[11] [1986] Ch D 289 at 301.
[12] [1988] 3 WLR 764 at 771.
[13] *Ibid,* at 772.

> By the underlying scheme, the company had bound the garage to accept the card and had authorised the cardholder to pledge the company's credit. By the signature of the voucher, all parties became bound: the garage was bound to accept the card in payment; the company was bound to pay the garage; and the cardholder was bound to pay the company. *The garage, knowing that the cardholder was bound to pay the company and knowing that it was entitled to payment from the company which the garage itself had elected to do business with, must in my judgment be taken to have accepted the company's obligation to pay in place of any liability on the customer to pay the garage direct.*[14]

What was not explicitly mentioned, but could have been a factor, was the fact that both *I* and *S* were business concerns. The arrangement benefited their respective businesses. Although *C* also benefited, he benefited as a consumer. The assumption of risks is an integral part of any business for which a reasonable response would be the taking out of insurance. In accepting *C*'s card, *S* accepts a risk which is prescribed in the franchising agreement between *S* and *I*. If *I*, also a business concern, does not pay *S*, should the law support *S* if *S* looks to *C* instead, bearing in mind that *C* is a consumer? Viewed from this light, on policy grounds, the decision is correct. Yet, from another viewpoint, one may argue that as between *I* and *S,* the decision may seem somewhat hard on *S. I* doubly benefits in that even though no payment has yet been made by him to *S*, he, nevertheless, may collect payment from *C*. As between *I* and *S*, he is the party in breach of their agreement. The law would, therefore, appear to favour the defaulting party.

Another fact that impressed the court was that *S* never knew or could have known the full identity or address of *C.* In the circumstances, should *I* fail to pay *S*, could it ever be envisaged that *S* would look to *C* for payment? The court held that this was hardly conceivable.[15] However, even if *S* was not entitled to payment from *C*, was *I* so entitled? Was *I*'s entitlement dependent on *I* having paid *S*? That was the more difficult question confronting the court. The court answered it in favour of *I*. Its answer was based on its construction of the subscriber agreement which it considered to be ambiguous on this point in its material parts.[16] The court implied

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[14] *Ibid,* at 772. Emphasis added.

[15] *Ibid,* at 775.

[16] *Ibid,* at 773. Four clauses were relevant: clauses 1, 2, 3 and 6. In particular, clause 3 read as follows: "A statement showing all amounts debited, less any credits or refunds, will be sent to (*C* by (*I*) each month. (*C*) will pay to (*I*) within 14 days from the date to which such statement is made up, the whole of the amount shown to be owing by that statement...."

a term in law to the effect that *C* had agreed that he was to be debited according to the date of the transaction of purchase and that the monthly statement would show debits made on that basis. It noted that there was no reference at all in the agreement to the alternative argument put forward: that the "amounts" referred to the actual sum that was paid by *I* to *S*. As such, the ambiguous word "debit" in the agreement was construed to mean "sumswhich (*I*) had become liable to pay in respect of supplies of fuel to (*C*) irrespective of the date of payment by (*I*) to *(S)*".[17] In arriving at this conclusion, the court held that a proper construction of the agreement should take into account the factual matrix underpinning its formation. In this regard, a matter of particular importance was the interlocking triangle of agreements which formed the basis of *C*'s signature on the payment voucher. It also held that such a construction accorded with the "commercial sense" of the transaction.[18]

In *Customs and Excise Commissioners* v *Diners Club Ltd and Anor,*[19] the issue was whether two companies, Diners Club Ltd ("Diners") and Cardholder Services Ltd ("CSL") had made supplies to retailers that were subject to value added tax or VAT (output tax). Under the tax scheme, output tax was charged on certain supplies of goods and services made by a taxable person. Taxable persons were, in certain circumstances, entitled to recover VAT chargeable on goods and services that were supplied to them and VAT paid by them on imported goods. The entitlement to recover such input tax depended on the nature of the supplies made by the taxable person and, generally, recovery was not possible where exempt supplies were made. The specific issue that arose was whether Diners and CSL made supplies to the authorised establishments ("*S*") in connection with their relevant credit or charge operations that were taxable or exempt. The court answered this in the affirmative. In the process, the judges made several interesting observations on the legal nature of the transaction in question.

Despite the fact that the agreement between Diners and *S* and that between CSL and *S* were clearly couched in the language of assignment, the court adopted the approach of both Millet J and the Court of Appeal in *Re Charge Card Service Ltd* and held that a debt arose directly between the issuers, Diners and CSL ("*I*") and the consumers who bought from *S* ("*C*"). This

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[17] *Ibid,* at 774.

[18] *Ibid,* at 13. Increasingly, courts are mindful of the commercial context in which statements are made (in order to ascertain whether or not there is a contract in the first place) and contracts are entered into (in order to put a judicial construction on the terms of the contract). See, *eg,* the important decision of *Williams* v *Roffey Bros & Nicholls (Contractors) Ltd* [1990] 1 All ER 512 and in particular, the judgments of Russell LJ and Purchas LJ at 524f and 527d respectively.

[19] [1989] 2 All ER 385. The decision was followed in *Boots* v *Customs and Excise Commissioners* [1990] 1 ECJR 5.

occurred when *C* used the card in a purchase from *S*.[20] The liability that arose on the part of *C* to pay *I* was therefore a direct one, and did not arise from any assignment by *S* to *I*. Furthermore, Woolf LJ, in giving the main judgment, described two situations where it may be difficult to uphold the assignment analysis. The first situation is where payment for goods purchased by *C* from *S* (in this case by card) takes place at the same time as when the contract is formed.[21] In such a case, no debt comes into existence as the goods are paid for immediately upon the liability to pay arising. No assignment can thereafter take place.[22] The second situation is where the agreement between *I* and *C* stipulates for payment of interest by *C* to *I*. In such a case, *C* would pay to *I* more than what he owes to *S* (based on the assignment analysis), *I*'s rights against *C*, therefore, cannot be said to be derived from the debt owed by *C* to *S*. The basis must, therefore, be a direct one that arises from the agreement between *I* and *C*.[23] In the final analysis, the decision of the court was that there was a supply by the two card companies to retailers through the operation of the schemes in question. Two services were supplied: firstly, a service to retailers that enabled them to increase their business by advertising their readiness to accept cards and, secondly, Diners and CSL provided a secure source of payment to retailers.[24]

An important point that arises from the two cases is that whilst the underlying sale contract between *C* and *S* is the one that activates the chain of events, it is the underlying contractual scheme supported by two other contracts – between *I* and *S* and between *I* and *C* – that is of utmost importance. Unlike the usual factoring situation, there is here a pre-existing contract

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[20] It is noteworthy that the court ignored the explicit wording of the agreement. In doing do, it went to the substance of the matter rather than the form. This approach contrasts with the earlier approach of courts in dealing with the issue whether a transaction was a bill of sale or sale and hire-back transaction. In that situation, the court's approach was to focus on the documentation as reflecting the intentions of the parties rather than on the reality of the transaction.

[21] An example he gives is a customer who buys a book at a bookshop. The customer hands the book he wishes to purchase and his credit card to the shop assistant who there and then makes out the credit card slip which is signed by the customer *(supra,* note 19, at 393).

[22] See Petkovic, "Contracting Out of Charge Card" (1989) 6 JIBFL 254 for an elaboration of this point.

[23] Based on this analysis, it has been argued that it would be more difficult to apply the assignment analysis to credit card (as compared to charge card) transactions where interest is levied on charges incurred. The amount paid by *C* to *I* would definitely be greater than the debt incurred by *C* to *S*. (See Petkovic, "Contracting Out of Charge Card" (1989) 6 JIBFL 254). However, this is only true if interest is levied as a matter of course, and not a matter of choice as is the case for most credit card operations. The cardholder is provided credit facility whereby he pays a minimum amount and defers payment of the balance in consideration of interest being paid.

[24] *Per* Woolf LJ at 395 and *per* Dillon LJ at 397.

between the purported assignee and client. The terms of this agreement are of paramount importance: even more so than those in the agreement between *I* and *S.* Despite the assignment language of the latter agreement, the courts have upheld the direct theory – that a debt arises directly between *I* and *C,* in other words, credit or financial accommodation is furnished to *C* by *I* rather than by *S*.[25] In doing so, the courts have emphasised substance rather than form. At this juncture, we should examine whether the Moneylenders Act deals with these problems.

In Singapore, moneylending is governed by the Moneylenders Act.[26] The Act applies to all moneylenders who fall within the definition of "moneylender"[27] and who resides and carries on the business of moneylending in Singapore.[28] The definition of "moneylender" is not very useful as it is defined in terms of "moneylending" which in turn is not defined in the

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[25] In a moneylending transaction, the money lent need not be paid directly to the borrower as long as it is paid in the manner agreed to by the borrower. See *Associated Finance Corporation Ltd* v *Poomani* [1972] 1 MLJ 117. This is in accord with the court's analysis in *Customs and Excise Commissioners* v *Diner's Club Ltd and Anor* [1989] 2 All ER 285 that when the cardholder proffers his card to the supplier who accepts it, any debt owing by the cardholder to the supplier is replaced by one owed by the cardholder to the issuer (at 394).

[26] Cap 188, 1985 Rev Ed. In the UK, credit card transactions are regulated by the Consumer Credit Act 1974 if the debtor is an individual person or a partnership. In the UK Act, "credit" is defined to include a cash loan, and any other form of financial accommodation (section 9(1)). Under section 8, a consumer credit agreement is one where the creditor provides the debtor with credit not exceeding £5,000. The Act goes on to describe the various types of credit agreements (sections 9, 10(a), 12, 14, 18, *etc).* For our purposes, it is to be noted that the Act defines the transaction in creditor-debtor terms.

[27] Section 2. In essence, a moneylender includes "every person whose business is that of moneylending". An important aspect of section 2 is exemptions (a) to (e), particularly exemption (c) which states:

> "any person bona fide carrying on the business of banking or insurance or *bona fide carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money."* (Emphasis added.)

The italicised phrase has been the subject of judicial scrutiny. See especially *The Official Assignee* v *Ek Liong Hin* [1960] MLJ 85 (Privy Council); *Esmail Sahib* v *Noordin* [1951] MLJ 98 and *Premor Ltd* v *Shaw Bros* [1964] 1 WLR 978.

It should be noted that *bona fide* banks, societies, pawnbrokers and finance companies validly registered under the respective Acts are also exempted from the provisions of the Act. The Minister may also exempt any body corporate or society from all or any of the provisions of the Act, with or without conditions (see section 36). As of the end of 1991, 14 companies have been issued with certificates of partial exemption, and 120 companies with certificates of complete exemption (see *Singapore 1992 – A Review of 1991,* Publicity Division, Ministry of Information and the Arts).

[28] Section 5(1). This requirement was held to be satisfied in the Singapore Court of Appeal decision of *Lorraine Esme Osman* v *Elders Finance Asia Ltd* [1992]1 SLR 369 and the Singapore High Court decision of *Vernes Asia Ltd* v *Trendale Investment Pte Ltd & Anor* [1988] 1 MLJ 357 (*per* Grimberg JC). In *Elders Finance Asia Ltd,* Karthigesu J, delivering the judgment of the Court, noted that "it is not surprising that neither counsel was able

Act.[29] There is a presumption that "any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary is proved to be a moneylender."[30] The essence of a moneylending transaction is the payment of money on condition that it will be repaid.[31] In practice, two questions are raised: first, is this a moneylending transaction? and, second, does this transaction fall within the Moneylenders Act?

The Act is based on the English Moneylenders Acts of 1900 and 1927. Complemented by the rules made thereunder[32] and case law,[33] it provides the basic framework governing the licensing of moneylenders and the conduct of moneylending business in Singapore. The basic approach of the Singapore Act is to provide for a scheme to license moneylenders.[34] In so doing, it regulates the manner in which moneylending business may be conducted, including matters such as setting limits to which interest may be charged, prescribing a form for the moneylending agreement, setting out particulars

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to refer us to any authority dealing with 'residence' or 'residing in' in the context of moneylending legislation anywhere. We ourselves have been unable to find any." He then relied on several tax cases which had expounded on these concepts (at 374).

[29] The scope of the definition has occupied considerable judicial time both here and overseas. See, *eg*, *Teng Ah Seah* v *Teh Choo Pheng* 2 MC 253; *Jayal Singh* v *Leong Yung Kwok* [1954] MLJ 92; *Esmail Sahib* v *Noordin* [1957] 1 MLJ 98; *Koh Sek Lim* v *Marriot* [1941] MLJ 214; *Chellapah* v *Official Assignee* [1970] 1 MLJ 220; *Chellapah Rasadurai* v *Ghaanthimathi* [1991] 2 MLJ 447; *Newton* v *Pike* (1908) 25 TLR 127; *Lichfield* v *Dreyfus* [1906] 1 KB 584 and *Goldberg* v *Tait* [1950] NZLR 976.

[30] Section 3. As this is only a presumption, it may be rebutted. One way of doing this is to show that the loan was an isolated incident and not part of a system or trend of moneylending transactions. See *Subramaniam Dhanapakiam* v *Ghaanthimathi* [1991] 2 MLJ 447 and *Cheong Kim Hock* v *Lin Securities (Pte)* [1992] 2 SLR 349. In *Esmail Sahib* v *Noordin* [1951] MLJ 98, Spencer-Wilkinson J said it was difficult to see how else a plaintiff could discharge this burden except by giving evidence that he was not a moneylender and submitting to cross-examination on the point. This burden was accordingly discharged in *Lek Peng Lung* v *Lee Investments (Pte) Ltd* [1992] 2 SLR 150 by the plaintiff stating in an affidavit that she was a housewife and that she had not, apart from the two sums in question, lent any money to anyone else at interest or otherwise. The defendants failed to show anything to the contrary.

[31] *Ferguson* v *O'Neil* [1943] VLR 30, 32. Jowitt, *The Dictionary of English Law* (1959) defines moneylending as "Anything lent or given to another on condition of return or repayment" and *Wharton's Law Lexicon* (14th ed, 1957) has it as "Anything lent or given to another on condition of repayment". See also *Chitty on Contracts* (23rd ed, 1968), Vol 2, paras 1101 *et seq.*

[32] These are the Moneylenders Rules 1972 (S 320/1972), Moneylenders (Amendment)Rules 1975 (S 266/1975), Moneylenders (Amendment) rules 1983 (S 213/1983) and Moneylenders (Amendment)Rules 1988 (S 270/1988).

[33] It is estimated that there are about 27 Singapore reported court decisions on moneylending. Including Malaysian court decisions, there are about 100 reported decisions on moneylending.

[34] As of the end of 1991, there were 97 licensed moneylenders, of which 29 were sole-proprietors, 49 partnerships and 19 private limited companies (see *Singapore 1992 – A Review of 1991*, Publicity Division, Ministry of Information and the Arts).

to be shown on the licence, imposing restrictions on advertising by moneylenders and mandating certain details to be shown in the loan agreement.[35] These requirements are to be strictly observed otherwise the moneylender may find that he is not able to enforce the contract, he is subject to a fine, or worse, lands himself in jail.[36] For this reason, legal practitioners try, as far as possible, to avoid the Act.[37]

The more important sections of the Act, particularly those relating to interest, will now be discussed. Section 15 states that: "No contract for the repayment of money lent by an unlicensed moneylender shall be enforceable." Section 23 provides for the setting of maximum rates of interest. This is effected by the Moneylenders (Amendment) Rules 1975 which prescribe the maximum rate of interest chargeable for secured loans at 12% and for unsecured loans at 18%. Section 18(1) prohibits the charging of compound interest. Another provision on interest that should be noted is section 23(5). Whilst section 23(1) prescribes for maximum rates of interest that may be charged under a moneylending contract governed by the Act, section 23(5) provides that the sum of money recoverable by a person who has lent money and who is not governed by the Act shall not exceed the aggregate of the amount lent and a sum equal to simple interest at the rate of 20% per annum on the money lent. A person who fails to comply with this provision is punishable with a fine, for a first offence, and with fine or imprisonment for subsequent offences. Another important provision is section 22 which considerably extends the powers of a court to strike down a transaction at common law. The Singapore provision has no exactly identical provision in the English, Australian and New Zealand legislation.[38] The provision empowers the court to "reopen" a transaction and "take an account between the moneylender and the debtor" in the event that the moneylender sues the debtor for repayment of the debt, and the debtor complains that "the interest charged is excessive and that the transaction is harsh and unconscionable". To the writer's knowledge, there has been

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[35] See sections 6, 16, 17, 19, 20 and 20(5).

[36] See sections 8, 11, 12, 13, 14, 16(7), 23(6), 25(3), 32 and 33.

[37] A parallel is seen in the Bills of Sale Act (Cap 29, 1985 Rev Ed) which is another piece of archaic legislation. Like the Moneylenders Act, its requirements are to be strictly complied with and will attract dire consequences in the event of non-compliance.

[38] See the English Moneylenders Act 1900 (section 1) and 1927 (section 10(1)) which have been repealed and replaced by section 137(1) of the Consumer Credit Act 1974 read with Commencement (No 2) Order 1977; of Australia: NSW (1941-1961) section 30; Vic (1958) section 28; SA (1940-1960) section 32; Q (1916-1962) section 4 and ACT 9 1936-1956) section 6; W A (1912-1962) section 4 and Tas (1915-1963) section 2; of New Zealand (1908) section 3. For a sample of English cases that have interpreted section 137(1), see *A Ketley Ltd* v *Scott* [1981] ICR 241; *Davies* v *Directlons Ltd* (1986) 2 All ER 783 and *Woodstead Finance Ltd* v *Petrou* [1986] NLJ Rep 188.

no local decision interpreting this provision.[39] Interest which is higher than the prescribed maximum of 12% and 18% is presumed, unless the contrary is proved, to be excessive and the transaction is presumed to be "harsh and unconscionable" for the purposes of section 22. As discussed earlier, another section on interest is section 3 which states the presumption that where interest is charged, the lender would be presumed to be a moneylender. However, one cannot conclude from this that, if no interest is charged, there can be no moneylending transaction.[40]

The Singapore Act is patterned after English legislation on moneylending which dates back almost a century. In England, such legislation has been repealed and replaced by the Consumer Credit Act 1974.[41] The Consumer Credit Act updated the law on moneylending and in one important respect narrowed its application: whereas the Moneylenders Acts applied regardless of the status of the debtor, the Consumer Credit Act 1974 applies only to individual, as opposed to corporate, debtors. The Singapore Act dates back to 1959 and has been amended only a total of six times since then (the last time being in 1975).[42] Four sets of Rules have been made.[43] The structure of the Act, however, remains largely unchanged. Has it become an anachronism? Or, put another way, are there gaps in its framework, either by itself or taken in relation to other pieces of legislation such as the Bills of Sale Act,[44] created by newer applications? An outstanding example of such a gap is the issue under consideration, that is, whether a credit or charge card is caught by the onerous regime of the Moneylenders Act.[45]

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[39] At common law, the court has long had an equitable jurisdiction to set aside harsh and unconscionable bargains. See, *eg, Multi-service Bookbinding Ltd* v *Marden* [1979] Ch 84 where there was an unsuccessful attempt to upset an index-linked money obligation in a mortgage. The case also provides a review of the court's power to re-open unconscionable mortgage transactions.

[40] See *Victor Kee Yong Poey* v *Diners Club Malaya Sdn Bhd* [1970] MLJ 30.

[41] Provisions of the Consumer Credit Act 1974 came into effect in successive stages. The relevant provisions repealing the Moneylenders Acts came into effect in May 1985.

[42] These were in 1960 (6 of 1960), 1967 (19 of 1967), 1969 (13 of 1969), 1970 (48 of 1970), 1975 (22 of 1975) and 1975 (22 of 1975) and S 295/75.

[43] These are the Moneylenders Rules 1972 (S 320/1972), the Moneylenders (Amendment) Rules 1975 (S 266/1975), the Moneylenders (Amendment) Rules 1983 (S 213/1983) and the Moneylenders (Amendment) Rules 1988 (S 270/1988).

[44] Cap 29, 1985 Rev Ed. The Act follows a similar historical legislation pattern as the Moneylenders Act. It is patterned after the English Bills of Sale Acts 1878 and 1882. Like the Moneylenders Act, the Bills of Sale Act is technical in nature with the result that practitioners seek to avoid it whenever possible. One commonly-used technique is the sale and leaseback device. See the recent decision of *Thai Chee Ken and Ors* v *Banque Paribas* (Original Summons No 123 of 1988).

[45] In the UK, the practical effect of this issue is not as critical as charge and credit card transactions have been subsumed under the Consumer Credit Act (sections 8 and 9 of the Act).

Returning to this key issue, the cases support an affirmative answer: the "direct" rather than the "derived" theory. This is so despite the language of assignment in the issuer-supplier contract. The key difference between the typical assignment transaction and the credit card transaction is that – using the language of assignment – the purported assignee (credit card company) and client or customer (cardholder) in the credit card transaction are also in a contractual relationship. By the terms of this contract, the purported client agrees to pay the purported assignee the value of the debt, with or without interest. This is not the case in the usual assignment transaction where the assignee is not in a pre-existing contractual relationship with the client. In that situation, the assignee's rights against the client are clearly derived from the contract of assignment between him and the assignor.

There is yet another possibility. It may be argued that a credit or charge card transaction is not a moneylending transaction *simpliciter,* but an adapted or hybrid form. The basis of this argument is that the transaction involves not only the extension of credit but also the purchase of goods or services.[46] The two are inextricably linked: credit is extended only because there has been a sale and purchase of goods or services. The concepts of lender credit and vendor credit are familiar to any student of commercial law.[47] It formed an important basis of distinction in the law of credit and security prior to

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[46] See, *eg*, the Crowther Committee Report (Cmnd 4596) which classifies the extension of credit through credit or charge cards as a hybrid transaction between moneylending and selling (para 4.1.66).

[47] Lender credit involves transactions where the legal form is one of a loan of money, whether or not the loan is associated with a particular purchase. When the money is used to purchase goods, the lender may use the goods as security by taking a bill of sale over it. Vendor credit involves transactions that are not, *strictu sensu*, loans but where credit is extended to enable the "debtor" to purchase specific goods. Common examples are hire-purchase and conditional sale transactions. In these transactions, the extension of credit and purchase of goods are intimately linked. Credit is very often provided by third parties such as finance company. In order to avoid the tag of moneylending (which would be the case if the finance company lends to the consumer), the company buys the goods from the dealer and hire-purchases them to the consumer. In both situations, the finance company has a security interest over the goods. The purchase of goods by the finance company from the dealer is a formality to constitute the finance company owner of the goods. The law does not consider the hire-purchase transaction as one of moneylending. See *Old Discount Co Ltd* v *John Playfair* [1938] 3 WLR 275 and *Premor Ltd* v *Shaw Bros* [1964] 1 WLR 978. It has also been held that a finance charge that is added to the cash prize under a hire purchase agreement is not considered to be interest. See *Beete* v *Bidgood* (1827) 7 B & C 453. The older cases indicate a more conservative judicial approach to giving a legal construction to transactions. Greater acceptance is given to what documents actually say. Form takes precedence over substance. Two outstanding examples are hire-purchase (not a moneylending transaction) and sale and leaseback (not a moneylending transaction, for which see note 44). This approach is on the decline as courts in more recent experience are more prepared to go beyond form to substance, for which see note 18.

the enactment of the Consumer Credit Act 1974. It was, however, a distinction that was based on form rather than substance and had glaring anomalies.[48] The Crowther Committee considered the distinction to be fundamentally flawed as it did not accord with reality and recommended a legislative scheme to replace it. The Act adopts this recommendation. In Singapore, this distinction with its attendant anomalies still exists as we have not adopted the scheme introduced by the Consumer Credit Act 1974. The lender-credit and vendor-credit distinction presents a possible basis for an argument that since the credit or charge card transaction is not a lender credit transaction *simpliciter* (inextricably based, as it were, on a sale of goods or services), it is, as in the case of the hire-purchase and conditional sale transaction, not a moneylending transaction.[49] It is a hybrid transaction that is *sui generis.*

The legal position at best is inconclusive. Most credit and charge card operations in Singapore are not at risk. Many involve only two parties, for example, cards issued by department stores or petrol stations to their customers, which can clearly be argued to fall within section 2(b) of the Moneylenders Act whereby the store is said to be "carrying on a business not having for its primary object the lending of money in the course of which and for the purpose whereof he lends money."[50] Credit or charge card operations of banks are also not at risk as they fall within section 2(a) of the Act which exempts banks from the operation of the Act. What is not settled is the legal status of the three-party paradigm operations of non bank-based credit and charge card companies. As argued earlier, the position is at best inconclusive although English decisions point towards the moneylending analysis. As an act of prudence, such companies could apply to the Minister for exemption under section 36 of the Act.

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[48] Some outstanding anomalies were:

a. The Moneylenders and Bills of Sale legislation applied regardless of the size of the loan or the status of the borrower, whether individual or corporate. The Hire Purchase legislation only applied to transactions below a stipulated value and did not apply when the hirer was a corporate body.
b. Under the Moneylenders legislation, a lender could not carry on business unless he was licensed under or exempted from the Act's provisions. A party letting out goods under the Hire Purchase legislation did not require a special licence.
c. Under the Moneylenders legislation, the lender was subject to negative control on advertising by stringent restrictions on the contents of advertisements. The instalment seller had no such restrictions but was under a positive obligation to provide designated information.
d. Under the Moneylenders legislation, a lender was entitled to recover his advance with stipulated interest, subject only to the power of the court to reopen transactions which were harsh and unconscionable. An entirely different set of principles governed the monetary liability of those taking goods on hire-purchase or conditional sale.

[49] *Supra,* note 47.

[50] For a recent discussion of this exception, see *Lorraine Esme Osman* v *Elders Finance Asia Ltd* [1992] 1 SLR 369.

The wider context of this discussion is the important topic of consumer credit and protection. The part of the Crowther Committee's Report on Consumer Credit recommending basic changes to the law on consumer credit has been implemented in the United Kingdom. The fundamental basis of the new regime is the recognition that whatever form credit may take – vendor or lender – the essential purpose is the same, that is, to enable a person to obtain and enjoy the use of goods without having to be out of pocket. The Consumer Credit Act 1974, concerned with providing reasonable protection for consumers obtaining credit, adopts an integrated approach and brings consumer credit agreements generally under one regime. In doing this, it has repealed earlier disparate legislation such as the Pawnbrokers Acts 1872 and 1960, Moneylenders Acts 1900-1927, Hire Purchase Act 1965 and the Advertisements (Hire Purchase) Act 1967.[51] With 193 sections, it is a massive piece of legislation that introduces some cohesion into the law of consumer credit.[52] Calls have been made as early as 1979 for the Singapore draftsman to take heed of the recommendations of the Crowther Committee.[53] The legislative regime governing consumer credit in Singapore has hardly changed since then.[54] The time is now ripe for a comprehensive review. This review can take one of two approaches. The first is to examine each piece of legislation such as the Bills of Sale Act and Moneylenders Act and amend each accordingly so as to achieve some coherence in the overall scheme. This is the "piecemeal approach". The other approach, which is the better one but which will consume more of the draftsman's time and energy, is to enact a comprehensive piece of legislation along the lines of the Consumer Credit Act. Such a review should focus principally on consumer credit but should, however, not preclude improving on the legislative regime governing consumer law generally. Specific matters that could be examined include firstly, whether an institution equivalent to the English Office of Fair Trading should be established in Singapore; secondly, legislation on newer methods of sales promotion such as door-to-door sales and mail orders; thirdly, legislation on advertising puffs regarding sales,

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[51] Two sets of legislation remain: Bills of Sale Acts 1878-1882 and the Hire-Purchase Act 1964, Part III which deals with hire-purchase of motor vehicles.

[52] R M Goode has this to say of the Act: "...after 14 years of intensive study I remain even more firmly of the view that despite undeniable flaws and infelicities the Act is a triumph of the draftsman's art and a brilliant consummation of the reforms advocated by the Crowther Committee." (Preface to *Consumer Credit Law,* 1989).

[53] CY Lee, "Towards New Consumer Credit Legislation in Singapore" (1979) 21 Mal L R 266.

[54] The legislation would include the Hire Purchase Act (Cap 125, 1985 Rev Ed), the Bills of Sale Act (Cap 24, 1985 Rev Ed), the Civil Law Act (Cap 43, 1985 Rev Ed), the Pawnbrokers Act (Cap 222, 1985 Rev Ed), the Moneylenders Act (Cap 188, 1985 Rev Ed), the Consumer Protection (Trade Descriptions and Safety Requirements) Act (Cap 53, 1985 Rev Ed) and the Bankruptcy Act (Cap 20, 1985 Rev Ed).

particularly as to prices; fourthly, further amendments to the Small Claims Tribunals Act on matters such as the widening of its scope, appropriate curbs on excessive use by corporate claimants and discretion to be given to the Registrar to allow lay representation; and fifthly, a consumer code on electronic banking.

When such a comprehensive piece of legislation is in place, Singapore will be better placed to assert itself as a centre for international and regional trade, banking and finance. Singapore consumers and tourists alike will also find shopping in Singapore a more enjoyable experience. And most importantly, both cardholders and card companies alike will breathe more easily.

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